MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

SEPTEMBER 27, 1971 to NOVEMBER 22, 1971

HOWARD L. ELLIS
SUPREME COURT REPORTER

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

VOLUME 36

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	Term Expires
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[1] Died October 11, 1971.
[2] Died November 15, 1971.

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7.	JOHN W. BAKER, Flint	Jan. 1, 1973
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[3] From October 14, 1971.

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Gladwin	Gladwin	21
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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
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PEOPLE *v.* BERRY

1. CRIMINAL LAW—CONFLICTING TESTIMONY—INSTRUCTIONS TO JURY—PRESUMPTION OF INNOCENCE.

   Failure to give a criminal defendant's requested instruction to jury that if the testimony of different witnesses is in direct conflict and both versions as given cannot be true and there is reasonable doubt as to which story is true, the jury must accept the version consistent with the innocence of defendant was not error where the trial judge charged the jury fully concerning the presumption of innocence, reasonable doubt, and tests for determining credibility of witnesses.

2. CRIMINAL LAW—WITNESSES—REFUSAL TO ANSWER QUESTIONS—RIGHT OF CONFRONTATION—PREJUDICE.

   A defendant, charged as an accessory, was not denied his right of confrontation where a defense witness, a principal in the crime charged, testified but refused to answer two of defense counsel's questions and six of the prosecutor's questions on Fifth Amendment grounds, where defense counsel successfully extracted the desired answers by rephrasing the questions and where defendant was not prejudiced by the refusal to answer the prosecutor's questions.

3. INDICTMENT AND INFORMATION—WAIVER OF DEFECTS—PLEA OF GUILTY.

   A plea of not guilty waives any defect in the information.

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 June 15,

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 747 *et seq.*
[2] 53 Am Jur, Trial § 36 *et seq.*
[3] 21 Am Jur 2d, Criminal Law § 495.
41 Am Jur 2d, Indictments and Informations § 300.

1971, at Detroit. (Docket No. 7312.) Decided September 27, 1971.

John W. Berry, Sr., 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 *Thomas M. Khalil,* Assistant Prosecuting Attorney, for the people.

Armand D. Bove, for defendant on appeal.

Before: T. M. BURNS, P. J., and HOLBROOK and MCGREGOR, JJ.

HOLBROOK, J. Defendant appeals from conviction by jury verdict of first-degree murder in violation of MCLA § 750.316 (Stat Ann 1954 Rev § 28.548). He was given the mandatory sentence of life imprisonment.

Defendant was charged with aiding and abetting a robbery wherein a homicide resulted.

On November 4, 1967, a Detroit News substation on Appoline Street near 7 Mile Road was robbed by two armed men. During the course of the robbery the station manager, Mr. Gerald Vincent McCullough, was shot and killed after being forced to lay facedown on the floor.

On November 16, 1967, Thomas Perry Bragg and Victor Marvin Daniels were arrested in Buffalo, New York by Federal agents in connection with the robbery of the Wayne Oakland Bank here in Michigan.

While held in New York they were interrogated by two detectives from the Detroit Police Department who flew to New York.

On the last day of the interrogations, Bragg and Daniels implicated John W. Berry, Sr., as being involved with them in planning the substation robbery.

Defendant was then arrested at his home on December 19, 1967.

At the time of defendant's prosecution neither Bragg nor Daniels had been tried in connection with this crime.

Testimony by a newspaper boy at the trial established that two weeks prior to the robbery, he had been approached on the street in the immediate vicinity and solicited by a man to give information concerning the operations of the substation. Bragg testified he was present and that the man was defendant. However, there was no identification by the paper boy that Berry was that person.

At the time of the robbery Berry had been lodged in the Oakland County Jail. He had been there from October 31, 1967, until November 14, 1967, making it physically impossible for him to be present at the scene.

Both Bragg and Daniels took the stand during the proceedings.

According to Bragg, had it not been for his incarceration at the time, Berry was going to drive the getaway car. Bragg testified that $200 was acquired from the robbery and that he and Daniels split it. He further testified subsequently he and Daniels gave Berry $1,300 which represented the portion Berry was to receive from the substation robbery had there been the amount available they had antici-

pated receiving from the robbery. According to Bragg this money came from a bank robbery.

Bragg testified that the gun he used in the robbery belonged to Berry, and that Berry had given it to Daniels to give to Bragg; however, Bragg never saw Berry give it to Daniels. Bragg then said he witnessed Daniels giving the gun back to Berry after the robbery, at which time the gun used by Daniels, the murder weapon, was broken into pieces and thrown in the river.

Daniels testified that all statements he made in New York implicating Berry were untrue and the only reason he made them was because he was led to believe by his interrogators that Berry had informed on him concerning the substation robbery. He testified that he and Bragg had never given any money to Berry and that Berry had nothing to do with the planning of the crime.

Defendant raises four issues which we deal with in our order.

I.

Whether the trial court's refusal to give one of defendant's requested instructions was a failure to instruct the jury on a point of substantive law, resulting in reversible error?

The denied instruction is as follows:

"I charge you ladies and gentlemen of the jury that when testimony such as there is in this cause is directly conflicting and both versions as given to you cannot be true and there is a reasonable doubt as to which story is true, it is your duty to accept that version which is consistent with the innocence of the defendant. *People* v. *Crofoot* (1931), 254 Mich 167."

Upon denial, the judge informed defense counsel that he would cover the essence of this instruction in his charge to the jury.

The pertinent part of the charge is set out herein:

"Now, the burden of proof is always on the people and it never shifts. That is because the defendant in any criminal case, as the defendant in this case, is presumed to be innocent of the charge brought against him, and that presumption of innocence attaches with the defendant at the beginning of the trial and abides with him throughout the entire trial and throughout your deliberations in the jury room until each of you is satisfied beyond a reasonable doubt by the testimony given and the exhibits presented that the defendant is guilty of the charge brought against him.

"Now, the mere fact that he has been brought here on trial, that he has been arrested and brought into this court by the ordinary criminal processes, should not be considered by you as in any way to raise the presumption that he is guilty. Because, as I have said to you, the presumption that abides with him is that presumption of innocence.

* * *

"What is a reasonable doubt? A reasonable doubt, members of the jury, is just what the words imply. It is a doubt founded in reason. It is a doubt for which you can give a reason for entertaining. It is a doubt growing out of the evidence or lack of evidence in the case. It is a doubt which would cause you to hesitate in the ordinary affairs of your own everyday life. * * *

"Members of the jury, in this particular case there was testimony of one of the codefendants. And I charge you that the testimony of a self-accused conspirator or accomplice should be carefully scrutinized to determine to what other extent it is concerned, upon the extent to which it is cor-

roborated. Such testimony should be received by you with utmost caution and care because of the interest such witness may have in the outcome of the trial and his desire as a result of his interest to color or shade his testimony.

"Now, that is so, members of the jury, because the credibility of all witnesses is for the jury. You are the sole judges of the credibility of the witnesses sworn here in open court before you and to the weight to be given to their testimony. A credible witness, members of the jury, is one who gives competent testimony worthy of belief. In determining the credibility of a witness you may consider his conduct, manner and bearing on the witness stand, his interest in the outcome of the case. You may consider his opportunity to know and to remember the events about which he speaks. You may consider his willingness to speak the truth and all the surrounding circumstances that show his willingness to testify to the truth. You may consider his reliability or unreliability, his apparent fairness or want of fairness, the fact of whether the witness was corroborated or contradicted by other witnesses, the probability or improbability of the truth of the statements that he made in view of all other evidence and other facts and circumstances apparent in the trial."

In *People* v. *Larco* (1951), 331 Mich 420, the *Crofoot* charge was also requested and denied, and the Court held as long as the trial judge had charged the jury fully concerning presumption of innocence, reasonable doubt, and tests for determining credibility of witnesses, denial of the charge was not grounds for reversal.

Comparing the charge given in this cause with the rules set out in the *Larco* case, we find no reversible error present.

II.

Whether an individual's constitutional prerogative of confrontation is violated when, tried as an accessory, he is precluded from thoroughly examining a principal because of improper concessions under the Fifth Amendment?

At the trial Victor Daniels was called as a defense witness. He was informed by the court that by taking the stand he would waive his right against self-incrimination. During direct examination he was allowed to invoke the Fifth Amendment on two occasions. During cross-examination the right was invoked on six occasions. The judge allowed the questions to go unanswered.

Defendant relies upon *People* v. *Henderson* (1968), 10 Mich App 333, 337, which states:

"To allow a participant to testify as to participation in a crime and then permit him to refuse to answer certain questions on the basis of possible self-incrimination would deny the accused on trial the constitutional right of confrontation."

The purpose of the rule is to protect the defendant's right to confront witnesses used to testify against him. Even though a review of the transcript shows two occasions when the right was invoked on direct examination, defense counsel successfully extracted answers desired by rephrasing the questions. It is evident the defendant was not injured or prejudiced by invocation of the Fifth Amendment by witness Daniels.

Even though it is true that the witness waived his Fifth Amendment rights by taking the stand, no prejudice resulted to defendant from the witness's refusal to answer the prosecution's questions, and therefore we are constrained to hold that reversal is not merited on this issue.

III.

Whether the criminal information improperly apprised defendant as to what he must defend against?

Defendant claims the information was inadequate. This issue was not raised at the trial court level and we decline a determination here. However, a review of the record shows that defendant Berry pleaded not guilty to the charge against him. The recent case of *People* v. *Minton* (1970), 25 Mich App 225, holds that any defect in the information is waved by a plea of not guilty.

IV.

Whether the trial court failed to apprise the jury that the offense with which defendant was charged demanded a determination of scienter?

A review of the transcript shows that this issue was not raised in the trial court, nor the instructions objected to in order to preserve it on appeal. The rule is well-settled that failure to raise an objection in the trial court eliminates the availability of a determination on appeal. *People* v. *Mason* (1970), 22 Mich App 595.

Affirmed.

All concurred.

PEREZ v. CHRYSLER CORPORATION

1. UNEMPLOYMENT COMPENSATION—JUDICIAL REVIEW—CIRCUIT COURT JURISDICTION—CLAIMANT'S RESIDENCE.

   The statute setting forth the appropriate circuit court before which review of a decision of the Employment Security Commission Appeal Board may be brought is a jurisdictional statute, not merely a statute concerning venue; a motion for review of a decision of the appeal board was properly dismissed where the claimant, who moved for review, was not a resident of the county of the circuit court before which the motion was made (MCLA § 421.38).

2. UNEMPLOYMENT COMPENSATION—JUDICIAL REVIEW—CIRCUIT COURT JURISDICTION—STATUTES—CONSTRUCTION—AMENDMENTS.

   The statute governing the limitation of jurisdiction of circuit courts to review decisions of the Employment Security Commission Appeal Board has not been rendered merely a matter of venue by a subsequent provision in the Revised Judicature Act giving circuit courts venue-transferring power, because the provision in the Revised Judicature Act is not a jurisdiction provision, but deals only with venue and because the Legislature has amended the provisions governing review of unemployment compensation cases, after the Michigan Supreme Court interpreted the provisions as imposing jurisdictional limits, and the Legislature chose not to change the language in the statute (MCLA §§ 421.38, 600.1651).

3. STATUTES—CONSTRUCTION—AMENDMENT—INTERVENING JUDICIAL CONSTRUCTION.

   Legislative amendment of a statute must be taken as approval of a prior judicial construction of the language of the statute

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 46 *et seq.*

[3] 50 Am Jur, Statutes § 441 *et seq.*

where the amendment does not change the language previously construed by the court.

4. UNEMPLOYMENT COMPENSATION—CIRCUIT COURT JURISDICTION—TRANSFERRING VENUE—IMPROPER JURISDICTION.

A provision of the Revised Judicature Act giving circuit courts venue-transferring power does not enable a circuit court, before which an appeal from the Employment Security Commission Appeal Board has erroneously been brought because the claimant is a resident of another county, to merely transfer the appeal to the county of the claimant's residence; the circuit court must dismiss the appeal for lack of jurisdiction (MCLA §§ 421.38, 600.1651).

Appeal from Wayne, Joseph G. Rashid, J. Submitted Division 1 June 8, 1971, at Detroit. (Docket No. 7313.) Decided September 27, 1971.

Susan Perez presented her claim for unemployment compensation benefits against Chrysler Corporation. Benefits denied by the Employment Security Commission Appeal Board. Plaintiff filed a motion for review in circuit court. Defendant's motion to dismiss granted. Plaintiff appeals by leave granted. Affirmed.

Thomas, Saunders & Gualtieri, for plaintiff.

Walter B. Maher, for defendant Chrysler Corporation.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Felix E. League,* Assistant Attorney General, for appellee Michigan Employment Security Commission.

Amicus Curiae: International Union, United Auto Workers (by *Stephen I. Schlossberg, John A.*

Fillion, Jordan Rossen, Bernard F. Ashe, and *Stanley Lubin*).

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

V. J. BRENNAN, J. Claimant appellant, a resident of Macomb County, was employed by appellee at one of its plants in Wayne County (which county is also appellee's principal place of business). From an adverse decision of the Employment Security Appeal Board, claimant filed a timely motion for review in Wayne County. Wayne County Circuit Judge Joseph Rashid granted appellee's motion to dismiss on the ground that claimant was not a resident of Wayne County, and therefore, the circuit court of that county did not have jurisdiction under MCLA § 421.38 (Stat Ann 1968 Rev § 17.540), citing *Peplinski* v. *Employment Security Commission* (1960), 359 Mich 665.

The above-cited statute provides for review of decisions of the Employment Security Commission, and states, in pertinent part:

"The circuit court of the county in which the claimant resides, or, if no claimant is a party to the case, the circuit court of the county in which the employer's principal place of business in Michigan is located, or in any case the circuit court for the county of Ingham, shall have power to review questions of fact and law on the record made before the referee and the appeal board involved in any such final order or decision of said appeal board."

In *Peplinski, supra,* the Supreme Court held that this statute granted jurisdiction only to certain circuit courts, and that if an appeal were brought to the wrong circuit court that court could do nothing

other than dismiss the appeal for lack of jurisdiction.

Claimant appellant contends that changes in the Constitution of Michigan, the Revised Judicature Act, and the General Court Rules which have occurred since the Supreme Court's decision in *Peplinski* would require reversal of that decision. We will consider claimant's arguments *ad seriatim*.

First, at the time *Peplinski* was decided, the Constitution of the State of Michigan provided:

"The judicial power shall be vested in 1 Supreme court, circuits courts, * * * ." Const 1908, art 7, § 1.

The 1963 Constitution of the State of Michigan provides:

"The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court * * * ." art 6, § 1.

Claimant argues that since the new constitution created a unitary circuit court, the statute providing for appeals from the commission must now refer to venue, and not jurisdiction. Judge Rashid disposed of this argument as follows:

"The court cannot agree with this contention as the section [Const 1963, *supra*] relied upon by claimant-appellant must be considered with Section 13 of Article VI of the Michigan Constitution of 1963, which section provides as follows:

" '*The circuit court shall have original jurisdiction in all matters not prohibited by law;* appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law.' (Emphasis in original.)

"Clearly, as contended by appellee-employer herein, the circuit courts do not have jurisdiction *to hear any matter*. The foregoing limitation is imposed thereon. Not only the original jurisdiction but the appellate jurisdiction of the circuit courts are limited by acts of the Legislature. The conclusion is inescapable that section 38 of the act (MCLA § 421.38) is such a limiting statute. Section 38, in the opinion of this court, is a legislative directive indicating that only specified circuit courts in Michigan were empowered to hear appeals from decisions of the appeal board. This conclusion is supported by *Peplinski,* * * * ."[1] (Emphasis in original.)

We concur with both Judge Rashid's analysis and conclusion.

Claimant next argues that § 1651 of the Revised Judicature Act (MCLA § 600.1651 [Stat Ann 1962 Rev § 27A.1651]) would compel a result different from that in *Peplinski.* That section provides:

"An action brought in a county not designated as a proper county may nevertheless be tried therein, unless a defendant moves for a change of venue within the time and in the manner provided by court rule, in which case the court shall transfer the action to a proper county on such conditions relative to expense and costs as may be provided by court rule. The court of the county to which the transfer is made, shall thereupon have full jurisdiction of the action as though the action had been originally commenced therein."

In order to concur with claimant's argument, we would have to hold that this section is a grant of jurisdiction enabling all circuit courts to hear cases in which the Legislature has elsewhere limited jurisdiction to other circuits. This we cannot do for two

[1] Opinion of Wayne County Circuit Judge Rashid, filed March 4, 1969, p 6.

reasons: first, according to MCLA § 600.1601 (Stat Ann 1962 Rev § 27A.1601) the cited section deals with venue and not jurisdiction; and second, the statutory review provision here in question was amended by the Legislature in 1967 (PA 1967, No 254).

If the Legislature disagreed with the interpretation given to that statute in *Peplinski,* they could have changed the language at that time. Since they did not elect to do so, we must assume that the Legislature agrees with the interpretation given to the statute by the Supreme Court. *Chrysler Corp.* v. *Smith* (1941), 297 Mich 438, 452.

Claimant finally argues that GCR 1963, 403 (as amended December 7, 1965; adopted December 8, 1965)[2] would authorize a circuit court judge who has before him an appeal from the MESC to issue an order changing venue, despite the fact that he does not have jurisdiction as provided by statute. In this phraseology, the argument dismisses itself: a court without jurisdiction in a case can do nothing more than dismiss that case. Furthermore, the amendment to the court rule cited by claimant was obviously adopted in view of the Supreme Court's decision in *Chrysler Corporation* v. *Employment Security Commission* (1965), 377 Mich 26, which was decided on the same day rule 403 was amended. In that case, the Court held that even a court with

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2 General Court Rule 1963, 403 [as amended December 7, 1965; adopted December 8, 1965] (language added by amendment in brackets):

"The venue of any civil action properly laid [, or of an appeal from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules and regulations,] may be changed to any other county by order of the court upon timely motion by one of the parties, for convenience of parties and witnesses, [or, in the case of appellate review of the administrative proceedings aforementioned, for convenience of counsel,] or when an impartial trial cannot be had in the county where the action is pending."

jurisdiction to hear an appeal from the MESC did not have statutory authority to issue a change of venue. The amended rule was issued to correct this situation, and nothing else.

Affirmed.

All concurred.

PEOPLE v. BOZZI

1. EVIDENCE—IDENTIFICATION—VOICE—CRIMINAL LAW.

Identification of a defendant by his voice alone requires that the identification testimony be reasonably positive and certain and that there be some reason to which the witness can attribute his ability to make the voice identification, such as familiarity with the peculiarity of the voice identified.

2. RAPE—EVIDENCE—IDENTIFICATION—VOICE—WITNESSES.

Identification by his voice of a defendant charged with rape was sufficient to go to the jury on the issue of identification where the victim was positive in her testimony and had opportunity to become familiar with the defendant's voice both by previous meetings and by conversation of some duration within a few hours before the crime.

3. RAPE—IDENTIFICATION—VOICE—EVIDENCE.

Voice identification of the defendant was sufficient, if believed by the jury, to support a conviction of assault with intent to commit rape, where the lack of light prevented the victim, a babysitter, from making a visual identification, and the assailant spoke during the course of the assault in an unnatural voice except in two instances where, after the victim screamed, he said "shut up", and after the baby awakened "look at what you

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 29 Am Jur 2d, Evidence § 368.

Identification of accused by his voice. 70 ALR2d 995.

did", and she had had prior opportunity to become familiar with the defendant's voice both by previous meetings and by conversation of some duration within a few hours before the crime.

Appeal from Wayne, James L. Ryan, J. Submitted Division 1 November 9, 1970, at Detroit. (Docket No. 8268.) Decided September 27, 1971. Leave to appeal denied, 386 Mich 775.

Ronald J. Bozzi was convicted of assault with intent to commit 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 *Luvenia D. Dockett,* Assistant Prosecuting Attorney, for the people.

Jane Burgess, for defendant on appeal.

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

PETERSON, J. On the night of November 9, 1968, a 15-year-old girl was at the home of a divorced woman with whose small child she was baby-sitting. The woman had a date with the defendant that evening but for some reason, left before he called for her. It appears that defendant was a steady and sometimes overnight visitor of the woman, familiar with the house and accustomed to making himself "at home" there. The baby-sitter had seen him on previous occasions, though never for any length of time.

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

Finding his date gone, and expecting her return, defendant made himself at home, watching television and visiting with the baby-sitter for several hours, leaving about 10:20 p.m. The sitter locked the house and dozed off on the davenport in the living room. Two lights in the living room, the kitchen light, and a lamp in the child's room were left on, along with the television, and the door to the child's room was left open. She awoke near midnight to find the television and lights off and a man standing over her in the dark. She was raped. Later examination disclosed that there was no evidence of a forcible entry into the house, and that the door to the child's room had been closed and locked, the lock being unusually located at the top of the door where its presence would not likely be observed by one unfamiliar with the house.

After leaving the house at 10:20, defendant went to a bar where he claimed to have remained until it closed after 2 a.m. The bar was within five minutes' driving time of the house. There is a host of circumstantial evidence tending to incriminate defendant in addition to his knowledge of the girl's presence in the house, his familiarity with the house and nearness to it. Among the circumstances are flight from custody, inconsistent statements, an admission that he left the bar to drive by the house, several absences from the bar, a pointed statement to a waitress observing his return that he "had been there all the time", a phone call to the home after the crime in which defendant asked to speak to the baby-sitter, and "alibi" testimony that was consistent with the possibility that he could have committed the offense and in conflict with his own testimony.

Convicted by jury of assault with intent to commit rape,[1] defendant raises only one question on

[1] MCLA § 750.84 (Stat Ann 1962 Rev § 28.280).

appeal, the sufficiency of the evidence to establish guilt beyond a reasonable doubt, with reference to the complainant's identification of defendant as her assailant.

From the scant light entering the living room from a street light, the complainant was unable to make a visual identification of her assailant save for the negative circumstance that the gross observations of size, hair, *etc.,* possible in darkness were not inconsistent with the defendant's description. During the assault she was made either to lie face down or with a pillow over her face. During the course of events, her assailant spoke in an unnatural or disguised voice except at one point when she screamed. At that point, speaking in a natural way, her assailant said "shut up". The baby awoke and he said, "Look at what you did". The complainant testified, "That's when I recognized his voice", "Right then and there I noticed the voice." It is not clear whether she meant that she made the voice identification solely from the two words, "shut up", or from the following phrase as well, but throughout direct and cross-examination she was positive and certain in her identification. The only other testimony bearing on identification was that her assailant had a peculiar aroma, like a hair tonic, and that she had noticed the same odor on defendant earlier in the evening.

Defendant contends that this identification testimony is insufficient to go to a jury, citing a number of cases on voice identification.

In *State* v. *Karas* (1913), 43 Utah 506 (136 P 788), a house-tent in a mining camp was burglarized. At the apparent time of the burglary, a grocer attempted to make a delivery there but the door was held shut by someone in the interior who told the

grocer to go away. Shortly thereafter the grocer saw defendant nearby, and he identified defendant as the person whose voice he had heard from within the tent. The Court said, in holding the evidence insufficient to sustain the conviction:

"Undoubtedly voice is a competent means of identification, and one by such means alone may be sufficiently identified. In some instances identification by such means may be as ponderous as identification by sight. But the testimony should be reasonably positive and certain, and based upon some peculiarity of the person's voice, or upon sufficient previous knowledge by the witness of the person's voice."

In *Walker* v. *State* (1906), 50 Tex Crim 221 (96 SW 35), the complainant met defendant for the first time when they were together in the company of others a few hours before complainant was robbed in a dark room. A conviction based on his opinion that the voice of the robber was defendant's was reversed.

In both *Walker* and *Karas,* unlike the instant case, the identifying testimony was far from positive. In *Walker,* the complainant gave it as an opinion that the voices were alike and that he was only swearing on suspicion. In *Karas,* the grocer's identification was that "myself, I think it was the fellow", and on cross-examination he admitted uncertainty, that he couldn't swear that this was the defendant, and that he could be mistaken.

In *People* v. *Thompson* (1925), 231 Mich 256, a county clerk received a telephone call about a marriage license from a person unknown to him. Defendant was charged with perjury in connection with the later issuance of a marriage license and the clerk testified to the call. The conviction was re-

versed for insufficient evidence, but the clerk did not attempt to identify the caller's voice as defendant's and testified only that the call was made by a man who purported to be Thompson.

In *Commonwealth* v. *Derembeis* (1935), 120 Pa Super 158 (182 A 85), the complainant was attacked and robbed at his bowling alley. He recognized some of his assailants as persons who had bowled there in the past, but he did not know their identity. He was precluded from a visual identification thereafter since his assailants blinded him after the robbery. Circumstances pointing to defendants, a line-up was arranged by police at which defendants, with others, spoke in the presence of complainant. He apparently recognized the voices of the suspects, Derembeis and Arendash, and they were convicted on trial. On appeal, a new trial was ordered, the Court citing *Karas, supra,* and saying:

"The established rule is that while the sound of the voice is a relevant circumstance to be considered on the question of identity, the value of such testimony depends, first, upon some peculiarity of the voice *and* second, the extent of the familiarity of the witness with the voice: Wharton's Criminal Evidence, Vol 2, p 1803; *Brown* v. *Commonwealth* [1874], 76 Pa 319." (Emphasis supplied.)

The Court commented on the lack of testimony establishing any peculiarity in the voice of either defendant, and appears to have misread Wharton to require both peculiarity of voice and familiarity as a basis for identification. Further, the Court commented on the confuson in the line-up, poor handling of the examination of complainant, the trial court's confusing comments, a poor foundation for showing familiarity and the fact that one defendant testified in his own behalf so that the com-

plainant could have been recalled to buttress his identification. In ordering the new trial, the Court said:

"Our decision is not based upon any specific assignments of error, but upon the broad ground that the case was not tried as fully and carefully as the gravity of the charge and the dangerous character of the evidence introduced and relied upon by the Commonwealth demanded."

It may be noted that *Brown* v. *Commonwealth,* cited by the Court in *Derembeis,* did not involve an identification by peculiarity of voice but only by familiarity, a prisoner being allowed to testify that in a whispered conversation through the soil pipe at the jail, Brown confessed to robbery-murder, the prisoner identifying the whispered voice as that of Brown because he was familiar with it from past acquaintance.

Wharton's statement is as follows:

"The qualification of the witness to express an opinion as to the identity of the voice must be shown as based either on familiarity with the speaker, or upon some peculiarity in the voice which would make it likely that the witness could distinguish and identify the voice in question." 1 Wharton's Criminal Evidence, § 183, p 365.

Wharton cites *Commonwealth* v. *Williams* (1870) 105 Mass 62. In that case, a nighttime robbery, one burglar addressed two short sentences to complainants and two to his accomplices. Complainants testified that they had met defendant for the first time that evening; that he had a "manly, pleasant, smooth, gentle, handsome voice," and that they identified it when the burglar spoke. The Court said:

"We are not prepared to agree to the legal proposition, contained in the defendant's prayer for instructions, that identification, by voice alone, of a person whose voice has been previously heard by witnesses but once, was insufficient and too uncertain, and that no conviction could be had thereon. The voice is one means of recognition and identification. The degree of certainty of identification by that means does not depend upon the ability of the witness to describe its peculiarities. It is for the jury only to determine how much reliance should be placed upon such testimony."

It thus appears that *Williams,* the case giving rise to Wharton's comment and the later cases, is not authority for the limited rule for which it is cited. We are disposed to consider it somewhat too broad, and unnecessary on the facts of the case. Those facts, and those of *Brown, Thompson,* and *Walker,* are all consistent with the statement from *Karas, supra,* with the emphasis being on the necessity that identification testimony, by voice, as otherwise, must be reasonably positive and certain. Obviously that certainty must be shown to exist in the mind of the identifying witness by testimony that is, in form, positive and unequivocal (as in *Williams,* but not in *Walker, Thompson* and *Karas*); but it must also appear by the existence of some reason to which the witness can attribute his ability to make the voice identification, of which familiarity or peculiarity are the most common example. Modern scientific voice analysis suggests that there may be others.

Here, we believe that test has been met. The complainant was positive in her testimony. She had the opportunity to become familiar with the voice of defendant by past meetings and by conversation of some duration at a point in time proxi-

mate to the crime. There was sufficient evidence to go to the jury which, being found credible, supports a finding of guilt beyond a reasonable doubt.

Affirmed.

All concurred.

PEOPLE v. FUSTON THOMAS

1. CRIMINAL LAW—DEFENDANT'S GUILT—PROSECUTOR'S BELIEF.

Prosecutor's statement to the jury that he believed the defendant was guilty of armed robbery, did not constitute error where the prosecutor, after making that statement, went on to tell the jury that they would have to disregard the testimony of five eyewitnesses to the armed robbery to come to any other conclusion, because a prosecutor may argue from the testimony that a defendant is guilty and may state what evidence convinces him and should convince the jury of defendant's guilt.

2. CRIMINAL LAW—MENTIONING PENALTY TO JURY.

A witness's mentioning the penalty for the crime for which defendant was being tried was improper; however, the mentioning of the penalty did not constitute reversible error where defense counsel had elicited the testimony concerning the penalty and where the trial judge instructed the jury that the penalty was no concern of theirs and was a matter solely for the court.

3. CRIMINAL LAW — WITNESSES — PERJURY —PENALTY — INFORMING JURY.

A defendant was not entitled to have the trial court advise the jury of the penalty for perjury on the theory that if the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 486.
[2] 53 Am Jur, Trial § 778.
[3] 53 Am Jur, Trial § 599.
[4] 41 Am Jur, Indictments and Informations § 56.
[5] 58 Am Jur Witnesses § 749.

jury were advised that a defense witness was running the risk of being prosecuted for perjury, the jury would be more inclined to believe the witness's otherwise unbelievable testimony; an instruction on perjury in such a situation would have been error.

4. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESSES—NONINDORSEMENT—DEFENDANT'S KNOWLEDGE.

Prosecutor's failure to indorse the names of two *res gestae* witnesses on the information was not error where defendant and his attorney had the circuit court history in defendant's case for some ten months before trial and knew that the names of the two witnesses were missing.

5. CRIMINAL LAW—DEFENDANT'S CRIMINAL RECORD—MOTION TO SUPPRESS.

A defendant in a criminal prosecution is not entitled to have his criminal record suppressed so that he can testify in his own behalf with the knowledge that he cannot be questioned about past convictions; the people have a statutory right to cross-examine a testifying defendant concerning his criminal convictions in order to assist the jury in determining the defendant's credibility (MCLA § 600.2158).

Appeal from Genesee, Elza H. Papp, J. Submitted Division 2 June 8, 1971, at Grand Rapids. (Docket No. 8402.) Decided September 27, 1971.

Fuston Thomas 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,* Chief Assistant Prosecuting Attorney, for the people.

Gary W. Brasseur, for defendant on appeal.

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

FITZGERALD, J. Defendant, along with his codefendant, Daniel Angers,[1] was convicted by a jury of the crime of robbery armed, MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797), and sentenced to serve 20–1/2 to 30 years in the state prison. He brings this appeal as of right.

At 1:30 a.m. of the morning in question, Eddie's Party Store in Flint was robbed by two men. Witnesses DeCaire and Schumacher, employees at the store, were on duty at the time. Both bandits wore silk stockings over their faces. The taller bandit came over to the cash register and demanded money and started to grab it. When the two men fled the store, the taller of the two bandits removed the silk stocking from his face and was positively identified by several witnesses as being defendant Thomas. The police were called and about 30 minutes later spotted and stopped the getaway car, arresting Thomas and Angers.

While the two men were in the county jail, James Barnett offered to confess to the crime. He wrote out his confession and later testified in court that he was the man who perpetrated the robbery. Barnett was called as a witness and testified to the facts set out in his confession. Defendant did not take the stand and thus the only testimony that contradicted that of the people's witnesses in this case was the testimony of witness Barnett. The jury rejected his testimony and defendant was convicted.

On appeal defendant raises several issues.

Defendant first contends that his conviction should be reversed because of alleged prejudicial remarks made by the prosecutor in his closing argument. He asserts that the prosecutor's argument comes within the rules of those cases enunciated in *People*

[1] See *People* v. *Angers* (1971), 36 Mich App 28.

v. *Ignofo* (1946), 315 Mich 626, and *People* v. *Quick* (1885), 58 Mich 321. Although the prosecutor did inform the jury of his own belief that Thomas was guilty, he was arguing that the evidence supported this conclusion. After stating his belief that defendant was guilty, the prosecutor went on to say that the jury would have to disregard the testimony of five eyewitnesses in the case to come to any other conclusion. This type of argument is akin to that of the prosecutor in *People* v. *Bigge* (1941), 297 Mich 58, 68. The Michigan Supreme Court there said:

"It is not error for a prosecutor to argue from the testimony that the defendant is guilty and to state what evidence convinces him and should convince them [the jury] of such guilt."

Defendant next contends that the trial court should have declared a mistrial because of certain testimony. The testimony of witness Barnett was rather unbelievable and the court so indicated at trial. Defendant asserts that when the court became thus convinced, it was obliged to move *sua sponte* for a mistrial. No authority is cited for this proposition and so it can be deemed abandoned and disposed of under the rule of *People* v. *Rogers* (1968), 10 Mich App 380, and *People* v. *McGown* (1969), 19 Mich App 580.

Defendant further contends that reversible error was committed because the penalty for armed robbery was mentioned during trial. Witness Barnett was allowed to state, under questioning by defendant's attorney, that the penalty for armed robbery was life imprisonment. Following this, the prosecutor asked Barnett what the penalty for first-degree murder was (Barnett was then awaiting trial on charges of first-degree murder). The court in-

structed the jury that penalty was no concern of theirs and was a matter solely for the court. In addition, the matter of penalty in regards to robbery armed came out in response to defense counsel's own questioning. While the mention of penalty may have been improper, appellant cannot be heard to complain. *People* v. *Singer* (1913), 174 Mich 361.

Defense counsel, in chambers, moved the court to advise the jury regarding the penalty for perjury. His theory apparently was that if the jury were advised that witness Barnett was running the risk of being prosecuted for perjury, they would be more inclined to believe his otherwise-unbelievable testimony. This the court declined to do and defendant assigns this as error. He does not bring to our attention any authority for this proposition; in fact, it appears that it would have been error for the court to so advise the jury. *Cf. People* v. *Wein* (1969), 382 Mich 588.

The prosecution did not indorse the names of two *res gestae* witnesses on the information. While this is ordinarily error, defense counsel as well as defendant himself had the circuit court history in this matter for some ten months prior to trial and well knew that the names of these two witnesses were missing. The error is not saved for review. *People* v. *Love* (1969), 18 Mich App 228; *Accord: People* v. *Bowman* (1971), 33 Mich App 262.

Defendant did not take the stand and claims he did not do so because of his somewhat unsavory criminal record. A motion was made to suppress his criminal record but the court declined to grant it. Realizing that his record would come out if he did take the stand, defendant declined to do so. We are urged that the trial court erred in this regard. By statute, MCLA § 600.2158 (Stat Ann 1962 Rev

§ 27A.2158), the people have the right to cross-examine a defendant concerning his criminal convictions, the purpose being to assist the jury in determining the credibility of the defendant as a witness in his own behalf. Defendant was not entitled to have his motion to suppress his record granted. *People* v. *Cook* (1970), 24 Mich App 401.

The decision of the trial court is affirmed.

All concurred.

PEOPLE *v.* ANGERS

1. ROBBERY — PRELIMINARY EXAMINATION — PROBABLE CAUSE — EVIDENCE — SUFFICIENCY.

   Evidence introduced at defendant's preliminary examination was sufficient to bind him over for armed robbery where the evidence showed that defendant's general characteristics fit those of one of the two robbers, as given by witnesses, defendant's car was used in the robbery, and defendant was arrested with a man positively identified as one of the robbers shortly after the robbery was committed, because although the evidence may not have required a finding of probable cause, neither did it preclude such a finding.

2. CRIMINAL LAW—JOINT TRIALS—DISCRETION.

   The decision concerning joint or separate trials for two jointly-indicted defendants is within the trial judge's discretion; the trial judge's determination will not be overturned, absent an

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 442 *et seq.*
[2] 53 Am Jur, Trial § 56 *et seq.*
[3] 53 Am Jur, Trial § 59.
[4] 29 Am Jur 2d, Divorce § 541.
[5] 46 Am Jur, Robbery § 50.

affirmative showing that a joint trial prejudiced the substantial rights of one or both defendants.

3. CRIMINAL LAW—JOINT TRIALS—SEPARATE TRIALS—SAME CRIME.
A denial of a motion for separate trials of jointly-indicted defendants is not an abuse of discretion where the defendants are charged with the same crime and the same evidence is to be used to implicate both defendants in the joint commission of the crime.

4. CRIMINAL LAW — WITNESSES — DEFENSE WITNESS — EVIDENCE — EXCULPATORY STATEMENT — INCULPATORY EFFECT.
A motion for a mistrial was properly denied where the motion was based on the ground that defendant was inculpated, rather than exculpated, by a defense witness's purported confession that he, not the defendant, had committed the crime, in that the confession placed the defendant in the company of defendant's codefendant, postively identified as one of two robbers, before the armed robbery occurred and where defendant failed to object to the introduction of the confession into evidence.

5. ROBBERY—EVIDENCE—SUFFICIENCY.
Evidence was sufficient to support a verdict that defendant was guilty of armed robbery where the evidence showed that defendant owned the automobile used in the robbery, that defendant was arrested while driving that car approximately 30 minutes after the robbery, that defendant was arrested in the company of a man who was positively identified by a witness as being one of the two robbers, that defendant fit the general description of one of the robbers, and that the defendant and the other man arrested had planned to be together on the night of the robbery; even though the evidence was circumstantial, well-authenticated circumstantial evidence can be more positive than direct evidence.

Appeal from Genesee, Elza H. Papp, J. Submitted Division 2 June 8, 1971, at Grand Rapids. (Docket No. 8411.) Decided September 27, 1971.

Daniel G. Angers 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,* Chief Assistant Prosecuting Attorney, for the people.

James A. Ruhala, for defendant on appeal.

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

FITZGERALD, J. Defendant appeals as of right his jury conviction on a charge of robbery armed, MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28-.797). Defendant was sentenced to serve 10–1/2 to 25 years in the state prison for the offense.

On July 23, 1968, two armed men robbed a party store in Flint. While the two men were leaving the store, one of them removed his mask and was identified by witnesses as codefendant Fuston Thomas.[1] The two men drove away in a red convertible; the license number was recorded by witnesses. Approximately 30 minutes after the robbery, defendant was arrested by police with codefendant Thomas in a car that matched the getaway car and had the same license plate number. The car was owned by defendant. Defendant, although not positively identified, met the general description of the second man in the robbery.

Defendant's first issue on appeal is that the trial court committed reversible error by denying defendant's motion to quash the information. Defendant contends that there was not sufficient evidence introduced at the preliminary hearing to establish probable cause to believe that defendant committed the crime.

Absent a clear abuse of discretion on the part of the examining magistrate, this Court will not disturb

[1] See *People* v. *Fuston Thomas* (1971), 36 Mich App 23.

his determination regarding establishment of probable cause at the preliminary examination. *People* v. *O'Leary* (1967), 6 Mich App 115; *People* v. *Lunsford* (1969), 20 Mich App 325.

The evidence introduced at the preliminary examination in the instant case showed, (1) defendant's general characteristics fit those given by witnesses, (2) his car was used in the robbery, and (3) he was arrested with positively-identified codefendant Thomas soon after the robbery. While such evidence may not have required a finding of probable cause, neither does it preclude such a finding. *Lundsford, supra.*

Defendant next contends that it was reversible error for the trial court to deny defendant's motion for a separate trial. MCLA § 768.5 (Stat Ann 1954 Rev § 28.1028) places the decision concerning joint or separate trials of two jointly-indicted defendants within the discretion of the trial court. The determination of the trial court as to this issue will not be overturned absent an affirmative showing that a joint trial prejudiced the substantial rights of the accused. *People* v. *Schram* (1966), 378 Mich 145.

Neither the record below nor defendant's brief on appeal establishes any prejudice to substantial rights of the defendant as a result of the joint trial. Defendant, in his brief, alludes to possible prejudice if his codefendant took the stand. However, neither codefendant took the stand, so that situation did not arise.

This case fits under the general rule that when the defendants are charged with the same crime and the same evidence is to be used to implicate both defendants in the joint commission of the crime, the denial of a motion for a separate trial is not an

abuse of discretion. *People* v. *Carter* (1970), 28 Mich App 83; *People* v. *Schram* (1966), 378 Mich 145.

Defendant next contends that the trial court abused its discretion in denying defendant's motion for a mistrial. Defendant's motion was based largely on the denial of a separate trial, which we have already dealt with, and also on the effect of certain testimony by a witness who claimed he had committed the crime. The witness had been a cellmate of defendant while defendant was awaiting trial. The claimed confession of the witness, rather than exculpating defendant, appears to have inculpated him in the minds of the jurors because that confession placed defendant Angers with codefendant Thomas *before* the crime. This was the only evidence introduced placing the two together before the crime.

Defendant did not object below to the introduction of the confession into evidence and cannot subsequently use that evidence as the basis for a mistrial. *People* v. *Dombrowski* (1968), 10 Mich App 445. Therefore, because there was no abuse of discretion by the trial court in denying defendant's motion for a mistrial, we cannot overrule the trial court on appeal. *People* v. *Qualls* (1968), 9 Mich App 689.

Lastly, defendant argues that it was error for the trial court to deny defendant's motion for a new trial which was based on the grounds that there was insufficient evidence to find defendant guilty beyond a reasonable doubt.

The evidence adduced at trial showed that defendant owned the automobile used in the robbery of the store; that he was arrested while driving that car approximately 30 minutes after the robbery;

that he was arrested in the company of codefendant Thomas who was positively identified by a witness as being one of the perpetrators; that defendant fit the general description of codefendant Thomas' accomplice; and that defendant Angers and codefendant Thomas had planned to be together on the night of the robbery.

On appeal, this Court will not disturb a verdict unless the evidence fails to support the finding of fact by the jury. *People* v. *Floyd* (1966), 2 Mich App 168. Although in the instant case the evidence against defendant was circumstantial, we are mindful of the fact that well-authenticated circumstantial evidence can be more positive than direct evidence. *People* v. *Iron* (1970), 26 Mich App 235.

We therefore hold that there was sufficient evidence adduced at trial in the instant case to prove defendant guilty beyond a reasonable doubt.

Affirmed.

All concurred.

WRIGHT *v.* ESTATE OF TREICHEL

1. ATTORNEY AND CLIENT—REPRESENTATION OF ESTATE.

An attorney's representation of a person during that person's lifetime does not give the attorney the authority to act on behalf of the person's estate.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 71 Am Jur 2d, Attorneys at Law § 141.
[4] 7 Am Jur 2d, Attorneys at Law § 119.
[5] 31 Am Jur 2d, Executors and Administrators §§ 714, 718.
[6, 7] 7 Am Jur 2d, Attorneys at Law § 112 *et seq.*
[8] 31 Am Jur 2d, Executors and Administrators § 738.

2. ATTORNEY AND CLIENT—TERMINATION OF RELATIONSHIP—CLIENT'S DEATH.

The authority of an attorney is revoked and the attorney-client relationship is terminated when the client dies.

3. ATTORNEY AND CLIENT—TERMINATION OF RELATIONSHIP—DEATH OF ADMINISTRATOR.

The death of the administrator of an estate terminated the authority of the attorney representing the administrator to act further on behalf of the estate where it was the administrator who hired the attorney and it was for the administrator, not the estate itself, for whom the attorney was employed; the attorney had no official capacity with respect to the estate.

4. PROCESS—SERVICE—ATTORNEY AND CLIENT.

Service of process on an attorney who had represented the administrator of an estate was ineffective to give a court jurisdiction over the estate where the administrator of the estate, who had hired the attorney and for whom the attorney worked, had died before the attorney was served.

5. EXECUTORS AND ADMINISTRATORS—SERVICE OF PROCESS—ADMINISTRATOR'S DEATH—SUCCESSOR ADMINISTRATORS.

Plaintiffs' contention that if they were not allowed to serve the attorney for an estate whose administrator had died they would be without legal remedy in that there was no one who could be served with process is without merit because, as provided by statute, plaintiffs simply had to petition the court for the appointment of a successor administrator who, once appointed, could be served with process (MCLA § 702.51).

6. APPEARANCE—UNAUTHORIZED APPEARANCE—DEFECTIVE SERVICE—WAIVER.

An unauthorized general appearance of an attorney is ineffective for any purpose, including the waiver of defects in the service of process.

7. APPEARANCE—UNAUTHORIZED APPEARANCE—DEFECTIVE SERVICE—WAIVER.

The general appearance of an attorney on behalf of an estate did not subject the estate to the court's jurisdiction and did not waive the defects in the service of process upon the attorney where the attorney had been hired and had worked for the administrator of the estate, not the estate itself, and the administrator had died before the attorney was served.

8. LIMITATION OF ACTIONS — ESTATE WITHOUT ADMINISTRATOR — TOLLING OF STATUTE.

The statute of limitations is tolled during the time when an estate is without an administrator (MCLA §§ 600.5852, 708.20).

Appeal from Wayne, John B. Swainson, J. Submitted Division 1 June 15, 1971, at Detroit. (Docket No. 8910.) Decided September 27, 1971. Rehearing granted November 10, 1971, and remanded for further evidence.

Complaint by Ward Wright and Viola Wright against the Estate of Arthur Treichel for damages for injuries received in an automobile accident. Defendant's motion for accelerated judgment denied. Defendant appeals by leave granted. Reversed.

Moore, Sills, Poling & Wooster (by *William G. Sinn* and *Thomas A. Law*), for plaintiffs.

Plunkett, Cooney, Rutt & Peacock (by *Jeannette A. Paskin*), for defendant.

Before: T. M. BURNS, P. J., and HOLBROOK and MCGREGOR, JJ.

T. M. BURNS, P. J. Plaintiffs were injured in an automobile accident on July 21, 1966, in which the driver of the other car, Arthur Treichel, was killed. Plaintiffs filed the complaint in this action on July 2, 1969, against Arthur Treichel's estate[1] alleging $160,000 in damages.

On July 5, 1969, a copy of the complaint and summons was served upon George Johnson, the probate judge of Gladwin County and the alleged

[1] It should be noted that an estate is not a proper party to a lawsuit but rather the administrator or executor is the proper party plaintiff or defendant.

attorney for the estate. The administrator of the estate had died before the commencement of this action and no new administrator had been named.

On August 18, 1969, George Johnson entered a general appearance in this matter on behalf of the estate. On September 4, 1969, defendant moved for an accelerated judgment for the reason that service of process upon George Johnson was not proper and, therefore, the circuit court was without jurisdiction.

The trial court denied defendant's motion for an accelerated judgment. On May 19, 1970, this Court granted leave to appeal. We will discuss the issues raised by the defendant in the order presented.

1. *Whether George Johnson, an attorney who entered a general appearance on behalf of the defendant estate, had authority to act on behalf of the estate after the administrator died.*

Plaintiffs contended that George Johnson had authority to represent the estate because he had represented the deceased during his lifetime and had represented the deceased's estate prior to the administrator's death. Defendant contends that neither of these facts gave Johnson such authority.

First, it is clear that Johnson's prior representation of Arthur Treichel during his lifetime did not give him the authority to act on behalf of the estate. The rule in Michigan is that the authority of an attorney is revoked and the attorney-client relationship is terminated when the client dies. *Doty* v. *Dexter* (1886), 61 Mich 348; *Courser* v. *Jackson* (1909), 159 Mich 119. See generally, 7 CJS, Attorney and Client, § 113, p 945.

Second, it is also our opinion that the death of the administrator terminated the authority of Johnson to act further on behalf of the estate. It was

the administrator who hired Mr. Johnson and it was for him, not the estate itself, for whom Mr. Johnson was employed. The death of the administrator terminated the attorney-client relationship and Mr. Johnson no longer had any authority to act on behalf of the estate. Therefore, since Mr. Johnson had no official capacity with respect to the estate, the service of process upon him was defective and no jurisdiction over the estate was obtained.

Plaintiffs contend, however, that if they could not serve the attorney for the estate in this case, they would be without legal remedy since there was no administrator conducting the affairs of this estate. However, MCLA § 704.51 (Stat Ann 1962 Rev § 27.3178[302]) provides for the appointment of successor fiduciaries where a fiduciary dies.[2] The statute provides in part:

"The successor shall be appointed in the manner prescribed by this act for the appointment of fiduciaries."

MCLA § 702.51 (Stat Ann 1962 Rev § 27.3178 [121]) provides for the appointment of administrators. Under that section, plaintiffs are entitled to petition the probate court for the appointment of an administrator. Therefore, plaintiffs' contention that unless allowed to serve the estate's attorney they were without remedy is without merit. They simply had to petition the court for the appointment of a successor administrator who, once appointed, could be served with process.

We therefore hold that the service of process upon Mr. Johnson, an attorney for the estate, was defective and no jurisdiction over the estate was obtained.

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[2] The term "fiduciary" includes an administrator of an estate under MCLA § 704.1 (Stat Ann 1962 Rev § 27.3178[251]).

2. *Whether the general appearance by George Johnson on behalf of the estate waived the defects in the service of process.*

Plaintiffs contend that even if the service of process did not obtain jurisdiction over the estate, the general appearance by Mr. Johnson on behalf of the estate waived the defects in service thereby subjecting the estate to the jurisdiction of the circuit court.

While a general appearance by a defendant or his attorney usually waives defects in service of process,[3] it is generally the rule that an unauthorized appearance is ineffective for any purpose. See *Hanzes* v. *Flavio* (1920), 234 Mass 320 (125 NE 612); *Cf. Fisher* v. *Fisher* (1923), 224 Mich 147. See generally 6 CJS, Appearances, § 25, p 68.

In the instant case there could be no authority, either expressed or implied, enabling Johnson to enter an appearance for the estate because the administrator, from whom such authority must come, had expired. As a consequence, Johnson's appearance was ineffective to bind the estate for any purpose. Therefore, the defects in the service of process were not waived.

Since we have held that the service of process upon Mr. Johnson was defective and that the general appearance on behalf of the estate did not cure the defects, the trial court's denial of the motion for accelerated judgment must be reversed.

Plaintiffs have, however, requested this Court to rule that the statute of limitations has been tolled during the course of these proceedings.

MCLA § 600.5856 (Stat Ann 1962 Rev § 27A.5856) demands that before the statute is tolled,

[3] See *Austin* v. *Burroughs* (1886), 62 Mich 181; *Nelson* v. *McCormick* (1952), 334 Mich 387.

jurisdiction must be acquired over the defendant in some form. However, under MCLA § 600.5852 (Stat Ann 1962 Rev § 27A.5852) the plaintiffs had two years from the date on which letters of administration were filed to commence suit.

In the instant case the administrator died after having served only 3–1/2 months. Since we have already held that an administrator is essential to obtaining jurisdiction over an estate, it is our conclusion that, in this case, the statute is tolled during the time when the estate is without an administrator. Therefore, in the instant case, the plaintiffs will have 20–1/2 months to start suit after a new administrator is appointed subject only to the six-year limit on all claims against an estate provided for in MCLA § 708.20 (Stat Ann 1962 § 27.3178 [430]).

Reversed.

All concurred.

FULCO, INC., *v.* MARTIN TROPF & SONS, INC.

1. MUNICIPAL CORPORATIONS—CITY CHARTER—PRESENTATION OF CLAIMS.

   A section in a home rule city's charter, providing that unless the city has been notified of a claim against it within a specific period after the claim arises, an action on that claim is barred is, as a general rule, valid, except to the extent that the provision contains a period of limitation which has the effect of shortening the statutory period of limitations.

REFERENCES FOR POINTS IN HEADNOTES

[1–3, 5] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 684.

[4] 8 Am Jur 2d, Aviation § 58.

2. Municipal Corporations — City Charter — Presentation of Claims — Validity.

A home rule city charter provision requiring that claims against the city be presented to the governing body as a condition precedent to an action in tort or contract is, as a general rule, valid; the provision gives the governing body the opportunity to investigate the claim and determine whether to allow it, settle it, or prepare a defense.

3. Municipal Corporations — City Charter — Presentation of Claims — Proprietary Function.

A presentation of claims provision in a city charter, requiring that claims be presented to the city's governing body as a condition precedent to an action on that claim, will, as a general rule, bar an action unless the claim against the city arose from a function of the city which was proprietary; where the city was acting in a proprietary function the presentment of claims provision does not apply and suit may be initiated as against a private party.

4. Municipal Corporations — Operation of Airport — Governmental Function.

The City of Detroit was operating in a governmental capacity, not a proprietary capacity, in having hangars constructed for its municipal airport (MCLA § 259.132).

5. Municipal Corporations — City Charter — Presentation of Claims — Futile Gesture.

The failure of a contractor, with whom the City of Detroit had contracted to build hangars at its municipal airport, to present its contract claim against the city's common council for audit and allowance prior to institution of an action against the city did not bar suit even though the presentation of claims provision in the city charter was valid where the city, before the suit had been filed, had, by resolution, declared the contractor in default of the contract, because the contractor's presenting his claim would have been a useless gesture (Detroit Charter, Title 6, ch 7, § 11).

Appeal from Macomb, Frank E. Jeannette, J. Submitted Division 2 May 11, 1971, at Lansing. (Docket No. 9071.) Decided September 27, 1971.

Complaint by Fulco, Inc., against Martin Tropf & Sons, Inc., for the balance due on a contract. The City of Detroit was added as a third-party defendant on motion of defendant Tropf. Judgment for Fulco against defendant Tropf and judgment for defendant Tropf against third-party defendant City of Detroit. The City of Detroit appeals. Affirmed.

Robert E. Childs, for defendant Martin Tropf & Sons, Inc.

Michael M. Glusac, Corporation Counsel, and *David S. DeWitt,* Assistant Corporation Counsel, for third-party defendant City of Detroit.

Before: DANHOF, P. J., and FITZGERALD and QUINN, JJ.

FITZGERALD, J. Third-party defendant City of Detroit appeals as of right from a judgment rendered against it in a contract action for the amount of $37,497. Said judgment was in favor of defendant Martin Tropf & Sons, Inc.

Plaintiff Fulco, Inc., a subcontractor, sued defendant Tropf for moneys due it on a contract for work, labor, materials, and design. Third-party defendant Detroit was brought in on a motion by defendant Tropf.

Pertinent facts are the following: On November 7, 1964, the City of Detroit received goods for the construction of hangars at its municipal airport. Defendant Tropf was the lowest bidder and thus received the contract. Plaintiff Fulco, Inc., designed and manufactured the hangars under a subcontract with defendant Tropf.

During construction, considerable trouble developed from frost raising the floor of the hangars and thereby causing severe distortion of the structures. A dispute developed between defendant Tropf and third-party defendant Detroit as to responsibility for the resultant damages and defendant Tropf did no further work on the structure. Third-party defendant Detroit declared defendant Tropf in default of the contract and took steps to have the work completed by another contractor. Plaintiff Fulco filed an action against defendant Tropf for the unpaid balance on the hangars supplied by plaintiff Fulco to defendant Tropf. Defendant Tropf added third-party defendant Detroit, claiming that third-party defendant Detroit had wrongfully terminated the contract and thus caused defendant Tropf damages and was liable to defendant Tropf therefor. Third-party defendant Detroit moved for a directed verdict after defendant Tropf's opening statement on the grounds that defendant Tropf's claim was barred because it did not first present the claim to the Common Council of the City of Detroit for audit and allowance as provided by Title VI, Chapter 7, § 11, of the Charter of the City of Detroit. This motion was denied and defendant recovered a verdict of $37,497 from third-party defendant Detroit. (Plaintiff Fulco recovered $20,700 from defendant Tropf.) Only defendant Tropf and third-party defendant Detroit participate in this appeal.

The sole question presented on appeal is whether or not defendant Tropf's claim for damages is barred because it did not submit the claim to the Common Council of Detroit for audit and allowance before filing suit.

The Charter of the City of Detroit, Title VI, Chapter 7, § 11, reads, in pertinent part, as follows:

"It shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against said city that it has never been presented to the common council for audit or allowance or if on contract that it was presented without said affidavit and rejected for that reason or that the action or proceeding was brought before the common council had a reasonable time to investigate and pass upon it." (Emphasis supplied.)

Defendant Tropf admitted that no attempt was made to comply with the terms of the charter provision, although there was correspondence with third-party defendant City of Detroit relevant to claims by defendant Tropf against third-party defendant City of Detroit, and it was the city which declared the defendant in default on the contract.

Charter requirements such as the one in issue here have been the subject of considerable litigation in Michigan, although the large percentage of it involves tort claims and not contract actions. It should be noted that there are two distinct types of provisions. One type is merely a notice provision, requiring that the city be notified of claims against it in order to give the city ample time to investigate the facts of the claim. The second type, like the provision in issue here, provides that the claim against the city should be brought before the governing body of the city so that settlement may be reached, if possible, before litigation is commenced.

Notice provisions often provide that unless the city has notice of a claim within a specific period (usually 60 or 90 days) the claim against the city is barred. In general, the notice requirements have

been upheld by the court except to the extent that they contain a period of limitations which has the effect of shortening the statutory period of limitations. *Marks* v. *City of Battle Creek* (1959), 358 Mich 114; *Republic Franklin Insurance Company* v. *City of Walker* (1969), 17 Mich App 92; *Lenneman* v. *City of Lansing* (1969), 17 Mich App 592.

Presentment-of-claims provisions require that claims against the city be presented to the governing body as a condition precedent to an action in tort or contract. This notice is required to give the body an opportunity to investigate the claim and determine whether to allow it, settle it, or prepare a defense to the claim. In general, these provisions have been upheld by the courts. *Northrup* v. *City of Jackson* (1935), 273 Mich 20; *City of Detroit* v. *Michigan Paving Company* (1878), 38 Mich 358; *Grand T.W.R. Co.* v. *City of Detroit* (1955), 342 Mich 537. However, it has been held that where the claim against the city involves a proprietary function of the city, as opposed to a governmental or municipal function, then notice and presentment-of-claims provisions do not apply and suit may be instituted as against any private party. *Northrup, supra; Marks, supra; Borski* v. *City of Wakefield* (1927), 239 Mich 656.

The Michigan Supreme Court, although not finally deciding the question, said that in owning and operating an airport, the City of Battle Creek was "apparently" engaged in a proprietary function. *Marks, supra.*

However, there is a statute, which was not mentioned in *Marks, supra,* that belies the *Marks'* interpretation:

"[T]he acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports * * * , *are hereby*

declared to be public, governmental and municipal functions, exercised for a public purpose, and matters of public necessity." MCLA § 259.132 (Stat Ann 1968 Rev § 10.232) (Emphasis supplied.)

In light of the above statute, we hold that the operation of the airport in the instant case is a governmental and municipal function. Therefore, the presentment-of-claims provisions of the city charter is applicable. *Marks, supra; Borski, supra.*

However, there are certain circumstances that will excuse a party from the presentment of claims requirement. In *Ely v. City of Detroit* (1943), 306 Mich 300, 307, the Supreme Court held that presentment of claims is not required if "it would have been a useless gesture".

It is difficult to imagine a situation in which a presentment of a claim would be a more "useless gesture" than in the instant case. Here, third-party defendant Detroit by resolution declared defendant Tropf to be in default of the contract and terminated its right to proceed. That action was taken well before this action was commenced. Thus, this is not a case where the Detroit Common Council (third-party defendant) was not aware of the contract upon which this suit is based. Third-party defendant Detroit had, by its own affirmative action, declared defendant Tropf to be in default, and to say now that defendant Tropf should have presented the claim to the very body which had previously declared him in default is unreasonable and, in the words of *Ely,* "a useless gesture".

Defendant Tropf is thus excused from the presentment-of-claims provision and the trial court is affirmed.

Costs to appellee.

All concurred.

MOBIL OIL CORPORATION *v.* CITY OF CLAWSON

OPINION OF THE COURT

1. ZONING—ORDINANCES—SPECIAL PERMITS—CONSTITUTIONALITY.

   A zoning ordinance which requires a Board of Zoning Appeals to issue a special exception permit for a use otherwise not permitted if the conditions and safeguards listed in the ordinance are met is not an unlawful delegation of the legislative function.

2. ZONING—ORDINANCES—AMENDMENT—PLEADING.

   A zoning ordinance passed subsequent to the denial of plaintiffs' application for a special exemption permit to build a gasoline station controls plaintiffs' suit for declaratory judgment and other equitable relief where the subsequent zoning ordinance, containing new standards for granting special exemptions, was properly pled by the plaintiff.

3. ZONING—SPECIAL PERMITS—EVIDENTIARY HEARINGS—SUBSEQUENT ORDINANCE.

   A Zoning Board of Appeals must grant a full evidentiary hearing to applicants for a special use permit under an amended zoning ordinance which provided an entirely new test for the granting of special use permits different from that in effect when the board denied the original application for the permit.

4. ZONING—SPECIAL PERMITS—DENIAL.

   The record of a Board of Zoning Appeals hearing discloses material and substantial evidence supporting denial of plaintiffs' request for a special exemption permit to build a gasoline service station where letters in the record from the city

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REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 58 Am Jur, Zoning § 196 *et seq.*
[2, 7] 58 Am Jur, Zoning § 182.
[3, 4] 58 Am Jur, Zoning § 218 *et seq.*
[5] 58 Am Jur, Zoning § 140.

engineer, the city manager, and the police chief state that the proposed gasoline service station would create additional traffic problems and hazards out of proportion to other uses of property in the district, and where at the hearing specific foreseeable problems were stated, pictures and accident-spot maps were shown, and reports on traffic studies related to gasoline service stations in other cities were read.

5. ZONING—SPECIAL PERMITS—VALUE OF PROPERTY—CONFISCATORY DIFFERENCE IN VALUE.

The difference in the value of property with its present permitted uses and the use contemplated if a special use permit was granted is one of the factors to be considered in determining whether a Board of Zoning Appeals denial of the special use permit was unreasonably discriminatory against the owner's right in his property; a difference in value of one of three times the present value does not approach the proportionate differences ordinarily required to be held confiscatory.

6. ZONING—DUE PROCESS—SPECIAL PERMIT.

A zoning ordinance requiring a special use permit to construct a gasoline service station is not an unreasonable and arbitrary discrimination against the use of property and a violation of due process where the zoning ordinance requires a special permit to be obtained to construct a gasoline station, the ordinance requires the showing of specific standards before issuing the permit, and plaintiff has failed to plead or prove that the city excludes all gasoline service stations.

CONCURRENCE BY O'HARA, J.

7. ZONING—SPECIAL PERMIT—DENIAL—SUBSEQUENT ORDINANCE—HEARING REQUIREMENT.

Circuit court had no proper record to review a Board of Zoning Appeals denial of plaintiffs' request for a special use permit where the board's hearing was based on a prior ordinance and a subsequent ordinance, providing for an entirely new test, was enacted and properly pled.

Appeal from Oakland, Arthur E. Moore, J. Submitted Division 2 May 6, 1971, at Lansing. (Docket No. 9329.) Decided September 27, 1971. Leave to appeal denied, 386 Mich 791.

Complaint by the Mobil Oil Corporation and the Bryant-Nicks Company against the City of Clawson for a declaratory judgment that a zoning ordinance is unconstitutional. Judgment for plaintiffs. Defendant appeals. Reversed and remanded.

Robert E. Childs, for plaintiffs.

Hartman, Beier, Howlett, McConnell & Googasian, for defendant.

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

MCGREGOR, J . Plaintiffs brought suit August 3, 1967, in circuit court, seeking a declaratory judgment (GCR 1963, 521) and other appropriate equitable relief against defendant city, based upon defendant's refusal to grant plaintiffs a "special exception" permit to use certain premises owned by plaintiff Bryant-Nicks Company (with an option to buy held by plaintiff Mobil Oil Corporation) for a gasoline service station. After a three-day nonjury trial, judgment was entered for plaintiffs on March 31, 1970; defendant appeals as of right.

The challenged section of ordinance No. 303 specifies that in B-A districts, gasoline stations constitute a permitted land use, with permits issued by the board of zoning appeals.

Plaintiffs seek a "special exception" permit on certain lots in the City of Clawson situated on the northwest corner of the intersection of Main Street and 14 Mile Road in the heart of the city's business district. Pursuant to the procedural requirements

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

set out by defendant's zoning ordinance No. 303,[1] adopted September 7, 1965, and in force at the time of the filing of the complaint, plaintiffs requested a special exception permit to construct a gasoline service station on the property in question. The city zoning board of appeals, empowered under ordinance No. 303 (hereinafter referred to as #303) to authorize plaintiffs' request, denied said request at the end of a hearing held June 15, 1967.

Thereafter, defendant's city council amended its zoning ordinance, passing ordinance No. 339[2] in

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[1] Zoning Ordinance No. 303, City of Clawson:
"B-A Business District
"The intent of this district is to establish areas composed of land and structures used primarily to provide retailing, parking, personal and business services of all kinds satisfying the needs of the residents of the entire community and the surrounding trade area. To this end certain uses and activities which typically disrupt the functioning of a concentrated business district and which at the same time function better outside such district are excluded."
Section 7.2 is entitled "Permitted Principal Uses":
"2. Any retail business, whose principal activity is sale of merchandise in an enclosed building."

* * *

Section 7.4, entitled "Uses Requiring Board of Zoning Appeals Special Exception Permit" reads:
"1. Any use having the same general character as the permitted principal uses and which is in keeping with the intent of this district.
"2. Gasoline filling stations.
"3. Outdoor sales by temporary permit for six (6) months periods or less.

* * *

"6. The Board of Zoning Appeals, pursuant to Section 17.3 'B. Special Exceptions' has these powers:
"B. Special Exceptions:
"In special situations specifically described in this ordinance, exceptions to the general regulations are permitted to the extent that such special exceptions are specifically authorized."

[2] Zoning Ordinance No. 339, City of Clawson:
"Article XVII. Board of Zoning Appeals
"Section 17.3. Powers and Duties of Board of Appeals:

* * *

"(2) Requests for Special Uses.
"The board shall hear and grant or deny all requests for permission to carry on special uses, where such uses are permitted under the zoning ordinance with board approval. The board shall not grant any such request unless it shall first determine that:

December, 1967. Plaintiffs amended their complaint on November 26, 1969, to include an attack on that ordinance also.

Although plaintiffs in their complaint contended that the zoning ordinance in question (#303 and thereafter #339) amounted to an unconstitutional delegation of a legislative function to the zoning board of appeals, this issue was never seriously contended at trial. In any event, such a contention was entirely one of law and no proofs existed on this issue except in the pleadings. The circuit court ruled that both ordinances amounted to an unconstitutional delegation of a legislative function and cited *Osius* v. *City of St. Clair Shores* (1956), 344 Mich 693, as controlling authority.

Although the present zoning classification regarding the property in question did not encompass gasoline stations, the board of zoning appeals, pursuant to this ordinance, had the power to issue special exception permits. The ordinance, in part, reads:

"Uses requiring board of zoning appeals special exemption permit are permissible only when, in the finding of the board of zoning appeals, adequate conditions exist or can be imposed that will make such uses compatible with the purposes of this ordinance and intent and principal uses of the district.

"(a) All requirements set forth in this zoning ordinance will be complied with;

"(b) The use and any proposed structures to be utilized in connection therewith will not create any threat to the public health, safety and welfare and will not unduly aggravate any traffic problem in the area;

"(c) The proposed use will not be injurious to the surrounding neighborhood, and

"(d) The proposed use will not be contrary to the spirit and purpose of the zoning ordinance. In granting a special use the board may attach such conditions as it may deem reasonably necessary to promote the spirit and intent of the zoning ordinance."

Otherwise, such uses are prohibited uses. In issuing a special exception permit, the board of zoning appeals shall take into consideration the public health, safety, and welfare, and shall prescribe appropriate conditions and safeguards to insure the following: (1) that all proposed structures, equipment or material shall be readily accessible for fire and police protection, (2) that the proposed use shall not cause traffic congestion or movement out of proportion to that normally prevailing in the particular district, (3) that the proposed use shall provide sufficient space for the offstreet parking of all vehicles attracted by its presence and abides by the regulations set forth in this ordinance for its particular district or use, (4) that any proposed building shall not be out of harmony with the predominant type of building in the particular district by reason of its size, character, location, or intended use."

The fundamental consideration as to whether an ordinance constitutes an unlawful delegation of the legislative function was expressed in 8A McQuillan, Municipal Corporations (3rd ed), § 25.215, pp 100, 101:

"There is a distinction between the delegation of power to legislate, which involves discretion as to what the law shall be, and a conferring of authority or discretion as to the execution of the law. Executing the policy of a zoning ordinance is an administrative function that may be delegated to administrative officials or boards." Quoted with approval in *Marathon Oil Company* v. *Plymouth Township* (1970), 25 Mich App 399, 401.

In the instant case the zoning board of appeals found that the erection of a gasoline station in the proposed location would exacerbate what was already deemed to be a severe traffic problem in the

area. A reading of the ordinance does not reveal unfettered discretion in the board of zoning appeals; we read the statute to require the board to issue a permit, if the conditions and safeguards of #303 can be met.

The case of *Osius* v. *City of St. Clair Shores, supra,* is inapposite to the matter at hand. The zoning board of appeals in that case was not provided with *any* standards whatsoever regarding special exception permits. There, the court said:

"The ordinance presented is fatally defective. The zoning board of appeals is simply given authority to permit, and obviously to refuse to permit, the erection of gasoline stations after public hearings. But what standards prescribe the grant or rejection of the permission? *We find none.*" *Osius, supra,* p 700. (Emphasis supplied.)

In *Florka* v. *City of Detroit* (1963), 369 Mich 568, it was stated, in regard to the *Osius* decision, that it was based upon the failure to prescribe any standards whatever in the granting of legislative authority with reference to matters of the character here involved, in accordance with which an administrative officer or commission should ascertain and determine facts deemed vital to the exercise of delegated power.

Our reading of #303 indicates that the intent of the ordinance provision was that the zoning board of appeals should ascertain the existence or nonexistence of particular facts justifying the action taken, with reference to the approval of the use specified in the application.

Plaintiffs' amended complaint, filed November 26, 1969, attacked ordinance No. 339, contending that the amended ordinance was inapplicable to the instant request for special exception permit, but that

in the alternative it amounted to an unconstitutional delegation of legislative powers. (Defendant city council amended this ordinance on December 19, 1967.) In *Willingham* v. *City of Dearborn* (1960), 359 Mich 7, the trial judge's refusal to permit defendant city to amend its answer to include a recently-passed ordinance was upheld by a four-to-three decison. Thereafter, our Court has cited the *Willingham* case once to uphold a trial judge's decision refusing to allow a township to amend its pleadings after the trial had begun so as to reflect the recent passage of an ordinance. *Algoma Township* v. *Van Lieu* (1969), 16 Mich App 640, 642.

In *Franchise Realty Interstate Corporation* v. *City of Detroit* (1962), 368 Mich 276, a unanimous Court upheld the trial judge's exercise of discretion to grant the parties leave to amend their pleadings to include a recent zoning ordinance. In the instant action, leave was granted by the circuit court for the amendments to the pleadings to include zoning ordinance No. 339. The declaratory judgment included said ordinance.

The trial judge ruled that *Willingham* was controlling, not *Franchise Realty*. The language of *Franchise* leads us to conclude that, once ordinance No. 339 was properly pled, it became controlling (pp 279, 280):

"In this case, the circuit court was duly faced with a 'law', brand-new yet valid for its purposes, which between the filing of plaintiff's petition and hearing thereof came to enactment prohibitory of that which plaintiff sought to compel. Since the grant or denial of a petition for mandamus is, as in equity [citations omitted], determinable according to germane conditions existing at the time of hearing and determination rather than at the time of institution of proceedings and it must be held that upon author-

ity of the *Dawley* case [247 Mich 394] that the law in effect at the time of the hearing and determination controlled plaintiff's petition and called for denial of the writ sought."

Plaintiff's original hearing was before the zoning board of appeals on June 15, 1967, when ordinance No. 303 was in effect. Defendant city council passed ordinance No. 339 on December 19, 1967. Plaintiff's complaint, seeking declaratory judgment and certain equitable relief, was filed June 11, 1968.

It appears to this Court that plaintiffs' attack is essentially upon the present law, and since plaintiffs apparently seek the issuance of a special exception permit still, in 1971, ordinance No. 339 should be considered controlling.

The Court notes parenthetically that defendant has contended and that plaintiffs seem to admit that ordinance No. 339 was proposed so as to give the zoning board of appeals of the defendant a broad grant of administrative discretion, as has been held valid in *Florka* v. *City of Detroit, supra.* Although the specific standards of the previous ordinance No. 303, were actually more easily ascertainable than those of the later ordinance, #339, the language of #339 is couched in much the same terminology as the ordinance upheld in *Florka.* Inasmuch as *Florka* is the present law in this state, we are compelled to uphold this delegation of authority to the zoning board of appeals. However, this does not mean that the circuit court can decide this case on the factual record already made. This, for the reason that Mr. Justice BLACK's carefully worded opinion that "the law in effect at the time of hearing and determination controlled plaintiff's petition", *Franchise, supra,* p 280, does not enable the trial judge to apply that law to facts adduced in a prior

hearing where neither party has been able to introduce testimony or other evidence bearing upon the new and different test which the amended ordinance contains.

Section 7.4(2) of ordinance No. 303 by its terms affirmatively requires a special exemption permit for a gasoline filling station. A gasoline station is placed in a special and specific category by the terms of the ordinance. Proofs bearing upon the grant of a special exemption, and those bearing upon the issue of confiscation then must be addressed to the narrow issue of a gasoline filling station *per se*. Upon proper proof under ordinance No. 303, "exceptions to the general regulations *are permitted* to the extent that such special exceptions are specifically authorized". This is permissive.

The key words, of course, are "exceptions are permitted". The ordinance as amended is exactly the converse. Under its terms "special uses" require a different measure of proof. By its terms "The Board shall *not* grant any such request unless * * * ", and then follow four tests alphabetically designated "a" through "d".

When the ordinance was so amended, the governing test for authorizing a special use was completely changed. The situation here is not as it was in *Franchise, supra,* where the issue was the exercise of judicial discretion in granting or denying leave to amend a pleading *"tarde"*. Here, a new substantive test has been created. Consequently, the board of zoning appeals must grant a full evidentiary hearing in light of the new test.

In their amended complaint, plaintiffs also sought the circuit court to declare the record of the zoning board of appeals to be infirm. However, at trial, plaintiffs' attorney entered no proofs to show the alleged inadequacy of the record. This Court has

stated previously that all zoning cases are heard *de novo* on appeal here. *Muffeny* v. *City of Southfield* (1967), 6 Mich App 19, 24; *Raabe* v. *City of Walker* (1968), 10 Mich App 383, 389. The record in the zoning board of appeals consisted of minutes which showed that William Elliott represented the Mobil Oil Corporation at the hearing, and that Joseph Bryant, of Bryant-Nicks Company, also was present. The letters of the city engineer, the city manager, and the city chief of police were copied in full into the minutes. The crux of such letters is that the proposed gasoline service station of plaintiffs would create additional traffic problems and hazards out of proportion to the other uses of property in the district. Specific foreseeable problems were stated, pictures and accident-spot maps were shown. Mr. Elliott read reports on traffic studies related to gasoline service stations from the Detroit and Buffalo (N. Y.) police departments. Discussion was had on the matter and the request for the special exception permit was then denied by the board.

This Court does not find that the plaintiffs have any basis for their contention that the decision of the board of appeals was not supported by material and substantial evidence on the whole record. See Const 1963, art 6, § 28, and *Lorland Civic Association* v. *DiMatteo* (1968), 10 Mich App 129, 135. Specifics were stated at the hearing and were borne out by the record.[3] The judge's action in overturning the finding of the board was not warranted.

[3] The minutes concluded: "Therefore, be it resolved that the board of zoning appeals do hereby determine that the proposed use of a gasoline filling station at the northwest corner of Main and 14 Mile Road would worsen traffic conditions at this intersection, would substantially increase traffic problems and congestion on Main and 14 Mile Road, would be out of harmony and would disrupt the functioning of the concentrated business district in the central Clawson area * * * ."

The trial court also concluded in its opinion that the record disclosed that the plaintiff had been denied a fair hearing, an apparent due-process violation. This Court notes that defendant never had presented this issue, nor does the record bear out such assertion, and we decline to review this issue.

Plaintiffs further contend that the action of the zoning board of appeals was unreasonably discriminatory and confiscatory as to the rights of these plaintiffs. Joseph H. Bryant, representative of plaintiff Bryant-Nicks Corporation, testified that the downtown area of the City of Clawson was deteriorating, primarily because of the large number of good outlying shopping centers. He described the business in the area and noted that there was a Tulsa service station one block away, a Mobil Oil station a couple of blocks away, and a Standard station in the vicinity. Primarily, Mr. Bryant expressed concern over the difference between the value of the property as presently zoned, and its possible value if a gasoline service station were permitted. He bought the property in bits and pieces and had to pay well over the actual value of the land in order to purchase the last few pieces, paying a total of about $80,000. He testified that the present value of the land, with no service station permitted, would be about $65,000 or $75,000, which is comparable to similar land values in the district. However, if the special exception permit were granted, the value of the land would be $135,000 or $140,000. Plaintiffs' additional witness, a licensed real estate broker, had viewed the area including a Pure Oil station not far away. He testified that, in his opinion, plaintiffs' property was presently worth no more than $50,000 and that, if

a gasoline station were permitted, the value of the land would be $125,000 to $150,000.

In support of their argument, plaintiffs contend that § 7.2 of ordinance No. 303 (which section has not been amended by ordinance No. 339, § 7.2) clearly indicates the discriminatory attitude which they have faced from the outset. In the B-A districts are allowed, among other uses, offstreet parking lots, retail stores, theaters, bowling alleys, commercial garages, repair shops, eating and drinking establishments, auto washes, drive-in banks, and drive-in restaurants. A Burger King drive-in restaurant, recently built, exists in downtown Clawson, apparently in the same B-A zoned district. Yet, a gasoline service station must be granted a special exception permit.

Plaintiffs contend that such discriminatory zoning action, combined with the loss in possible value of approximately one to three times the present value, amounts to a confiscatory taking of property without due process of law.

The zoning ordinances are presumed to be valid and to authorize certain uses on lines really within the appeal board's power, as in *BraeBurn, Inc.* v. *City of Bloomfield Hills* (1957), 350 Mich 425, 431, 432. The difference in values contended here to be confiscatory does not even approach the proportionate differences ordinarily required. See *BraeBurn, supra,* 433, 434, and *Smith* v. *Village of Wood Creek Farms* (1963), 371 Mich 127, 133. As noted in *Smith, supra,* such differences in values are only one consideration in the determination of whether the board of appeals' action was unreasonably discriminatory against plaintiffs' rights in their property.

The minutes of the hearing before the zoning board of appeals discloses that the primary consideration was the traffic problems and traffic-related hazards which would be created by the existence of a gasoline service station on the property in question. The procedure employed appears to reflect a valid government interest, based upon police power. We agree that such discrimination, if any, is quite reasonable and legal, and that evidence of disparity in land values presented on behalf of the plaintiffs, standing alone, is not enough proof upon which to base the findings of confiscatory taking in this case.

Plaintiffs contend, on appeal, that the effect of defendant's zoning ordinance is to exclude all gasoline service stations from the City of Clawson, thus being tantamount to an unreasonable and arbitrary discrimination against the use of property, and that such ordinances should be voided by the due process clause of the 14th Amendment. Nowhere in the pleadings was it contended that the defendant city excludes all gasoline stations. Nowhere in the trial testimony was proof offered to support such an allegation. During closing argument, plaintiffs' counsel mentioned that no service stations are permitted in the City of Clawson, except through the special exception permit procedure.

The trial court apparently agreed that this meant that a reasonable use of private property (*viz.*, gasoline service stations) was denied throughout the city. The trial court noted that gasoline service stations create no greater traffic problems than any other business establishments which attract customers driving automobiles, that the actual traffic conditions in the City of Clawson make its regulation unreasonable, and that gasoline stations are discriminated against, primarily for esthetic reasons. He

states that defendant's ordinances prohibit gasoline service stations from the city.

The Court finds that this is not a case where a city is adopting an ordinance with only one zoning district, as in *Gundersen* v. *Village of Bingham Farms* (1964), 372 Mich 352, nor is it a case where a legitimate business use of property has been flatly excluded on the face of the ordinance, as in *Gust* v. *Township of Canton* (1955), 342 Mich 436, and *Bzovi* v. *City of Livonia* (1957), 350 Mich 489. Rather, a special showing is required as a condition precedent to the granting of a permit, as in *Marathon Oil Company* v. *Plymouth Township* (1970), 25 Mich App 399. This would appear to be permissible, again, so long as standards were provided to the zoning board of appeals.

The judgment of the trial court is reversed and the cause is remanded to the board of zoning appeals for a full evidentiary hearing in light of the new test. No costs, a public question being involved.

BRONSON, J., concurred.

O'HARA, J. (*concurring*). I concur in the result reached by Judge MCGREGOR on the specific ground that ordinance No. 339, pleaded by amendment to the complaint, created a new substantive test for "special uses". No proceedings under *that* ordinance have been had before the zoning appeal board. Hence, there was no proper record for the circuit court to review judicially. I too would remand to the zoning appeal board for hearing. I express no view as to the other issues discussed since I regard the necessity of remand for the reason above specified as controlling.

BRUNO *v.* DETROIT INSTITUTE OF TECHNOLOGY

1. CONTRACTS—EMPLOYMENT CONTRACTS—RATE OF COMPENSATION—PARTIES' INTENT.

   The rate of compensation or a definite method for ascertaining the rate of compensation must, as a general rule, be included as a part of an employment contract; however in this state, employment contracts are interpreted the same as other contracts, the main object being to effect the intention of the parties.

2. WORDS AND PHRASES—REVIEW.

   "Review" means to examine again or to go over or examine critically or deliberately.

3. CONTRACTS—EMPLOYMENT CONTRACTS—RATE OF COMPENSATION—REVIEWABLE COMPENSATION.

   A contract of employment appointing a teacher to a position for a two-year period, the salary for the first year being fixed at $7,500 and the salary for the second "to be reviewed", did not fail, as a matter of law, to be a contract, even though it was contended that the rate of compensation was not specified for the second year, where for several years plaintiff teacher had been offered and had accepted yearly contracts with raises each year, because the word "reviewed" as interpreted in reference to the conduct of the parties meant that the rate of compensation was at least $7,500 in both years with the possibility of a raise in the second year.

Appeal from Wayne, Edward S. Piggins, J. Submitted Division 1 June 17, 1971, at Detroit. (Docket No. 9350.) Decided September 27, 1971. Leave to appeal denied, 386 Mich 782.

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur 2d, Master and Servant § 73.

[2, 3] 53 Am Jur 2d, Master and Servant § 71 *et seq.*

Complaint by Vincent J. Bruno against the Detroit Institute of Technology for breach of employment contract. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

Zwerdling, Miller, Klimist & Maurer, for plaintiff.

Cross, Wrock, Miller & Vieson (by *W. Robert Chandler*), for defendant.

Before: T. M. BURNS, P. J., and HOLBROOK and MCGREGOR, JJ.

T. M. BURNS, P. J. Plaintiff, an associate professor of economics, brought suit alleging that defendant had breached an employment contract for the academic year 1966–1967. The trial court found for the defendant, and plaintiff brings this appeal as of right.

Plaintiff was first employed by the defendant for the academic year 1959–1960 as an assistant professor of economics and finance at a salary of $5,800. Prior to the academic year 1965–1966, defendant had offered plaintiff yearly contracts with an increase in salary.

The contract of April 19, 1965, offered a two-year appointment with the salary increased to $7,500, the salary for the second year to be reviewed at a later date.

On April 15, 1966, defendant sent plaintiff a letter of appointment offering the salary the same as the previous year, $7,500. There was a series of verbal and written communications discussing the salary which culminated in the defendant's letter of August 29, 1966, which dismissed plaintiff because of an alleged lack of contract.

Plaintiff then brought suit alleging breach of contract. The trial court found, as a matter of law, that there was no contract because plaintiff and defendant had never reached agreement on the amount of salary for the year 1966–1967 and, therefore, no breach was possible.

The contract in question provided:

"Mr. Vincent J. Bruno
College of Business Administration
The Detroit Institute of Technology
Detroit, Michigan
"Dear Mr. Bruno:

"I am pleased to inform you that upon the recommendation of Mr. William M. Kessel, Acting Dean, College of Business Administration, you have been appointed Associate Professor of Economics and Chairman, Economics Department in the College of Business Administration, for the academic years 1965–66 and 1966–67. Salary for the academic year 1965–66 will be $7,500. Salary for the academic year 1966–67 will be reviewed at a later date.

"Validation of this offer and the terms as stated in the attached memorandum to members of the General Faculty Council of the Detroit Institute of Technology is contingent upon receipt of your signed acceptance by this office not later than April 30, 1965. The copy is for your records.

"Sincerely yours,
"Dewey F. Barish."

(*Signed*)
Vincent J. Bruno
April 28, 1965.

It is basic, of course, that compensation is an essential ingredient of an employment contract, and the compensation must be ascertainable if such employment contract is to be enforced. As a general rule, the rate of compensation or a definite

method for ascertaining it must be included as part of the contract.[1] In Michigan, however, employment contracts are interpreted the same as other contracts:

"Contracts of employment are subject to the same rules of construction as other contracts. Accordingly, the main object to be arrived at in construing an employment contract is the intention of the parties, and effect is to be given to that intention whenever it can be done without doing violence to the obvious meaning of the language employed by the parties in making the agreement. Where the terms of an employment contract are in doubt, it is proper to look, in its interpretation, at the conduct of the parties themselves with reference thereto and the manner in which they have treated the contract, and an employment contract will be construed most strongly against the party preparing it. The fact that the application of the plain terms of the contract may appear to inflict hardship upon the employer does not warrant the remaking of the contract by the court."[2]

This Court, in the case of *Stark* v. *Budwarker, Inc.* (1970), 25 Mich App 305, spoke at length on the interpretation of contracts and at p 313 stated:

"The cardinal rule of construction is that we seek to determine and to give effect to the intention of the parties."

Up to the time of April 19, 1965, the defendant had offered, and the plaintiff had accepted, a yearly contract for a specified sum. Each year there had been an increase in that sum.

In the April 19, 1965, contract the defendant gave a definite offer of employment for a two-year pe-

[1] See 53 Am Jur 2d, Master and Servant, § 16, p 94.
[2] 10 Michigan Law & Practice, Employment, § 4, p 495.

riod; the salary being definite for the first year, and the salary for the second year to "be reviewed at a later date".

Some definitions of the word "review" are: (1) to examine again; and (2) to go over or examine critically or deliberately. Webster's Seventh New Collegiate Dictionary (G. & C. Merriman Company, 1969), p 736. It is our opinion, given defendant's practice of giving the plaintiff annual raises, that the contract provided for at least a $7,500 salary for both years with the possibility of plaintiff receiving a raise in the second year. This would seem to be the common understanding of the word "reviewed" in relation to the parties' prior practice regarding plaintiff's salary.

Since our interpretation is that the writing dated April 19, 1965, did bind the parties, the trial court's decision that the parties did not have a contract is reversed. It is also the decision of this Court that the defendant did breach the contract and is liable to the plaintiff for at least the one year's salary of $7,500.

Plaintiff has, however, requested damages in excess of the one year's salary based upon the tenure policy presently in effect at the Institute. Since this issue was not briefed on appeal, we will remand to the trial court for determination of any damages in excess of the one year's salary.

Reversed and remanded.

All concurred.

LOWE *v.* HOTEL & RESTAURANT EMPLOYEES UNION, LOCAL 705

OPINION OF THE COURT

1. LABOR RELATIONS—UNIONS—AGGRIEVED UNION MEMBER—EXHAUSTION OF REMEDIES.

   An aggrieved union member must, as a general rule, exhaust his intra-union remedies before seeking judicial redress.

2. LABOR RELATIONS—UNIONS—AGGRIEVED UNION MEMBER—EXHAUSTION OF REMEDIES.

   An aggrieved union member need not exhaust his intra-union remedies prior to seeking judicial redress where resort to those remedies would be ineffective, if not futile, or where the member alleged facts from which it may be reasonably inferred that the union has breached its duty of fair representation.

3. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION.

   The fiduciary duty of a union to fairly represent its members in the administration and enforcement of collective bargaining agreements is correlative to the right of the union to represent all the employees in a bargaining unit as their exclusive agent, despite opposition from a minority.

4. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION—GOOD-FAITH REPRESENTATION.

   Part of a union's duty of fair representation is to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 48 Am Jur 2d, Labor and Labor Relations § 334.
[3] 48 Am Jur 2d, Labor and Labor Relations § 276.
[4–11] 48 Am Jur 2d, Labor and Labor Relations § 273 *et seq.*
[12] 5 Am Jur 2d, Appeal and Review § 702 *et seq.*

5. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION.

The doctrine of fair representation does not confer on a union member the absolute right to press his grievance all the way through the last stage of the grievance procedure as provided in the collective bargaining agreement; the union has the power and right to abandon processing of a grievance which it determines in good faith to be meritless and to settle disputes between the employer and the union member short of arbitration.

6. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION—REFUSAL TO ARBITRATE.

Refusal of a union to take an employee member's grievance to arbitration does not *per se* amount to a breach of the union's duty of fair representation.

7. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION—BREACH OF DUTY—BURDEN OF PROOF.

A union member who claims that his union breached its duty to fairly represent him in his grievance with his employer must show that the union's motivation was improper or hostile; the member must establish that the union's conduct toward him was arbitrary, discriminatory, or in bad faith.

8. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION—BREACH OF DUTY.

To establish a union's breach of its duty of fair representation in processing a grievance, the complaining union member must demonstrate more than that his grievance, viewed with hindsight, had merit; lack of success in the redress of a grievance cannot be equated with bad faith representation.

9. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION—BREACH OF DUTY.

The test to determine whether a union has breached its duty of fair representation is not success or failure, nor whether the grievance had merit, but rather whether the union dealt with its member's claim in a bad faith or arbitrary manner.

10. LABOR RELATIONS — UNIONS — FAIR REPRESENTATION DUTY — BREACH OF DUTY—EVIDENCE.

The union member's evidence, considered in the light most favorable to the member, did not establish a breach of the member's union's duty of fair representation when processing the member's grievance with his employer where the record shows that the member had been involved in an altercation with his super-

visor and was discharged, that the member had previously received two warning letters from the supervisor, a thorough investigation was made by the union after which the member was given numerous opportunities to present his version of the incident, and several union hearings and rehearings were held before the union decided not to press the grievance to arbitration, because there was no evidence showing that the decision of the union was made with hostility or dishonesty.

DISSENT BY T. M. BURNS, J.

11. LABOR RELATIONS—UNIONS—FAIR REPRESENTATION—BREACH OF DUTY—QUESTION OF FACT.

A question of fact was created as to whether defendant union breached its duty to fairly represent the plaintiff union member in his grievance with his employer where, even though the record shows that the plaintiff was discharged by his employer because of an altercation with the plaintiff's supervisor and that the plaintiff had previously received two disciplinary letters, the record also shows that the plaintiff testified that he had not been in a fight with the supervisor, that he had brought the disciplinary letters to the attention of the union but that nothing had been done even though no cause existed for the letters' issuance, that at the various meetings with the union concerning his dismissal and grievance, he was given no consideration, and that he had been told by his employer that the employer and the union had decided together to discharge him; a jury verdict in plaintiff's favor should not be reversed because there was sufficient evidence to support such a verdict.

12. APPEAL AND ERROR—JURY VERDICT—STANDARD OF REVIEW.

An appellate court will not set aside a jury verdict unless the evidence preponderates in the opposite direction.

Appeal from Wayne, Neal Fitzgerald, J. Submitted Division 1 May 4, 1971, at Detroit. (Docket No. 9513.) Decided September 27, 1971. Leave to appeal granted, 386 Mich 777.

Complaint by Richard Lowe against the Young Women's Christian Association for wrongful discharge, against the Hotel & Restaurant Employees Union, Local 705, and Myra Wolfgang for failure

to process his grievance in good faith, and against both the union and the YWCA for conspiring against him to deprive him of his employment. Judgment for plaintiff. Defendants union and Myra Wolfgang appeal. Reversed and remanded.

Eddie D. Smith, for plaintiff.

Goodman, Eden, Robb, Millender, Goodman & Bedrosian, for defendants Hotel & Restaurant Employees Union, Local 705, and Myra Wolfgang.

Before: V. J. BRENNAN, P. J., and J. H. GILLIS and T. M. BURNS, JJ.

J. H. GILLIS, J. Plaintiff Richard Lowe was a member of defendant Local 705, Hotel and Restaurant Employees Union, at the time he was employed as a maintenance man by the Young Women's Christian Association (hereafter referred to as YWCA). The terms of employment were controlled by the collective bargaining agreement between the employer and Local 705, among others.

Plaintiff was discharged in 1963 by the YWCA after an alleged altercation between him and a female supervisor. It was the personnel policy of the employer to dismiss employees who were involved in employment trouble after previously having received two disciplinary letters. Plaintiff received written disciplinary warnings on two separate occasions, in 1958 and 1962.

After his discharge, plaintiff filed a grievance with his union representative alleging that the employer had breached the collective bargaining agreement by discharging him. A union representative investigated the facts surrounding plaintiff's griev-

ance. The results of the investigation were reported to the union's Grievance Committee, and the committee concluded that plaintiff's discharge was for good cause. Plaintiff appealed to the union's Joint Executive Board, which affirmed the Grievance Committee's finding. Following denial of his grievance, plaintiff wrote an informal letter[1] to the general president of the international union. The response plaintiff received urged him to take his grievance back to the local union secretary-treasurer, Mrs. Myra Wolfgang, also a defendant herein.

Plaintiff then turned to the courts for relief. He commenced an action against the YWCA[2], the union, and Mrs. Wolfgang, alleging that he was wrongfully discharged, that the employer and union conspired against him to deprive him of his employment, and that the union failed to process his grievance in good faith.

At the close of plaintiff's proofs, the trial court granted a partial directed verdict in defendants' favor, GCR 1963, 515.1. The court ruled that plaintiff failed to establish a *prima facie* case of conspiracy. The issue of good faith representation went to the jury, and they returned an award of $7990 for plaintiff.

Defendants raise two issues on appeal. They first contend that the trial court erred in denying their motion for summary judgment, GCR 1963, 117.2(1). They argue that plaintiff failed to exhaust

[1] The union's constitution provides that appeals from local decisions can be taken to the general president, and in turn the president's decision may be appealed to the general executive board; this decision may be appealed to the convention of the international union. Constitution of the Hotel and Restaurant Employees and Bartenders International Union, of 1961, article 20, § 11. Plaintiff did not formally appeal the decision of the Joint Execuitve Board to the international union's general president.

[2] Plaintiff settled with the Young Women's Christian Association before the trial commenced.

his intra-union remedies before seeking judicial redress. The defense buttresses its argument with the settled doctrine that, generally, aggrieved union members must exhaust their union remedies before seeking judicial redress. This is likewise a substantial Federal and state law of collective bargaining. *Republic Steel Corporation* v. *Maddox* (1965), 379 US 650 (85 S Ct 614, 13 L Ed 2d 580); *Seay* v. *McDonnell Douglas Corporation* (CA9, 1970), 427 F2d 996; *Anderson* v. *Ford Motor Company* (ED Mich, 1970), 319 F Supp 134; *Mayo* v. *Great Lakes Greyhound Lines* (1952), 333 Mich 205; *Knox* v. *Local 900, UAW-CIO* (1960), 361 Mich 257.

However, narrow exceptions, when satisfied, have removed the complainant's cause of action from beneath the tutelage of the exhaustion doctrine. *Howland* v. *Local Union 306, UAW-CIO* (1948), 323 Mich 305; *Vaca* v. *Sipes* (1967), 386 US 171 (87 S Ct 903, 17 L Ed 2d 842).

This Court's holding in *Harrison* v. *Arrow Metal Products Corporation* (1969), 20 Mich App 590, *leave to appeal denied* (1970), 383 Mich 816, is dispositive. There, the majority held that the aggrieved employee

"must allege facts from which it may be reasonably inferred either that he duly exhausted his union remedies, or that resort to such remedies would be ineffective, if not futile, or that the union breached its duty of fair representation." *Harrison* v. *Arrow Metal Products Corporation, supra,* p 603.

Plaintiff, in his amended complaint, alleged that the employer and union conspired against him, and that the union breached its duty of fair representation. Despite the questionable adequacy of plaintiff's

complaint,[3] the trial court, once satisfied that plaintiff had stated a cause of action, did not err in accepting jurisdiction over this matter. *Vaca* v. *Sipes, supra,* at 186 (87 S Ct at 914, 17 L Ed 2d at 855); see also *Harrison* v. *Arrow Metal Products Corporation, supra,* 617–628 (J. H. GILLIS, J., *concurring in part, dissenting in part*).

The heart of plaintiff's suit is rooted in his allegation that defendants breached their duty of fair

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[3] The trial court, prior to trial, granted defendants' motion for summary judgment because plaintiff's complaint failed to state a cause of action, GCR 1963, 117.2(1). Plaintiff's original complaint was based solely upon conclusionary terms. Plaintiff amended his complaint to include the conspiracy count, and the trial court granted his motion for reinstatement solely upon the addition of this second count. After the close of plaintiff's proofs, the trial court granted defendants' motion for directed verdict on the conspiracy count, GCR 1963, 515.1. The court permitted plaintiff's case to go to the jury on the alleged breach of the duty of fair representation, *i.e.,* the count in plaintiff's original complaint which failed to state a cause of action. The court, in doing so, commented upon the scant amount of evidence:

"*The Court:* I don't think there is any question of conspiracy. But there may be a question of whether the union acted in good faith in what they did. I think that is a question for the jury. * * * I don't know what testimony there is. There isn't much testimony to go on. I mean, what is the jury going to consider when they get down to good faith? What is the bad faith, outside of the fact that the man lost his job?

"*Mr. Smith* [*counsel for plaintiff*]: The bad faith is, here is a man who has been employed for 14 years. He has been here a shop steward.

"*The Court:* But they have no obligation to take his word.

"*Mr. Smith:* They don't have the obligation—

"*The Court:* Isn't the whole thing going to come down to whose word the jury takes [when] they examine this thing?

"*Mr. Smith:* Yes.

"*The Court:* Unless you can prove that he had malice toward this man, or something of that sort. And there is no testimony of malice."

Plaintiff's complaint alleged insufficient facts to support its allegation of breach of the duty of fair representation. GCR 1963, 111.9; *Knox* v. *Local 900, UAW-CIO* (1960), 361 Mich 257, 259 260; *McCann* v. *Local 12075, UMW* (1967), 6 Mich App 720, 725; *Mandel* v. *Highway and Local Motor Freight Drivers Union* (SD NY, 1964), 246 F Supp 805; *Local 13, International Longshoremen's & Warehousemen's Union* v. *Pacific Maritime Association* (CD Calif, 1967), 278 F Supp 755, 766.

However, since the trial court let this case go to the jury, on the substantive issue, we feel constrained to now review that issue.

representation. Plaintiff argues that he was discharged for insufficient cause, and furthermore that the union's investigation should have disclosed this. He concludes that the union failed to represent him in the utmost good faith when it refused to take his grievance to arbitration.

The fiduciary duty of fair representation in the administration and enforcement of collective bargaining agreements has been imposed upon unions by federal law.[4] *Cortez* v. *Ford Motor Company* (1957), 349 Mich 108; *Brady* v. *Trans World Airlines, Inc.* (CA 3, 1968), 401 F2d 87, 94, *cert den* 393 US 1048 (89 S Ct 681, 21 L Ed 2d 691); *Sciaraffa* v. *Oxford Paper Company* (D Me, 1970), 310 F Supp 891, 901. This obligation is correlative to the right of a union to represent all the employees in a bargaining unit as their exclusive agent, despite opposition from a minority. *Bazarte* v. *United Transportation Union* (CA 3, 1970), 429 F2d 868, 871. Similarly, the employee has made personal concessions to achieve collective solidarity.

"The employee has gained bargaining strength through representation by his union but has surrendered his right to make 'the law of the job,' and his interests are subordinated to those of the bargaining unit as a whole." *Harris* v. *Chemical Leaman Tank Lines, Inc.*, (CA 5, 1971), 437 F2d 167, 171.

Part of a union's duty of fair representation is to "serve the interests of all members without hos-

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[4] See: *Vaca* v. *Sipes* (1967), 386 US 171 (87 S Ct 903, 17 L Ed 2d 842); *Humphrey* v. *Moore* (1964), 375 US 335 (84 S Ct 363, 11 L Ed 2d 370); *Ford Motor Company* v. *Huffman* (1952), 345 US 330 (73 S Ct 681, 97 L Ed 1048). Also see generally, Lewis, "Fair Representation in Grievance Administration: *Vaca* v. *Sipes*", 1967 Supreme Court Rev 81; Cox, "Rights Under a Labor Agreement," 69 Harv L Rev 601 (1956).

tility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct", *Vaca* v. *Sipes, supra,* at 177 (87 S Ct at 910, 17 L Ed 2d at 850). In exercising its discretion, the union has the power "to sift out frivolous grievances, to abandon processing of a grievance which it determines in good faith to be meritless, and to settle disputes with the employer short of arbitration". *Harris* v. *Chemical Leaman Tank Lines, Inc., supra,* at 171. In so doing,

"the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved." *Vaca* v. *Sipes, supra,* at 191 (87 S Ct at 917, 17 L Ed 2d at 858). Also see: *Encina* v. *Tony Lama Company* (WD Texas, 1970), 316 F Supp 239, 244.[5]

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[5] It has been a long-standing principle of labor law that union action which is taken honestly and with deliberation will not be disturbed. *Humphrey* v. *Moore, supra,* at 355 (84 S Ct at 375, 11 L Ed 2d at 385); *Ford Motor Company* v. *Huffman, supra,* at 338 (73 S Ct at 686, 97 L Ed at 1057). This principle is cited with approval in *Brown* v. *Truck Drivers and Helpers Local Union No 355 of Baltimore, Maryland* (D Md, 1968), 292 F Supp 125, 128: *Ferrara* v. *Pacific Intermountain Express Company* (ND Ill, 1969), 301 F Supp 1240, 1244; *Bartels* v. *New York Lithographers and Photo-Engravers' Union No. One-P* (SD NY, 1969), 306 F Supp 1266, 1271; *aff'd* 431 F 2d 1205.

Furthermore, it is the policy of the Labor Management Relations Act, § 203(d), 61 Stat 153, 29 USCA § 173(d), to encourage that the final adjustment of disputes be resolved by the method settled upon by the parties. Therefore, unless the union is shown to have acted in bad faith, differences of opinion will be resolved in the union's favor. Anno: "Union-Failure to Process Grievances", 34 ALR 3d 884; and *Slagley* v. *Illinois Central Railroad Company* (CA 7, 1968), 397 F2d 546.

However, this doctrine of fair representation does not confer on an employee the absolute right to press his grievance all the way through the last stage of the grievance procedure, as that procedure is made possible in the collective bargaining agreement. *Vaca* v. *Sipes, supra,* at 190–193 (87 S Ct at 916–918; 17 L Ed 2d at 857–859). Refusal of a union to take the grievance to arbitration does not *per se* amount to a breach of the duty of fair representation. *Lomax* v. *Armstrong Cork Company* (CA 5, 1970), 433 F2d 1277, 1281. To allow an individual employee to compel arbitration of his grievance, regardless of its merit, would weaken and undermine the collective bargaining process. *Vaca* v. *Sipes, supra,* at 191 (87 S Ct at 917, 17 L Ed 2d at 858). The employee, therefore, is subject to the union's discretionary power to settle or even to abandon a grievance, so long as the union does not violate its duty of fair representation. *Brandt* v. *United States Lines, Inc.* (SD NY, 1964), 246 F Supp 982.

Consequently, the aggrieved employee who challenges a union's actions is obligated to demonstrate more than that his grievance, viewed with hindsight, had merit. *Vaca* v. *Sipes, supra,* at 193–195 (87 S Ct at 918, 919; 17 L Ed 2d at 859, 860); *Gottschling* v. *Square D Company* (ED Wis, 1969), 301 F Supp 1349, 1353. Rather, a breach of the statutory duty of fair representation is established only when the union's conduct toward the complaining employee has been shown to be arbitrary, discriminatory, or in bad faith. *Vaca* v. *Sipes, supra,* at 190 (87 S Ct at 916, 17 L Ed 2d at 857). It is therefore essential to plaintiff's claim that there should have been proof of "arbitrary or bad faith conduct on the part of the union in processing his

grievance". *Vaca* v. *Sipes, supra,* at 193 (87 S Ct at 918, 17 L Ed 2d at 859). Plaintiff carries a strong burden of proof, and this necessitates a showing that the union's motivation was improper or hostile.[6] *Field* v. *Local 652, UAW AFL-CIO* (1967), 6 Mich App 140. Accord: *Hardcastle* v. *Western Greyhound Lines,* (CA 9, 1962), 303 F2d 182; *Turley* v. *Hall's Motor Transit Company* (MD Pa, 1969), 296 F Supp 1183, 1187; *St. Clair* v. *Local Union No. 515 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America* (CA 6, 1969), 422 F2d 128, 132; *Simberlund* v. *Long Island R. Co.* (CA 2, 1970), 421 F2d 1219, 1224.

Here, the proofs considered in the light most favorable to plaintiff showed that he had been involved in an altercation with a female supervisor and that on two previous occasions he had received

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6 Whether the aggrieved employee has been treated in a fair and impartial manner depends, to some extent, upon the actor's motivation. For a further discussion see Cox, "The Duty of Fair Representation," 2 *Villanova L Rev* 151 (1957). An inquiry into defendant's motivation has also been a prerequisite to a finding of breach of the duty of fair representation in numerous cases.

It is not enough that the defendant union has acted improperly, the union must have acted with malice or hostility. *DeArroyo* v. *Sindicato De Trabajadores Packinghouse, AFL-CIO* (CA 1, 1970), 425 F2d 281, 284. Accord: *Brady* v. *Trans World Airlines, Inc.* (CA 3, 1968), 401 F2d 87, 104, *cert den* 393 US 1048 (89 S Ct 680, 21 L Ed 2d 691); *Bruen* v. *Local 492, International Union of Electrical, Radio and Machine Workers, AFL-CIO* (D NJ, 1969) 313 F Supp 387, 392, *aff'd* 425 F2d 190; *Balowski* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO* (CA 6, 1967), 372 F2d 829, 834; *Meola* v. *Bethlehem Steel Company* (1967), 246 Md 226 (228 A2d 254); *Guille* v. *Mushroom Transportation Company* (1967), 425 Pa 607 (229 A2d 903). However, if a grievance which has merit is ignored or handled in a perfunctory manner, this may constitute a breach of the duty to fairly represent. *Vaca* v. *Sipes, supra,* at 194 (87 S Ct at 919, 17 L Ed 2d at 860). Consequently, negligence coupled with improper motivation could amount to a breach of duty. *St. Clair* v. *Local Union No. 515 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America* (CA 6, 1969), 422 F2d 128, 130; *Seay* v. *McDonnell Douglas Corporation* (CA 9, 1970), 427 F2d 996, 1000. Therefore, *Sims* v. *United Papermakers & Paperworkers, AFL-CIO* (1970), 26 Mich App 129, should be read cautiously.

warning letters. A thorough investigation was made by the union, after which, plaintiff was given numerous opportunities to present his version of the incident. Several union hearings and re-hearings were held before the union decided not to press the grievance to arbitration.

Aggrieved employees should not equate lack of success with bad faith representation. *Acuff* v. *United Papermakers and Paperworkers* (CA 5, 1968), 404 F2d 169, 171.

The test is not success or failure, or whether the grievance had merit, but rather whether the union breached its duty of fair representation by dealing with plaintiff's claim in a bad-faith or arbitrary manner. The evidence introduced at trial falls short of this test. *Bieski* v. *Eastern Automobile Forwarding Company* (CA 3, 1968), 396 F2d 32, 37; *Watson* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* (CA 5, 1968), 399 F2d 875, 880; *Fabian* v. *Baltimore and Ohio R. Co.* (ND Ohio, 1970), 320 F Supp 573.

Nowhere in the record are we able to find evidence that the union acted arbitrarily or in bad faith. Instead, this record rebuts plaintiff's contentions. The record shows the union pursued plaintiff's grievance vigorously, and that it was only after a complete investigation of the facts surrounding plaintiff's discharge that the union took the position not to further act on the grievance. The decision not to demand arbitration does not amount to an abuse of the union's discretion.[7] Plaintiff failed to

[7] Even if plaintiff's grievance is now seen to be meritorious, it is not the function of a court to make such an inquiry. Rather, it is incumbent upon plaintiff to plead and prove that the union treated his grievance in an arbitrary, discriminatory, or bad-faith manner, regardless of the grievance's merit. *Vaca* v. *Sipes, supra,* at 192, 193 (87 S Ct at 917, 918; 17 L Ed 2d at 859); *Simberlund* v. *Long Island Railroad Company* (CA 2, 1970), 421 F2d 1219, 1225; *Bowen*

advance evidence that this position was taken dishonestly and with hostility. From our review of the record, we conclude that the union acted "upon wholly relevant considerations, [and] not upon capricious or arbitrary factors". *Humphrey* v. *Moore,* (1963), 375 US 335, 350 (84 S Ct 363, 372; 11 L Ed 2d 370, 382).

Since there is insufficient proof to support the verdict, the judgment of the trial court is vacated and this case is remanded with direction to take proceedings not inconsistent herewith.

Reversed and remanded.

V. J. BRENNAN, J., concurred.

T. M. BURNS, J. (*dissenting*). The majority does not deny that the trial court properly accepted jurisdiction in this cause. Rather, they hold that plaintiff failed to establish that the union breached its duty of fair representation.

It is, of course, essential to plaintiff's cause that he prove that the union's conduct was arbitrary or in bad faith. *Vaca* v. *Sipes* (1967), 386 US 171, 193 (87 S Ct 903, 918; 17 L Ed 2d 842, 859). However, whether a union is guilty of such conduct depends upon the facts of each case.[1]

Plaintiff testified that he had not been in any fight but that he merely held the arm of the woman involved to keep from being struck himself. He also testified that he had brought the previous warn-

v. *Lockheed-Georgia Company* (ND Ga, 1970), 309 F Supp 1210, 1213; *Gottschling* v. *Square D Company* (ED Wis, 1969), 301 F Supp 1349, 1353; *Wheeler* v. *Brotherhood of Locomotive Firemen and Enginemen* (D SC, 1971), 324 F Supp 818, 828; *DeMarco* v. *Thatcher Furnace Company* (1968), 102 NJ Super 258 (245 A2d 773).

[1] *Trotter* v. *Amalgamated Association of Street Electric Railway* (CA 6, 1962), 309 F2d 584.

ing letters written by his employer to the attention of the union but that nothing had been done about them despite the fact that he had given the YWCA no cause to issue said letters. Plaintiff also testified that at his various meetings with the union he was given no consideration and further that he had been told by the Executive Director of the YWCA that the YWCA and the union had decided together to discharge him. Plaintiff's testimony, if true, would establish conduct on the part of the union amounting to a breach of the union's duty of fair representation.[2]

Admittedly, there was evidence on the other side. However, this framed the question of fact for the jury and they, after viewing the witnesses and hearing all of the evidence, found for the plaintiff; this Court does not set aside jury verdicts unless the evidence preponderates in the opposite direction. *Totok* v. *Elfstrom* (1966), 4 Mich App 705, 709.

It is my opinion that there is sufficient evidence, if believed by the jury, to support the verdict rendered. Accordingly, I would affirm the trial court.

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[2] Such conduct on the part of the union would be sufficient to establish a hostile discrimination against the plaintiff. This the union may not do. See *Trotter* v. *Amalgamated Association of Street Electric Railway, supra,* at 586.

PEOPLE *v.* NODINE

1. KIDNAPPING—INDICTMENT AND INFORMATION—SPECIFIC INTENT.

   The failure to include in the information in a prosecution for kidnapping an allegation of specific intent, *i.e.*, intent either to cause such person to be secretly confined or imprisoned against his will or held to service against his will, did not cause the information to be infirm where the information charged that the defendant had feloniously, wilfully, maliciously, and without lawful authority forcibly confined and imprisoned another against that person's will, because the kidnapping statute makes it a felony to wilfully, maliciously, and without lawful authority confine forcibly *or* secretly confine or imprison another; there was no necessity to charge specific intent, because the defendant was charged with having confined another forcibly or secretly (MCLA § 750.349).

2. INDICTMENT AND INFORMATION—VARIANCE FROM COMPLAINT—APPRISAL OF CHARGE.

   The defendant did not suffer any prejudice even though the language in the information returned to the circuit court differed from the language of the original complaint and warrant and from the language of the warrant and complaint as amended at the preliminary examination where all of these documents specifically and clearly apprised the defendant of what he was charged with.

3. CRIMINAL LAW—INSTRUCTIONS TO JURY—OBJECTION TO WORDING—INACCURATE TRANSCRIPT—ELECTRONIC EQUIPMENT.

   The trial judge is obligated to require the court reporter to read back to him and both counsel the wording of the instruction to the jury as the reporter has taken it down and as it would

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REFERENCES FOR POINTS IN HEADNOTES

[1] Am Jur 2d, Abduction and Kidnapping § 20 *et seq.*
[2] 41 Am Jur 2d, Indictments and Informations § 21 *et seq.*
[3, 4] 4 Am Jur 2d, Appeal and Error § 411 *et seq.*

be transcribed where a timely question has been raised as to the precise wording of the instruction as given and the court and counsel disagree as to that wording; if it appears that there is a disagreement between the reporter's notes and the instruction as the judge claimed it was given, even though back-up electronic equipment shows that the instruction given was proper, the instruction must be repeated to the jury either as agreed upon by the court and counsel or as the court determines that it should be given, thus preserving an unequivocal record for review.

4. CRIMINAL LAW—INSTRUCTIONS TO JURY—APPEAL AND ERROR—EQUIVOCAL RECORD.

An appellate court will not presume that the trial court did not erroneously instruct the jury as to the elements of the crime charged where the court reporter's notes of the instruction show a garbled, patently prejudicial and erroneous instruction, even though it is unlikely that the trial judge gave the instruction as the court reporter's notes show the instruction; under such circumstances, the case must be remanded for a new trial because of the possible prejudice to the defendant.

Appeal from Washtenaw, William F. Ager, Jr., J. Submitted Division 2 May 4, 1971, at Lansing. (Docket No. 9691.) Decided September 27, 1971.

James Nodine was convicted of kidnapping. Defendant appeals. Reversed and remanded for a new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *John B. Huss,* Assistant Prosecuting Attorney, for the people.

Shirley J. Burgoyne, for defendant on appeal.

Before: MCGREGOR, 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. Defendant appeals on leave granted from his conviction of kidnapping. MCLA § 750.349 (Stat Ann 1954 Rev § 28.581).

We recite the pertinent facts.

An Ann Arbor police officer, assigned to enforcement of the anti-narcotics laws, gained ingress to the apartment of a man named Smedley. The officer earlier made a "buy" of hashish and "seco" pills from Smedley and a man named Taylor. Somewhere around midnight he left the apartment and went to pick up another officer with whom he apparently worked as a team. The officers were undercover agents, not in uniform, and posing as narcotics purchasers. They returned together and were again admitted to the apartment. Upon entry they were confronted by Smedley holding a gun on them. They were both forcibly searched. A pistol and notebook were taken from one officer. The other, who had previously made the "buy", was forced to return to his own apartment and recover the purchased narcotics. During this interlude, his partner was held in the apartment at gun point. When he returned, and while both officers were being confined, the defendant arrived at the Smedley apartment. He is alleged by the police to have participated in their restraint by holding them at bay at gun point with the weapon previously taken from one of the officers.

The defendant denies this. While he admits he was present in the room where the officers were held, he claims never to have covered them with a gun. He says he did see the officer's gun on a table. He admits he questioned the officers about the notebook which was taken from one of them, and of questioning them about their identity as "narcs", *i.e.*, anti-narcotics agents. Later the officers were

released unharmed. Defendant was subsequently arrested. The complaint filed read:

"One James Nodine, did then and there wilfully, maliciously, and without lawful authority forcibly or secretly confine or imprison within this state a person, to-wit: Garry Lapides against his will, contrary to * * * ."

The defense made a motion to quash before the examining magistrate by reason of the fact that the complaint did not set forth a crime cognizable under the kidnapping statute. The complaint was amended to read:

"One James Nodine did then and there wilfully, maliciously and without lawful authority forcibly or secretly confine or imprison within the state a person, to-wit: Garry Lapides against his will, or did forcibly seize or confine or inveigle or kidnap such person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will or in any way held to service against his will contrary to * * * ."

The information filed against defendant used the language of the original complaint, to-wit:

"did then and there feloniously, wilfully, maliciously, and without lawful authority forcibly confine and imprison one Garry Lapides within this state against his will."

Defendant moved the circuit court to quash the information. The motion was denied. The motion was renewed during trial and in the motion for a new trial. In each instance the trial court held that the information was sufficient and was within the scope of the magistrate's return. The claimed infirmity is the failure to include an allegation of

specific intent, *i.e.*, "intent either to cause such person to be secretly confined * * * or imprisoned against his will * * * or * * * held to service against his will".

We think able defense counsel misreads the statute. The defendant was charged in the language of the statute which alternatively makes it a felony to wilfully, maliciously, and without lawful authority confine forcibly *or* secretly confine or imprison another. Defendant was charged with having confined another forcibly or secretly. The proofs might have substantiated either or both. The proofs were submitted to the jury. They were abundantly sufficient to create a jury issue. The jury convicted on those proofs. We find no reversible error. There was no necessity of charging specific intent under the section of the statute upon which the state proceeded.

Defendant's claims of error that the original complaint and warrant differed from the return to the circuit court, and from the language of the amended complaint and warrant, does not move us to reverse. All these documents specifically and clearly apprised the defendant of what he was charged with. No possible prejudice to him could have resulted.

We have examined the other claimed errors and we do not believe they merit decisional discussion. We note, however, that defense counsel most carefully raised every conceivable issue and briefed each issue ably and extensively.

We are concerned about one issue and it does merit full decisional discussion. After the charge to the jury was completed, in prompt compliance with the court rule, defense counsel objected to the instruction concerning the extent of proof necessary to establish the aiding and abetting in the offense of another so as to render the accused guilty as a principal.

The court reporter's transcript, it must be candidly admitted, gives a garbled version of the controlling law. It is as follows:

"The court instructs you that all who are present either actually or at the place of the crime, are either actually aiding, abetting, assisting, or advising its commission, or who are present for such purpose are now regarded as principals."

If the foregoing instructions were given in the above quoted language, it is so clearly erroneous and patently prejudicial as to require no discussion, much less citation of authority. Under it, literally read, any passerby at the scene of a crime would become a principal.

The learned trial judge addressed himself to this issue in his opinion on the motion for a new trial. We quote:

"In regard to paragraph 10 of defendant's motion, the court would state very emphatically that the transcript filed by the former court reporter is in error. The Washtenaw County Circuit Court has for many years had an Edison Voicewriter machine in the court at all times, so that all testimony could be recorded verbatim on the record of the Edison Voicewriter. Counsel for the defendant well knows that the court read the instructions regarding aiding and abetting directly from Gillespie starting at page 68 and at the bottom of page 69 and top of page 70. The court first read the statute as set forth in Gillespie at the top of page 68 in which it is stated, 'Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids or abets in its commission may hereafter be prosecuted, indicted, tried, and on conviction shall be punished as if he had directly committed such offense'. The court then went on to *read* the statement in Gil-

lespie starting with the last three words in the text on page 69 up to and including the first four lines of the text on page 70. This was read as follows: 'All who are present, either actually or constructively, at the place of the crime, and are either aiding, abetting, assisting or advising its commission, or who are present for such purpose, are now regarded as principals'. The transcript does not set forth what the court told the jury, and the court has the recording in its possession so that this can be played for the reviewing court so that they can hear what the court actually said to the jury. The court is of the opinion that this states the law of the State of Michigan and that the court committed no error in this instruction."

This is a very sensitive question. The ramifications of our answer could reverberate through every courtroom in our state which utilizes back-up electronic equipment during a trial. We approach it with care. We decline to pass in appellate review upon the relative accuracy of the stenographer's certified transcript and an electronic transcription. We deem it unwise, and we see no reason why it must be done. We adopt what we consider a salutary rule.

Where, as here, a timely question is raised as to the precise wording of an instruction as given, and the court and counsel disagree as to that wording, we hold it to be the obligation of the trial judge to require the court reporter to read back to him and to both counsel the wording of the charge as the reporter has taken it down and as it would be transcribed. If it appears that there is disagreement, the jury should be called in and the instruction repeated either as agreed upon by the court and counsel or as the court determines that it should be given, thus preserving an unequivocal record for

review. We hardly deem it necessary to note that we think it highly unlikely that the trial judge worded the involved instruction as the reporter took it down and transcribed it. We cannot, however, indulge in any presumption where so crucial an issue is at stake. In conformity with the foregoing holding, we perforce reverse and remand for a new trial.

McGREGOR, J., concurred.

BRONSON, J., concurred in the result only.

PEOPLE *v.* MOORE

1. MOTIONS—EVIDENCE—SUPPRESSION.

Taking a motion to suppress evidence under advisement does not constitute a denial of the motion, but leaves the question open for a later decision.

2. SEARCHES AND SEIZURES—EVIDENCE—ADMISSIBILITY—SUBMISSION TO JURY.

The question of the legality of a search and seizure raised by a motion to suppress evidence is a question of law to be decided by the court and not by the jury.

3. EVIDENCE—ADMISSIBILITY—INSTRUCTIONS TO JURY—DETERMINATION OF ADMISSIBILITY.

Instruction to the jury that testimony had been received conditionally and could be considered by them only if they first

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 29 Am Jur 2d, Evidence § 408 *et seq.*

Modern status of rule governing admissibility of evidence obtained by unlawful search and seizure. 50 ALR2d 531.

determined that it was not obtained by an illegal search and seizure is reversible error.

Appeal from Recorder's Court of Detroit, Frank G. Schemanske, J. Submitted Division 1 June 14, 1971, at Detroit. (Docket No. 9852.) Decided September 27, 1971.

Elbert Moore was convicted of the unlawful possession of narcotic drugs. Defendant appeals. Reversed and remanded for new trial.

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.

James A. Sullivan, for defendant on appeal.

Before: T. M. BURNS, P. J., and HOLBROOK and MCGREGOR, JJ.

HOLBROOK, J. Defendant, Elbert Moore, was convicted in the Recorder's Court for the City of Detroit before a jury of the crime of unlawful possession of narcotic drugs (10 capsules containing a total of 6.25 grains of heroin hydrochloride) contrary to MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123).

The defendant appeals, claiming that the evidence seized and admitted in evidence was unlawfully obtained.

Defendant claims that the police officers broke open the closed door of the apartment, searched the premises, and arrested the defendant and his guests. The police officers claim they were making a routine inspection of the apartment building when

they came to the defendant's apartment; further, that the door was half open and they observed the defendant pouring possible narcotics into red capsules, from a bottle in his hand. At this point they entered the room, arrested the defendant, confiscated the capsules and some syringes, and made the arrests. The other parties arrested were not charged with possession and were released.

The complaint and warrant were signed and issued on July 2, 1968. On July 19, 1968, the defendant waived examination. On August 15, 1968, the defendant was arraigned in Recorder's Court for the City of Detroit and stood mute, and a plea of not guilty was entered for him. A pretrial conference was heard on March 24, 1969. In the trial call statement he indicated a desire to file a motion. On May 13, 1969, the defendant filed a *praecipe* for motion to suppress evidence and the prosecutor's office waived the four-day notice. Said motion was noticed for May 16, 1969. The motion to suppress was not heard before trial, and defense counsel requested that the court delay its decision on the motion until after all the testimony had been heard. This took place on Thursday, May 15, 1969, at the beginning of the trial. The trial court took the motion under advisement. The contraband narcotics and syringes were admitted in evidence over objections of defense counsel. The trial was completed on Tuesday, May 20, 1969.

The court in its instructions to the jury stated in part as follows:

"Now during the trial defense has moved to suppress which [*sic*] to bar from evidence certain narcotics and narcotic equipment offered in evidence by the people. Usually such a motion is raised in advance of trial, and the judge who hears such a

motion determines the question of [*sic*] the basis of the affidavits or evidence at the hearing on the motion.

"Here, however, no such timely motion was filed. The question to be answered depends both upon the applicable law and on the facts as you found from the evidence. This means that I do not answer the question of whether or not you shall consider evidence which the people offer, except conditionally. I will instruct you on the law and leave to you as triers of the facts the determination of whether or not you will consider the testimony which the people offered as regards narcotics and narcotic equipment seized.

"I charge you therefore that if the officers were in the public hall of this apartment building, and if that door was opened, members of the jury, in the apartment building, the hall does become public. On an investigation and if through an open, or partially opened, door they could see and did see narcotics and narcotic equipment, or person using narcotics, in that case they had a right to enter and a right to arrest for a felony committed in their presence; and, consequently, a right to confiscate the narcotics and equipment found on the premises at the time they made the arrest. However, if the officers although in a public hall did not see such narcotics and narcotic equipment, or person using narcotics through an open or partially opened door, if they had to open the door, whether by force or not, in that case the entry would not be legal, and so the arrest or the confiscation would not be legal.

"If you find from the testimony that under the law as I have given it to you the officers entry was legal, you may then consider the evidence of what the officers seized in determining the guilt or innocence of this defendant. On the other hand, if you find under the law as I have given it to you that the entry was not legal, in that case you do not consider the evidence which was seized in reaching your

determination as to the guilt or innocence of this defendant. I repeat: take the law as I have given it to you and test the testimony which you believe on the basis of this law in determining whether or not you consider the offered evidence of narcotics and narcotic equipment. This evidence I have only accepted conditionally, conditioned on your determination of its legality in the light of the law as I give it to you, and the light of such testimony as you believe."

Now, it is true that the motion to suppress was not timely filed. However, the people through the prosecutor waived the four-day notice. The trial court could have properly determined that the motion was not timely filed and denied it. In 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), Search and Seizure, § 874, pp 1143, 1144, it is stated as follows:

"Courts cannot pause during the trial of a criminal case, when a bit of evidence admissible under the general rules is offered, to engage in a collateral inquiry as to how the prosecution became possessed of such evidence. That would be the trial of a collateral matter, and the courts have held that where evidence so offered is competent, the trial will not be halted to determine a collateral issue of whether or not the evidence was legally secured. The rule is well established that the legality or illegality of a search and seizure is a collateral matter, and must be raised by a timely motion to suppress the evidence. The court will not turn aside from the trial of the case to consider such a collateral matter. The trial court need not stop during the course of the trial to inquire how the evidence comes into court.

"It is the duty of counsel for the respondent, if he desires to test the validity of a search warrant,

or, the method by which evidence was secured by a search of the defendant's property or person, to raise the question by a timely motion to suppress such evidence before the trial, and, if it appears that the defendant's constitutional rights have been violated, it is the duty of the court to suppress the evidence. This rule announced in prior cases, and consistently followed by the supreme court, declares that evidence will be suppressed on a motion if obtained by illegal search and seizure, without a search warrant or lawful arrest, or without reasonable grounds or probable cause."

When the trial judge took the motion to suppress under advisement, that did not constitute a denial because it was not timely filed, but left the question open for decision.

Reversible error was committed when the court in its instructions informed the jury that the testimony had been received conditionally and could be considered by them if they determined that the search and seizure was legal. In the case of *People* v. *Walker* (1965), 374 Mich 331, it is stated on p 337 as follows:

"Capsulized, the question is: Will Michigan entrust the now required separate hearing on the issue of voluntariness to the trial judge alone and make his determination thereof final? This is the so-called 'orthodox' rule. Under this rule, if the judge finds on a proper record made the confession to be involuntary, the matter ends there and the jury never considers it. Contrariwise, if the judge determines it to have been voluntarily made, it is admitted. The issue of voluntariness is not submitted to the jury. Jury consideration is limited to its weight and credibility. *This rule is in legal substance an extension of the present concept of the admissibility of evidence challenged on a motion to suppress. If the evidence is suppressed, again*

the matter ends there. If it is admitted, the jury may still consider its evidentiary weight." (Emphasis supplied.)

The submission to the jury of the question of the admissibility of the evidence pertaining to the search and seizure was not proper and has no precedent of approval in our state. Upon a new trial the motion to suppress should be heard in advance of the trial and determined.

Reversed for new trial.

All concurred.

PEOPLE *v.* STEWART

1. CRIMINAL LAW—APPEAL AND ERROR—THEORIES OF INNOCENCE—NEGATION.

An appellate court, in determining whether the prosecution has negated all theories consistent with a defendant's innocence, must look at the record in the light most favorable to the prosecution and decide whether sufficient evidence was adduced, which, if believed by the jury, could support a finding of guilt beyond a reasonable doubt.

2. BURGLARY—EVIDENCE—SUFFICIENCY.

Testimony that defendant was the man who had left the burglarized store carrying a package and then had returned, coupled with the arresting officers' testimony that defendant was inside the store when they approached the scene, was sufficient evidence on which the jury could base a finding of

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 867.
[2] 13 Am Jur 2d, Burglary § 45 *et seq.*
[3, 4] 5 Am Jur 2d, Appeal and Error §§ 786, 883.

breaking and entering a business place with intent to commit larceny.

3. CRIMINAL LAW—EVIDENCE—REASONABLE PROBABILITIES.
Evidence that establishes no more than a choice between reasonable alternative conclusions cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal.

4. CRIMINAL LAW—EVIDENCE—EVIDENTIARY CONFLICTS.
Conflicting versions as to what defendant was doing in a store which had been burglarized did not present a choice between reasonable alternative conclusions but merely a choice between two different accounts of the incident; therefore, the jury could properly reject the defense version and accept the account of the prosecution witness.

Appeal from Recorder's Court of Detroit, John R. Murphy, J. Submitted Division 1 June 8, 1971, at Detroit. (Docket No. 9950.) Decided September 27, 1971. Leave to appeal denied, 386 Mich 775.

Michael Stewart was convicted of breaking and entering a business place with intent to commit larceny. 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.

Coleman E. Klein, for defendant.

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

V. J. BRENNAN, J. Defendant, Michael Stewart, was found guilty of breaking and entering a business place with intent to commit larceny (CL 1948 § 750-.110 [Stat Ann 1962 Rev § 28.305]) after a jury

trial in the Recorder's Court of Detroit. Defendant's motion for judgment of acquittal notwithstanding the verdict was denied. He was sentenced to a term of 3–1/2 to 10 years.

The only issue raised on appeal is whether there was sufficient evidence to support the jury's finding of guilt beyond a reasonable doubt. The testimony elicited at trial presents two contradictory versions of the circumstances leading to the arrest of the defendant. In view of the complex nature of the situation, each version of the incidents will be individually considered.

First, the version of the situation consistent with the jury's finding of guilt beyond a reasonable doubt:

Mr. James H. Williams testified at trial that he was the owner of a grocery store located at 3025 Beaubien in the City of Detroit. On the night of February 9, 1970, he closed and locked the store at approximately 10 p.m. The front door contained a plywood insert, which was intact at the time he closed the store. When he returned to the store the following morning, the plywood had been removed and poorly replaced in the door. He believed some packages of cigarettes were missing, but could not say how many.

Mr. George Haney testified that he lived directly across the street from Mr. Williams' store, and that he was awakened by a noise at approximately 12:45 a.m., February 10, 1970. After being awakened, he proceeded downstairs and looked out the window of his home; at this time he observed a Negro male leaving Mr. Williams' store carrying a package in his hands. Mr. Haney telephoned the Detroit Police Department to report the incident, and continued to observe the man who walked south on Beaubien.

Mr. Haney lost sight of this man, but remained on the phone with the police. He then observed a man approach from the south and enter the store; this man, the defendant, was arrested by the Detroit police and identified by Mr. Haney as the same man he originally saw leaving the store, despite the fact that he could not see defendant's face, and could not identify him at trial.

In response to a radio call received in their scout car, Detroit patrolmen Gainey and Wilson were the first police officers to arrive at the scene. Officer Gainey testified that as they approached the store from the north, he observed defendant in the store with the latter's head projecting outside and looking about. He told defendant to freeze, and defendant fell out of the doorway onto the ground. The plywood panel of the door was off, and individual packages of cigarettes were found both strewn about the floor of the store, and within a large box near the door.

Patrolman Wilson, who was driving the car, corrobated Officer Gainey's testimony and added that as the car approached the store, he observed defendant in the doorway bent over at the waist and moving his elbows.

Second, the defendant's explanation of the incident:

The defendant testified that he was preparing to leave the home of his girl friend, Cassandra Penny, at approximately 12:30 a.m., February 10, 1970. Her home is one-half block south of, and across the street from, Mr. Williams' grocery store. As he was leaving, he observed two men about to break into Mr. Williams' store; he instructed Miss Penny to telephone the police and then proceeded to the scene to discourage the two men. As he approached the

store, the two men dispersed; he was in the process of attempting to replace the paneling when officers Gainey and Wilson apprehended him.

Defendant attempted to inform the officers that he was not the culprit; he did not attempt to flee or resist arrest. When he was informed, by a detective at police headquarters, that there was an eyewitness and defendant might be placed in a lineup, he indicated that he was eager to take part in a lineup.

Miss Penny corroborated defendant's testimony, and further testified that she did call the police. At trial, two police department tape recordings were introduced into evidence. One was identified as a recording of Mr. Haney's call, the other was that of a woman informing the police of the same incident; such tape recordings include automatic time signals in the background. Counsel stipulated that the woman's call was received four and one-half seconds before Mr. Haney stated that defendant had been apprehended. Officers Gainey and Wilson approached the store from the north, and did not pass Miss Penny's residence in the process.

The police officers did corroborate defendant's testimony to some extent. They testified that defendant did attempt to indicate that he was responsible for the police department being informed of the incident. They also agreed that defendant did not attempt to flee or resist arrest.

Based on these facts, and the fact that there was a discrepancy between Mr. Haney's description of the culprit's apparel, and the police (and defendant's) description of his apparel, defendant contends that there was insufficient evidence introduced at trial to support a finding of guilt beyond a reasonable doubt.

When an appellate court is confronted with a challenge to the judgment of the trier of the facts, it will not easily be moved to overturn the judgment below. The trier of the facts, be it judge or jury, has had the opportunity to listen to the witnesses and observe their demeanor; he has had the opportunity to observe and evaluate the plethora of subjective and objective factors which together influence his opinion of the credibility of the witnesses. These factors do not survive in the stenographic transcription, we merely have a record of the words spoken at trial—an incomplete record at best. For this reason, an appellate court is reluctant to overturn the judgment of the trier of fact and substitute its judgment, which must necessarily be based on an inadequate description of the factors which lead the trier of fact to reach its decision. *People* v. *Franczyk* (1946), 315 Mich 384; *People* v. *Panknin* (1966), 4 Mich App 19.

The principle of deference to the judgment of the trier of fact is, like all soundly applied judicial principles, subject to exceptions. Defendant urges that this case should be an occasion of such an exception. Defendant advances two theories to support this argument: First, that the prosecution failed to negate all reasonable theories consistent with defendant's innocence, and, second, that the evidence presented the jury with a mere choice of probabilities, and therefore, for either, or both of these reasons, the evidence was insufficient to support a finding of guilt beyond a reasonable doubt.

In support of his first argument, defendant draws the attention of the Court to the appropriate language in *People* v. *Millard* (1884), 53 Mich 63, 70, as cited in *People* v. *Spann* (1966), 3 Mich App 444, 454, and reasserted in *People* v. *Fortuna* (1968), 13 Mich App 245, 246.

We feel that the rule as set forth in these cases is a sound one, but we disagree with defendant regarding its applicability to this case. Defendant asks, rhetorically, " * * * doesn't the evidence at the very least fairly make out the defense theory that appellant was an innocent person mistakenly arrested for a crime he attempted to prevent?" We feel that the answer to this question, even if the Court were swayed to respond in the affirmative, is irrelevant to our disposition of this case. To determine whether or not the prosecution negated all theories consistent with innocence, we must look at the record in the light most favorable to the prosecution and determine whether sufficient evidence was adduced, which, if believed by the jury, *could* support a finding of guilt beyond a reasonable doubt (*People* v. *Williams* [1962], 368 Mich 494; *People* v. *Panknin, supra; People* v. *Floyd* [1968], 15 Mich App 284), not whether it could support a verdict of innocent.

The testimony of the eyewitness that the defendant was the same man who previously left the store carrying a package, coupled with the testimony of the police officers that defendant was inside the store when they approached the scene, is sufficient evidence on which the jury could base a finding of guilty beyond a reasonable doubt. The defendant asserts it would be illogical for a man who knew the police were being summoned to attempt to remove merchandise from the store; the prosecution would argue that it is illogical for an innocent party to enter the store at all, let alone tamper with the scene of the crime by attempting to replace the broken paneling. These and other such questions are proper for a closing argument to a jury, and not to an appellate court on review.

At oral argument defendant called the attention of the Court to *United States* v. *Saunders* (CA6, 1964), 325 F2d 840, 843, which advances the proposition that,

"Evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal."

We do not agree with defendant that the evidence in this case presents no more than a "choice of reasonable probabilities."

In *Saunders* the evidence presented established that a police informer did not possess any narcotics before meeting the defendant, but he did possess narcotics and had parted with cash after he met defendant. The defendant and the informer were not under surveillance for the entire time they were together, and the informer was not available to testify at the trial. The probabilities presented in that case were, obviously, that the informer either purchased narcotics from the defendant or acquired them elsewhere.

In the case at hand, the jury was not presented with a choice of "probabilities" but with a choice between two different eyewitness accounts of the incident. Both of these versions could not be entirely true; either the defendant and Miss Penny were being less than candid, or Mr. Haney's identification was mistaken. In order to reach a verdict in this case, the jury had to accept some of the testimony and reject some of the testimony. Such decisions are properly left to the jury. *People* v. *Brown* (1970), 21 Mich App 579.

To reverse the decision below on this argument would have the effect of raising the "reasonable

doubt" standard as an almost absolute bar against conviction. There are evidentiary conflicts in almost every case, civil or criminal, and it is the function of the trier of fact to resolve such conflicts.

Affirmed.

All concurred.

PEOPLE *v.* FALKNER

OPINION OF THE COURT

1. EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.

Photographs are not inadmissible into evidence simply because they might prejudice the jury; the test of their admissibility is whether the probative value of such otherwise admissible photographs outweighs their probable prejudicial effect.

2. HOMICIDE—FIRST-DEGREE MURDER—PHOTOGRAPHS—ADMISSIBILITY.

Admitting color photographs of the corpse of a decedent, who was killed by a shotgun fired at close range, in defendant's trial for first-degree murder was not an abuse of discretion where the photographs clarified and illustrated testimony relating to the victim's appearance and condition immediately after death and where, except for defendant's contention that the photographs were prejudicial, the photographs were otherwise admissible.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 12, 13] 29 Am Jur 2d, Evidence § 783 *et seq.*
[3] 29 Am Jur 2d, Evidence § 440.
[4] 58 Am Jur, Witnesses § 865 *et seq.*
[5] 58 Am Jur, Witnesses §§ 675, 696.
[6, 7] 29 Am Jur 2d, Evidence § 277.
[8, 9] 53 Am Jur, Trial § 476.
[10] 21 Am Jur 2d, Criminal Law § 333 *et seq.*
[11] 58 Am Jur, Witnesses § 734 *et seq.*

3. CRIMINAL LAW—ALIBI WITNESSES—CREDIBILITY.

Alibi witnesses, who have chosen to testify for a defendant, place their credibility in issue and can be questioned concerning the relationship between them and the accused and all the attendant circumstances thereof.

4. CRIMINAL LAW—WITNESSES—CREDIBILITY.

Prosecutor's asking alibi witnesses about their membership in a group known as the Black Messengers did not constitute reversible error where the defendant, charged with first-degree murder, was a member of the group, even though the murder the defendant was being tried for was purportedly a racially-motivated murder of a white by a black.

5. WITNESSES—OPINION—RELIGION.

Prosecutor's single reference to the Black Muslims, during cross-examination of a defense witness, did not contravene the statute providing that witnesses may not be questioned about their opinions on religion, either before or after being sworn (MCLA § 600.1436).

6. CRIMINAL LAW—WITNESSES—THREATS BY DEFENDANT.

Prosecutor's eliciting testimony from a witness concerning defendant's threat that anyone who testified against him would be killed was proper, because testimony showing conduct and declarations of the defendant subsequent to commission of a crime is admissible where the behavior indicates a consciousness of guilt or is inconsistent with innocence.

7. CRIMINAL LAW—DEFENDANT'S COERCING WITNESSES—ADMISSIBILITY.

Evidence of attempts by a defendant to induce witnesses not to testify may be considered by the fact finders.

8. CRIMINAL LAW—PROSECUTOR'S COMMENT—DEFENSE'S FAILURE TO CALL WITNESS.

Prosecutor's comment upon defendant's failure to call one who was alleged by a defense witness to have been able to substantiate defendant's alibi was permissible where the defense case was based on alibi and the noncalled witness was available.

9. CRIMINAL LAW—PROSECUTOR'S COMMENT—DEFENSE'S FAILURE TO CALL WITNESS.

Prosecutor's stating that the reason a person, who a defense witness had stated could support defendant's alibi, had not

been called by the defense was that she was a "go-between" for defense witnesses did not constitute reversible error where the prosecutor's remark was not reiterated, the trial judge *sua sponte* cautioned the jury that the verdict was to be based on the evidence adduced, not the argument of the attorneys, defendant did not object to the remark nor request any instructions, and defendant did not move for a mistrial.

10. CRIMINAL LAW—RIGHT OF CONFRONTATION—CROSS-EXAMINATION —UNCOOPERATIVE WITNESS.

Prosecution witness's conducting herself in a supposedly "unruly, flippant, and evasive manner" during cross-examination did not deny defendant his right of confrontation where any difficulties in questioning the witness were due to the defendant's decision to proceed in proper person and to limit the assistance of his counsel, a respected member of the bar, to an advisory role; the trial judge was constitutionally powerless to deny the defendant's free and unequivocal demands to defend himself.

11. WITNESSES—CREDIBILITY—PRIOR CONVICTIONS.

The credibility of witnesses may be attacked by questions concerning convictions of crime (MCLA § 600.2158).

CONCURRENCE BY BRONSON, J.

12. HOMICIDE — MURDER — EVIDENCE — PHOTOGRAPHS — INFLAMMATORY PHOTOGRAPHS — ADMISSIBILITY.

The test for admitting possibly inflammatory photographs in a murder trial should not be whether the photographs clarify and illustrate testimony, because all photographs clarify and illustrate; the photographs are admissible only if their probative value outweighs their probable prejudicial effect.

13. HOMICIDE — MURDER — EVIDENCE — PHOTOGRAPHS — INFLAMMATORY PHOTOGRAPHS — ADMISSIBILITY.

Color photographs showing the deceased, killed by shotgun fire at close range, were improperly admitted into defendant's trial for first-degree murder where the photographs were admitted to clarify and illustrate testimony relating to the victim's appearance and condition immediately after death, there was no issue as to the victim's identity, his manner of death, or the defendant's alleged malice, and there was ample testimony detailing the extent of the victim's wounds.

Appeal from Jackson, Gordon W. Britten, J. Submitted Division 2 June 7, 1971, at Lansing. (Docket No. 10338.) Decided September 27, 1971. Leave to appeal applied for.

Roy E. Falkner, Jr., was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Bruce A. Barton,* Prosecuting Attorney, and *Paula Hosick,* Chief Appellate Attorney, for the people.

Arthur J. Tarnow, State Appellate Defender, for defendant.

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

O'HARA, J. This is an appeal of right from a jury verdict of guilty of first-degree murder.[1] We recite the facts and allegations of fact. On the evening of August 20, 1968, Ernest Rotholer and his wife were sitting on the front porch of their home in the City of Jackson. Because of oncoming darkness Mr. Rotholer decided, it was testified by his wife, to put his car away and close the garage door. While awaiting her husband's return she heard a "terrific blast of something". Hearing another noise in the back of the house, she ran toward the sound and found her husband lying unconscious on the floor between the back porch and kitchen. She screamed for assistance. A neighbor responded, but death had already ensued.

* 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 § 750.316 (Stat Ann 1954 Rev § 28.548).

The record tends to establish that the search for the murderer focused upon the defendant because of information supplied by a secret informant and two subsequently-discovered material witnesses, Zonnie Armstrong and Jacqueline Edmond.

At the trial both of these witnesses testified that defendant came to an apartment, where Zonnie Armstrong had been staying, sometime between 9 and 9:30 p.m. on the night of the fatal shooting. He claimed he had a gun and offered to let either Miss Edmond or Miss Armstrong shoot it. At his invitation Miss Edmond accompanied him outside where he picked up an unidentified object beside the house. The two proceeded down an alley adjacent to the Rotholer property. Defendant saw the reflection from a flashlight and allegedly said to his companion, "Let's shoot that man". For her own reasons, the girl kept on walking and left defendant behind. Momentarily thereafter she heard a shot followed by a scream. She returned immediately to the apartment where Zonnie Armstrong had remained while the foregoing events transpired. Shortly thereafter defendant entered the apartment and is said to have announced: "I think I shot someone". Miss Armstrong testified on trial that defendant informed her two days later that anyone who incriminated him would be killed.

All of the foregoing was relayed to the police. Both Miss Armstrong and Miss Edmond were placed in protective custody. Defendant was arrested and charged with first-degree murder.

Upon trial by jury, defendant was found guilty as charged. He was sentenced to life in solitary confinement at hard labor.

On appeal defendant asserts initially that the introduction into evidence of colored photographs

of the decedent's body constituted reversible error because of the prejudice engendered thereby, and that the photographs were unessential to the state's case as being merely cumulative and prejudicially inflammatory. Five pictures were taken at the scene of the crime. Some show decedent as found at the site of the killing; one shows the body of the victim taken just prior to the postmortem examination.

We examine this issue.

In *People* v. *Bergin* (1969), 16 Mich App 443, 447, 448, this Court quoted with approval 23 CJS, Criminal Law, § 852(1), pp 352, 353, as to the test of admissibility of photographs which it is claimed might prejudice the jury:

"As a general rule, where photographs are otherwise properly admitted, it is not a valid objection to their admissibility that they tend to prejudice the jury. Ordinarily photographs are not inadmissible merely because they bring vividly to jurors the details of a shocking crime or tend to arouse passion or prejudice, as in the case of unpleasant, gruesome, or horrifying photographs. The test of admissibility in such cases is whether the probative value of the photographs outweighs their probable prejudicial effect. Accordingly, photographs should be excluded where their logical relevancy will unquestionably be overwhelmed by the inherently prejudicial nature of the particular picture."

It was the theory of the prosecution that the deceased was killed by a shotgun fired at relatively close range. The photographs, shocking indeed, showed decedent's body literally pockmarked by small pellets. We hold that the pictures, identified as detailing the nature and extent of the wounds inflicted, were admissible for the purposes of clarifying and illustrating testimony relating to the victim's appearance and condition immediately after

death. We reject the claim that their sole evidentiary purpose was to create inflammatory prejudice. As otherwise nonobjectionable, they were admissible. Their admissibility was within the discretion of the trial judge. We perceive no abuse thereof. See *People* v. *Bergin, supra.*

As part of his second assignment of error, defendant has incorporated in "Appendix II" of his brief numerous reproductions of newspaper articles alluding to a period of racial strife in Jackson sometime prior to the trial of this cause. He contends that the temper of the community was such that the prosecutor was obligated to be scrupulously fair in order to prevent prejudice against a black defendant charged with what purported to be a senseless, racially-motivated killing. With this general principle we agree, but we must examine the specifics. It is contended that even though the prosecutor may not have committed any single act so grossly prejudicial as to require reversal of the judgment of conviction, that nonetheless defendant was denied a fair trial because of the cumulative effect of three alleged instances of misconduct by the prosecutor. We address ourselves to them.

First, objection is made to the cross-examination of defendant's alibi witnesses concerning their alleged membership in a group known as the Black Messengers. We have read the trial transcript with painstaking care. There was testimony adduced that the accused was a member of this organization. Having chosen to testify, the alibi witnesses placed their credibility in issue and they could be questioned concerning the relationship between them and the accused and all the attendant circumstances thereof. See *People* v. *Durham* (1912), 170 Mich 598. We are not persuaded that the single reference

to the Black Muslims, during the questioning of Phillip Smith, contravened the proscription of MCLA § 600.1436 (Stat Ann 1962 Rev § 27A.1436) which provides in relevant part: "No witness may be questioned in relation to his opinions on religion, either before or after he is sworn."[2]

Defendant also objected to the prosecutor's eliciting testimony from Zonnie Armstrong concerning defendant's threat that anyone who testified against him would be killed. Testimony showing conduct and declarations of the defendant subsequent to commission of a crime, when the behavior indicates a consciousness of guilt or is inconsistent with innocence, is admissible. Evidence of attempts by the accused to induce witnesses not to testify may properly be considered by the fact finders. See 62 ALR 136 and cases cited therein.

As the final instance of misconduct by the prosecutor, objection is made to the following excerpts from the state's closing argument commenting upon the failure of defendant's sister to testify in his behalf:

"At this point, I wonder if you considered why his sister Diane wasn't called as one of the defense witnesses, and perhaps, you might consider perhaps Diane in fact was the go-between among the defense witnesses. Not being a witness is no reason why she should not have been in the courtroom apparently. In any event, certainly one would wonder why she was not called as a defense witness."

We must examine the contention in the context of the testimony concerning defendant's sister's involvement in the case. Conflicting statements had been made by defense witnesses as to whether defendant's sister had been present in an apartment

[2] On cross-examination, the witness was simply asked whether he had ever heard of or if he had any knowledge about this group.

which she shared with her husband, Ardell Robinson, and the defendant, and where defendant was alleged to have been at the time of the fatal shooting.

The whole crucial defense was alibi. The comment upon failure to call one who was alleged by one defense witness to have been present at the place where defendant was claimed to have been at the time the fatal shot was fired, was well within the limits of permissible argument. See *People* v. *Hunter* (1922), 218 Mich 525, 528. Mr. Justice BIRD observed:

"The statute (citation omitted) protects the defendant from comment or criticism for not taking the witness stand, but the protection is not extended to witnesses. If a witness knows facts which will be helpful to defendant in making his defense, and he is competent and within the reach of defendant, his failure to produce him ought properly to be a subject of comment by the prosecutor."

Nothing in the records suggests that the accused's sister was not available. There was some testimony that she knew facts helpful to the defense of alibi. We can find no error upon which reversal could be predicated in this comment, nor upon it in combination with the others hereinbefore discussed.

The prosecutor did exceed the bounds of permissible comment by suggesting that the sister may have served as a go-between among the defense witnesses. The allegedly-prejudicial statements were not reiterated. However, the trial judge, on his own initiative, carefully instructed the jury that the verdict was to be rendered on the basis of the evidence adduced, not on the argument of either counsel. Defendant neither objected to the comment of the prosecutor, nor did he request any spe-

cific instruction from the trial judge in relation thereto. No motion for a mistrial was made. We cannot predicate reversal on this single unpreserved instance of impropriety.

Defendant next argues that one of the material witnesses held in protective custody, Jacqueline Edmond, conducted herself in such a manner as to deny him his constitutional right of confrontation since the witness's "unruly, flippant and evasive manner" precluded an adequate cross-examination.

Whatever difficulties the defendant experienced in questioning the witness are attributable, in whole or in part, to his own decision to proceed in proper person and to limit the assistance of his counsel, Mr. Guy Christian, a respected member of the Jackson County Bar, to an advisory role. The trial judge was constitutionally powerless to deny defendant's free and unequivocal demands to defend himself. No denial of defendant's right of confrontation occurred.

Next, defendant claims that permitting cross-examination of a defense witness as to a prior criminal conviction, unrelated to the crime charged, and supposedly not having a tendency to prove a lack of veracity, was an abuse of judicial discretion.

Both statute and case law allow attacks upon the credibility of witnesses by questions concerning conviction of crime. MCLA § 600.2158 (Stat Ann 1962 Rev § 27A.2158); *People* v. *Brocato* (1969), 17 Mich App 277. There was no error.

Finally, the claim is made that the judge improperly charged the jury as to the defense of alibi. We quote the challenged excerpt from the charge.

"Now, certain other evidence has been introduced that is known as an 'alibi', which is a claim that the defendant was elsewhere from the scene of the crime

at the time of its commission. Now, I instruct you that the defense of alibi is as legitimate as any other, and if satisfactorily proven, is a complete defense. However, you should carefully scrutinize the evidence relied upon to prove it, for the reason that an alibi is a defense that is easily claimed and hard to disprove. And, in this connection I instruct you that the defendant does not have the burden of proof to establish the alibi; if he offers evidence of alibi which raises a reasonable doubt in the mind of the jury as to his guilt, the jury should acquit him. I further instruct you that the witnesses who testify to an alibi are entitled to that credit as other witnesses, if you think they are telling the truth."

We have examined all the cited authorities, as well as researching the question independently. We find no error. *People* v. *Virgil Brown* (1969), 15 Mich App 600; *People* v. *Schaner* (1942), 302 Mich 6; *People* v. *Wudarski* (1931), 253 Mich 83; *People* v. *Marcus* (1931), 253 Mich 410.

We feel the burden of appellate review in all cases. In this, because of the brief-alleged existence of racial overtones, we feel it the more heavily. We have read the record with extreme care. We conclude that the essential issue was the weight and credibility of the testimony of the witnesses who implicated the defendant and those who testified in support of his defense of alibi. By its verdict, the jury, the sole judge of that weight and credibility, rejected the proffered defense. We are not empowered to disturb their verdict, absent reversible error of law. We find no single reversible error, nor any composite of claimed errors, that denied the defendant any safeguards of the judicial system or due process or equal protection of law.

Perforce, the conviction is affirmed.

DANHOF, P. J., concurred.

BRONSON, J. (*concurring*). I concur in the result reached by the majority. I write separately to state my views about the use of photographic evidence.

As I stated in my dissent in *People* v. *Phillips* (1969), 20 Mich App 103, 117, *aff'd* (1971), 385 Mich 30, "even if the photographs in the present case had had probative value, they might still have been inadmissible because of the inflammatory nature of their content". That statement applies to this case.

My brethren rely on 23 CJS, Criminal Law, § 852(1), pp 352, 353, which states in pertinent part: "The test of admissibility in such cases is whether the probative value of the photographs outweighs their probable prejudicial effect". My brothers urge that the probative value of the photographs sufficiently outweighed their prejudicial effect in that they "clarified and illustrated" testimony relating to the victim's appearance and condition immediately after death. That same reasoning has previously been used by this Court to approve the admission of gruesome photographs into evidence. *People* v. *Eddington* (1970), 23 Mich App 210, 228. I heartily disagree with that rationale.

To admit photographs on this basis would have the effect of nullifying the general rule as stated by CJS, *supra*. All photographs serve to "clarify and illustrate". The rule enunciated by my colleagues is overbroad. There was nothing at issue here which justified the admission of the photographs. There was no issue as to the victim's identity, his manner of death, or the defendant's alleged malice. There was ample testimony on the record detailing the extent of the victim's wounds. Whatever probative value these photographs may

have had was outweighed by the possibility of their prejudicial effect. To allow such photographs into evidence whenever they "clarify and illustrate" testimony is to allow them into evidence under all circumstances. For numerous cases supporting the proposition here stated, see Anno., 73 ALR2d 769, 802.

I concur in the result because I am convinced, after reading the record, that the result would not have been different had the photographs been excluded.

ORLOWSKI *v.* JACKSON STATE PRISON

1. AUTOMOBILES—NEGLIGENCE—GOVERNMENTAL LIABILITY.
   Negligent operation of a government-owned motor vehicle may occur even though the vehicle is standing still, as long as the vehicle is being used or employed in some specific function or to produce some desired work or effect.

2. AUTOMOBILES—NEGLIGENCE—GOVERNMENTAL LIABILITY.
   The faulty latching of the tailgate of a prison truck by a prison officer could constitute negligent operation of the vehicle by a governmental employee where, at the time and place of plaintiff's fall from the truck, the vehicle was being used to transport plaintiff, normally a cook, and other inmates to help curtail a fire that had broken out on the prison grounds, because, at the time of the failure to lock the tailgate, the truck was being used in some specific function or to produce some desired work or effect (MCLA §§ 257.401, 691.1405).

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 8 Am Jur 2d, Automobiles and Highway Traffic § 602.

Appeal from Court of Claims, Leo W. Corkin, J. Submitted Division 2 June 15, 1971, at Detroit. (Docket No. 11094.) Decided September 27, 1971.

Complaint by Arthur Orlowski against Jackson State Prison and the State of Michigan for personal injuries arising from negligent operation of a motor vehicle. Accelerated judgment for defendants. Plaintiff appeals. Reversed and remanded for trial.

Lopatin, Miller & Bindes (*Michael H. Feiler,* of counsel), for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Everett R. Trebilcock,* Special Assistant Attorney General, for defendants.

Before: T. M. BURNS, P. J., and HOLBROOK and MCGREGOR, JJ.

HOLBROOK, J. Plaintiff appeals from an order in the Michigan Court of Claims, granting defendants' motion for accelerated judgment.

On August 9, 1969, Arthur Orlowski was an inmate at Jackson State Prison. On that day he was taken from his regular job as a cook and recruited to help detain a fire that had broken out on the prison grounds. He was placed in a prison truck with other inmates and was being transported to the immediate area of the fire, when the accident occurred.

Plaintiff alleges that as a consequence of the negligent operation of the motor vehicle, *i.e.,* the negligent latching of the tailgate on the truck by Officer Williams, an employee of the prison, the tailgate

opened while the truck was moving which caused plaintiff to fall to the ground, sustaining serious bodily injuries. Further, plaintiff alleges that after the fall and while lying on the ground, the truck driver, having knowledge of the incident, continued to drive along and failed to stop or render assistance.

The issue on appeal is whether the operation of the truck in question by defendants' agent for the purpose of transporting prisoners to contain a fire on the prison grounds at a time when the latch securing the tailgate was not properly fastened, causing one of the prisoners to fall from the truck and be injured, constitutes negligent operation of a motor vehicle within PA 1949, No 300?

In its opinion the lower court quoted MCLA § 691-.1405 (Stat Ann 1969 Rev § 3.996[105]) as follows:

"Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948."

The court then concluded that even assuming that there was negligence by the defendants in the operation of a motor vehicle, it is not the type of negligence defined by PA 1949, No 300, MCLA § 257.401 (Stat Ann 1968 Rev § 9.2101) which states in part:

"Nothing herein contained shall be construed to abridge the right of any person to prosecute a civil action for damages for injuries to either person or property resulting from a violation of any of the provisions of this act by the owner or operator of a motor vehicle, his agent or servant. The owner

of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle whether such negligence consists of a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in such operation as the rules of the common law requires."

Defendants argue the alleged act of negligence, the family latching of the tailgate on the truck, was not an act involving "negligent operation" of the vehicle because operation in this context means a physical working or manipulation of the mechanism of the vehicle.

Both parties admit there are no Michigan cases covering the precise question.

In other jurisdictions it has been almost universally held that "negligent operation" may occur even though the vehicle is standing still as long as it is being used or employed in some specific function or to produce some desired work or effect. *Diggins* v. *Theroux* (1943), 314 Mass 735 (51 NE2d 425).

In *Chilcote* v. *San Bernardino County* (1933), 218 Cal 444, 445 (23 P2d 748, 749), the court said, with reference to the meaning of "operation":

"To be in operation, the vehicle must be in a 'state of being at work' or 'in the active exercise of some specific function' by performing work or producing effects at the time and place the injury is inflicted."

At the time and place of the accident the truck was being put to a definite task and was carrying out a desired objective. It is undisputed that the truck was being used for the purpose of transporting the inmates to have them help curtail the fire.

The back of the truck was equipped with a tailgate which could have been properly fastened in

order to protect the men from falling out or being thrown from the truck while it was in operation.

Plaintiff claims that the operator of the truck had either failed to close the tailgate properly, or failed to determine if it was properly closed. Such failure could be considered by the jury in determining the presence of negligence in the operation of a motor vehicle. *Moore* v. *City of Detroit* (1969), 19 Mich App 636.

Reversed and remanded for a trial on the merits. Costs to appellant.

All concurred.

PEOPLE *v.* ERGIE WILLIAMS

1. POISONS—NARCOTICS—MARIJUANA—ILLEGAL POSSESSION—EVIDENCE.

   The prosecution need not prove that the marijuana seized from a defendant is not from that portion of the marijuana plant the possession of which is not prohibited by statute (MCLA § 335.153).

2. CRIMINAL LAW—PROCESS—WITNESSES—DEFENSE WITNESSES—COMPULSORY PROCESS—DISCRETION.

   Granting of compulsory process to obtain witnesses requested by a criminal defendant is a decision within the discretion of the trial court.

3. CRIMINAL LAW—PROCESS—WITNESSES—DEFENSE WITNESSES——COMPULSORY PROCESS—DISCRETION.

   Denial of defendant's request that a certain witness be produced to testify on his behalf was not an abuse of discretion where defendant presented his request at the end of the first day of a two-day trial, and where an attempt was made to procure the requested witness's attendance, but the witness could not be produced until a time when presentation of evidence would be concluded but where the parties stipulate to that witness's testimony, and defendant at no time claimed that the method employed prejudiced his rights.

Appeal from Kalamazoo, Lucien F. Sweet, J. Submitted Division 2 September 7, 1971, at Grand Rapids. (Docket No. 9140.) Decided September 28, 1971.

REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 16, 17.
[2, 3] 21 Am Jur 2d, Criminal Law § 345 *et seq.*

Ergie Williams was convicted of illegal possession of marijuana. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Donald A. Burge,* Prosecuting Attorney, for the people.

Joseph J. Jenkins, for defendant.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

PER CURIAM. Defendant was charged with possession of marijuana, a violation of MCLA § 335.153 (Stat Ann 1957 Rev § 18.1123). He was convicted by a jury on January 29, 1970, and sentenced to from two to ten years imprisonment.

Defendant was arrested on a charge of reckless driving on February 4, 1969. While he was being booked into the Kalamazoo County Jail, an inventory of his personal effects was taken; included among his effects was a pack of Benson & Hedges cigarettes in which three marijuana cigarettes were intermingled.

Defendant contends that to establish their case the people must prove not only that the substance in the cigarettes seized was marijuana, but also that the marijuana seized was from that portion of the marijuana plant the possession of which is prohibited by statute. In *People* v. *Nelson White* (1970), 26 Mich App 35, this Court concluded that in light of MCLA § 767.48 (Stat Ann 1954 Rev § 28.988), it was not incumbent upon the people to prove that marijuana which was allegedly sold was nonexempt marijuana. See also *People* v. *Rios* (1970), 27 Mich App 54; *People* v. *Albert White* (1970), 27 Mich App 432. Defendant's contention is without merit.

Defendant next urges that he was denied due process when the trial court denied his request that a certain witness be produced to testify on his behalf. Whether or not compulsory process is used to obtain witnesses requested by a defendant is a decision which is committed to the discretion of the trial court. MCLA § 775.15 (Stat Ann 1954 Rev § 28.1252); *People* v. *William L. Thomas* (1965), 1 Mich App 118; *People* v. *Morris* (1968), 12 Mich App 411.

The record reveals that defendant presented his request for production of a witness to the court at the end of the first day of a two-day trial. Further, the record discloses that the court attempted to procure the attendance of the requested witness, but upon learning that such witness could not be produced until late in the day at a time when presentation of the evidence would be concluded, the court denied the request on the ground that it would unduly delay the proceedings to await the production of the witness in court. The court suggested that the parties stipulate to the witness's testimony and a stipulation was agreed upon. At no time during this request and decision did the defendant claim that the method employed prejudiced his rights. In light of these circumstances, the trial judge did not abuse his discretion in refusing defendant's request for production of a witness.

Affirmed.

PEOPLE v. BENSON

CRIMINAL LAW—MOTIONS—MISTRIAL—FAILURE TO RULE.

Failure to rule on the prosecution's motion for a mistrial did not result in reversible error where the motion was made because the defendant shouted out the penalty for the crime he was being tried for.

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 September 7, 1971, at Grand Rapids. (Docket No. 9151.) Decided September 28, 1971. Leave to appeal denied, 387 Mich 780.

Willie Benson, 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 *Luvenia D. Dockett,* Assistant Prosecuting Attorney, for the people.

M. John Shamo, for defendant on appeal.

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

PER CURIAM. Defendant was convicted by a jury for the offense of armed robbery. MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

REFERENCE FOR POINTS IN HEADNOTE

53 Am Jur, Trial § 970 *et seq.*

While under direct examination, defendant blurted, "I realize that what they have me charged with carries life." Whereupon, the prosecution, out of hearing of the jury, moved for a mistrial. The court did not rule on the motion and submitted the case to the jury.

The court instructed the jury that there was one of two verdicts they could return. They could either find the defendant guilty as charged, or not guilty.

Defendant appeals and raises two issues:

1. Does a trial judge's failure to rule on a motion for a mistrial made by the prosection constitute reversible error?

2. Did the trial court commit reversible error in refusing defendant's request for an instruction as to lesser included offenses?

We find no merit in defendant's contention that the trial court's failure to rule on the prosecution's motion for a mistrial deprived defendant of his constitutional right to a trial by jury. In *People* v. *Roland Robinson* (1971), 30 Mich App 372, we held that if it was error at all it was harmless error for the trial court to fail to rule on the defendant's motion for a mistrial. It does not appear the trial court's failure to rule on the prosecution's motion worked any miscarriage of justice.

A thorough search of the record reveals no evidence which would have supported a charge as to any lesser included offenses.

The requested instruction was properly refused by the trial judge. *People* v. *Hearn* (1958), 354 Mich 468; *People* v. *Stevens* (1968), 9 Mich App 531.

Affirmed.

PEOPLE v. HOOPER

1. CRIMINAL LAW—SENTENCES—MINIMUM SENTENCE.

   The failure of the trial court to provide for a substantial period intervening between the minimum and maximum terms of a sentence was not error where the court exercised discretion in imposing the sentence, having evaluated defendant as an individual, and the sentence was within the statutory maximum.

2. ASSAULT—FELONIOUS ASSAULT—ELEMENTS.

   A conviction of felonious assault requires the prosecution to prove only that the assault was made with a dangerous weapon (MCLA § 750.82).

3. CRIMINAL LAW—DEFENDANT'S CRIMINAL RECORD—WITNESS'S UNRESPONSIVE ANSWER.

   Police officer's testimony, upon direct examination, that he knew defendant "from previous occasions" did not constitute reversible error where the remark was a voluntary and unresponsive answer to a proper question.

4. CRIMINAL LAW—CARRYING CONCEALED WEAPON—LICENSE TO CARRY—BURDEN OF PROOF.

   The state does not have the burden of proving that a defendant, charged with carrying a concealed weapon, did not have a license to carry that weapon (MCLA §§ 750.227, 776.20).

Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 June 16, 1971, at Detroit. (Docket No. 9245.) Decided September 28, 1971.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 592.
[2] 6 Am Jur 2d, Assault and Battery § 53.
[3] 29 Am Jur 2d, Evidence § 320 *et seq.*
[4] 56 Am Jur, Weapons and Firearms § 10.

Lawrence E. Hooper was convicted of felonious assault and carrying a concealed weapon. 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.

Armand D. Bove, for defendant on appeal.

Before: T. M. BURNS, P. J., and HOLBROOK and MCGREGOR, JJ.

ON REHEARING

PER CURIAM. Defendant was convicted by a jury in the Wayne County Circuit Court of the offenses of felonious assault, MCLA § 750.82 (Stat Ann 1962 Rev § 28.277), and carrying a concealed weapon, MCLA § 750.227 (Stat Ann 1962 Rev § 28.424). Defendant was sentenced upon conviction on the counts charged to terms of from 3 years, 11 months to 4 years, and from 4 years, 11 months to 5 years, respectively. The court appointed appellate counsel to represent defendant in post-conviction proceedings. From denial of defendant's motion for new trial, this appeal is taken as of right.

We consider defendant's claims of error in the order presented.

Whether the trial court erred in not providing for a "substantial period" intervening between the minimum and maximum terms of sentence.

The transcript of sentencing in the instant case reveals that the trial judge exercised discretion in imposing the sentences upon defendant, having

evaluated defendant as an individual, *People* v. *Lessard* (1970), 22 Mich App 342. This Court has held that a sentence within the statutory maximum will not ordinarily be disturbed on appeal. *People* v. *Stroble* (1970), 28 Mich App 451, 453.

Whether sufficient credible evidence to sustain defendant's conviction for felonious assault was produced upon trial of this case.

In a case involving a charge of felonious assault, such as the present, it is necessary, in order to convict upon that charge, to prove only that an assault was made with a dangerous weapon. *People* v. *Childs* (1968), 11 Mich App 408, 411. A thorough review of the record convinces us that the jury's verdict was amply supported by the evidence. *People* v. *Arither Thomas* (1967), 7 Mich App 103; *People* v. *Dawson* (1971), 29 Mich App 488.

Whether reversible error occurred when, during the trial, a police officer testified, in the jury's presence, that he knew defendant "from previous occasions".

The testimony of the police officer, upon direct examination, that he knew defendant "from previous occasions" was a voluntary and unresponsive answer to a proper question. As such, it was not reversible error. *People* v. *Tutha* (1936), 276 Mich 387, 393.

Whether the trial court committed error in instructing the jury that the state must prove a matter involving circumstantial evidence beyond a reasonable doubt.

Defendant's allegation that the trial judge improperly instructed the jury as regards to the proof required on a matter involving circumstantial evidence, need not be considered for the first time on appeal, no objections to the court's instructions

having been made at trial. *People* v. *Floyd* (1968), 15 Mich App 284; GCR 1963, 516.2.

Whether the trial court erroneously instructed the jury that the people did not have to prove that defendant did not have a license to carry a concealed weapon.

Defendant finally contends that the trial court, in regard to the charge of carrying a concealed weapon, committed error in instructing the jury that the state need not prove that defendant did not have a license to carry such a weapon. Defendant relies on the following language contained in *People* v. *Kelsch* (1969), 16 Mich App 244, 245:

"To establish the *corpus delicti* of this felony, the prosecutor must prove not only that the defendant carried a concealed pistol, but also that he had no license to do so. *People* v. *Autry* (1967), 7 Mich App 480, 483."

However, the decision in *Kelsch* preceded the effective date of PA 1968, No 299, being MCLA § 776.20 (Stat Ann 1971 Cum Supp § 28.1274[1]) which provides:

"In any prosecution for the violation of any acts of the state relative to use, licensing and possession of pistols or firearms, the burden of establishing any exception, excuse, proviso or exemption contained in any such act shall be upon the defendant but this does not shift the burden of proof for the violation."

It is the opinion of this Court that the above statutory language has eliminated the burden upon the state of proving that defendant did not have a license to carry a concealed weapon. Accordingly, we find no error in the trial court's instruction.

Affirmed.

PEOPLE v. MAXWELL

CRIMINAL LAW—ASSAULT WITH INTENT TO ROB—ATTEMPT.

The crime of attempted assault with intent to rob does not exist.

Appeal from Recorder's Court of Detroit, Robert J. Colombo, J. Submitted Division 1 August 31, 1971, at Lansing. (Docket No. 9315.) Decided September 28, 1971. Leave to appeal denied, 387 Mich 779.

Willie Maxwell was convicted of assault with intent to rob being armed. 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 *Gerard A. Poehlman,* Assistant Prosecuting Attorney, for the people.

Charles Burke, for defendant on appeal.

Before: DANHOF, P. J., and MCGREGOR and QUINN, JJ.

PER CURIAM. The defendant was tried and convicted of assault with intent to rob being armed. MCLA § 750.89 (Stat Ann 1962 Rev § 28.284). He was sentenced to life imprisonment.

REFERENCE FOR POINTS IN HEADNOTE

6 Am Jur 2d, Assault and Battery § 10.

On appeal he claims reversible error occurred because the trial judge did not *sua sponte* instruct on lesser included offenses. There was no evidence on the record to support an instruction on lesser included offenses and the court did not affirmatively exclude the jury from considering lesser included offenses. No reversible error occurred. *People* v. *Membres* (1971), 34 Mich App 224 and *People* v. *Busby,* (1971), 34 Mich App 235. Additionally, the crime of attempted assault with intent to rob does not exist. *People* v. *Patskan* (1971), 29 Mich App 354.

The trial court did not err in sentencing the defendant to life imprisonment without specifying a minimum term. *Elliott* v. *Department of Corrections* (1955), 343 Mich 681; MCLA § 750.89 (Stat Ann 1962 Rev § 28.284); and MCLA § 769.9 (Stat Ann 1971 Cum Supp § 28.1081).

The jury instruction on specific intent was proper.

No argument or formal submission is necessary because the questions sought to be reviewed are so unsubstantial.

The motion to affirm is granted.

PEOPLE *v.* RYAN

CRIMINAL LAW—DEFENDANT TESTIFYING—IMPEACHMENT—PRIOR ARRESTS.

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 question is to impeach the defendant's credibility as a witness.

Appeal from Muskegon, Charles A. Larnard, J. Submitted Division 3 September 7, 1971, at Grand Rapids. (Docket No. 9444.) Decided September 28, 1971. Leave to appeal denied, 387 Mich 801.

Ralph Ryan was convicted of illegal sale of marijuana. Defendant appeals. Reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Paul M. Ladas,* Prosecuting Attorney, and *Fredric A. Grimm, Jr.,* Chief Assistant Prosecuting Attorney, for the people.

Michael E. Kobza, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

REFERENCE FOR POINTS IN HEADNOTE

29 Am Jur 2d, Evidence § 320 *et seq.*

PER CURIAM. Dennis Brown and defendant were charged in a two-count information with the sale and possession of marijuana. MCLA §§ 335.152, 335.153 (Stat Ann 1957 Rev §§ 18.1122, 18.1123).

A police narcotics agent testified that both Brown and defendant were present during negotiations for the sale, and that the agent paid Brown $120 on July 11, 1969. Delivery was made by Brown on July 14, 1969. Arrests were made a few days later.

Brown entered a plea of guilty to possession and testified at defendant's trail as a witness for the prosecution. Defendant was found guilty by a jury of illegal sale under count I and sentenced to a term of 20 to 40 years. Defendant appeals.

These facts, although not comprehensive, are sufficient to decide this appeal.

Defendant raises seven issues. With one exception, these questions were not preserved for review by timely trial objections. The exception was the question of whether it was prejudicial error for the judge to admit, over objection by the defendant's attorney, the prior record of both arrests and convictions of defendant during cross-examination by the prosecutor. The record reveals the following, during cross-examination.

"*Q*. Where were you in June?

"*A*. In June I was in jail in Grand Haven.

"*Q*. Okay, and you said you'd been arrested for sale is that correct? [*He had not made this statement.*]

"*A*. No, the only thing I was convicted of—

"*Q*. I didn't ask you what you were convicted of. You were arrested for sale?

"*A*. Yes, I was arrested for sale.

"*Q*. How many times were you arrested for sale?"

At this time, a proper and timely objection was made. The court overruled and allowed the prosecu-

tor to "interrogate this witness as to whether he had been arrested or whether he had been convicted". More questions relating to arrests were asked and answered. The record does not disclose any convictions "for sale".

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 defendant's credibility as a witness. *People* v. *Brocato* (1969), 17 Mich App 277, 302.

This trial started after the *Brocato* decision. The law as expressed in *Brocato* applies. *People* v. *Ruppuhn* (1970), 25 Mich App 62, 66.

Reversal for the reasons stated makes unnecessary the consideration of other issues submitted for review.

PEOPLE *v.* ROCHA

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 September 7, 1971, at Detroit. (Docket No. 9476.) Decided September 28, 1971. Leave to appeal denied, 387 Mich 783.

Richard Rocha was convicted of accepting the earnings of a prostitute without consideration. 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.

Gerald M. Lorence, for defendant on appeal.

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

PER CURIAM. After a jury trial the defendant was convicted of accepting the earnings of a prostitute without consideration. MCLA § 750.457 (Stat Ann 1954 Rev § 28.712). He now appeals raising several issues.

The defendant contends that the trial court erred in refusing to give a requested jury instruction. The defendant's theory of the case was that he received the prostitute's money under an agreement that he would provide such things as clothing and a car and return any surplus to her. The defendant requested an instruction upon this theory of disinterested altruism which he labels a bailment theory. The trial court instructed the jury that if the money was received under this arrangement and any surplus was in fact returned then the defendant was not guilty. The defendant requested a supplementary instruction to the effect that if the defendant intended to return any surplus he was not guilty whether or not the surplus had been returned. The trial court refused this request and the defendant assigns this refusal as error.

Standing alone the refusal to give the instruction might be considered reversible error. However, the jury instructions must be read as a whole, *People* v. *Dye* (1959), 356 Mich 271, and a refusal to give an instruction is not reversible error when the substance of the instruction has been given in another portion of the charge. *People* v. *Fred W. Thomas* (1967), 7 Mich App 519. On numerous occasions the trial court informed the jury that to find guilt they must find that the defendant intended to make a profit. A reading of the instruction as a whole indicates that the jury was informed that if the defendant was merely holding the prostitute's money with the intent to return any funds that were not spent on her the defendant was not guilty.

The defendant's second contention is that the trial court erred by repeating certain portions of the statute and over-emphasizing certain portions of the prosecution's case. The record does not support defendant's contention. As has already been stated,

jury instructions must be read as a whole and when this is done it appears that the trial court correctly and fairly instructed the jury as to applicable law.

The defendant's final issue was not raised at the trial level and in the absence of a miscarriage of justice will not be reviewed on appeal. *People* v. *Larry Smith* (1971), 31 Mich App 191; *People* v. *Wright* (1970), 23 Mich App 330.

Affirmed.

PEOPLE *v.* CHARLES THOMAS

1. CRIMINAL LAW — PLEA OF GUILTY — VOLUNTARINESS — FACTUAL BASIS.

   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 (MCLA § 768.35; GCR 1963, 785.3[2]).

2. CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS.

   A plea of guilty, freely, voluntarily, and understandingly made, establishes the crime charged and the guilty-pleading defendant's participation in the crime.

3. CRIMINAL LAW—ATTEMPTED, UNLAWFUL POSSESSION OF A CREDIT CARD—PLEA OF GUILTY—FACTUAL BASIS.

   A sufficient factual basis for a plea of guilty of attempted possession of a credit card with intent to circulate or sell it without the consent of the cardholder was established where the nature of the offense had been explained to the defendant, the defendant indicated that he wished to plead guilty, and the defendant indicated the place and time the crime occurred (MCLA §§ 750.92, 750.157p).

Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 September 7, 1971, at Detroit. (Docket No. 9636.) Decided September 28, 1971.

Charles W. Thomas was convicted, on his plea of guilty, of attempted possession of a credit card

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REFERENCE FOR POINTS IN HEADNOTES

[1–3] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

with intent to circulate or sell it without the consent of the cardholder. 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.

Armand D. Bove, for defendant on appeal.

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

PER CURIAM. The defendant was charged with possession of a credit card with intent to circulate or sell it without the consent of the cardholder. MCLA § 750.157p (Stat Ann 1971 Cum Supp § 28.354[15]). He pled guilty to attempted possession. MCLA § 750.92 (Stat Ann 1962 Rev § 28.287).

The trial judge examined the defendant personally and established on the record that the defendant was pleading guilty because he was guilty and that the plea was made willingly, freely, understandingly, and voluntarily. The defendant had counsel present, the court read the pertinent statute to the defendant, and the defendant was advised that the maximum penalty would be two years. There was not then, nor is there now, any protestation of innocence.

The issue presented is whether the trial court adequately examined the defendant as to the facts of the crime. In *People* v. *Head* (1971), 31 Mich App 491, it was held that GCR 1963, 785.3(2), MCLA § 768.35 (Stat Ann 1954 Rev § 28.1058); and *People* v. *Barrows* (1959), 358 Mich 267 did not require the

trial judge to obtain from the defendant the facts of the offense. The Court stated at p 496:

"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."

Furthermore, while the inquiry into the facts was minimal the record before us does show a substantial factual basis for the plea. The nature of the offense had been explained to the defendant and he indicated that he wished to plead guilty. The defendant then indicated that the crime occurred at the People's Outfitting Company located in downtown Detroit on December 19, 1969. Thus, the defendant admitted that on December 19, 1969, at the People's Outfitting Company located in downtown Detroit he attempted to possess a credit card with the intent to circulate or sell it without the consent of the cardholder. This constitutes a sufficient factual basis for the plea.

Affirmed.

PEOPLE *v.* DUPREE

1. ARREST—EVIDENCE—CRIME-CONNECTED EVIDENCE—ADMISSIBILITY.

   Articles seized from a defendant upon his arrest may, as a general rule, be admitted into evidence if they may logically connect the defendant with the crime charged.

2. CRIMINAL LAW — EVIDENCE — IMPROPERLY-ADMITTED EVIDENCE — FAILURE TO OBJECT.

   Failure to object to the admission into evidence of a knife taken from the defendant at the time of his arrest for the rape and robbery of the complainant, the arrest occurring ten days after the crimes, precluded review of the question of the knife's admissibility, even though there was no logical connection between the knife taken from the defendant and the crimes charged in that the complainant testified that the knife admitted into evidence was not the knife used by her assailant.

Appeal from Recorder's Court of Detroit, George E. Wicklund, J. Submitted Division 1 September 7, 1971, at Grand Rapids. (Docket No. 10036.) Decided September 28, 1971.

Kenneth J. Dupree was convicted of rape and armed robbery. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur, Searches and Seizures § 19.
29 Am Jur 2d, Evidence §§ 288, 411 *et seq.*

[1] Modern statutes of rule as to validity of non-consensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of arrest and search. 19 ALR3d 727.

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.

Stuart L. Young, for defendant on appeal.

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

PER CURIAM. This is an appeal from a conviction by a jury of rape (MCLA § 750.520 [Stat Ann 1954 Rev § 28.788]) and armed robbery (MCLA § 750.529 [Stat Ann 1971 Cum Supp § 28.797]). Defendant alleges but one error on appeal.

The complainant testified that her assailant forced himself upon her at knife point. At the trial the people introduced into evidence, without objection from the defense, a knife taken from the defendant at the time of his arrest. On subsequent examination of the complainant she testified specifically that the knife introduced as evidence by the people was not the knife used by her assailant. Defendant now alleges that the court erred in allowing this knife to remain in evidence. He bases this objection upon the premise that by associating the defendant with a knife the jury was encouraged to infer that the defendant was a "bad man" whose credibility should therefore be discounted. In this case the jury was faced with the decision of whether to believe complainant's identification of the defendant or defendant's alibi as bolstered by the testimony of his wife and sister.

Generally, articles seized from a defendant following his arrest may be admitted into evidence if they

may logically connect the defendant with the crime charged. *People* v. *Hall* (1969), 19 Mich App 95; *People* v. *Mason* (1971), 29 Mich App 613. In this case there appears to have been no logical connection between the knife seized from defendant ten days after the alleged assault and the crime charged. However, we cannot second-guess the trial tactics of the defense attorney.

Defendant's attorney did not object to the admission of the knife into evidence and his failure to so object precludes review.

Affirmed.

PEOPLE v. GARCIA

1. HOMICIDE—MURDER—MALICE—USE OF DANGEROUS WEAPON—INFERENCE.

Malice may be inferred where death results from a dangerous weapon.

2. CRIMINAL LAW—PLEA OF GUILTY—DEFENSES—COURT'S INQUIRY.

The trial court, before accepting a guilty plea, need not make an exhaustive examination as to possible defenses, even if the testimony of the accused gives some indication that defenses might have been raised at trial, where the defendant is represented by counsel.

Appeal from Van Buren, David Anderson, Jr., J. Submitted Division 3 September 7, 1971, at Grand Rapids. (Docket No. 10151.) Decided September 28, 1971.

Domingo Garcia was convicted, on his plea of guilty, of second-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *William C. Buhl,* Prosecuting Attorney, for the people.

Horace W. Adams, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur 2d, Homicide §§ 265–267.
[2] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

PER CURIAM. Defendant pled guilty to murder in the second degree. CL 1948, § 750.317 (Stat Ann 1954 Rev § 28.549). At the plea hearing, defendant testified that he stabbed deceased with a knife, believing deceased to be unarmed, and that he stabbed with the intent to wound. Portions of defendant's testimony tend to indicate that he was somewhat drunk at the time of the killing and that he and deceased were in a fight. On appeal defendant asserts that the trial court did not make sufficient inquiry into the facts to establish malice and that the trial court should have made inquiry into the possible defenses of self-defense and intoxication.

Where death results from a dangerous weapon, malice may be inferred. *People* v. *Case* (1967), 7 Mich App 217; *People* v. *McKeller* (1971), 30 Mich App 135; *People* v. *Morrin* (1971), 31 Mich App 301. Such inference of the specific intent is a reasonable ascertainment of the truth of the plea. *People* v. *Herbert Sanders* (1970), 28 Mich App 274.

Defendant was represented by counsel at all stages of the proceedings. At no stage of the proceedings, including this appeal, did the defendant assert or claim either of the above-noted defenses. Where defendant is represented by counsel, the trial court need not make exhaustive examination as to the possible defenses, even if the testimony of the accused gives some indication that defenses might have been raised at trial. *People* v. *Edwards* (1970), 27 Mich App 83; *People* v. *Spencer* (1970), 23 Mich App 56. In light of the lack of any positive claim of these defenses, to reverse would exhault form over substance.

Affirmed.

PEOPLE v. WILKINS

CRIMINAL LAW—PHOTOGRAPHIC IDENTIFICATION.

A conviction based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Appeal from Recorder's Court of Detroit, John R. Kirwan, J. Submitted Division 1 September 7, 1971, at Detroit. (Docket No. 10288.) Decided September 28, 1971.

Garfield Wilkins 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 *Frederick R. Doetsch, Jr.,* Assistant Prosecuting Attorney, for the people.

Armand D. Bove, for defendant on appeal.

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

REFERENCES FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 361 *et seq.*

Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures. 39 ALR3d 487.

PER CURIAM. Defendant was convicted by a jury of armed robbery. MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

He was arrested the morning of the robbery on a different charge. At the time of his arrest he had complainant's watch in his possession but did not have complainant's ring. He was not armed. Subsequent to his arrest defendant was identified in a photograph by two witnesses as the man who perpetrated the robbery.

Defendant raises two issues on appeal.

1. Was the admission into evidence of photographs shown to the complaining witnesses after the defendant was in custody and without the presence of the defendant or his attorney reversible error?

2. Did the court err in its instructions to the jury by refusing the defendant's requested charge?

There is no merit to defendant's second issue, since the trial court's instruction, when read as a whole, encompassed defendant's requested instruction.

In *United States* v. *Wade* (1967), 388 US 218, 241 (87 S Ct 1926, 1940, 18 L Ed 2d 1149, 1165), the Supreme Court recited certain elements for determining whether or not there was an independent basis for an in-court identification.

"Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, *the identification by picture of the defendant prior to the lineup,* failure to identify the defendant on a prior occasion, and the lapse of time

between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup." (Emphasis supplied.)

Defendant relies heavily on the case of *United States* v. *Zeiler* (CA 3, 1970), 427 F2d 1305, in applying the principle of *Wade* to pretrial photographic identifications. That case is distinguishable from the present case. Defendant Wilkins was not arrested or in custody for the robbery in question nor had counsel been appointed at time of the identification.

The great weight of authority holds that *Wade* and *Gilbert* v. *California* (1967), 388 US 263 (87 S Ct 1951, 18 L Ed 2d 1178) do not apply to photographic identifications. See *Allen* v. *Rhay* (CA 9, 1970), 431 F2d 1160 and cases cited therein.

Mr. Justice Harlan, speaking for the Court in *Simmons* v. *United States* (1968), 390 US 377, 384 (88 S Ct 967, 971; 19 L Ed 2d 1247, 1253) discussed the issue of photographic identification:

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness

identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identfication procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The record here discloses nothing which could be said to be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification".

Affirmed.

PEOPLE *v.* HAWK

1. RAPE—INCEST—INCLUDED OFFENSES.
   Incest is not a lesser included offense of statutory rape; a *prima facie* case of statutory rape does not, of necessity, include a showing of any consanguinity between the parties, whereas such showing of consanguinity between the parties is essential to a *prima facie* case of incest (MCLA §§ 750.333, 750.520).

2. RAPE—INCEST—INCLUDED OFFENSES—INSTRUCTIONS TO JURY.
   Instructing the jury that incest was a lesser included offense of statutory rape did not constitute reversible error where defendant made no objection to the instruction and the defendant suffered no manifest injustice from the instruction, as shown by the facts that defendant had been charged with statutory rape, the jury had been given the choice of six possible verdicts, and the defendant was found guilty as charged.

Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted Division 1 June 10, 1971, at Detroit. (Docket No. 10324.) Decided September 28, 1971. Leave to appeal denied, 386 Mich 779.

Ardless Hawk was convicted of statutory rape. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,*

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 44 Am Jur, Rape § 17 *et seq.*
41 Am Jur 2d, Incest § 1 *et seq.*
Incest as included within charge of rape. 76 ALR2d 484.

Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Leonard Meyers,* Assistant Prosecuting Attorney, for the people.

William R. Stackpoole, for defendant on appeal.

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

PER CURIAM. Defendant Ardless Hawk was charged with statutory rape (MCLA § 750.520 [Stat Ann 1954 Rev § 28.788]), whereupon he was convicted upon a jury verdict and sentenced to 10 to 20 years in prison. Defendant brings this appeal as of right, asserting instructional error and challenging the sufficiency of the evidence.

Defendant first contends the trial court erroneously charged the jury that incest (MCLA § 750.333 [Stat Ann 1954 Rev § 28.565]) was a lesser and included offense to statutory rape. He is correct. A *prima facie* case of statutory rape does not, of necessity, include a showing of any consanguinity between the parties. Such showing of consanguinity between the parties is, however, essential to a *prima facie* case of incest. Therefore, according to the language of *People* v. *Simpson* (1966), 5 Mich App 479, 486, we hold that incest is not a lesser and included offense to statutory rape.

Though having found error, we judge it not to be reversible. Defendant made no objection to the erroneous instruction and he shows no manifest injustice flowing therefrom. Examination of the instructions as a whole reveals that the jury was given the choice of six possible verdicts, and yet found the defendant guilty as charged.

We find no error in the trial court's instruction regarding the standard of evaluation for credibility

of witnesses. It is the mainstay of the jury function to determine who is truthful and who is not and who, therefore, should be believed.

Defendant contends that insufficient evidence was adduced at trial. His contention is belied by the record. Complainant's testimony not only constituted a *prima facie* case, but clearly revealed understanding of the meaning of the crucial element, "sexual penetration".

No reversible error shown. Affirmed.

PEOPLE *v.* JONES

CRIMINAL LAW—JURY TRIAL—WAIVER.

Defendant's waiver of his right to trial by jury was valid where the waiver was regular on its face and the defendant did not contend that the waiver was not made in open court, that he did not first consult with counsel, or that he was in any way coerced.

Appeal from Recorder's Court of Detroit, Robert J. Colombo, J. Submitted Division 1 September 7, 1971, at Detroit. (Docket No. 10566.) Decided September 28, 1971.

Sim Jones, Jr., was convicted of breaking and entering an unoccupied dwelling house with intent to commit larceny. 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 *Frederick R. Doetsch, Jr.,* Assistant Prosecuting Attorney, for the people.

William R. Stackpoole, for defendant on appeal.

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

REFERENCES FOR POINTS IN HEADNOTE

47 Am Jur 2d, Jury § 72 *et seq.*

Withdrawal of waiver of right to jury trial in criminal case. 46 ALR2d 919.

PER CURIAM. After a nonjury trial the defendant was convicted of breaking and entering an unoccupied dwelling house with intent to commit larceny. MCLA § 750.110 (Stat Ann 1971 Cum Supp § 28.305). He now appeals.

The record contains a written waiver of trial by jury signed by the defendant and his trial counsel. Immediately before the trial began the defendant offered to plead guilty to the offense of larceny in a building.[1] The prosecutor objected and the trial court refused to accept the plea.

The defendant's first contention is that he did not effectively waive his right to trial by jury. He contends that he waived jury trial only for the purpose of offering a plea to the offense of larceny in a building. This contention finds no support in the record. The waiver of jury trial is regular on its face and the defendant does not contend that it was not made in open court, that he did not first consult with counsel, or that he was in any way coerced. In the absence of such a contention the waiver must be considered valid and effective. *People* v. *Woody* (1970), 25 Mich App 627.

The defendant's next contention is that the trial judge erred when he did not disqualify himself after he had refused to accept the guilty plea. The defendant raised no objection to the trial judge hearing the case and he cannot do so for the first time on appeal. *People* v. *Piotrowski* (1966), 4 Mich App 510.

The defendant's final contention is that he was denied effective assistance of counsel. The record does not support this contention.

Affirmed.

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[1] MCLA § 750.360 (Stat Ann 1954 Rev § 28.592).

PEOPLE *v.* CLYNE

1. CRIMINAL LAW—SENTENCES—DEFERRED SENTENCE—PROBATION—SUMMARY HEARING.

   A person granted probation is entitled to a summary hearing before his probation can be revoked; however, a person convicted of a crime is not entitled to a summary hearing where sentencing has only been delayed.

2. CRIMINAL LAW—SENTENCING—DEFERRED SENTENCE—PROBATION.

   Defendant, convicted of a crime, was not placed on probation by the trial court's delaying sentencing for a period of six months and the requirements that the defendant refrain from drinking alcoholic beverages, stay away from bars and taverns, and report weekly to a probation officer, where the requirements were imposed to aid the court's determination whether the defendant would be eligible for probation when the six-month period ended (MCLA §§ 771.1, 771.4).

Appeal from Muskegon, Albert J. Engel, J. Submitted Division 3 September 9, 1971, at Grand Rapids. (Docket No. 10668.) Decided September 29, 1971.

Carol Ann Clyne was convicted, on her plea of guilty, of larceny from the person of another. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 568.
Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 ALR2d 1074.

[2] 21 Am Jur 2d, Criminal Law §§ 525, 562 *et seq.*

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

John C. Ruck, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

PER CURIAM. On April 9, 1970, by her plea of guilty, defendant was convicted of larceny from the person.[1] On June 5, 1970, the trial court delayed the imposition of sentence for a period of six months. MCLA § 771.1 (Stat Ann 1971 Cum Supp § 28.1131). During this period of delay defendant was required: (1) to refrain from drinking alcoholic beverages; (2) to stay away from bars and taverns; and (3) to report each week to a probation officer. On September 28, 1970, defendant was sentenced to a term of 3–1/2 to 10 years.

On appeal, defendant contends: (1) that the trial court, by imposing the above-stated requirements upon her, actually placed her on a probationary status; (2) that, therefore, she was entitled to a summary hearing before the trial court could properly revoke such status; MCLA § 711.4 (Stat Ann 1954 Rev § 28.1134); and (3) that the trial court erred in revoking her probationary status and imposing sentence without affording her a summary hearing.

Although a person who has been granted probation is entitled to a summary hearing before a trial

[1] MCLA § 750.357 (Stat Ann 1954 Rev § 28.589).

court may properly revoke his probation,[2] a person whose sentencing has been delayed is not entitled to such a hearing before the trial court may properly terminate the delay in sentencing.[3]

A review of the record clearly shows that the trial court did not place defendant Clyne on probation, but, in fact, delayed her sentencing for a period of six months.[4] The three requirements which the

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[2] MCLA § 771.4 (Stat Ann 1954 Rev § 28.1134) provides, in pertinent part, as follows:

"All probation orders, therefore, shall be revocable or terminable in any manner which the court which imposed probation shall deem applicable, either for any violation, or attempted violation of any condition of probation, or for any other type of antisocial conduct or action on the part of the probationer which shall satisfy such court that revocation is proper in the public interest. *Hearings on such revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials.* * * * The method of hearing and presentation of charges accorded shall lie entirely within the discretion of the court which granted probation: *Provided, however, that the probationer shall be entitled to a written copy of the charges against him which constitute the claim that he violated his probation, and shall be entitled to a hearing thereon.*" (Emphasis added.)

[3] MCLA § 771.1 (Stat Ann 1971 Cum Supp § 28.1131) provides, in pertinent part, as follows:

"In any case in which the court may place the defendant on probation, it may delay the imposing of sentence of the defendant for a period of not to exceed 1 year for the purpose of giving the defendant an opportunity to prove to the court his eligibility for probation or such other leniency as may be compatible with the ends of justice and the rehabilitation of the defendant. * * * The delay in passing sentence shall not deprive the court of jurisdiction to sentence the defendant at any time during the extended period."

[4] In deciding to delay defendant's sentencing, the trial court said:

"You [defendant Clyne] are not eligible for probation at this time. You simply are not, and I cannot make the necessary finding in your case. Your background is such that I am satisfied you do constitute a danger to the public, and yet I am extremely reluctant to send you back to the Detroit House of Corrections, which is where you would go if you were committed. I know they have good programs there. You have seen them already. The greater challenge is to see what you could do yourself. What I am about to do, and you may not like it, I am about to release you from jail today and I am about to defer your sentence. The law allows a judge to defer a sentence for a period of up to one year where he is uncertain that that person is eligible for probation and wants to give that person an opportunity to prove whether he or she can be eligible for probation. It permits the judge to bring the person back for regular sentencing at any time, notwithstanding the one-year defer-

trial court imposed upon defendant Clyne were reasonably well designed to assist the court in determining whether or not she would be eligible for probation when the six-month period ended.[5] We cannot say that the imposition of such requirements was tantamount to placing defendant on probation.

Affirmed.

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ment. That is what I am going to do in your case. I am going to defer the sentence for a period of six months from this date."

[5] See statutory language of MCLA § 771.1 (Stat Ann 1971 Cum Supp § 28.1131), footnote 3 *supra*.

LAWRENCE *v.* COOK

1. JUDGMENT—DEFAULT JUDGMENT—SETTING ASIDE JUDGMENT.
The four-month limitation governing a motion to set aside a default judgment must be met even though the attorney of the party against whom the default was entered was inexcusably remiss in handling the case (GCR 1963, 520.4).

2. JUDGMENT—DEFAULT JUDGMENT—SEVEN-DAY NOTICE.
Requirement that seven-days notice be given a party who has appeared in an action before a default judgment can be entered against that party is mandatory; a default judgment was set aside where the judgment was entered three days after the date set for trial of the matter and the hearing held thereon, even though the application to set the default aside was not made until over five months after the default was entered (GCR 1963, 520.2[2], 520.4).

Appeal from Hillsdale, Robert W. McIntyre, J. Submitted Division 2 June 16, 1971, at Detroit. (Docket No. 10763.) Decided September 29, 1971.

Complaint by Samuel L. Lawrence and Anna Grimes, coexecutors of the estate of Willington A. Lawrence, and Kathleen Wallace against Vernon Cook, Mattie Cook, and the Hillsdale State Savings Bank, for payment of two promissory notes, to have a deed set aside, and for a judgment on account. Default judgment for plaintiffs. Defendants

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REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur 2d, Judgments § 706.
[2] 47 Am Jur 2d, Judgments §§ 1178, 1179.

Vernon Cook and Mattie Cook appeal. Reversed and remanded.

Emil M. Fry, for plaintiffs Lawrence and Grimes.

Prettie, Parker & Hayes, for plaintiff Wallace.

Charles G. Gibbons, for defendants Cook.

Before: T. M. BURNS, P. J., and HOLBROOK and MCGREGOR, JJ.

PER CURIAM. On January 5, 1970, plaintiffs brought suit against defendants for payment of two promissory notes, to have a deed set aside, and for a judgment on account. Defendants were personally served with a summons and complaint on January 10, 1970.

An appearance was made on defendants' behalf by their attorney on January 23, 1970. The record shows, however, that no answer or any other responsive pleading on behalf of the defendants Cook was ever filed.

After a lapse of five months, during which time nothing was done by defendants' attorney, a default for failure to answer was entered against the defendants. On August 19, 1970, proofs were presented and a judgment was entered on the default against defendants. On August 20, 1970, an amended judgment was filed which corrected certain clerical errors.

On November 3, 1970, defendants by their present attorney filed a motion to have the default set aside. The trial court refused to grant the motion, and defendants then brought this timely appeal.

Although it is apparent that defendants' first attorney was inexcusably remiss in handling this

case, the time requirements contained in GCR 1963, 520.4 must still be met:

"4. Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 528. If personal service was made upon the party against whom the default was taken, it shall not be set aside unless application to have it set aside is made either before the entry of judgment or within *4 months after the default was regularly filed* or entered except as provided in Rule 528." (Emphasis supplied.)

Since the application of the instant case was not made until over five months after the default was entered, it would appear that the application is too late. However, the seven-day notice requirement of GCR 1963, 520.2(2) must also be met:

"In all other cases the party entitled to a judgment by default shall apply to the court therefore; * * * if the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least *7 days prior to the hearing on such application.*" (Emphasis supplied.)

The judgment here was entered only three days after the date set for trial of the matter and the hearing thereon. This Court has held that the above notice requirement is mandatory. *Rhodes* v. *Rhodes* (1966), 3 Mich App 396; *Advance Dry Wall Co.* v. *Wolfe-Gilchrist, Inc.* (1968), 14 Mich App 706.

Since the seven-day notice requirement was not met, it is the opinion of this Court that the judgment below must be reversed. However, since it was not the plaintiffs' fault that defendants' attorney was

inexcusably negligent in handling defendants' case, we quote the following from *Penney* v. *Protective National Insurance Co.* (1970), 24 Mich App 218, 223, as a guide for the trial court:

"We recognize, however, that the plaintiff should not be penalized for the defendants' original selection of an attorney who did not properly represent their interests. They should be obligated to pay counsel fees and costs arising out of the litigation. We recommend as a guide to the trial court the Supreme Court's award in *Walters* v. *Arenac Circuit Judge* (1966), 377 Mich 37, 47."

Reversed and remanded. No costs.

PEOPLE *v.* INGRAM

1. ASSAULT—EVIDENCE—BLOODSTAINED CLOTHING—ADMISSIBILITY—INTENT TO KILL.

   Admitting into defendant's trial for assault with intent to commit murder a blouse and coat, both worn by the victim at the time defendant shot the victim and both bearing bloodstains and bullet holes was not an abuse of discretion, because such evidence could assist the trier of fact in weighing the victim's testimony and in assessing the probability of defendant's suggestion that the location of the wounds indicated an absence of intent to kill.

2. CRIMINAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—COMMENT ON PRIVILEGE.

   A police officer's testimony, during cross-examination, that defendant had stated at the time of his arrest that he did not want to make any statements and wanted to talk to an attorney did not violate defendant's constitutional or statutory rights.

3. CRIMINAL LAW — DEFENSES — INTOXICATION — INSTRUCTIONS TO JURY — INTENT.

   Giving the standard instruction regarding intoxication applicable to a general intent crime, followed by the standard instruction regarding intoxication as a defense to specific intent crimes was not prejudicially confusing and misleading where the jury could have convicted defendant of one of two crimes, one requiring general intent, the other specific intent, because it was essential for the trial judge to instruct regarding the role of intoxication as a defense to each type of crime.

REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur 2d, Homicide §§ 411–413.
Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing. 68 ALR2d 903.
[2] 21 Am Jur 2d, Criminal Law § 356.
[3] 21 Am Jur 2d, Criminal Law §§ 81, 82, 107, 108.

Appeal from Kalamazoo, Lucien F. Sweet, J. Submitted Division 3 September 7, 1971, at Grand Rapids. (Docket No. 10817.) Decided September 29, 1971.

Ed Ingram 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, *Donald A. Burge,* Prosecuting Attorney, and *Robert P. Holman,* Assistant Prosecuting Attorney, for the people.

Peter W. Hirsch, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

PER CURIAM. Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder. MCLA § 750.84 (Stat Ann 1962 Rev § 28.279).

On the night of February 7, 1970, defendant shot and wounded his girl friend four times, outside a residence in Kalamazoo, Michigan. Defendant maintained at trial that he was too inebriated to form the specific intent requisite for conviction of the crime charged.[1] Defendant now assigns the following allegations of error:

(1) The trial court erred in admitting into evidence clothing worn by the victim, which bore bloodstains and bullet holes.

(2) Defendant was prejudiced by the testimony of a police detective that defendant did not want to

[1] Assault with intent to commit murder. MCLA § 750.83 (Stat Ann 1962 Rev § 28.278).

make any statements and wanted to talk to an attorney.

(3) The trial court's instructions regarding intoxication as a defense were prejudicially confusing and misleading.

Over defendant's objection, the trial judge received into evidence a blouse and coat, both worn by the victim at the time of the shooting, and both of which bore bloodstains and bullet holes. We do not agree that these exhibits are gruesome and inflammatory, as defendant contends. Such evidence could assist the trier of fact in weighing the victim's testimony and in assessing the probability of defendant's suggestion that the location of the wounds indicated an absence of intent to kill. See *People* v. *Wright* (1891), 89 Mich 70; *People* v. *Becker* (1942), 300 Mich 562. Admission of evidence, objected to as prejudicial and inflammatory, is within the trial court's discretion. *People* v. *Eddington* (1970), 23 Mich App 210. The facts and circumstances of this case indicate no abuse of this discretion.

During cross-examination by defendant's attorney, a police detective testified that defendant "didn't want to make any statements. He said he wanted an attorney." We find no violation of defendant's constitutional or statutory rights as a result of this testimony and, since no objection was made at trial, the issue is not preserved for review. *People* v. *Webb* (1968), 13 Mich App 625; *People* v. *Matthews* (1970), 22 Mich App 619; *accord, United States* v. *Dolleris* (CA 6, 1969), 408 F2d 918, *cert den* 395 US 943 (89 S Ct 2014, 23 L Ed 2d 461). Furthermore, since the effect of the challenged testimony is insignificant when compared with the great weight of evidence against defendant, the principles

enunciated in *People* v. *Degraffenreid* (1969), 19 Mich App 702, are inapplicable here.

Defendant's final claim of error is that the trial court stated the standard instruction regarding intoxication applicable to a general intent crime, followed by standard instructions regarding intoxication as a defense to formation of specific intent in crimes requiring such intent. Defendant alleges that the juxtaposition of these instructions was prejudicially confusing and misleading.

Since the jury could have convicted defendant of a crime requiring either general or specific intent, it was essential for the trial judge to instruct regarding the role of intoxication as a defense to each type of crime. An appellate court considers the entire charge in reviewing alleged errors in the instructions. *People* v. *Fred W. Thomas* (1967), 7 Mich App 519. A careful perusal of the entire charge reveals that the trial judge explicitly instructed the jury regarding the proper role of intoxication as a defense to each specific intent crime of which conviction was possible. There was no error.

Affirmed.

PEOPLE *v.* DAVIS

AUTOMOBILES—DRIVING AWAY AUTOMOBILE OF ANOTHER—INTENT.

Intent to steal is not an element of the crime of unlawfully driving away an automobile of another.

Appeal from Recorder's Court of Detroit, Andrew L. Wood, J. Submitted Division 1 August 31, 1971, at Lansing. (Docket No. 10881.) Decided September 29, 1971.

Kenneth Davis was convicted of possessing a motor vehicle known to be stolen and unlawfully driving away the automobile of another. Defendant appeals. Reversed as to the conviction of possessing a motor vehicle known to be stolen; affirmed as to the conviction of unlawfully driving away the automobile of another.

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.

M. John Shamo, for defendant on appeal.

Before: DANHOF, P. J., and MCGREGOR and QUINN, JJ.

REFERENCE FOR POINTS IN HEADNOTE

7 Am Jur 2d, Automobiles and Highway Traffic § 304.

PER CURIAM. The defendant was convicted after a bench trial of possessing a motor vehicle known to be stolen, MCLA § 257.254 (Stat Ann 1968 Rev § 9.1954), and unlawfully driving away the automobile of another, MCLA § 750.413 (Stat Ann 1954 Rev § 28.645). He was sentenced to a term of four to ten years in prison on the first count and four to five years on the second count, to run concurrently.

The defendant's reliance on *People* v. *Morton* (1970), 384 Mich 38, is sound. The people concede the case is controlling, that there was no evidence of intent to transfer title, and that the conviction of possession of a motor vehicle known to be stolen should be reversed.

There was sufficient evidence to sustain the defendant's conviction of unlawfully driving away the automobile of another. Intent to steal is not an element of the offense. *People* v. *Stanley* (1957), 349 Mich 362; *People* v. *Limon* (1966), 4 Mich App 440.

The defendant's conviction on the first count is reversed. The motion to affirm the defendant's conviction on the second count is granted. Resentencing is not required. The case is remanded for further proceedings consistent with this opinion.

PEOPLE *v.* RUFFIN

1. CRIMINAL LAW—APPEAL AND ERROR—PRESERVING QUESTION.
   The Court of Appeals does not consider objections raised for the first time on appeal in a criminal case in the absence of manifest injustice.

2. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESS—NONPRODUCTION—MANIFEST INJUSTICE.
   A conviction need not be reversed in a criminal case where the prosecution knew that a *res gestae* witness would not be available for trial and failed to notify the defense of this fact, no request for a continuance was made by the defense so that the defendant might try to locate the witness when it first learned of this, no objections were made, and where the record establishes that there has been no miscarriage of justice.

Appeal from Recorder's Court of Detroit, Geraldine Bledsoe Ford, J. Submitted Division 1 September 7, 1971, at Detroit. (Docket No. 10903.) Decided September 29, 1971. Leave to appeal denied, 387 Mich 755.

Willie J. Ruffin 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.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 545.
[2] 21 Am Jur 2d, Criminal Law §§ 328, 345 *et seq.*

Burton L. Borden, for defendant on appeal.

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

PER CURIAM. Defendant was convicted by a jury of armed robbery, MCLA 750.529; MSA 28.797, and sentenced to a term of not less than 8 nor more than 15 years in prison. It was alleged at trial that the defendant robbed, at gunpoint, two attendants of a gas station. Defendant appeals as of right from his conviction and sentence. The following two issues are raised on appeal: (1) Were the trial court's instructions adequate? (2) Was the defendant denied a fair trial when the prosecution failed to notify defendant prior to trial that a *res gestae* witness would not be produced?

The detective in charge of the case testified in the presence of the jury that he attempted to locate Edward Dew, one of the two gas station attendants above referred to. The detective stated he went to Dew's home and there was no response to his knock. He left a business card and a note which advised Dew of the purpose of his call and requested Mr. Dew to phone him. The officer also testified that he checked with the post office department to see if there was a new address. The last time that the witness attempted to locate Mr. Dew was approximately 26 days prior to trial, although several attempts had been made prior to this time to locate the witness. In the absence of the jury the trial court advised the prosecuting attorney that this was not a sufficient showing for the non-production of the missing witness. The trial court charged the jury on this issue as follows:

"Now, one of the *res gestae* witnesses here, Eddie Dew, was not produced. If you find that the people

have not made a reasonable effort to produce him, you may infer that the testimony was not favorable to the state. But, if you find a reasonable effort to produce him was made, then you may not draw any inferences at all from his non-appearance in this case."

Following the instruction to the jury, the trial court asked both counsel if there were any omissions that they would like to call to the court's attention. Defendant's attorney stated: "No, I have none".

In the absence of manifest injustice, we do not consider objections raised for the first time on appeal. *People* v *Pearson,* 24 Mich App 270 (1970). Additionally, defendant failed to fulfill the requirements of GCR 1963, 516.2, by objecting to the failure to give an instruction. Defendant's basic objection is not directed to that charge as given by the court but his contention is that the charge did not adequately explain to the jury what efforts must be made by the prosecution to produce a *res gestae* witness.

Defendant's second argument is to the effect that if the prosecution had notified defendant in advance of trial that the witness could not be produced, the defense would have made their own effort to produce the witness. At trial defendant did not request a continuance in order that he might exert his own efforts to locate and serve with subpoena the missing witness. This would appear to be either an afterthought on the part of the defense or a trial tactic. From our examination of the record of the entire cause it does not affirmatively appear that the error complained of has resulted in a miscarriage of justice,* and we, therefore, affirm.

Affirmed.

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* MCLA 769.26; MSA 28.1096.

PEOPLE *v.* WANZER

CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWING PLEA.

Denial of defendant's motion to withdraw his plea of guilty was not an abuse of discretion where the affidavit in support of the motion did not state facts, which, if true, would substantiate the claim that defendant's plea was not freely, voluntarily, and understandingly made and where there was no other substantiating affidavit nor any other evidence of any kind offered at the hearing on the motion.

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 August 31, 1971, at Grand Rapids. (Docket No. 11039.) Decided September 29, 1971. Leave to appeal denied, 386 Mich 786.

Kenneth Wanzer was convicted, on his plea of guilty, of attempt to utter and publish. 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.

Edward Malinzak, for defendant on appeal.

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

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 484 *et seq.*

PER CURIAM. The defendant and a codefendant were charged with forgery and uttering and publishing. On the day set for trial, the information was amended to add a third count of attempt to utter and publish, MCLA § 750.92 (Stat Ann 1962 Rev § 28.287) and MCLA § 750.259 (Stat Ann 1962 Rev § 28.446), to which the defendant and his codefendant pled guilty. Three and one-half months after the sentencing the defendant filed a motion to withdraw the plea and his affidavit in support thereof. A hearing was held and the motion was denied.

The affidavit contained unspecific allegations and did not state facts, which if true, would substantiate the defendant's claim that the plea was not freely and voluntarily and understandingly made. *People* v. *James Smith* (1970), 27 Mich App 650 and *People* v. *Winegar* (1968), 380 Mich 719. Further, this Court is not impressed by the recanting statements of witnesses who claim they perjured themselves. *People* v. *Jimmerson* (1971), 30 Mich App 147.

The defendant was not denied an evidentiary hearing. *Cf. People* v. *Doster* (1970), 25 Mich App 169 and *People* v. *Jones* (1971), 385 Mich 288. Before denying the motion, the court commented on the fact that there was no other substantiating affidavit of any kind or any other evidence of any kind offered at the hearing. This Court will not consider the affidavit of the codefendant because it was not before the trial court. See *People* v. *Barron* (1970), 27 Mich App 379.

There was no abuse of the trial court's discretion in denying the motion to withdraw guilty plea. *People* v. *Sylvester Johnson* (1970), 25 Mich App 258. The issue raised is so unsubstantial as to require no argument or formal submission. The motion to affirm is granted.

PEOPLE *v.* BUKOSKI

CRIMINAL LAW—PROSECUTOR'S COMMENT—APPEAL AND ERROR—PRESERVING QUESTION.

The failure of defense counsel to object to the prosecutor's improper statement in closing argument that certain facts were uncontroverted barred appellate review where the error could have been cured by an instruction upon timely objection.

Appeal from Huron, Arthur M. Bach, J. Submitted Division 2 September 7, 1971, at Grand Rapids. (Docket No. 11045.) Decided September 29, 1971.

Robert Bukoski, John Bukoski, and Thomas Bukoski were convicted of obstructing a police officer while attempting to perform his duty. Defendants appeal. Motion to affirm granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Peter B. Capling,* Prosecuting Attorney, for the people.

Marshall L. Wilson, for defendants on appeal.

Before: FITZGERALD, P. J., and R. B. BURNS and HOLBROOK, JJ.

REFERENCE FOR POINTS IN HEADNOTE

4 Am Jur 2d, Appeal and Error §§ 541, 624 *et seq.*

PER CURIAM. Defendants were jointly tried before a jury and convicted on the charge of obstructing a police officer while attempting to perform his duty.[1] The defendants were sentenced to pay a $100 fine and $50 in court costs. Also, each of the defendants was placed on a one-year term of probation, the first 30 days of that period to be served in the county jail. A timely claim of appeal was filed and by order of the circuit court judge, an appeal bond was granted. The people have filed a motion to affirm the convictions and sentences.

The sole issue raised by the defendants is that the prosecutor committed reversible error when he represented facts contained in his closing argument as being "uncontroverted". This issue is without merit because the defense counsel at no time objected to the statement of the prosecutor. In *People* v. *Humphreys* (1970), 24 Mich App 411, 414, 415, we said:

"A conviction will not be reversed, however, if by failing to object, the defendant has allowed the impact of the prosecutor's remarks to go uncountered by an instruction. *People* v. *David Smith* (1969), 16 Mich App 198. The defendant will not be heard to complain of an error that could have been cured upon timely objection."

It is clear that the foregoing allegation of error could have been cured by a timely instruction and was not otherwise prejudicial.

The motion to affirm is granted.

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[1] MCLA § 750.479 (Stat Ann 1954 Rev § 28.747).

PEOPLE v. DANIELS

1. CRIMINAL LAW — LINEUP — ABSENCE OF COUNSEL — PRESERVING QUESTION.

The constitutionality of a lineup, held without affording defendant his right to counsel, cannot be raised for the first time on appeal; any objection to such a lineup must first be made in the trial court.

2. CRIMINAL LAW—LINEUP—ABSENCE OF COUNSEL—RAISING ISSUE.

Trial court was not obligated to hold an evidentiary hearing regarding the constitutionality of a lineup where trial counsel, although knowing that the lineup was possibly constitutionally defective, failed to raise the constitutional issue in the trial court.

Appeal from Recorder's Court of Detroit, Elvin L. Davenport, J. Submitted Division 1 September 7, 1971, at Grand Rapids. (Docket No. 11318.) Decided September 29, 1971. Leave to appeal denied, 386 Mich 780.

Patrick Daniels was convicted of breaking and entering a business establishment with intent to commit larceny. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error §§ 517, 602.
Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures. 39 ALR3d 487.
[2] 53 Am Jur, Trial § 132 *et seq.*
21 Am Jur 2d, Criminal Law § 368.

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

James D. Murphy, Jr., for defendant on appeal.

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

PER CURIAM. Defendant was convicted by a jury of breaking and entering a business establishment with intent to commit larceny. MCLA § 750.110 (Stat Ann 1971 Cum Supp § 28.305). He was sentenced to a term of five to ten years. He appeals following the grant of an application for delayed appeal.

The defendant and two other men were observed by an eyewitness carrying packages and boxes from a party store adjacent to the eyewitness's apartment. The lighting was sufficient for the witness to observe that the men were not the owners of the store and therefore the witness called the police. When the police officers arrived the witness gave them a detailed description of the men she had observed. The witness then spotted the men and pointed them out to the police officers. The police officers gave chase and eventually arrested the men. They returned them to the scene of the crime at which point the witness recognized the defendants as those who had perpetrated the crime. The witness testified that later in the day she was taken to police headquarters and observed these men in a lineup. The police attempted to refute this testimony through testimony of the two detectives assigned to the case and the lack of a lineup record in the police file on

the case. If a lineup was, in fact, held, no counsel was afforded for any of the defendants.

The testimony concerning the alleged lineup became apparent to the defendant's counsel for the first time at the trial. No objection, however, was made to the constitutionality of the lineup held without the aid of counsel for the defendant. Now for the first time on appeal the defendant challenges the lineup procedure as being constitutionally defective. He also challenges the failure of the trial court to conduct a hearing as to the constitutionality of the lineup. Finally, the defendant challenges the verdict as not being supported by the evidence.

It is settled law in Michigan that when it appears that a lineup has been held without affording to the defendant the right to counsel at such lineup and no objection to this procedure is made at the trial court, then the objection when raised for the first time on appeal is made too late. *People* v. *Childers* (1969), 20 Mich App 639; *People* v. *McClendon* (1970), 21 Mich App 142; *People* v. *McLaughlin* (1970), 25 Mich App 211; *People* v. *Rowls* (1970), 28 Mich App 190. Likewise, in *People* v. *Childers, supra,* the procedure for raising such constitutional issues is set out and it is clearly the duty of trial counsel to raise the constitutional issue. If such constitutional issue is raised in the trial court, the trial court is then obligated to hold a hearing as to the constitutional question. No such objection being made in this case, the court was not obliged to conduct such a hearing. Finally, evidence clearly shows that the defendants had been described and identified immediately after the policemen arrived at the scene of the crime. They were arrested and returned to the scene of the crime at which time the witness again identified the men as the perpetrators of the crime. This was sufficient basis to allow the in-court

identification of the defendant and his codefendant by the witness. It cannot be said that the jury verdict was contrary to the evidence here.

Affirmed.

PEOPLE *v.* VAN BRAGT

1. CRIMINAL LAW—PLEA OF GUILTY—MOTION TO WITHDRAW.

   A motion to withdraw a plea of guilty must be based upon a miscarriage of justice where the motion to withdraw was made after conviction and sentence.

2. CRIMINAL LAW—PLEA OF GUILTY—NONSUPPORT—BOND—ADVISING DEFENDANT.

   Trial judge's failure to inform a defendant, who pled guilty to family nonsupport, that the nonsupport statute provided for the posting of bond was not reversible error where defendant did not make an attempt to post bond, defendant did not claim to have attempted to post bond, and defendant did not claim that he would have entered into such a bond arrangement had he been advised of the statutory bonding provision (MCLA § 750.161).

Appeal from Ottawa, Raymond L. Smith, J. Submitted Division 3 September 7, 1971, at Grand Rapids. (Docket No. 11420.) Decided September 29, 1971.

Robert Van Bragt was convicted, on his plea of guilty, of nonsupport. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Calvin L. Bosman,* Prosecuting Attorney, for the people.

REFERENCE FOR POINTS IN HEADNOTE

[1, 2] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

Donald H. Hann, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

PER CURIAM. The defendant pleaded guilty to a charge of nonsupport in violation of MCLA § 750-.161 (Stat Ann 1962 Rev § 28.358) in the Circuit Court of the County of Ottawa on April 27, 1970. He alleges as error the failure of the trial judge to inform him that the violated statute has provisions for the posting of bond, after the granting of which the trial court, in its discretion, could grant probation. On January 7, 1971, the defendant made a motion that he be allowed to withdraw his guilty plea, and a new trial be granted. The trial court refused to grant the motion, and the defendant appeals that denial.

When first made, after conviction and sentence, a motion to withdraw a guilty plea is within the discretion of the trial court, *People* v. *Vasquez* (1942), 303 Mich 340, and must be based upon a miscarriage of justice. *People* v. *Collins* (1968), 380 Mich 131; *People* v. *Winegar* (1968), 380 Mich 719. In this case no such miscarriage is present.

While the provisions of MCLA § 750.161 (Stat Ann 1962 Rev § 28.358) may require that the defendant post a bond to insure the support of those he is obliged by law to support, that provision is irrelevant to the issue of guilt. See *People* v. *Stickle* (1909), 156 Mich 557.

The same statute that defines the crime for which the defendant pleaded guilty, also provides that the granting of probation is within the discretion of the trial court. The trial judge found that:

"And Mr. Van Bragt has had such a history with this court and with the probation department of

failure to support one or more of his families, that the court would not have taken his word that he would perform under probation."

There is no record of an attempt by the defendant, nor is there a claim by the defendant that he attempted, to enter into bond to the People of the State of Michigan, for the support of his minor children, nor is there any claim by defendant that he would have entered into such a bond arrangement had he been advised of the provision under the statute.

The trial court has, upon a conviction under this statute, complete discretion on the penalty to be imposed not to exceed three years in the state prison. We do not have supervisory control over a sentence properly imposed. *People* v. *Pate* (1965), 2 Mich App 66; *People* v. *Doran* (1967), 6 Mich App 86; *People* v. *Poole* (1967), 7 Mich App 237.

Affirmed.

PEOPLE *v.* SMITH

1. NEW TRIAL—MOTION—WEIGHT OF EVIDENCE.

The issue of the weight of the evidence must first be presented to the trial court by a motion for a new trial; absent a motion for a new trial, the discretionary power of the court has not been invoked and, therefore, there cannot have been an abuse of discretion.

2. BURGLARY—POSSESSION OF BURGLAR TOOLS—AUTOMOBILES—CAR TRUNK—DEPOSITORY.

The trunk of a motor vehicle is a depository within the meaning of the statute making it illegal to possess burglar tools adopted to breaking open any building, room, vault, safe, or *other depository,* because an automobile trunk is clearly a place where things are deposited or stored for safekeeping or convenience, and as such is within the scope of the statute (MCLA § 750.116).

Appeal from Recorder's Court of Detroit, Daniel J. Van Antwerp, J. Submitted Division 1 September 7, 1971, at Grand Rapids. (Docket No. 11456.) Decided September 29, 1971.

Andrew Smith was convicted of possession of a burglar tool and attempted breaking and entering of a motor vehicle. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur 2d, New Trial § 14 *et seq.*
[2] 13 Am Jur 2d, Burglary §§ 61, 74–77.
Validity, construction and application of statutes relating to burglars' tools. 33 ALR3d 798.

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.

Burton L. Borden, for defendant on appeal.

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

PER CURIAM. The defendant was convicted, after a non-jury trial, of possession of a burglar tool (ground and filed channel lock pliers), MCLA § 750.116 (Stat Ann 1962 Rev § 28.311) and attempted breaking and entering of a motor vehicle for the purpose of stealing, MCLA § 750.356a (Stat Ann 1954 Rev § 28.588[1]) and MCLA § 750.92 (Stat Ann 1962 Rev § 28.287).

On appeal the defendant has raised two issues. First, he argues that the evidence against him was purely circumstantial and that it was insufficient to prove him guilty beyond a reasonable doubt of the crime of attempted breaking and entering a motor vehicle for the purpose of stealing.

The issue of the weight of the evidence must first be presented to the trial court by a motion for a new trial. No such motion having been filed in this case, the discretion of the trial court was not invoked. There being no exercise of discretionary power, there is nothing for this Court to review to determine if there was any abuse of discretion. *People* v. *Paintman* (1970), 28 Mich App 590; *People* v. *Hearndon* (1971), 31 Mich App 113. From our review of the record we conclude that there was sufficient evidence to support a conviction.

The defendant's other issue is whether the possession of a burglar tool adapted for use in breaking into the trunk of a motor vehicle is within the statute making it illegal to possess burglar tools adapted to breaking open "any building, room, vault, safe or other depository." The defendant argues that the trunk of a motor vehicle is not a building, room, vault, safe, or other depository within MCLA § 750.116 (Stat Ann 1962 Rev § 28.311), and therefore the statute does not apply in this case.

MCLA § 750.116 (Stat Ann 1962 Rev § 28.311) reads:

"Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool or implement, device, chemical or substance, adapted and designed for cutting or burning through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years."

This question is one of statutory construction. Can the trunk of a car be considered included in the words "other depository?" No Michigan case in point has been found. The language "any building, room, vault, safe or other depository" was added to a former act in 1867, some years before the burglary of motor vehicle trunks became a social problem. *People* v. *Howard* (1888), 73 Mich 10. The applicable definition of the word "depository" in Webster's Third New International Dictionary (p 606) is "a place where something is deposited or stored (as for safekeeping or convenience)".

Essentially the same question of statutory construction has been raised in three cases in other states. In each case the courts held that the words "other depository" did include locked cars or the trunks of motor vehicles. The three cases are *Commonwealth* v. *Tilley* (1940), 306 Mass 412 (28 NE2d 245); *State* v. *Klein* (1966), 91 NJ Super 509 (221 A2d 550); and *Greene* v. *State* (Fla App, 1970) 237 So 2d 46.

In the *Tilley* case, the statute involved was first enacted in 1853. The court recognized that automobiles were not in use at that time and consequently the legislature could not have had automobile trunks in mind when enacting the statute. Nevertheless, the court held that the statute was framed in general terms and could include conditions in the future not even known at the time of the enactment if they were fairly within the meaning of the words and within the obvious scope and purpose. The *Tilley* case was cited the next year by the United States Supreme Court for the proposition that while a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope. *Browder* v. *United States* (1941), 312 US 335 (61 S Ct 599, 85 L Ed 862).

The *Klein* case, *supra,* involves a locked car rather than a locked car trunk. The court summarily disposed of Mr. Klein's argument that an automobile was not included in the language of the statute by stating, p 513:

"Common sense dictates that the statute includes a locked automobile as an 'other depository'."

The *Greene* case, *supra,* again involved a locked car trunk. That court also considered the argument based on the fact that the statute involved was adopted before automobiles were invented. Rely-

ing on the *Tilley* case, *supra,* the court held that an automobile trunk was a depository within the meaning of the pertinent criminal statute.

While the *Tilley, Klein,* and *Greene* cases are not controlling authority in this state, we too are convinced that the trunk of a motor vehicle is included in the words "other depository" as used in the statute in question. An automobile trunk is clearly a place where things are deposited or stored for safekeeping or convenience and as such we hold that it is within the scope and purpose of the statute.

Affirmed.

SCHMIDT *v.* SCHMIDT

DIVORCE—ALIMONY IN GROSS—MODIFICATION OF JUDGMENT.

A court cannot amend or modify a judgment of divorce to reduce or eliminate the payment of alimony in gross provided by the original judgment except on a showing of fraud.

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 September 7, 1971, at Lansing. (Docket No. 11985.) Decided September 29, 1971. Leave to appeal denied, 386 Mich 774.

Complaint by Treva Schmidt against Louis J. Schmidt for divorce. Judgment for plaintiff. Motion by defendant seeking modification of the divorce judgment to eliminate the alimony provision dismissed. Defendant appeals. Affirmed.

Porter, Day & Sawdey, for plaintiff.

Dunn & Dunn, for defendant.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

PER CURIAM. Defendant appeals the dismissal of his motion to amend the alimony provision of a judgment of divorce. The parties were divorced in May 1967, by a judgment which awarded plaintiff alimony of $75,000 to be paid in 125 monthly pay-

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REFERENCE FOR POINTS IN HEADNOTE

24 Am Jur 2d, Divorce and Separation § 675.

ments of $600 each, commencing on June 10, 1967. Defendant filed the present action on February 5, 1971, seeking amendment of the divorce judgment to eliminate the monthly payments, alleging a change in his financial circumstances.

Plaintiff has filed a motion to dismiss or affirm on the ground that the appeal does not present a substantial question. Defendant has filed a motion for reduction of alimony pending appeal.

The trial court correctly ruled that it could not amend or modify the judgment of divorce to reduce or eliminate the payment of alimony in gross provided by the original judgment. *Edgar* v. *Edgar* (1962), 366 Mich 580; *Kutchai* v. *Kutchai* (1926), 233 Mich 569. The courts cannot modify such an alimony in gross provision embodied in a final judgment except on a showing of fraud. *Ferrera* v. *Ferrera* (1969), 16 Mich App 661, 662; *Edgar* v. *Edgar, supra.* Defendant does not allege fraud. Defendant's complaint failed to state any ground for relief and was properly dismissed.

We find that the question presented is unsubstantial and requires no argument or formal submission. Defendant's motion for reduction of alimony is denied for lack of jurisdiction.

Affirmed.

MEMORANDUM OPINIONS

PEOPLE *v.* RONALD BROWN. Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted Division 1 August 31, 1971, at Detroit. (Docket No. 9647.) Decided September 30, 1971.

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

Robert E. McCall, for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

PER CURIAM. The defendant was convicted by a jury of knowingly accepting money without consideration from the earnings of a prostitute. MCLA § 750.457 (Stat Ann 1954 Rev § 28.712). He was sentenced to a term of 3–20 years in prison.

The defendant questions the constitutionality of the statute on the basis that the phrase "without consideration" is too vague, and he also attacks the jury instruction which permitted the jury to consider whether the consideration bore a reasonable relationship to the value of the goods and services.

On the authority of *People* v. *Hill* (1971), 32 Mich App 404, we hold that the issues raised are without merit. See also *People* v. *Jackson* (1937), 280 Mich 6. No argument or formal submission is required.

The motion to affirm is granted.

PEOPLE *v.* HEMINGWAY. Appeal from Recorder's Court of Detroit, Robert L. Evans, J. Submitted Division 1 September 14, 1971, at Lansing. (Docket No. 9792.) Decided September 30, 1971.

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.

A. Ross MacEwen, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

MEMORANDUM OPINION. Defendant was convicted in Detroit Recorder's Court by a judge sitting without a jury of possession of marijuana and appeals as of right. The people move to affirm the conviction.

Upon study of the briefs and records, it is manifest that the issue raised on appeal is so unsubstantial as to need no argument or formal submission.

Accordingly, the motion to affirm is granted.

PEOPLE *v.* MICHAEL WILLIAMS. Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 September 7, 1971, at Grand Rapids. (Docket No. 10228.) Decided September 30, 1971.

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. Neenan, for defendant on appeal.

Before: FITZGERALD, P. J., and R. B. BURNS and HOLBROOK, JJ.

MEMORANDUM OPINION. Defendant, while represented by counsel, pled guilty to assault with intent to rob being armed and was sentenced to a term of 7-1/2 to 15 years imprisonment. Defendant's post-sentence motion to withdraw his guilty plea and for new trial was denied. Defendant contends on appeal that his plea of guilty was not freely and voluntarily given because it was offered on defendant's "mistaken belief" that the trial court would be lenient in sentencing him.

From an examination of the transcript of defendant's plea of guilty it is manifest that the question presented on appeal is so unsubstantial as to warrant no argument or formal submission.

Accordingly, the people's motion to affirm is granted.

PEOPLE *v.* HARRIS. Appeal from Recorder's Court of Detroit, Geraldine Bledsoe Ford, J. Submitted Division 1 September 7, 1971, at Lansing. (Docket No. 10832.) Decided September 30, 1971.

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.

Carl Ziemba, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

MEMORANDUM OPINION. Defendant was convicted by a Recorder's Court jury of robbery armed and appeals as of right. The people move to affirm the conviction.

Upon the study of the briefs and records, it is manifest that the issue raised on appeal is so unsubstantial as to need no argument or formal submission.

Accordingly, the motion to affirm is granted.

PEOPLE *v.* SQUIRES. Appeal from Recorder's Court of Detroit, Frank G. Schemanske, J. Submitted Division 1 September 14, 1971, at Grand Rapids. (Docket No. 11264.) Decided September 30, 1971.

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

Charles Rubinoff, for defendant on appeal.

Before: FITZGERALD, P. J., and R. B. BURNS and HOLBROOK, JJ.

MEMORANDUM OPINION. Defendant was convicted by the court sitting without a jury of larceny from the person. Defendant was placed on three years probation, the first six months to be served in the Detroit House of Correction. Defendant was at all times represented by counsel.

Defendant appeals as of right. The people have filed a motion to affirm the conviction and sentence.

Upon study of the briefs and records, it is manifest that the issues raised on appeal are so unsubstantial as to need no argument or formal submission.

Accordingly, the motion to affirm is granted.

PEOPLE *v.* ROBERT THOMAS

1. CRIMINAL LAW—LINEUP—RIGHT TO COUNSEL—WAIVER OF COUNSEL.

   A lineup conducted without the presence of counsel and without a waiver of counsel by the defendant himself violates the defendant's constitutional right to counsel at this stage of the proceedings and is, therefore, illegal.

2. CRIMINAL LAW—LINEUP—RIGHT TO COUNSEL—ATTORNEY'S REFUSAL TO ATTEND—WAIVER OF COUNSEL.

   A lineup conducted without the presence of the attorney retained to represent the defendant and without a waiver of counsel by the defendant himself was illegal even though the defendant's attorney refused an invitation by the police to attend the lineup.

3. CRIMINAL LAW—LINEUP—ILLEGAL LINEUP—EVIDENTIARY HEARING.

   An evidentiary hearing was required on the issue whether an in-court identification of the defendant was of an origin independent of a prior lineup identification even though no request for an evidentiary hearing was made in the trial court where the lineup was illegal in that defendant did not have counsel at the lineup and defendant himself had not waived counsel.

4. CRIMINAL LAW—LINEUP—ILLEGAL LINEUP—APPEAL AND ERROR—EVIDENTIARY HEARING.

   A failure by the defendant to object in the trial court to an illegal pre-trial identification lineup does not preclude ap-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 313, 368.
[3] 53 Am Jur, Trial § 132 *et seq.*
21 Am Jur 2d, Criminal Law § 368.
[4] 53 Am Jur, Trial § 132 *et seq.*
5 Am Jur 2d, Appeal and Error § 545 *et seq.*

pellate review of the issue; a full evidentiary hearing at the trial level focused on the identification procedure is generally required and an appellate court may not attempt such a determination on the record made in connection with the trial.

Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted Division 1 June 9, 1971, at Detroit. (Docket No. 5501.) Decided October 1, 1971.

Robert Thomas, Jr., was convicted of first-degree murder. Defendant appeals. Remanded.

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

Irving Tukel, for defendant on appeal.

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

LEVIN, P. J. Robert Thomas, Jr. was convicted by a jury of first-degree murder.[1]

In March, 1967, the victim was shot in his automobile by the driver of another automobile after an altercation concerning the right of way. There was some horn blowing and name calling, and several shots were fired by the assailant who was driving a blue Buick automobile.

Jerry Henry testified that shortly before the shooting, at a point six or seven blocks from the

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

place where the shooting occurred, he encountered the defendant armed with a pistol driving a blue Buick toward the scene of the shooting. Henry identified the defendant from a police photograph.

Over five months later the defendant's picture was printed in a newspaper along with an article entitled, "Clues Put Police on Trail of Traffic Murderer". Andrew Smith testified that he saw the article and the defendant's picture. He was the only witness who said he could identify the defendant as the person who shot the victim.

A few days after the news story, the defendant surrendered to the authorities and a lineup attended by both Henry and Smith was held. Both identified the defendant as the driver of the blue Buick. A lawyer retained by the defendant's uncle refused a police invitation to attend the lineup and the defendant was not represented by counsel when it was held.

At the trial both Henry and Smith made in-court identifications and testified regarding the lineup identifications. Smith testified that before the lineup he was shown a number of photographs, including the defendant's. In response to the question, "Before you attended that showup, they showed you these pictures?" Smith responded, "Well, at the same time I saw his picture in the paper that's the reason I knowed him". On rebuttal, a police officer said Smith was not shown photographs until after the lineup.

We agree with the defendant's appellate counsel that the defendant's *Wade*[2] rights were violated when a lineup was conducted without counsel pres-

2 *United States* v. *Wade* (1967), 388 US 218 (87 S Ct 1926, 18 L Ed 2d 1149).

ent and the defendant had not personally waived counsel.[3]

Although the defendant's trial lawyer did not ask for an evidentiary hearing on the question whether the in-court identification was tainted by the photographic and lineup identifications, we are satisfied, in the light of the illegality of the lineup identification,[4] that the defendant is entitled to a separate evidentiary hearing focused on the question whether the in-court identification was of independent origin.

In *People* v. *Schumacher* (1971), 384 Mich 831, the Michigan Supreme Court reversed our Court and remanded Schumacher's appeal for an evidentiary hearing to determine whether an in-court identification was of independent origin even though there had been no objection to the identification procedures at Schumacher's trial. Schumacher had been identified through the use of photographs and a one-way mirror. He was not represented by counsel when he was so identified.[5]

While our Court in *Schumacher* had acknowledged that the failure of trial counsel to preserve the identification procedures issue did not preclude appellate review,[6] we affirmed Schumacher's conviction be-

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[3] *Cf. People* v. *Thorne* (1970), 21 Mich App 478, *modified on other grounds* (1970), 383 Mich 791.

[4] In *United States* v. *Zeiler* (CA3, 1970), 427 F2d 1305, 1307 the United States Court of Appeals for the third circuit held "that the rule of the *Wade* case [guaranteeing the right of counsel at a lineup] applies to pretrial photographic identifications of an accused who is in custody". In this connection see *Commonwealth* v. *Whiting* (1970), 439 Pa 205 (266 A2d 738); *People* v. *Rowell* (1968), 14 Mich App 190, 197 (LEVIN, J., *concurring*); *People* v. *Adams* (1969), 19 Mich App 131, 133, n 1.

[5] The Supreme Court did not file a full opinion. Its order does not state the facts. They appear in our Court's opinion, see *People* v. *Schumacher* (1971), 29 Mich App 594, 596.

[6] We said that, nevertheless, the people are obliged to establish by "clear and convincing evidence that the in-court identification was based on observation of the suspect not connected with the identification procedures under attack". *People* v. *Schumacher*, *supra*, p 596.

cause, on our examination of the trial record, we were convinced that the in-court identification was not attributable to the erroneous procedures.

The Supreme Court's ruling in *Schumacher* establishes not only that a failure to object at the trial level to illegal identification procedures—here, the conduct of a lineup without the presence of counsel representing the accused person or waiver of counsel by the accused person himself—does not preclude raising the issue on appeal, but also that where a question regarding identification procedures is raised, a full evidentiary hearing at the trial level focused on that question will generally be required, and that we may not ourselves attempt such a determination on the record made in connection with the trial.

After this appeal was argued, our opinion in *People* v. *Morrin* (1971), 31 Mich App 301, was published. There we found that the evidence of premeditation and deliberation did not support the defendant's conviction of first-degree murder and reduced the judgment of conviction to second-degree murder. In this case, error was not assigned regarding the sufficiency of the evidence. If a new trial is not granted upon the evidentiary hearing we have ordered, the defendant may seek a reduction of his conviction from first- to second-degree murder on the authority of *Morrin* by filing a delayed motion for a new trial in the trial court and, if relief is there denied, by application for a delayed appeal in our Court. Although we see a substantial question concerning the sufficiency of the evidence to convict of the more aggravated offense, since the question has not been briefed or argued, we reserve our opinion until the question is properly and fully presented.

Remanded for further proceedings consistent with this opinion.

All concurred.

PEOPLE v. CHARLES WILLIAMS

OPINION OF THE COURT

1. CRIMINAL LAW—IDENTIFICATION TESTIMONY—CREDIBILITY.

The credibility of the complainant's identification of the defendant as one of the robbers was a question for the trier of fact where the complainant was unable to recall, on cross-examination, whether the robber, whose unmasked face she had seen for several seconds during the robbery; had a beard, or a moustache, or a goatee, the defendant and another defense witness had testified that the defendant had a beard or goatee at the time the crime was committed, and the defense had contended that the identification was tainted by a conversation after the robbery with another person who had said that the robber resembled the defendant.

2. CRIMINAL LAW—INSTRUCTIONS TO JURY—INCLUDED OFFENSES—AFFIRMATIVE EXCLUSION.

An instruction to the jury which affirmatively excludes lesser included offenses does not constitute reversible error where the record shows that defense counsel agreed with the trial court that there were no included offenses and additionally said that a statement covering included offenses would be inconsistent with the theory of the defense; an affirmative exclusion of that which neither litigant wishes the jury to consider does not require reversal or a new trial.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 860 *et seq.*
29 Am Jur 2d, Evidence § 367 *et seq.*
[2, 3] 21 Am Jur 2d, Criminal Law § 185 *et seq.*

3. CRIMINAL LAW—INCLUDED OFFENSES—INSTRUCTIONS TO JURY—AFFIRMATIVE EXCLUSION.

An instruction to the jury cannot affirmatively exclude from the jury's consideration lesser included offenses, even though defense counsel tried the case on an alibi defense and stated to the court that a statement covering any included offenses would not be consistent with the defense.

Appeal from Berrien, Karl F. Zick, J. Submitted Division 1 May 5, 1971, at Grand Rapids. (Docket No. 8194.) Decided October 1, 1971. Leave to appeal denied, 386 Mich 783.

Charles Williams was convicted of armed robbery. 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.

Harry J. Creager, for defendant on appeal.

Before: R. B. BURNS, P. J., and HOLBROOK and LEVIN, JJ.

LEVIN, J. The defendant, Charles Williams, was convicted by a jury of the offense of armed robbery. MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28-.797). He appeals claiming that the evidence against him was insufficient and that the court erred in failing to charge on included offenses.

I.

Four masked bandits carrying revolvers held up a grocery store. The wife of the owner testified that during the course of the robbery the mask of

one of the robbers slipped, allowing her to view his face uncovered for several seconds. She identified the defendant as that robber.

A cashier who had known the defendant for more than ten years testified that while she had mentioned to the owner's wife after the robbery that one of the robbers resembled the defendant, she was unable to state definitely that the defendant was involved in the crime.

The other witnesses were unable to recognize the defendant.

The defendant and the woman with whom he was living testified in support of an alibi. They also testified that the defendant was wearing a goatee or beard when the crime was committed. On cross-examination, the owner's wife did not recall the robber she identified as the defendant having a goatee or beard or a moustache.

The defendant contends that the testimony of the owner's wife, which was the only positive identification testimony, is insufficient to convict because she was unable on cross-examination to recall whether the robber she identified as the defendant wore a moustache, goatee or beard and because her identification was influenced by the statement of the cashier shortly after the crime was committed that one of the robbers "resembled" the defendant.

The evidence that the defendant was wearing a goatee or beard at the time the offense was committed was presented through the testimony of the defendant and the woman with whom he was living, clearly interested witnesses. It was for the jury, as the trier of fact, to decide whether to credit or reject the identification testimony of the owner's wife; whether it was accurate and based on what she saw at the time the robbery was committed or

whether it was prompted by the conversation she had with the cashier following the robbery.

II.

In *People* v. *Lemmons* (1970), 384 Mich 1, as here, the defendant was convicted of armed robbery and the defense was alibi. Lemmons' conviction was reversed by the Michigan Supreme Court because the trial judge not only failed to instruct on included offenses, but affirmatively excluded consideration by the jury of included offenses.

The judge in *Lemmons* had instructed the jury as follows:

"There are only two possible verdicts as to each defendant. You may find the defendant, naming them individually, guilty of robbery armed or not guilty. *There are no included offenses.*" (Emphasis supplied.) *Lemmons, supra,* p 2.

The Supreme Court ruled that the affirmative exclusion by the judge of included offenses was an "improper instruction" requiring reversal and a new trial even though Lemmons' lawyer had made no request that the jury be instructed on included offenses.

While the trial judge in this case also affirmatively excluded included offenses,[1] we do not think we are

[1] He advised the jury:
"Now, I don't have to give you, members of the jury, in this case any instruction on automatic included offenses, which we have in so many cases. Why? Because in this case, due to the fact that the defense attorney is conceding and has conceded that there was a robbery armed—although he claims the defendant was not a participant—and in view of the nature of his defense, a denial plus an alibi defense—that he was not there—and in view of all of the undisputed evidence we have heard regarding the incident that happened at the Simmons Grocery that night, it is either a case of robbery armed, or nothing. There are no included offenses because of the circumstances in this case. Lots of times in cases of this type we have included offenses of robbery unarmed, where it is not clear that the robber had a gun."

obliged to reverse or that we would be justified in reversing and granting a new trial to the defendant Williams on that ground. In this case, in contrast with *Lemmons,* the defendant's lawyer made it clear that he did not expect the court to charge on included offenses:

"*The Court:* Now, Mr. Creager, if I understand correctly, from talking with you before, keeping in mind your defense is alibi, plus the general denial that he was not there and never had been in the store, do you maintain there are any included offenses in this charge?

"*Mr. Creager:* No, because of the nature of the defense, there are no included offenses.

"*The Court:* In other words, due to the nature of the offense and the evidence as to what happened in the store—not by your man—the court understands you are conceding that there was a robbery armed committed by three or four persons, right?

"*Mr. Creager:* Right; and I might add that a statement covering any lesser included offense would not be consistent with the defense in this case. It is the defendant's position he was not there and that is the gist of it."

The distinction noted in *Lemmons* between a judge's failure to charge on included offenses and an affirmative exclusion should not be extended to a situation where the lawyer for the defendant agrees that there are no included offenses and additionally says that a statement covering included offenses would not be consistent with the theory of the defense. An affirmative exclusion of that which neither litigant wishes the jury to consider does not require reversal or a new trial.

To rule otherwise would mean that the policy of the law requires in every criminal case a charge as to included offenses without regard to the wishes

and requests of the lawyers representing the litigants. It would mean that the distinction recognized in *Lemmons* between an omission and an affirmative exclusion would be untenable.[2]

Affirmed.

HOLBROOK, J., concurred in the result.

R. B. BURNS, P. J. (*dissenting*). Defendant was found guilty by a jury of armed robbery pursuant to MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797). This appeal is taken from the trial court's denial of defendant's motion for a new trial.

Defendant claims the evidence upon which he was convicted was insufficient to prove guilt beyond a reasonable doubt. The wife of the owner of the store which defendant and three other men were accused of robbing, positively identified defendant as one of the armed bandits. The store cashier, Perona Mitchell, also thought defendant was one of the robbers, although she was not positive. Defendant claims that the eyewitness testimony was unbelievable since he was wearing a moustache and a beard on the night of the robbery and the eyewitness did not recall seeing this excess facial hair. Defendant's alibi witness, a woman with whom defendant had been cohabiting for several years, corroborated defendant's claim of excess facial hair and further testified that defendant was with her at the time the alleged robbery took place.

It was the jury's prerogative to disbelieve defendant and his alibi witness. *People* v. *Jenkins* (1968), 10 Mich App 257.

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[2] See *People* v. *Phillips* (1971), 385 Mich 30, 36 reiterating the general rule that in the absence of a request, a trial court does not err by failing to instruct on included offenses.

See also *People* v. *Riley* (1971), 33 Mich App 721, commenting on *Lemmons*.

It cannot be said as a matter of law that defendant's conviction was unjustified due to insufficient evidence. The eyewitness testimony of the store owner's wife and of the store cashier was sufficient to support defendant's conviction beyond a reasonable doubt. See *People* v. *Arither Thomas* (1967), 7 Mich App 103.

On authority of *People* v. *Jones* (1935), 273 Mich 430 and *People* v. *Lemmons* (1970), 384 Mich 1, defendant contends that the trial court erred in giving a jury instruction which affirmatively excluded consideration of lesser included offenses from the jury. The pertinent part of the court's instructions reads:

"Now, I don't have to give you, members of the jury, in this case any instruction on automatic included offenses, which we have in so many cases. Why? Because in this case, due to the fact that the defense attorney is conceding and has conceded that there was a robbery armed—although he claims the defendant was not a participant—and in view of the nature of his defense, that he was not there—and in view of all the undisputed evidence we have heard regarding the incident that happened at the Simmons Grocery that night, it is either a case of robbery armed, or nothing. There are no included offenses because of the circumstances in this case."

In the *Lemmons* case, *supra,* pp 2, 3, the Court stated:

"The complaining witness identified defendant as one of two men who robbed him at gunpoint. * * *

"Defendant made no request at trial that the lesser included offenses be included in the charge.

"The court instructed the jury that:

" 'There are only two possible verdicts as to each defendant. You may find the defendant, naming

them individually, guilty of robbery armed or not guilty. There are no included offenses.' * * *

"In *Jones* this Court went on to say:

" 'However, the rule does not excuse improper instructions. *Here the court did more than fail to charge upon the included offenses. It affirmatively excluded them from the consideration of the jury.* This was error because, under 3 Comp. Laws 1929, § 17325, the jury was authorized to find the defendant guilty of a lesser offense * * * .' (The statutory section now is CL 1948, § 768.32 [Stat Ann 1954 Rev § 28.1055]).

"The court's instruction in the instant case that the jury might find defendant either guilty of robbery armed or not guilty but that there were no included offenses comes directly within the interdiction of *Jones* and requires reversal with new trial." (Emphasis in original.)

It is true that the defense tried this case on the theory that the defendant was not present at the scene of the crime. Defendant's attorney did state to the court that a statement covering any lesser included offenses would not be consistent with the defense in this case. However, it is my interpretation of the *Jones* and *Lemmons* cases that a trial judge cannot affirmatively exclude the jury from considering lesser included offenses.

I would reverse and remand the case for a new trial.

OWEN *v.* OWEN

OPINION OF THE COURT

1. DIVORCE—COURTS—JURISDICTION.

A Nevada decree of absolute divorce, which was rendered during the pendency of Michigan proceedings and which involved the same parties, subject matter, and proposed relief, was void because the Michigan court, which first obtained jurisdiction, had the exclusive right to decide the matter.

2. DIVORCE—SEPARATE MAINTENANCE—DISCRETION.

Amended judgment for separate maintenance requiring the husband to pay the wife defendant $60 per week and to pay for all reasonable necessary medical requirements of the wife was not an abuse of discretion where the husband had previously been ordered to pay $40 per week, to make payments of $146 per month on the mortgage on the house that the wife was occupying, and to pay premiums for the wife's hospital and medical insurance, the husband had failed to pay anything, and, because of the husband's failure to pay anything, the wife was left homeless when the mortgage was foreclosed.

CONCURRENCE IN PART, DISSENT IN PART BY R. B. BURNS. J.

3. DIVORCE—FOREIGN DIVORCE—FULL FAITH AND CREDIT—DIVISIBLE DIVORCE THEORY.

A Nevada judgment granting the husband an absolute divorce

REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur 2d, Divorce and Separation § 240 *et seq.*
Domestic recognition of divorce decree obtained in foreign country and attacked for lack of domicil or jurisdiction of parties. 13 ALR3d 1419.

[2] 24 Am Jur 2d, Divorce and Separation § 675 *et seq.*
41 Am Jur 2d, Husband and Wife § 400 *et seq.*

[3] 24 Am Jur 2d, Divorce and Separation § 947 *et seq.*
Domestic recognition of divorce decree obtained in foreign country and attacked for lack of domicil or jurisdiction of parties. 13 ALR3d 1419.

was entitled to full faith and credit to the extent that it affected the marital status of the parties where a Michigan court, before the Nevada suit had been filed, had granted separate maintenance to the wife; the Nevada judgment was not void in its entirety.

Appeal from Allegan, Raymond L. Smith, J. Submitted Division 3 October 8, 1970, at Grand Rapids. (Docket No. 8449.) Decided October 1, 1971. Leave to appeal granted, 386 Mich 779.

Complaint by Ben Owen against Angeline Barbara Owen for absolute divorce. Counterclaim by defendant for separate maintenance. Judgment for defendant. Plaintiff moved to amend the judgment and to prohibit enforcement of the judgment in Nevada. Motion denied. Plaintiff appeals. Affirmed.

Smith, Haughey & Rice (by *Michael S. Barnes*), for plaintiff.

Gerald M. Henry, for defendant.

Before: HOLBROOK, P. J., and R. B. BURNS and KELLEY,* JJ.

KELLEY, J. On December 21, 1964, the husband filed in the Allegan circuit court a complaint for absolute divorce, alleging extreme cruelty. On February 4, 1965, the wife filed a counterclaim for separate maintenance, alleging extreme cruelty and specifically praying "That the marriage between the parties hereto not be dissolved and that a judgment of separate maintenance be entered in accordance with Act No. 243 of the Compiled Laws of Michigan

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

of 1889, being MSA 25.21 *et seq.*, as amended".[1] Each party filed an answer to the other's complaint.

After a contested trial, the court found that the husband had become infatuated wih another woman, causing the marriage to break up; that this constituted extreme cruelty on the part of the husband; and that the husband's allegations of extreme cruelty were unfounded. On July 26, 1965, a judgment for separate maintenance was filed which recited "that cross-plaintiff is hereby granted separate maintenance from the cross-defendant upon her cross bill of complaint". The judgment required the husband to make specified payments for the wife's support.

On August 11, 1965, the husband filed a claim of appeal to the Michigan Court of Appeals and paid the appeal fee. On October 6 of the next year (1966) that appeal was dismissed.

Apparently some time during August 1965, the husband moved to the State of Nevada where on October 7, 1965, he obtained a decree of absolute divorce. The following day he remarried and has since lived and been employed in Nevada. The wife had not appeared in the Nevada proceeding and denies that there was any personal service of papers upon her as required by the Nevada code of civil procedure.[2]

The Nevada decree recites that the wife "since the marriage of the parties hereto, has treated the plaintiff with extreme cruelty". The decree is silent as to any support or alimony for the wife. The husband never paid any alimony or support for the wife under the Michigan judgment or otherwise.

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[1] The correct citation is PA 1889, No 243, CL 1948, §§ 552.301, 552.302 (Stat Ann 1957 Rev §§ 25.211, 25.212).

[2] NRCP 4(e). *Moran* v. *Second Judicial District Court* (1956), 72 Nev 142 (297 P2d 261); *Kelley* v. *Kelley* (1969), 85 Nev 317 (454 P2d 85).

In May, 1969, the husband filed in the Michigan court a motion seeking to have the Michigan judgment for separate maintenance amended to a judgment for absolute divorce. In October of the same year the husband filed in the Michigan court a "motion for preliminary injunction" seeking to restrain the wife from attempting to enforce in the Nevada court the Michigan judgment for separate maintenance. The court denied both these motions and determined that arrearages in support for the wife totalled $13,229 as of March 1, 1970.

On appeal the husband claims that the Nevada decree is entitled to full faith and credit, and that the amount of support ordered is excessive.

Is the Nevada decree of absolute divorce entitled to full faith and credit?

Seeking an absolute divorce on the ground of extreme cruelty, the husband commenced the Michigan proceedings. He pursued his claim through a contested trial to a decision on the merits and an appeal to the Court of Appeals. Throughout this period the circuit court, followed by the Court of Appeals,[3] continuously had jurisdiction over the parties and the subject matter, and no other court could have acquired jurisdiction. It is a familiar, well-established rule that the court which first obtains jurisdiction has the exclusive right to decide the matter in issue. *Allen* v. *Allen* (1915), 188 Mich 532, 535; *Detroit United Ry.* v. *Circuit Judge* (1919), 204 Mich 543; *Mulford* v. *Stender* (1921), 215 Mich 637, 640. Any other rule could lead to unfairness and absurdity. Under the circumstances present here the Nevada decree, which was rendered during the pendency of the Michigan proceedings and which involved the

[3] Michigan General Court Rules, GCR 1963, 802.1.

same parties, subject matter and proposed relief, is void.[4] It is not necessary to decide the wife's other contentions that the Nevada court lacked jursdiction.

Is the amount of alimony or support for the wife excessive?

The husband claims that the trial court misinterpreted its own order for support and, therefore, the amount is excessive.

The record includes the following: The parties were married in 1943 and lived together until October, 1964. In 1947, there was born to them a child whom they raised and who is now of full age. During the marriage, the wife worked in a factory in order that the husband might continue his education. The wife claimed that her subsequent state of health would not allow her to have full-time employment and that she earned only enough to pay her monthly drug bill. At the time of the judgment the husband earned a salary of $9,600 for the school year, with a potential for earning an additional $1,600 during the summer months. Subsequently he became vice president of a branch of the University of Nevada.

The original judgment required the husband to pay $40 per week, to make payments of $146 per month on the mortgage on the house which the wife was occupying, and to pay premiums for her hospital and medical insurance. Due to the husband's failure to pay anything, the mortgage was foreclosed, leaving the wife without a home. The court amended the judgment and interpreted the amendment to require the husband to pay $60 per week and to pay for all reasonable necessary medical requirements of the wife.

[4] See *Albaugh* v. *Albaugh* (1948), 320 Mich 16, and cases there cited.

Although the husband never made any payments, he now claims that after the amendment he "operated under the belief" that he was to pay only $20 per week as support.

In interpreting the order in question and in fixing the amount for the wife's support, the court did not abuse its discretion. *Pinchuk* v. *Pinchuk* (1947), 317 Mich 523.

Affirmed. Costs to appellee.

HOLBROOK, P. J., concurred.

R. B. BURNS, J. (*concurring in part and dissenting in part*).

I concur with my brothers that the Nevada judgment cannot affect the obligation of the plaintiff to support the defendant, but I cannot agree that the Nevada decree is void.

The cases cited by Judge KELLEY (*Allen* v. *Allen* [1915], 188 Mich 532, 535; *Detroit United Ry.* v. *Circuit Judge* [1919], 204 Mich 543; *Mulford* v. *Stender* [1921], 215 Mich 637, 640) stand for the proposition as he states it: "It is a familiar, well-established rule that the court which first obtains jurisdiction has the exclusive right to decide the matter in issue". But the facts of those cases are different from the facts of the present case.

In *Allen* v. *Allen, supra,* the plaintiff was a resident of Flint, Michigan. On his way to Alaska during the gold rush he married the defendant in Seattle, Washington. They separated and upon his return to Flint he instituted divorce proceedings and after the defendant filed an answer and a cross-bill he had the case dismissed because he was not sure of his necessary residency requirements. He did not obtain permission from the court to dismiss the bill.

The defendant had the case reinstated and obtained a divorce decree. In the meantime the plaintiff had returned to Nome, Alaska, where he obtained a divorce. The trial judge found, and the Supreme Court agreed, that the plaintiff had not abandoned his residency in Flint, and that the stay in Alaska was temporary.

In *Detroit United Ry.* v. *Circuit Judge, supra,* the headnote is sufficient to state the case. The headnote reads as follows:

"Where a suit attacking the validity of an ordinance of the city of Detroit fixing the maximum rate of fares on certain street railway lines in said city was pending in the Federal court, it had exclusive jurisdiction, and the State court was without jurisdiction to issue an injunction also involving the validity of said ordinance."

In *Mulford* v. *Stender, supra,* a suit was filed in Wayne County Circuit Court. A bill of interpleader was filed asking the court to delay the case as an action had been filed in the Circuit Court for Cook County, Illinois. The Supreme Court held that the Wayne County Circuit Judge, having first acquired jurisdiction of the matter, had the right to dispose of the issue.

In the present case plaintiff moved to Nevada and obtained a divorce after his wife had been granted a judgment for separate maintenance.

Following the *Williams* cases (*Williams* v. *North Carolina* [1942], 317 US 287 [63 S Ct 207, 87 L Ed 279], and *Williams* v. *North Carolina* [1945], 325 US 226 [65 S Ct 1092, 89 L Ed 1577]), the question arose whether a valid *ex parte* divorce entered at the domicile of only one party to the marriage automatically terminated the wife's right to support. This question was settled by the theory of divisible

divorce, foreshadowed in *Esenwein* v. *Pennsylvania* (1945), 325 US 279 (65 S Ct 1118, 89 L Ed 1608) (concurring opinion *per* Douglas, J.) and set forth in *Estin* v. *Estin* (1948), 334 US 541 (68 S Ct 1213, 92 L Ed 1561), where the Court held that an *ex parte* Nevada divorce procured by the husband did not terminate the wife's prior adjudicated right to separate maintenance:

"The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern." 334 US at 549.

Finally, in *Vanderbilt* v. *Vanderbilt* (1957), 354 US 416 (77 S Ct 1360, 1 L Ed 2d 1456), the Court perfected the divisible divorce theory by its holding that even when the wife's right to support had not been reduced to judgment before the *ex parte* divorce, that divorce could not affect her support rights. The Court rested its holding on the due process clause: since the foreign state had no personal jurisdiction over the absent spouse, its decree "to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition". Since the due process clause forbids the divorce court to adjudicate the absent wife's right to support, it follows that she cannot be deprived by that court of whatever rights of support she had under the law of her domicile at the time of that divorce. This line of reasoning was accepted by the Courts of this state in *Malcolm* v. *Malcolm* (1956), 345 Mich 720. In accord are *Farnham* v. *Farnham* (1964), 80 Nev 180 (391 P2d 26) and *Hudson* v.

Hudson (1959), 52 Cal 2d 735 (344 P2d 295) among others.

In the instant case the Nevada court did not pronounce, nor did it attempt to pronounce, judgment respecting support of Mrs. Owen. The State of Michigan, having had personal jurisdiction over both plaintiff and defendant, had provided support in its 1965 judgment of separate maintenance. Accordingly, I would hold that the Nevada judgment of divorce is entitled to full faith and credit only insofar as it affects the marital status of the parties. Mr. and Mrs. Owen are no longer husband and wife. However, the Nevada judgment in no way would affect the plaintiff's obligation to support his former wife.

PEOPLE *v.* RODGERS

OPINION OF THE COURT

1. EVIDENCE—HEARSAY—IMPEACHMENT.

   Testimony which is not offered to prove the truth or falsity of a witness's testimony but to contradict it is not hearsay as that term is used in the law of evidence.

2. EVIDENCE—IMPEACHMENT—MEMORANDUM.

   The contents of a memorandum containing a verbatim tran-

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur 2d, Evidence §§ 493, 497.
[2–5, 7, 9] 58 Am Jur, Witnesses §§ 688, 767–791.
[6] 53 Am Jur, Trial § 670.
[8, 10] 58 Am Jur, Witnesses §§ 688, 767–791.
29 Am Jur 2d, Evidence §§ 493, 497.
[11–14] 58 Am Jur, Witnesses § 529 *et seq.*
29 Am Jur 2d, Evidence §§ 876, 877.

scription of a witness's prior inconsistent out-of-court statement to the police are admissible to impeach the witness where a proper foundation is laid.

3. WITNESSES—IMPEACHMENT—PRIOR INCONSISTENT STATEMENT.

A witness may be impeached by showing that his testimony upon a material matter is inconsistent with a prior statement made by him.

4. WITNESSES—IMPEACHMENT—PRIOR INCONSISTENT STATEMENTS.

A witness may be impeached by producing written statements which are inconsistent with the testimony given at trial and a written statement made at the direction of the witness to be later used to impeach his prior testimony.

5. WITNESSES—IMPEACHMENT—PRIOR INCONSISTENT STATEMENTS.

A police officer's written memorandum of his interview with a witness which contradicts the witness's in-court testimony is admissible for purposes of impeachment regardless of whether the memorandum is a verbatim transcription of the interview or the conclusions of the police officer.

6. WITNESSES—IMPEACHMENT—PRIOR INCONSISTENT STATEMENTS—INSTRUCTIONS TO JURY.

Instruction to the jury that a witness's prior inconsistent statement as testified to by a police officer could only be considered to test the credibility of the witness and could neither be considered for its truth nor as substantive evidence was correct.

DISSENT BY LEVIN, J.

7. WITNESSES—IMPEACHMENT—PRIOR INCONSISTENT STATEMENTS.

The people are entitled to impeach the credibility of a witness who testified in support of a defendant's alibi by showing that he told a story to the police which was inconsistent with his testimony at trial.

8. EVIDENCE—PRIOR INCONSISTENT STATEMENTS—HEARSAY.

A witness's out-of-court inconsistent statement offered to impeach his credibility is not regarded as hearsay because it is not offered as substantive evidence to prove the truth of the statement attributed but rather to discredit the witness's at-trial testimony.

9. EVIDENCE — PRIOR INCONSISTENT STATEMENT — MEMORANDUM — FOUNDATION.

The fact that a prior inconsistent statement was made must be proved before the statement is admissible in evidence.

10. EVIDENCE—PRIOR INCONSISTENT STATEMENTS—MEMORANDUM—ADMISSIBILITY.

An unsigned written memorandum made by the hearer of a witness's prior inconsistent out-of-court statement is hearsay, regardless of whether the statement recorded in it is offered as substantive evidence or for the purpose of impeaching a witness's at-trial testimony, because the writing is an out-of-court statement by its writer that the other person said what is contained in the writing.

11. EVIDENCE—MEMORANDUM—ADMISSIBILITY.

A witness who does not have a present recollection of facts about which he is to testify may refer to a written memorandum to refresh his recollection, and when he speaks from a memory thus revived his testimony is what he says, not the writing; therefore a party who uses a memorandum to refresh the memory of a witness may not introduce the writing in evidence or have it read to the jury.

12. EVIDENCE—MEMORANDUM—ADMISSIBILITY.

A writing may be introduced in evidence under the past recollection recorded exception to the hearsay rule only where the witness has no present recollection of the facts and, upon reference to the document, his memory is not refreshed; it is the writing, not refreshed recollection, that is the evidence.

13. EVIDENCE—PRIOR INCONSISTENT STATEMENTS—MEMORANDUM—ADMISSIBILITY.

It was error to permit a police officer to read a written memorandum of a witness's prior inconsistent statement, without regard to whether the statement was offered to impeach the witness's credibility, where the memorandum was unsigned by the witness and was taken only three days before the officer testified, and where the officer was neither asked if he had any present recollection of what the witness had said nor if his recollection could be refreshed by reference to the writing.

14. EVIDENCE—PRIOR INCONSISTENT STATEMENT—MEMORANDUM—ADMISSIBILITY.

Permitting a police officer to read into evidence his written memorandum of a witness's prior inconsistent statement was not

harmless error where there was a close factual question on the identity of the defendant as one of those who beat and robbed the complaining witness for the jury to decide, the defense was alibi, and where the reading of the memorandum tended to discredit not only the witness being impeached by the statement, but all of the defendant's alibi witnesses.

Appeal from Wayne, James L. Ryan, J. Submitted Division 1 February 4, 1971, at Detroit. (Docket No. 8675.) Decided October 1, 1971. Leave to appeal granted December 16, 1971, 386 Mich 776.

Larry D. Rodgers 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.

Samuel A. Turner, for defendant on appeal.

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

J. H. GILLIS, P. J. Defendant, Larry Douglas Rodgers, appeals his conviction by a jury of the offense of robbery armed.[1] The offense occurred on March 7, 1969, at approximately 8:40 p.m. in the City of Ecorse, Michigan.

The victim testified that while he was driving his automobile it was bumped from behind by another vehicle. The complainant observed that the car which struck him had no lights on and he immediately pulled to the curb. The other car pulled

[1] MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

parallel to complainant's car. Mr. Walker, the complainant, rolled down the window and noticed that the other car was occupied by five or six men. One man, sitting in the right front seat of the striking vehicle, said "We don't think there is much damage". Mr. Walker got out of his car to inspect the damage; he left his vehicle running and the lights on. Mr. Walker stated that one of the occupants of the striking automobile ran past him just as he reached the rear of his car to inspect the damage. This individual got into Mr. Walker's car, and when Mr. Walker rushed back this person leaped out with a gun in hand. The gun wielder pointed it at Mr. Walker saying, "I got a gun, I got a gun". The complainant testified that the remaining occupants of the striking vehicle got out of their car and began "working me over", and one of them took the complainant's wallet from his back right pocket. Mr. Walker identified the person with the gun as defendant, Larry Douglas Rodgers, and testified that the defendant pointed the gun at complainant's face and struck him with it. The assailants attempted to force Mr. Walker into his own automobile, but Mr. Walker ran from them at his first opportunity. After he traveled about 25 or 30 feet, he was shot in the back. The bullet struck about an inch from the spine at belt level. Mr. Walker ran to the nearest house where the occupants summoned police.

Patrolman Ohannasian of the Melvindale Police Department testified that on the morning of March 8, 1969, at approximately 12:45 a.m., he and his partner drove into a White Castle restaurant parking lot where he observed the complainant's automobile parked.[2] Officer Ohannasian testified that

[2] Identification of the automobile in question was made by observing its license plate. The plate number was traced to this vehicle.

the car was empty, and thus the officers drove out of the parking lot to a point nearby where continued surveillance could be made. The officer testified that he observed defendant and a young lady enter the car. At that moment the officers drove back into the lot and parked behind the automobile in question. Defendant was placed under arrest.

At trial, the victim identified defendant as the assailant who held the gun on him.

The defense was alibi. Defendant claimed he was at a high school basketball game at the time the robbery was committed. The defense produced several witnesses to substantiate this argument. One of those who testified on defendant's behalf was Samuel King. On direct examination Mr. King stated that he met the defendant at a basketball game and that they were together for the remainder of the evening. Later in the course of the trial, the prosecution recalled the investigating officer, Detective Taylor, who read, over defendant's objection, a statement he allegedly took from witness King at the time Taylor interviewed him:[3]

"*The witness* [*Detective Taylor*]: This is the statement of Samuel King taken by Detective Charles Taylor at 2249 South Electric, Detroit, Michigan. Time: 1:30 a.m. Saturday, June 14, 1969: 'I went to the game that night. I saw Larry there but it wasn't until after the game. Anyway, the game was over I don't know what time it was but Larry did not go to the Castle with me. We were parked in the Castle parking lot. Larry might have come over sometime during the time he was at the Castle and got in my car and got right back out but he didn't go to the Castle with me. They told me

[3] The trial commenced on a Thursday and ended the following Wednesday. Witness King testified on Monday. On the intervening Saturday, he was interviewed by Detective Taylor.

to say that he was with me but I told them I wasn't going to lie for them and I didn't want to get involved.'

"This is what he told me."

The court overruled the objection following the prosecutor's explanation that the evidence was being introduced solely for impeachment purposes. The statement was not read to prove the truth or falsity of witness King's prior testimony. Instead, it was read to contradict the prior testimony. The statement is not hearsay information as that term is evidentially understood.

"Testimony, the truth of which is not to disprove the crime but which if believed would tend to discredit the witnesses, cannot be classed as hearsay." *Smith* v. *United States* (CA6, 1960), 283 F2d 16, 20, *cert den* 365 US 847 (81 S Ct 808, 5 L Ed 2d 811).

In accord: *United States* v. *88 Cases, More or Less, Containing Bireley's Orange Beverage* (CA3, 1951), 187 F2d 967, 974; *Carantzas* v. *Iowa Mutual Insurance Co.* (CA5, 1956), 235 F2d 193, 196; *Young* v. *State Farm Mutual Automobile Insurance Co.* (CA4, 1957), 244 F2d 333, 337.

Nor is the use of witness Taylor's memorandum statement an example of present memory improperly refreshed. For unlike present memory refreshed, the document referred to by the testifying witness was not set aside. *People* v. *Thomas* (1960), 359 Mich 251; *People* v. *Redman* (1969), 17 Mich App 610. Instead, this document was read into the record.

The memorandum now in question allegedly is Detective Taylor's verbatim transcription of his interview with witness King. Its contents, if actually stated by witness King and accurately re-

corded by Detective Taylor, constitute a prior inconsistent out-of-court statement. To introduce such a prior inconsistent statement, the laying of a proper foundation is required. *Osborne* v. *United States* (CA9, 1967), 371 F2d 913, *cert den* 387 US 946 (87 S Ct 2082, 18 L Ed 2d 1335); *People* v. *Keller* (1933), 261 Mich 367. The foundation was laid when Mr. King, on cross-examination, was challenged with the information he allegedly gave Detective Taylor:

"*Q*. Do you know this man right here sitting in front of me?
"*A*. I don't know him.
"*Q*. You don't know him?
"*A*. No.
"*Q*. Do you know who he is?
"*A*. I know he is a detective.
"*Q*. Do you know what his name is?
"*A*. Taylor.
"*Q*. Taylor?
"*A*. Yeah.
"*Q*. All right. Is today the first day you ever saw him?
"*A*. No.
"*Q*. Did he come to see you over the weekend?
"*A*. Yes.
"*Q*. Did you talk to him over the weekend?
"*A*. Yes.
"*Q*. Did you tell him anything different than you told us here today?
"*A*. No.
"*Q*. Did you tell Detective Taylor, when he came to see you this weekend, that this man had never been in your car on that evening and wasn't riding with you that evening?
"*A*. No, I didn't.
"*Q*. And you hadn't been with him a whole year at that time?
"*A*. No.

"*Q*. Did you tell the detective that?
"*A*. No.
"*Q*. You didn't?
"*A*. No.
"*Q*. You are sure about that, huh?
"*A*. Yes."

Witness King denied ever telling Detective Taylor anything which was inconsistent with his trial testimony. When the prosecution recalled Detective Taylor to refute this, he testified:

"*Q*. Did you take a written statement from Mr. King?
"*A*. I wrote it down and Mr. King was talking.
"*Q*. As Mr. King was talking to you, you wrote it down?
"*A*. Yes, exactly word for word what he said.
"*Q*. All right, I'm going to show you a piece of paper and ask you if you can identify that.
"*A*. Yes.
"*Q*. All right, can you tell me what it represents to you?
"*A*. That is a statement Mr. King given [*sic*] to me by him."

Detective Taylor also testified that Mr. King declined to sign this statement because he "did not want to get involved".

Detective Taylor's memorandum was introduced solely to impeach Mr. King's prior in-court testimony. It is generally held that a witness may be impeached by showing that his testimony upon a material matter is inconsistent with a prior statement made by him. 3A Wigmore on Evidence, §§ 1017–1022, pp 993–1018; McCormick on Evidence §36, pp 66–67. A witness may be impeached by producing written statements which are inconsistent with the testimony given at the trial. 1 Under-

hill's Criminal Evidence (5th ed), § 230, p 531. Michigan courts have traditionally allowed written statements made at the direction of the witness to be later used to impeach the witness's prior testimony. *People* v. *Kennedy* (1895), 105 Mich 434; *People* v. *Tice* (1897), 115 Mich 219; *People* v. *Dellabonda* (1933), 265 Mich 486; *People* v. *DeBeaulieu* (1944), 308 Mich 173. Witness King allegedly told witness Taylor what he knew. The memorandum, written in the hand of witness Taylor, represents the summary of that interview. Whether it is a verbatim transcription or the conclusions of witness Taylor is for the finder of fact to determine. However, in either instance it represents an alleged contradictory position to witness King's in-court testimony, and for the purposes of impeachment, was admissible. *People* v. *Nemeth* (1932), 258 Mich 682.

Furthermore, the trial court correctly instructed the jury that they could only consider this evidence for impeachment purposes. *People* v. *Durkee* (1963), 369 Mich 618. The court advised the jury that they could not consider the statement of King as recited by witness Taylor for the purpose of its truth nor could it be considered as substantive evidence. He further advised the jury that they could consider this testimony *only* for the purpose of testing the credibility of the witness.

We find no error in this regard. Other questions raised on appeal have been considered, and we find no reversible error.

Affirmed.

R. B. BURNS, J., concurred.

LEVIN, J. (*dissenting*). I am in full agreement with my colleagues that the people were entitled to

impeach the credibility of a witness who testified in support of the defendant's alibi by showing that the witness told a different story to a detective than the one he related at the trial. Plainly, incontrovertibly, that is the law.

The real issue—not touched on in the majority opinion—concerns the manner in which the people were allowed to prove the prior inconsistent statement.

Over the objection of the defendant's lawyer, the trial judge allowed the detective to read a written statement he wrote out at the time of his conversation with the alibi witness; the witness had refused to sign the statement. The judge ruled that the detective could read the statement under the exception to the hearsay rule for past recollection recorded. In that ruling the judge erred on the facts of this case.

I.

The defendant was convicted of committing the offense of armed robbery. The defense was alibi.[1] The defendant claimed that he was at a high school basketball game at the time of the robbery. Sixteen of his friends, among them, Samuel King, supported various time sequences of his alibi.

[1] The facts are set forth at some length in the majority opinion. In summary, the people's evidence was as follows: The victim testified that while he was driving his automobile it was bumped from behind by another automobile. After he had alighted to inspect the damage, one of the five or six occupants of the other automobile confronted him with a gun. The man with the gun and his companions struck the victim and took his wallet. The victim broke away and ran toward a nearby house and was shot in the back. He obtained aid and survived.

Four hours after the robbery the victim's automobile was sighted by police officers at a drive-in restaurant. They staked it out and a short time thereafter the defendant and a young lady entered the automobile. The defendant was arrested. At the trial, the victim identified the defendant as the occupant of the automobile who held the gun on him. See footnote 10 and accompanying text.

The trial commenced on a Thursday and ended the following Wednesday. On the intervening Saturday King was interviewed by a detective. King testified on Monday.

On direct examination, King said that he met the defendant at the game at halftime, was with him during the second half and left the game with him and other persons in King's automobile. The group made two stops and then proceeded to the drive-in restaurant where the defendant, a short time afterwards, was arrested.

During cross-examination, King denied having given the detective a different account. Specifically, King denied telling the detective that the defendant was not in King's automobile during the evening the crime was committed.

The people called the detective as a rebuttal witness. He testified that when he interviewed King on the intervening Saturday he wrote down what King said but King refused to sign the writing. The defendant's lawyer objected to the introduction or reading of the writing on the ground that it was hearsay.[2] The judge overruled the objection saying

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[2] *Hileman* v. *Indreica* (1971), 385 Mich 1, 10, shows that our Supreme Court does not require absolute precision in voicing objections in order to preserve for review the propriety of a trial judge's ruling concerning the admissibility of evidence where the judge fails to see all the aspects of a multi-faceted problem of admissibility.

The defendants in that case contended successfully in our Court (see *Hileman* v. *Indreica* [1969], 15 Mich App 662, 664, 665) "that plaintiff did *not state* to the trial judge that she sought to use the deposition [of a witness] to *refresh the recollection* of the witness and to induce her to correct her testimony, but rather sought to have the trial judge declare the witness hostile in order to impeach her testimony" (emphasis supplied). The judge had ruled that the deposition could not be used because the witness was not hostile and plaintiff could not impeach her own witness.

On appeal the Supreme Court reversed and held that the deposition could be used to refresh the witnesses' recollection saying that the judge had erroneously "looked upon the *effort of counsel* [emphasis added] solely as an attempt to *impeach* [the witness], or

that the detective's testimony was admissible as past recollection recorded. The detective then read the statement as follows:

"This is the statement of Samuel King taken by Detective Charles Taylor at 2249 South Electric, Detroit, Michigan. Time: 1:30 a.m. Saturday, June 14, 1969: 'I went to the game that night. I saw Larry there but it wasn't until after the game. Anyway, the game was over I don't know what time it was but Larry did not go to the Castle with me. We were parked in the Castle parking lot. Larry might have come over sometime during the time he was at the Castle and got in my car and got right back out but he didn't go to the Castle with me. They told me to say that he was with me but I told them I wasn't going to lie for them and I didn't want to get involved.'

"This is what he told me."

II.

The majority ignore the judge's ruling that the statement was admissible under the exception for past recollection recorded and affirm his ruling admitting the statement on the ground that "the statement is not hearsay information as that term is evidentially understood."

We will, of course, ordinarily sustain on appeal a ruling by a judge who reaches the right result even though the grounds for decision stated by him are erroneous.[3] In this case the judge reached the wrong

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as an effort to have her judged 'hostile' ". (Last emphasis added by the Court.)

Implicit in the judge's ruling that the statement was admissible under an exception to the hearsay rule is recognition on the judge's part that the writing itself was hearsay. See footnote 4 *infra* and accompanying text.

[3] 2 Michigan Law & Practice, Appeal, § 282.

result—the unsigned written memorandum was not shown to be admissible.

It is also true that a prior inconsistent statement of a witness, admissible to impeach his credibility, is not regarded as admissible as an exception to the hearsay rule. It is admissible on the tenet that it is not hearsay because it is not offered as substantive evidence to prove the truth of the statement attributed to the witness but to prove that he said it. In theory at least the trier of fact is not being asked to accept the substance of the prior statement as the true account of the matter but rather to discount the witness's at-trial testimony because on an earlier occasion he gave a different account.

However, merely because the statement made by King to the detective *when* offered to impeach King's credibility is not hearsay, does not grant free license to introduce it by any means. Whether the earlier statement is, as here, oral or is written, the fact that it was made must be proved. If the earlier statement is written, the witness's handwriting or signature must be proved. If the earlier statement is oral the impeaching witness must be able to testify that the inconsistent statement was in fact made.

Just as an impeaching witness could not testify, in the name of impeachment, that Frank told him that Joe told Frank that Sara remarked to Bill that the chief defense witness had told her that the defendant had threatened the victim, so, too, an out-of-court written memorandum of an oral statement allegedly made by the witness to be impeached may be used *to prove the fact that the statement was made* only if that fact—the fact that the witness made the statement—is provable by means of such a memorandum.

Although the inconsistent statement, when admissible to impeach credibility, is not hearsay, the written memorandum of the statement, unsigned by the witness being impeached, is hearsay and therefore admissible, if at all, only under an exception to the hearsay rule.[4]

A written memorandum of an oral statement made by another person, not signed by that person, necessarily reflects two statements; one written, the other oral: (1) it is the *written statement* of the writer of the memorandum that (2) the other person made the *oral statement* attributed to him.

Since the written memorandum, not signed by the other person, is an out-of-court statement made by the writer that the other person said what is contained in the writing, the writing itself is hearsay without regard to whether the statement recorded in it is offered as substantive evidence or solely to impeach credibility. The rules of evidence concerning the proof of facts do not evaporate upon utterance of the magic word "impeachment".[5]

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[4] See 3 Wigmore on Evidence, § 754a; McCormick on Evidence, §§ 276, 278.

[5] I have found no authority holding that the fact that an inconsistent statement was made may be proved by the use of a memorandum of the statement not signed by the witness to be impeached without a showing that the person who made the memorandum cannot testify from present memory refreshed. See discussion in Part III of this opinion *infra*.

The question can arise whenever a stenographic transcript is offered to prove a prior inconsistent statement. Understandably in that kind of case, where it is obvious that the stenographer could not possibly recall the testimony or truly refresh his recollection by reading it and must testify based on past recollection recorded, no point is sometimes made about a failure to prove inability to testify from refreshed recollection. See *St. Louis, S. F. & T. R. Co.* v. *Williams* (Tex Civ App, 1937), 104 SW2d 103, 105; *People* v. *Sherman* (1950), 97 Cal App 2d 245 (217 P2d 715, 721).

Nevertheless in other cases the governing principle has been recognized, the courts stating that the stenographer could read a transcript of shorthand notes because he could not testify from refreshed or revised present recollection. See *State* v. *Polan* (1956), 80 Ariz 129 (293 F2d 931, 933); *Hudlow* v. *Langerhans* (1936), 230

III.

A witness who does not have a present recollection of the facts may refer to a written memoran-

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Mo App 1160 (91 SW2d 629); *Klepsch* v. *Donald* (1894), 8 Wash 162 (35 P 621, 623). Similarly see *Stahl* v. *City of Duluth* (1898), 71 Minn 341 (74 NW 143, 146); *Cooper* v. *Hoeglund* (1946), 221 Minn 446 (22 NW2d 450, 455).

Cf. Robertson v. *M/S Sanyo Maru* (CA5, 1967), 374 F2d 463, holding that a purported copy of a statement signed by a witness and offered for impeachment purposes was improperly admitted since it had not been authenticated and the best evidence rule had not been complied with. See, also, *Boulch v. John B. Gutmann Construction Company, Inc.* (Mo App, 1963), 366 SW2d 21, 36.

In this case, the statement was not taken down by a stenographer. It does not purport to be a verbatim report of the questions and answers. It is a brief memorandum of a conversation. There is an obvious difference between a stenographic transcript prepared by a court reporter and a memorandum prepared by an investigator for one of the litigants.

The cases cited by the majority are distinguishable:

People v. *Kennedy* (1895), 105 Mich 434, 436, dealt not with out-of-court statements but with depositions made by a witness at a preliminary examination. The court held that the statements were "admissible as original evidence". It was sought to introduce the depositions through the testimony of the deputy clerk who recorded them at the preliminary examination. The court approved use of the written record only to refresh the memory of the witness.

In *People* v. *Tice* (1897), 115 Mich 219, no writing was involved and the testimony was solely from memory. No question of past recollection recorded was, therefore, presented.

In *People* v. *Dellabonda* (1933), 265 Mich 486, the earlier written statement sought to be introduced for impeachment purposes had been written by the witness being impeached. Again, no question of past recollection recorded was presented.

In *People* v. *Nemeth* (1932), 258 Mich 682, the prosecutor read to the jury statements made to the police by defense witnesses. The opinion does not indicate that the witnesses denied having made the statements or that the statements were not signed by the witnesses. Furthermore, there is no discussion of what foundation, if any, was laid for their admission.

Finally, *People* v. *DeBeaulieu* (1944), 308 Mich 173, 177, rather than supporting the position taken by the majority, held that a writing, signed by the witness sought to be impeached but prepared by another, was properly excluded where it appeared that the witness was unaware of what she had signed. The Court cited 6 Jones, Commentaries on Evidence (2d ed), § 2406, p 4746, for the proposition that "in order to serve as in itself a contradiction a writing must be shown to have been made by the witness himself, or by someone under his direction, or to have been approved and adopted by the witness as his own act and deed."

dum. If the memorandum refreshes his recollection, "when he speaks from a memory thus revived, his testimony is what he says, not the writing".[6] Accordingly, the general rule is that a party who uses a memorandum to refresh the memory of a witness may not introduce it in evidence or have it read to the jury.[7]

In this case the witness did not claim that his recollection was refreshed by reading the writing—he read the writing itself. This was not a case of testimony from refreshed recollection.

Nor, contrary to the ruling of the judge, did the prosecution make out a case for introduction of the writing as past recollection recorded. The exception for past recollection recorded may be availed of only in a case where it is claimed that the witness has no present recollection of the facts and, upon reference to the document, his memory is *not* refreshed.[8] When a witness testifies based on past recollection recorded it is the writing, not refreshed recollection, that is the evidence.

It is most difficult to cross-examine a witness who is allowed to "testify" based on past recollection

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[6] McCormick, Law of Evidence, § 9, p 15; 58 Am Jur, Witnesses, § 579.

[7] 29 Am Jur 2d, Evidence, § 876.

[8] See *People* v. *Hobson* (1963), 369 Mich 189, 190–192; *People* v. *Blakes* (1966), 4 Mich App 13, 16; *People* v. *Bracy* (1967), 8 Mich App 266, 276; *Jaxon* v. *City of Detroit* (1967), 379 Mich 405, 413 (per T. E. BRENNAN, J.); 58 Am Jur, Witnesses, § 588.

Additional pre-conditions to admissibility are a showing that the document was prepared at some prior and rather remote date (*People* v. *Hobson, supra*), that the document is an original memorandum made by the witness from personal observation contemporaneously with or near the time of the transaction recorded (*People* v. *Hobson, supra; Jaxon* v. *City of Detroit, supra*) and that the substance recorded is not otherwise admissible (*Jaxon* v. *City of Detroit, supra*).

And, since in a case of past recollection recorded, in contrast with refreshed recollection, the writing, not revived recollection, is the evidence, most courts hold that the writing may be introduced in evidence in connection with the witness' testimony during his direct examination. See 29 Am Jur 2d, Evidence, § 877, p 978.

recorded. In allowing him to read the writing, the judge finds that he now has no present recollection of what was said when the writing was made and that his memory cannot be revived by reference to the writing; when cross-examined, such a witness is bound to retreat behind the writing.

The written word has a way of carrying greater weight than the spoken word. The law, therefore, wisely limits the use of past recollection recorded to those situations where the just mentioned preconditions to admissibility have been satisfied. Dispensing with the requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately" would, as stated in the commentary accompanying the Revised Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, "encourage the use of statements *carefully prepared for purposes of litigation* under the supervision of attorneys, investigators or claim adjusters". (Emphasis supplied.)[9]

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[9] Text writers argue that the evidence should be admissible without regard to whether the witness remembers the event recorded (3 Wigmore on Evidence [Chadbourn Rev, 1970], § 738, p 91), but their views have not been accepted by most courts.

Indeed, the very argument advanced by these writers points up the danger of allowing use of past recollection memoranda indiscriminately. Just as they are of the opinion that the memoranda is likely to be more accurate than the witness' recollection, so, too, the trier of fact is likely to be under that impression. It is to guard against the indiscriminate creation, without any necessity, of "better" evidence that most courts have restricted the use of past recollection recorded writings.

The following appears in the commentary accompanying the Revised Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (March, 1971), Rule 803, p 111, exception 5 (51 FRD 315, 425):

"The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p 593; 3 Wigmore § 738, p 76;

The detective was not asked whether he had any present recollection of what King told him on Saturday—three days before he testified—or whether his recollection would be refreshed by reference to the writing. It is doubtful whether, if the detective had been so questioned, he would have claimed both that he had no recollection and that his recollection could not be refreshed from a writing he made just three days before he testified.

IV.

The admission of this inadmissible testimony could not properly be said to be harmless. There was a close question for resolution by the trier of fact. Although the defendant was seen, just a few hours after the robbery, entering the stolen automobile at the drive-in restaurant by police officers who had staked out the automobile, that did not establish that the defendant was one of the assailants. There were a number of assailants and what was done with the automobile between the time of the robbery and the time the defendant was apprehended was

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Jordan v. *People* (1962), 151 Colo 133 (376 P2d 699), *cert den* 373 US 944 [83 S Ct 1553, 10 L Ed 2d 699]; *Hall* v. *State* (1960), 223 Md 158 (162 A2d 751); *State* v. *Bindhammer* (1965), 44 NJ 372 (209 A2d 124). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have 'sufficient recollection to enable him to testify fully and accurately.' To the same effect are California Evidence Code § 1237 and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg & Meridian R.R.* v. *O'Brien* (1886), 119 US 99 [7 S Ct 118, 30 L Ed 299]; *Ahern* v. *Webb* (CA10, 1959), 268 F2d 45; and see *N.L.R.B.* v. *Hudson Pulp & Paper Corp.* (CA5, 1960), 273 F2d 660, 665; *N.L.R.B.* v. *Federal Dairy Co.* (CA1, 1962), 297 F2d 487. But *cf. United States* v. *Adams* (CA2, 1967), 385 F2d 548."

In all events, the Michigan Supreme Court appears to have aligned itself with the view that the writing is not admissible if the witness can independently recall the event or can refresh his recollection from the writing. See cases cited in fn 8.

not shown. The defendant's act of entering the automobile was at best circumstantial evidence, implicating him but not pointing assuredly to his guilt.

This left the identification testimony of the victim. His identification was not certain; he conceded that it was possible—although not probable—that he was mistaken. In this connection it is noteworthy that, although the defendant was in custody, the police showed a photograph to the victim the day he was released from the hospital.[10] The victim had not theretofore given the police a description of any of his assailants. He was not asked to view the defendant in a lineup. He did not view the defendant after he was arrested until the defendant was brought into the courtroom for the preliminary examination.

The resolution of the factual issue depended on the jury's evaluation of the victim's identification testimony and the contradictory testimony of the alibi witnesses. The detective's rebuttal testimony discrediting alibi witness King tended to discretit not only King's testimony but also the testimony of the other alibi witnesses who said they saw the defendant when he was with King.

The detective's rebuttal testimony was especially damaging to the defendant because of the statement attributed to King that "*they* told me to say that he was with me but I told them I wasn't going to lie for them and I didn't want to get involved". (Emphasis supplied.) It is doubtful whether the quoted words were admissible on any basis. They purport to be a statement by King as to what other

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[10] See *People* v. *Rowell* (1968), 14 Mich App 190, 198 (LEVIN, J., *concurring*); *People* v. *Adams* (1969), 19 Mich App 131, 133, n 1; *United States* v. *Zeiler* (CA3, 1970), 427 F2d 1305, 1307; *Commonwealth* v. *Whiting* (1970), 439 Pa 205 (266 A2d 738).

unidentified people—"them"—told him; triple hearsay: (1) the writing was hearsay, (2) the statement by King to the detective was hearsay (although *when* offered to impeach credibility it is not), and (3) the statement attributed to "them" was hearsay. It is well nigh impossible for a party to respond to a hearsay statement attributed to "them". "Them" are not identified; King denied making the statement—he, therefore, could not or would not identify "them". Who among "them" could the defendant call to answer the charge that "them" asked King to lie?

We could not properly declare that the detective's inadmissible testimony did not contribute to or affect the result.

PEOPLE *v.* MELVIN HARRIS

1. CRIMINAL LAW — INEFFECTIVE COUNSEL — ALIBI WITNESS NOT CALLED.

   Defendant received the effective assistance of counsel, even though trial counsel at defendant's second trial, after the defendant's first trial had ended in a mistrial, failed to call two alibi witnesses called at the first trial, where the attorney at the second trial consulted with the attorney from the first trial about calling the witnesses, the attorneys agreed that it would be a tactical error to call the witnesses, especially since one witness could have been discredited, and the defendant was allowed to make the final decision whether to call one of the witnesses.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 319, 321.
[2] 5 Am Jur 2d, Appeal and Error § 545.
21 Am Jur 2d, Criminal Law §§ 319, 321.
[3] 21 Am Jur 2d, Criminal Law §§ 319, 321, 358.

2. CRIMINAL LAW—INEFFECTIVE COUNSEL—FACTS NOT OF RECORD—TESTIMONIAL RECORD.

To the extent that a claim of ineffective assistance of counsel depends on facts not of record, the appealing defendant must, before filing his brief in the appellate court, make a testimonial record at the trial level in connection with a motion for a new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately.

3. CRIMINAL LAW—INEFFECTIVE COUNSEL—ATTORNEY-CLIENT PRIVILEGE—TESTIMONIAL RECORD.

A defendant is deemed to have waived the attorney-client privilege to the extent necessary to permit an inquiry concerning the adequacy of the representation received from his attorney where the defendant in connection with a motion for a new trial causes a hearing to be held in order to make a testimonial record of facts not of record necessary to support his claim of ineffective assistance of counsel.

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 January 12, 1971, at Detroit. (Docket No. 8996.) Decided October 1, 1971.

Melvin Harris, Jr., was convicted of rape. Defendant appealed. Remanded for a hearing on the issue of ineffective assistance of counsel. The trial court found that defendant had received the effective assistance of counsel. Conviction 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.

Gerald F. Wigle, for defendant on appeal.

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

LEVIN, J. The defendant, Melvin Harris, Jr., appeals his conviction of rape. MCLA § 750.520 (Stat Ann 1954 Rev § 28.788).

At the trial, the victim testified that between 7:30 and 8 p.m., while she was standing at a street corner waiting for a bus, a man with a knife grabbed her and forced her to accompany him into a dark alley where the charged offense was committed. She said there was sufficient light to see her assailant's face. After the rape, clad only in underclothes, she hailed a cab driver. There was testimony that she was trembling and hysterical.

The defendant lived with his parents in the same general neighborhood where the crime was committed. Some months afterwards, the victim saw the defendant on the street, recognized him as her assailant, and called the police. The defendant was arrested and the victim identified him at the trial.

It is apparent that there was sufficient evidence to convict. It is the function of the jury, as the trier of fact to determine the credibility of the witnesses and to appraise the accuracy of their testimony.

The defendant was convicted following a second trial for the charged offense. The jury at the first trial was unable to agree on a verdict and a mistrial was declared.

The defendant has been represented by four different lawyers in this matter. One lawyer represented him at the preliminary examination, another at the first trial, another at the second trial, and still another on this appeal.

The defense was alibi. The defendant claimed that he was home sick in bed with a strep throat at the time the crime was committed. No other testimony or evidence was offered in support of his alibi.

One of the assignments of error on this appeal is that the lawyer who represented the defendant at the second trial deprived him of the effective assistance of counsel by failing to call his mother and a Doctor Jones to testify in support of his alibi as they had at his first trial.

We were impressed with the apparent merit of this assignment of error and ordered an evidentiary hearing focused on the effective assistance of counsel question, *viz.*:

"It is ordered that this case is remanded to the trial court for an evidentiary hearing on the allegations contained in the defendant's affidavit of August 7, 1970 that he informed the attorney appointed to represent him at the second trial that Dr. Jones had testified at the preliminary examination and at the first trial in support of his alibi and on the defendant's allegations therein that the attorney appointed for the second trial did not conscientiously prepare the case for trial, and for a determination, after hearing both the defendant and his attorney, whether the attorney was justified in not calling Dr. Jones and the defendant's mother to testify at the second trial and of whether he conscientiously prepared the case for trial.

"Before the hearing, the defendant's present attorney and the prosecutor shall be furnished at county expense with copies of the transcript of the testimony at the first trial of Dr. Jones, the defendant's mother, and of the defendant.

"The trial court shall, after making its determination, file with our Court the transcript of the proceedings and of its determination and the transcripts of the testimony of Dr. Jones, the defendant's mother, and of the defendant at the first trial."

The evidentiary hearing was held and the trial judge found that the defendant's claim of ineffective assistance of counsel was not substantiated:

"In this court's view, the evidentiary hearing clearly established that the defendant's attorney at the second trial adequately and conscientiously prepared his case for trial. He thoroughly discussed the defense with the defendant's attorney at the first trial, and together they concluded that it would be inadvisable to call Dr. Jones and the defendant's mother as alibi witnesses. In the view of both attorneys it would have been a tactical error to call Dr. Jones as a witness. The transcript of the hearing further reflects that the final decision not to call Dr. Jones was left to the defendant. The transcripts disclose ample justification for not calling Dr. Jones as a witness. The policewoman was prepared to testify that the record entered by the doctor at defendant's first trial was different when she first saw it at the doctor's office shortly after defendant's arrest. She would have established a possible alteration of the doctor's patient card, thereby raising serious questions concerning Dr. Jones' effectiveness as a witness. This court cannot say that the attorneys made an improper decision. He is bound by his trial tactics."

The stenographic record made at the remand hearing amply supports the judge's findings.[1]

[1] The lawyer who represented the defendant at his first trial testified that "it was my opinion that on the retrial of this matter—I told him frankly that Mr. Carter, the prosecutor, had been most effective in cross-examining Dr. Jones. There were some questions raised regarding his records and the fact that Dr. Jones was a doctor advanced in years. I thought perhaps it might be inadvisable to call him. I said if I were retrying the case I would not call Dr. Jones."

An examination of the record of the first trial reveals that Dr. Jones had in fact been effectively cross-examined by the prosecutor. Dr. Jones testified, in effect, that the defendant had been in his office on the evening of March 9, the date of the rape, sometime between the hours of 7 and 9, his usual evening office hours. It was clear that the doctor was not testifying from independent memory but rather based his testimony solely on his office record which indicated that the defendant had been in his office on March 9.

The history of this litigation demonstrates the soundness of our recent ruling in *People* v. *Jelks* (1971), 33 Mich App 425, 431, where we declared:

"A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level *in connection with a motion for a new trial* which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately." (Emphasis supplied.)

The prosecutor argued that the doctor's records had been altered to indicate that the defendant's visit was on March 9 when in fact it had been on March 8.

A policewoman testified at the first trial that she had visited the doctor in September 1969, after having received notice of an alibi defense and at that time was shown the records which were later exhibited at the first trial as the basis for the doctor's testimony that defendant had been in his office on March 9. She testified that at the time of her visit the cards did not indicate the date of the defendant's appointment. The date was later inserted in ink of a different color than the other writing on the card.

It was also brought out at the first trial that the doctor had filled in certain insurance papers relating to the defendant's illness with false information; on such papers he had indicated that the defendant had been treated by him eight times when in fact he had only been treated three times. Also, the date of the last treatment indicated on these papers was March 8, the day before the crime was committed.

The lawyer who represented the defendant at his second trial testified at the remand hearing that he discussed the question of calling Dr. Jones with the defendant and told him that his best advice was not to call the doctor and that the defendant "agreed to that. I left the final decision up to him as to which way to proceed. That decision was his and I told him that the decision was his." The defendant acknowledged that his second trial lawyer had discussed the matter with him and that on his lawyer's advice he had felt it would be better not to call Dr. Jones.

Defendant's second trial lawyer stated that he did not call the defendant's mother to testify because he felt that it would be a tactical mistake to call her and not the doctor, and besides, all she could testify to was that the defendant had been at the doctor's office sometime between the hours of 7 and 9.

Economy in the administration of justice requires that we adhere as a general proposition[2] to the rule declared in *Jelks* that to the extent a claim of inadequacy depends on facts not of record the appealing defendant must, *before* filing his brief in our court,[3] make a testimonial record at the trial level in connection with a motion for new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately. In connection with such a hearing, the appealing defendant is deemed to have waived the attorney-client privilege to the extent necessary to permit an inquiry concerning the adequacy of the representation he received.[4]

Affirmed.

All concurred.

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[2] The hearing on remand in this case was ordered before *Jelks* was decided. Also, a compelling showing had been made in this case that there might have been ineffective assistance; it appeared that an alibi witness who was not called at the second trial had testified in support of the alibi at the first trial.

[3] The motion for a new trial can be filed before a claim of appeal is filed or, with our court's permission, while an appeal is pending in our court. We have granted permission in a large number of cases pending on appeal to file an application in the trial court for leave to file a delayed motion for a new trial.

[4] See *People* v. *Thomas* (1971), 33 Mich App 664, 676 (LEVIN, J., *concurring*):

"On the issue of whether the defendants' trial lawyers had a good reason [not to call a witness], the trial judge was not precluded by the attorney-client relationship from asking them to explain their failure to call * * * a witness. To rule that such inquiry is barred would be to shield inadequate representation and unduly impede the establishment of a meritorious claim of ineffective assistance. A client who attacks the adequacy of the representation he received at his trial waives the attorney-client privilege to the extent necessary to permit an inquiry concerning the adequacy of his representation."

"The plaintiffs waived the privilege when they charged their former attorney with incompetency and unpreparedness." *Everett* v. *Everett* (1947), 319 Mich 475, 484. Similarly, see *Leverich* v. *Leverich* (1954), 340 Mich 133, 137; 8 Wigmore, Evidence, § 2326, p 638, fn 4.

PEOPLE *v.* EVANS

1. CRIMINAL LAW—PROSECUTOR'S ARGUMENT—PERSONAL OPINION OF GUILT.

   Every positive statement by the prosecutor is not an expression of a personal opinion concerning the defendant's guilt, necessitating a new trial.

2. CRIMINAL LAW—PROSECUTOR'S ARGUMENT—PERSONAL OPINION OF GUILT.

   Prosecutor's stating, during closing argument, that the defendants were both guilty did not constitute the expression of the prosecutor's personal opinion or reversible error where the prosecutor immediately pointed to the evidence showing guilt and where any waywardness in the prosecutor's argument could have been overcome by a cautionary instruction, if such an instruction had been requested.

3. LARCENY—FROM THE PERSON—INSTRUCTIONS TO JURY—ELEMENTS OF CRIME.

   Instructions to the jury in a prosecution for larceny from the person of another in which the judge read the statute and then the information charging that defendants committed the offense by stealing a purse "from the person of the said complainant", instructed that to convict the jury must find that the property "was taken from the person of the owner by the defendants with the intent to commit larceny", and then summed up in the next sentence but did not again say that the taking must be "from the person" could not have misled or confused the jury, especially where defendants' lawyer did not object to the instructions and the evidence was uncontroverted that two men had snatched the victim's purse and the only disputed issue was whether the defendants were the thieves (MCLA § 750.357).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial § 459.
[3] 50 Am Jur 2d, Larceny §§ 174, 175.

Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 April 20, 1971, at Grand Rapids. (Docket No. 9378.) Decided October 1, 1971.

Donald R. Evans and Marvin L. Evans were convicted of larceny from a person. 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 *Thomas M. Khalil,* Assistant Prosecuting Attorney, for the people.

Kenneth A. Webb, for defendants on appeal.

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

LEVIN, P. J. The defendants, Donald and Marvin Evans, were convicted of larceny from a person.[1] They contend (1) during closing argument to the jury, the prosecutor expressed his personal opinion that the defendants were guilty, and (2) the trial judge failed to charge the jury regarding a legally-essential element of the offense of larceny from a person. We affirm.

I.

The prosecutor opened his final argument to the jury with the following statement:

"Counsel [defense counsel] remembers the testimony different than I do. He remembers that one

[1] MCLA § 750.357 (Stat Ann 1954 Rev § 28.589).

person said the taller man had the purse, one person said the shorter man had the purse. My recollection of this testimony is both witnesses said it was the taller man who had the purse.

"Now, it really doesn't matter which one of us is right, whether he remembers it correctly or I remember it correctly, because it is the way you remember the testimony that counts. *It doesn't matter for another reason and that is this: That these men are both guilty of this crime.* They were acting together. They were acting in concert and it doesn't matter which one of them was actually the one who was holding the purse because they did this together. They cooperated, they approached this lady together, they ran together, they were apprehended together, and they did it together in cooperation with each other. So which one actually held the purse is not controlling in this case." (Emphasis supplied.)

The defendants contend that this argument violated the rule which prohibits a prosecutor from expressing a "personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant".[2]

This rule seeks to guard against the jury being unduly swayed by a personal plea from one representing duly-constituted authority:

"It is presumable that statements of fact based upon personal knowledge, made by a person occupying the responsible position of prosecuting attorney of a county, whom the people have chosen because of his ability and character to fill that position, would have both weight and influence with the jury,

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[2] ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, 5.8(b). See *People* v. *Quick* (1885), 58 Mich 321, 324; *People* v. *McGuire* (1891), 89 Mich 64; *People* v. *Hill* (1932), 258 Mich 79, 88; *People* v. *Ignofo* (1946), 315 Mich 626, 636; *People* v. *Slater* (1970), 21 Mich App 561, 565; *People* v. *Humphreys* (1970), 24 Mich App 411, 418.

and may have determined any doubt which they, or some of them, may have entertained of the defendant's guilt against him." *People* v. *Dane* (1886), 59 Mich 550, 553.

In the present case, the prosecutor did not vouch for the defendants' guilt on a personal basis, he was not saying, "take it from me, we have the right men". Rather, we have a spirited argument in which the prosecutor said something much closer to: "The evidence shows that these men committed the crime". The line is imprecise, but every positive statement by the prosecutor is not an expression of a personal opinion or a personal plea necessitating a new trial.

Moreover, we are convinced that whatever waywardness there may have been in the prosecutor's argument could have been overcome by an instruction from the bench had the defendants' trial lawyer objected at the time.[3]

II.

In his instructions to the jury, the judge read the statute making larceny from a person an offense and also the information charging the defendants with committing that offense by stealing a lady's purse "from the person of the said complainant". He *also* instructed the jury that "in order to constitute an offense under this statute" the jury must find that the property "was taken from the person of the owner by the defendants with the intent to commit larceny". In the next sentence he summed up, but did not again say that the taking must be "from the person".

[3] *People* v. *Latham* (1971), 32 Mich App 198; *People* v. *Humphreys* (1970), 24 Mich App 411; *People* v. *Montevecchio* (1971), 32 Mich App 163, 166.

In *People* v. *Price* (1970), 21 Mich App 694, 697, relied on by the defendants, the judge, as in the present case, read the statute and the information to the jury. He did not, in contrast with the present case, separately explain and instruct the jury that it must find the elements distinguishing the particular statutory larceny charged in the information from other crimes of larceny. In *People* v. *Bowen* (1968), 10 Mich App 1, the judge did not give any instruction whatsoever concerning a necessary element of the offense. Nor is this a case of "conflicting instructions * * * , one erroneous and the other correct".[4] In this case, the judge merely did not reiterate that which in the immediately preceding sentence he had adequately covered. That elision could not have misled or confused the jury.

In this connection it is of some significance that the defendants' lawyer did not object to the instructions given and the evidence was uncontroverted that two men had snatched the victim's purse and the only disputed issue was whether the defendants were the thieves.

Affirmed.

All concurred.

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[4] *People* v. *Dewitt* (1925), 233 Mich 222, 226, quoted approvingly in *People* v. *Kanar* (1946), 314 Mich 242, 253.

MARTIN v. HESS CARTAGE COMPANY

1. DISCOVERY—INTERROGATORIES—FAILURE TO REPLY—DISMISSAL.

   An action should not be dismissed because a party's response to an interrogatory failed to comply with a court order compelling an answer to the interrogatory where it has been established that the party's failure to comply was due to inability, and not to wilfulness, bad faith, or any fault on his part (GCR 1963, 313.2[2][c]).

2. DISCOVERY—INTERROGATORIES—ANSWER TO INTERROGATORY—SUFFICIENCY OF ANSWER—COURT ORDER.

   Court order compelling plaintiff to comply with defendant's request that plaintiff furnish a detailed and accurate report, stated in dollars, concerning the physical damage done to plaintiff's vehicle, was unclear as to whether a report submitted by the plaintiff could constitute compliance with the order or whether nothing other than a report prepared by an independent, disinterested person, such as a garage or repair shop, could constitute compliance.

3. DISCOVERY—INTERROGATORIES—ANSWER TO INTERROGATORY—SUFFICIENCY OF ANSWER—DISMISSAL.

   Dismissal of complaint with prejudice on the ground that plaintiff had failed to comply with a court order that plaintiff supply defendant with a detailed and accurate report, stated in dollars, concerning the physical damage done to plaintiff's vehicle was error where plaintiff furnished defendant with his own affidavit detailing damages, the dismissal was based on the ground that only a garage repair bill or a garage report would have constituted compliance, and the trial court's construction of its order had never been communicated to plaintiff or his lawyer.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 23 Am Jur 2d, Depositions and Discovery §§ 258, 259.
[2] 23 Am Jur 2d, Depositions and Discovery §§ 256, 257.

Appeal from Wayne, John M. Wise, J. Submitted Division 1 June 10, 1971, at Detroit. (Docket No. 9544.) Decided October 1, 1971.

Complaint by John H. Martin and Nellie Martin against Hess Cartage Company for negligence. Complaint dismissed with prejudice. Plaintiffs appeal. Reversed and remanded for trial.

Zeff & Zeff, P. C., for plaintiffs.

Garan, Lucow, Miller & Lehman (by *David J. Cooper*), for defendant.

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

LEVIN, P. J. This action was dismissed with prejudice upon a finding by the trial court that the plaintiffs had not responded to an interrogatory in accordance with an earlier order of the court. We reverse and remand for trial because the earlier order requiring the response to the interrogatory did not provide that the information sought could be furnished *only* in the manner that the court, at the time of dismissal, found was required, and the record does not show that the construction placed by the court on its earlier order was communicated by the court to the plaintiffs or their lawyer before the action was dismissed.

I.

The plaintiffs, John H. Martin, and his wife, Nellie, commenced this action against the defendants, Hess Cartage Company and Charles Owens. Owens was the employee-operator of a truck owned

by Hess Cartage. The action was later dismissed as to Owens.

On November 23, 1962, plaintiff John Martin drove his automobile into a light pole. Owens, who was driving a Hess Cartage truck, stopped to give assistance and drove Martin to Hess Cartage's nearby place of business.

Upon arriving, Martin alighted. He claims that before he could do so safely, Owens negligently resumed forward progress causing him to lose his balance and fall to the ground and suffer injury. Hess Cartage denies that Owens was negligent and alleges that Martin was intoxicated and fell out of the stopped truck while attempting to alight.

Pertinent to the issue on appeal, Hess Cartage further contends that Martin suffered whatever injuries occurred when his automobile struck the light pole, not when he alighted. In an effort to substantiate that contention, it sought discovery concerning the extent of the damages to his automobile.

II.

Plaintiff's complaint was filed on November 22, 1965. On February 18, 1966, Hess Cartage submitted interrogatories, including the following:

"25. Please itemize all repairs made to plaintiff's automobile following the accident involved in the instant case.

"26. Does plaintiff have a copy of the repair invoice or repair statement for this automobile? If so, give the name and address of the person or persons who have custody thereof. Will you furnish a copy of that repair invoice or statement to the defendant? If so, please attach copy."

On May 2, 1966, Hess Cartage moved to dismiss plaintiffs' action because they had failed to respond to the interrogatories. On May 25, 1966, they responded to the interrogatories, and to interrogatories 25 and 26 as follows:

"25. $100.00 deductible collision policy
"26. No."

On August 5, 1966, an Order Compelling Answers to Interrogatories was entered. Four items of information were required to be supplied. Three were supplied. The dispute concerns item 3, *viz.*:

"3. Plaintiff shall supply to the defendant a detailed and accurate report, stated in dollars and cents, concerning the amount of physical damage done to the plaintiff's vehicle in the accident in question."

On November 13, 1967, the action was dismissed for "want of prosecution, but without prejudice". It was reinstated by order dated December 1, 1967.

On May 8, 1968, the circuit judge filed an opinion stating that the Order Compelling Answers to Interrogatories had not been complied with and that the plaintiffs would be allowed 20 days within which to comply; pursuant to the opinion an order was entered on May 17, 1968, providing that if the plaintiffs failed to comply with the Order Compelling Answers to Interrogatories the action would "stand dismissed with prejudice, without need for the defendant to take any further action". On June 5, 1968, *within the 20-day period,* the plaintiffs filed the following response in the form of an affidavit signed by plaintiff John Martin:

"3. Amount of damage $300.00 said damage being in the nature of the following repairs, to-wit:

"Replace right front fender and bumper
"Replace headlight
"Bump out hood
"Realign and bump out right front door
"Replace righthand side of front grill."

One year and eight months later, a pretrial conference was scheduled for February 27, 1970. Hess Cartage submitted a pretrial statement asserting that paragraph 3 of the Order Compelling Answers to Interrogatories required the plaintiffs to furnish "a copy of the property damage repair report", that they had not done so, and under the order of May 17, 1968 the action was dismissed and there was no reason to have a pretrial conference.

The parties appeared before the circuit judge on April 24, 1970. At the conclusion of oral argument he ruled that the action was dismissed because of noncompliance with the May 17, 1968 order requiring a response within 20 days to the order Compelling Answers to Interrogatories. On May 1, 1970, an order was entered dismissing the action with prejudice.

III.

The defendant did not advance its claim that the plaintiffs' June 5, 1968 response did not comply with the court's orders until the pretrial conference on February 27, 1970, over 20 months after the plaintiffs' response was received. True, the May 17, 1968 order provided that if the plaintiffs did not comply within the 20-day period the complaint was to be deemed automatically dismissed. Nevertheless, the defendant's lawyer should not have been surprised when the plaintiffs' lawyer contended that the June 5, 1968 response complied with the court's directives. When the plaintiffs responded by affidavit on June 5, 1968, to interrogatory No. 3, it must

have been apparent to the defendant's lawyer that the plaintiffs and their lawyer thought or would contend that by filing the affidavit in the form it was filed that they had complied with the court's orders. The delay in bringing the matter to a head from June, 1968 to April, 1970 cannot be charged to the plaintiffs.

The plaintiffs' lawyer did, indeed, delay in responding to the interrogatories. First, there was the delay from February 18, 1966, when the defendant's interrogatories were filed, until May 25, 1966, when the plaintiffs filed their response. Then there was the delay from August 5, 1966, when the Order Compelling Answers to Interrogatories was entered, until June 5, 1968, when the response to item 3 in the form of an affidavit signed by one of the plaintiffs was filed—a delay of almost two years.

The correspondence in the interim between the lawyers for the parties, referred to during oral argument and which is not part of the record on appeal, indicates that the lawyers for the parties were in communication, but does not justify this extraordinarily long delay. However, the court did not dismiss the plaintiffs' complaint in May, 1968 because they had not by then responded to the August 5, 1966 Order Compelling Answers to Interrogatories. In May, 1968, the court gave the plaintiffs 20 days within which to cure the defect. Within the 20-day period the plaintiffs made a response.

IV.

The question then becomes whether the court acted properly in concluding on April 24, 1970, that the June 5, 1968 response was so inadequate as to justify the drastic remedy of dismissal of plaintiffs' complaint.

In *Krim* v. *Osborne* (1969), 20 Mich App 237, we affirmed an order dismissing a complaint pursuant to GCR 1963, 313.4[1] for failure to answer interrogatories. We observe that the court rule is based on F R Civ P 37(d) and declared, citing decisions of Federal courts as authority:

"Dismissals of causes of action under this rule are within the discretionary power of the trial judge (*Halverson* v. *Campbell Soup Company* [CA 7, 1967], 374 F2d 810; *White Pine Copper Company* v. *Continental Ins. Company* [WD, Mich, 1968], 166 F Supp 148; *Dann* v. *Compagnie Generale Trans-Atlantique Limited* [ED NY, 1939], 29 F Supp 330), but because of the drastic nature of such action, the rule should be applied only in extreme circumstances. *Independent Productions Corporation* v. *Loew's Incorporated* (CA 2, 1960), 283 F2d 730."[2]

The defendant in this case relies on GCR 1963, 313.2(2)(c)[3] as the source of the court's power to

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[1] ".4 Failure of a party to Attend or Serve Answers. If a party or officer or managing agent of a party willfully fails to appeal before the person who is to take his deposition, after being served with a proper notice or fails to serve answers to interrogatories submitted under Rule 309, after proper notice of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." GCR 1963, 313.4.

[2] See also *Robison* v. *Transamerica Insurance Co.* (CA10, 1966), 368 F2d 37; *Bon Air Hotel, Inc.* v. *Time, Inc.* (CA5, 1967) 376 F2d 118; *Maresco* v. *Lambert* (ED NY, 1941), 2 FRD 163.

[3] "(2) Other consequences. If any party or an officer or managing agent of a party refuses to obey an order made under sub rule 313.1 requiring him to answer designated questions, or an order made under either rule 310 or 311, the court may make such orders in regard to the refusal as are just, and among others the following: * * *

"(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;" GCR 1963, 313.2(2)(c).

Our disposition of this case makes it unnecessary for us to discuss the interplay of rules 313.2(2)(c) and 313.4. See generally, 4 Moore's Federal Practice ¶¶ 37.03[2], 37.05.

dismiss a case where the party from whom discovery is sought has responded but the response does not comply with a court order requiring an answer. This rule is also derived from a Federal rule, F R Civ P 37(b). The United States Supreme Court construed that rule in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers* (1958), 357 US 197, 212 (78 S Ct 1087, 1096; 2 L Ed 2d 1255, 1267) and declared that an action should not be dismissed "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner".

In this connection it has been said that the "courts should make the punishment fit the crime and should not impose a drastic sanction, which will prevent adjudication of a case on its merits, except on the clearest showing that such a course is required".[4] In this case a less drastic sanction would have been to enter an order that "designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order". GCR 1963, 313.2(2)(a). The question of the propriety of the sanction imposed, need not, however, be reached to decide this case.

V.

An antecedent and the primary question is whether the plaintiffs were under a duty to furnish more than was contained in their June 5, 1968 response. That in turn requires an interpretation of the court's August 5, 1966 Order Compelling Answers to Interrogatories.

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[4] 2A Barron and Holtzoff, Federal Practice and Procedure § 853, pp 544, 545, quoted approvingly *Oaks* v. *Rojcewicz* (Alaska, 1966), 409 P2d 839, 844.

The defendant contends, and the trial judge by implication found, that no response prepared by the plaintiffs themselves could constitute compliance with the court's orders, that the plaintiffs could comply only by furnishing a document prepared by an independent, disinterested person, *e.g.,* a copy of the repair bill or a report furnished by the garage.

The August 5, 1966 Order Compelling Answers to Interrogatories provides that the plaintiffs shall supply the defendant with "a detailed and accurate report, stated in dollars and cents, concerning the amount of physical damage done to the plaintiff's vehicle in the accident in question". In our opinion, it is not clear whether a "report" prepared by the plaintiffs could constitute compliance with the order or whether nothing other than a report prepared by an independent, disinterested person could constitute compliance.

It does not appear that a record was made of any hearing preceding the entry of the August 5, 1966 or May 17, 1968 orders, and, thus, we cannot construe the language of the orders in the light of what took place at hearings preceding the entry of those orders. The orders appear to have been prepared by defendant's lawyer.

Neither the opinion filed by the circuit judge on May 8, 1968, nor the order entered pursuant to that opinion on May 17, 1968, focuses on the interpretive problem with which we are faced. Nor does the transcript of the April 24, 1970 argument indicate that the court, either in August, 1966 or May 1968, had communicated to the plaintiffs' lawyer that they must furnish a report prepared by an independent, disinterested person or that a response by the plaintiffs themselves furnishing the requested information could not constitute compliance. Nor did the circuit judge find on April 24, 1970, expressly

or by implication, that the construction he then placed on his earlier orders had been communicated to the plaintiffs or their lawyer before that date.

At one point during the April 24, 1970 argument, the judge said, "Now, where was the bill or copy of the bill of the damages which was the itemization which was required by" the August 5, 1966 order. At other times, the judge spoke of a garage report, or both of a repair bill and a garage report. A repair bill would have been prepared contemporaneously with the making of the repairs. A garage report might be prepared months or years later.

It will be recalled that the plaintiffs responded in the negative to the initial interrogatory whether they had and would furnish a copy of the repair invoice or repair statement for the repairs to plaintiff John Martin's automobile. On several occasions during the April 24, 1970 argument, plaintiffs' lawyer asserted that they did not have a repair bill. He said: "In 1966 and 1968, 1965 this man [plaintiff John Martin] could not get to [defendant's lawyer] a copy of the repair bill, did not have it".

In response to the statement by the judge that the purpose of discovery is to "open the files", the plaintiff's lawyer responded, "what happens if he cannot find the repair bill?" The judge replied, *"that wasn't before me"* (emphasis supplied). The colloquy between the court and counsel concluded with the following exchange:

"The Court: Now I'm going to put on the record that the court was a specialist in the negligence field before getting on the trial level and the court would like the record to indicate that there is a good deal of information from a garage report or a detailed accurate report of the damages of a vehicle. Counsel for plaintiff in this cause has a tendency

in any number of cases to fail to comply with orders of the court, which has been an every day, every week occurrence.

"*Mr. Zeff* [*plaintiff's lawyer*]: This I also object to as a matter of record because what has transpired—

"*The Court* (*interposing*): Just a moment. Put this on the record. There isn't a judge on this bench who does not know the situation—

"*Mr. Zeff* (*interposing*): I will object to this also.

"*The Court:* May I say this to you, Mr. Zeff. I have been ultra-liberal, giving you everything you wanted in spite of [defendant's lawyer's] objections back in 1968.

"*Mr. Zeff:* In 1968 I told you I couldn't get a repair bill. What could I do? When a person can't find a repair bill is the person's cause going to be dismissed?

"*The Court:* Dismissed because of the negligence or manner in which you were proceeding. That is the reason."

While plaintiffs might have responded to the court's orders by furnishing a copy of a repair bill and the plaintiffs' lawyer may have understood that the defendant or the court expected the plaintiffs to furnish a copy of the repair bill, it is far from clear from the language of the August 5, 1966 order (or the later May 17, 1968 order) that the *only* manner in which the plaintiff could comply would be to furnish a copy of the repair bill, particularly if the plaintiffs' lawyer did, as he asserted on April 24, 1970, advise the court in May, 1968 that (as earlier stated in response to an initial interrogatory) the plaintiffs did not have a copy of the repair bill.[5]

[5] Plaintiffs' lawyer kept insisting at the April 24, 1970 hearing that his clients did not have a copy of the repair bill. There is nothing in the record which would indicate that plaintiffs' lawyer's statement not truthful.

If the plaintiffs could only comply by furnishing a copy of the repair bill itself, then there was no need to say more than just that in the August 5, 1966 order; there was no need for a particularization in that order of what the "report" was to contain.

Nor do we think it is clear from the order that a "report" by the plaintiffs would not suffice, that the report had to come from the garage where the repairs were made.

While the judge said on April 24, 1970, that he could understand why the defendant's lawyer would want "the repair bill because a lot of information is obtained from that", and "there is a good deal of information from a garage report or a detailed and accurate report to the damages of the vehicle", and he found that plaintiffs' lawyer had not "supplied the defendant with a detailed and accurate report as to the physical damage done to the vehicle", he earlier said that plaintiffs' lawyer was right in saying there had been substantial compliance with the August 5, 1966 order: *"there is a substantial compliance with number three. You are right"* (emphasis supplied), that the question of what happens if plaintiffs can't find the repair bill "wasn't before me", and that he was dismissing the action because of the "negligence or manner" in which the plaintiffs' lawyer was proceeding.

There is nothing in the record showing that the repair bill or a garage report, if it ever was available, is not now available.

If the April 24, 1970 argument had focused on the question whether a repair bill or garage report was obtainable, it might have then or on an adjourned date have been established whether a garage bill or report is presently obtainable etither from the garage or some employee of the garage or from plaintiff John Martin's insurer. It might even appear upon examination of such a bill or report, if obtainable, that the damages were no different than the damages stated in the affidavit furnished by the plaintiffs on June 5, 1968.

We could not properly say on this record that it was ever made clear to plaintiffs' lawyer in May, 1968 or in August, 1966, that if the plaintiffs did not have a copy of the repair bill that an answer by one of them detailing the damages would not suffice and that they were under an obligation to obtain from the garage either a duplicate of the repair bill or a written report as to the nature and amount of the damages. There being no evidence to show that the construction placed on the 1966 and 1968 orders at the April 24, 1970 argument was communicated to plaintiffs' lawyer before April 24, 1970, plaintiffs' action could not properly be dismissed for noncompliance with the court's orders.[6]

Reversed and remanded for trial. Costs to the plaintiffs.

All concurred.

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[6] On May 25, 1966, in response to Hess Cartage's interrogatories, the plaintiffs responded that they did not have and would not furnish a copy of the repair bill. If it was of such transcendent importance to Hess Cartage to obtain a copy of the repair bill or a report from the garage, its lawyer could have asked, upon oral examination of the plaintiffs or by written interrogatories, for the names of the garage and of plaintiff John Martin's insurer. With the response Hess Cartage's lawyer might have determined whether a copy of the repair bill or a report itemizing the damages could be obtained from the garage or the insurer.

While the court could require the plaintiffs to furnish information in their possession and to respond to interrogatories, it is a separate question whether it could require them to attempt to obtain from a third person information in that person's files or to seek to have a third person prepare a report to be furnished to the defendant, at least without any showing on the part of the defendant that it was unable to obtain the information from the third person and there was reason to believe that the plaintiffs could. We intimate no opinion on that question because it has not been briefed or argued. We advert to it because we do not wish to be understood as declaring by implication that an order requiring a party to obtain information from a third party can be entered as a matter of course. See *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers* (1958), 357 US 197, 204 (78 S Ct 1087, 1091; 2 L Ed 2d 1255, 1262).

PEOPLE *v.* BASEMORE

1. CRIMINAL LAW—USE OF DEFENDANT'S NICKNAME—RELEVANCY.
   Prosecutor's referring to the defendant's nickname, "Wolf", was not improper where defendant had the same nickname for many years and the nickname was relevant to the case in that some of the witnesses stated that the murderer, when seeking entrance to the victim's house, said his name was "Wolf".

2. CRIMINAL LAW—WITNESS'S STATEMENT—LOSS OF STATEMENT.
   Loss of statements given by witnesses, shortly after the crime with which the defendant was charged was committed, that one of the murderers, when entering the victim's house had said his name was "Wolf" did not entitle the defendant, nicknamed "Wolf", to have the prosecution suppressed where there was no claim that the statements were deliberately lost and the defense brought out at trial that some of the witnesses had said the name given was "Walt".

3. CRIMINAL LAW — EVIDENCE — DEFENDANT'S PRIOR CONVICTION — CHARACTER WITNESS.
   Prosecutor's asking a witness, who testified concerning the defendant's good reputation and character, whether he was aware that the defendant had been convicted of an offense while in the army was not error where the defendant had already testified concerning his army conviction.

4. CRIMINAL LAW—DEFENDANT TESTIFYING—OWNERSHIP OF GUN—PRESERVING QUESTION.
   Prosecutor's asking the defendant, charged with murder, if he had ever owned a gun did not constitute reversible error

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 459.
[2] 21 Am Jur 2d, Criminal Law §§ 218, 225, 333.
[3] 58 Am Jur, Witnesses § 734 *et seq.*
[4] 58 Am Jur, Witnesses § 649.
[5, 6] 58 Am Jur, Witnesses § 736.

where defendant's lawyer objected and, after an off-the-record conference in the absence of the jury, the defendant's lawyer was satisfied to let the matter drop, the lawyer and defense counsel did not ask for a cautionary instruction, did not attempt to develop the facts regarding defendant's ownership of a gun, if he did own one, and defense counsel did not claim that irreparable damage had been done to the defendant's case or ask for a mistrial.

5. WITNESSES—JUVENILE RECORD—IMPEACHMENT.

A person's history of juvenile offenses may not be used under the statute "against" him, but it can be used to impeach a witness's credibility when he testifies against someone else (MCLA § 721A.23).

6. WITNESSES—JUVENILE RECORD—IMPEACHMENT.

Refusal to allow defense counsel to place before the jury for impeachment purposes the juvenile records of two prosecution witnesses in a trial for murder was error, where one of the witnesses was the only witness who identified defendant both at a lineup and at trial as one of two assassins, and the other was unable so to identify defendant at the lineup but identified him at trial.

Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 June 9, 1971, at Detroit. (Docket No. 9637.) Decided October 1, 1971.

Robert Basemore was convicted of second-degree murder. 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 *Richard R. Nelson,* Assistant Prosecuting Attorney, for the people.

Francis K. Young, for defendant on appeal.

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

LEVIN, P. J. Some time between 11:30 and midnight on May 27, 1969, two men were admitted to the home occupied by Lulu M. Sailor and Audrey Posey. A few minutes later the women were assassinated by means of repeated revolver shots to the head.

Walter Caddell and defendant-appellant Robert Basemore were bound over on a charge of second-degree murder.[1] After a jury trial Caddell was acquitted and Basemore was convicted.

The people's case was based on the testimony of five teen-age boys between the ages of 15 and 17 who were sitting on the porch of the house adjacent to the Posey house when the two assassins appeared at the door of the Posey house and asked to be admitted.

The boys testified that Audrey Posey answered the door asking, "Who is it?" The response was either "Wolf" or "Walt". Four of the boys testified on direct examination that the response was "Wolf". On cross-examination, two admitted that it might have been "Walt". A policeman testified that the account he was given shortly after the crime was committed included the name "Walt".

Statements were taken from the youthful witnesses shortly after the crime was committed but they were lost before the trial. Resumés of the statements, on the basis of which the prosecutor recommended issuance of warrants, were found and made available to defense counsel during the trial. It appears from the resumés that in their initial

[1] MCLA § 750.317 (Stat Ann 1954 Rev § 28.549).

statements to the police some of the boys said that the response at the front door was "Walt".

The police were called and shortly thereafter they arrested Orlando Lewis and *Walt*er Harvard at the Playmore Bar.

Lewis lived in a flat above the one where the murders were committed. Harvard was the proprietor of the Playmore. Lulu Sailor worked at the Playmore and Audrey Posey was a frequenter of the bar. Basemore was a friend of Harvard and also a frequenter of the bar.

Lewis and *Walt*er Harvard were later released and it was then that *Walt*er Caddell and Robert Basemore were arrested and charged. Basemore was known by the nickname of "Wolf".

There were two lineups. Basemore was in one lineup and Caddell in the other.

At the trial three of the boys, Zachary Baldwin, Michael Harris, and Garfield Hawkins, identified Basemore as one of the men who entered the Posey home. Kenneth Richardson and Terrance Stovall were unable to identify him. All the boys except Richardson attended the Basemore lineup. A police officer testified that Baldwin identified Basemore in the lineup, that Harris and Hawkins (who identified Basemore at the trial) could not identify him in the lineup, and that Stovall (who could not identify Basemore at the trial) was uncertain at the lineup.

In summary, the only witness who identified Basemore both at the lineup and at the trial was Baldwin. Baldwin also identified an innocent person (a man named Reed) who was in the Basemore lineup. Walter Harvard testified at the trial that Baldwin pointed him out shortly after the shooting and said, "That's the one". On direct examination Baldwin

said the response at the door was "Wolf" but concluded his testimony with the statement that he was positive that it was "Walt".

The evidence tended to show that the boys were about 25 to 35 feet from the entrance to the Posey flat. Hawkins, who could not identify Basemore at the lineup but who identified him at the trial, said that the porch light was on. Richardson, who could not identify Basemore, said the porch light was not on.

The boys had been drinking beer and wine shortly before they witnessed the murderers' arrival.

There is no merit in Basemore's claim that the prosecutor's use of the nickname "Wolf" was improper. "Wolf" had been Basemore's nickname since he was 13 or 14 years of age. The name "Wolf" was relevant in these proceedings. The testimony of the teen-agers was that one of the assassins had identified himself as "Walt" or "Wolf". There were two Walts, Walter Caddell, the codefendant who was acquitted, and Walter Harvard, the proprietor of the Playmore Bar, who was arrested shortly after the crime was committed and who was pointed out by Baldwin at the police station but who was later released. The defendant's claim that the prosecutor used the term in a derogatory or abusive manner is not supported by an examination of the record.

The loss of the witnesses' statements does not entitle Basemore to a suppression of the prosecution. He makes no claim that the statements were deliberately lost or destroyed. The defense brought out at the trial the fact that at the time the teen-agers gave their statements some of them said that the response at the door was "Walt".[2]

[2] The judge required that a further effort be made to locate the statements during the trial, but they could not be found. It was

The prosecutor asked a witness who testified concerning Basemore's good reputation and character whether he was aware that Basemore had been convicted of the offense of larceny while he was in the army. The witness responded that he was aware of the conviction. The great weight of authority appears to support the view that a character witness may be cross-examined regarding his knowledge of specific acts or crimes attributed to the defendant.[3] We need not associate ourselves with those decisions in order to decide this case. Here it could not be claimed that the question put to the character witness placed before the jury evidence otherwise inadmissible; Basemore had already testified concerning his army conviction of the offense of larceny. There was no error.

The prosecutor also asked the character witness whether he had ever been arrested and convicted of a crime and repeated this inquiry after the witness had already responded once in the negative:

"*Q*. Have you ever been arrested and convicted of a crime?

"*A*. No.

"*Q*. You have never been arrested and convicted of a crime?"

Defense counsel objected and the question was not then pursued. However, later the following occurred:

"*Q*. You testified that you have never been arrested and convicted of a crime, is that correct?

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then that defense counsel were furnished with the resumés of the statements upon the basis of which the warrants were recommended. It was agreed that the resumés could be used in cross-examining the witnesses.

[3] 58 Am Jur, Witnesses, § 657, p 362; Anno: Cross-examination of character witness for accused with reference to particular acts or crimes, 47 ALR2d 1258. But see *People* v. *Hill* (1932), 258 Mich 79, 83–87.

"*A*. That's right.
"*Q*. Do you recall August 16, 1958?
"*A*. No, I don't.
"*Q*. You don't recall that date?
"*A*. No, I do not recall that date.
"*Q*. Do you recall ever being arrested and convicted—"

The jury was excused and there was an off-the-record conference and the matter was not pursued. Without more we have no basis for concluding that the prosecutor sought by innuendo to put before the jury inadmissible evidence or a fact that he was not prepared to prove.

Toward the conclusion of the cross-examination of Basemore, he was asked:

"*Q*. Have you ever owned a gun?"

His lawyer objected. The jury was excused, there was an off-the-record conference, and the matter was not further pursued.

While the mere asking of a question can carry with it a damaging innuendo, it appears that Basemore's lawyer was satisfied to let the matter drop. He did not ask for a cautionary instruction. He did not attempt to develop the facts regarding Basemore's ownership of a gun, if he did own one. He did not claim that irreparable damage had been done to Basemore's case or ask for a mistrial.

Shortly before this appeal was argued, we held in *People* v. *Davies* (1971), 34 Mich App 19, *leave to appeal denied* July 21, 1971, 385 Mich 773, that while a person's history of juvenile offenses may not, under the statute, be used "against" him,[4] it is reversible error to prevent use of a witness's juve-

[4] MCLA § 712A.23 (Stat Ann 1962 Rev § 27.3178[598.23]).

nile record to impeach his credibility when he testifies against someone else.

In this case, the trial court refused to allow defense counsel to place before the jury the juvenile records of Baldwin and Hawkins. It will be recalled that Baldwin was the only witness who identified Basemore both at the lineup and at the trial, and that Hawkins was one of the two boys who was unable to identify Basemore in the lineup but who identified him at the trial.

Basemore is entitled on this direct appeal of his conviction of second-degree murder to the benefit of the rule stated in *Davies*.[5]

Reversed and remanded for a new trial.

All concurred.

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[5] *People* v. *Hampton* (1971), 384 Mich 669; *People* v. *Townsend* (1970), 25 Mich App 357, 361; *People* v. *Nichols* (On Rehearing, 1971), 33 Mich App 83.

HUSSEY *v.* CITY OF MUSKEGON HEIGHTS

1. NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAYS—NOTICE OF CLAIM—PURPOSE.

   The purpose of the statute requiring that an injured party give *notice to the responsible city for an injury* sustained due to a defect in a city highway is to provide the governmental agency with an opportunity to investigate the claim while the evidentiary trail is still fresh and to remedy the defect before other persons are injured (MCLA § 691.1404).

2. NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAYS—NOTICE OF CLAIM—DESCRIPTION OF DEFECT—SUFFICIENCY—SUBSTANTIAL COMPLIANCE.

   Plaintiff's timely notice to the city responsible that she suffered an injury due to a defect in the city's sidewalk in front of 2042 Park Street substantially complied with the statutory notice requirement concerning the nature of the defect, even though the city did not concede that it had no difficulty locating the defect, where the record indicates that the city located the defect without difficulty and there was no suggestion that after the accident another person was injured because of the defect (MCLA § 691.1404).

3. NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAYS—NOTICE OF CLAIM—SUBSTANTIAL COMPLIANCE.

   The notice of injury and defect required to be made as a condition precedent to an action against a city for an injury sustained because of a defect in the city's sidewalk will not be

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REFERENCES FOR POINTS IN HEADNOTES

[1] 56 Am Jur 2d, Municipal Corporations §§ 680, 681.
[2] 56 Am Jur 2d, Municipal Corporations § 758.
[3] 56 Am Jur 2d, Municipal Corporations § 739 *et seq.*
[4] 56 Am Jur 2d, Municipal Corporations §§ 802, 803.
[5] 56 Am Jur 2d, Municipal Corporations § 729 *et seq.*
[6] 56 Am Jur 2d, Municipal Corporations §§ 768–771.
[7] 56 Am Jur 2d, Municipal Corporations §§ 693, 703.

regarded as insufficient because of a failure to comply literally with all the statutory criteria; substantial compliance will suffice (MCLA § 691.1404).

4. NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAYS—NOTICE OF CLAIM—DEFICIENCIES IN NOTICE—SHOWING OF PREJUDICE.

Deficiencies in a notice of injury and defect, required by statute to be given the responsible city for an injury sustained because of the city's defective highway, are not of jurisdictional import and an injured person may not be denied his day in court on that account absent a showing by the governmental agency that it has been prejudiced by the deficiency (MCLA § 691-.1404).

5. NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAYS—NOTICE OF CLAIM—NAMES OF WITNESSES.

Plaintiff's failure to state the names of witnesses to her accident in the statutorily-required notice to the responsible city for an injury sustained due to the city's defective highway does not render the notice defective if the plaintiff was unaware of any witnesses; even a failure to state the names of witnesses of whom the plaintiff was aware would not necessarily cause the notice to be so defective as to require a dismissal of plaintiff's suit against the city (MCLA § 691.1404).

6. NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAYS—NOTICE OF CLAIM—NATURE OF INJURY.

Plaintiff's failure to state the nature of her injuries in her notice of injury and defect to the city which was responsible for the allegedly defective sidewalk which caused plaintiff's injury did not warrant dismissal of plaintiff's suit against the city where the deficiency was not shown to have been prejudicial to the city; the plaintiff's failure to state, as was stated in the complaint, that she had suffered serious ankle and knee injuries probably did not impede the city's investigation or defense.

7. NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAYS—NOTICE OF CLAIM—SERVICE OF NOTICE.

The failure to serve personally or by certified mail, as required by statute, the notice of claim against a city for an injury sustained due to the city's defective highway is inconsequential where the notice was timely received (MCLA § 691.1404).

Appeal from Muskegon, John H. Piercey, J. Submitted Division 3 May 6, 1971, at Grand Rapids. (Docket No. 9785.) Decided October 1, 1971.

Complaint by Eddie and Agnes Hussey against the City of Muskegon for damages resulting from a defect in the city's sidewalk. Summary judgment for defendant. Plaintiffs appeal. Reversed and remanded for trial.

Edward C. Wilson, for plaintiffs.

Landman, Hathaway, Latimer, Clink & Robb (by *Charles H. Rawlings*), for defendant.

Before: R. B. BURNS, P. J., and HOLBROOK and LEVIN, JJ.

LEVIN, J. The plaintiffs, Eddie and Agnes Hussey, commenced this action against the defendant, City of Muskegon Heights, claiming that they were damaged when Agnes Hussey tripped after stepping into a hole approximately 10–1/2 inches by 7–1/2 inches in the sidewalk in front of a store in that city located at 2042 Peck Street, and that the city is liable under the 1964 governmental tort immunity act to compensate them for their damages because it had failed to maintain the sidewalk "in reasonable repair so that it is reasonably safe and convenient for public travel".[1]

The circuit judge granted the city a summary judgment, dismissing the Husseys' action on the ground that the notice of injury and defect which they gave the city following the accident was not sufficiently specific and, therefore, did not comply with the statutory requirement, *viz.:*

[1] MCLA § 691.1402 (Stat Ann 1969 Rev § 3.996[102]).

"As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 60 days from the time the injury occurred, shall serve a verified notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." MCLA § 691.1404 (Stat Ann 1969 Rev § 3.996[104]).[2]

Agnes Hussey tripped and fell on September 23, 1966. Twenty-five days later, on October 18, 1966, the Husseys' attorney sent the following letter:

"Clerk of City Commission
City of Muskegon Heights
City Hall
Muskegon Heights, Michigan
"Re: Agnes Hussey

"Dear Sir:

"Mrs. Agnes Hussey has contacted me in regard to a fall with resulting injuries she sustained on September 23, 1966, on Peck Street at Johnson Drugstore and Vi & Herm's Cafe, 2042 Peck Street.

"It is merely my intention to notify you of a possible claim at this time; my information is that there appeared to be a defect in the sidewalk at this location."

The following day, October 19, 1966, the city manager sent the letter received from the Husseys to the city's liability insurer. One of the insurer's adjusters conducted an investigation, and submitted a report on April 27, 1967.

The principal purpose sought to be served by requiring notice is to provide the governmental agency

[2] The term highway is defined in the act as including "sidewalks" on any highway. See MCLA § 691.1401 (Stat Ann 1969 Rev § 3.996 [101]).

with an opportunity to investigate the claim while the evidentiary trial is still fresh and, additionally, to remedy the defect before other persons are injured.[3] (There is no suggestion that after the accident another person was injured by the claimed defect, let alone that any failure of the city to correct any defect was attributable to an insufficiency in the notice from the Husseys. And even if another person had been injured by a defect which the city on a more explicit notice from the Husseys might have corrected, it would not necessarily follow that the appropriate remedy would be to dismiss the Husseys' complaint.)

In this case the defendant City of Muskegon Heights learned within 26 days of the accident that Agnes Hussey claimed she was caused to trip and fall by reason of a defect in the sidewalk in front of 2042 Peck Street.

The Husseys' description of the defect as a "defect in the sidewalk" in front of 2042 Peck Street is adequate. In *Jones* v. *City of Ypsilanti* (1970), 26 Mich App 574, 583, 584, we held that a notice based on a "defective sidewalk immediately east of 5 West Michigan Avenue which is located on the south side of Michigan Avenue" was sufficient.[4] While in *Jones* the defendant city admitted it had experienced no difficulty in locating the defect and there is no such concession on the record in this case, neither has it been shown that defendant City of Muskegon Heights experienced any difficulty in locating the defect. It affirmatively appears from the report

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[3] See *Pearll* v. *City of Bay City* (1913), 174 Mich 643, 647. See also *Barribeau* v. *City of Detroit* (1907), 147 Mich 119, 125.

[4] In *Meredith* v. *City of Melvindale* (1969), 381 Mich 572, the nature of the "defect" was not spelled out with particularity.

In *Rule* v. *City of Bay City* (1968), 12 Mich App 503, 507, we upheld a notice imprecise as to the location of the defect.

dated April 27, 1967, prepared by the insurance adjuster, that the claimed defect was located without difficulty.

In *Meredith* v. *City of Melvindale* (1969), 381 Mich 572, the Michigan Supreme Court ruled that the notices of injury and defect given in that case substantially complied with Melvindale's charter requiring that the "notice shall specify the location and the nature of the defect, the injury sustained, the names of the witnesses and the facts concerning the happening of the accident complained of".[5]

In *Meredith,* the first (and only timely) notice stated the date, place, and the nature of the injured person's *activity* and injury. It did not state the names of any witnesses.[6] The Supreme Court ruled that the first notice "should have alerted the city attorney and his employer, the City of Melvindale, that an accident had occurred which should be investigated. This *alone,* in the judgment of this Court, would be sufficient to constitute substantial compliance with the charter." (Emphasis supplied.) *Meredith, supra,* 580, 581.

Meredith and subsequent decisions of our Court make clear that a notice of injury and defect will not be regarded as insufficient because of a failure to comply literally with all the stated criteria. Substantial compliance will suffice.

In *Republic Franklin Insurance Company* v. *City of Walker* (1969), 17 Mich App 92, we held that there had been substantial compliance with a notice requirement where the notice stated the date of an

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[5] The text of the ordinance is not set forth in the Supreme Court's opinion, but may be found in the opinion of our Court. See *Meredith* v. *City of Melvindale* (1968), 11 Mich App 208, 210, 211.

[6] A second notice, given after the 60-day period allowed for giving notice had expired, advised that "it was impossible to state all the witnesses to the accident, other than Jim Arnett".

automobile collision between the plaintiff and one of the defendant's police cruisers even though the notice did not state the place where the collision occurred.[7]

In *Kustasz* v. *City of Detroit* (1970), 28 Mich App 312, we held that the failure to verify a notice of claim was not a fatal defect in a case where the notice was specific as to the time, place, nature, and result of the accident. Similarly see *Reynolds* v. *Clare County Road Commission* (1971), 34 Mich App 460.

We are satisfied that, as the law now stands, deficiencies in a notice of injury and defect are not of jurisdictional import, and an injured person may not be denied his day in court on that account absent a showing by the governmental agency that it has been thereby prejudiced.[8]

While names of witnesses were not stated in the notice given by the Husseys to the City of Muskegon Heights, their notice would not be defective on that account if they were unaware of any witnesses.[9] And even if they failed to mention the name of a witness of whom they were aware, that failure

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[7] The notice stated the name of the officer operating the cruiser at the time of the accident. We observed that "doubtless few of the defendant city's police cruisers were involved in collisions in the month of May 1965, and it is most unlikely that more than one was involved in a collision on May 24, 1965". *Republic Franklin Insurance Company* v. *City of Walker* (1968), 17 Mich App 92, 100.

[8] Compare *Stacey* v. *Sankovich* (1969), 19 Mich App 688, where we held that there had been adequate compliance with the notice requirement of the motor vehicle accident claims fund act even though the plaintiff had not, as required by section 18 of the act (MCLA § 257.1118 [Stat Ann 1968 Rev § 9.2818]), given notice in full conformity with the statute. We declared: "The notice requirement was not intended to be jurisdictional". *Stacey* has been followed and applied in subsequent decisions of our Court, see *Curtis* v. *Biermacher* (1971), 30 Mich App 503; *Mullas* v. *Secretary of State* (1971), 32 Mich App 693.

[9] See *Bates* v. *City of Detroit* (1928), 242 Mich 651, 655; *Rule* v. *City of Bay City, supra,* 506, 507.

would not necessarily justify dismissal of their complaint. See *Meredith* v. *City of Melvindale, supra,* and discussion in fn 6.

Likewise, although the notice given by the Husseys did not state the nature of Agnes Hussey's injuries, we doubt whether the city would have been substantially aided in its investigation or defense if the notice had stated, as does the complaint, that she suffered "serious and permanent injuries to her right ankle and both knees".[10] This deficiency in the notice has not been shown to be prejudicial.

The statute further provides that "the notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency".[11] The failure to serve the notice personally or by certified mail is inconsequential where, as here, the notice was timely received. See *Meredith* v. *City of Melvindale, supra.*

Pertinent to our disposition is the following recent statement by the Michigan Supreme Court:

"Even if we assume the above original policy considerations were once valid, today they have lost their validity and cease to exist due to changed circumstances. In recent years most governmental units and agencies have purchased liability insurance as authorized by statute. MCLA § 691.1409 (Stat Ann 1969 Rev § 3.996[109]). In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents occurring on streets and highways. As a result these units and agencies are better prepared to investigate and defend negligence suits than are

[10] See *Rule* v. *City of Bay City, supra,* 507.

[11] MCLA § 691.1404 (Stat Ann 1969 Rev § 3.996[104]); MCLA § 600.1925 (Stat Ann 1962 Rev § 27A.1925).

most private tort-feasors to whom no special notice privileges have been granted by the legislature." *Grubaugh* v. *City of St. Johns* (1970), 384 Mich 165, 176.

Alternatively, the defendant city contends that the Husseys' complaint fails to state a cause of action. This contention is raised for the first time on appeal and therefore need not be considered. Even if, and on this we intimate no opinion, the contention is well founded, to affirm the judgment of the trial court dismissing the Husseys' complaint on that ground would be to deprive them of an opportunity to amend their complaint, an opportunity which, under the court rule, is to "be freely given when justice so requires".[12]

Reversed and remanded for trial. Costs to the plaintiffs.

All concurred.

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[12] GCR 1963, 118.1.

PEOPLE *v.* BAILEY

OPINION OF THE COURT

1. EVIDENCE—ADMISSIBILITY.

The proper test for the admissibility of evidence is whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 29 Am Jur 2d, Evidence §§ 1, 249.
[3] 29 Am Jur 2d, Evidence §§ 367, 371–373.
[4, 5, 8, 9] 29 Am Jur 2d, Evidence § 251 *et seq.*
[6, 7] 30 Am Jur 2d, Evidence §§ 1170–1172.

2. EVIDENCE—FUNCTION OF JURY—WEIGHT OF EVIDENCE—EXCLUSION OF EVIDENCE.

The jury performs the function of assigning persuasive values to relevant evidentiary matters and the judicial duty of excluding evidence from this jury function should be exercised with great caution.

3. ROBBERY—IDENTIFICATION—ASSOCIATION—ADMISSIBILITY.

Police officer's testimony that defendant had frequently associated with another man was admissible in defendant's trial for robbery where the complainant, who had given a not-so-positive identification of the defendant as one of the five bandits who had robbed her, had positively identified the other man as one of the bandits, because the defendant's and the other man's association before the crime, when considered with the positive identification of the other man, would tend to support the identification of defendant.

DISSENT BY LEVIN, J.

4. CRIMINAL LAW—EVIDENCE—ASSOCIATION—RELEVANCE.

Defendant's association with a man identified as one of a group that committed a robbery is not evidence relevant to defendant's participation in the robbery where it was expectable that they would have had contacts with each other since they were of the same race, in the same age group, and living in a relatively small town.

5. CRIMINAL LAW—EVIDENCE—ASSOCIATION—RELEVANCE.

An 18-year-old defendant's association with a 21-year-old man identified as one of a group that committed a robbery is inadmissible in defendant's trial for participating in the robbery where they were two of less than 600 Negro males between the ages of 15 and 24 in their town of 45,000, and, therefore, it is expectable that they would have contacts with one another.

6. CRIMINAL LAW—PRESUMPTION OF INNOCENCE—ASSOCIATION.

A reasonable doubt as to defendant's innocence should not be resolved against him merely because he was friendly with a man positively identified as one of a group that had committed the crime.

7. CRIMINAL LAW—EVIDENCE—PRESUMPTIONS.

In a criminal case where the only evidence—other than the objected-to evidence—was the uncertain identification by the

victim, it should be assumed that but for the objected-to testimony the defendant would have been found innocent.

8. CRIMINAL LAW—EVIDENCE—FREEDOM OF ASSOCIATION.

The fact that defendant had associations with one of a group of men accused of committing a crime should not be provable by itself, and to allow the people to prove that association as some evidence of the likelihood of defendant's participation in the crime would be a dangerous precedent to all who value the right of free association.

9. CRIMINAL LAW—EVIDENCE—SURVEILLANCE—ADMISSIBILITY.

Detective's testimony that he was in charge of investigating serious crime and that he had come to know defendant and another accused of the robbery and had seen them together on a number of occasions was improperly admitted since it tended to show that defendant, who did not testify, was under police surveillance and implied that the accused had committed other crimes or had a disposition toward conduct similar to the offense charged.

Appeal from Muskegon, Charles A. Larnard, J. Submitted Division 3 May 4, 1971, at Grand Rapids. (Docket No. 9802.) Decided October 1, 1971.

Louis Bailey was convicted of armed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Roman T. Plaszczak,* Prosecuting Attorney, for the people.

Vernon D. Kortering, for defendant on appeal.

Before: R. B. BURNS, P. J., and HOLBROOK and LEVIN, JJ.

R .B. BURNS, P. J. Louis Bailey appeals from his armed robbery[1] conviction. The defendant's sole

[1] MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

objection on appeal concerns the trial testimony of a Muskegon police officer. To understand defendant's objection it is necessary to recount the eyewitness testimony of the robbery's victim, *viz.*, a clerk at the Muskegon grocery store in which the robbery occurred.

The clerk identified the defendant at a pretrial lineup and at trial as one of the five armed bandits who robbed the store. The clerk's identification of Bailey at the lineup was somewhat less than positive.[2] The clerk was positive, however, in her identification of one Charles Salis as the person who choked her and dragged her to the rear of the store during the robbery.

Subsequent to the clerk's identification testimony, the police officer testified that Salis and Bailey had frequently associated with each other prior to the robbery. Defendant objects to this "guilt by association"[3] testimony as being immaterial, irrelevant, and prejudicial.

We begin analysis of defendant's testimonial objection by noting and giving respect to the considerable amount of judicial discretion associated with evidentiary admissibility. *People* v. *Charles Williams* (1969), 15 Mich App 683. Supporting his argument of immateriality and irrelevancy, the defendant cites the case of *United States* v. *Smith* (CA 6, 1968), 403 F2d 74. In *Smith,* as in this case, an issue involving testimonial evidence was presented but any further analogy to the *Smith* case is illusory. The objectionable testimony in *Smith*

[2] In identifying Bailey as one of the culprits the clerk exclaimed that Bailey "looks like him."

[3] Defendant's reliance on the phrase "guilt by association" is misplaced since it has historically been used in situations where a particular association in itself has been labeled criminal. The phrase has never been applied to matters of evidentiary relevance. See 3 Wharton, Criminal Law and Procedure, § 959, p 106.

came from a prosecution witness who stated that the defendant had "just got out of the penitentiary".[4]

The rule disallowing evidence of former convictions to prove a presently-charged crime is an evidentiary axiom.[5] *People* v. *Matthews* (1969), 17 Mich App 48. See, also, 1 Wharton, Criminal Evidence (12th ed), § 232, pp 492, 493. The testimony to which defendant objects, unlike the *Smith* case, involves evidence of defendant's prior relationship to a man who was positively identified as one of the robbers. Defendant does not rely on any other case to support his contention that such evidence is incompetent. Our own analysis of the law indicates that the general rule gravitates against the defendant's position.[6]

The test of evidentiary relevancy in Michigan was stated by Justice COOLEY in *Stewart* v. *People* (1871), 23 Mich 63, 75:

"The proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness."[7] See, also, *United States* v. *Craft* (CA 6, 1969), 407 F2d 1065.

Thus, if the proffered testimony of the police officer in this case tends to establish, in the mind of a reasonably cautious person, the proposition that defendant participated in the robbery, then it is

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[4] *United States* v. *Smith* (CA6, 1968), 403 F2d 74, 75.

[5] Unless such crimes come within the plan, scheme, or design exception. See MCLA § 768.27 (Stat Ann 1954 Rev § 28.1050).

[6] The general rule as stated in 22A CJS, Criminal Law, § 608, pp 415, 416, approves of evidence showing the prior relationship between the accused and an accomplice.

[7] *Cf. People* v. *Lewis* (1933), 264 Mich 83, 88, and *Ames* v. *MacPhail* (1939), 289 Mich 185, 192. The definition of relevancy has varied from state to state but according to one prominent author the Michigan rule is consistent with the most acceptable test. McCormick, Evidence, § 152, p 318, fn 23.

relevant. Such evidence need not be conclusive of the ultimate issue. A single piece of circumstantial evidence rarely proves the ultimate fact. *Whitaker* v. *Shooting Club* (1894), 102 Mich 454. Furthermore, the relevance of a given piece of evidence may in whole or in part depend on the introduction of other competent evidence. 1 Wigmore, Evidence (3d ed), § 28, p 410. See, also, *People* v. *Doyle* (1870), 21 Mich 221, and *People* v. *Lewis* (1933), 264 Mich 83.

The jury performs the function of assigning persuasive values to relevant evidentiary matters, and the judicial duty of excluding evidence from this jury function should be exercised with great caution.

It is clear that identity may be proven by circumstances pointing towards one person.[8] In this case the fact of prior acquaintance between Bailey and Salis would tend to affect the belief of a reasonably cautious person on the question of Bailey's presence at the robbery. Human experience indicates that total strangers are not likely to spontaneously commit a crime together. At least a few minutes of association are necessary to communicate intentions. It is true, of course, that mere association or friendship with a felon does not prove one guilty of committing a crime with him, but it cannot be contradicted that the friend or associate is more likely a suspect than a complete stranger.

In *People* v. *Tucker* (1969), 19 Mich App 320, evidence that defendant's dog was present at the home of the rape victim was certainly less than conclusive on the question of defendant's guilt, yet it was admitted for jury consideration. The probative value of the evidence in *Tucker* and in this case may be

[8] *People* v. *Sullivan* (1939), 290 Mich 414; *People* v. *Tucker* (1969), 19 Mich App 320.

slight, but as long as its admission tends to cast a shadow of guilt it must be admitted for the jury's determination as to the extent of that shadow.

The evidence that Bailey and Salis were associates before the crime, when considered along with the positive identification of Salis as one of the robbers, would tend to support the not-so-positive identification of Bailey. Such a tendency renders this testimonial evidence relevant.

The defendant's objection on the ground of "materiality" is without merit since the evidence was introduced to prove a matter in issue.[9]

We cannot perceive of any countervailing policy of why, even though relevant, this evidence should not have been presented for the jury's consideration. See *People* v. *Jordan* (1970), 23 Mich App 375.

Affirmed.

HOLBROOK, J., concurred.

LEVIN, J. (*dissenting*). The majority and I are in agreement that it is the function of the court to decide what evidence is admissible—in this case, whether the objected-to evidence was of probative value.

My colleagues write that "the relevance of a given piece of evidence may in whole or in part depend on the introduction of other competent evidence", and that "identity may be proven by circumstances pointing towards one person". I have no quarrel with those general observations.

Their opinion continues: "It is true of course that mere association or friendship with a felon

[9] For the technical distinctions between the words "relevant" and "material" see McCormick, Evidence, § 152, p 315, and 4 Callaghan's Michigan Pleading & Practice, § 36.188, p 16.

does not prove one guilty of committing a crime with him, but it cannot be contradicted that the friend or associate is more likely a *suspect* than a complete stranger". (Emphasis supplied.)

They conclude: "The evidence that Bailey and Salis were associates before the crime, when considered along with the positive identification of Salis as one of the robbers, would tend to support the not-so-positive identification of Bailey. *Such a tendency renders this testimonial evidence relevant*". (Emphasis supplied.)

The tendency is, however, far too tenuous to be of probative value. I therefore dissent.

I.

The defendant, Louis Bailey, was convicted by jury verdict of armed robbery.[1]

The victim, a clerk in a grocery store, testified that five black boys robbed her at gunpoint. Bailey and four other persons charged with the crime were tried together. Four of the defendants, including Bailey, were convicted. Subsequently, Bailey was granted a new trial because of *Bruton* error.[2] This appeal is from Bailey's conviction at his second trial.

At Bailey's second trial, he was tried alone. The victim again testified that Bailey was one of the robbers. She also testified that another of the robbers, Charles Salis, had grabbed and choked her and then dragged her to the rear of the store during the robbery.

A City of Muskegon police detective testified that it was his duty to investigate serious crimes. Over objection, he was permitted to say that he had known

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[1] MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

[2] *Bruton* v. *United States* (1968), 391 US 123 (88 S Ct 1620, 20 L Ed 2d 476).

both Charles Salis and Louis Bailey before August 19, 1969, the date on which the crime was committed, and that they had associated together before that date. He had seen both of them together in crowds on street corners and he had seen them in the area where they lived. They lived within two blocks of each other. In response to the question whether he had seen them chum around together, he responded, "I have seen them together on a number of occasions with other people, yes".

The people's case against Bailey rested entirely on the identification testimony of the victim. The success or failure of Bailey's defense depended on whether he could create a reasonable doubt in the minds of the jurors concerning the accuracy of the victim's identification testimony. Bailey contends that, in allowing the detective to testify concerning Bailey's association with Salis, the trial judge erroneously permitted the jurors to infer guilt by reason of his association with Salis whose conduct was the most aggravated of all the assailants since he had been identified by the victim as the assailant who had grabbed and choked her and dragged her to the rear of the store.

In response the people argue, and the trial judge and the majority agree, that the detective's testimony was of probative value because the jury could properly reason that it was unlikely the victim was mistaken in identifying Bailey if another of the persons she identified was one of his friends.

II.

To begin with, it is not as improbable as one might hastily conclude that the victim of a crime would mistakenly identify as a participant in the commission of a crime a friend of another person also

identified as a participant. When the 1970 census was taken, there were 44,631 persons living in Muskegon; 6,411 were black.[3] When the crime was committed in August 1969, Salis was 18 years old and Bailey was 21. In 1970, there were 584 black men between the ages of 15 and 24 living in Muskegon.

The record does not show how many of the men in the lineups were acquainted with or friends of Bailey. Perhaps none were. Perhaps no one other than a friend or acquaintance of his was placed in the lineup. If a considerable number of the men in the lineup were Bailey's friends or acquaintances, the probability that the victim would identify a friend or acquaintance of Bailey's is not really that remote.

The probability or improbability of a mistake in identification depends on factors which have nothing to do with coincidences in the backgrounds of the persons identified—whether or not they are friends. It depends on the eyesight, powers of observation, recall, emotional makeup, intelligence, honesty and the like of the identifying witness.

A statistician might be able to determine a probability factor. But until *all* the components are determined empirically, it is impossible to even guesstimate a probability factor. And even if it were determinable, it would only be good for a witness who has the same sensory and emotional profile as does the witness for whom the probability factor was determined.

For a person of faulty eyesight, poor powers of observation, bad recall, unstable emotional makeup —who is as prone to make an identification, correct or faulty, as are some persons to stub their own

[3] The statistics stated are taken from the 1970 United States Census of Population.

toes—the probability factor worked out for another person who has a superior sensory or emotional profile would be worthless.

I submit that if the odds are 2, 10, 50, or 100 to 1 that a paragon would pick out two friends, they are 2, 10, 50, or 100 to 1 that an ordinary citizen would mistakenly pick out two friends.

For a penetrating analysis of the weakness and dangers of "probability" proof see Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv L Rev 1329 (1971). See, also, Anno: Admissibility, In Criminal Case, of Statistical or Mathematical Evidence Offered for Purpose of Showing Probabilities, 36 ALR3d 1194. Cases rejecting such proof include *People* v. *Collins* (1968), 68 Cal 2d 319 (66 Cal Rptr 497, 438 P2d 33); *Smith* v. *Rapid Transit, Inc.* (1945), 317 Mass 469 (58 NE2d 754); *State* v. *Sneed* (1966), 76 NM 349 (414 P2d 858).

Even if we assume, without record evidence, that there were persons in the lineup who were not friends or acquaintances of Bailey and that he was not acquainted or friendly with a sizeable number of the 584 black men of his age level living in Muskegon, or at least a sizeable number of those likely to be placed in a police lineup,[4] it would be surprising if careful police work would not reveal some coincidental common denominator in the background of almost any two men in a group as small as 584 all residing in the same relatively small town, *e.g.*, school attended, part-time employment, sports activities, girls dated.

[4] See Note, Title VII—Racial Discrimination in Employment—Employer's Use of Record of Arrests Not Leading to Conviction, 17 Wayne L Rev 228, 235 (1971).

III.

But it is argued that this case is different. Here the evidence shows that Salis and Bailey were chums, friends; more than mere coincidence was shown. What then is the relevance of the fact that they were chums or friends? Why is that of greater probative value than would be the happenstance that they both had the same birthdays, went to the same high school, or dated the same girl?

It is, indeed, true, as the majority write, that it is more likely that a person will enter into an agreement or concert of action with an acquaintance or friend than with a complete stranger. Nevertheless, it would be unsound to resolve against Bailey a reasonable doubt otherwise held as to the accuracy or credibility of the victim's identification testimony based on the fact that he was friendly with Salis who had also been identified. To do so would be circular reasoning:

(1) From the sole fact that A and B are friends, a trier of fact could not properly infer that they had ever entered into an agreement, let alone a particular agreement, or an illegal one.

(2) From the facts that (i) the victim of a crime claims that two felons committed it and (ii) the victim identifies A as one of the felons and (iii) B is a friend of A, the trier could not properly, on that alone, infer that B was the other felon.

(3) Add that the victim also identifies B as one of the two felons: (i) If the trier of fact entertains a reasonable doubt as to the accuracy or credibility of the victim's identification of B as one of the felons, then the only other "evidence" against B is the fact that he is a friend of A, but as shown in (2) above, their friendship is not sufficient evidence to convict.

(ii) It would, therefore, be circular as well as illogical to resolve against B a reasonable doubt otherwise held concerning the accuracy or credibility of testimony identifying him as the second felon because B and A are friends, to dissolve, on that account, *post hoc ergo propter hoc,* a reasonable doubt.

For the purpose of deciding the issue raised on this appeal, the testimony identifying both Salis and Bailey cannot be regarded as evidence tending to establish that Salis and Bailey entered into an agreement to commit the crime of which Bailey was convicted.[5] To hold otherwise would be to beg the question and would, again, be circular. *In deciding this case we should proceed on the hypothesis that, but for the objected-to testimony showing that Salis and Bailey were friends, the jurors would have entertained a reasonable doubt as to the accuracy or credibility of the identification testimony and acquitted Bailey.*

Excluding from consideration the possibility that Salis and Bailey entered into an agreement to commit the crime—and we must exclude that possibility from consideration, there being no evidence whatsoever that they entered into such an agreement—the fact that they were friends is just another coincidental common denominator. It was without probative value.

The fact that Salis was a friend of Bailey had no rational or logical connection to any other evidence offered by the people pointing towards Bailey's

[5] The people did not charge or attempt to prove conspiracy or that Salis and Bailey had entered into an agreement to commit the charged offense. Surely, the jury would not have been permitted to speculate on the possibility that A (Salis) and B (Bailey) had entered into an illegal agreement based solely on the evidence that they were friends. But that is precisely the tendency of the objected-to testimony.

guilt. The fact of their friendship was not part of a composite of circumstantial proofs[6] from which Bailey's guilt could have been reasonably inferred. The fact that Salis was Bailey's friend was left suspended before the jury unrelated to any complementary evidence. It served but one purpose, to create the impression that Bailey was guilty because he was a friend of another person who was also identified as one of the assailants.

A reasonable doubt as to the accuracy or credibility of identification testimony should not be resolved against a defendant because he is a friend or associate of a felon. Where the disputed issue is identification, the fact of association should not be provable by itself, because by itself it means nothing.[7] To allow the people to introduce such proof where identification is the disputed issue would introduce a dangerous and pernicious doctrine prejudicial not only to the defendant Bailey but to all who value and would freely exercise the right of association.[8]

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[6] As in *People* v. *Tucker* (1969), 19 Mich App 320, cited by the majority. Noteworthy is the fact that in *Tucker*, in contrast with this case of *Bailey*, there was no identification testimony. The people's entire case was circumstantial. There is no risk in that kind of case, as there is in a case where the people's case does depend entirely on identification testimony, that the jury may be misled by an extraneous piece of circumstantial evidence from careful appraisement of the only real evidence against the defendant. But see fn 7.

[7] The people may, of course, bolster identification testimony with other evidence which, *without regard to the identification*, tends to prove that the defendant committed the crime; for example, evidence that the defendant was seen near the scene or with another person identified as a participant *shortly* before or after the crime was committed, or evidence incriminating the defendant left at the scene or found in his possession.

[8] I do not mean to be understood as saying that association is never provable. Where the fact of association is germane and is interconnected with other proofs which together constitute sufficient evidence of guilt, it may be proven as in *People* v. *Keller* (1933), 261 Mich 367, where the question was whether the defendant was an accessory after the fact in harboring a murderer and the people were allowed to prove the defendant's intimacy with the murderer before

I would hold, on the bases of both logic and principle, that the testimony that A (Salis) and B (Bailey) were friends was without probative value.[9]

IV.

I further note that an impermissible and objectionable innuendo emanated from the detective's testimony. His testimony that he was in charge of investigating serious crime and that he had come to know Bailey and Salis before the robbery was committed and had seen them on a number of occasions tended to show that Bailey was under police scrutiny and surveillance; that Bailey, who did not testify, had or was suspected of committing other crimes.

"Evidence that tends to show that the accused person has committed other acts or crimes or has a disposition toward conduct similar to the offense charged is ordinarily inadmissible to prove the commission of the charged offense. This rule of law guards against convicting an accused person because he is a bad man. Barring such evidence prevents the trier of fact from inferring that the accused person is guilty of the charged offense because he has committed other similar acts or crimes." *People* v. *Matthews* (1969), 17 Mich App 48, 51, 52.

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he committed that crime as bearing on her *knowledge* that he had committed the crime and the probability that she would harbor and assist him to escape conviction. The issue in *Keller* was whether the defendant had aided the murderer. In the present case, Bailey's guilt or innocence was not dependent on Salis' complicity or the existence of any relationship between Bailey and Salis. Here, the people made no effort to prove an agreement or conspiracy between Bailey and Salis to commit the crime of which Bailey was convicted.

[9] Since, in my opinion, the fact of Salis' and Bailey's friendship was without probative value, I do not reach the question of whether that evidence should be excluded because, although of probative value, its admission could confuse, mislead or prejudice the jury. See *People* v. *Hall* (1969), 19 Mich App 95, 103, *et seq.* (LEVIN, P. J., *dissenting*).

The people may not inject, by subtle innuendo, evidence otherwise inadmissible. *People* v. *DiPaolo* (1962), 366 Mich 394, 397; *People* v. *Jones* (1940), 293 Mich 409, 413.

WILSON *v.* EUBANKS

1. PLEADING—AMENDMENT—DISCRETION.

   Allowance of an amendment to a pleading rests in the trial judge's discretion, but his discretion in that regard is not unbounded, and where a rule good for all cases can be stated, it is the responsibility of an appellate court to state the rule rather than to leave the matter in unstructured discretion.

2. PLEADING—AMENDMENT—DISCRETION.

   The tendency of disposition should be to disallow an amendment to a pleading where allowance of the amendment will prevent consideration of the controversy on the merits.

3. LIMITATION OF ACTIONS—FOREIGN CLAIMS—BORROWING STATUTE—PUBLIC POLICY.

   Statutes which borrow the limitational period of the jurisdiction where a claim accrued were enacted to prevent forum-shopping and to avoid the interminable tolling of the statutes of limitations where the defendant is a nonresident of the jurisdiction where the action is brought.

4. LIMITATION OF ACTIONS—FOREIGN CLAIMS—BORROWING STATUTE—PUBLIC POLICY.

   The public policy which engendered the borrowing statutes which adopt a statute of limitations of the jurisdiction where a claim

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REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 293.
[2] 41 Am Jur, Pleading § 294.
[3, 4] 51 Am Jur 2d, Limitation of Actions §§ 67, 68.
[5] 41 Am Jur, Pleading §§ 293, 294.
51 Am Jur 2d, Limitation of Actions § 457.

accrued does not apply to a case where the claim accrued in Ontario, a few miles from Detroit, but where both the plaintiffs and defendant were residents of Detroit and the action was commenced in Michigan.

5. PLEADING—AMENDMENT—LIMITATION OF ACTIONS.

A failure to plead the bar of a foreign statute of limitations in the first responsive pleading is not amendable in an action, commenced in Michigan between litigants all of whom are domiciliaries of Michigan, which is timely brought but for the provision of the Revised Judicature Act borrowing the foreign limitational period (MCLA § 600.5861[2]).

Appeal from Wayne, Benjamin D. Burdick, J. Submitted Division 1 June 11, 1971, at Detroit. (Docket No. 10100.) Decided October 1, 1971. Leave to appeal denied, 386 Mich 773.

Complaint by Barbara Wilson and Ubelia Meadows against Eddie Eubanks for personal injuries sustained in an automobile collision. Accelerated judgment for defendant. Plaintiffs appeal. Reversed and remanded for trial.

Lemberg, Gage & Brukoff (by *Leonard A. Siudara*), for plaintiffs.

Davidson, Gotshall, Kohl, Nelson, Secrest, Wardle & Lynch (by *Marlynn Marcks*), for defendant.

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

LEVIN, P. J. The plaintiffs, Barbara A. Wilson and Eubelia Meadows, claim they suffered personal injuries when the defendant, Edward Eubanks, negligently drove his automobile into an automobile being operated by plaintiff Wilson in which plaintiff Meadows was a passenger.

On March 3, 1967, 13 months after the accident, well within the three-year limitational period generally applicable to actions to recover damages for injuries to persons and property,[1] the plaintiffs commenced this action in the Wayne County Circuit Court. The limitational period in force in the place where the accident occurred, Windsor, Ontario, is one year.[2]

The conflict of laws rule developed by the courts is that the law of the forum determines the time within which an action may be brought on a claim which arose in another jurisdiction.[3] Many states have enacted so-called "borrowing" statutes adopting the limitational period of the jurisdiction where the claim accrued and, sometimes, of the jurisdiction where the defendant or both parties reside.[4] Michigan adopted such a statute with the enactment of the Revised Judicature Act which incorporates the Uniform Statute of Limitations on Foreign Claims Act,[5] *viz.*:

"The period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim

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1 MCLA § 600.5805(7) (Stat Ann 1962 Rev § 27A.5805[7]).

2 The Highway Traffic Act, 2 Rev Stats Ontario (1960), C 172, § 147, p 422.

3 See Restatement of Conflicts of Laws, 2d, § 142, p 396; 51 Am Jur 2d Limitations of Actions § 66, p 645; Ehrenzweig, Conflict of Laws, § 160, p 428; Leflar, American Conflicts Law, § 127.

In *Abendschein* v. *Farrell* (1969), 382 Mich 510, the Michigan Supreme Court reiterated its adherence to the conflict-of-laws doctrine of *lex loci delicti* for the purpose of determining the applicable substantive law.

4 See Leflar, American Conflicts Law, § 128; Ehrenzweig, Conflict of Laws, § 161, p 430; Restatement of Conflicts of Laws, 2d, § 142, Comment (1)f, p 397; Developments in the Law, Statutes of Limitations, 63 Harv LR 1177, 1262 *et seq.* (1950); Blume and George, Limitations and the Federal Courts, 49 Mich LR 937, 982 (1951).

5 Two other states, Oklahoma and West Virginia, have adopted the Uniform Act. Am Jur 2d Desk Book, Document 129, 1971 Cum Supp, p 175. The act was first proposed in 1957.

accrued or by the law of this state, whichever bars the claim." MCLA § 600.5861 (2) (Stat Ann 1962 Rev § 27A.5861 [2]).

In this case, the defendant did not plead the statute of limitations. He answered, served interrogatories on the plaintiffs and obtained an order for production and examination of doctor and hospital records. Depositions were taken.

Two years after the action was commenced, on April 1, 1969, a pretrial conference was held. The pretrial summary states that the "defendant is hereby given leave to urge statute of limitations. All pleadings are deemed amended to reflect the pretrial statements of the respective parties". The pretrial summary continues: "In view of the fact that the question of statute of limitations was first urged by defendant at the pretrial hearing, it is suggested that this court's decision to allow the same as an affirmative defense be reviewed by the trial judge".

One year was to elapse before the matter was set for trial. In August, 1970, the defendant's present counsel was substituted for the lawyer who filed the answer and who represented him in the earlier stages of the proceedings.

When the case was set for trial, the plaintiffs moved to strike the affirmative defense of the statute of limitations. Their motion was denied by the circuit judge to whom the case was assigned for trial, and a judgment was entered dismissing the plaintiffs' complaint on the ground that it was barred by the statute of limitations. We reverse and remand for trial.

Borrowing statutes were enacted to prevent forum shopping and to avoid interminable tolling of the statutes of limitations where the defendant is a non-

resident.[6] Here, although read literally the words of the uniform act do apply, the public policy which engendered borrowing statutes does not.

The defendant and both of the plaintiffs are residents of the City of Detroit. While the accident occurred over the border, a few miles from Detroit, the action was commenced in the jurisdiction where one would expect it to be commenced, the jurisdiction where all the parties reside and where service on the defendant was probably most readily obtainable.

There is no reason to believe that the plaintiffs commenced this action in Michigan in an effort to obtain the benefit of some advantage under Michigan law or that, except for the matter of the statute of limitations, the defendant is disadvantaged by the commencement of the action here rather than in Ontario.

It is indeed the law and the almost invariable practice to allow pleadings to be freely amended—as expressed in the statute, "for the furtherance of justice" and, as expressed in the court rule, "when justice so requires".[7] But in this case allowing the amendment does not further, it defeats, the ends of justice.[8]

The law encourages amendment and the setting up of a new claim or a new defense, including an

[6] See Leflar, American Conflicts Law, § 128; Developments in the Law, Statutes of Limitations, 63 Harv LR 1177, 1263 (1950); Legislation Governing the Applicability of Foreign Statutes of Limitation, 35 Col LR 762, 764 (1935); Statute of Limitations: Foreign Causes of Action; Effect of Defendant's Absence From the State; and Actions Against Nonresidents. Study by New York Law Revision Commission, p 141 *et seq.* (1943).

[7] MCLA § 600.2301 (Stat Ann 1962 Rev § 27A.2301); GCR 1963, 118.1.

[8] See *Goeltz* v. *Continental Bank and Trust Company* (1956), 5 Utah 2d 204 (299 P2d 832) upholding on this and other grounds a trial judge's refusal to allow an amendment to set up a statute of limitations defense. *Cf. Institute For Trend Research* v. *Griffin* (1958), 101 NH 255 (139 A2d 628).

affirmative defense, to the end that the controversy will be decided on its merits. All rights and values are not fungible; where allowance of an amendment will prevent meritorious consideration, the tendency of disposition should be to disallow the amendment.

There will, of course, be cases of stale claims where the defendant should be allowed to amend his answer to set up an overlooked statute of limitations defense. This is not that case. Here we have a purely technical defense which would bar a claim on which an action was commenced within 13 months. It would bar it through the literal application of loose language in a statute generated by problems attendant nonresident defendants—forum shopping and the tolling of the statute of limitations—although the defendant, like the plaintiffs, is a resident of Michigan. It would bar the action even though the defendant delayed over two years after the action was commenced in seeking leave to assert the statute of limitations defense.

We have not overlooked the statements in the cases that the allowance of an amendment to a pleading rests in the trial judge's discretion.[9] The recent trend of decision, however, shows that his discretion in that regard is not unbounded.[10] Discretion is confided to trial judges to decide questions for which, because of the variegated facts of the matter, a rule good for all cases cannot be stated. Where a rule can be stated, it is the responsibility

[9] See *Lau* v. *Pontiac Commercial & Savings Bank* (1932), 260 Mich 73.

[10] See *LaBar* v. *Cooper* (1965), 376 Mich 401; *Doan* v. *Chesapeake & Ohio R. Co.* (1969), 18 Mich App 271, 280; *Plowman* v. *Satkowiak* (1970), 22 Mich App 425; *Home Insurance Company* v. *Van Koevering* (1968), 13 Mich App 389; *Burg* v. *B & B Enterprises, Inc.* (1966), 2 Mich App 496; *Tri-Part Manufacturing Company* v. *Michigan Consolidated Gas Company* (1965), 1 Mich App 684.

of an appellate court to state the rule rather than to leave the matter in unstructured discretion; there is no sound reason why an amendment should be allowed in one case and denied in another on similar facts.[11]

We hold that in an action between litigants all of whom are domiciliaries of Michigan, timely brought but for the provisions of RJA § 5861(2), a failure to plead the bar of a foreign statute of limitations in the first responsive pleading is not amendable.[12]

Our disposition of this case makes it unnecessary to decide whether the Ontario limitational period governs on the facts of this case.[13] We hold only that under the circumstances here present one who asserts the defense of a foreign statute of limitations to bar an action between residents of Michigan timely brought under Michigan law must cut square corners.

Reversed and remanded for trial. Costs to plaintiffs.

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[11] See *Noonan* v. *Cunard Steamship Co. Ltd.* (CA 2, 1967), 375 F2d 69, 71.

[12] In *Lau* v. *Pontiac Commercial & Savings Bank, supra,* and *Villamor* v. *Premier Insurance Company* (1968), 13 Mich App 30, the limitation on the time for bringing an action was established by Michigan law. Here the limitation arises under foreign law.

[13] See Ehrenzweig, Conflict of Laws, § 162, p 433; § 163, pp 434–436.

PEOPLE *v.* FARRAR

1. CRIMINAL LAW—PROSECUTOR'S REMARKS—INABILITY TO CURE BY INSTRUCTION.

   A new trial is required where the prejudice to the defendant created by the prosecutor's improper argument could not have been cured by instructions to the jury.

2. CRIMINAL LAW—PROSECUTOR'S REMARKS—INABILITY TO CURE BY INSTRUCTIONS.

   The prosecutor's statements, during a trial for assault committed against a police officer, that "Every day [policemen] are called pigs and people assault them with their fists and words" and that "[policemen] don't bring these things into court unless they really happened", were improper arguments whose prejudice could not be cured by instructions.

3. CRIMINAL LAW—PROSECUTOR'S IMPROPER ARGUMENT—FAILURE TO OBJECT.

   The failure of defense counsel to object to improper argument of the prosecutor does not preclude an appellate court from considering that issue on appeal where that argument created such prejudice that it could not have been cured by instructions.

4. CRIMINAL LAW—ARGUMENT TO JURY.

   The prosecutor must refrain from argument which, by injecting issues broader than the guilt or innocence of the accused,

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur 2d, New Trial § 57.
[3] 5 Am Jur 2d, Appeal and Error § 545.
[4–6] 42 Am Jur, Prosecuting Attorneys § 20.
53 Am Jur, Trial § 459.
[7–11] 58 Am Jur, Witnesses § 734 *et seq.*
[12] 29 Am Jur 2d, Evidence §§ 320, 321, 326, 329.

would divert the jury from its duty to decide the case on the evidence.

5. CRIMINAL LAW—PRESUMPTION OF INNOCENCE—PROSECUTOR'S REMARKS.

The prosecutor may not subtly subvert the presumption of innocence by appealing to the jurors to perform a civic duty to support the police, especially where policemen testified as prosecution witnesses.

6. CRIMINAL LAW—PROSECUTOR'S REMARKS—PERSONAL BELIEF.

The prosecutor may not express a personal belief in the guilt of the defendant.

7. CRIMINAL LAW—DEFENDENT TESTIFYING—IMPEACHMENT—PRIOR CONVICTIONS.

The prosecutor's questioning of a criminal defendant on cross-examination as to whether he had been arrested and convicted of attempted murder was improper where the defendant had merely been charged with attempted murder but had pled guilty to the charge of aggravated assault.

8. CRIMINAL LAW—DEFENDANT TESTIFYING—IMPEACHMENT—PRIOR CONVICTIONS.

A trial judge is not required to allow a prosecutor to impeach a criminal defendant by referring to the defendant's prior conviction record; the judge may, in the exercise of discretion, refuse to allow any questioning of a defendant concerning his previous criminal record (MCLA §§ 600.2158, 600.2159).

9. CRIMINAL LAW—DEFENDANT TESTIFYING—PRIOR CONVICTIONS—DISCRETION.

It is error for a trial judge to refrain from exercising his discretion as to the admissibility of a defendant's prior conviction record for impeachment purposes if defendant requests its exclusion.

10. CRIMINAL LAW—DEFENDANT TESTIFYING—IMPEACHMENT—PRIOR CONVICTIONS—ADMISSIBILITY—DISCRETION.

Among the factors to be considered by the trial judge in exercising his discretion as to the admissibility of the criminal defendant's prior conviction record for impeachment purposes are: (a) the probative relevance of the prior conviction to the issue of credibility, and (b) the prejudicial effect on the decisional process if the accused does not testify out of fear of impeachment by prior convictions.

11. CRIMINAL LAW—EVIDENCE—OTHER CRIMES—PREJUDICE.

The prosecutor may not ordinarily introduce evidence of crimes other than the one the defendant is charged with committing, but when the other crime occurs shortly before or after the charged offense it may be provable unless the probative value of the proferred evidence is overcome by the danger that introduction of the evidence will confuse, mislead, or prejudice the jury.

12. CRIMINAL LAW—EVIDENCE—OTHER CRIMES—FELONIOUS ASSAULT—PRIOR SHOOTING INCIDENT—ADMISSIBILITY.

Evidence, introduced without undue emphasis or detail, of an incident in which the defendant allegedly shot his brother was properly introduced by the prosecutor in a trial in which the defendant was charged with the felonious assault of a police officer where the felonious assault occurred when the police responded to a call to investigate the brother's shooting, and the closeness in time between the two incidents make it almost impossible to conduct the felonious assault trial without reference to the earlier incident.

Appeal from Oakland, Philip Pratt, J. Submitted Division 2 June 8, 1971, at Detroit. (Docket No. 10532.) Decided October 1, 1971.

Robert C. Farrar was convicted of the felonious assault of a police officer. Defendant appeals. Reversed and remanded for a new trial.

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.

Arthur J. Tarnow, State Appellate Defender, and *Martin Reisig,* Assistant Defender, for defendant on appeal.

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

LEVIN, P. J. The defendant, Robert C. Farrar, was convicted by a jury of felonious assault of a police officer.[1]

The questions presented on this appeal concern statements made by the prosecutor during the trial and in his closing argument and the prosecutor's reference to the defendant's criminal record in cross-examining him. We reverse and remand for a new trial.

The defendant shot his brother, Henry, in the leg at about three in the morning on March 22, 1970. The shooting was reported to the police by the landlord of the house in which Henry lived. Upon arriving at the scene, police officers observed the defendant with a gun in his hand.

At the trial, the officers testified that defendant pointed the gun at the chest of one of them for about five seconds before finally dropping it to the ground. The landlady testified that the defendant backed out of a door of the house, that he did not point the gun at the officers, and that he dropped it and raised his hands immediately upon being told to do so. The defendant related substantially the same version of the facts.

I.

The prosecutor made the following statement during his closing argument:

"Every day they're [policemen] called pigs and people assault them with their fists and words. You know, they don't bring these things in. Those people are never charged with offenses. They don't bring these things into court unless they really happened. The point is the reason why they're here is this actually happened as the officers testified that it happened."

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[1] MCLA § 750.82 (Stat Ann 1962 Rev § 28.277).

In *People* v. *Humphreys* (1970), 24 Mich App 411, 418, we reversed a defendant's conviction because we concluded that the prejudice created by the prosecutor's improper argument could not have been cured by instructions even if the defendant's lawyer had timely objected. The argument in that case was similar to the argument in the present case; there the prosecutor argued:

"I can assure you this: That if the defendant in the opinion of the police and in my opinion were innocent of this charge, we would not be here right now."

In *Humphreys,* we stressed that there was a close question of fact turning on the credibility of the witnesses. So too in this case the jury's decision on the disputed factual issue of whether the defendant pointed the gun at one of the officers before dropping it to the ground depended on its appraisal of the witnesses.

A new trial is required even though the defendant's trial lawyer failed to make proper objection.[2] The presumption of innocence protects the defendant in a criminal case with equal force whether the witnesses against him are police officers or ordinary citizens. The prosecutor may not subtly convert the presumption of innocence into a presumption of guilt by appealing to the jurors to perform a civic duty to support the police:

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[2] Other cases ordering new trials because of improper prosecutorial argument even though the issue had not been properly preserved at the trial level include *People* v. *Ignofo* (1946), 315 Mich 626, 641; *People* v. *Slater* (1970), 21 Mich App 561; *People* v. *Montevecchio* (1971), 32 Mich App 163. Similarly, see the civil cases of *Sauve* v. *Carling Brewing Company, Inc.* (1965), 374 Mich 487 and *Morrison* v. *Skeels* (1969), 16 Mich App 727, 736. See, generally, *People* v. *Shirk* (1970), 383 Mich 180, 194; *People* v. *Degraffenreid* (1969), 19 Mich App 702, 715.

"The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."[3]

Both the Supreme Court of Michigan and our Court have repeatedly stressed that the prosecutor may not express a personal belief in the guilt of the defendant.[4] It is the prosecutor's duty, as well as the court's to see to it that the defendant receives a fair trial:

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[5]

Unless we enforce the rules we encourage their violation and add to the burden of the appellate courts. Our frequent strictures against this kind of argument mean little unless we are prepared to reverse and require a new trial. A prosecutor who crosses a clearly defined line, and a trial judge who makes no effort to stop him,[6] have only themselves,

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[3] ABA Project on Standards for Criminal Justice, The Prosecution Function, Std. 5.8(d); *cf. In re Widening of Woodward Avenue* (1941), 297 Mich 235, 246.

[4] See *People* v. *Quick* (1885), 58 Mich 321, 324; *People* v. *Dane* (1886), 59 Mich 550, 553; *People* v. *McGuire* (1891), 89 Mich 64; *People* v. *Boske* (1922), 221 Mich 129, 134, 135; *People* v. *Hill* (1932), 258 Mich 79, 88; *People* v. *Ignofo* (1946), 315 Mich 626, 636; *People* v. *Slater* (1970), 21 Mich App 561; *People* v. *Montevecchio* (1971), 32 Mich App 163. Similarly, see ABA Project Standards for Criminal Justice, The Prosecution Function, Std. 5.8(b).

[5] ABA Code of Professional Responsibility, EC 7–13. Similarly, see *Berger* v. *United States* (1935), 295 US 78, 88 (55 S Ct 629, 633; 79 L Ed 1314, 1321); ABA Project on Standards for Criminal Justice, The Prosecution Function, Std. 1.1(c); *Wellar* v. *People* (1874), 30 Mich 16, 23; *People* v. *Quick, supra* fn 4; *People* v. *Dane, supra* fn 4; *People* v. *Carr* (1887), 64 Mich 702, 708; *People* v. *Evans* (1888), 72 Mich 367, 383; *People* v. *Kirby* (1966), 4 Mich App 201, 204; *People* v. *Brocato* (1969), 17 Mich App 277, 304.

[6] See *People* v. *Aikin* (1887), 66 Mich 460, 480; *People* v. *Plautz* (1970), 28 Mich App 621, 623, stressing the court's duty to "check

not the appellate courts, to blame if a judgment of conviction is reversed and the case must be retried because of improper argument.

II.

In cross-examining the defendant, the prosecutor asked him if he had been arrested and convicted of attempted murder. Subsequent questioning brought out that some years before the incident which gave rise to the instant prosecution, the defendant had been *charged* with attempted murder, and had pled guilty to the reduced charge of aggravated assault.

The questions were improper. A defendant's credibility may not be impeached by reference to a prior charge of which he was not convicted.[7] A prosecutor may not by innuendo inject evidence otherwise inadmissible.[8]

III.

We address ourselves to additional assignments of error concerning questions likely to arise again upon the retrial.

The defendant contends that the judge erred when he failed to recognize that he may in the exercise of discretion refuse to allow any questioning of a defendant concerning his previous criminal record.

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and control" unwarranted intemperance of zeal or language on the part of a prosecutor. In *People* v. *Brocato* (1969), 17 Mich App 277, 305, we said: "He [the judge] must not hesitate to keep the conduct of the attorneys within the boundaries of legitimate argument and to promptly check them when they exceed it". Similarly, see *People* v. *Carr* (1887), 64 Mich 702, 708; *People* v. *Camel* (1968), 11 Mich App 219, 222.

[7] *People* v. *Brocato* (1969), 17 Mich App 277, 301–303.

[8] *People* v. *DiPaolo* (1962), 366 Mich 394, 396, 397; *People* v. *Jones* (1940), 293 Mich 409, 413; *People* v. *Jones* (1971), 32 Mich App 309, 314; *People* v. *Ball* (1971), 33 Mich App 288, 290.

The relevant statutes provide:

"No person shall be disqualified as a witness in any civil or criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise or by reason of his having been convicted of any crime; but such interest or conviction *may* be shown for the purpose of affecting his credibility. A defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." MCLA § 600.2159 (Stat Ann 1962 Rev § 27A.2159); originally enacted as PA 1881, No 245; words "civil or" added by PA 1915, No 314, C 17, § 64 (emphasis supplied).

"No person shall be excluded from giving evidence on any matter, civil or criminal, by reason of crime or for any interest of such person in the matter, suit, or proceeding in question, or in the event of such matter, suit or proceeding, in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime, *may* be shown for the purpose of drawing in question the credibility of such witness, except as is hereinafter provided." MCLA § 600.2158 (Stat Ann 1962 Rev § 27A.2158); originally enacted as PA 1861, No 125; see fn 21 and accompanying text (emphasis supplied).

In *Luck* v. *United States* (1965), 121 App DC 151, 156 (348 F2d 763, 768), the United States Court of Appeals for the District of Columbia Circuit, in a two-to-one decision, held, under a statute reading fundamentally as does Michigan's, that a trial judge may, in the exercise of discretion, exclude evidence of prior crimes. In so holding the Court emphasized that the statute:

"says, in effect that the conviction 'may', as opposed to 'shall', be admitted; and we think the choice of words in this instance is significant. The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field." (Emphasis by the Court.)

In subsequent decisions the District of Columbia Circuit fully adopted the *Luck* construction of the statute.[9] In *Gordon* v. *United States* (1967), 127 App DC 343 (383 F2d 936), guidelines were suggested for the exercise of this trial judge discretion in an opinion written by Chief Justice (then Judge) Burger: Among the factors to be considered are

[9] An extensive jurisprudence has been developed by the United States Court of Appeals for the District of Columbia Circuit regarding the *Luck-Gordon* rule. In *Jones* v. *United States* (1968), 131 App DC 88 (402 F2d 639), and *Barber* v. *United States* (1968), 129 App DC 193 (392 F2d 517), the trial judge was found to have abused his discretion in admitting evidence of the defendant's prior conviction record. No abuse of discretion was found in *Evans* v. *United States* (1968), 130 App DC 114 (397 F2d 675). Compare *Brown* v. *United States* (1966), 125 App DC 220 (370 F2d 242); *Covington* v. *United States* (1966), 125 App DC 224 (370 F2d 246); *Hood* v. *United States* (1966), 125 App DC 16 (365 F2d 949); *Lewis* v. *United States* (1967), 127 App DC 115 (381 F2d 894); *Williams* v. *United States* (1968), 129 App DC 332 (394 F2d 957).

the nature of the prior offense, whether it is for substantially the same conduct for which the accused is on trial, and the effect on the decisional process if the accused does not testify out of fear of impeachment by prior convictions.

In the few years since they were decided, *Luck* and *Gordon* have prompted a number of courts to take a new look at their statutes. The Supreme Courts of New Jersey[10] and Massachusetts[11] announced their adherence to the traditional view that the prosecutor has the right to have prior conviction evidence introduced. The Court of Criminal Appeals of Texas[12] stated that its rule "lies between the practice common in such states as New Jersey and the *Luck* doctrine". The Supreme Court of Minnesota noted the "recent trend" of leaving the question to the trial court to decide but ruled that it was for the legislature to make any change; the dissenter declared that when a majority of the court agrees that a statutory rule is manifestly prejudicial to the rights of an accused it should be set aside because the legislature is not empowered to enact rules of evidence which deprive a defendant of a fair trial.[13]

The United States Courts of Appeals have, on the whole, adopted the leadership of the District of Columbia Circuit and recognized that the question rests in trial judge discretion.[14] The Supreme

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10 *State* v. *Hawthorne* (1967), 49 NJ 130 (228 A2d 682).

11 *Commonwealth* v. *West* (1970), — Mass — (258 NE2d 22).

12 *Bustillos* v. *State* (Tex Crim App, 1971), 464 SW2d 118, 124.

13 *State* v. *West* (1969), 285 Minn 188 (173 NW2d 468). The Michigan Supreme Court has asserted its paramount power over practice and procedure, including statutory rules of evidence. See *Perin* v. *Peuler* (On Rehearing, 1964), 373 Mich 531, 540–542.

14 See *United States* v. *Johnson* (CA1, 1969), 412 F2d 753, 756; *United States* v. *Palumbo* (CA2, 1968), 401 F2d 270, 273; *United States* v. *Greenberg* (CA3, 1969), 419 F2d 808, 809; *United States* v. *Hildreth* (CA4, 1967), 387 F2d 328, 329; *United States* v. *Vigo*

Courts of Connecticut,[15] Alaska,[16] Kentucky,[17] and Illinois[18] have also adopted that view.[19] Mr. Justice Schaefer, speaking for a unanimous Illinois Supreme Court, recently declared:

"The question is inherently judicial, and we believe that view is correct which places the discretion as to the admissibility of this kind of evidence in the judge rather than in the prosecutor." *People* v. *Montgomery* (1971), 47 Ill 2d 510, 513 (268 NE 2d 695, 698).

Commentators generally are critical of the rule allowing evidence of prior conviction record to be admitted to impeach a defendant when he takes the stand as a witness.[20]

(CA5, 1970), 435 F2d 1347; *United States* v. *Allison* (CA9, 1969), 414 F2d 407, 411; *United States* v. *Bartello* (CA10, 1970), 432 F2d 1030, 1033. *Contra: United States* v. *Escobedo* (CA7, 1970), 430 F2d 14, 18–20; *United States* v. *Scarpellino* (CA8, 1970), 431 F2d 475, 478–479. Both of the *contra* decisions were by divided courts. The dissenter in the Seventh Circuit relied on an earlier decision of his Court which followed the *Luck-Gordon* rule; the majority's decision is weakened by its heavy reliance on the preliminary draft of Proposed Rules of Evidence for the United States District Courts which, as later revised and now proposed (Revision of March, 1971), adopts the *Luck-Gordon* rule; see 51 FRD 315, 391, and *People* v. *Montgomery* (1971), 47 Ill 2d 510 (268 NE2d 695), for the text of the revised draft.

15 *State* v. *Marquez* (1970), 160 Conn 47 (273 A2d 689).

16 *Spaulding* v. *State* (Alaska, 1971), 481 P2d 389. This unanimous opinion apparently supersedes *Parish* v. *State* (Alaska, 1970), 477 P2d 1005, where a majority comprised of three Justices expressed a disinclination to modify prior practice over the dissent of one justice and the concurrence without opinion of another.

17 *Bogie* v. *Commonwealth* (Ky, 1971), 467 SW2d 767.

18 *People* v. *Montgomery* (1971), 47 Ill 2d 510 (268 NE 2d 695).

19 The Supreme Judicial Court of Maine has indicated that it is ready to adopt this view when the question is squarely presented. See *State* v. *Toppi* (Maine, 1971), 275 A2d 805, 810. See also *State* v. *Ross* (1971), — Ariz — (485 P2d 810, 811).

20 Professor McCormick in his work on Evidence, § 43, points out that the present rule is an historical accident. See also, Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale LJ 763, 774–778 (1961); Note, Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the

In the first statement by our Supreme Court after the common-law disability of a defendant in a criminal case to testify in his own behalf was legislatively removed, the Court declared it "was quite within the *discretionary* authority of the trial judge" (emphasis supplied) to permit a defendant who had elected to testify to be cross-examined as to his prior conviction record. *People* v. *Cummins* (1882), 47 Mich 334, 336.[21]

Purpose of Impeaching the Credibility of the Defendant Witness, 37 Cinci L Rev 168 (1968).

Both the Uniform Rules of Evidence Act (Rule 21; 9A ULA, 607) and the Model Code of Evidence (Rule 106), would eliminate the use of such evidence against a defendant in a criminal case unless he first introduces evidence admissible solely for the purpose of supporting his credibility and then would limit such evidence to convictions of a crime involving "dishonesty or false statement".

It has been suggested that the present rule unconstitutionally chills a defendant's right to take the stand in his own defense and that it "effects an anomalous distinction between defendants with and those without a criminal record in the exercise of the right to testify in their own behalf". See Note, 70 Yale LJ 763, 776 (1961); Note, 37 Cinci L Rev 168 (1968).

A defendant in a criminal case has a constitutional right to take the stand in his own behalf. *Cf. In re Oliver* (1948), 33 US 257, 273 (68 S Ct 499, 507; 92 L Ed 682, 694); *MacKenna* v. *Ellis* (CA5, 1960), 280 F2d 592, 595; *Ferguson* v. *Georgia* (1961), 365 US 570 (81 S Ct 756, 5 L Ed 2d 783). 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, 1217; 20 L Ed 2d 138, 147); *Simmons* v. *United States* (1968), 390 US 377, 394 (88 S Ct 967, 976; 19 L Ed 2d 1247, 1259); *Groshart* v. *United States* (CA9, 1968), 392 F2d 172, 180; *People* v. *Luna* (1967), 37 Ill 2d 299, 308 (226 NE 2d 586, 590); *Griffin* v. *California* (1965), 380 US 609, 614 (85 S Ct 1229, 1232, 1233; 14 L Ed 2d 106, 109, 110).

[21] The common-law disabilities were removed for defendants in criminal cases by PA 1881, No 245; as to the former state of the law see *People* v. *Thomas* (1861), 9 Mich 314 commenting on PA 1861, No 125. See opening paragraphs of part III for texts of the 1861 and 1881 acts.

There are, of course, numerous statements in our later cases concerning the prosecutor's "right" to introduce prior conviction evidence. Those statements were not made in the context of a challenge based on *Luck* and its reading of the statute; *cf. Bissell* v. *Starr* (1875), 32 Mich 297, 299; *People* v. *Wimberly* (1970), 384 Mich 62, 69. The rule is well settled that a point "assumed without consideration is of course not decided". *Allen* v. *Duffie* (1880), 43 Mich 1, 11.

In *People* v. *Eldridge* (1969), 17 Mich App 306, our Court, citing *Luck*, reversed a defendant's conviction of statutory rape for, among other reasons, the prosecutor's questioning of an alleged *res gestae* witness regarding his conviction of taking indecent liberties with the girl who complained against the defendant Eldridge.

We are convinced that the *Luck* construction of the statute is the correct one. Accordingly, on remand the trial judge shall exercise his discretion if again requested to exclude any reference to the defendant's prior conviction record.

IV.

The defendant also assigns as error the prosecutor's reference to the shooting of the defendant's brother inside the house shortly before the police officers were called.

While the prosecutor may not ordinarily introduce evidence of crimes other than the one the defendant is charged with committing, when the other crime occurs shortly before or after the charged offense it may be provable unless the probative value of the proffered evidence is overcome by the danger that introduction of the evidence will confuse, mislead or prejudice the jury.[22]

Taylor v. *Walter* (1970), 384 Mich 114, (on rehearing, 1971), 385 Mich 599, and *Sting* v. *Davis* (1971), 384 Mich 608, concern the construction of GCR 1963, 607. This rule, first promulgated in 1965 because of the court's concern regarding proof in negligent entrustment actions, by its terms applies only to the trial of civil actions and overrules a rule of evidence established in the motor vehicle code. Rule 607 does not apply to the special problem of defendants in criminal cases dealt with in PA 1881, No 245; see comments of Mr. Justice BRENNAN (384 Mich at p 615). See *People* v. *Simard* (1946), 314 Mich 624, 630, 631.

[22] See *People* v. *Lincourt* (1923), 221 Mich 674; *People* v. *Savage* (1923), 225 Mich 84; *People* v. *Andriacci* (1968), 11 Mich App 482, 486; *People* v. *Nichols* (1971), 33 Mich App 63.

A review of the record indicates that the closeness in time between the two incidents made it almost impossible to conduct the trial without some reference to the earlier incident. The people were entitled to show, generally, without undue emphasis or detail, how the defendant came to be armed and why the police were called to the scene, that there had been an altercation between the defendant and a member of his family, and that the defendant had obtained a gun and the police were called. We can see no prejudice to the defendant in the introduction of such testimony as it must be apparent to the jury from the fact that several squad cars were called to the scene that something untoward had occurred.

For the errors mentioned, we reverse and remand for a new trial.

All concurred.

SHEPARD v. BRUNSWICK CORPORATION

1. WORKMEN'S COMPENSATION—FINDINGS OF FACT—APPEAL AND ERROR.

An appellate court must sustain any issue of fact which the Workmen's Compensation Appeal Board determines, if the finding of fact is supported by the record (MCLA § 418.861).

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation §§ 522, 529, 530, 535.
[2] 58 Am Jur, Workmen's Compensation §§ 200–204.

2. WORKMEN'S COMPENSATION — DISQUALIFICATION — INTENTIONAL MISCONDUCT —TOLUENE ADDICTION.

Workmen's compensation claimant's intentional violation of a strictly-enforced safety rule requiring all employees to wear a mask covering their noses and mouths while they were in an area containing vats of toluene constituted intentional and wilful misconduct disqualifying claimant from compensation because he became addicted to toluene.

Appeal from Workmen's Compensation Appeal Board. Submitted Division 3 June 8, 1971, at Grand Rapids. (Docket No. 10795.) Decided October 1, 1971. Leave to appeal denied, 386 Mich 776.

Richard J. Shepard presented his claim for workmen's compensation against Brunswick Corporation and Zurich Insurance Company. Compensation denied by the Workmen's Compensation Appeal Board. Plaintiff appeals. Affirmed.

Marcus, McCroskey, Libner, Reamon & Williams, P. C. (by *Darryl R. Cochrane*), for plaintiff.

Cholette, Perkins & Buchanan (by *Sherman H. Cone*), for defendants.

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

FITZGERALD, J. Plaintiff has been granted leave to appeal from an order of the Workmen's Compensation Appeal Board reversing the awarding of compensation to the plaintiff for total disability resulting from addiction to toluene, a commonly used industrial solvent which is a highly addictive intoxicant. When inhaled it produces euphoria, exhilaration, excitement and a sense of well-being.

Plaintiff, 33 years of age at the time of hearing, began his employment with defendant in 1956 where he worked, apparently without incident, until 1963 when he was assigned as a trainee in the bowling pin department. There, bowling pins were coated with plastic by dipping them in a series of 11 different dipping tanks containing toluene.

At the time, it was plaintiff's responsibility to audit the dip tanks for temperature, viscosity, adhesion, quality of the pins, and matters of that nature. Plaintiff was provided with a mask and was instructed to wear it while in the dipping area. Plaintiff, however, testified that he and his fellow workers often neglected to wear masks while in this area and only put them on when one of them observed that the supervisor was approaching.

While leaning over the vats performing his duties, plaintiff sniffed the toluene and enjoyed the pleasant feeling it gave him. After being assigned to other parts of the plant, he returned to the vats with increasing frequency to sniff and eventually he became addicted to the intoxicant. Still later, he began to take the solvent home from the plant. He also made outside purchases. Ultimately, he was carrying it in a jar on his person at work for convenient sniffing. Management observed his actions at the plant and cautioned him to stop the habit, which he did for a time, but he always returned to fulfill his cravings. As a result, he became unable to work and was confined to Traverse City State Hospital. At the time of his hearing before the referee he was still an outpatient at that same hospital.

On appeal, the Workmen's Compensation Appeal Board reversed the referee's determination that the plaintiff was entitled to compensation. The board, in a four to three decision, found that the plaintiff

was guilty of intentional and willful misconduct within the meaning of the Workmen's Compensation Act. MCLA § 418.305 (Stat Ann 1971 Cum Supp § 17.237[305]), which provides:

"If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

The board's determination was based upon two grounds: (1) violation of safety rules, and (2) larceny of company property.

Defendants claim that there is ample evidence in the record to support the findings of fact by the appeal board, *e.g.,* that plaintiff, through intentional violation of a strictly-enforced safety rule and because he committed larceny of the toluene from his employer, was guilty of willful and wanton misconduct barring recovery of workmen's compensation benefits. They further contend that these determinations were issues of fact which neither this Court nor the Supreme Court can review if the findings are supported by the record.

The plaintiff argues that the appeal board erred as a matter of *law* in holding the plaintiff guilty of willful misconduct and therefore this issue is reviewable in this Court. It is well established that this Court must sustain any issue of fact which the appeal board determines if the findings of fact are supported by the record. *Sosnowski* v. *Dandy Hamburger* (1969), 17 Mich App 547.

Regretfully, it is the defendant's position which must be sustained on appeal. The workmen's compensation board of appeals is the final factfinder in cases before it. MCLA § 418.861 (Stat Ann Cum Supp 1971 § 17.237[861]); *Miller* v. *Sullivan Milk Products, Inc.* (1971), 385 Mich 659.

Findings of fact were made in this case indicating disregard for safety rules and less probatively, larceny of company property.

The finding of larceny of company property is irrelevant. That plaintiff was addicted to toluene was uncontroverted. When plaintiff removed quantities of toluene from the plant, he did so to satisfy his habit, his addiction. Therefore, the injury for which he claims disability, his addiction and the resulting injuries therefrom, had preceded this "larcenous" act. Further, as the three dissenting members so cogently point out, "his takings were dictated by irresistible cravings to supply his needs. His actions were not the result of his will and consequently they were not 'willful.' We think that this man's disease which ultimately led to his separation from work and his confinement in a state hospital should not be equated to criminal culpability."

Be that as it may, the board's finding of fact of violation of company safety rules is conclusive and the final word on the subject, precluding review. Each case, however, brings some nuance that creates a predisposition to remove it from the mine-run of cases. Here we deal with an addiction; a claimant unable to resist the cravings within him, and that addiction arising from his employment. His psychiatric treatment reveals the depth of his addiction and yet, with a fact finding that he violated company safety rules, we are powerless to give him relief which might ultimately contribute to his rehabilitation from what appears to be a tragic future. *Non datur secundum.*[1]

The order of the Workmen's Compensation Appeal Board is affirmed.

Costs to appellees.

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[1] There is no second choice.

R. B. BURNS, P. J., concurred.

J. H. GILLIS, J. (*concurring*). I concur in the results arrived at by my colleagues. There is ample support in the record to substantiate the findings of fact made by the Workmen's Compensation Appeal Board.

There is no question but what the company rigidly enforced the rule requiring employees working in the area in question to wear safety masks. Plaintiff was given warnings and then suspended for a ten-day period for violations pertaining to this particular rule.

I concur in the affirmation of the Workmen's Compensation Appeal Board's order.

PEOPLE *v.* DAILEY

1. CRIMINAL LAW — DEFENDANT TESTIFYING — PRIVILEGE AGAINST SELF-INCRIMINATION — SILENCE — PROSECUTOR'S COMMENT.
   A defendant who has exercised his privilege against self-incrimination at any time cannot be impeached by the prosecution's showing that the defendant exercised his constitutional right.

2. CRIMINAL LAW — DEFENDANT TESTIFYING — PRIVILEGE AGAINST SELF-INCRIMINATION — SILENCE — PROSECUTOR'S COMMENT.
   Prosecutor's cross-examining a testifying defendant as to why the defendant had not told the arresting officer why he (the

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REFERENCE FOR POINTS IN HEADNOTE

[1, 2] 21 Am Jur 2d, Criminal Law § 356.

defendant) was hiding in the bushes and what he was doing there, and prosecutor's commenting during summation as to why defendant, in a letter to the complainant, did not deny that he had stolen complainant's automobile, denied defendant due process and a fair trial by improperly commenting on defendant's exercise of his constitutional right to remain silent.

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 October 5, 1971, at Detroit. (Docket No. 9783.) Decided October 7, 1971. Leave to appeal denied, 387 Mich 754.

Patrick James Dailey was convicted of unlawfully driving away a motor vehicle. 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 *Gerald A. Poehlman,* Assistant Prosecuting Attorney, for the people.

William R. Kray, for defendant on appeal.

Before: LESINSKI, C. J., and V. J. BRENNAN and O'HARA,* JJ.

LESINSKI, C. J. Defendant Patrick James Dailey was convicted by a jury of the crime of unlawfully driving away a motor vehicle, MCLA § 750.413 (Stat Ann 1954 Rev § 28.645). He appeals as of right.

The defendant charges that the prosecutor, in cross-examination of the defendant who took the stand during his trial, and in final argument to the jury, denied defendant due process and a fair trial

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

by improperly commenting on defendant's exercise of his constitutional right to remain silent. Defendant objects to the following questions by the prosecutor:

"*Q.* Did you see Patrolman Moses Dunn ask you why you were hiding in the bushes?

"*A.* No, No.

"*Q.* Did you tell him why you were hiding in the bushes?

"*A.* No.

"*Q.* Why didn't you tell him why you were hiding in the bushes?

* * *

"*Q.* Why didn't you tell them at that time what you were doing?

* * *

"*Q.* At no time did you tell the police what you were doing in that backyard, did you?

"*A.* Nobody asked me.

"*Q.* But you didn't tell anybody either, did you?

* * *

"*Q.* Even before the examination, you had an opportunity to explain your actions to the police, did you not?

"*A.* What actions?

[*Prosecutor's summation*]:

" * * * He said he was in there to defecate. Now, this is the first time that story was told. He said he never said that to the police officers."

The prosecutor on final argument stated: "It is reasonable to assume that if a person accused of a crime that he didn't commit communicates with the person who accuses him of it, he would sometime, somehow, say to him, 'I didn't do it.' Mr. Dailey didn't say in that letter, 'I didn't do it.'"

In *People* v. *Hicks* (1970), 22 Mich App 446, this Court held in a similar factual context that it was

error for the prosecutor to cross-examine the defendant concerning his previous exercise of his constitutional right to remain silent. In *People* v. *Rolston* (1971), 31 Mich App 200, we held that when the right to remain silent embodied in the Fifth Amendment privilege against self-incrimination is exercised at any time by the accused, it is impermissible for the people to use the exercise of this right to impeach the accused should he elect to testify in his own behalf at the trial.

The statements made by the prosecutor in the case at bar do not differ from those made by the prosecutor in the *Hicks* and *Rolston* cases which were held to violate defendant's constitutional right to remain silent.

Judge BRENNAN, who joins in this opinion, notes that he participated in cases in which the Fifth Amendment privilege against self-incrimination was raised and he stood for affirmance. See *People* v. *Bell* (1971), 32 Mich App 375, and *People* v *Timmons* (1971), 34 Mich App 643. See, also, *People* v *Calhoun* (1971), 33 Mich App 141. However, the facts in this case are distinguishable. In the case before us the line of questioning by the prosecutor and the totality of the circumstances of this case denied the defendant a fair trial.

Reversed and remanded.

O'HARA, J. (*dissenting*). I regret that I cannot agree with the result reached by the Chief Judge. My view expressed in *People* v. *Calhoun* (1971), 33 Mich App 141, mandates the contrary result.

I would affirm.

PEOPLE *v.* SCHAFER

1. CRIMINAL LAW—INSTRUCTIONS TO JURY—PROSECUTION THEORY.
   It is reversible error for a court to instruct the jury on a theory for the prosecution where there is no evidence tending to establish the theory.

2. HOMICIDE—MURDER—ACCIDENT.
   An intent to kill coupled with an accidental death cannot constitute either first- or second-degree murder.

Appeal from Recorder's Court of Detroit, Thomas L. Poindexter, J. Submitted Division 1 June 8, 1971, at Detroit. (Docket No. 4025.) Decided October 19, 1971.

Hobart Schafer was convicted of manslaughter. 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 *Angelo A. Pentolino,* Assistant Prosecuting Attorney, for the people.

Joseph W. Louisell, P. C. (*Carl Ziemba,* of counsel), for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 627.
[2] 40 Am Jur 2d, Homicide § 112.

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

V. J. BRENNAN, J. Defendant was charged with first-degree murder, MCLA § 750.316 (Stat Ann 1954 Rev § 28.548). He pled not guilty to that charge and was tried by a jury which returned a verdict of guilty of manslaughter, MCLA § 750.321 (Stat Ann 1954 Rev § 28.553. Following his manslaughter conviction, defendant was sentenced to serve a term of 7 to 15 years.

The deceased, Ronald Ardelean, was found by the police dead behind the wheel of his automobile. The right-hand door of the automobile was open, and the deceased was clutching a partially filled bottle of beer. The deceased was 23 years of age. Cause of death was a shotgun wound to the right side of his neck near the front; the gun was fired from close range, and the charge entered at the neck and travelled downward and slightly backward. Defendant never denied that he had a shotgun when he went to the deceased's car nor that his gun fired the fatal shot. Defendant did testify, however, that while he was sternly admonishing the deceased not to pay any attention to his young daughter, deceased told appellant not to point the gun at him, or "I'll come up there and stick it up your ass"; deceased then made a motion toward the gun. At this point defendant jumped back and the gun went off. Defendant's theory at trial was that the gun discharged accidentally and he denied that he intended to take the life of the deceased.

Defendant appeals, alleging error in the trial judge's charge to the jury. Of the alleged errors to which proper objection was made below, we consider only two.

First, defendant argues that the following portion of the charge discusses an issue raised by neither party:

"I must instruct you that under the laws of Michigan, a man is not justified in taking the life of another for the protection of the chastity or honor of a female relative unless that constitutes an assault such as rape, a forceful attack, and if it appears that the action of the female involved was voluntary on her part, then there could be no defense of self-defense arising therefrom."

The defendant is correct. The prosecution did not contend that the defendant shot the decedent in order to protect his daughter's chastity, nor did the defense raise that issue as justification.

"A court should refuse to give instructions upon a theory of defense where there is no evidence tending to establish it. *People* v. *Knox* (1961), 364 Mich 620; *People* v. *Chivas* (1948), 322 Mich 384. By virtue of the same reasoning it is reversible error for the court to give instructions upon a theory for the prosecution which is unsupported by the evidence. See *People* v. *Goodrode* (1903), 132 Mich 542." *People* v. *Ware* (1968), 12 Mich App 512, 516.

Second, we also find merit in the defendant's argument that the following charge was erroneous:

"But it is also true that if the defendant, at the time of the shooting, had an intent at that time, at that particular moment, to kill the deceased, then the fact that the discharge was accidental would not be of great materiality because it goes to the question what was the intention of the defendant at that particular moment which is important in the case."

This charge is erroneous. A criminal intent, coupled with an accidental occurrence, cannot constitute either first- or second-degree murder.

"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." *People* v. *Morrin* (1971), 31 Mich App 301, 310.

The fact that the judge gave a more suitable charge on this point elsewhere is irrelevant.

"[W]hen several instructions are imparted to the jury, some proper and some incorrect, the jury is presumed to have followed the erroneous, absent repudiation of the questionable charges by the court. *People* v. *Eggleston* [(1915), 186 Mich 510]; *People* v. *Burkard* (1967), 374 Mich 430." *People* v. *Neumann* (1971), 35 Mich App 193.

In view of our resolution of these two issues, we do not consider defendant's other allegations of error.

Reversed and remanded.

All concurred.

BOWSER *v.* JACOBS
MILLER *v.* REDD
PAYNE *v.* BLACK

OPINION OF THE COURT

1. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—PURPOSE.
The purpose of the Motor Vehicle Accident Claims Act is to render relief to those who suffer damage attributable to uninsured motorists and who have no meaningful recovery (MCLA § 257.1101 *et seq.*).

2. STATUTES—CLASSIFICATION—LEGISLATIVE DISCRETION.
The Legislature is given great latitude in drawing classifications to effect social, economic, or regulatory legislation.

3. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—WORKMEN'S COMPENSATION—STATUTES—CONSTITUTIONAL LAW.
The section of the Motor Vehicle Accident Claims Act which prevents those covered by workmen's compensation from applying to the Motor Vehicle Accident Claims Fund for payment for damages after being injured by an uninsured motorist is unconstitutionally discriminatory, because in several other instances the act allows other persons to reach alternative indemnities without prohibiting recovery from the fund (MCLA § 257.1101 *et seq.*).

DISSENT BY LEVIN, J.

4. STATUTES—CLASSIFICATION—CONSTITUTIONAL LAW.
A classification in a statute is not an invidious discrimination merely because the classification lacks the force of compelling

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 7–11, 14, 15] 7 Am Jur 2d, Automobiles and Highway Traffic § 301.
Unsatisfied claim and judgment statutes; Validity and construction of provisions for deduction from awards of sums collectible by claimant from other sources. 7 ALR3d 836.
[2, 4–8, 12–15] 16 Am Jur 2d, Constitutional Law § 494 *et seq.*
[16] 16 Am Jur 2d, Constitutional Law § 151.

logic or is incongruous; unless the classification is invidious, the courts may not interfere with the legislative judgment.

5. STATUTES—LEGISLATIVE JUDGMENTS.

The courts have not been commissioned to substitute their concepts of fairness and common sense for the practical legislative judgments and compromises which must be made in order to enact innovative legislation addressed to the social problems of our times; if the courts, when passing on the constitutionality of such statutes, ignore the need for rough accomodations, the courts may discourage the Legislature from dealing with a problem at all.

6. CONSTITUTIONAL LAW—STATUTES—CLASSIFICATION—EQUAL PROTECTION—CONSTITUTIONAL STANDARD.

A classification does not violate this state's Equal Protection clause if there is a reasonable basis for the classification; the reasonable basis test must be used because it is the most recent pronouncement of the United States Supreme Court and because the Michigan Supreme Court has previously declared that the Michigan Equal Protection clause means the same thing as the Federal Equal Protection clause.

7. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS FUND—WORKMEN'S COMPENSATION—CLASSIFICATION—CONSTITUTIONAL LAW.

The statutory classification that prevents those covered by workmen's compensation from applying to the Motor Vehicle Accident Claims Fund for payment after being involved in an automobile accident with an uninsured motorist must be sustained if there is a reasonable basis for the classification; the Court of Appeals must, in light of the decisions of the United States and Michigan Supreme Courts, proceed on the assumption that it may not balance the competing interests, comparing the relative importance to the discriminated class of the governmental benefit denied and the asserted state interest advanced in support of the classification (MCLA § 257.1101 et seq.*).*

8. AUTOMOBILES — MOTOR VEHICLE ACCIDENT CLAIMS ACT — WORKMEN'S COMPENSATION — CLASSIFICATION — REASONABLENESS — BURDEN OF PROOF.

The state, not the claimant, has the burden of showing the reasonableness of the classification precluding those entitled to workmen's compensation from recovering from the Motor Vehicle Accident Claims Fund on account of an accident with an uninsured motorist; the burden is on the state because of

the universality of the social problem sought to be dealt with by the Motor Vehicle Accident Claims Act, the omnipresence of the risk ameliorated, the breadth of the general right of recovery—all state residents, and the narrow exclusion—those residents injured in the course of their employment so that they are covered by workmen's compensation (MCLA § 257.1101 et seq.*).*

9. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—INSURANCE CODE—UNINSURED MOTORIST COVERAGE—PURPOSE.

Motor Vehicle Accident Claims Act and the act amending the insurance code providing that any policy protecting a person from personal injury also protects against loss caused by an uninsured motorist unless uninsured motorist protection has been rejected are in pari materia; *the amendment to the insurance code sought to encourage the purchase of uninsured motorist coverage and, thus, reduce the number of claims against the Motor Vehicle Accident Claims Fund.*

10. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—WORKMEN'S COMPENSATION—EXCLUSION FROM RECOVERY—PURPOSE.

The legislative purpose in barring those covered by workmen's compensation from recovery from the Motor Vehicle Accident Claims Fund for damages caused by an uninsured motorist was not based on the policy that the employees already had an adequate minimum source of recovery, because the only *group having a collateral source of recovery barred from proceeding against the fund were injured employees entitled to workmen's compensation (MCLA § 257.1101* et seq.*).*

11. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—WORKMEN'S COMPENSATION—EXCLUSION FROM RECOVERY—PURPOSE.

The Legislature's purpose in prohibiting employees who are covered by workmen's compensation from suing the Motor Vehicle Accident Claims Fund for injuries caused by uninsured motorists was simply to reduce the fund's exposure by eliminating a readily identifiable group of potential claimants who, arguably, were in less need of protection (MCLA § 257.1101 et seq.*).*

12. STATUTES—CLASSIFICATION—CONSTITUTIONAL LAW.

The state may for sound reasons of public policy grant benefits to some and deny like benefits to others.

13. STATUTES—CLASSIFICATION—RATIONAL BASIS.

A classification in a statute which does not foster the objective which impelled it is not rational.

14. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—WORKMEN'S COMPENSATION—EXCLUSION FROM RECOVERY—REASONABLENESS.

The reasonableness of the classification barring claims for damages from uninsured motorists against the Motor Vehicle Accident Claims Fund by employees entitled to workmen's compensation must be judged in the light of the objective sought to be served by the classification—the preservation of the fund's financial soundness; if the classification bears no reasonable relationship to the purpose of protecting the fund's actuarial soundness, the classification is irrational.

15. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—WORKMEN'S COMPENSATION—EXCLUSION FROM RECOVERY—REASONABLENESS.

Actions questioning the constitutionality of the provision barring those covered by workmen's compensation from suing the Motor Vehicle Accident Claims Fund for injuries caused by uninsured motorists must be remanded for the taking of additional evidence, showing the fund's present financial condition, because the constitutionality of the provision depends on whether it is reasonably related to the preservation of the fund's actuarial soundness (MCLA § 257.1101 et seq.*).*

16. STATUTES—CONSTITUTIONAL LAW—CHANGED CONDITIONS.

A change in facts, conditions, or circumstances may render unconstitutional a statute valid when enacted.

Appeals from Wayne, George E. Bowles, Horace W. Gilmore, and Thomas D. Roumell, JJ. Submitted Division 1 February 2, 1971, at Detroit. (Docket Nos. 8197, 8353, 8464.) Decided October 19, 1971.

Complaint by John Anthony Bowser against Paul E. Jacobs, Charles Furtaw, and the Secretary of State, as Director of the Motor Vehicle Accident Claims Fund, for damages for injuries received in an automobile accident with an uninsured motorist. Summary judgment granted defendant Secretary of State. Plaintiff appeals. (No. 8197.)

Complaint by Charles E. Miller, Jr., against James Redd for damages for injuries received in an automobile accident. The Secretary of State, as Director of the Motor Vehicle Accident Claims Fund, intervened as a defendant. Secretary of State's motion for summary judgment denied. The Secretary of State appeals. (No. 8353.)

Complaint by Dorothy Ann Payne against Harvey Black and Charles Black for damages for injuries received in an automobile accident. The Secretary of State, as Director of the Motor Vehicle Accident Claims Fund intervened as a defendant. Secretary of State's motion for summary judgment denied. The Secretary of State appeals. (No. 8464.)

Cases consolidated. Reversed and remanded for trial as to plaintiff Bowser; remanded for trial as to plaintiffs Miller and Payne.

Sheldon L. Miller (*Theodore M. Rosenberg,* of counsel), for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph B. Bilitzke* and *Carl K. Carlsen,* Assistants Attorney General, and *John F. Potvin,* Special Assistant Attorney General, for defendant Secretary of State.

Before: LESINSKI, C. J., and R. B. BURNS and LEVIN, JJ.

LESINSKI, C. J. In the cases before us we are squarely faced with determining the constitutionality of that portion of the Motor Vehicle Accident Claims Act (hereinafter the Act) which prevents those covered by workmen's compensation from

applying to the Motor Vehicle Accident Claims Fund (hereinafter the Fund) for payment. MCLA § 257.1101, *et seq.* (Stat Ann 1968 Rev § 9.2801, *et seq.*).

To facilitate adjudication of this question, this Court ordered that the three causes captioned above be consolidated. All of the cases presently before us are factually identical: plaintiffs are taxicab operators who, while in the course and scope of their employment, were injured in automobile accidents allegedly caused by uninsured motorists. The plaintiffs brought the instant actions against the various uninsured motorists and the Secretary of State in his representative capacity as administrator of the Fund. In each of the cases, the Secretary, relying on § 29 of the Act, sought dismissal of the action against the Fund by way of motion for summary judgment. Plaintiffs resisted these motions by contending that the section was unconstitutional. In the *Bowser* case, the trial court upheld § 29 as constitutional and granted the Secretary's motion. In *Miller* and *Payne,* the trial courts struck down the section as violative of the Equal Protection clause of the Federal and State Constitutions; these lower courts denied the Secretary's motions with prejudice.

Section 29 of the Act bars the recovery by an injured person from the Fund if the claimant is covered by workmen's compensation with respect to such injury.[1] Plaintiffs assert that this statutory classification is unreasonable, arbitrary, and contravenes the Equal Protection clause. The Secretary's position is that since the purpose of the Act

[1] New Jersey has a similar provision in its statute. NJ Stat Ann § 39:6–70. Extensive research, however, has failed to uncover any decision which addresses itself to the constitutionality, *vel non,* of such a provision.

is to render relief to those who suffer damage attributable to uninsured motorists (and who have no meaningful recovery), the Legislature's classification prohibiting those covered by workmen's compensation from proceeding against the Fund is a reasonable, constitutionally permissible distinction.

We accept the Secretary's statement of the purpose of such legislation. This interpretation is given weight by reference to decisions from the courts of other states. See, for example, *Askey* v. *General Accident Fire & Life Assurance Corp.* (1968), 30 App Div 2d 632 (290 NYS2d 759), *aff'd* (1969), 24 NY2d 937 (302 NYS2d 576); *Garcia* v. *Motor Vehicle Accident Indemnification Corp.* (1964), 41 Misc 2d 858 (246 NYS2d 841); *Corrigan* v. *Gassert* (1958), 27 NJ 227 (142 A2d 209); *Dixon* v. *Gassert* (1958), 26 NJ 1 (138 A2d 14); *Douglas* v. *Harris* (1961), 35 NJ 270 (173 A2d 1); *Proskurnja* v. *Elder* (1962), 73 NJ Super 466 (180 A2d 200); *Tschider* v. *Burtts* (ND, 1967), 149 NW2d 710. Given this objective, we must examine the statutory differentiation presently challenged in light of the purposes of the legislative enactment. *Fox* v. *Employment Security Commission* (1967), 379 Mich 579, 588.

It remains axiomatic that the Legislature is to be given great latitude in drawing classifications to effect social, economic, or regulatory legislation. *Fox* v. *Employment Security Commission, supra; Levy* v. *Louisiana* (1968), 391 US 68 (88 S Ct 1509, 20 L Ed 2d 436). This holds true for uninsured or unsatisfied judgment fund statutes as well. See *Allied American Mutual Fire Insurance Co.* v. *Commissioner of Motor Vehicles* (1959), 219 Md 607 (150 A2d 421). See, also, *Naudzius* v. *Lahr* (1931), 253 Mich 216, 223.

We would be persuaded by the Secretary's argument, were it not for the fact that, in several other instances, the Act allows other persons to reach alternative indemnities without prohibiting recovery from the Fund.

The availability of *any* workmen's compensation totally bars an injured party from looking to the Fund for recovery of any amount.[2] But § 22(4) of the Act, MCLA § 257.1122(4) (Stat Ann 1968 Rev § 9.2822[4]), permits the beneficiaries of a life insurance policy to recover from the Fund for the death of a person caused by an uninsured motorist. Certainly it may be said that the existence of life insurance could adequately compensate survivors for their loss. The Act allows these persons to recover and, incongruously, refuses an employee to look to the Fund for relief. Furthermore, § 23(2) of the Act, MCLA § 257.1123(2) (Stat Ann 1968 Rev § 9.2823[2]), permits one to apply for payment out of the Fund even after exhausting one's coverage on a private policy of automobile insurance (presumably uninsured motorist coverage existing in many such policies).

In *Green* v. *Blicharski* (1971), 32 Mich App 15, plaintiff was injured by an uninsured motorist. Plaintiff owned a private automobile insurance policy with uninsured motorist coverage. Plaintiff's insurer paid $7,250 to plaintiff after plaintiff and the insurer arbitrated the claim. Plaintiff then sought damages from the uninsured motorist and the Fund; plaintiff obtained a judgment for $16,000.

[2] For example, a reading of MCLA § 257.1129 (Stat Ann 1968 Rev § 9.2829) indicates that an employee who suffers $50,000 in damages inflicted upon him by an uninsured motorist and to whom a workmen's compensation award with a present value of $20,000 is made, is unable to sue the Fund, regardless of the $30,000 in damages which would go uncompensated.

This Court held in that case that the Secretary was liable for the excess of the judgment over the payment made by the insurer. However, had plaintiff in the *Green* case received a workmen's compensation award of $7,250, he would have been unable to secure any amount from the Fund in excess of that paid to him by the employer or his workmen's compensation carrier.

The legislative aim of this social legislation, as noted above, is to compensate those injured by uninsured tortfeasors who would otherwise have had no source of recovery. But, as we have seen, some persons who have available avenues of recovery are permitted to reach the Fund but injured employees are not. We are constrained to agree that the Legislature has arbitrarily carved out this class from those who have recourse to the Fund. This classification is one made without the force of compelling logic; we find it unconstitutionally discriminatory.

In *Fox* v. *Employment Security Commission, supra,* several similar examples of discrimination were challenged. In that case, weekly unemployment benefits were denied by statute to those receiving total permanent, partial permanent, or temporary disability workmen's compensation payments as well as to those receiving weekly workmen's compensation benefits. However, the statute permitted recipients of death, workmen's compensation benefits, "specific loss" benefits, and those who had elected to accept their workmen's compensation award in a "lump sum" to receive unemployment compensation. Noting that the object of the statute was to preclude the possibility of duplication of benefits, the Court held the distinctions to be arbitrary since some persons were able, because of the

statutory scheme, to reach unemployment benefits and others similarly situated were not.[3]

We reverse and remand in the *Bowser* case with an order to the trial court to proceed to trial for a determination of liability.

We remand in the *Miller* and *Payne* cases with orders to try the cases so as to fix liability.

No costs, a public question being involved.

R. B. BURNS, J., concurred.

LEVIN, J. (*dissenting*). Although I am in complete sympathy with the result reached by my colleagues, on the record presented it is beyond our authority to declare the challenged legislative classification unconstitutional.

Time and again we have been instructed that "the Legislature may recognize degrees of evil and adapt its legislation accordingly" (*Truax* v. *Raich* [1915], 239 US 33, 43 [36 S Ct 7, 60 L Ed 131]), that it need not cover "the whole field of possible abuses" (*Patsone* v. *Pennsylvania* [1914] 232 US 138, 144 [34 S Ct 281, 58 L Ed 539]), and that *"logical* appropriateness of the inclusion or exclusion of objects or persons is not required. * * * At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment" (*Heath & Milligan Manufacturing Company* v. *Worst* [1907], 207 US 338, 354, 355 [28 S Ct 114, 52 L Ed 236]). Accord: *Naudzius* v. *Lahr* (1931), 253 Mich 216; *Mutchall* v. *City of Kalamazoo* (1948), 323 Mich 215, 227; *Tracer* v. *Bushre* (1968), 381 Mich 282, 291; *People* v. *Chapman* (1942), 301 Mich 584, 599.

[3] We need not pass upon the question of whether declaring § 29 unconstitutional grants the employer or his workmen's compensation carrier a derivative cause of action.

A "lack of abstract symmetry does not matter. The question is a practical one". *Patsone* v. *Pennsylvania, supra,* p 144. Merely because a classification may lack, as my colleagues in this case argue, "the force of compelling logic" or is "incongruous" does not mean that it accomplishes an "invidious discrimination". And, unless the challenged discrimination is invidious, we may not properly interfere with the legislative judgment. *Wolodzko* v. *Wayne Circuit Judge* (1969), 382 Mich 528, 534 (discussed in fn 6, *infra*); see, also, cases cited and discussed in part I, *infra.*

Logic and inductive reasoning can carry one down a false path:

(a) The majority points out that § 22(4) of the Motor Vehicle Accident Claims Act[1] provides that amounts recoverable under a policy of life insurance or under any policy, contract or agreement providing for the payment of any hospital or medical expenses are not to be deducted in determining the liability of the Motor Vehicle Accident Claims Fund. The majority use this preferential treatment of such insurance recoveries as an argument to buttress their conclusion that the challenged classification—distinguishing between persons injured by uninsured motorists based on whether they are entitled to receive workmen's compensation benefits on account of their injuries—is illogical, without appreciating where their logic takes them. Surely the fund—which the Legislature clearly intended would ordinarily be liable only to the extent the damages are in "excess" of amounts forthcoming from other sources of recovery—is not now to be placed on a par with all others who are potentially liable in order to achieve, if that is possible, an

[1] MCLA § 257.1122 *et seq.* (Stat Ann 1968 Rev § 9.2822 *et seq.*)

abstract and logical symmetry for all persons injured by uninsured vehicles in relation to those of such injured persons who are entitled to recover life insurance or hospital or medical expense insurance proceeds on account of their damages.

(b) Nor should we be troubled that those injured persons who carry uninsured motorist insurance protection may also recover from the fund if their damages exceed the amounts received from their own insurers. As observed in *Oatis* v. *Dairyland Insurance Company* (1969), 20 Mich App 367, 372, "with the statute the Legislature has encouraged the purchase of uninsured motorist coverage". If it were not possible to recover from the fund any excess of the damages suffered over the amount recovered from one's own insurer, there would be little incentive to purchase uninsured motorist coverage. Informed policyholders would reject uninsured motorist coverage secure in the knowledge that if they were damaged by an uninsured motorist they could proceed against the fund and recover all that they could recover were they to purchase uninsured motorist coverage.

(c) Persons who are injured by motorists *who are insured* for $10,000 of liability cannot recover at all from the fund. Surely we are not prepared to declare that limitation unconstitutional because persons who are injured by uninsured motorists and who carry $10,000 uninsured motorist protection may proceed against both their insurers *and* against the fund.

(d) Under the majority's decision employees injured by uninsured motorists can now collect from the fund even though they are entitled to recover workmen's compensation benefits, without, it would appear, reduction on account of the workmen's com-

pensation benefits paid (see part VI, *infra*). This creates an "illogical" inequity between employees injured by uninsured motor vehicles and employees injured by insured vehicles or in some other manner as regards employers' rights of subrogation in respect to amounts recoverable by employees from third-party tortfeasors.

It is apparent that we are not more likely than the Legislature to achieve a fully harmonious symmetry in legislation. Before legislation can properly be declared unconstitutional we must be able to point to a shortcoming of more overriding significance than a mere lack of "compelling logic" or "incongruity". We have not been commissioned to substitute our concepts of fairness and common sense for the practical legislative judgments and compromises which must be made in order to enact innovative legislation addressed to the social problems of our times. If we ignore the need for rough accommodations we may well discourage a Legislature, fearful that we will extend its work into areas beyond its intention, from dealing with a problem at all.

The plaintiffs in these actions, consolidated on appeal, are taxicab drivers who suffered injuries in automobile collisions that occurred in the course of their employment by a cab company. Workmen's compensation benefits were paid to them.

They commenced these actions against the drivers and owners of the other vehicles involved in the collisions. And, claiming that the other vehicles were uninsured, they served the Secretary of State as director of the Motor Vehicle Accident Claims Fund.

The Secretary of State intervened as a party defendant and moved separately in each action for

summary judgment on the basis of § 29 of the act establishing the fund:

"Any person covered with respect to such injury or death by workmen's compensation law or the personal representative of such person shall not be permitted to recover from the fund except for property damage."[2]

The motions were heard by three different circuit judges; a summary judgment was entered in favor of the fund in *Bowser* v. *Jacobs,* #8197, and denied in *Miller* v. *Redd,* #8353, and *Payne* v. *Black,* #8464.

The question presented is whether the legislative classification set forth in § 29, barring a person covered under the workmen's compensation law from seeking benefits from the accident claims fund, deprives those in the excluded class of the equal protection of the laws.

Although I cannot subscribe to the view of my colleagues that lack of "compelling logic" or "incongruity" in the challenged classification renders it unconstitutional on its face, the classification may, indeed, in the total factual context, be unconstitutional. For reasons set forth at length in this dissenting opinion I would hold that the constitutionality of the classification cannot be determined on the record presented and remand for the taking of additional evidence and further fact finding.

I.

The Michigan Supreme Court has declared that the scope and nature of the right to the equal protection of the laws is the same under the Michigan Constitution (Const 1963, art 1, § 2) as it is under

[2] MCLA § 257.1129 (Stat Ann 1971 Cum Supp § 9.2829).

the Fourteenth Amendment to the United States Constitution.[3]

Our Supreme Court has adopted and frequently reiterated[4] as the standard by which a statutory classification is to be tested, when challenged as a denial of equal protection of the laws, principles summarized in 1911 by the United States Supreme Court in *Lindsley* v. *Natural Carbonic Gas Company* (1911), 220 US 61, 78, 79 (31 S Ct 337, 55 L Ed 369), a case where the Court upheld the validity of classifications in an act prohibiting drilling for natural mineral waters.

In *Lindsley* the Court declared that the state may exercise a power to classify in the adoption of "police laws" and that a classification is not invalid merely because it results in some inequality in practice. Only those classifications which have no "reasonable basis and, therefore, are purely arbitrary" deny the equal protection of the laws. A court will assume the existence of any state of facts that reasonably can be conceived which will sustain the classification and he who assails the classification must carry the burden of proving that it does not rest upon any reasonable basis, but is essentially arbitrary.[5]

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[3] *Naudzius* v. *Lahr* (1931), 253 Mich 216, 222; *Gauthier* v. *Campbell, Wyant & Cannon Foundry Company* (1960), 360 Mich 510, 514.

[4] See *Naudzius* v. *Lahr, supra,* pp 222, 223; *Gauthier* v. *Campbell, Wyant & Cannon Foundry Company, supra,* p 514.

[5] "1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden

More recently, the Michigan Supreme Court reaffirmed its assimilation of the Federal "reasonable basis" standard when it adopted a rearticulation of that standard by the United States Supreme Court in *McGowan* v. *Maryland* (1961), 366 US 420, 425, 426 (81 S Ct 1101, 6 L Ed 2d 393), a case where the classifications in a Sunday closing law containing numerous exemptions were sustained.[6] As earlier indicated, still another formulation by the United States Supreme Court of the reasonableness basis standard has been adopted by our Supreme Court: "The prohibition of the equal protection clause goes no further than the invidious discrimination."[7]

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of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Company* (1911), 220 US 61, 78, 79 (31 S Ct 337, 55 L Ed 369).

[6] "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland* (1961), 366 US 420, 425, 426 (81 S Ct 1101, 6 L Ed 2d 393), quoted approvingly in *Wolodzko* v. *Wayne Circuit Judge* (1969), 382 Mich 528, 533, 534.

In *Wolodzko* v. *Wayne Circuit Judge* (1969), 382 Mich 528, 533, 534, the Michigan Supreme Court sustained the validity of a provision in the insurance code which permits an insurance company authorized to do business in this state to obtain a stay of execution of the entire amount of a judgment against one of its insureds even though the amount of the insurance company's liability under the policy is less than the amount of the judgment. The Court declared that "[t]he desirability of carrying liability insurance for the protection of the public, in some amount, and the encouragement thereof which [the statutory provision] exhibits" is a nonarbitrary reason for the special treatment provided insurance carriers.

[7] *Williamson* v. *Lee Optical of Oklahoma, Inc.* (1955), 348 US 483, 489 (75 S Ct 461, 99 L Ed 563), quoted approvingly in *Wolodzko* v. *Wayne Circuit Judge, supra,* p 534, fn 4. Similarly, see *Levy* v. *Louisiana Through the Charity Hospital of Louisiana at New Orleans Board of Administrators* (1968), 391 US 68, 71 (88 S Ct 1509, 20 L Ed 2d 436).

II.

The *Lindsley* doctrine that a classification challenged as invidious will be upheld if it rests upon a reasonable basis—if it is not invidious or arbitrary—and that a person challenging the classification must show that no state of facts can reasonably be hypothesized that would justify the classification has in recent years been re-examined by the United States Supreme Court.

In a considerable number of cases the Court has declared that the "any-rationale-basis-for-the-classification" analysis, utilized in appraising legislation regulating business or industry, does not circumscribe the inquiry where the classification is "suspect" or the discrimination concerns a "fundamental right" and that in such a case the burden, a "very heavy burden of justification", must be carried by the state contending that the legislation is valid.[8]

In *Williams* v. *Rhodes* (1968), 393 US 23, 30 (89 S Ct 5, 21 L Ed 2d 24), a voting rights case, the Court moved toward a more generalized test, one which would require a reviewing court to weigh the interest of the individual and the interest of the

[8] *Loving* v. *Virginia* (1967), 388 US 1, 8, 9 (87 S Ct 1817, 18 L Ed 2d 1010) (statute prohibiting a white person from marrying any person other than a white person is invalid). Similarly, see *Skinner* v. *Oklahoma* (1942), 316 US 535, 541 (62 S Ct 1110, 86 L Ed 1655) (statute providing for sterilization of habitual criminals held invalid; "strict scrutiny" of the classification in a sterilization law is essential); *Korematsu* v. *United States* (1944), 323 US 214, 216 (65 S Ct 193, 89 L Ed 194) (exclusion of citizens of Japanese extraction from certain areas of the west coast at the beginning of the war with Japan held to have been a valid exercise of the war power; but the Court observed: "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. * * * [T]he courts must subject them to the most rigid scrutiny."); *Harper* v. *Virginia State Board of Elections* (1966), 383 US 663, 670 (86 S Ct 1079, 16 L Ed 2d 169) (poll tax held invalid; "Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.")

state, making the matter turn on the "importance" to each of the interests at stake:

"It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, *we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.*" (Emphasis supplied.)[9]

In *Shapiro* v. *Thompson* (1969), 394 US 618, 634, 638 (89 S Ct 1322, 22 L Ed 2d 600), in ruling that welfare recipients are denied equal protection of the laws by a one-year residency classification, which had the effect of impinging their constitutional right to travel freely from state to state, the Court declared:

"At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley* v. *Natural Carbonic Gas Company* [1911], 220 US 61, 78 [31 S Ct 337, 55 L Ed 369, 377]; *Flemming* v. *Nestor* [1960], 363 US 603, 611 [80 S Ct 1367, 4 L Ed 2d 1435, 1444]; *McGowan* v. *Maryland* [1961], 366 US 420, 426 [81 S Ct 1101, 6 L Ed 2d 393, 399]. The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from

[9] Similary, see *Kramer* v. *Union Free School District No.* 15 (1969), 395 US 621 (89 S Ct 1886, 23 L Ed 583).

state to state or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. *Cf. Skinner* v. *Oklahoma* [1942], 316 US 535, 541 [62 S Ct 1110, 86 L Ed 1655, 1660]; *Korematsu* v. *United States* [1944], 323 US 214, 216 [65 S Ct 193, 89 L Ed 194, 198]; *Bates* v. *Little Rock* [1960], 361 US 516, 524 [80 S Ct 412, 4 L Ed 2d 480, 486]; *Sherbert* v. *Verner* [1963], 374 US 398, 406 [83 S Ct 1790, 10 L Ed 2d 965, 971]." (Emphasis by the Court.)

Later the Court said:

"Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." (Emphasis by the Court.)

However, more recently, in *Dandridge* v. *Williams* (1970), 397 US 471 (90 S Ct 1153, 25 L Ed 2d 491), *reh den* 398 US 914 (90 S Ct 1684, 26 L Ed 2d 80), the United States Supreme Court, in upholding the validity of a regulation of the Maryland Department of Public Welfare placing an absolute limit of $250 per month on the amount of a grant under the AFDC program regardless of the size of the family and its actual need, reiterated its adherence to the traditional reasonable basis standard enunciated in *Lindsley,* acknowledging as it did so that there was a "dramatically real factual difference" between cases in which that standard was evolved—mainly cases concerning "State regulation of business or industry"—and the case there presented which concerned the administration of public welfare assistance and hence "the most basic economic

needs of impoverished human beings". The Court declared:

"*In the area of economics and social welfare,* a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. *Lindsley* v. *Natural Carbonic Gas Co., supra,* p 78." (Emphasis supplied.) *Dandridge* v. *Williams, supra,* p 485.

Mr. Justice Harlan concurred with the reservation that, in his opinion, the standard of rationality of classification governs in all cases without regard to the nature of the classification or interest involved with the sole exception of racial classifications, where a higher standard limits legislative action, and, thus, he would not suggest that a different standard might apply if the interest involved was not in the area of "economics and social welfare."[10]

Mr. Justice Marshall and Mr. Justice Brennan, in dissent, chided the majority for not explaining why a classification in "social welfare" legislation should be judged by the same standard developed in "economic" regulation cases (p 520): "We are told no more than that this case falls in 'the area of economics and social welfare', with the implication that from there the answer is obvious". They expressed the view that the distinction evolving in the equal protection cases between "fundamental" rights and other kinds of rights as to the standard by which the validity of a classification would be judged was not workable and was not valid. They

[10] *Dandridge* v. *Williams* (1970), 397 US 471, 489, 490 (90 S Ct 1153, 25 L Ed 2d 491), *reh den* 398 US 914 (90 S Ct 1684, 26 L Ed 2d 80), Harlan, J., concurring.

said that the "equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a 'right', fundamental or otherwise. Rather [they said, relying on *Williams* v. *Rhodes, supra*] concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted State interests in support of the classification".[11]

In its latest pronouncement on the subject, *Graham* v. *Richardson* (1971), 403 US 365, 371, 372 (91 S Ct 1848, 1852; 29 L Ed 2d 534, 541), in holding violative of the Equal Protection clause state statutes denying welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years, the Court declared:

"Under traditional equal protection principles, a state retains broad discretion to classify as long as its classification has a reasonable basis. [Citations omitted.] This is so in 'the area of economics and social welfare.' *Dandridge* v. *Williams* (1970), 397 US 471, 485. But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States* v. *Carolene Products Co.* [1938], 304 US 144, 152, 153, n. 4 [58 S Ct 778, 783, 784; 82 L Ed 1234, 1241, 1242]) for whom such heightened judicial solicitude is appropriate."

It is apparent that the traditional test, stated in *Lindsley* in a business regulation case, has not been

[11] *Dandridge* v. *Williams, supra,* pp 520, 521, Marshall, J., dissenting.

found adequate to deal with the many varied kinds of statutes and regulations with which the courts are now confronted. No one verbal formulation is likely to be adequate to judge and decide all cases.

The statements by the Michigan Supreme Court that the Equal Protection clause means the same thing in the Michigan Constitution as it means in the Federal Constitution were made at times when there was complete unanimity that the relatively simplistic *Lindsley* test would permit apropriate resolution of all cases likely to be presented. Now that other standards have been propounded and applied in some cases by the United States Supreme Court itself and there is a running debate in that Court as to the standard or standards to be applied in particular cases, the Michigan Supreme Court might well conclude that it has a choice to make between the competing formulations.

However, until the Michigan Supreme Court decides, in the application of the Equal Protection clause in the Michigan Constitution, to explicate and develop diversified standards unconstrained by the Federal standards, we must, controlled as we are by the doctrine of *stare decisis*,[12] attempt to apply the most recent pertinent pronouncement of the United States Supreme Court as best we can. And that would appear to be the statement in *Dandridge* v. *Williams*. It would seem that if the traditional reasonable basis test governs the propriety of a regulation controlling the distribution of state funds to welfare recipients, that a test no more restrictive of state legislative power to classify would be applied by the United States Supreme Court in determining the propriety of an exception in a state

[12] See *Abendschein* v. *Farrell* (1969), 382 Mich 510, *affirming* *Abendschein* v. *Farrell* (1968), 11 Mich App 662; *Maxwell* v. *Maxwell* (1969), 15 Mich App 607, 614; *Hollerud* v. *Malamis* (1969), 20 Mich App 748, 758.

statute providing indemnification for claims against uninsured motorists.

Thus, in deciding this case we must proceed on the assumption that we may not balance the competing interests, comparing the relative importance to the class discriminated against of the governmental benefit denied, and the asserted state interest advanced in support of the classification. We must sustain the classification if there is a reasonable basis for it.

While the Supreme Court in *Dandridge* states the governing test in the same language as does *Lindsley,* it is significant that in *Dandridge,* as in *Shapiro* v. *Thompson,* the Court did not require the persons challenging the classification to negative any reasonably conceivable state of facts that would sustain the classification as reasonable. The Court scrutinized the justification of the regulation advanced by the state, and finding it substantial concluded that the $250 per month limitation was rationally based and free from invidious discrimination. This points to the path which we should adopt decisionally in this case.

Although the right involved in this case is not as important as the right to vote (*Williams* v. *Rhodes*)[13] or the right to travel from state to state (*Shapiro* v. *Thompson*) or the right to marry (*Loving* v. *Virginia,* see fn 8), and the classification before us is not, like one based on nationality, race or alienage, inherently suspect (*Loving* v. *Virginia; Graham* v. *Richardson*),[14] a classification (such as the one here challenged) carving out of the entire population of Michigan a relatively small group of

[13] But see *McDonald* v. *Board of Election Commissioners of Chicago.* (1969), 394 US 802 (89 S Ct 1404, 22 L Ed 2d 739).

[14] Similarly, see *Hunter* v. *Erickson* (1969), 393 US 385 (89 S Ct 557, 21 L Ed 2d 616).

potential claimants should be more closely scrutinized than the kinds of classifications repeatedly approved in cases challenging classifications in legislation regulating business and industry.

Under the Motor Vehicle Accident Claims Act, any Michigan resident injured in this state by an uninsured motor vehicle may, to the extent he does not recover from other sources for his damages, have recourse to the Motor Vehicle Accident Claims Fund for indemnification up to $10,000 unless—the preclusion here challenged—his injuries were suffered in the course of his employment so that he is entitled to workmen's compensation benefits.[15] Under the accident claims act, if the collateral source of recovery is a source other than workmen's compensation the amount collaterally recovered is merely required to be deducted from the amount of the damages suffered before recourse may be had to the fund; but, if the collateral source is workmen's compensation, no recourse whatsoever may be had to the fund even though the damages suffered substantially exceed the benefits allowed under the workmen's compensation act.

Having in mind the nature of the legislation before us, the universality of the social problem sought to be dealt with, the omnipresence of the risk ameliorated by this legislation, the breadth of the general right of recovery: all residents of Michigan, and the narrowness of the preclusion: residents injured in the course of their employment, the state, not the precluded citizen, must show that the preclusion is reasonable.

It should be emphasized that no departure from the governing standard is intended. The ultimate

[15] MCLA §§ 257.1107, 257.1122, 257.1123, 257.1125 (Stat Ann 1968 Rev §§ 9.2807, 9.2822, 9.2823, 9.2825); MCLA § 257.1129 (Stat Ann 1971 Cum Supp § 9.2829).

question remains the same: Is the classification reasonable or rational;[16] conversely stated, is the classification invidious or arbitrary? I adopt only the approach followed consistently by the United States Supreme Court in all recent cases (including the *Dandridge* case) not involving the regulation of business or industry. See, also, cases cited in fn 38.

When the reasonableness of a classification in legislation of the nature and general breadth of this legislation is challenged, the State must explicate and factually support, it may not rely on the courts to conjure up, the asserted justification for the classification. It is then for the reviewing court to determine whether the asserted justification for the classification, so explicated and supported, is reasonable, not invidious or arbitrary.

III.

Under the Motor Vehicle Accident Claims Act, enacted in 1965,[17] recourse may be had to the fund established under the act to recover for death, personal injury, or property damage suffered by a Michigan resident[18] occasioned in this state by an uninsured motor vehicle,[19] an unidentified motorist,[20]

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[16] See *Levy* v. *Louisiana Through the Charity Hospital of Louisiana at New Orleans Board of Administrators, supra* (a law authorizing legitimate children, but precluding illegitimate children, from suing for the wrongful death of their mother is not rational and the classification is invidious.)

[17] PA 1965, No 198, MCLA § 257.1101 *et seq.* (Stat Ann 1968 Rev § 9.2801 *et seq.*).

[18] The act protects only residents of Michigan and residents of other states in which recourse of a substantially similar character to that provided by this act is afforded to residents of Michigan. MCLA § 257.1125 (Stat Ann 1968 Rev § 9.2825).

[19] MCLA § 257.1106 (Stat Ann 1971 Cum Supp § 9.2806); MCLA § 257.1107 (Stat Ann 1968 Rev § 9.2807).

[20] MCLA § 257.1112 (Stat Ann 1971 Cum Supp § 9.2812); MCLA § 257.1113 (Stat Ann 1971 Cum Supp § 9.2813).

or a motor vehicle driven without the owner's consent.[21]

A vehicle is deemed uninsured unless there is in force a liability policy meeting the requirements of the motor vehicle responsibility law with policy limits of $10,000 for injury to or death of one person, $20,000 for two or more persons in any one accident, and $5,000 for property damage.[22]

To finance the fund, upon the annual licensing of an insured vehicle a fee of $1 is required to be paid, and a fee of $35 for an uninsured vehicle. In the first five years of operation the State collected amounts far greater than required to pay claims and expenses. Early this year, an accumulated surplus was, by act of the Legislature, transferred as a loan from the accident claims fund to the state's general fund (see fn 37), the $1 fee was eliminated effective October–November, 1971, and for succeeding years if the report for the preceding period shows that the fund has a free surplus equal to or greater than 40% of the combined gross claims and claim expense reserves, and the fee for uninsured motor vehicles was increased to $45.[23]

The liability of the fund is limited to $10,000 for injury to or death of one person, $20,000 for two or more persons in any one accident, and $5,000 for property damage.[24]

With a view to decreasing potential claims against the fund, it is provided that no judgment may be

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[21] MCLA § 257.1115 (Stat Ann 1968 Rev § 9.2815).

[22] See MCLA § 257.1102 (Stat Ann 1968 Rev § 9.2802); MCLA §§ 257.501–257.532 (Stat Ann 1968 Rev §§ 9.2201–9.2232), particularly MCLA § 257.520 (Stat Ann 1968 Rev § 9.2220). See, generally, *Bennett* v. *Pitts* (1971), 31 Mich App 530; *Allstate Insurance Company* v. *Motor State Insurance Company* (1971), 33 Mich App 469.

[23] PA 1971, Nos 19, 63, MCLA §§ 257.1103, 257.1103a (Stat Ann Curr Mat §§ 9.2803, 9.2803[1]).

[24] MCLA § 257.1123 (Stat Ann 1968 Rev § 9.2823).

paid unless a claimant has brought an action against all persons against whom he reasonably may be considered to have an action.[25] The $10,000/$20,000/$5,000 monetary limitations on the fund's liability are applicable to the excess of the claim or judgment over any amount (a) recovered from any other source in partial discharge of the damages or (b) paid or payable by an insurer (except pursuant to policies of life insurance or hospital or medical policies)[26] or any other person pursuant to a policy of insurance, agreement or arrangement "providing for the payment of compensation, indemnity or other benefits".[27] An insurer or other person from whom such contractual compensation, indemnity, or other benefits are recoverable may not, directly or indirectly, recover from the fund.[28]

At the same legislative session in which the accident claims act was enacted, the Legislature amended the insurance code to provide that unless a person insured under an automobile policy rejects uninsured motorist coverage any policy protecting him against his liability for personal injury shall be deemed also to protect him from loss caused by uninsured motor vehicles.[29]

The two acts, the act amending the insurance code and the accident claims act, are *in pari materia*.[30]

It is apparent that the Legislature sought, by the amendment made to the insurance code, to encour-

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[25] MCLA § 257.1107 (Stat Ann 1968 Rev § 9.2807). See, generally, *Steel* v. *Wilson* (1971), 29 Mich App 388.

[26] MCLA § 257.1122(4) (Stat Ann 1968 Rev § 9.2822[4]).

[27] MCLA § 257.1122(2), (3) (Stat Ann 1968 Rev § 9.2822[2], [3]).

[28] MCLA § 257.1122(5) (Stat Ann 1968 Rev § 9.2822[5]).

[29] PA 1965, No 388, adding § 3010 to the insurance code, MCLA § 500.3010 (Stat Ann 1971 Cum Supp § 24.13010).

[30] *Woods* v. *Progressive Mutual Insurance Co.* (1968), 15 Mich App 335; *Oatis* v. *Dairyland Insurance Company* (1969), 20 Mich App 367, 372.

age insured owners and drivers to purchase uninsured motorist insurance protection, and that this was done with a view to reducing the number of claims against the Motor Vehicle Accident Claims Fund.[31]

IV.

The state contends that the legislative purpose in enacting the accident claims act was to provide a minimum source of recovery to persons injured by uninsured motorists, and that employees so injured who are entitled to recover workmen's compensation benefits were barred from proceeding against the fund because the legislative judgment was that injured employees already had an adequate minimum source of recovery in the form of workmen's compensation benefits. The state argues that this was a reasonable basis for excluding injured employees from the benefits of the accident claims act, and that, therefore, the discrimination against them is not invidious.

The state's argument rests on the premise that the Legislature barred persons having collateral sources of recovery from recourse to the fund. It did not. The *only* group having a collateral source of recovery, minimum, adequate or otherwise, barred from proceeding against the fund is injured employees who are entitled to workmen's compensation benefits.

A person who is injured by joint tortfeasors, one or more of whom is insured or solvent and another uninsured, may have recourse to the fund for whatever portion of any judgment obtained that is not recovered from an insured or solvent joint tort-

[31] See *Oatis* v. *Dairyland Insurance Company, supra.*

feasor.[32] Proceeds payable under a policy of life insurance or under a policy, contract, or agreement providing for the payment of any hospital or medical expense need not be deducted from the aggrieved person's damages before recourse to the fund.[33] Insured drivers or owners who purchase uninsured motorist insurance may, if their damages exceed the policy limits of their uninsured motorist insurance protection, have recourse to the fund for the excess.[34]

But it could be argued, and correctly so, that a sound reason for allowing owners and drivers who purchase uninsured motorist insurance to recover for the excess is that otherwise there would be no incentive to purchase uninsured motorist insurance. Permitting purchasers of uninsured motorist insurance to recover from the fund the excess of their damages over the amounts recoverable under their policies encourages the purchase of uninsured mo-

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[32] See *Steel* v. *Wilson* (1971), 29 Mich App 388; *Basch* v. *Secretary of State* (1971), 30 Mich App 459.

Section 7(3) of the act provides:

"The secretary shall not pay out of the fund any amount in respect of a judgment unless the judgment was given in an action brought against all persons against whom the applicant might reasonably be considered as having a cause of action in respect of the damages in question and prosecuted against every such person to judgment or dismissal." MCLA § 257.1107(3) (Stat Ann 1968 Rev § 9.2807[3]).

Section 23(2) of the act provides:

"Where any amount is recovered from any other source in partial discharge of the claim or judgment, or where a claim or judgment for damages is reduced by an amount paid or payable by an insurer or any other person, as provided in section 22(2) or (3) of this act, then the limitations set forth in subsection 1 of this section shall be applicable to the excess of the claim or judgment over the amount by which the claim or judgment is partially satisfied or is reduced under section 22(2) or (3). Any amount paid out of the fund in excess of the amount authorized by this section may be recovered by action brought by the secretary." MCLA § 257.1123(2) (Stat Ann 1968 Rev § 9.2823[2]).

[33] MCLA § 257.1122(4) (Stat Ann 1968 Rev § 9.2822[4]).

[34] *Oatis* v. *Dairyland Insurance Company, supra; Green* v. *Blicharski* (1971), 32 Mich App 15.

torist insurance and in the long run serves to reduce the aggregate claims filed against the fund. There is, thus, so the argument goes, a reasonable basis for the classification; the classification achieves an overall reduction in the amounts of the claims filed against the fund by owners and drivers insured against loss caused by uninsured motorists.

If the accident claims act reflected a general policy of barring those having a collateral source of recovery from proceeding against the fund with such exceptions as would encourage the purchase of protection that would constitute a collateral source, then a different question would be presented. However, since persons injured by a solvent or insured joint tortfeasor or who purchase various kinds of insurance or, indeed, who have any collateral source of recovery except workmen's compensation, may proceed against the fund for their unpaid damages, we could not rightly say that the discrimination against injured employees entitled to workmen's compensation benefits is based on a legislative determination that persons having a collateral source of recovery should not be permitted to proceed against the fund except to the extent that allowing an exception would encourage the purchase of collateral protection.

An injured employee may, indeed, recover workmen's compensation benefits without regard to his own contributory negligence and without proving his employer to be at fault. However, in order to collect from the accident claims fund an injured employee must, like every other claimant, establish that he was free of fault and that the uninsured motorist was at fault. It does not make sense, it would not be rational, to draw a distinction between one group and another based on whether in order

to collect from a collateral source they must prove themselves free of fault when everyone who wishes to proceed against the accident claims fund must prove that he was himself free of fault, that the uninsured motorist was at fault and that the amount of the claimant's damages exceeds the amount forthcoming from a collateral source.[35]

The argument that the Legislature has determined that injured employees have an adequate minimum source of recovery in the form of workmen's compensation benefits, while it has a certain verbal appeal, is clearly a rationalization for something that was done for another reason. If the Legislature was really concerned with the adequacy of the compensation paid injured employees it would not have excluded them altogether from the coverage of the accident claims act. The structure of the accident claims act is such that anyone who recovers from the accident claims fund has received an inadequate recovery or no recovery from whatever collateral sources may be open to him. An injured employee, like everyone else, can only recover from the fund if the amount of his damages exceeds the amount forthcoming from collateral sources; the discrimination against injured employees is not designed to avoid redundancy in compensation.

V.

I am satisfied that the legislative purpose in discriminating against injured employees who are entitled to receive workmen's compensation benefits was simply to reduce the fund's exposure by eliminating a readily identifiable group of potential claimants who, arguably, were in less need of the

[35] Moreover, other groups of potential claimants against the fund can recover from their collateral sources without proof of fault. *E.g.*, persons holding life, health, medical expense, or accident insurance.

protection to be provided by the legislation under consideration. When the accident claims act was enacted there was great concern that the fees charged would not be sufficient to assure its actuarial soundness. The Legislature, looking for means of strengthening the fund, adopted the expedient of excluding injured employees who are entitled to recover workmen's compensation benefits. Could it constitutionally do so?

That depends on the facts, facts not of record.

Merely because, as here, a relatively small group is excluded, does not in and of itself demonstrate that the classification is invidious. It has long been recognized that the state may for sound reasons of public policy grant benefits to some and deny like benefits to others. Thus, in *Williamson* v. *Lee Optical of Oklahoma* (1955), 348 US 483, 489 (75 S Ct 461, 99 L Ed 563), the United States Supreme Court, in language also adopted by our Supreme Court, declared:

"Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think. [Citation omitted.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation omitted.] The Legislature may select one phase of one field and apply a remedy there, neglecting the others."[36]

In *Gauthier* v. *Campbell, Wyant & Cannon Foundry Co.* (1960), 360 Mich 510, 517, the Michigan Supreme Court unanimously sustained the constitutionality of the $6,000 limitation then placed on workmen's compensation for industrial silicosis vic-

[36] Quoted approvingly in *Wolodzko* v. *Wayne Circuit Judge, supra,* p 534, fn 4.

tims. The Court reviewed the history of equal protection attacks on workmen's compensation legislation and referred to earlier decisions sustaining a classification exempting employers with less than a specified number of employees and classifications exempting household servants, farm laborers, and casual employees. The Court observed that it had become

"firmly established that the Legislature could attack one or several evils without having its statutory effort fail because it did not attack all of the evils in the field.

"Indeed, we are led to wonder whether, absent this legislative power of exception and exemption by classification, any of the great social legislation of our time could ever have been written upon the books."

The *Gauthier* Court pointed out that the original workmen's compensation act made no provision for occupational diseases and that by progressive amendment protection had been provided for silicosis victims, first with a limitation of $3,000, later raised to $6,000 and subsequently to $10,500. It had taken 31 years after the passage of the workmen's compensation act to secure any sort of coverage for foundry workers and without a monetary limitation the Legislature probably would not, because of concern for the economic impact on the industry and the possibility that foundries would close and workers would lose their jobs, have provided any protection at all.

The impact on the industry of allowing full recovery, because of the accumulated prior exposure of employees to the disease and the resulting "accrued liability", and the attendant repercussions on the current employment of workers already suffer-

ing from some stage of the disease, was, said the Court, a reasonable and rational basis for imposing *a dollar limitation* on the amount recoverable by silicosis victims even though no like limitation circumscribed the amount recoverable by victims of other compensable injuries or diseases.

The Court added significantly and relevantly to our disposition of this case (pp 523, 524):

"There are no facts in this record which suggest that the classification complained of was 'obsolete' as to decedent at the time of his disablement. * * *

"Any argument that the scheme is now 'obsolete' as to future disabilities must wait consideration on a record which presents some facts from which it might be deduced that the legislative reasoning had lost all value with passage of time and change of circumstances".

In *Gauthier,* unlike this case, the record showed a substantial economic reason for the discrimination. In this case, there is nothing in the record to substantiate the legislative decision that, in order to preserve the actuarial soundness of the fund, it is reasonably necessary to foreclose injured employees from proceeding against the fund for the excess of their damages caused by an uninsured motorist over the amount recoverable as workmen's compensation.

Earlier in this opinion I observed (last three paragraphs of part II, *supra*) that, having in mind the nature of the legislation before us, the breadth of the general right of recovery and the narrowness of the preclusion (employees injured in the course of their employment), the state, not the precluded citizen, must show that the preclusion is reasonable.

The accident claims act provides that the fees required to be collected from motorists shall be paid into the fund established under the act. The act

does not provide for the funding of deficits which might develop as a result of adverse actuarial experience; it is not stated whether any deficits would be met by the legislative appropriation of monies raised by general taxation or an increase in the prescribed fees or in some other manner.

In addressing itself to a social problem requiring toward its solution the appropriation of public funds, the Legislature must of necessity draw lines. The implorations on the public treasury are boundless. Legislatures, not courts, have the appropriating power and draw the fiscal lines. Courts are, therefore, reluctant to declare that a legislative classification designed to conserve public funds denies equal protection of the laws. See *Dandridge* v. *Williams, supra,* pp 478–480, 487. But see *Shapiro* v. *Thompson, supra,* p 633; *Fox* v. *Employment Security Commission* (1967), 379 Mich 579.

The accident claims fund is not financed through the appropriation of money raised through general taxation. Nor has the Legislature decreed that any surplus in the fund should be used to defray other expenses of government designated by the Legislature or that a surplus shall be permanently transferred to the general fund. The monies in the accident claims fund have been treated by the Legislature as a kind of trust fund for the benefit of persons injured by uninsured motorists.[37]

The rationality of the classification barring claims by injured employees entitled to workmen's compensation, a classification, I am satisfied, that was made

[37] The Legislature has appropriated $9,000,000 a year, plus interest at a rate to be determined annually by the Legislature, to repay the $45,000,000 transferred earlier this year from the accident claims fund to the state general fund, the first annual installment being payable in the fiscal year beginning July 1, 1973. PA 1971, Nos 19, 63, MCLA §§ 257.1103, 257.1103a (Stat Ann Curr Mat §§ 9.2803, 9.2803[1]).

to preserve the actuarial integrity of the fund, must be judged in the light of the objective sought to be served by making the classification. A classification which does not foster the objective which impelled it is not rational. See *Fox* v. *Employment Security Commission, supra,* p 591. If the discrimination against injured employees entitled to workmen's compensation benefits bears no reasonable relationship to the purpose of protecting the actuarial soundness of the fund, then the discrimination is irrational.

The record is silent as to the number and the amounts of the claims precluded by the exclusion of claims by injured employees entitled to workmen's compensation benefits. It has not been shown that by excluding the claims of injured employees a substantial or important contribution is made to preserving the actuarial soundness of the fund. Without such a showing, we would not be justified in validating the preclusion on the ground that the Legislature acted reasonably in excluding the claims of injured employees so as to conserve monies required to fund the uninsured motorist program so that, although the monies available were insufficient to deal fully with the entire social problem of unpaid judgments against uninsured motorists, a partial attack could be made on the problem.

We know that the fund is actuarially sound, so much so that the Legislature recently ordered a transfer of $45,000,000 as a loan to the state general fund. Rather than decide these consolidated cases on the basis of unproven assumptions or indulge presumptions which are without evidential support, the sound and correct disposition of these cases is to remand them to the trial court to take additional evidence and for additional fact finding on the question whether there is a reasonable need to bar the claims

of injured employees entitled to workmen's compensation benefits so as to preserve the actuarial soundness of the fund, determined on a current basis without regard to any extraordinary reserves established.[38]

Until dollars and cents figures are presented, there is no way of rationally deciding the presented question of the reasonableness and rationality of the legislative discrimination against injured employees.

The facts should be determined in the light of the experience because, as indicated in *Gauthier* and as shown by the cases there cited, a change in facts,

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[38] Recently in *Park* v. *Lansing Board of Education* (1971), 32 Mich App 752, plaintiffs, administrative employees of a school district who lived outside the geographical boundaries of the district, challenged the validity of a policy rule requiring such personnel to live within the district on the ground, among others, that an exception for persons who had continuously resided outside of the district since July 1, 1962, denied plaintiffs the equal protection of the laws. We remanded for the taking of additional evidence an additional fact finding, saying that the record presented was insufficient to permit a determination whether the cutoff date of July 1, 1962, "bears some reasonable relation to the intended purpose of the residence policy rule". Similarly, see *Askew* v. *Hargrave* (1971), 401 US 476, 479 (91 S Ct 856, 858; 28 L Ed 2d 196, 199), where the Court said:

"Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing."

Other cases holding that an appellate court may remand for the taking of additional evidence in circumstances comparable to those in the present case include *City of Hammond* v. *Schappi Bus Line* (1927), 275 US 164, 171, 172 (48 S Ct 66, 72 L Ed 218); *United States, ex rel. Bradshaw,* v. *Alldredge* (CA3, 1970), 432 F2d 1248, 1250; *Smith* v. *Auditor General* (1962), 366 Mich 165; *Robb* v. *Liquor Control Commission* (1945), 311 Mich 604; *Billiet* v. *Aulgur* (1969), 18 Mich App 391; *Roberts* v. *Rubin* (1968), 13 Mich App 652; *Sharer* v. *Tuck* (1916), 172 Ky 200 (189 SW 27); *Sioux City Bridge Co.* v. *Dakota County* (1923), 110 Neb 597 (194 NW 729); *A. & H. Transp., Inc.,* v. *Mayor & City Council of Baltimore* (1968), 249 Md 518 (240 A2d 601); *Mara* v. *Township of Parsippany-Troy Hills* (1955), 20 NJ 274 (119 A2d 449); *Garratt* v. *Dailey* (1955) 46 Wash 2d 197 (279 P2d 1091); *Bernier* v. *Preckel* (1925), 60 ND 547 (236 NW 242).

conditions, or circumstances may render unconstitutional a statute valid when enacted.[39]

VI.

Under the workmen's compensation act an employer or an employer's workmen's compensation insurance carrier who pays benefits to an injured workman is subrogated to any claim of the workman against a third party tortfeasor.[40] Under § 22(5) of the accident claims act no amount may be paid out of the fund "directly or indirectly * * * to or on behalf of any insurer or other person to reimburse or indemnify the insurer or such other person for any amount paid or payable by the insurer or such other person, by reason of the existence of any policy of insurance or any contract, agreement or arrangement, providing for the payment of any compensation, indemnity or other benefits".[41]

Although the parties have not adverted to these statutory provisions in their briefs, they may be relevant to the correct disposition of these cases.

If the provision in the accident claims act prohibiting payment, directly or indirectly, to persons whose claims arise in the manner described in § 22 (5) of the act bars claims against the fund by employers or their insurers who have paid workmen's compensation benefits, then an employee injured by

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[39] *Vigeant* v. *Postal Telegraph Cable Company* (1927), 260 Mass 335 (157 NE 651, 53 ALR 867); *Nashville, C. & S. L. R. Co.* v. *Walters* (1935), 294 US 405, 415 (55 S Ct 486, 79 L Ed 949); *Atlantic C. L. R. Co.* v. *Ivey* (1941), 148 Fla 680 (5 So 2d 244, 139 ALR 973).

Similarly, see *Detroit Edison Company* v. *Department of Treasury* (1969), 382 Mich 497, 506; *Abie State Bank* v. *Bryan* (1931), 282 US 765, 772 (51 S Ct 252, 75 L Ed 690).

[40] MCLA § 413.15 (Stat Ann 1968 Rev § 17.189).

[41] MCLA § 257.1122(5) (Stat Ann 1968 Rev § 9.2822[5]).

an uninsured motorist who is entitled to workmen's compensation benefits might, if he may also proceed against the accident claims fund, receive more from the fund than he would receive if § 22(5) were not part of the act.

It might, therefore, be appropriate to require that any recovery by an injured employee from the accident claims fund be reduced to such amount as he would have been entitled to retain if § 22(5) were not part of the act; if that is required, then the increased exposure of the fund resulting from allowing an injured employee to recover from the fund would be substantially less than it would be if he is entitled to recover from the fund an amount that is not reduced by the amount which, but for § 22(5), would be payable to his employer or his employer's insurer in reimbursement of the workmen's compensation benefits paid to the employee. Reducing an injured employee's recovery from the fund by the amount that, but for § 22(5), would be payable to the employer or the employer's insurer, would tend to make less reasonable the discrimination against injured employees.[42]

Because the question has not been briefed or argued, I intimate no opinion on the interplay of the employer's and the employer's insurer's right of subrogation under the workmen's compensation act and § 22(5) of the accident claims act. I refer to the possible relevance of the right of subrogation of the employer and his insurer under the work-

[42] Under the circumstances that by reason of § 22(5) subrogees and indemnitees generally are not entitled to recover from the accident claims fund, it is doubtful whether disallowing recovery from the fund by workmen's compensation subrogees would work an invidious or arbitrary discrimination against them, most subrogees and indemnitees being treated alike.

men's compensation act because these consolidated cases present a question of public importance that transcends the interests of the parties.

BRILLHART *v.* DANNEFFEL

1. CONTRACTS—COVENANT NOT TO COMPETE—SALE OF BUSINESS—VALIDITY.

   A covenant not to compete, contained in a contract of the sale of a business, is valid if reasonable (MCLA §§ 445.731, 445.761, 445.766).

2. CONTRACTS—COVENANT NOT TO COMPETE—SALE OF BUSINESS—VALIDITY—REASONABLENESS.

   A covenant made by the sellers of a restaurant not to compete within a ten-mile area with the purchaser of the restaurant for a five-year period was reasonable and, thus, valid where the sellers knew what they were contracting for, the sellers' own agent drew the instrument, the sellers voluntarily signed the instrument, and the business sold was located in a small, rural area and any similar business in the immediate area would be in competition with the business sold.

3. DAMAGES—SPECULATIVE DAMAGES—CONTRACTS—COVENANT NOT TO COMPETE—EVIDENCE.

   An award of damages was improper as based on speculative evidence where the plaintiff buyer had sought damages due to a breach of a covenant not to compete, contained in the contract of sale of defendants' restaurant business, the evi-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur 2d, Contracts § 109.
54 Am Jur 2d, Monopolies and Restraints of Trade § 522.
[2] 54 Am Jur 2d, Monopolies and Restraints of Trade § 535.
[3] 22 Am Jur 2d, Damages § 296.
[4–6] 20 Am Jur 2d, Costs § 72 *et seq.*

dence of damages consisted of the testimony of the plaintiff himself regarding the amount of profits lost due to the defendants' violation of the covenant and mainly showed only that the plaintiff did not take in as much money in six months as the defendants had taken in during the last six months of their operation of the business, other evidence showed that the plaintiff had lost some customers to the defendants, that two other restaurants had recently come into competition with the plaintiff, and that plaintiff had been closing his restaurant two and one-half hours earlier in the day than had the defendants when they operated the business.

4. COSTS—ATTORNEY FEES.

Attorney fees cannot be charged as included in costs taxed against the party who does not prevail in a trial in the absence of statutory authority or court rule except in an equity case where the court bases the taxation upon a showing that under the circumstances an equitable result requires it.

5. COSTS—ATTORNEY FEES—ACTION ON CONTRACT.

Attorney's expenses incurred in an action to enforce a contract or to recover money damages for the contract's breach are not ordinarily allowable in the absence of a statute or court rule authorizing the award.

6. COSTS—ATTORNEY FEES—ACTION ON CONTRACT.

Including attorney's fees in the award of cost was improper where the evidence in plaintiff's suit to enforce a covenant not to compete, did not show that the defendants' acts were unlawful.

Appeal from Kent, John T. Letts, J. Submitted Division 3 May 6, 1971, at Grand Rapids. (Docket No. 8679.) Decided October 19, 1971. Leave to appeal denied, 387 Mich 783.

Complaint by Hollis Brillhart against Earl and Dorothy Danneffel for damages and an injunction to restrain the defendants from further violation of their covenant not to compete. Judgment for plaintiff granting damages and injunctive relief. Defendants appeal. Affirmed in part, reversed in part.

Roach, Twohey & Benson, for plaintiff.

Robert L. Gillette, for defendants.

Before: R. B. BURNS, P. J., and HOLBROOK and LEVIN, JJ.

HOLBROOK, J. This appeal is from a judgment of the Kent County Circuit Court in favor of plaintiff, granting money damages and an injunction against defendants restraining defendants from operating a restaurant business, which operation was found to be in violation of an agreement not to compete. Defendants obtained an order staying the execution of the judgment pending appeal.

On July 29, 1968, Hollis Brillhart purchased a restaurant from defendants Earl and Dorothy Danneffel. The restaurant is known as Dorothy's Diner and is located at 4414 Remembrance Road, N.W. in the City of Walker, Michigan. Purchase price was $7,000. As part of the purchase contract, a covenant not to compete was entered into by the defendants. The pertinent part of the agreement is set out herein:

"2. Earl Danneffel and Dorothy Danneffel, parties of the first part, agree not to have any interest whatsoever, as owners, part owners, employers, employees, partners, limited partners, joint venturers, officers of a corporation, stockholders or agents, owning, working in, or conducting, any restaurant or any activity normally carried on by a restaurant within the city limits of Walker or within an area ten miles from said city limits for a period of five years from the date hereof."

This agreement was signed by defendants on the day of the real estate closing. In December of 1968, defendants claimed they heard rumors that the

plaintiff was encountering financial problems with the business and was going to close. Defendants offered to work for plaintiff on a part-time basis. Defendants worked evenings for a combined total of 60 hours per week until March 15, 1969. On March 13, 1969, plaintiff heard from a friend that defendants might have purchased a restaurant called The Village Inn located in Coopersville, Michigan, which is within the 10-mile distance from plaintiff's business. Defendants never mentioned to plaintiff that they had purchased the new restaurant but had indicated all along that they were looking for another such business located in or around Fremont or Kalamazoo, Michigan. Defendants signed the purchase agreement on March 15, 1969. On March 17, plaintiff's attorney sent letters to defendants and the seller of The Village Inn indicating that the sale was in violation of the covenant not to compete and that action would be taken if the sale was consummated. Defendants opened The Village Inn for business on March 31 and this action was brought on April 8, 1969. Defendants assert invalidity of the agreement as a bar to any recovery by the plaintiff and further contend that plaintiff incurred no damages as the result of defendants' operation of the new restaurant. At the trial plaintiff introduced figures indicating that since defendants opened their new business he had sustained an average loss of $100 per week in gross receipts. The Village Inn is located 9.2 miles by expressway from plaintiff's business. Defendants contend the reason for loss of income is that plaintiff did not stay open as long each day and, further, that two other restaurants had opened near the plaintiff's location; one within 2 miles and the other within 5 miles. Plaintiff proffered a figure of $1,860 as being his loss attributable to competition by defendants, and

attorney fees of $1,000. The trial court found that the covenant not to compete was valid, that defendant had acted in violation of it, and that damages sustained as lost income were $1,240 plus attorney fees of $1,000 and rendered judgment in the amount of $2,240.

The defendants make no claim that equitable relief should not have been granted in addition to money damages in the event it is determined that the covenant is valid.

Defendants allege two assignments of error.

I.

The covenant not to compete was illegal and void because it was unreasonable.

In Michigan we have a statute which governs the legality of covenants not to compete. MCLA § 445.761 (Stat Ann 1962 Rev § 28.61) states:

"All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

But this act must be interpreted in conjunction with MCLA § 445.731 (Stat Ann 1962 Rev § 28.51) which states:

"Provided, That nothing in this act shall be construed to impair or invalidate agreements or contracts known to the common law and in equity as those relating to good will of trade."

Therefore, in a contract not to compete with the purchaser of a business the rule remains the same as at common law, *i.e.*, a covenant not to compete

is valid if reasonable. This is further indicated by MCLA § 445.766 (Stat Ann 1962 Rev § 28.66), Contracts in restraint of trade; exceptions:

"Sec. 6. This act shall not apply to any contract mentioned in this act, nor in restraint of trade where the only object of restraint imposed by the contract is to protect the vendee, or transferee."

The contract in question here, falling within the exception, is not invalid on its face. Our determination must then necessarily be based upon reasonableness. Defendants' counsel argues that the 10-mile limitation is unreasonable. The defendants knew for what they were contracting. Their own agent drew the instrument and it was voluntarily signed by them. In support of invalidity, defendants cite *Wolverine Sign Works* v. *Powers* (1929), 248 Mich 371, wherein it was held that restraint upon the vendor as to engaging in a like business must be fair and reasonable and not greater than is required for the necessary protection of the vendee. That case is easily distinguishable from the one before us. There, the vendor of a billboard advertising company agreed "never" to re-engage in that business within a certain area which covered hundreds of square miles. The Court held at page 375, "never is a long time, it is a longer time than is necessary to enable the purchaser of a business to convert the good will into a good will personal to himself". In the instant case we are dealing with a limitation of only 10 miles and for a period of only 5 years. There is nothing here so permanent as to time nor encompassing as to area to preclude reasonableness. Plaintiff's business is located in a small and predominately rural area and any similar business operating in the immediate or near vicinity would necessarily be in direct competition with it. The case of *Hubbard* v. *Miller* (1873), 27

Mich 15 is authority for the rule that when a vendor sells his business to another person with the stipulation that he will not re-engage in the same business nor compete with the vendee, the agreement will be enforced if the restraint is not unreasonable. We agree with the holding of the trial court that the agreement not to compete was reasonable.

II.

There was not sufficient evidence before the trial court for the trial judge to make the determination concerning damages.

It appears that the testimony concerning loss of damages was mainly that plaintiff did not take in as much money from the business for the last six months as the defendants had taken in during the last six months while they were operating the business.

It does appear that some of plaintiff's customers patronized defendants' new business and discontinued eating at the plaintiff's diner. Other customers of plaintiff, on occasion, did eat at the defendants' new place of business, The Village Inn. There is no question that it is very difficult to show damages under such circumstances. The fact that plaintiff was closing 2–1/2 hours earlier in the day, *i.e.*, 3:30 p.m. instead of 6 p.m., as was the custom when the defendants operated the business, further complicated the matter. The only testimony concerning actual damage was the testimony of the plaintiff, Mr. Brillhart, to the effect that he lost $1,860 according to his books. The trial judge evidently did not consider this completely valid because he awarded only $1,240. Mr. Brillhart stated that closing 2–1/2 hours earlier each day cost him only "probably three or four dollars some days". Mr.

Brillhart did not explain whether this was gross income, net income, or whether it was considering labor or not considering labor. This evidence as to damages was quite speculative.

We now consider the award of $1,000 attorney fees to plaintiff. In the case of *Gundersen* v. *Village of Bingham Farms* (1965), 1 Mich App 647, 648, 649 it is stated as follows:

"The power to tax costs is wholly statutory. *Kuberski* v. *Panfil* (1936), 275 Mich 495. Chapter 24 of PA 1961, No 236 (CLS 1961, § 600.2401 *et seq.* [Stat Ann 1962 Rev § 27A.2401 *et seq.*]) is the statutory authority for costs. Section 2401 provides in part, 'Except as otherwise provided by statute, the Supreme Court shall by rule regulate the taxation of costs.' GCR 1963, 526 is the Supreme Court rule on costs; it does not provide for attorney fees. No other section of chapter 24 *supra* authorizes an attorney fee as here involved. The trial court indicated that the attorney fee was allowed because the case was a chancery matter. No statute or rule is cited to support its position, and if reliance is placed on the general powers of a court in chancery, some showing of inequitable result is required to justify the award. *Merkel* v. *Long* (1965), 375 Mich 214. There is no such showing here. The attorney fee was improperly awarded."

We fail to find any statute or rule giving the court in this injunction case the right to tax as a part of the costs the plaintiff's attorney fees. If the grant of the attorney fees is predicated upon the claim that it is a part of the damages, then it might be justified in the event the expense was incurred before commencement of the present action. Attorney's expenses incurred in an action against a party in default to enforce a contract or to recover money damages for its breach are not ordinarily allowable

in the absence of a statute or court rule authorizing the same. In the case of *Fleischer* v. *Buccilli* (1968), 13 Mich App 135, 139, it is stated as follows:

"Next plaintiff stated that he paid his attorney $600. Generally, attorney fees cannot be charged as a measure of damages in the absence of statutory authority or court rule. *Curtis* v. *Mueller* (1915), 184 Mich 148. Exceptions to this rule have been sparingly allowed when the parties seeking to recover attorney fees as damages have been forced to expend money by the unlawful acts of the other party. *Cagney* v. *Wattles* (1899), 121 Mich 469; *Bates* v. *Kitchel* (1911), 166 Mich 695. The proof submitted in the trial court did not substantiate an award of attorney fees on this basis."

The proofs submitted in the instant case do not, in our opinion, substantiate an award of the attorney fees on the basis that the defendants' acts were unlawful.

We are constrained to rule that the matter should be remanded for the purpose of taking further testimoney as to damages so that the same be determined with such reasonable degree of certainty as the situation permits. *Stimac* v. *Wissman* (1955), 342 Mich 20, 28; *Valley Die Cast Corp.* v. *A.C.W., Inc.* (1970), 25 Mich App 321, 336.

Affirmed in part, reversed in part. No costs, neither party prevailing fully.

All concurred.

PEOPLE *v.* GRIFFEN

OPINION OF THE COURT

1. CRIMINAL LAW—WITNESSES—EXPERT WITNESS—REQUESTED WITNESS—SURVEYOR.

   Denial of defendant's request to be furnished a surveyor to survey the area of the homicide charged to determine distances involved was not reversible error where the trial court furnished defendant with a city map, which contained pertinent distances, and photographs of the street block where the crime occurred.

2. CRIMINAL LAW — WITNESSES — REQUESTED WITNESS — POLICE ARTIST.

   Denial of defendant's request for the production of an FBI artist who had made a composite sketch for a police "wanted" circular of a man witnesses saw at the scene of the crime charged was not error where the artist was in Washington, D. C., at the time of defendant's trial, the sketch was not introduced into evidence, and two eyewitnesses testified that the sketch did not resemble the man they saw.

3. CRIMINAL LAW—INSTRUCTIONS TO JURY—JUDGE'S COMMENTS—UNDISPUTED FACTS.

   Trial judge's comment, during his charge, that he did not believe the jury would have much difficulty in arriving at the conclusion that a felonious homicide had been committed and that the homicide was second-degree murder was improper, but not reversible error where the fact that a homicide had been committed was not disputed at trial and the defendant's defense was that he did not commit the crime.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 348.
[3] 53 Am Jur, Trial § 584 *et seq.*
[4] 53 Am Jur, Trial § 937 *et seq.*
[5] 21 Am Jur 2d, Criminal Law § 310.
[6] 58 Am Jur, Witnesses § 620 *et seq.*
[7] 53 Am Jur, Trial § 480 *et seq.*
[8] 53 Am Jur, Trial § 469 *et seq.*

4. CRIMINAL LAW—READING TESTIMONY—REQUESTED READING.

Permitting portions of a prosecution witness's direct examination testimony, relating to defendant's statements made to the witness while they were in county jail together, to be read back to the jury without also reading that witness's cross-examination testimony was not reversible error where there was no direct conflict between the witness's testimony on direct and cross-examination and the jury had requested to be read only those portions that were read back.

5. CRIMINAL LAW—PROCEEDING IN PROPRIA PERSONA—REQUEST TO DISMISS COUNSEL.

Defendant was not denied his right to proceed *in propria persona* where the trial judge granted defendant's request to dismiss assigned counsel who, at the judge's request, remained to help defendant, if needed, and counsel did conduct the *voir dire* examination of the jury and cross-examined some witnesses.

DISSENT BY LEVIN, P. J.

6. CRIMINAL LAW—WITNESSES—CREDIBILITY—IRRELEVANT ISSUES—OTHER CRIMES.

The prosecutor, although allowed much latitude in cross-examining to test credibility, cannot bring out independent issues involving other alleged crimes that are entirely dissimilar both in nature and motive and have nothing whatsoever to do with the issue involved.

7. CRIMINAL LAW—PROSECUTOR'S ARGUMENT—IMPROPER ARGUMENT.

Prosecutor's introducing into defendant's trial for murder and arguing to the jury the defendant's failure to register for the draft, defendant's employment record, defendant's alleged operation of a blind pig, defendant's alleged ownership of handguns, the testimony of a prosecution witness that defendant had done something to the witness, who had formerly worked as a barmaid for defendant, and the prosecutor's asking defense counsel in front of the jury why, after having been allowed to read the statement the prosecution witness had given the police about what the defendant had done to her, he had not cross-examined her concerning what was allegedly done to her exceeded the permissible bounds of cross-examination and argument; the meritorious issue of who killed the victim may well have been resolved against defendant because the jury was deflected from temperate consideration of the real

issue by the introduction of irrelevant, inflammatory testimony.

8. CRIMINAL LAW—PROSECUTOR'S ARGUMENT—IMPROPER ARGUMENT. *Prosecutor's challenging defense counsel in the presence of the jury in a murder trial to explain why there had been no cross-examination concerning a prosecution witness's testimony that she had once gone to the police and had given them a statement about what the defendant had done to her, even though defense counsel had been allowed to read the statement was impermissible as a challenge in the presence of the trier of fact to waive a legal right.*

Appeal from Recorder's Court of Detroit, Cornelius J. Sullivan, J. Submitted Division 1 September 9, 1971, at Detroit. (Docket No. 9363.) Decided October 19, 1971.

Leon Maurice Griffen was convicted of second-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.

Armand D. Bove, for defendant on appeal.

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

QUINN, J. Convicted by a jury of murder of the second degree, MCLA § 750.317 (Stat Ann 1954 Rev § 28.549), defendant was sentenced and he appeals.

Two of the alleged errors relied on for appellate relief were not saved for review, namely: the claimed error in the charge of the court to the jury and the

claim that the pretrial identification process vitiated the in-court identification.

Defendant's request for expert witnesses at trial was denied and this denial is asserted as reversible error. Defendant requested that he be furnished a surveyor to survey the area of the crime in order to determine distances involved. The trial judge furnished defendant with a survey map of the block in question which contained pertinent distances and photographs of the street. We find no reversible error in the denial of defendant's request for a surveyor.

An artist for the FBI made a composite sketch for a police "wanted" circular. Defendant requested production of the artist at trial. The artist was in Washington, D. C., at the time, and the trial judge denied the request. The sketch was not introduced in evidence and two eyewitnesses indicated that the sketch did not resemble the man they saw. Defendant's claim of reversible error in denying his request for production of the artist is not sustained by the record.

During his charge to the jury, the trial judge said:

"I may say that I don't believe this jury is going to have much difficulty in arriving at the conclusion that a felonious homicide was committed, and that the homicide was second-degree murder."

The comment was improper, and if the fact that a homicide had been committed had been disputed, it would require reversal, *People* v. *Wichman* (1968), 15 Mich App 110. However, the fact that a homicide had been committed was not disputed at trial. The contest was over who did it and defendant's defense was that he did not do it. If the comment was error, it was not reversible error.

During its deliberations, the jury requested that portions of witness Copeland's testimony relating to statements made by the defendant to Copeland in the county jail be read back to them. This was done and defendant objected because Copeland's cross-examination was not read. The trial judge overruled the objection and defendant contends this was reversible error. What the jury requested was read; there was no direct conflict between Copeland's testimony on direct and cross-examination. The reading of testimony back to the jury and the extent thereof is a matter of discretion, *People* v. *Shuler* (1904), 136 Mich 161, 167. This record does not establish abuse of that discretion.

Defendant requested that his assigned counsel be dismissed. This request was granted but at the judge's request, counsel remained to help defendant, if needed. Counsel conducted the *voir dire* examination of the jury and cross-examined some witnesses. Defendant's claim of reversible error because he was denied his right to proceed *in propria persona* is not sustained on this record.

Finally, defendant's contention that he was denied a fair trial is not sustained on this record. Most of the turmoil, chaos, and confusion relied on to support this claim was created by defendant.

Affirmed.

V. J. BRENNAN, J., concurred.

LEVIN, P. J. (*dissenting*). The defendant, Leon Maurice Griffen, was convicted of murdering a milk truck driver.

A number of witnesses saw a man running from the scene of the crime. At the trial none of the

witnesses could identify Griffen as the gunman except Clare Haynes. She testified that she saw a full view of the gunman's face for "a second or half a second" as he ran by her home about 25 feet from where she was standing, and that Griffen was that man.

The shooting occurred on February 7, 1968. Eleven months later, on January 17, 1969, Clare Haynes identified Griffen in a lineup. Her description of the gunman matched that of the other eyewitnesses except that some of the witnesses said that the gunman had a goatee and Clare Haynes did not remember seeing a goatee.

Three months after Griffen was arrested, on April 11, 1969, Robert Copeland was arrested for another crime, the murder of a *beer* truck driver. At Griffen's trial, Copeland testified that Griffen had told Copeland that he had killed the milk truck driver.

Before the trial, on August 8, 1969, Copeland gave the prosecutor a statement implicating Stanley Mitchell in the beer truck driver killing. The murder charge against Copeland was dismissed later that month. On November 1, 1969, Oscar Cooper was also arrested for the beer truck driver killing. It was a few weeks later, November 19, 1969, that Copeland first gave the prosecutor a statement implicating Griffen in the murder of the milk truck driver.

At Griffen's trial Copeland testified that at a party in October, 1968, before either Griffen or Copeland had been arrested, and subsequently, in April 1969, after they both had been arrested and while they were in the county jail, Griffen told him that he had killed the milk truck driver.

Copeland testified that Griffen said that he shot the milk truck driver on the spur of the moment because the driver had just seen him leaving an apartment where he had killed a woman who was supposed to testify against one of Griffin's relatives. That story was inconsistent with the testimony of James Moore, who said that the gunman alighted from an automobile, put gloves on, and then walked over to the milk truck and shot the driver. It was also inconsistent with the testimony of a police officer who said that the police were not able to discover any other shooting on the same day in the area where the milk truck driver was killed.

Griffen took the stand and denied that he committed the crime. He said that he was unable to account for his whereabouts at the time the crime was committed because he was not arrested until almost a year later and he had no recollection of the day the killing occurred.

When Griffen testified he had not previously been convicted of committing a crime. He was asked by the prosecutor, over his lawyer's objection, whether he had ever been in the army. He admitted that he had not been in the army and later admitted that he had not registered for the draft.

The prosecutor also assiduously cross-examined Griffen concerning his employment record and whether Gloria Jackson had ever worked for him.

Gloria Jackson was called by the people as a rebuttal witness. She testified that she had worked for Griffen as a barmaid at a speakeasy that he operated in his apartment, that Griffen owned two handguns,[1] and that she had gone to the police on the encouragement of a Father Ward to report what the defendant "done to me". What Griffen had

[1] See *People* v. *Hall* (1969), 19 Mich App 95, 101 (LEVIN, J., concurring in part and dissenting in part.)

"done" to her was not elaborated upon. Father Ward operated a halfway house to which Gloria Jackson had been paroled after she left the Adrian Girls Training School.

During his jury argument the prosecutor stressed Gloria Jackson's testimony that she had gone to the police at the suggestion of Father Ward, that she had given the police a statement and defense counsel had been given an opportunity to read the statement and after reading it he had decided not to cross-examine her regarding the contents of her statement: "I ask you why [defense counsel] didn't cross-examine after spending five minutes reading that statement?" The prosecutor also asked the jury to consider "the credibility of a man who doesn't register for the draft" and his "employment of Gloria Jackson".

The prosecutor's questions and argument manifestly exceeded permissible bounds.

Griffen was on trial for a capital offense. The issue to be decided by the jury was whether he was the gunman who killed the milk driver. The people's case was far from conclusive. Clare Haynes, the only witness who claimed she could identify the gunman, conceded that she had seen a full view of his face for not more than a second. The details of Robert Copeland's testimony that Griffen had admitted committing the crime were inconsistent with established facts; moreover, Copeland had a possible motive for fabricating his testimony.

The meritorious issue may well have been resolved against Griffen because the jury was deflected from temperate consideration of the real issue by the introduction of irrelevant, inflammatory testimony concerning his past.

The observations of the Michigan Supreme Court in *People* v. *Pinkerton* (1889), 79 Mich 110, 114, are in point:

"in a criminal case, we do not think it competent to compel respondent, who is a witness, to answer questions irrelevant to the issue, having a tendancy to bring in other charges. Whatever latitude is proper in cross-examination to test veracity, it cannot properly introduce independant issues against the person who is both witness and respondent."

In the cited case, Jennie Pinkerton's conviction of keeping a house of ill fame was reversed because, among other errors, there had been references to her unchastity and to charges made against her of prostitution.

In *People* v. *Dowell* (1904), 136 Mich 306, 311, it was held improper to bring out during cross-examination of a defendant, charged with the crime of assault with intent to commit the crime of statutory rape, that he had been sued on a previous occasion for taking indecent liberties with another young girl.

More recently, in *People* v. *Simard* (1946), 314 Mich 624, 630–631, the defendant's conviction of inducing an abortion was reversed because on cross-examination the prosecutor brought out that he had signed a medical certificate showing that persons contemplating marriage were free from venereal disease without a laboratory test having been made as required by statute. The Michigan Supreme Court declared:

"While much latitude is allowed in cross-examination to test credibility, the prosecutor cannot bring out independent issues involving other alleged crimes that are entirely dissimilar both in nature and motive and have nothing whatsoever to do with the issue involved."

In *People* v. *Wright* (1940), 294 Mich 20, 29, the Supreme Court, relying on the principle elucidated in *Pinkerton* and the language quoted above taken from that opinion, reversed the defendant's conviction of manslaughter because the prosecutor asked the defendant on cross-examination about earlier incidents when he had brandished a gun. Language quoted above from the *Pinkerton* opinion was also relied on in the civil cases of *Forsyth* v. *Nostrand* (1918), 201 Mich 558, 569, and *Kovich* v. *Church & Church, Inc.* (1934), 267 Mich 640, 644, where judgments were reversed because of improper cross-examination of the party or an employee of the party against whom the judgment was rendered.

Courts in other jurisdictions have recognized the serious and unjustified prejudice done a defendant in a criminal case when it is brought out on cross-examination that he has avoided or not properly discharged his military service obligation and have on that account reversed convictions; there do not appear to be any Michigan decisions.

In *Grigsby* v. *Commonwealth* (1945), 299 Ky 721, 727 (187 SW2d 259, 263), the prosecutor established that the defendant was an escapee from a guardhouse where he was being held as a deserter. The defendant's conviction was reversed, the Court saying:

"We think it apparent that compelling the admission of the defendant that he was or may have been guilty of an offense under the military law, especially of being a deserter in time of war, was calculated to inflame or infuriate the jury against him, and that the cross-examination went beyond the range of fair and legitimate inquiry. Therefore, that a prejudicial error was committed."[2]

[2] Similarly, see *Powell* v. *Commonwealth* (1948), 308 Ky 467, 471 (214 SW2d 1002, 1004), where, as in Grigsby, the people proved

In *People* v. *Wilson* (1948), 400 Ill 461 (81 NE2d 211), it was held improper to ask the defendant whether he had not gone AWOL while he was in the army. Similarly, in *People* v. *Jackymiak* (1943), 381 Ill 528, 535 (46 NE2d 50, 54), the defendant's conviction was reversed because he had been questioned concerning his registration for military service. The Court observed:

"It had no basis whatever in the record. It neither proved nor tended to prove the guilt of the accused, or any issue involved in the case. It was not justified under any circumstances by the mere fact that plaintiff in error was improperly permitted in his examination in chief to testify to the fact that he had registered. The assistant state's attorney did not occupy the role of partisan counsel; he was the people's lawyer. It was his duty to see that both the state and the defendant received a fair trial according to the law of the land. The repeated insinuation by the prosecutor that plaintiff in error had never registered for the draft could only convey to the jury the impression that he had violated the laws of the United States and was a draft evader."[3]

On the same principle that the draft evasion line of inquiry was out of bounds, it was completely improper to drag before the jury the red herring of

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that the defendant was a deserter from the army. On the following trial day the judge admonished the jury not to consider the evidence, but, said Kentucky's highest court, "by the time this admonition was given the damage had been done, and we doubt if it was possible for any juror under the circumstances, no matter how fair-minded he may be, to disabuse his mind of such inflammatory testimony."

[3] Similarly, see *Harold* v. *Commonwealth* (1927), 147 Va 617 (136 SE 658), where it was brought out that the defendant had been discharged without honor by the army, and *Blackwell* v. *State* (1946), 82 Okla Crim 390 (171 P2d 634), where the court recognized the impropriety of asking a defendant in a criminal case whether he was guilty of draft evasion but, nevertheless, affirmed his conviction because it was not a close case and it was apparent that the defendant was guilty of the offense charged, nonsupport of his minor children.

Griffen's employment record, his operation of a blind pig, the fact that he owned handguns, if he did, the allegation that he had "done" something to Gloria Jackson, and to challenge his lawyer before the jury for an explanation of why he hadn't given Gloria Jackson an opportunity during cross-examination to reveal the contents of the statement she gave to the police concerning, presumably, what Griffen had done to her. "It is not permissible for a litigant to challenge his opponent in the presence of the trier of fact to waive a legal right." *Oakland County* v. *Schoenrock* (1971), 33 Mich App 365, 368.

The impropriety of these inquiries and arguments and the challenge is apparent. Less fundamentally, from a technical point of view, the rebuttal testimony of Gloria Jackson violated the doctrine that "the answer of a witness on cross-examination as to a merely collateral matter becomes binding upon the cross-examiner and may not be contradicted through introduction of further testimony of other witnesses regarding these collateral matters." *People* v. *Joseph Barbara, Jr.* (1970), 23 Mich App 540, 548.[4]

[4] Similarly, see *People* v. *MacCullough* (1937), 281 Mich 15, 26, where the Michigan Supreme Court said:

"Where a witness is cross-examined on matters purely collateral, the cross-examiner may not inquire of other witnesses whether the answers given are truthful, because such inquiry would open irrelevant matters."

PEOPLE *v.* WATKINS

OPINION OF THE COURT

1. HOMICIDE—FIRST-DEGREE MURDER—DELIBERATION—PREMEDITATION —TIME.

   Murder in the first degree is a killing of another which is deliberate and premeditated, but the length of time before the act when the purpose to kill another was deliberately formed and the act premeditated is unimportant; it is enough that the purpose was deliberately formed and preceded and induced the act (MCLA § 750.316).

2. HOMICIDE—FIRST-DEGREE MURDER—DELIBERATION—PREMEDITATION —EVIDENCE—INFERENCES.

   Deliberation and premeditation, elements of the crime of first-degree murder, can be proved by inference from evidence showing the character of the weapon used, the wound inflicted, and the circumstances surrounding the killing (MCLA § 750-.316).

3. HOMICIDE—FIRST-DEGREE MURDER—EVIDENCE—SUFFICIENCY.

   The appellate court, in determining whether there was sufficient evidence presented at trial to warrant an instruction to the jury on first-degree murder, must take the state's evidence as true and view it in the light most favorable to the state giving the prosecution the benefit of every reasonable inference to be drawn from its evidence (MCLA § 750.316).

4. HOMICIDE—FIRST-DEGREE MURDER—EVIDENCE—SUFFICIENCY.

   The evidence produced by the prosecution, viewed in the light most favorable to it, was sufficient to warrant submission to

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 6, 7] 40 Am Jur 2d, Homicide § 52.
[3, 4] 40 Am Jur 2d, Homicide § 425 *et seq.*
[5] 40 Am Jur 2d, Homicide § 44.
[8–10] 40 Am Jur 2d, Homicide § 265 *et seq.*
[11] 53 Am Jur, Trial § 1033.

the jury of the issue of first-degree murder where the two witnesses upon whose testimony the case was submitted stated that there was no evidence of animosity between the defendant and the victim, and that after the witnesses had retired to an adjoining bedroom and while they were engaged in an act of sexual intercourse, the defendant came into the bedroom and told them to get the victim before he killed him, left the bedroom, and then a short time later came back and reported that the victim had been cut, and where the record shows that the defendant had stabbed the victim with a butcher knife (MCLA § 750.316).

DISSENT BY LEVIN, J.

5. HOMICIDE—FIRST-DEGREE MURDER—STATUTES—COMMON-LAW OFFENSE.

First-degree murder is a statutory offense, the common-law offense of murder with the added element that the murder is "willful, deliberate, and premeditated" (MCLA § 750.316).

6. HOMICIDE—FIRST-DEGREE MURDER—DELIBERATION.

What is done on sudden impulse or hastily is not done deliberately within the meaning of the statute defining first-degree murder (MCLA § 750.316).

7. HOMICIDE—FIRST-DEGREE MURDER—DELIBERATION—PREMEDITATION—EVIDENCE.

Evidence that a homicide occurred during an affray whose nature would not permit cool and orderly reflection is insufficient to warrant submission to the jury of the issue of first-degree murder since it would not support a finding that there was deliberation and premeditation (MCLA § 750.316).

8. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION—EVIDENCE—SUFFICIENCY—DEADLY WEAPON.

The use of a deadly weapon in a homicide is not alone sufficient evidence of premeditation to warrant submission to the jury the issue of first-degree murder (MCLA § 750.316).

9. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION—EVIDENCE—SUFFICIENCY.

Evidence that a homicide was committed with a deadly weapon is insufficient to establish the element of premeditation necessary to submit to the jury the issue of first-degree murder where there is no evidence of 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 (MCLA § 750.316).

10. HOMICIDE—FIRST-DEGREE MURDER—EVIDENCE—SUFFICIENCY.

The evidence produced by the prosecution, viewed in the light most favorable to it, was insufficient to warrant submission to the jury of the issue of first-degree murder where the two witnesses upon whose testimony the case was submitted stated that there had been no evidence of animosity between the defendant and his victim but that after the witnesses had retired to an adjoining bedroom and while they were engaged in an act of sexual intercourse the defendant came into the bedroom and told them that they had better get the victim before he killed him, left the bedroom, and then seconds later came back and reported that the victim had been cut, nothing in the record would support a finding that the defendant had deliberated and reflected in a cool state of blood upon a decision to kill the victim even though the evidence showed that he stabbed the victim with a butcher knife, and the first statement he made to the witnesses does not evidence an intention both premeditated and deliberated upon, to kill the victim, but rather a desire to prevent the killing (MCLA § 750.316).

11. NEW TRIAL—HOMICIDE—MURDER—INSTRUCTIONS TO JURY—COMPROMISE VERDICT—EVIDENCE.

Defendant's conviction of second-degree murder should be reversed and he should be entitled to a new trial where he was charged with first-degree murder and the jury was instructed on that charge but returned a verdict of guilty of second-degree murder and where the evidence submitted by the prosecution would not support a finding of deliberation and premeditation, thus making the instruction on first-degree murder unwarranted and the possibility of a compromise verdict non-excludable (MCLA §§ 750.316, 750.317).

Appeal from Muskegon, Charles A. Larnard, J. Submitted Division 3 May 4, 1971, at Grand Rapids. (Docket No. 9650.) Decided October 19, 1971. Leave to appeal granted, 386 Mich 782.

DeShorn Watkins was convicted of second-degree murder. Defendant appeals. Affirmed.

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

Carl S. Krueger, for defendant on appeal.

Before: R. B. BURNS, P. J., and HOLBROOK and LEVIN, JJ.

HOLBROOK, J. In a trial before a jury defendant DeShorn Watkins was tried for the crime of first-degree murder[1] and convicted of second-degree murder.[2] He was sentenced to prison for a term of from 10 to 15 years. He states one issue on appeal as follows:

Did the trial court err in failing to grant a motion to dismiss the charge of first-degree murder and later in instructing the jury on the offense of first-degree murder in view of the evidence in this case?

On the evening of December 31, 1969, defendant and Crawford Crowell had attended a social gathering in Muskegon Heights with two or three other persons, including Dora Kirks.

There had been some drinking of beer by the men. Earlier defendant and Crowell had been drinking wine at Crawford Crowell's house. Sometime after 11 p.m. defendant left with Crawford Crowell and Dora Kirks to go to defendant's apartment. On the way they met Larry Kirk, the deceased, and Arnold Penn who were invited to accompany them to defendant's apartment. After arriving at defendant's

[1] MCLA § 750.316 (Stat Ann 1971 Cum Supp § 28.548).
[2] MCLA § 750.317 (Stat Ann 1954 Rev § 28.549).

apartment they entertained themselves by talking and listening to some records. The men engaged in drinking beer and whiskey and Dora Kirks had one beer. For a period of time defendant was demonstrating karate to Larry Kirk. Arnold Penn fell asleep in a chair in the living room. Then defendant and Kirk went to the bathroom and they were apparently in a jovial mood. Shortly before they returned to the living room, Crawford Crowell and Dora Kirks retired to the bedroom. She testified the door was left slightly ajar and he testified he closed it. They engaged in an act of sexual intercourse. After a short time, according to Dora Kirks, the defendant came and opened the bedroom door and said "you better come and get this mother * * * before I kill him".

Both Dora Kirks and Crawford Crowell testified that at this time their act of intercourse was not completed. Later defendant came back again and said he had cut him or something. At that time Crowell got up and dressed and went out into the living room where he observed that the deceased had been cut with a knife. It was established that the weapon (knife) had been out in the kitchen. Dora Kirks, at the sight of blood, said she felt faint and she was told she could leave and she left.

Dora Kirks and Crawford Crowell testified that they did not notice any animosity between defendant and the deceased during the course of the night except for the two times when defendant came to the bedroom and made the remarks stated.

That night before the police arrived, defendant told Crowell that a guy came into the apartment and got into it with Kirks and cut him and then ran out.

In 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), First-Degree Murder, § 1638, p 1972, the author states:

"To constitute murder in the first degree the killing must have been deliberate and premeditated, but the length of time before the act when this purpose was deliberately formed and the act premeditated is unimportant. It is enough that the purpose was deliberately formed, and preceded and induced the act."

In the case of *People* v. *Lem Dumas* (1970), 25 Mich App 173, 174, our Court stated:

"Defendant contends that there was no direct evidence produced at trial to sustain a verdict of either first- or second-degree murder. We disagree.

"Deliberation and premeditation, which would have been necessary to prove first-degree murder, could have been inferred from the character of the weapon used, the wound inflicted, and the circumstances surrounding the killing. *People* v. *Bauman* (1952), 332 Mich 198, 205; *People* v. *Wolf* (1895), 95 Mich 625, 629. Since there was ample evidence for the jury to find murder in the first or second degree, it was properly a jury question; thus, there was no reversible error in allowing the question to go to the jury."

In determining whether or not there was sufficient evidence present in the case to submit to the jury an instruction on first-degree murder, we follow the rule set forth in the case of *People* v. *Livermore* (1967), 9 Mich App 47, 59:

"In passing on the motion for dismissal or nonsuit, the State's evidence must be taken as true, and viewed in the light most favorable to the State, which is entitled to the benefit of every reasonable inference to be drawn therefrom."

Dora Kirks testified in part as follows:

"*Q.* Am I correct in understanding that DeShorn Watkins came into the bedroom at the time he said this?

"*A*. Yes, he came in and said that and left.

"*Q*. He opened the door, and he came into the room and said that?

"*A*. Yes.

"*Q*. All right. Now, were you still in the act of having intercourse at this particular time?

"*A*. When he first came in?

"*Q*. When he came in and uttered those words, were you in the process of and in the act of having intercourse at this time?

"*A*. Yes, sir.

"*Q*. Now, was this the first time you had ever had intercourse with Crawford Crowell?

"*A*. Yes.

"*Q*. What is your answer?

"*A*. Yes.

"*Q*. Now, he immediately left out of the room again, is that right?

"*A*. DeShorn?

"*Q*. Yes.

"*A*. He came back in and he left out again.

"*Q*. Now, how long was he in the room?

"*A*. He just came in and told him that, and then he left back out.

"*Q*. Long enough to make one statement?

"*A*. Yes, and then he came back in and said he had cut him, and went back out.

"*Q*. Now, he came in the room and he made one statement, and immediately left the room?

"*A*. Yes.

"*Q*. Now, did he immediately come back into the room again?

"*A*. He stayed in there for awhile, and then he came back and he told Crawford that he had cut him, and then Crawford—

"*Q*. Now, just answer my questions, if you will, please. He went out of the room?

"*A*. Yes.

"*Q*. And how long before he came back in again?

"*A*. It wasn't that long.
"*Q*. How long was it?
"*A*. Just a few minutes. He just went back out and he came back in again."

She later testified that it was seconds between the first time and the second time that defendant came to the bedroom. She also testified as follows:

"*Q*. All right. And was there any other conversation besides DeShorn telling Crawford Crowell to get an ambulance for Larry Kirk?
"*A*. Then I said that I had to go before I faint, and he told me that I could go, because I didn't see nothing, and I didn't hear nothing, and then Watkins told Crawford that he was going to prison.
"*Q*. And that is all you heard is a conversation between these boys to that extent?
"*A*. Yes."

Crawford Crowell testified in part as follows:

"*Q*. After you went in the bedroom, was the door closed or was it left open?
"*A*. I closed the door myself.
"*Q*. Do you know if it was tight or fastened tight?
"*A*. I closed the door all the way. But I couldn't say whether it came out a little bit after that.
"*Q*. You don't know if it was latched?
"*A*. It was not enough crack for you to see in or out.
"*Q*. All right. And how long were you in the bedroom?
"*A*. About 15 or 20 minutes.
"*Q*. And what were you doing in the bedroom?
"*A*. Well, having intercourse.
"*Q*. Now, could you hear anything that was going on out in the living room during this time?
"*A*. Well, you could hear some talking, but you didn't know or couldn't say what they were saying. They were talking.

* * *

"*Q*. Did anyone come into the bedroom before you left the bedroom on this morning?

"*A*. Yes.

"*Q*. And who was it?

"*A*. DeShorn Watkins.

"*Q*. And you had been in there how long when he came in?

"*A*. I would say about 15 minutes. It was a pretty good while, about 15 minutes.

"*Q*. Were you all through having intercourse at the time he came in?

"*A*. No."

Crowell's account of what happened when first interrogated and his testimony at trial were not the same, and he admitted he had changed his story.

At the trial the defendant testified, in essence, that he was out of the living room and when he returned to the living room Larry Kirk held a knife and when he was asked to put down the knife challenged DeShorn Watkins to take it from him. That he, DeShorn Watkins, then went to the kitchen and picked up a butcher knife and returned with the knife holding it extended toward Larry Kirk and stated, "Give me the knife", whereupon Larry Kirk lunged at DeShorn Watkins with the knife in his hand held in a stabbing gesture and was speared upon the end of the blade held by the defendant.

We rule that the testimony produced at trial would justify a finding by the jury that defendant deliberately formed in his mind beforehand the intent to kill the deceased. As a result of this determination, we are constrained to rule, viewing the evidence in the light most favorable to the people, that the jury could also have determined that sufficient time had elapsed between the time defendant deliberately formed in his mind the intent to kill the deceased and the act of stabbing the deceased which

caused his death, to justify a finding of premeditation.

Affirmed.

R. B. BURNS, P. J., concurred.

LEVIN, J. (*dissenting*). I would reverse because there was insufficient evidence of premeditation and deliberation to justify submitting the issue of first-degree murder[1] to the jury, and, since we cannot exclude the possibility that the jury's verdict convicting the defendant of second-degree murder[2] was a compromise, the defendant is entitled to a new trial.

On New Year's Eve 1969, defendant DeShorn Watkins and Crawford Crowell dropped in on Dora Kirks and one of her sisters at the sister's home, 2309 Hoyt Street, Muskegon Heights. All four then went next door to a friend's home. Watkins and Crowell left to buy some beer and returned with two six-packs. Each drank some beer. Around midnight, Watkins, Crowell and Dora Kirks left for Watkins' home at 2804 Hoyt. On the way they encountered the victim, Larry Kirk, a first cousin of Dora Kirks, and Arnold Penn. After they arrived at the Watkins residence they played some records and the four men finished the beer and drank some whiskey. Everyone danced. Watkins and Larry Kirk began horseplaying, Watkins demonstrating karate moves to Kirk and Kirk in turn attempting to imitate the moves. The sport was good-natured, accompanied by much laughter. Watkins and Kirk entered a bathroom where they were heard talking and, according to Crowell, they were still playing and laughing.

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[1] MCLA § 750.316 (Stat Ann 1971 Cum Supp § 28.548).
[2] MCLA § 750.317 (Stat Ann 1954 Rev § 28.549).

At this point, around 4 o'clock in the morning, Dora Kirks and Crowell retired to the bedroom leaving the door slightly ajar or closed. In the meantime Arnold Penn had fallen asleep on the couch in the living room. While Dora Kirks and Crowell engaged in sexual intercourse, Watkins and Larry Kirk returned to the living room. Their voices seemed normal, betraying no anger to either Dora Kirks or Crowell who could hear them through the bedroom door. Ten or twenty minutes[3] after Dora Kirks and Crowell entered the bedroom, Watkins pushed open the door and said something to Crowell. At this point the testimony of Dora Kirks and Crowell differs.

Dora Kirks testified that Watkins said to Crowell, "You'd better come and get this motherfucker before I kill him". A *few seconds* later Watkins returned to the bedroom and said that he had cut Larry Kirk.

Crowell testified that Watkins upon first appearing at the bedroom door said something to the effect that Larry had been cut or stabbed. A few second later he returned and said something like, "Hey, man, I ain't playing, come on the guy is hurt".[4]

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[3] Dora Kirks said that the time interval between when she and Crowell entered and left the bedroom was about ten minutes. Crowell said it was "about 15 or 20 minutes".

[4] Although Crowell did admit he changed his story after he was first interrogated, he said he changed it long before the time of his testimony at trial and, in any event, he did not say that there was any change from the factual version which he first gave the police. He said that in an effort to protect Dora Kirks, so as not to reveal that they were in the bedroom engaged in sexual intercourse when the stabbing took place, when he was first questioned by the police he responded, "that I was sitting in the chair sleeping. And the only reason I said that I was sitting in the chair sleeping, was because I didn't want them to know that Dora Kirks was upstairs". He testified further that when the police arrived he thought the victim had been "just cut or something, but after I found out he was dead, that is when I told them the truth, that she was in the bedroom with me". Thus, while Crowell dissembled when first interrogated, he did not give the police a version of the facts inconsistent with the version of the facts which he gave at the trial.

Dora Kirks and Crowell dressed and entered the living room where they saw Larry Kirk slumped over one arm of the couch. Arnold Penn was still asleep. Watkins, who was on the phone, had telephoned for an ambulance and asked Crowell to call again. Dora Kirks, faint at the sight of blood, left. After Larry Kirk stopped groaning, Watkins laid him in Penn's lap and tried to administer mouth-to-mouth or mouth-to-nose resuscitation. Before the police arrived Watkins told Crowell another man had come and fought with Kirk and then fled after stabbing him. Two knives, one with blood on it, were found in the living room. At the trial, the defense was self-defense.

First-degree murder is a statutory offense. It is the common-law offense of murder with an added element—in this case the added element charged is that the murder was a "willful, deliberate and premeditated" killing.[5]

In *Nye* v. *People* (1876), 35 Mich 16, 18, 19, the Michigan Supreme Court rejected a jury 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 victim knocked the defendant Nye down, Nye having, according to most of the witnesses, struck at him first. "Nye then stabbed him with a knife which he had in his pocket." Nevertheless, the absence of any testimony whatsoever to show that the killing was not a sudden impulse prompted the Supreme Court to rule that there was insufficient evidence to support a verdict of first-degree murder. The Court declared:

[5] MCLA § 750.316 (Stat Ann 1971 Cum Supp § 28.548).

"In dividing murder into degrees, its common-law qualities are not changed, but (except in special cases) the division is chiefly between cases where the malice aforethought is deliberate and where it is not. 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. But it is a perversion of terms to apply the term deliberate to any act which is done on a sudden impulse.

"In the record before us there is no testimony whatever upon which a verdict of murder in the first degree could properly have been rendered, and the charge given must have misled the jury. That alternative should not have been left open to them."

It is, thus, clear from *Nye* that what is done on "sudden impulse" or "hastily" is not done deliberately within the meaning of this statute.[6]

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[6] The majority speak of a "deliberately formed * * * intent to kill". (They say: "We rule that the testimony produced at trial would justify a finding by the jury that defendant deliberately formed in his mind beforehand the intent to kill the deceased".)

While this is subject to the interpretation that the requisite intent must be an intent which has been pondered upon, the more likely interpretation is that there is enough to convict a defendant of first-degree murder if it is established that the intent to kill was *actually* formed, as distinguished from an intent which is *implied*.

In every case of first-degree murder the intent to kill must be actual or, as was sometimes said in the older cases, "express". But every case of actual or express intent to kill is not a case of first-degree murder. To make it first-degree murder the actual or express intent must be premeditated *and* deliberated upon; "deliberate", as used in this context, means not merely an intended consequence but also an intended consequence which has been pondered and thought over while the actor is in an emotional state which permits true reflection on the enormity of the crime contemplated. The additional punishment for first-degree murder is reserved for a case where the evidence shows not only that the defendant actually intended to kill the victim but additionally that he reflected on that decision and, nevertheless, proceeded to murder the victim in cold blood.

The suggestion that in any case where the jury finds there is a "deliberately formed intent to kill" it may find the defendant guilty of first-degree murder is subject to the erroneous interpretation that the jury should find the defendant guilty of first-degree murder whenever it finds actual intent to kill and that second-degree murder is reserved only for those cases where, although there is no actual intent

Recently in *People* v. *Morrin* (1971), 31 Mich App 301, 329, 330, *leave denied* 385 Mich 775, we reviewed the Michigan case law concerning the sufficiency of evidence to establish premeditation and deliberation, and observed that time and again the Michigan Supreme Court had reversed convictions in first-degree murder cases for insufficiency of evidence and that the reversals were in cases where the homicide occurred during an affray whose nature would not permit cool and orderly reflection.[7] We said:

"To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process undisturbed by hot blood. 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.'"

The use of a deadly weapon is not alone sufficient evidence of premeditation. See *Nye* v. *People, supra,* where, as previously mentioned, 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".

"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

to kill, intent to kill is implied. ("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. The common-law felony-murder rule is [another] example of implied intent." *People* v. *Morrin* [1971], 31 Mich App 301, 311.)

[7] See *People* v. *Morrin* (1971), 31 Mich App 301, 331, fn 47.

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, supra*, p. 333.

Recently in *People* v. *Anderson* (1968), 70 Cal 2d 15, 26, 27 (73 Cal Rptr 550, 557; 447 P2d 942, 949), the California Supreme Court, after a careful review of the case law, summed up as follows:

"The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' (*People* v. *Thomas* [1945], 25 Cal 2d 880, 898, 900, 901 [156 P2d 7, 14]); (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2).

"Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (Emphasis by the Court.)

In *Austin* v. *United States* (1967), 127 App DC 180, 188, 189 (382 F2d 129, 137, 139), the United States Court of Appeals for the District of Columbia Circuit held that, where the government's testimony did not show any motive for killing the victim who had been in the defendant's company the night of the homicide and there was no showing of prior threats or quarrels from which an inference of premeditation or deliberation might be drawn, even though the victim had been killed by multiple stab wounds inflicted by a knife the defendant had been carrying with him that night, the government's evidence was insufficient to warrant submission of the issue of premeditation and deliberation to the jury:

"In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion. These are the archtypes, that clarify by contrast."

In the case at bar there was no evidence of Watkins' actions before the killing which would indicate a premeditated and deliberated plan to kill Larry Kirk. Neither Crowell nor Dora Kirks could say whether Watkins had a knife with him when he first appeared at the bedroom door. Dora Kirks testified that there was insufficient time between Watkins' first and second appearances at the doorway to allow him to leave the living room to secure a knife from the kitchen. On view of the evidence most favorable to the people, we must assume that Watkins already had a knife at the time he first appeared in the doorway and that within a few seconds he both knifed the victim and reappeared in the doorway.

To show premeditation and deliberation, the people rely entirely on Watkins' statement to Crowell,

on first appearing in the doorway, "You'd better come and get this motherfucker before I kill him". I emphasize that the *people* do not claim that there is any other evidence from which an inference of deliberation and premeditation could properly be drawn.

That statement, attributed by Dora Kirks to Watkins, does not evidence an intention, both premeditated and deliberated upon, to kill Larry Kirk. If anything, the statement would appear to indicate an unwillingness to harm Kirk and a desire by Watkins for Crowell's aid in preventing a killing.

The language used by Watkins in referring to Larry Kirk does not necessarily indicate animosity. The term "motherfucker" is used by some men in their everyday speech. Just as it cannot be taken as a literal comment on Larry Kirk's sexual practices, it does not appear to have been used in a pejorative sense.

Both Dora Kirks and Crowell were in agreement that the time lapse between Watkins' first and second appearances in the doorway, by which time Larry Kirk had been stabbed, was just a few seconds.[8]

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[8] The time interval between Watkins' first and second appearances at the door of the bedroom was seconds, not minutes. The majority opinion quotes the testimony of Dora Kirks as follows:

"'*Q*. And how long before he came back in again?

"'*A*. It wasn't that long.

"'*Q*. How long was it?

"'*A*. Just a few minutes. He just went back out and he came back in again.'

"She later testified that it was seconds between the first time and the second time that defendant came to the bedroom."

I recognize that when a witness says one thing one time and something else another time the jury ordinarily is given the choice of believing one statement or the other. This is not such a case as it is apparent that Dora Kirks misspoke herself when she said "minutes" not "seconds." The *very next* question after her answer, "Just a few minutes. He just went back out and he came back in again," was the following:

"*Q*. Was it a matter of seconds or a matter of minutes?

"*A*. Seconds.

"*Q*. Seconds?
"*A*. Yes.
"*Q*. So that it was just time enough for him to go back in the living room for a few seconds, and then return?
"*A*. Yes."
A few questions later she was asked:
"*Q*. Was there time for DeShorn Watkins to have gone through the living room, across the living room, through the dining room, and into the kitchen to get a knife?
"*A*. I wouldn't know, I don't know.
"*Q*. You can't tell us whether there was enough time for that or not?
"*A*. When he came in and went back out?
"*Q*. Yes.
"*A*. No.
"*Q*. There wasn't time enough for that?
"*A*. I don't think so. It wasn't that long."
A few pages later:
"*Q*. All right. And it was just a matter of seconds between the time that DeShorn Watkins first came in the bedroom, and the time he returned?
"*A*. The second time?
"*Q*. Yes.
"*A*. Yes."
On the following page:
"*Q*. All right. So he indicated that Larry Kirk was cut the second time he came in the bedroom?
"*A*. Yes.
"*Q*. And this was just a matter of a few seconds between the time he came in the first time, and made a statement, isn't that right?
"*A*. Yes."
It is manifest that when Dora Kirks said "minutes" she meant "seconds"; this is not a case of two different statements by a witness, but rather a case of a slip of the tongue and of a clarification in the immediately following question.
Crawford Crowell said it was "seconds":
"*Q*. All right. Then what happened after that?
"*A*. After this?
"*Q*. Yes.
"*A*. Well, then he left out and he stayed out for a few seconds, and then he came back in—because when he first came in I figured—you know, he was just playing around".
Later:
"*Q*. How long was he gone between those two times, Mr. Crowell?
"*A*. Just a few seconds or two, I am not sure, it was not too long.
"*Q*. Was it a matter of seconds?
"*A*. Yes."
This is a matter of some importance because it indicates that after the defendant Watkins made the statement attributed to him by Dora Kirks (which Crowell said was not made), "You better come and get this motherfucker before I kill him", he did not have sufficient time to go and get a knife in the kitchen, as

There is nothing in this record which would support a finding that when Watkins first appeared in the doorway he had decided to kill Larry Kirk or that in the few seconds interval between his first and second appearances in the doorway, or before his first appearance, he had deliberated and reflected in a cool state of blood upon a decision to kill him. There was, therefore, insufficient evidence to support a conviction of first-degree murder.[9]

In *Morrin,* where we found there was insufficient evidence to convict the defendant of first-degree murder, we affirmed his conviction of second-degree murder and remanded for sentencing on that conviction. We said that the jury's mistaken belief that the record permitted an inference of premeditation and deliberation did not detract from the fact that there was sufficient evidence to support a finding of second-degree murder. We observed, however, that affirming a conviction for the lesser offense was permissible only where the accused person is convicted of the charged offense and it is, therefore, apparent that the verdict was not the product of compromise. In the present case, the defendant Watkins was con-

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Dora Kirks herself so testified. This means that Watkins already had a knife at the time he first appeared in the doorway and that, adopting Dora Kirks' testimony tending to show that the victim had not been stabbed when Watkins first appeared at the door, within a few seconds he both knifed the victim and reappeared in the doorway.

The parties stipulated that the case would be submitted solely on the testimony of Dora Kirks and Crawford Crowell. However, even if we consider Watkins' statement at the preliminary examination that he armed himself with a knife after the victim had first brandished a knife at him, this would not permit an inference that Watkins in so arming himself did so with a formulated intention to kill the victim rather than simply to protect himself. Two knives were found at the scene. There was no evidence of hostility between Watkins and the victim, and no evidence that at some time before the knife entered the victim Watkins had resolved to kill him *and* that he deliberated and premeditated on that decision.

[9] See *People* v. *Hillman* (1956), 140 Cal App 2d 902 (295 P2d 939).

victed of second-degree murder. In such a case the possibility of compromise cannot be excluded and, therefore, the defendant is entitled to a new trial.[10]

The defendant moved for acquittal upon the completion of the people's proofs. For reasons already stated, he was entitled to a directed verdict of acquittal of first-degree murder. It does not appear that upon a new trial the people would be able to introduce additional evidence which would be sufficient to support a conviction of first-degree murder. See *People* v. *Baker* (1969), 19 Mich App 480, 484. Accordingly, on a retrial the defendant should not be tried for an offense greater than murder in the second degree.

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[10] In the following murder cases it was held prejudicial to the defendant to submit the issue of first-degree murder to the jury even though he was convicted of a lesser offense: *People* v. *Marshall* (1962), 366 Mich 498, 501 (defendant was charged with first-degree murder and convicted of manslaughter); *People* v. *Hansen* (1962), 368 Mich 344, 353 (defendant was charged with first-degree murder and convicted of second-degree murder). Similarly, see *Leonard* v. *People* (1962), 149 Colo 360 (369 P2d 54). *Cf. Price* v. *Georgia* (1970), 398 US 323 (90 S Ct 1757, 26 L Ed 2d 300).

PEOPLE *v.* COLLINS

OPINION OF THE COURT

1. CRIMINAL LAW—SENTENCE—CREDIT FOR TIME SERVED.

The Court of Appeals orders a convicted defendant to be credited with 217 days on his sentence where the record shows that he is entitled to 217 days credit rather than 10 days credit allowed by the trial judge (MCLA § 769.116).

CONCURRENCE BY LEVIN, P. J.

2. CONSTITUTIONAL LAW—SPEEDY TRIAL—DEMAND—WAIVER.

A defendant's failure to make a formal record-entered demand for a speedy trial constitutes a waiver of his constitutional right to a speedy trial under controlling Michigan precedent.

3. CONSTITUTIONAL LAW—CRIMINAL LAW—TRIAL—DELAY.

An accused person awaiting trial is protected from undue delay in the prosecution of the charge made against him by both the constitutional right to a writ of habeas corpus and the constitutional right to a speedy trial.

4. CRIMINAL LAW—TRIAL—DELAY.

An indicted person held in prison shall, if he require it, be tried at the next term of the court after the expiration of six months from the time he was imprisoned, or shall be bailed upon his own recognizance unless it appears that the people's witnesses have been enticed, detained, kept away or prevented from attending court (MCLA § 767.38).

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 545.
[2, 9–11] 21 Am Jur 2d, Criminal Law § 254.
Waiver or loss of accused's right to speedy trial. 57 ALR2d 302.
[3, 4, 8] 21 Am Jur 2d, Criminal Law § 241 *et seq.*
[5, 6] 39 Am Jur 2d, Habeas Corpus § 40 *et seq.*
[7] 21 Am Jur 2d, Criminal Law § 244.

5. HABEAS CORPUS—BAIL—DISCHARGE.

The privilege of the writ of habeas corpus *is, at least, the right of a person to be admitted to bail if he is not indicted and to be discharged if not tried within a clearly defined period of time.*

6. HABEAS CORPUS—CONSTITUTIONAL LAW.

The right to a writ of habeas corpus *is absolute and cannot be denied where the preconditions of the habeas corpus act have been met; it is therefore incumbent on courts to implement this constitutional right by providing clearly defined, unequivocal procedures for the release of persons held in jail for undue periods of time awaiting trial.*

7. CONSTITUTIONAL LAW—CRIMINAL LAW—SPEEDY TRIAL.

A criminal defendant is entitled to a speedy trial even where he is at large on bail.

8. CONSTITUTIONAL LAW—CRIMINAL LAW—SPEEDY TRIAL—PREJUDICE—PRESUMPTIONS.

Prejudice is conclusively presumed when a criminal defendant is denied a speedy trial.

9. CONSTITUTIONAL LAW—CRIMINAL LAW—SPEEDY TRIAL—DEMAND.

A defendant's failure to demand a speedy trial formally bars him from being discharged for not receiving a speedy trial.

10. CONSTITUTIONAL LAW—CRIMINAL LAW—SPEEDY TRIAL—DEMAND.

The requirement that a defendant make a demand on the record for a speedy trial to enforce his right undermines the right to a speedy trial.

11. CONSTITUTIONAL LAW—CRIMINAL LAW—SPEEDY TRIAL—DEMAND.

The rule that the burden is on a defendant in a criminal case to demand a speedy trial rather than on the prosecution and the courts to see to it that he is given a speedy trial is inconsistent with the constitution and with the language of statutes providing for a speedy trial; cases holding that a defendant must make a formal demand on the record for a speedy trial in order to enforce his right should be overruled.

Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted Division 1 June 10, 1971, at Detroit. (Docket No. 9684.) Decided October 19, 1971. Leave to appeal granted, 387 Mich 755.

Harold Collins 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 *Robert A. Reuther,* Assistant Prosecuting Attorney, for the people.

George G. Matish and *Dorean M. Koenig,* for defendant on appeal.

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

QUINN, J. A review of the trial record, briefs and oral arguments reveals no reversible error. That review does reveal that defendant is entitled to 217 days credit on his sentence pursuant to MCLA § 769-.11b (Stat Ann 1971 Cum Supp § 28.1083[2]), rather than the 10 days credit ordered by the trial judge.

Affirmed, but defendant's sentence is amended to reflect a credit of 217 days thereon instead of 10 days.

V. J. BRENNAN, J., concurred.

LEVIN, P. J., (*concurring*). The principal claim advanced on this appeal is that the defendant, Harold S. Collins, was denied his right to a speedy trial.

Collins was arrested and charged with armed robbery on January 5, 1969. Fifteen months later, April 6, 1970, his trial commenced. He was convicted the following day.

Collins was admitted to bail. Subsequently he was arrested on another charge. He was then kept

in jail for over six months until the trial for the offense which resulted in the conviction he now appeals.

Although Collins asked his lawyer to bring his case to trial, the lawyer neither made a demand for a speedy trial nor sought to have him released on a writ of *habeas corpus*. Under controlling Michigan Supreme Court precedent (see part II, *infra*) the failure of Collins' lawyer to make a formal, record-entered demand constitutes a waiver of his constitutional right to a speedy trial. I write separately because in my opinion the time has long since come to reconsider the demand requirement and other erosions of the constitutional rights to a speedy trial and to a writ of *habeas corpus*.[1] The problem is of such dimensions, involving as it does the allocation of judicial resources at the trial level throughout the state, as to be beyond the competence of this Court to deal with effectively; only the Supreme Court can shape a decree.

I.

An accused person awaiting trial is protected from undue delay in the prosecution of the charge made against him by both the constitutional right to a writ of *habeas corpus* and the constitutional right to a speedy trial. Both rights have been implemented by statutory provisions.

The rights have a common origin in our organic law:

"To none will we sell, to none will we deny, or delay, right or justice." Magna Charta, art 40.

Over the years the practice developed of sending judges periodically to the various bailiwicks armed

[1] See, generally, Notes, The Lagging Right to a Speedy Trial, 51 Va L Rev 1587 (1965); The Right to a Speedy Criminal Trial, 57 Colum L Rev 846 (1957).

with writs of gaol delivery to clear out the jails.[2] A parallel development was the emergence of the writ of *habeas corpus,* hammered out in the great struggles between the crown and the judges and the parliament, as the mechanism by which a judicial inquiry concerning the legality of a detention could be obtained.[3]

The right to the writ, developed at common law, was codified and reinforced in the Habeas Corpus Act of 1679. Under that act, a person committed to jail for treason or felony who petitions in open court to be brought to trial is entitled (1) to be set at liberty upon bail if he is not indicted sometime in the next session after his commitment, and (2) to be discharged if he is not tried by the following session unless it appears upon oath that the witnesses for the King cannot be produced.[4] No person once

[2] Coke's Second Institutes, ch 26, p 43; 1 Pollock and Maitland, The History of English Law (2d ed), p 200; 2 *Id.*, p 645; 2 Hale, Pleas of the Crown, p 34; Plucknett, A Concise History of the Common Law (2d ed), pp 151, 380.

[3] See Jenks, The Story of the Habeas Corpus, 18 LQ Rev 64 (1902); 9 Holdsworth, A History of English Law, p 108 *et seq.*

[4] The Habeas Corpus Act of 1679:

"An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas.

"Whereas great delays have been used by sheriffs, gaolers and other officers, to whose custody, any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus* to them directed, by standing out an *alias* and *pluries habeas corpus,* and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation. * * *

"VII. Provided always, and be it further enacted, That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of *oyer* and *terminer* or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of *oyer* and *terminer* or general gaol-delivery, after such commitment; it shall and may be lawful to and for the judges of the Court of King's Bench and justices of *oyer* and

delivered by *habeas corpus* could be recommitted *by the crown* for the same offense.[5] A judge who denied, and persons who violated, the writ were subject to an enormous forfeiture (500 pounds [a large sum today, a stupendous sum at the time] for a judge and 100 pounds for others) in favor of the person aggrieved.[6]

"This act made the writ of *habeas corpus ad subjiciendum* the most effective weapon yet devised for the protection of the liberty of the subject, by providing both for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a *speedy trial* of prisoners remanded to await trial." 9 Holdsworth, A History of English Law, p 118. (Emphasis supplied.)[7]

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terminer or general gaol-delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions or gaol-delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made, that the witnesses for the King could not be produced the same term, sessions or general gaol-delivery; and if any person or persons committed as aforesaid, upon his prayer or petition in open court the first week of the term or first day of the sessions of *oyer* and *terminer* and general gaol-delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of *oyer* and *terminer* or general gaol-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment." 31 Charles II, c 2, May 26, 1679 (5 Stat at Large [1660–1690], pp 458–465); reprinted Adams and Stephens, Select Documents of English Constitutional History, p 440; and Sokol, Federal Habeas Corpus (2d ed), p 308.

[5] "A person discharged upon *habeas corpus* is not to be reimprisoned for the same cause; but it is not to be deemed the same cause if he be afterwards committed for the same cause by the legal order of the court in which he was bound to appear, or in which he may be indicted and convicted." 2 Kent, Commentaries on American Law (13th ed), p 31.

[6] "The remedies of the habeas corpus act are so effectual that no man can possibly endure any long imprisonment on a criminal charge, nor would any minister venture to exercise a sort of oppression so dangerous to himself." Hurd, Habeas Corpus (2d ed), p 86.

[7] The act as described by Holdsworth:

"Prisoners indicted for treason or felony must be tried at the next sessions or bailed; but if it appear that the King's witnesses cannot be ready at that time, they may be committed until the

The right to a writ of *habeas corpus* is protected by the Federal and State Constitutions:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." US Const, art 1, § 9.

"The inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus." Northwest Ordinance 1787, § 14, art II.

"All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion

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following term; if not tried, then they must be discharged." 9 Holdsworth, A History of English Law, p 118.

Blackstone's description of the right secured by the 1679 act, which probably was more available to American lawyers and draftsmen of legislative acts than the precise verbiage of the act itself, in relevant part reads:

"That every person committed for treason or felony shall, if he requires it the first week of the next term or the first day of the next session of *oyer* and *terminer*, be indicted in that term or session, or else admitted to bail; unless the King's witnesses cannot be produced at that time; and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offense." 3 Blackstone, Commentaries on the Laws of England, ch 8, pp 136, 137 (1768).

Among other descriptions of the rights secured by the act are the following:

"By the specific provisions which we have considered, the remedy for all unjust detention is distinctly marked; and even in cases of valid imprisonment, care is taken that it be not unreasonably or unnecessarily protracted. * * * And prisoners indicted are to be tried at the next court after such indictment found, or they will be entitled to be discharged, unless the trial was postponed at their instance, or satisfactory cause shown by the public prosecutor for delay." 2 Kent, Commentaries on American Law (13th ed), pp 31, 32.

"At common law and under the famous Habeas Corpus Act of 1679 the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time." Oaks, Habeas Corpus in the States—1776–1865, 32 U Chi L Rev, 243, 244, 245 (1965).

or invasion, the public safety may require it." Const 1835, art 1, § 12.[8]

It is probably not without some significance that the dual rights to be released on bail and to the privilege of the writ of *habeas corpus* were originally written side-by-side in Michigan's first Constitution; see art 1, § 12 of the Constitution of 1835 just quoted. The substance of the 1835 constitutional provision was carried forward with minor changes in phraseology in the Constitutions of 1850,[9] 1908,[10] and 1963.[11]

The right of persons accused of crime who have been committed to jail to be indicted or let to bail and after indictment to be tried or discharged within a definite period of time is set forth in an 1820 territorial enactment of the governor and judges in language obviously based on the Habeas Corpus Act of 1679:

"That when any prisoner, committed for any offence, the punishment whereof is capital, shall apply to the court, on or before the fifth day of the term, by petition or motion and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term, unless it appear by affidavit that the witnesses against him cannot be produced in time, the court shall set him at liberty,

[8] Since the privilege of the writ is rooted in the Constitution there is no need to consider whether the English statutes of general application are part of the common law of this State. Compare *Trask* v. *Green* (1861), 9 Mich 358, 365, and *Matter of Lamphere* (1886), 61 Mich 105, 108, with *In re Sanderson* (1939), 289 Mich 165, 174. See discussion in Brown, British Statutes in American Law 1776–1836 (1964, Michigan Legal Studies), p 169 *et seq.*

[9] Const 1850, art 4, § 44 (*habeas corpus*); art 6, § 29 (bail).

[10] Const 1908, art 2, § 11 (*habeas corpus*); art 2, § 14 (bail).

[11] "The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it." Const 1963, art 1, § 12.

"All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great." Const 1963, art 1, § 15.

upon his giving bail in such sum as they shall think reasonable, to appear before them at a day to be appointed of the succeeding term.

"That every person charged with a crime or misdemeanor, who shall not be indicted before, or at the second term after he shall have been committed or let to bail, unless the attendance of the witnesses against him appeared to have been prevented by himself, shall be discharged from his recognizance or imprisonment, if he be detained for that cause only; and if he be not tried, at or before the third term after his examination before the judge or justice, or arrest, he shall be discharged." 1 Territorial Laws, Act of May 11, 1820, §§ 24, 25, p 596.

This 1820 act was reenacted verbatim by the legislative council of the Territory of Michigan on April 22, 1833.[12] It was in that context that the privilege of the writ of *habeas corpus* was written into Michigan's first Constitution by the framers and adopted by the people.

The language of the territorial acts was significantly modified by the Legislature in 1838, immediately after Michigan was admitted to statehood. Henceforth, a person held in prison shall be discharged if he is not indicted before the end of the second term of court, and, if indicted, "shall, if he require it, be tried at the next term of the court after the expiration of six months from the time when he was imprisoned, or shall be bailed upon his own recognizance" unless in either case it shall appear to the satisfaction of the court that the witnesses on behalf of the state have been enticed or kept away or are detained and prevented from attending court by sickness or some inevitable accident.[13] These

[12] See 3 Territorial Laws, Act of April 22, 1833, §§ 24, 25, p 1146.
[13] See Revised Statutes, 1838, part 4, title 2, ch 3, § 13, p 665, § 23, p 667.

statutory provisions have been carried forward without any charge in language to the present.[14]

The legislative change in 1838 of the consequence which attaches to a delay in trying a criminal charge lodged against a person held in jail cannot properly be read as vitiating the right secured constitutionally in 1835 to be discharged from imprisonment on a writ of *habeas corpus* without further delay if the accused person has petitioned in open court to be tried and his case is not tried at the next session, unless the state's witnesses cannot be produced.

While the nature of the substantive right to a writ of *habeas corpus* is not defined in our Constitution it is manifest that the right constitutionally protected is the right spelled out in the Habeas Corpus Act of 1679. The privilege of the writ, if nothing else, is the right to be admitted to bail if not indicted and to be discharged if not tried within a clearly defined period of time unless the people are unable to present their proofs.

"These historical incidents all lead to the conclusion that to suspend the privilege of *habeas corpus in the constitutional sense* is to deprive persons accused of crime of their right either to be speedily accused and tried or to be set free." Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?, 40 Cal L Rev 335, 340, 341 (1952). (Emphasis supplied.)[15]

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[14] See MCLA § 767.26 (Stat Ann 1954 Rev § 28.966); MCLA § 767.38 (Stat Ann 1954 Rev § 28.978).

[15] "The explicit and peremptory provisions of the statute of 31 Charles II, c 2 [the Habeas Corpus Act of 1679], restored the writ of *habeas corpus* to all the efficacy to which it was entitled at common law, and which was requisite for the due protection of the liberty of the subject. That statute has been reenacted or adopted, if not in terms, yet in substance and effect, in all the United States. The privilege of *this* writ is also made an express constitutional right at all times, except in cases of invasion or rebellion, by the Constitution of the United States, and by the constitutions of most of the states in the union. The citizens are declared, in some of these

See, also, *People* v. *Den Uyl* (1948), 320 Mich 477, 486.

"That act [the habeas corpus act of 1679] gave no new right to the subject, but it furnished the means of enforcing those which existed before.[16] * * *

"The state constitutions recognize the writ of *habeas corpus* as an existing remedy in the cases to which it is properly applicable, and designate the courts or officers which may issue it; but they do not point out the cases in which it may be employed. Upon this subject the common law and the statutes must be our guide; and although the statutes will be found to make specific provision for particular cases, it is believed that in no instance which has fallen under our observation has there been any intention to restrict the remedy, and make it less broad and effectual than it was at the common law." 1 Cooley, Constitutional Limitations (8th ed), p 723.

The right to a writ of *habeas corpus* is absolute. The right to the writ cannot be denied where the preconditions spelled out in the habeas corpus act have been met. The right can be suspended only when "in cases of rebellion or invasion, the public safety may require it". Like Magna Charta, *habeas corpus* is, to quote Coke's famous dictum, "such a fellow that he will have no sovereign".[17]

It is not open to any authority, executive, legislative or judicial, to deny or "suspend" the privilege

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constitutions, to be entitled to enjoy the privilege of the writ in the most 'free, easy, cheap, expeditious, and ample manner'; and the right is equally perfect in those states where such a declaration is wanting. The right of deliverance from all unlawful imprisonment, to the full extent of the remedy provided by the habeas corpus act is a common law right; and it is undoubtedly true, as has been already observed, that the common law of England, so far as it was applicable to our circumstances, was brought over by our ancestors upon their emigration to this country." 2 Kent, Commentaries on American Law (13th ed), pp 26, 27. (Emphasis supplied.)

[16] Similarly, see Hurd, Habeas Corpus (2d ed), p 83.

[17] Debate in Commons, May 17, 1628. Bartlett, *Familiar Quotations* (13th ed 1955), p 110.

of the writ except in the extraordinary case spelled out in the Constitution itself. It is, therefore, incumbent on the courts—if not their highest duty, among their important duties[18]—to implement the constitutional right to the issuance of a writ of *habeas corpus* by providing clearly defined, unequivocal procedures for the release of persons held in jail for undue periods of time awaiting trial equivalent to those spelled out in the Habeas Corpus Act of 1679:

(a) periodically, at clearly established periods of time, it should be the absolute duty of a judge to require that there be brought before him all persons held in jail for more than a designated time and to give them an opportunity to demand their right to an immediate trial;

(b) if the right is exercised and, nevertheless, the case is not tried within a prescribed period of time, then, unless the people are unable during that time to present their witnesses, the defendant should be discharged from imprisonment without further ado upon application for the issuance of a writ of *habeas corpus*.

It is the manifest duty of the courts to see to it that the necessary judges and supporting personnel are provided so that, except in the most extraordinary circumstances, such as a civil disturbance, the trial of criminal cases, particularly jail cases, is not delayed by accumulated backlogs of other cases that have not been tried. See *Wayne Circuit Judges* v. *Wayne County* (1971), 386 Mich 1. Failure to provide the necessary means, inability of the people to present their witnesses and to prove their case be-

[18] "It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnston* (1939), 306 US 19, 26 (59 S Ct 442, 446; 83 L Ed 455, 461).

cause of an accumulated chronic backlog of cases, cannot justify any longer the suspension and denial of this basic constitutional right. It should be remembered that the Habeas Corpus Act of 1679 was enacted in response to abuses which had "crept into daily practice, which had in some measure defeated the benefit of this great *constitutional remedy*".[19] (Emphasis supplied.)

Obviously, higher judicial authority must establish the precise periods of time. Clearly they do not have to be the same time periods prescribed in the Habeas Corpus Act of 1679, which were based on the court calendars of the time. The precise time is, no doubt, flexible, but the concept that all prisoners should periodically be brought to the bar of justice and given an opportunity to demand an immediate trial, and if the right is exercised and the case is not tried within a clearly defined period of time the prisoner is entitled to be discharged from imprisonment, is not flexible and must be implemented.

"It is not only a *constitutional* principle, as we have already seen, that no person shall be deprived of his liberty without due process of law, but *effectual provision* is made against the continuance of all unlawful restraint or imprisonment, by the security of the privilege of the writ of *habeas corpus*. * * *

"The habeas corpus act has always been considered in England as a stable bulwark of civil liberty, and nothing similar to it can be found in any of the free commonwealths of antiquity. Its excellence consists in the easy, prompt and efficient remedy afforded for all unlawful imprisonment, *and personal liberty is not left to rest for its security upon general and abstract declarations of right.*" (Emphasis supplied.) 2 Kent, Commentaries on American Law (13th ed), pp 26, 32.

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[19] 3 Blackstone, Commentaries on the Laws of England, ch 8, p 135 (1768).

II.

The constitutional right to a speedy trial is broader than the privilege of incarcerated persons to a writ of *habeas corpus*. In Michigan the right to a speedy trial obtains even though the accused person is at large on bail awaiting trial,[20] and it is not incumbent on him to show that he was prejudiced by the delay. Under the law of this state, "injury is conclusively presumed". *People* v. *Den Uyl* (1948), 320 Mich 477, 494.[21]

In this case the interval between the time that the defendant Collins was first arrested and the time when he was tried was 15 months.

In *Hicks* v. *Judge of Recorder's Court of Detroit* (1926), 236 Mich 689, a delay in 15–1/2 months was held to be unreasonable in the case of a lawyer charged with the offense of perjury who was at large on bond during the intervening period. The Supreme Court ordered an immediate trial.

In *Glasgow* v. *State* (Alaska, 1970), 469 P2d 682, the Supreme Court of Alaska ruled that a delay of some 14 months, excluding periods of time that could properly be attributed to the defendant, was unreasonable and reversed the defendant's conviction and directed that he be discharged.

There is no need in this case to express an opinion whether the delay in this case was under all the circumstances unreasonable entitling Collins to be

[20] "This Court and others have recognized that the privilege is a protection, not only against the hardships of imprisonment, but also against the harassment of being subjected to accusation, with its harmful effect on the defendant's reputation and business affairs. [Citations omitted.] The fact that the defendant is at liberty is a fact to be taken into consideration with the others in determining whether the case has been delayed for an unreasonable time." *People* v. *Den Uyl* (1948), 320 Mich 477, 490, 491.

[21] Similarly, see *Pitts* v. *North Carolina* (CA4, 1968), 395 F2d 182, 185.

discharged. Under the law of this state, even if it were to be found that the delay was unreasonable, he would be barred from obtaining relief because he did not file a formal demand in the Recorder's Court insisting upon recognition of his constitutional right to a speedy trial.

Michigan adopted the demand requirement in *People* v. *Foster* (1933), 261 Mich 247.[22] Subsequently, in *People* v. *Duncan* (1964), 373 Mich 650, 656, our Supreme Court declared: "Since *Foster*, it has not been questioned in this State that formal, record entered, demand is required to invoke the constitutional guaranty". This rule was reiterated in *People* v. *Miklovich* (1965), 375 Mich 536, 539. Similarly, see *People* v. *Krum* (1965), 374 Mich 356, 363.

While it appears that these statements by our Supreme Court were in each instance made in a case where the defendant was at large on bail during the entire period intervening between his arrest and the time that the case was set for trial or formal record-entered demand was made, that factual distinction would not justify us in applying, without notice to the prosecutors and trial judges of this state, a different rule in cases where the accused person is incarcerated.[23] It does appear, however, that considerations not relevant in the case of an incarcer-

[22] *Foster's* reasoning that (p 252) "where defendants are on bail and do not appear in court demanding trial, they have little reason to complain of delay. [Citation omitted.] They are not under the oppression of the government which the provision was designed to prevent" conflicts with the later statement in *Den Uyl* (p 490) that, "This Court and others have recognized that the privilege is a protection, not only against the hardships of imprisonment, but also against the harassment of being subjected to accusation, with its harmful effect on the defendant's reputation and business affairs".

[23] But see *Rutherford* v. *State* (Alaska, 1971), 486 P2d 946, where a closely divided Alaska Supreme Court applied retroactively the rule enunciated in *Glasgow* v. *State* (Alaska, 1970), 469 P2d 682, discussed, *infra*, in text preceding fn 26.

ated accused person may have motivated the Supreme Court in adopting the demand requirement. This suggests that the demand requirement should be reconsidered at least as it affects an incarcerated accused person.

In this case Collins was represented by a retained lawyer. Claiming that his lawyer had not been representing him adequately, Collins filed a grievance with the State Bar on March 4, 1970, and substitute assigned counsel was appointed for him shortly before his trial. It appears that his retained lawyer was subsequently admonished by the State Bar in connection with the grievance. Obviously, Collins, a layman, could not be expected to be aware of the demand requirement and especially that nothing less than a "formal, record entered, demand" would suffice.

The demand requirement does not enforce, rather it undermines, the constitutional right to a speedy trial. The constitutional right is meaningless unless it is enforced. But, except for Hicks, a lawyer, and Den Uyl, a wealthy man, who were represented by diligent counsel, I find no Michigan case enforcing the right. For the impecunious, incarcerated accused person who is dependent on a lawyer burdened with competing engagements the speedy trial clause is a collection of empty words.

The demand requirement does, indeed, have the support of the weight of authority.[24] In some jurisdictions, however, the burden is placed on the prosecutor to advance the case for trial, and if the accused person is denied his right to a speedy trial he may be discharged on that account.[25]

[24] See Anno: Waiver or loss of accused's right to speedy trial, 57 ALR2d 302, 326.

[25] *Op cit*, p 334.

The minority view was recently approved by the American Bar Association when it adopted the Standards Relating to Speedy Trial of the ABA Project on Minimum Standards for Criminal Justice. Standard § 2.2 provides that "the time for trial should commence running, without demand by the defendant". That view also has the support of respectable judicial authority.

In *People* v. *Bryarly* (1961), 23 Ill 2d 313, 319 (178 NE2d 326, 329), Justice Schaefer, speaking for a unanimous Illinois Supreme Court, declared:

"The constitutional guarantee of a speedy trial contemplates that the means that are available to meet its requirements shall be utilized. Under the circumstances of this case we think that the burden of taking the steps necessary to bring about a prompt trial rested upon the people. When the Legislature intended that a defendant should take affirmative action to prevent the delay of his trial, it expressly so provided [citations omitted].

"Although the defendant wrongfully left the jurisdiction of the court, the prosecution knew where he was and could have initiated proceedings to return him to Illinois for trial."

In *People* v. *Prosser* (1955), 309 NY 353 (130 NE2d 891, 895), Judge Fuld, for a unanimous New York Court of Appeals, declared:

"It is the state which initiates the action and it is the state which must see that the defendant is arraigned. It is likewise the state which has the duty of seeing that the defendant is speedily brought to trial. And from this it follows that the mere failure of the defendant to take affirmative action to prevent delay may not, without more, be construed or treated as a waiver."

It is true that the New York statute expressly provided that where the right to a speedy trial is

denied, "the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown", and our statute does not so provide. It cannot, however, reasonably be argued that this is a distinction of any importance. Although our statute does not provide the consequence that follows a denial of the constitutional right, unless a court may, in consequence of the denial of the right, dismiss the information, it is without meaningful remedy to enforce the right. In *Den Uyl* the Court directed that proceedings be completed within 60 days or that they be dismissed and the defendants discharged, thereby recognizing that Michigan courts have the power, independently of statute, to discharge a defendant for failure to give him a speedy trial.

The issue then is not whether Michigan courts have the power, constitutional or statutory, to dismiss an information and discharge the defendant. Obviously, they have. The issue is whether, as a condition precedent to the exercise of this power, the court should impose on the accused person a requirement that he shall have formally demanded his constitutional right.

In *Prosser,* the New York Court of Appeals declared that the speedy trial guaranty serves a threefold purpose:

"It protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and, finally, like statutes of limitation, it prevents him from being 'exposed to the hazard of a trial, after so great a lapse of time' that 'the means of proving his innocence may not be within his reach'—as, for instance,

by the loss of witnesses or the dulling of memory." *People* v. *Prosser, supra,* p 356 (130 NE2d p 893).[26]

In *Glasgow* v. *State* (Alaska, 1970), 469 P2d 682, 686, the Supreme Court of Alaska concluded, on the basis of its "interpretation of article 1, section 11, of the *Alaska* Constitution" (emphasis supplied) that "while the presence of a demand or a showing of prejudice to one's case can only help the claim, their absence alone will not necessarily frustrate the right to a speedy trial, including the right to a dismissal of the charges with prejudice when there has been a clear denial of this constitutional right". In reaching that conclusion, the Court relied on the reasoning of the New York Court of Appeals in *Prosser* and of the Illinois Supreme Court in *Bryarly*.[27] The Court was also influenced by the United

[26] "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell* (1966) 383 US 116, 120 (86 S Ct 773, 15 L Ed 2d 627).

[27] In *Zehrlaut* v. *State* (1951), 230 Ind 175 (102 NE2d 203), the Supreme Court of Indiana declared that its statute, entitling an accused person to be discharged if his case is not tried within three terms of court unless he causes the delay, was declarative of the constitutional right:

"No court has jurisdiction to amend or disregard either the Constitution or its implementing statute, nor can a court exercise a judicial discretion exceeding the limitations thereby imposed."

An Arizona rule of criminal procedure provides in terms similar to the Indiana statute that for delay in indictment or trial beyond the specified times, "the prosecution shall be dismissed". In *State* v. *Maldonado* (1962), 92 Ariz 70, 75 (373 P2d 583, 585, 586), the Supreme Court of Arizona declared that its rule was intended to implement the speedy trial provision of the Arizona Constitution and that "to effect the purposes underlying the constitutional provision this court follows the minority rule that an accused need not demand a trial in order to avail himself of the protection" of the rule. In so ruling the court relied in part on the Habeas Corpus Act of 1679.

Colorado, another state with a statute reading much like the Habeas Corpus Act, providing that a person committed for a criminal offense and not admitted to bail shall be tried by the second term of court or set at liberty unless he causes the delay, has ruled that the statutory right is expressive of the constitutional right to a

States Supreme Court's declaration in *Klopfer* v. *North Carolina* (1967), 386 US 213, 226 (87 S Ct 988, 995; 18 L Ed 2d 1, 9), that the constitutional right to a speedy trial was "one of the most basic rights preserved by our Constitution" and the established rule that "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege".[28] More recently the Alaska Supreme Court reiterated its holding in *Glasgow* and observed:

"[W]e feel it is too much to expect of human nature that a defendant must demand a speedy trial to receive one when he has no assurance as to the outcome of trial. The uncertainty as to the verdict can bring indecision to the innocent as well as the guilty. While trial should vindicate the innocent, such a defendant may nevertheless be apprehensive about

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speedy trial and there is no duty on the part of the defendant to demand trial within the specified time:

"[N]otwithstanding the holdings of courts of last resort in other jurisdictions to the contrary, this Court has clearly indicated that the defendant is not under a duty to demand trial within any specific time before he can claim the protection of a mandatory provision of the *Constitution* which says that he 'shall have the right to * * * a speedy public trial * * * '. As said in *In re Miller* [(1919), 66 Colo 261 (180 P 749)]: ' * * * * There is no attempt to justify or explain the delay and we must conclude that none is possible. It was distinctively the duty of the prosecution to move in the matter * * * '." (Emphasis supplied.) *Hicks* v. *People* (1961), 148 Colo 26, 30 (364 P2d 877, 879, 880).

Another state with a similar statute is Kansas. The Supreme Court of Kansas ruled that a defendant who was on bond throughout the statutory time span was entitled to the benefit of the statute and to be released upon expiration of that time period without regard to whether he had demanded a speedy trial:

"An accused need not insist upon, nor even ask for a speedy trial, nor need he protest against or object to the delay. Failure to object to continuance is not equivalent either to an application for such continuance or to a consent to the state's request for a continuance. [Citations omitted.] All that a defendant needs to do to retain the protection of the constitutional guaranty is to refrain from any affirmative act, application or agreement, the necessary and direct effect of which will be to delay the trial." *State* v. *Hess* (1956), 180 Kan 472, 475 (304 P2d 474, 479).

[28] *Johnson* v. *Zerbst* (1938), 304 US 458, 464 (58 S Ct 1019, 82 L Ed 1461).

the outcome, for even his innocence has not prevented him from reaching the trial stage of the criminal process. Thus, the innocent defendant is presented with two unhappy alternatives: either not to demand trial, hoping the state will not prosecute, or to demand trial, hoping to vindicate himself in spite of his fear of being found guilty."[11] *Rutherford* v. *State* (Alaska, 1971), 486 P2d 946, 950.

In *Dickey* v. *Florida* (1970), 398 US 30, 49, 50 (90 S Ct 1564, 1574, 1575; 26 L Ed 2d 26, 38, 39), Mr. Justice Brennan filed a separate concurring opinion, also signed by Mr. Justice Marshall, in which he addressed himself to some problems that he thought ought to be considered in defining the speedy trial guarantee. Among the problems alluded to was the demand requirement. He said:

"The view that an accused loses his right to a speedy trial by silence or inaction is open to question on at least three grounds. First, it rests on what may be an unrealistic understanding of the effect of delay. * * * It is true the delay may be welcomed by an accused. * * * But an accused may just as easily object to delay for its prolongation of the time in which he must live in uncertainty, carrying the emotional and financial burdens of accusation, and possessing the conditioned freedom of a potential felon. Moreover, the passage of time may threaten the ability of both the defendant and the government to prepare and present a complete case; in this regard, delay does not inherently benefit the accused any more than it does the prosecution.

"Second, the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. * * * Thus, can it be that affirma-

"[11] Chief Justice Burger has noted that to expect a criminal defendant to insist on his own trial is inconsistent with human nature. The State of the Judiciary—1970 [56 ABAJ 929], 931."

tive action by an accused is required to *preserve*—rather than to *waive*—the right?

"Third, it is possible that the implication of waiver from silence or inaction misallocates the burden of insuring a speedy trial. The accused has no duty to bring on his trial. He is presumed innocent until proven guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial." (Emphasis by Justice Brennan.)

The rule that the burden is on the defendant to demand a speedy trial rather than on the prosecutor and the court to see to it that the defendant is given a speedy trial cannot be squared with the unmistakeable language of our statutes:

"The people of this state and persons charged with crime are entitled to and shall have a speedy trial and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination without delay except as may be necessary to secure to the accused a fair and impartial trial." MCLA § 768.1 (Stat Ann 1954 Rev § 28.1024).

"The trial of criminal cases shall take precedence over all other cases. * * * No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown. * * * [N]o court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict neces-

sity and that the trial of said cause cannot be then had without a manifest injustice being done." MCLA § 768.2 (Stat Ann 1954 Rev § 28.1025).

Prosecutors and courts are, thus, under a statutory as well as a constitutional duty to the people and to accused persons to try them "without delay except as may be necessary to secure to the accused a fair and impartial trial". Even if the failure of an accused person to educate himself concerning the demand requirement and to make a demand is regarded as consent to delay, such consent does not, under our statutes, relieve the court of its obligation to order the case tried unless it *clearly* appears by a *sufficient* showing *entered upon the record* that the *reasons* for the consent are founded upon *strict necessity* and that the trial *cannot* be *then* had without a manifest injustice being done.

In this case there was no compliance by the prosecutor or by the court with these statutory requirements. It is fair to say that these statutory requirements are honored more in the breach than in the observance. If these requirements are to be more than empty words, then it will be necessary to overrule *Foster* and its progeny and to underscore that which the statutes and the Constitution clearly mean: it is the obligation of the prosecutor, not of the accused person subsisting in his cell, to advance the prosecution and to see to it that the accused is speedily tried; it is the obligation of the court to provide the means of enforcing and to enforce that imperative duty.

The Administrative Board of the Judicial Conference of the State of New York and the United States Court of Appeals for the Second Circuit pointed the way when earlier this year they announced the adoption of rules designed to assure prompt trial and disposition of criminal cases. Effective July

5, 1971, in the Second Circuit and May 1, 1972, in New York, in all cases where a defendant, except one accused of homicide, is detained in jail, the prosecutor must be ready for trial within 90 days from the date of arrest or the defendant will be released on bail or on his own recognizance unless good cause is shown for continued detention; and, whether the defendant is in jail or at large, he must be tried within six months of his arrest or the case will be dismissed with prejudice unless the time limit is extended for good cause as specified by the rules. Demand is not necessary to trigger the speedy trial rights conferred by the rules, but if the defendant does not move for release or dismissal he waives these rights.[29]

In March of this year the Florida Supreme Court adopted an emergency rule requiring that every person charged with a crime be brought to trial without demand within 90 days if the crime charged is a misdemeanor and within 180 days if it is a felony. The time periods apply without regard to whether the defendant is released on bail. If the rule is violated the defendant may file a motion with the appropriate court and have the charges against him dismissed.[30]

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[29] See 9 Crim L Rep 2186 for announcement of New York Rules; USCA, May, 1971 Supp, p 967 for Second Circuit Rules; see Comment, Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 71 Colum L Rev 1059 (1971).

[30] See 8 Crim L Rep 2453; see, also, Comment, Crowded Dockets No Longer Justify Denial of Speedy Trial, 23 U Fla L Rev 603 (1971).

COLLINS *v.* MOTORISTS MUTUAL INSURANCE COMPANY

OPINION OF THE COURT

1. INSURANCE—AUTOMOBILES—OCCUPYING—WORDS AND PHRASES.

A decedent who was leaning over the trunk of his friend's disabled automobile when he was struck by an uninsured motorist and who had been in the car shortly before he was struck, was "occupying" an automobile within the meaning of insurance policies which define "occupying" as being "in or upon, entering into or alighting from" an automobile.

2. INSURANCE—AUTOMOBILES—UNINSURED MOTORIST COVERAGE—OTHER INSURANCE.

An insurance policy which reduces the liability of the insurer under uninsured motorist coverage where the insured has recourse to other insurance does not comply with the statute requiring all policies of automobile liability insurance to provide coverage in the minimum statutory amounts for the protection of persons insured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles (MCLA §§ 257.504, 500.3010).

3. STATUTES—LEGISLATIVE INTENT—INTERPRETATION OF STATUTES.

Judicial interpretation of a statute in terms of legislative intent is not required where the wording of the statute is clear and unambiguous.

4. INSURANCE—AUTOMOBILES—UNINSURED MOTORIST COVERAGE.

An insurer cannot limit its liability under the uninsured motorist coverage required by statute through "other insurance" clauses; therefore, an "other insurance" clause must be read out of an automobile liability insurance policy which must be deemed

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REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Automobile Insurance §§ 127, 135.
[2, 4–6] 7 Am Jur 2d, Automobile Insurance § 135 *et seq.*
[3] 50 Am Jur 2d, Statutes § 219.

to include the coverage mandated by statute (MCLA §§ 257.504, 500.3010).

Concurrence by LEVIN, P. J.

5. INSURANCE—AUTOMOBILES—UNINSURED MOTORIST COVERAGE—ACCIDENT CLAIMS ACT—CONSTRUCTION OF STATUTES.

The motor vehicle claims act and the section of the insurance code requiring uninsured motorist protection in automobile insurance policies unless rejected in writing by the insured are in pari materia, *and when they are read together, it is apparent that the legislative purpose in adding the provision concerning uninsured motorist insurance to the insurance code was to reduce claims against the motor vehicle accident claims fund (MCLA §§ 257.1122, 257.1123, 500.3010).*

6. INSURANCE—AUTOMOBILES—UNINSURED MOTORIST COVERAGE—OTHER INSURANCE—VALIDITY.

Automobile insurance carriers cannot eliminate or reduce their liability in situations where the insured person has or can recover under other insurance since this would defeat the objective of encouraging the purchase of uninsured motorists insurance—so that persons who are injured by uninsured motorists will recover part or all of their damages from their own insurance, thereby reducing claims against the motor vehicle accident claims fund—and would therefore be contrary to the intent of the Legislature in enacting the provision concerning uninsured motorist insurance; therefore, an "other insurance" clause is invalid to the extent of the statutorily-required $10,000/$20,000 uninsured motorist insurance protection (MCLA §§ 257.1123, 500.3010, 500.3012).

Appeal from Wayne, John M. Wise, J. Submitted Division 1 February 2, 1971, at Detroit. (Docket No. 9808.) Decided October 19, 1971. Leave to appeal applied for.

Complaint by Marsha Collins against Motorists Mutual Insurance Company to recover for wrongful death of her husband under uninsured motorist coverage of two insurance policies. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded.

Goldsmith, Yaker & Goldsmith (by *Walter J. Goldsmith* and *Hal O. Carroll*), for plaintiff.

Alexander, Buchanan & Conklin (by *Wayne L. Ogne*), for defendant.

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

V. J. BRENNAN, J. On April 5, 1968, plaintiff's husband was struck and killed by an uninsured motorist. At the time he was struck decedent was bending over the trunk of a vehicle in which he had been a passenger, but which was now disabled. The accident occurred in the state of Florida. The plaintiff recovered $10,000 for the wrongful death of her husband under uninsured motorist coverage issued to the owner of the vehicle decedent had been occupying. Plaintiff now seeks to recover for the wrongful death of her husband under the uninsured motorist provisions of two policies of insurance issued by the defendant, Motorists Mutual Insurance Company, to the decedent.

The defendant denies any liability, citing, first, the fact that plaintiff has already received $10,000 from the insurer of the car which decedent had been occupying (which amount is the limit of defendant's liability under each policy), and, second, the following "other insurance" clause found in each of the policies issued to the decedent:

"Other Insurance: With respect to bodily injury to an insured while occupying an automobile not owned by the insured named in Item 1 of the declarations, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the appli-

cable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance.

"With respect to bodily injury to an insured while occupying or through being struck by an 'uninsured automobile', if such insured is a named insured or designated person under other similar insurance available to him, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable under this coverage for a greater proportion of the applicable limit of liability of this coverage than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance.

"Subject to the foregoing paragraphs, if the insured has other similar insurance available to him against a loss insured by this coverage, the company shall not be liable under this coverage for a greater proportion of such loss than the applicable limit of liability hereunder bears to the total applicable limits of liability of all valid and collectible insurance against such loss."

Despite the fact that it accepted premiums for uninsured motorist coverage on *each* policy of insurance it had issued to the decedent, the defendant points out that the courts of this state have interpreted such clauses in insurance policies previously, and have ruled that the effect of such clauses is to terminate the liability of the insurer once the insured has received the maximum benefit he could have received under just one policy. *Horr* v. *Detroit Automobile Inter-Insurance Exchange* (1967), 379 Mich 562; *Arminski* v. *United States Fidelity & Guaranty Company* (1970), 23 Mich App 352, *leave to appeal granted* October 20, 1970, *appeal dismissed* by order dated June 2, 1971, 384 Mich 769.

The plaintiff argues, first, that the "other insurance" clause is inapplicable since decedent was not "occupying" an automobile at the time of his demise. Judge Wise of the Wayne County Circuit Court correctly rejected this argument. Decedent's policies of insurance define "occupying" as "in or upon, entering into or alighting from". In that decedent was leaning over the trunk of his friend's automobile, and had been within it shortly before he was struck, we believe he was "occupying" the vehicle at the time of his death.[1] Since decedent was "occupying" an automobile, the "other insurance" clause is applicable to this situation, and would, under *Horr* and *Arminski,* relieve the insurer of liability.

However, those cases, because of the dates of the accidents, were not governed by the following statute, MCLA § 500.3010 (Stat Ann 1971 Cum Supp § 24.13010), which provides in pertinent part:

"No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto in limits for bodily injury or death set forth in section 504 of Act No. 300 of the Public Acts of 1949, as amended, being section 257.504 of the Compiled Laws of 1948, under provisions approved by the commissioner of insurance, for the protection of persons insured thereunder

[1] See *Pagan* v. *Motor Vehicle Accident Indemnification Corporation* (1966), 51 Misc 2d 664 (273 NYS2d 740), where the Supreme Court of New York, New York County, held that an individual who was outside of, but in contact with, a disabled vehicle was "in or upon or entering into or alighting from" that vehicle. See also *Motor Vehicle Accident Indemnification Corporation* v. *Oppedisano* (1964), 41 Misc 2d 1029 (246 NYS2d 879).

who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, including owners or operators insured by an insolvent insurer, because of bodily injury, sickness or disease, including death, resulting therefrom, unless the named insured rejects such coverage in writing as provided herein."

The "limits for bodily injury or death set forth in" PA 1949, No 300 (MCLA § 257.504 [Stat Ann 1968 Rev § 9.2204]), as amended by PA 1955, No 222, and PA 1966, No 247, are:

"not less than $10,000.00 because of bodily injury to or death of 1 person in any one accident, and, subject to said limit for 1 person, to a limit of not less than $20,000.00 because of bodily injury to or death of 2 or more persons in any one accident."

The plaintiff argues that this uninsured motorist statute requires all policies of automobile liability insurance to provide coverage (in the minimum statutory amounts) against uncompensated losses which result from the negligence of an uninsured motorist. She urges this Court that a policy of insurance which denies coverage where the insured has recourse to "other insurance" does not satisfy the clear mandate of the statute. Plaintiff also argues that neither *Horr* nor *Arminski* are applicable to this case. We agree; both of those cases grew out of incidents which occurred before the effective date of our uninsured motorist statute, hence the issue here, (whether "other insurance" clauses conflict with the statute requiring uninsured motorist coverage), was not relevant to the decision in either *Horr* or *Arminski,* and therefore those cases are not relevant to the issue now before us.

In response, the defendant argues that the plaintiff's construction of the statute could result in the

victim of an uninsured motorist being placed in a position more advantageous than the one he would have been in had the tortfeasor been insured in the minimum statutory amount. The defendant is correct in this analysis; if an individual has purchased automobile liability insurance, including uninsured motorist protection, and is injured by an uninsured motorist while riding as a passenger in an automobile whose operator has purchased similar coverage, this individual, under the plaintiff's construction of the statute, would have recourse against the operator's uninsured motorist coverage, and against his own. If the tortfeasor in the above-described circumstances had purchased insurance in the minimum statutory amounts, the passenger-victim would have recourse to only one policy of insurance, *i.e.*, the tortfeasor's.

The defendant argues that the Legislature could not have intended such an anomalous result, and urges that the statute has been satisfied if the insured victim of an uninsured motorist has been compensated up to the statutory minimum amount of $10,000. Another panel of our Court has rejected just such an argument in *Blakeslee* v. *Farm Bureau Mutual Insurance Company of Michigan* (1971), 32 Mich App 115, and has held that an "other insurance" clause which reduces the liability of the insurer where an insured has recourse to another policy of insurance violates the uninsured motorist statute. We agree with the holding.

The most logical manner in which to ascertain the intention of the Legislature is through the wording of the statute. It is only when a statute is ambiguous that a court is forced to interpret it in terms of legislative intent. Here, the meaning of the statute is clear; it provides, without uncertainty or ambiguity, that no automobile liability policy shall be

issued in this state unless it provides coverage, in the statutory minimum amounts, for the protection of the persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. The statute does not say that each insured should have access to the minimum statutory amount of insurance to compensate him for losses caused by an uninsured motorist, but that *each policy* of insurance shall provide such coverage.

As this Court noted in *Blakeslee,* a number of our sister states have adopted substantially similar, and in some cases identical, uninsured motorist statutes. Many of those states have already faced the question which faces this Court now; the manner in which those states have resolved this issue has not been uniform. A number of states have held "other insurance" clauses a valid limitation on the liability of the insurer on the theory that:

"The design and purpose of the uninsured motorist insurance statute was to provide protection only up to the minimum statutory limits for bodily injuries caused by financially irresponsible motorists. The statute was not designed to provide the insured with greater insurance protection than would have been available had the insured been injured by an operator with a policy containing minimum statutory limits." *Maryland Casualty Company* v. *Howe* (1965), 106 NH 422, 424 (213 A2d 420, 422).[2]

This reasoning does not impress us. The statute, and therefore the legislative intent, is both clear and certain. Furthermore, we see no evil in a situation which on some occasions gives an injured party a greater opportunity to receive full compensation for injuries he has suffered.

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[2] For other cases reaching the same result on similar grounds see Anno: 28 ALR3d 551, 557.

Had the Legislature intended "to provide protection only up to the minimum statutory limits" it could easily have so provided in the statutory scheme.[3] The Legislature having made no such provision, we believe that: "There appears no latitude in the statute for an insurer limiting its liability through 'other insurance' * * * clauses". *Sellers* v. *United States Fidelity & Guaranty Co.* (Fla, 1966), 185 So2d 689, 690.

The "other insurance" clause, being in violation of the uninsured motorist statute, must therefore be "read out" of the policy, and the policy deemed to include the coverage mandated by statute. MCLA § 500.3012 (Stat Ann 1957 Rev § 24.13012); *Oatis* v. *Dairyland Insurance Co.* (1969), 20 Mich App 367. The decedent having purchased two policies of insurance from the defendant, and not having waived the statutorily-required uninsured motorist coverage as provided in the statute, the defendant insurer is liable to his estate in an amount up to $10,000 for each policy. We reverse and remand for trial on the issue of damages.

As with the other states which have held that "other insurance" clauses are impermissible in this context, we also hold that "it was not intended by the [Legislature] that an insured shall receive more from such coverage than his actual loss, although he is the beneficiary under multiple policies." *Moore* v. *Hartford Fire Insurance Company Group* (1967), 270 NC 532, 543 (155 SE2d 128, 136). In this regard, the key phrase in the statute is "legally entitled to recover damages from owners or operators of uninsured motor vehicles". If an insured's loss

[3] At least one state, California, has done just that; see *Grunfeld* v. *Pacific Automobile Insurance Company* (1965), 232 Cal App 2d 4, 7 (42 Cal Rptr 516, 518).

has been totally compensated by other insurance, he is no longer "legally entitled" to recover damages.

Reversed and remanded.

QUINN, J., concurred.

LEVIN, P. J. (*concurring*). I agree with the result reached by my colleagues but on different grounds.

The facts of this case and in *Blakeslee* v. *Farm Bureau Mutual Insurance Co. of Michigan* (1971), 32 Mich App 115, where we also held that an "other insurance" exception to uninsured motorist protection was invalid, obscure what to me is the criticial factor to be considered in construing § 3010 of the insurance code[1] requiring uninsured motorist protection unless such coverage is rejected in writing by the insured.

Because of the atypical facts in this case and in *Blakeslee,* the decision in this case and in that one does not affect, except precedentially, the motor vehicle accident claims fund. However, in the more typical case where the accident occurs in Michigan and where the damages are far less than they were

[1] "No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto in limits for bodily injury or death set forth in section 504 of Act No. 300 of the Public Acts of 1949, as amended, being section 257.504 of the Compiled Laws of 1948, under provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, including owners or operators insured by an insolvent insurer, because of bodily injury, sickness or disease, including death, resulting therefrom, unless the named insured rejects such coverage in writing as provided herein." MCLA § 500.3010 (Stat Ann 1971 Cum Supp § 24.13010).

in the *Blakeslee* case,[2] it will be a matter of great importance to the fund whether insurance carriers may eliminate their liability on the ground that the insured person has other insurance protection.

We have previously held that § 3010 of the insurance code and the motor vehicle accident claims act are in *pari materia*.[3]

Under § 23 of the motor vehicle accident claims act, the fund is obliged to compensate persons injured by uninsured motorists to the extent of $10,000 on account of injury to or death of one person and $20,000 for two or more persons in any one accident, but the fund's liability is limited to situations where the damages caused by the uninsured motorist *exceed* (i) whatever amount "is recovered from any other source in partial discharge of the claim or judgment," and (ii) amounts "paid or payable by an insurer".[4] Sections 22(2) and 22(3) of the act

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[2] In neither this case nor in *Blakeslee* does our decision affect the fund.

In this case the accident occurred in Florida, and the fund is only required to respond when the accident occurs in Michigan.

In *Blakeslee,* the net unrecovered judgment against the uninsured motorist was for over $90,000, and, therefore, if timely claim was made against the fund, it was probably obliged to pay $10,000 to the injured plaintiff without regard to whether Farm Bureau Mutual Insurance Co. was also required to pay $10,000 under the uninsured motorist insurance protection which it had written.

[3] *Woods* v. *Progressive Mutual Insurance Co.* (1968), 15 Mich App 335, 337; *Oatis* v. *Dairyland Insurance Co.* (1969), 20 Mich App 367, 372.

Section 3010 was added to the insurance code by PA 1965, No 388. That amendatory act was approved the same day as PA 1965, No 389 which amended the motor vehicle accident claims act (PA 1965, No 198) before that act became effective.

[4] "(2) Where any amount is recovered from any other source in partial discharge of the claim or judgment, or where a claim or judgment for damages is reduced by an amount paid or payable by an insurer or any other person, as provided in section 22(2) or (3) of this act, then the limitations set forth in subsection 1 of this section [$10,000 for one person and $20,000 for two or more persons in any one accident] shall be applicable to the excess of the claim or judgment over the amount by which the claim or judgment is partially satisfied or is reduced under section 22(2) or (3)." MCLA § 257.1123(2) (Stat Ann 1968 Rev § 9.2823[2]).

similarly provide that no payments shall be made out of the fund "of any amount paid or payable by an insurer by reason of the existence of a policy of insurance".[5]

Since the fund is liable only to the extent that an injured person does not recover from other sources or from an insurer under a policy of insurance, it would tend to reduce potential claims against the fund if insured drivers carry insurance protection against the risk of damage caused by uninsured motorists. Read in conjunction with the motor vehicle accident claims act it is apparent that the legislative purpose in adding § 3010 to the insurance code (requiring insurance carriers to provide uninsured motorist protection unless such coverage is rejected by the policy holder in writing) was to reduce claims against the fund.

Having in mind that legislative purpose, it is clear that allowing insurance carriers to eliminate or reduce their liability in situations where the insured person has or can recover under other insurance would be contrary to the intent of the Legislature[6] and on that ground I agree with my

[5] "(2) No payment shall be made out of the fund in respect to a claim or judgment for damages or in respect to a judgment against the secretary, of any amount paid or payable by an insurer by reason of the existence of a policy of insurance or of any amount paid or payable by any other person by reason of the existence of any policy, contract, agreement or arrangement, providing for the payment of compensation, indemnity or other benefits.

"(3) No amount sought to be paid out of the fund shall be sought in lieu of making a claim or receiving a payment that is payable by reason of the existence of a policy of insurance, or in lieu of making a claim or receiving a payment that is payable by reason of the existence of any policy, contract, agreement or arrangement, providing for the payment of compensation, indemnity, or other benefits, to which the claimant would be entitled in the absence of this act." MCLA § 257.1122(2), (3) (Stat Ann 1968 Rev § 9.2822[2], [3]).

[6] An example will illustrate. Suppose an insured person is injured by an uninsured motorist and the damages are $20,000. If the insured person recovers, as did the plaintiff in this case, $10,000 under other insurance and is permitted to recover $10,000 under the

colleagues that an "other insurance" clause is invalid to the extent of the statutorily required $10,000/$20,000 uninsured motorist insurance protection.[7]

In this connection, see *Allstate Insurance Co.* v. *Motor State Insurance Co.* (1971), 33 Mich App 469, where we held invalid an exception to the public liability coverage in an automobile liability insurance policy for accidents caused while the vehicle is being operated by an "excluded driver."

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uninsured motorist protection provided by a policy he carries himself, then the fund has no exposure whatsoever. On the other hand, if an other-insurance clause in the uninsured motorist policy he carries himself is valid, then his unrecovered damages are $10,000 and he may collect $10,000 (the limit of the fund's liability) from the fund.

[7] "Such a liability insurance policy issued in violation of sections 3004 through 3012 shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties and obligations of the insured, the policyholder and the injured person shall be governed by the provisions of such sections". MCLA § 500.3012 (Stat Ann 1957 Rev § 24.13012).

PEOPLE *v.* PEPPER

OPINION OF THE COURT

1. CRIMINAL LAW—APPEAL AND ERROR—INSTRUCTIONS TO JURY.

   Instructions to the jury, whether comprised of only a principal charge or principal and supplemental charges, are reviewed in their entirety in an effort not so much to determine whether errors were made on any isolated issue but to ascertain whether their effect was prejudicial, where the defendant claims on appeal that the instructions given denied him a fair trial.

2. CRIMINAL LAW—INSTRUCTIONS TO JURY—SUPPLEMENTAL CHARGE—PREJUDICE.

   A supplemental instruction responding to questions submitted by the jury, which reiterated the previously enunciated elements of the offense charged, the lesser included offenses, and the possible verdicts, gave an approved definition of intent clarifying the principal charge, and admonished them of the necessity that they reach a verdict was not so prejudicial as to deny the defendant a fair trial where the instruction did not unduly emphasize the element of intent even though the definition might more appropriately have been included in the principal charge, did not direct the jury that they had a duty to infer intent, and did not coerce a verdict from them.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial § 842.
[3] 53 Am Jur, Trial § 748 *et seq.*
[4] 53 Am Jur, Trial § 759 *et seq.*
[5] 53 Am Jur, Trial § 950 *et seq.*
[6, 11] 40 Am Jur 2d, Homicide § 514 *et seq.*
[7] 40 Am Jur 2d, Homicide § 535.
[8] 31 Am Jur 2d, Expert and Opinion Evidence § 31.
[9, 10] 31 Am Jur 2d, Expert and Opinion Evidence § 151.
[12, 13, 18, 19, 21] 40 Am Jur 2d, Homicide § 112.
[14] 29 Am Jur 2d, Evidence § 11.
[15] 29 Am Jur 2d, Evidence § 167.
[16] 53 Am Jur, Trial § 555.
[17] 53 Am Jur, Trial § 680 *et seq.*
[20] 53 Am Jur, Trial § 514.

3. HOMICIDE—INSTRUCTIONS TO JURY—ELEMENTS OF CRIME—REASONABLE DOUBT.

A supplemental instruction to the jury that a reasonable doubt need only exist as to any one of the elements of homicide in order to allow an acquittal was not erroneous where the principal instruction had precisely and accurately defined the doctrine regarding the existence of a reasonable doubt.

4. CRIMINAL LAW—INSTRUCTIONS TO JURY—COERCION OF VERDICT.

A supplementary instruction in a trial for homicide in which the trial court cautioned the jurors to deliberate slowly, with a mind open to the arguments of others and a willingness to re-examine personal beliefs, explained to them the time and expense involved in every trial, and encouraged them that no 12 citizens were any better suited to decide the issues presented was not improper, because it did not suggest that personal beliefs were to be compromised, coerce a verdict, or contradict the principal instruction that the verdict was the responsibility of each juror.

5. CRIMINAL LAW—INSTRUCTIONS TO JURY—COERCION OF VERDICT.

Additional instructions to the jury which correctly state the law will not be held erroneous merely because they were given at one time rather than another and will not be presumed to be given for the purpose of coercing a verdict, nor so found, except upon convincing evidence.

6. CRIMINAL LAW—INSTRUCTIONS TO JURY—HOMICIDE—THEORY OF DEFENSE.

Comments by the trial court in a jury instruction that no claim of self-defense appeared on the record in the homicide case before it was permissible where there was no evidentiary support for that defense, and did not obligate the court to instruct the jury as to the defense of accident for which the defendant had submitted proof where there had been no request made by the defendant to have the jury instructed on that theory of defense (MCLA § 768.29).

7. HOMICIDE—FIRST-DEGREE MURDER—LESSER INCLUDED OFFENSE—MANSLAUGHTER—INSTRUCTIONS TO JURY—EVIDENCE.

Testimony regarding hostile feelings between the decedent and a defendant being tried on a charge of first-degree murder sufficiently supported an instruction to the jury on the lesser included offense of manslaughter (MCLA § 750.321).

8. WITNESSES—QUALIFICATION OF EXPERTS—DISCRETION.
The determination of a witness's qualifications to testify as an expert is within the discretion of the trial court.

9. HOMICIDE—EVIDENCE—EXPERT WITNESSES—PROPENSITY OF WEAPON—ADMISSIBILITY—DISCRETION.
Admission of the testimony of a police officer concerning the particular propensities of the gun which caused the death of the decedent, used to rebut the defendant's testimony that it had accidentally discharged, was not an abuse of discretion where the officer had been qualified as an expert on guns by evidence showing that he had worked in the area of firearms identification for 17 years whereby he obtained vast knowledge concerning the individual characteristics of such weapons.

10. WITNESSES—EXPERT WITNESSES—OPINION—FOUNDATION.
An expert witness in a criminal trial may state his opinion concerning the propensities of the gun which caused the death of the decedent in a homicide case without first giving the factual data upon which that opinion is based unless an inquiry into that factual data is pursued by the opposing party.

DISSENT BY LEVIN, J.

11. HOMICIDE—DEFENSES—INSTRUCTIONS TO JURY.
Instructions to the jury that self-defense was not present in the homicide case before them had the effect of implying to the jury that the only defense available was self-defense, was misleading and confusing, and was reversibly erroneous where that instruction was inconsistent with the defense of accident for which the defendant submitted proofs and where the court did not instruct the jury that accident was a good and valid defense even though, as an aside in a supplementary instruction, the court mentioned that accident was a possible defense.

12. HOMICIDE—DEFENSES—INNOCENT HOMICIDE.
There are two categories of innocent homicide for which there is no criminal liability: justifiable homicide authorized or commanded by law, and excusable homicide in which death is a result of an accident where the actor was not criminally negligent.

13. HOMICIDE—INTENT—PRESUMPTIONS—INSTRUCTIONS TO JURY.
An instruction to the jury that if it found that the defendant caused the death of the victim the law presumes that he did

so intentionally was erroneous because it was tantamount to a peremptory instruction that the jury had the duty to find that the killing was intentional and had the effect of eliminating altogether the defense of accident for which the defendant had submitted proofs.

14. CRIMINAL LAW—EVIDENCE—INSTRUCTIONS TO JURY—PRESUMPTIONS—INFERENCES.

The trial court may not instruct the jury in terms of "presumption" rather than in terms of "permissible inference" unless it is prepared to take an issue from the jury on the ground that the law conclusively presumes a fact from underlying facts; all that a judge may properly say to jurors where the prosecution has introduced evidence sufficient to give rise to a presumed fact is that if they find that underlying facts have been established, they may, *not must, infer the fact that the prosecution seeks to establish and he may not tell the jury that if they find that the underlying facts have been established, the fact inferred from them must be presumed.*

15. CRIMINAL LAW—PRESUMPTIONS—INNOCENCE.

The concept of a conclusive or mandatory presumption conflicts with the overriding presumption of innocence with which the law endows an accused in a criminal case and which extends to every element of the crime.

16. TRIAL—INSTRUCTIONS TO JURY—ERRONEOUS INSTRUCTION.

Conflicting instructions to the jury, one of which is erroneous, require reversal of the jury's verdict because it is presumed that the jury may have followed that which was erroneous.

17. CRIMINAL LAW — INTENT — PRESUMPTIONS — INSTRUCTIONS TO JURY.

The law deduces intent from the act itself for purposes of shifting the burden of going forward with the evidence, but does not deduce intent as a substitute for decision by the jury, and it is misleading to instruct the jury in terms of the presumption regarding intent without a clear statement by the judge of the limited purpose for which the law deduces a presumed fact from the underlying facts.

18. HOMICIDE—MURDER—INTENT—ACCIDENT.

A criminal intent, coupled with an accidental occurrence, cannot constitute either first or second-degree murder.

19. HOMICIDE—INSTRUCTIONS TO JURY—INTENT—DEFENSES—ACCIDENT.

An instruction to the jury in a homicide case that they must return a verdict of guilty of some degree of felonious homicide if they found that the defendant intended to kill the victim but which failed to charge them regarding the defense of accidental shooting was erroneous where the defendant had submitted proofs for his defense of accident.

20. CRIMINAL LAW—INSTRUCTIONS TO JURY.

The trial judge has a duty in a criminal case to instruct the jury as to the law applicable to the case even in the absence of a request to charge.

21. HOMICIDE—DEFENSES—ACCIDENT—INSTRUCTIONS TO JURY.

Failure to instruct the jury on the defense of accident in a homicide case was reversibly erroneous even in the absence of a request by the defendant for that instruction where the question of accident was made pivotal in the case by the defendant's proofs at trial.

Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted Division 1 February 5, 1971, at Detroit. (Docket No. 9895.) Decided October 19, 1971. Leave to appeal granted, 386 Mich 785.

Jodie Pepper was convicted of manslaughter. 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.

Carl Ziemba, for defendant on appeal.

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

J. H. GILLIS, P. J. Defendant, Jodie Pepper, was charged with murder in the first degree, MCLA § 750.316 (Stat Ann 1971 Cum Supp § 28.548), and was convicted by a jury of manslaughter, MCLA § 750.321 (Stat Ann 1954 Rev § 28.553). His testimony was that the gun accidentally discharged while being removed from his pocket, but the rebuttal testimony of a police officer from the firearms identification division of the scientific bureau was that a gun such as the one involved herein could not accidentally discharge. With this and other evidence, the jury was instructed as to the applicable law and was requested to render its verdict.

It is as to these instructions that defendant raises 10 of the 11 issues presented on appeal, arguing primarily that the substance and effect of certain supplementary charges were so prejudicial as to deny him a fair trial. Our review goes to the charge in its entirety (*People* v. *Dye* [1959], 356 Mich 271), in an effort not so much to determine whether errors were made as to any one isolated issue, but to ascertain if defendant received a fair trial. *People* v. *Mosley* (1953), 338 Mich 559; *People* v. *Boyles* (1968), 11 Mich App 417. Supplemental charges are considered along with the principal charge (*People* v. *Green* [1967], 7 Mich App 346) and are therefore viewed as being a portion thereof.

We do not find the charge here under attack to be riddled with the prejudicial error attributed to it by the defendant. The supplemental charges resulted solely from questions submitted by the jury, and the court, in responding thereto, essentially reiterated the previously enunciated elements of the offense, the lesser offenses included therein and the possible verdicts to be rendered. Having anticipated the jurors' apparent problem in deliberating (not

through any discussion with individual jurors as defendant suggests), the court provided an approved definition of intent (adapted from *People* v. *Carmichael* [1858], 5 Mich 10; *People* v. *Scott* [1859], 6 Mich 287; *People* v. *Resh* [1895], 107 Mich 251; see also 2 Gillespie, Michigan Criminal Law & Procedure [2d ed], § 906, p 1244); such served to clarify the initial instruction that specific intent to commit an illegal act must be established beyond a reasonable doubt in order to permit a finding of guilt. It is argued that this definition belonged more appropriately in the principal charge, but we are not convinced, as defendant contends, that the giving of it separately unduly emphasized this element or directed the jurors that they had a duty to infer intent.

The juror's remaining concern regarding the existence of reasonable doubt was correctly explained by the trial court; defendant admits that a precise and accurate definition of this doctrine had been given previously, and we find no error to have occurred in the court's additional explanation that such doubt need only exist as to any one of the elements of homicide in order to allow an acquittal.

Finally, the trial court herein cautioned the jurors to deliberate slowly, with an open mind to the arguments of others and a willingness to re-examine personal beliefs, explained to them the time and expense involved in every trial, and encouraged them that no 12 citizens were any better suited to decide the issues presented. We do not find in such pronouncements a suggestion that personal beliefs were to be compromised nor any of the objectionable infirmities found in *People* v. *Engle* (1898), 118 Mich 287, or *People* v. *Barmore* (1962), 368 Mich 26. Having previously stated that the verdict was the

responsibility of each juror, the court nowhere contradicted such statement or coerced a verdict.

In essence, we apply the statement found in *People* v. *Hoffmann* (1905), 142 Mich 531, 585, that if a trial court believes "that the instructions he has given a jury should be amended, corrected or enlarged, he ought to give additional instructions" so as to clarify any confusion. That is all the court herein attempted to do and we find no error in his presentation of these supplemental charges.

"If the law is correctly stated, instructions are not to be held erroneous because given at one time rather than at another time. That additional or repeated instructions are given for the purpose of coercing a verdict will not be presumed, nor be found except upon convincing evidence." *People* v. *Hoffmann, supra,* at 585.

The comments by the court that no claim of self-defense appeared on the record were permissible under the authority of MCLA § 768.29 (Stat Ann 1954 Rev § 28.1052), and do not, as suggested, obligate the court to instruct on a defendant's theory of the case. Such an instruction, if supported by the record, need be given only where a proper request is made; no request was submitted in this matter.

With the evidence before it, we conclude that the trial court precisely charged this jury as to the law applicable to this case. The testimony regarding hostile feelings between decedent and defendant sufficiently supported a charge on the lesser included offense of manslaughter. See *People* v. *Galarno* (1966), 3 Mich App 491.

The remaining issue concerns the admissibility of testimony from a police officer concerning the particular propensities of the type of gun which caused decedent's death. Determination of a witness's ex-

pert qualifications is addressed to the discretion of the trial court (*People* v. *Hawthorne* [1940], 293 Mich 15); as it was shown that this witness worked in the area of firearms identification for 17 years whereby he obtained vast knowledge concerning the individual characteristics of such weapons, we find no abuse of discretion in permitting the introduction of his testimony. *People* v. *Charles Wilson* (1970), 27 Mich App 171. The opinion offered by such a witness need not be prefaced by the factual data on which it is based unless such inquiry is pursued by the opposing party. *People* v. *John Willie Williams* (1970), 26 Mich App 218.

In conclusion, we hold that the trial court nowhere exceeded the bounds of his discretion or erred in his application and pronouncements of the law. On such a record, no error can be found.

Affirmed.

R. B. BURNS, J., concurred.

LEVIN, J. (*dissenting*). The defendant, Jodie Pepper, was charged with first-degree murder and convicted of manslaughter. The people's evidence tended to show that he shot the victim after they and others had been drinking together and an argument over a girl. Pepper took the stand and denied that there had been an argument and claimed that the gun discharged accidentally as he took it from his pocket to hand to the victim who was going to attempt to sell it for him.

Nowhere in the judge's charge to the jury did he mention, or even allude to, the defense that the shooting was an accident.

The judge instructed the jury that to establish a "felonious homicide" the prosecutor must prove that (1) the deceased was a human being, (2) he is now

dead, (3) the defendant caused his death, (4) the defendant intended to cause his death, and (5) the defendant did not act in *self-defense.*

The judge repeated his recital of the five elements several times during his principal charge and again during a supplemental charge after the jurors requested clarification. He thereby repeatedly stressed that it would be a defense if Pepper had acted in self-defense. However, the defense was not self-defense but accidental discharge of the gun as the judge himself belatedly recognized and, as an aside, stated in his supplemental charge;[1] even then he did not intimate, let alone state, that if the jurors found that the discharge of the gun was accidental they must acquit Pepper.

In stressing as a possible defense a defense which Pepper did not advance, a defense inconsistent with the actual defense, the charge was misleading and confusing. In implying that the only defense was self-defense, in failing to recognize and to instruct the jurors that accident was a good and valid defense, the charge was incorrect.[2]

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[1] In his supplemental charge the judge declared, during the penultimate review of the five elements, in response to a juror's request that he "go over the five points again that are necessary":

"The first one was that the deceased, Frank York, was alive and is now dead. I don't know why anybody should have any difficulty with that. However, let me always caution you that my reaction is not what is controlling. It's your reaction.

"The next point. That's two points, really, that he was alive, that he is now dead. The next point is that the defendant caused the death. The defendant was the moving factor that set in motion whatever it was that caused his death.

"The next point was that the defendant intended to cause his death. And the next point was that the defendant did not act in self-defense.

"Now as I recall the testimony you need not even concern yourself with number 5. There is no claim here that there was self-defense. So actually I think the only thing on which you might be a bit hung up is number 4,"

to which statement jurors responded: "That's right."

[2] "Homicide, the killing of one human being by another, may be innocent or criminal. There are two categories of innocent homicide;

The just-mentioned errors in instructing the jurors were compounded by the judge's supplemental instruction. After the jurors retired to consider their verdict they returned and requested additional instructions on first-degree and second-degree murder, and that the definition of manslaughter be read again; the foreman said, "we also would like the five points cleared up for us". The requests were complied with and after reiteration of the earlier instructions the jurors retired. Later they again returned and indicated that they might not be able to agree on a verdict. The judge asked if they had "some other specific questions" and the foreman requested the judge to "go over the five points again that are necessary". The judge repeated his instruction regarding the five elements (see fn 1), and it developed that the jurors were concerned with the fourth element in his recital, *i.e.*, did Pepper intend to cause the victim's death. Over the strong objection of Pepper's trial lawyer, the judge then instructed the jurors as follows:

"Something has been said about intent in this case, and as bearing upon that question, I say to you that where an unlawful act is done, the law *presumes* it was done with an unlawful intent.

"Intent, except when confessed, is a matter of *presumption.* Intent, unless confessed, can only be proved by acts, as jurors cannot look into the breast of the accused. And where an act is knowingly committed, it naturally leads to certain consequences, and a jury has a right to draw the inference, as they draw all other inferences, from the facts in evidence which to their minds fairly prove its existence.

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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." (Emphasis supplied.) *People* v *Morrin* (1971), 31 Mich App 301, 310.

"If the direct tendency of a man's willful act is to produce injury and injury is in fact produced, the intent to produce it is in law deducible from the act itself, for the law *presumes* that every person intends the usual consequences which accompany the use of the means employed in the manner employed." (Emphasis supplied.)

I.

The supplemental charge was wrong on several counts:

A. The essence of the instruction was to inform the jurors that since Pepper caused the victim's death the law *presumes* he did so intentionally. It was tantamount to a peremptory instruction that the jurors should find that Pepper intentionally killed the victim. Although the jurors could properly infer intent to kill from the evidence presented in this case, it was improper to instruct them in effect that they had a duty to do so.

It was undisputed, as the judge observed during his charge, that "the defendant caused the death".[3]

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[3] The judge said:

"Here again I hazard a comment on the facts [earlier he had said: 'But, that's a comment made by me on a factual issue, and that's not binding on you'], because here again I don't think there is any real dispute that Frank York [the victim] once lived and that he is dead and that he died as a result of a bullet discharged by a weapon in the hands of the defendant. The deceased was a human being who once had life, he is now dead, *and the defendant caused the death.* But those are comments by me on the facts. It's up to you to decide from the evidence whether or not those three elements have been established beyond a reasonable doubt." (Emphasis supplied.)

One could, of course, contend that if the gun went off accidentally Pepper did not "cause" the victim's death. Such semantic points are likely to be lost on a jury even if they are carefully made in clearly phrased instructions. Here the judge did not draw that possible distinction in the meaning of the word "cause"; indeed, he moved away from it, saying in his supplemental charge (fn 1) that Pepper caused the victim's death if he "was the moving factor that set in motion *whatever it was* that caused his death". (Emphasis supplied.)

To charge a jury in that context that intent "is a matter of presumption", and that "if the direct tendency of a man's willful act is to produce injury and injury is in fact produced, the intent to produce it is in law deducible from the act itself" was to eliminate altogether the defense of accidental shooting. The jurors could understandably reason—indeed, if they followed the clear tendency of the judge's instructions they were bound to reason—that since Pepper caused the victim's death and the intent to produce his death is "in law deducible from the act itself" that Pepper must be guilty.

I recognize that sprinkled through the supplemental charge are the phrases "unlawful act", "willful act", "knowingly committed" and the word "law". A dialectician with a copy of the judge's supplemental charge in written form in front of him and a clear understanding of the law of homicide, the legal meaning of the words "lawful", "knowing", and "willful" and the difference between a legal presumption and a permissible inference, might be able to harmonize the supplemental instruction with the defense of accidental shooting.

I am satisfied, however, that the undefined, question-begging phrases, "unlawful act", "willful act", "knowingly committed", and the word "law" left no lasting impression on the lay jurors who heard the judge's supplemental instruction but once, and that what came through to them in response to their request for clarification was that from the act of causing the death of the victim, the law deduced, indeed presumed, the intent to produce that result and, thus, since Pepper's actions were unquestionably a cause of the victim's death he must under the law have intended to kill him.

B. Unless a court is prepared to take an issue from the jury on the ground that the law conclu-

sively presumes a fact from underlying facts, it is always a mistake to charge a jury in terms of "presumption" rather than in terms of "permissible inference". As our Supreme Court has said:

"The immediate legal effect of a presumption is *procedural*—it shifts the *burden of going forward with the evidence* relating to the presumed fact." (Emphasis supplied.) *In re Wood Estate* (1965), 374 Mich 278, 289.

In a civil case, if a party to whom the burden of going forward with the evidence has shifted does not produce evidence tending to disprove the underlying facts which give rise to the presumption, he risks jury instruction that the presumed fact has been established. *In re Wood Estate, supra.* In a criminal case, however, the concept of a conclusive or mandatory presumption conflicts "with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."[4]

"However clear the proof may be, or however uncontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *People* v. *Flack* (1891), 125 NY 324, 334 (26 NE 267, 270).[5]

"The trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." *Morissette* v. *United States* (1952), 342 US 246, 274 (72 S Ct 240, 255; 96 L Ed 288, 306).

"The material facts in controversy upon which there is a conflict of evidence must not be assumed

[4] *Morissette* v. *United States* (1952), 342 US 246, 275 (72 S Ct 240, 256; 96 L Ed 288, 307).

[5] Similarly, see *People* v. *Doud* (1923), 223 Mich 120, 124; *Roberts* v. *People* (1870), 19 Mich 401, 416.

by [the judge in his instructions] to have been proven. It is for the jury to say whether or not the evidence is sufficient to establish such facts, and they are the sole judges of the credibility of the witnesses and the weight of the testimony. It must be apparent, on review, that the verdict rendered is that of the jury, and not the expressed opinion of the trial court." *People* v. *Lintz* (1928), 244 Mich 603, 618.

Since the jury in a criminal case may never be instructed that because of a failure of the defendant to disprove underlying facts the presumed fact must be deemed established, it is always misleading and confusing to instruct jurors in a criminal case in terms of presumption rather than in terms of permissible inference. All that a judge may properly say to jurors in a criminal case is that if they find that the underlying facts have been established, they *may,* not must, whether or not the defendant has controverted with evidence the people's evidence, infer the fact which the prosecutor seeks to establish by inference from underlying facts.[6]

In a sense the *law* does, indeed, presume from the doing of certain acts that they were done with the

[6] While in the legal lexicon the terms "presumption" and "inference" can mean the same thing, to many persons they have different meanings. The judge did not state that when he spoke of a presumption he meant only a permissible inference. As will appear from a reading of the supplemental instruction concerning intent, the judge charged the jurors that "where an unlawful act is done, the law *presumes* it was done with an unlawful intent", and intent "is a matter of *presumption*", and then that "a jury has a right to draw the *inference,* as they draw all other inferences, from the facts in evidence which to their minds fairly proved its existence", and then concluded with "the intent to produce it is in law deducible from the act itself, for the law *presumes* that every person intends the usual consequences which accompany the use of the means employed in the manner employed". (Emphasis supplied.) The established rule is that "when conflicting charges are given, one of which is erroneous, it is presumed that the jury may have followed that which was erroneous, and the verdict will be reversed". *Silverstone* v. *London Assurance Corporation* (1913), 176 Mich 525, 534; *People* v. *Kanar* (1946), 314 Mich 242, 253.

proscribed intent. Thus, proof that an accused person killed another person gives rise to a "presumption" that the act was done with malice. Independent evidence of malice is not required, and the trier of fact *may*, therefore, draw the requisite inference of intent from the fact alone that the accused person killed the victim. "Once it was established that the accused killed the victim, the burden was upon the accused to prove circumstances of justification, excuse, or mitigation." *People* v. *Morrin* (1971), 31 Mich App 301, 315. But, as we observed in the cited case (p 316): "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".

There is no need to instruct jurors in the sense in which the law presumes a fact, *i. e.*, that the proponent of the presumed fact has established with evidence the underlying facts thereby requiring submission of the proponent's case to the jury. There is no need to tell the jurors that in the court's judgment there is sufficient evidence to submit the case to them. It is apparent from the fact that the case is being submitted that the court is of that mind.

While the "law" does, for purposes of shifting the burden of going forward with the evidence, deduce intent from the "act itself", it beclouds the question facing jurors to instruct them about a procedural point of law especially when the limited purpose for which the law deduces intent is not stated. *The law does not deduce intent as a substitute for decision by the jury.* But that is what the jurors no doubt understood, or at least could well have understood, *without a clear statement by the judge of the limited purpose for which the law deduces a presumed fact from underlying facts.*

II.

Although in this case the judge charged the jurors that Pepper could not be found guilty unless he intended to kill the victim, that was not the equivalent of instructing them that they should acquit him if they found that the gun went off accidentally. We have no reason to believe that the jurors, untutored in the law, would understand, without any statement whatsoever from the judge, that the judge meant that Pepper must be acquitted if the shooting was, as he claimed, an accident, particularly under the circumstance that the judge repeatedly instructed them that self-defense—not an issue—would be a defense and was completely silent as to whether the claimed defense, accidental discharge of the gun, was a valid defense. The jurors could well have reasoned that, while self-defense was a possible defense, since the judge failed to instruct them that if they found that the shooting was accidental Pepper would not be guilty, accidental shooting was not a defense.

It was not enough for the jurors to find that Pepper harbored the intent to kill the victim. "The law does not punish evil intent or even every act done with the intent to commit a crime",[7] nor does it punish "every act done toward the commission of a crime".[8] Pepper was not guilty unless he intended to cause the victim's death *and* caused the victim's death *with* the purpose of accomplishing that result. "A criminal intent, coupled with an accidental occurrence, cannot constitute either first or second-degree murder."[9]

Accordingly, whether Pepper harbored the proscribed intent or not, if the gun went off accidentally

[7] *People* v. *Bowen* (1968), 10 Mich App 1, 13.
[8] *Commonwealth* v. *Peaslee* (1901), 177 Mass 267, 271 (59 NE 55, 56).
[9] *People* v. *Schafer* (1971), 36 Mich App 316.

he was not criminally liable. It was, therefore, error to fail to instruct the jurors, in addition to the charge that they must find that Pepper intended to kill the victim, that they must also find, contrary to Pepper's claim, that the gun did not go off accidentally as he was removing it from his pocket to hand it to the victim.

III.

The law in this state is settled that even in the absence of a request to charge, a trial judge has the "duty to charge the jury as to the law applicable to the case, his failure to do so constituting reversible error". *People* v. *Oberstaedt* (1964), 372 Mich 521, 526. In this case the only disputed issue, the pivotal issue, was the defendant's claim that the gun discharged accidentally, a claim totally ignored in the instructions. The statement of the Supreme Court in *People* v. *MacPherson* (1949), 323 Mich 438, 452, is in point:

"The charge of the trial court stating some of the elements of the offense involved in the case, without reference to others, would have a natural tendency to cause a jury to believe that those stated were exclusive."[10]

[10] See, also, *People* v. *Liggett* (1967), 378 Mich 706, 715, 717; *People* v. *Kanar*, *supra*, p 252; *People* v. *Guillett* (1955), 342 Mich 1, 7, 8.

PEOPLE *v.* McCOLOR

OPINION OF THE COURT

1. CRIMINAL LAW—APPEAL AND ERROR—PRESERVING QUESTION.

   Failure to object at trial to the prosecuting attorney's alleged improper cross-examination, to the prosecutor's alleged prejudicial argument in summation to the jury, and to alleged error in jury instructions precluded the defendant from appellate relief where no clear injustice was shown.

DISSENT BY LEVIN, P. J.

2. CRIMINAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—SILENCE—DEFENDANT TESTIFYING.

   A defendant who takes the stand may not be asked on cross-examination why he did not tell the police at the time of his arrest the story he related at trial.

3. CRIMINAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—SILENCE AT ARREST—PROSECUTOR'S COMMENT—APPEAL AND ERROR—PRESERVING QUESTION.

   Defense counsel's failure to object to the prosecutor's asking the defendant at trial why he did not tell the police at the time of his arrest the same story he told at trial does not necessarily preclude defendant from raising that issue on appeal.

4. CRIMINAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—SILENCE AT ARREST—PROSECUTOR'S COMMENT—REVERSIBLE ERROR.

   Prosecutor's asking the defendant why he had not told the police when he was arrested the version of the facts which defendant

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Evidence § 553.
[2–4] 29 Am Jur 2d, Evidence § 640.
[5–7] 53 Am Jur, Trial § 486.
[8] 53 Am Jur, Trial § 506.
[9] 53 Am Jur, Trial § 485.
[10] 53 Am Jur, Trial § 480 *et seq.*
[11] 53 Am Jur, Trial § 803.

gave on direct examination was not harmless error where the issue of guilt depended on the jury's assessment of the credibility of the defendant and the complainant.

5. CRIMINAL LAW—DEFENDANT'S GUILT—PROSECUTOR'S BELIEF.
Prosecutor's statement in closing argument that from the evidence, he believed defendant was properly charged and that defendant was guilty violated the rule which precludes a prosecutor from expressing a personal opinion concerning the guilt of the accused.

6. CRIMINAL LAW—PROSECUTOR'S COMMENTS—IMPROPER ARGUMENT.
Prosecutor's suggesting, during closing argument, that the jury should show its "sincerity" by convicting the defendant was improper.

7. CRIMINAL LAW—PROSECUTOR'S COMMENT.
Prosecutor's suggestion in summation to the jury that defendant was a member of the criminal class was improper.

8. TRIAL—TRIAL COURT'S DUTY—INTEMPERATE LANGUAGE.
A trial court has the duty to check and control any intemperance of zeal or language that is not warranted by the facts and circumstances shown by the proofs.

9. CRIMINAL LAW—PROSECUTOR'S MISCONDUCT—IRRELEVANT ISSUES—INNUENDO.
A prosecutor should stick to the pertinent facts and should not try to convict a defendant through innuendo and character assassination by the introduction of extraneous side issues.

10. CRIMINAL LAW—PROSECUTOR'S COMMENT—CROSS-EXAMINATION.
Prosecutor's asking the defendant's father and the defendant's wife, who were not present when the defendant shot complainant and who had no personal knowledge of the facts surrounding the shooting, whether they would shoot the prosecutor in the back and whether they believed it to be wrong to shoot anyone in the back was improper, because the issue in defendant's trial was whether the defendant acted properly at the scene of the assault: whether the defendant assaulted the complainant or whether the complainant assaulted the defendant, and whether the defendant acted feloniously or criminally in the matter.

11. CRIMINAL LAW—INSTRUCTIONS TO JURY—PUNISHMENT—EMPHASIS.
A supplemental instruction to the jury, in a trial for assault

with intent to do great bodily harm less than murder, in which the judge listed the various grades of assault in descending order, said that he could not mention punishment, and twice stated that assault and battery is a misdemeanor, given in response to a question about the difference between assault and battery and felonious assault, emphasized unduly that felonious assault is a lower grade of felony than the crime charged and that assault and battery is a misdemeanor, and thus improperly stressed the difference in possible punishment.

Appeal from Recorder's Court of Detroit, Elvin L. Davenport, J. Submitted Division 1 June 10, 1971, at Detroit. (Docket No. 10329.) Decided October 19, 1971.

Glenn Ray McColor 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, *William L. Cahalan*, Prosecuting Attorney, *Dominick R. Carnovale*, Chief, Appellate Department, and *Robert A. Reuther*, Assistant Prosecuting Attorney, for the people.

Carl Ziemba, for defendant on appeal.

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

QUINN, J. The errors relied on by defendant for appellate relief relate to prejudicial argument by the prosecuting attorney in summation to the jury, two instances of improper cross-examination by the prosecuting attorney and error in the jury instructions. None of the errors was preserved by objection at trial, and we are unable to find the "clear in-

justice" required by *People* v. *Qualls* (1968), 9 Mich App 689, to overcome the "no objection—no error" rule.

Affirmed.

V. J. BRENNAN, J., concurred.

LEVIN, P. J. (*dissenting*). Although none of the assignments of error were properly preserved for appellate review at the trial level, they should be recognized. The defendant did not have a fair trial.

The defendant was charged with assault with intent to commit the crime of murder MCLA § 750.83 (Stat Ann 1962 Rev § 28.278) and was convicted by a jury of assault with intent to do great bodily harm less than the crime of murder. MCLA § 750.84 (Stat Ann 1962 Rev § 28.279).

The complainant had lived in the defendant's home. They had a falling out and the complainant was asked to leave. The two men met on the street a short time afterwards.

The complainant testified that the defendant struck him and then shot him with a gun, including four shots in the back as he attempted to run away.

The defendant testified that he became dazed when the complainant struck him several times in the head with a gun, a struggle ensued, and shots were fired but that he had no recollection of shooting the victim.

I.

The defendant's first assignment of error concerns a question that has been litigated many times in our Court in the past few years. He claims it was improper for the prosecutor to ask him on cross-examination why he had not told the police

when he was arrested the version of the facts he gave on direct examination:

"*Prosecutor:* Did you ever tell the police after you were arrested that you got hit in the head?
"*Defendant:* No, I didn't tell the officers nothing."

The defendant's silence when arrested was exploited by the prosecutor in his closing jury argument.[1]

It is axiomatic that an accused person has a constitutional right to remain silent when he is arrested and faced with accusation, and that his silence may not be used against him. On that there has been complete agreement. The areas of disagreement are (1) whether the same rule applies when the defendant takes the stand, and (2) whether the failure of defense counsel to object bars the defendant from assigning error on this account.

In *People* v. *Rolston* (1971), 31 Mich App 200 (*leave denied,* 385 Mich 760); *People* v. *John Willie Williams* (1970), 26 Mich App 218; *People* v. *Hicks* (1970), 22 Mich App 446 (*leave granted,* 384 Mich 754, *subsequently dismissed*); and *People* v. *Seales* (1969), 16 Mich App 572, we ruled that a defendant who takes the stand may not be asked on cross-examination why he did not tell the police at the time of his arrest the story related at the trial. Similarly, see *People* v. *Rollins* (1971), 33 Mich App 1 (*leave denied,* 385 Mich 780). In *People* v. *Calhoun* (1971), 33 Mich App 141;[2] *People* v. *Bell* (1971), 32 Mich

[1] In this case the prosecutor argued to the jury during his final argument:
"The first time we hear this story about him being hit over the head and being dazed from the evidence that we have here—the first time the story comes out was on the stand."

[2] In *Calhoun* a panel of our Court referred to *Harris* v. *New York* (1971), 401 US 222 (91 S Ct 643, 28 L Ed 2d 1), and declared that: "We read *Harris* to include inconsistent 'nonutterances' as well as 'utterances'", with the result that when a defendant takes the stand his silence in the face of accusation can be used against him.

App 375 (*leave denied*, 385 Mich 769); *People* v. *Graham* (1971), 29 Mich App 528 (*leave granted*, 384 Mich 832),[3] other panels of our Court took a different view of the matter. For reasons fully set out in *Rolston*, *Williams*, *Hicks*, and *Seales*, they are, in my opinion, correctly decided.

In *People* v. *Fry* (1969), 17 Mich App 229, we recognized that the tacit admission argument is impermissible, and that a failure to object does not necessarily preclude a defendant from raising the question on appeal.[4] In *United States* v. *Brinson* (CA

The lawyer for the defendant in this case argued that if *Calhoun* is a correct interpretation of the law it is now necessary to amend the required *Miranda* warning to read: "However, if you choose to remain silent your silence may be used against you if you decide to take the stand". To continue to give the *Miranda* warning without that qualification, not so to inform the defendant, would be to misrepresent the significance of his remaining silent.

The practical effect of *Calhoun* is that an accused person must decide when he is arrested, without hesitation and without the advice of counsel, whether he will testify at the time of trial. Even if a lawyer were present when he was arrested, the lawyer would have to be omniscient to decide at that time, without consultation with his client, whether the client should take the stand at the time of trial.

In *Harris* the defendant gave a statement; he did not exercise his privilege to remain silent. At stake in *Harris* was the enforcement of the *Miranda* warnings requirement. It was thought that the failure to give the *Miranda* warnings was not of such importance as to require suppression of a statement actually and voluntarily given.

The issue here concerns the protection of the constitutional right to remain silent. Also at stake is the Fourteenth Amendment right to take the stand. *Harris* concerns the *Miranda* warnings. The rights with which we are concerned existed before *Miranda*. The difficulties experienced in the enforcement of the *Miranda* requirements should not be seized upon to erode rights existent before *Miranda*.

[3] Affirmed on the ground that a police officer's rebuttal testimony that the defendant had told the officer that he had "nothing to say" was admissible to impeach the defendant's testimony that he had attempted to tell police officers his side of the story. The Court added significantly: "In our holding today, we stress that the defendant's refusal to speak during interrogation is admissible only to impeach his own inconsistent statements at trial". *People* v. *Graham* (1971), 386 Mich 452, 458. Compare *People* v. *John Willie Williams* (1970), 26 Mich App 218, 226, fn 10.

[4] In *Fry*, we concluded that because of the other evidence against

6, 1969), 411 F2d 1057, and *United States* v. *Nolan* (CA 10, 1969), 416 F2d 588, 594, the United States Courts of Appeals for the Sixth and Tenth Circuits ruled that asking a defendant on cross-examination why he did not tell the story he related at the trial to the FBI (*Brinson*) and arguing to the jury that his failure to do so was a tacit admission of guilt (*Nolan*) were plain error requiring reversal even though the issue had not been properly preserved by objection at the trial level.

In the present case, resolution of the disputed factual issues turned on the jury's assessment of the credibility of the two protagonists, the complainant and the defendant McColor. In such a case the prosecutor's violation of the defendant's constitutional right cannot properly be regarded as harmless.[5] Pertinent are the observations of our Court in *People* v. *Hicks* (1970), 22 Mich App 446, 452:

"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. While we cannot affirmatively say that every jury would so react, we cannot speculate that it would not."

II.

The prosecutor's closing argument transgressed in many respects long established limitations. The statement that, "From the evidence in this case, I sincerely say that I believe it was a proper charge, and the person who was charged, namely, Glenn McColor, is guilty", violates the rule which precludes

the defendant the violation of his constitutional right was harmless beyond a reasonable doubt.

[5] *Cf. People* v. *Rolston, supra,* pp 207, 208, fn 12.

a prosecutor from expressing a personal opinion concerning the guilt of the accused.[6]

It was also improper to suggest to the jury that it show its "sincerity" by convicting the defendant.[7]

Nor ought we to countenance the prosecutor's suggestion, by the following statements, that the defendant was a member of the criminal class:

"It is no strange thing for people out there to have guns, and perhaps this is the whole problem now. It seems like the criminals have all the guns * * * there are too many bad guys out there with guns. * * *

"Counsel says that the defendant has no record. Therefore, we should believe him. Don't you know that every man up there in Jackson prison was at one time in court for his first time? *Maybe this is just the first time that Mr. McColor has ever been caught.*"[8] (Emphasis supplied.)

Recently in *People* v. *Montevecchio* (1971), 32 Mich App 163, we reversed a conviction because the prosecutor had "characterized the defendant as a professional criminal whose friends perjured them-

[6] ABA Project on Standards for Criminal Justice, Standards relating to the prosecution function, 5.8(b), p 128. See *People* v. *Quick* (1885), 58 Mich 321, 324; *People* v. *McGuire* (1891), 89 Mich 64; *People* v. *Hill* (1932), 258 Mich 79, 88; *People* v. *Ignofo* (1946), 315 Mich 626, 636; *People* v. *Slater* (1970), 21 Mich App 561, 565; *People* v. *Humphreys* (1970), 24 Mich App 411, 418.

[7] The prosecutor argued to the jury:

"I hope that your experiences here will not let you fall into the same trap that many of your citizens do. They read the papers and conclude that the court system is wrong. We have got criminals out in the street because the court system is wrong. It is the sincerity with which you decide the facts in this case, if we have proven to you these facts beyond a reasonable doubt."

[8] *Cf. People* v. *Ignofo, supra,* where the prosecutor argued:

"Joe Neuff [an alias of the defendant] killed that man. He has been slick enough and smooth enough to get away with it a number of years. Oh, yes, but there is the record and it has caught up with him."

The Supreme Court ruled this was reversible error even though there was no objection or request for a cautionary instruction.

selves in testifying as to defendant's alibi" even though the issue had not been preserved for review at the trial level.

In this connection it should be noted that "it is * * * the duty of the court * * * to check and control any intemperance of zeal or language that is not warranted by the facts and circumstances shown by the proofs". *People* v. *Aikin* (1887), 66 Mich 460, 480.[9]

It was also improper, in this trial for assault with intent to murder, to introduce an extraneous sideshow in the following manner:

"I wanted to see if there was truth and him [the defendant] to explain to us in the presence of his wife about Sandra Brown, the young lady he was with on the 15th, the portion of the 16th, and arrested with on the 17th. You heard that, and that goes to the credibility." [The shooting occurred on the 16th; Sandra Brown was not with the defendant at that time.]

The prosecutor should stick to the pertinent facts and should not seek to convict the defendant through innuendo and character assassination.[10]

III.

This next assignment of error shows the extent to which the prosecutor strayed from his proper role and the extent he was permitted to do so.

The defendant's father and wife, who testified concerning the altercation that resulted in the complainant being asked to leave the defendant's home

[9] Similarly, see *People* v. *Carr* (1887), 64 Mich 702, 708; *People* v. *Camel* (1968), 11 Mich App 219, 222; *People* v. *Brocato* (1969), 17 Mich App 277, 305; *People* v. *Plautz* (1970), 28 Mich App 621, 623.

[10] See *People* v. *Griffen* (1971), 36 Mich App 368, LEVIN, P. J., dissenting.

and who were not present at the scene of the shooting and had no personal knowledge of the facts surrounding it, were asked on cross-examination by the prosecutor:

Of the defendant's father: "Would you shoot me in the back?"

"You think that would be wrong?"

"Even if I say that I am going to kill you the next time I see you, would you shoot me in the back?"

Of the defendant's wife: "If I took the gun that John had and told you that I was going to kill you, but I didn't, and a week after that would you shoot me in the back?"

"Do you believe it is wrong to shoot people in the back?"

The prosecutor may not establish norms of conduct in that fashion. It is entirely beside the point whether the defendant's father or wife or the defendant himself[11] would shoot the prosecutor in the back. The issue was whether the defendant acted properly at the scene of the assault: whether he assaulted the victim, or whether the victim assaulted him; and whether the defendant acted criminally in the matter.

IV.

The jury was charged by the judge concerning included offenses. After the members of the jury had been deliberating for 20 minutes they returned to the courtroom and the following occurred:

"The Foreman: The question is the difference between assault and battery and felonious assault.

"The Court: All right. Felonious assault is any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or

[11] The defendant was asked on cross-examination, "Would you shoot me in the back?"

other dangerous weapon. Now, any object that is not enumerated, you have to find out whether it was dangerous or not, meaning that those we have enumerated are deemed to be dangerous in themselves. That is, by other dangerous weapons, but without intending to commit the crime of assault with intent to do murder, and without intending to commit the crime of assault with intent to do great bodily harm, shall be guilty of a felony. Assault and battery is any person who shall be convicted of an assault or an assault and battery where no other punishment is prescribed shall be guilty of a *misdemeanor. I cannot mention punishment in any one of these.* The grades are as follows: Assault with intent to commit murder. Under that is assault with intent to do great bodily harm less than murder. Felonious assault, where neither exists, that is to say, there is no intent to commit felonious assault, an assault with intent to murder or assault with intent to do great bodily harm. It is an assault with any one of the weapons or any one of the dangerous weapons and is a felony. *Assault and battery is a misdemeanor.* Is that clear enough now? (Emphasis supplied.)

The Foreman: Yes."

I am satisfied that the tendency of the judge's response was to emphasize unduly that felonious assault was a lower grade of felony than the felony charged in the information, and that assault and battery was a misdemeanor. Even the merest tyro knows that the punishment for a misdemeanor is significantly less than for a felony. The trial judge should not have stressed the difference in the possible punishment.

ERICKSON *v.* UNIVERSAL OIL PRODUCTS CORPORATION

1. UNEMPLOYMENT COMPENSATION—CHANGES IN WORK CONDITIONS—WORK STOPPAGE—ELIGIBILITY FOR BENEFITS.

   Employees who protest a change in working conditions by a work stoppage are usually ineligible for unemployment compensation.

2. UNEMPLOYMENT COMPENSATION—CHANGES IN WORK CONDITIONS—LIMITED HAZARD—WORK STOPPAGE—ELIGIBILITY FOR BENEFITS.

   Grievance procedures, not ordinarily a work stoppage, must be used by workers in order to be eligible for unemployment compensation benefits where a change in working conditions represents a hazard.

3. UNEMPLOYMENT COMPENSATION—CHANGES IN WORK CONDITIONS—DANGER TO LIFE.

   The Legislature, in denying men unemployment compensation for work missed because of a labor dispute, did not expect men to continue to work where the employer's unilateral change in working conditions exposed the men to a serious risk of immediate loss of life or limb.

4. UNEMPLOYMENT COMPENSATION—CHANGES IN WORK CONDITIONS—DANGER TO LIFE—ELIGIBILITY FOR BENEFITS.

   Denial of plaintiffs' claim for unemployment compensation was error where the Employment Security Appeal Board refused to consider the plaintiffs miners' claim that their employer's unilateral change in signalling procedures used during the raising and lowering of a mancar used to carry men in and out of a mine created such an immediate danger to life and limb as to justify their refusal to work.

REFERENCE FOR POINTS IN HEADNOTES

[1–4] 48 Am Jur, Social Security, Unemployment Insurance, and Retirement Funds § 36.

Appeal from Houghton, Stephen D. Condon, J. Submitted Division 3 May 13, 1971, at Grand Rapids. (Docket No. 10428.) Decided October 19, 1971.

Harold F. Erickson and others presented their claim for unemployment compensation against Universal Oil Products Corporation (Calumet & Hecla Group). Benefits denied by the Employment Security Commission Appeal Board. Plaintiffs appealed to circuit court. Affirmed. Plaintiffs appeal. Reversed and remanded.

Wisti & Jaaskelainen, for plaintiffs.

McLean & McCarthy, for the Universal Oil Products Corporation (Calumet & Hecla Group).

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *E. J. Setlock,* Assistant Attorney General, for Employment Security Commission.

Before: FITZGERALD, P. J., and HOLBROOK and LEVIN, JJ.

LEVIN, J. The plaintiffs filed claims for unemployment compensation which were denied successively by the Employment Security Commission, the appeal board, and the circuit court on the ground that the plaintiffs were disqualified for benefits because their unemployment was due to a "labor dispute". See MCLA § 421.29(8) (Stat Ann 1960 Rev § 17.531 [8]).

The plaintiffs and others were employed in the Kingston Copper Mine of defendant, Universal Oil Products Corporation (Calumet & Hecla Group), hereafter the "employer". On May 8, 1968, the em-

ployer unilaterally changed the procedures followed in signalling the hoist engineer during the raising and lowering of the mancar used to carry men into and out of the mine.

The miners refused to enter the mine claiming that the change had drastically increased the danger of accidental injury. Although the employer did not return to the old method of signalling, many of the miners, but not the plaintiffs, returned to work after May 15, 1968.

The plaintiffs did not quit their jobs nor were they laid-off or discharged. A grievance was filed and was submitted to an arbitrator, who found that the new signalling method was significantly more hazardous than the former method and was, therefore, unsafe within the meaning of the labor contract then in force and awarded call-in pay to those employees who had reported for work but refused to enter the mine. An inspector for the Bureau of Mines of the United States Department of Interior inspected the mine and made recommendations regarding the signalling system but did not find that the new procedure was unsafe.

Many labor disputes do, indeed, concern conditions of employment. However, generally the dispute is about amenities of convenience, comfort, and limited hazards.[1] It is rare that a change in working conditions represents an immediate threat to life or limb.[2]

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[1] See, *e.g.*, *Lillard* v. *Employment Security Commission* (1961), 364 Mich 401 (dispute about job elimination and work standards); *Linski* v. *Employment Security Commission* (1959), 358 Mich 239 (dispute about seniority and safety provisions of the labor agreement; the nature of the safety provisions and of the claimed violations is not described in the report).

[2] Where a person accepts work exposing him to a hazardous condition, it could be argued that he should not thereafter become eligible for unemployment compensation should he later decide to refuse such work without formally terminating the employment relationship. With that question we need not deal.

Normally, any unilateral change in working conditions made by an employer, if disapproved by his employees, can be made the subject of a grievance and handled in an orderly manner through the grievance procedure. In the meantime the employees can continue to work and earn a livelihood. If instead they decide to indicate their protest by a work stoppage, they would, having chosen that alternative, be ineligible under the statute for unemployment compensation.

In the ordinary case where the change in working conditions represents a limited hazard, public policy, as expressed in the legislative enactment, favors the use of the grievance procedure thereby avoiding a work stoppage. However, in an extraordinary case where there has been a significant increase in the dangers involved in the employment, the Legislature did not expect the men to continue to work at the serious risk of immediate loss of life or limb.

In *Philadelphia Marine Trade Association* v. *Unemployment Compensation Board of Review* (1963), 202 Pa Super 149 (195 A2d 138), the Superior Court of Pennsylvania dealt with a similar factual situation. There, stevedores refused to return to work and were locked out. In allowing unemployment compensation the Court reasoned:

"We have said that an employe has good cause for leaving his employment and is entitled to benefits if his health or safety is jeopardized by the job assigned to him, although mere dissatisfaction with working conditions is not enough to justify a voluntary separation. [Citations omitted.]

"The board has found on sufficient evidence that the employes engaged to unload the ship left their jobs because of abnormal hazards. This would entitle them to benefits under our decisions. There-

fore, we must affirm the board in its conclusion that such a situation is distinguishable from a mere disagreement as to whether slings or pallets were to be used. Ordinarily, quitting their job over such a dispute would not entitle those employes to benefits; however, the use of pallets in raising the cargo from a full hold in this particular case, where the ship and its hatches were small, created an imminent and immediate peril to the workmen therein and a situation which was more than a mere dispute to be settled under grievance procedures."

Also relevant are the cases holding that a worker is not made ineligible for unemployment compensation by his refusal of employment which would expose him to an immediate hazard to health or life.[3]

In the present case, the plaintiffs were employed in an already dangerous occupation which allegedly was made significantly more hazardous by the unilateral action of their employer.

We hold that the Employment Security Appeal Board erred in denying unemployment benefits without considering plaintiffs' claim that the change in the signalling procedures created such an immediate danger to life or limb as to justify their refusal to work. In so ruling, we do not ask the commission to determine fault in a labor dispute; the question of fault is not presented—merely that of hazard and safety. Our decision, thus, in no way departs from the rule that "the payment of unemployment bene-

[3] *First State Bank of East Detroit* v. *Keegan* (1962), 366 Mich 544 (bank clerk refused teller's job because it aggravated her nervous condition); *Fannon* v. *Federal Cartridge Corporation* (1945), 219 Minn 306 (18 NW2d 249) (employee in ordnance plant quit because of allergy to gun powder); *Dynamic Manufacturers, Inc.*, v. *Employment Security Commission* (1963), 369 Mich 556 (laid-off employees refused to cross picket lines under threat of personal injury); accord: *Kalamazoo Tank & Silo Company* v. *Unemployment Compensation Commission* (1949), 324 Mich 101; *cf. Knight-Morley Corporation* v. *Employment Security Commission* (1957), 350 Mich 397.

fits is not dependent upon the merits of a labor controversy".[4]

Reversed and remanded to the Employment Security Appeal Board for further proceedings consistent with this opinion.

All concurred.

[4] *Lawrence Baking Co.* v. *Unemployment Compensation Commission* (1944), 308 Mich 198, 208; *Intertown Corporation v. Unemployment Compensation Commission* (1950), 328 Mich 363, 366; *Lillard* v. *Employment Security Commission, supra,* p 419.

SLITER *v.* COBB

OPINION OF THE COURT

1. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—TORT LIABILITY.

   The right to control determines whether the relationship between an employer and his employee is that of master and servant or employee and independent contractor, and is the test for vicarious tort liability of the employer.

2. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—MOTIONS—SUMMARY JUDGMENT—ISSUE OF FACT.

   The trial court did not err in determining that plaintiffs had failed to raise any issue of material fact and in granting summary judgment for defendant newspaper publisher on the ground that, as a matter of law, its deliveryman who had been in an automobile collision with plaintiffs was an independent contractor and not a servant where plaintiffs urged the following as making the deliveryman a servant and not

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5] 53 Am Jur 2d, Master and Servant § 411 *et seq.*
[2] 41 Am Jur 2d, Independent Contractors § 9.
[3] 41 Am Jur 2d, Independent Contractors § 6 *et seq.*
[6] 53 Am Jur 2d, Master and Servant § 460.

an independent contractor: 1.) That the deliveryman could sell and deliver only in a mapped-out area and that when he gave up this particular territory he had to return the map to the publisher, and that he could not carry other newspapers without the written consent of the publisher; 2.) That he had to buy papers at a certain price and sell at a certain price; 3.) That he had to keep an up-to-date subscription list which was to be confidential, that the publisher would inspect it every six to eight weeks, and that it would be returned when he gave up his route, where the agreement between the publisher and the deliveryman provided that he leased the list; 4.) That he was encouraged to get new subscribers; 5.) That occasionally, three or four times during his employment, an employee of the publisher would ride with him to help him if he had trouble, that a rubber band supplied by the publisher and paid for by the deliveryman had to be placed around the newspapers, and that the newspapers had to be put in plastic tubes, furnished by the publisher and placed by the deliveryman for new customers, and removed by him when a subscription was cancelled; 6.) That the deliveryman had to do his accounting and billing on a form furnished by the publisher; 7.) That the deliveryman could cancel a subscription for nonpayment but could not cancel for other reasons without the publisher's permission; 8.) That the publisher required the deliveryman to train a replacement two weeks before he quit; 9.) That the deliveryman could not sell his route to whom he wished; 10.) That the newspaper could cancel the route at any time for good faith reasons, while the deliveryman had to give a notice of cancellation; and 11.) That the deliveryman was required to keep his vehicle in good mechanical condition.

3. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—CONTROL.

A newspaper publisher's action in bringing to its deliveryman's attention that its papers had been delivered late on at least two occasions after it had received complaints from customers was not inconsistent with the deliveryman's status as an independent contractor.

4. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—TORT LIABILITY—ECONOMIC REALITY TEST.

The economic reality test adopted by the Michigan Supreme Court in workmen's compensation cases will not be extended to determine tort liability of an employer to an injured third party, in the absence of any declaration by the Supreme Court that the test is applicable to tort cases.

DISSENT BY LEVIN, J.

5. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—NEWSPAPER DELIVERYMAN.

A newspaper publisher is not insulated from liability for the negligent automobile driving of a man delivering its newspapers even though the deliveryman owns the delivery vehicle and purports to act as an independent contractor.

6. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—MOTIONS—SUMMARY JUDGMENT—ISSUE OF FACT.

Whether newspaper deliveryman was a servant of defendant newspaper publisher or an independent contractor was a question of fact for the jury and summary judgment for defendant was improper where the pleadings and depositions showed that the deliveryman obtained his newspaper route in response to an ad for a motor route operator which he saw in the male help-wanted section of defendant's newspaper; that the defendant owned the route and merely leased it to the deliveryman under a lease cancellable by the defendant at any time without notice for "good faith" reason; that the deliveryman, who had no other occupation, agreed not to deliver other publications besides defendant's newspaper; that the defendant paid the deliveryman $28 a week as reimbursement for the cost of operating his own automobile; that when the deliveryman experienced difficulty, which occurred a number of times, an agent of the defendant would ride with him in an effort to iron out the problem; that the delivery procedure was structured so that the deliveryman had little, if any, room for exercising independence in his work performance and hardly any individualized judgment to exercise except in the operation of his automobile; that the deliveryman could not cancel a newspaper customer except for nonpayment, without first consulting with, and receiving permission from, defendant; that the defendant determined not only the pickup and delivery times for the newspapers but also directed the manner in which the newspapers were to be rolled, banded, and deposited in roadside tubes which the defendant supplied; and that the defendant established the billing procedures, credit policies and the manner of bookkeeping.

Appeal from Berrien, Chester J. Byrns, J. Submitted Division 3 May 5, 1971, at Grand Rapids. (Docket No. 10537.) Decided October 19, 1971. Leave to appeal granted, 386 Mich 780.

Complaint by Mary Sliter, Kermit W. Sliter, Erna Friesen, Charles Friesen, Jr., and Eleanor Krell against Marion Cobb, Ronald Lee Sims, and The Benton Harbor News Palladium, for negligent operation of a motor vehicle. Summary judgment for Benton Harbor News Palladium. Plaintiffs appeal. Affirmed.

Cholette, Perkins & Buchanan (by *Sherman H. Cone*), for plaintiffs.

Carl L. Reagh, for defendant Benton Harbor News Palladium.

Before: R. B. BURNS, P. J., and HOLBROOK and LEVIN, JJ.

HOLBROOK, J. This is an appeal by plaintiffs from the grant of a motion for summary judgment in favor of defendant-appellee, The Benton Harbor News Palladium.

In June, 1968, defendant Marion Cobb began delivering "The Benton Harbor News Palladium", a newspaper published by appellee. Defendant Cobb was designated as a "Motor Route Carrier" in the written lease agreement entered into by Cobb and appellee newspaper. On July 11, 1968, defendant Cobb invited two of his friends, defendant Ronald Lee Sims to drive and William Hauch to accompany him while he delivered that day's newspapers. This day had been chosen by Cobb to bill his customers for the month of August, 1968. It was necessary for Cobb to fill out and then insert a billing card in each newspaper. Because he filled out the cards while delivering the newspapers, it was necessary for some-

one else to drive his motor vehicle. His wife usually accompanied him on billing days; however, on this particular day his wife had gone shopping and had not returned in time to drive for him.

After delivering the newspapers to all his regular customers, Cobb proceeded to deliver some "sample" newspapers in an attempt to gain new customers. Approximately 3/4 of a mile beyond where the last house to which the last sample was delivered and which was outside of the route area of Mr. Cobb, defendant Sims failed to stop at a stop sign and a collision occurred between Cobb's automobile and the automobile in which the plaintiffs were riding.

On March 27, 1969, the plaintiffs filed a complaint in the Circuit Court for the County of Berrien alleging that they had sustained serious personal injuries as the result of the negligent operation of the motor vehicle owned by Cobb and operated by defendant Sims. Plaintiffs also alleged that defendant Cobb was an "employee" of appellee newspaper and was acting within the scope of his employment at the time of the accident; and therefore, appellee newspaper, as employer of Cobb, was also liable to plaintiffs for their damages.

On May 18, 1970, appellee newspaper filed a motion for summary judgment asserting that defendant Cobb was not an employee, but rather was an independent contractor doing work for the Benton Harbor News Palladium; and therefore, the appellee newspaper could not be held liable to plaintiffs for any negligence of defendant Marion Cobb. On May 27, 1970, appellee newspaper filed an amended motion for summary judgment.

On July 13, 1970, the motion was heard by the Hon. Chester J. Byrns, Berrien County circuit

judge. The trial court in deciding the motion considered: (a) the pleadings; (b) the written interrogatories propounded by the plaintiffs to the said defendants and answered by Charles H. Bowie, circulation manager of the Palladium Publishing Company; (c) the two depositions of defendant Marion Cobb; (d) the Motor Route Lease agreement between defendant Marion Cobb and appellee Palladium Publishing Company; (e) the affidavit of Charles H. Bowie in support of appellee Benton Harbor News Palladium's motion for summary judgment; and (f) the parties' briefs and oral arguments.

The learned trial judge decided that Cobb was as a matter of law an independent contractor and granted appellee Bentor Harbor News Palladium's motion for summary judgment as provided by GCR 1963, 117.

Plaintiffs raise two issues on appeal which we consider in order.

I.

Did the evidence presented in connection with appellee newspaper's motion for summary judgment, when viewed most favorably to plaintiffs, create a question of fact as to whether appellee newspaper maintained sufficient control over its news carrier Marion Cobb, to warrant a jury finding that Marion Cobb was, under the traditional test of employment, an employee of The Benton Harbor News Palladium?

The basis for relationship between the parties herein is the "Motor Route Lease" which is as follows:

"For and in consideration of the following covenants on the part of Marion Cobb, hereinafter re-

ferred to as the Lessee, The Palladium Publishing Company, a Michigan Corporation publishing The News-Palladium, at Benton Harbor, Michigan, hereinafter referred to as the Lessor, leases to Lessee a list of News-Palladium subscribers and the right to solicit additional subscribers living in an area described as follows:

"Covert, South Haven #9402.

"1. Lessee covenants and agrees as follows:

"(a) That he will purchase his newspapers from Lessor for $5.83 per hundred and sell and deliver said newspapers daily, except Sunday, to the subscribers on the above route at the established retail rate per subscriber, to wit: .55 per week; 2.40 per month; 7.20 quarterly; 14.40 semi-annually; 28.80 per year, and pay promptly each week to Lessor the sum of 5.83 per hundred on a settlement day to be determined by Lessor; and further, that he will make full and faithful accounting for advance collections from suctomers [*sic*] by Lessee.

"(b) That he will maintain an accurate and up-to-date subscription list of all customers, together with a road map of said customers; that he will disclose said list to no person except the Lessor which reserves the right of inspection of said list at all times; and upon termination of this lease, he will yield up said list as the exclusive property of Lessor to Lessor only.

"(c) That he will do (his, her) utmost to promote and expand the subscription list on the route described above; and that he will deliver no other publications on said route except as may be authorized in writing by the Lessor.

"(d) That he shall receive weekly from Lessor the sum of .07 per mile travelled in servicing said route as a mileage allowance, the Lessor reserving the right at all times to verify the mileage allowances claimed by Lessee; any unpaid mileage allowances may be held by Lessor in mitigation of any damage on its part as more fully set forth in Paragraph 3.

"(e) He shall, at his own expense, furnish to Lessor a fidelity bond in the penal sum of $1,000.00 with such sureties as Lessor may direct; in lieu, thereof, and at the discretion of Lessor, he shall deposit with Lessor the sum of 100.00 payable as follows: 92.00 down and 5.00 per week for — weeks, or until the total deposit has been paid; and that said bond or deposit shall be for (his, her) full and faithful performance of this lease. It is further agreed that lessor reserves the right to increase both the principal sum of this bond and the weekly accrual amount paid by lessee to correspond with the number of customers servised [*sic*] on said route as may be determined by periodic audit.

"2. Lessor may cancel this agreement at any time and without notice for good faith reason or reasons, including nut [*sic*] not limited to his physical or mental incapacity, failure to perform this agreement in all of its provisions, or intoxication. He may cancel this agreement by first giving Lessor 30-days notice of intention so to do.

"3. Any unpaid mileage allowance and/or the cash deposit described in subparagraph 1 (e) shall be available to Lessor, in whole or in part, in mitigation of any damage sustained by it through his breach of this agreement.

"In testimony whereof, the parties set their hands this 1st day of July, 1968.

"Lessee [*signed*] Marion W. L. Cobb
"Lessor PALLADIUM PUBLISHING COMPANY,
"Benton Harbor, Michigan
"By [*signed*] C. R. Bowie
"Circulation Manager

"Motor Route Deposit
"To: THE PALLADIUM PUBLISHING COMPANY

"Per your direction of even date, I hereby deposit 92.00 with you and agree to deposit further the sum of 5.00 per week until the sum specified in subparagraph 1 (e) is reached. Dated 1 July 1968

"Lessee [*signed*] Marion W. L. Cobb"

It was necessary for the trial court in considering and determining the motion for summary judgment to decide whether as a matter of law, defendant Cobb, a newspaper routeman, was an independent contractor or were there sufficient facts present to submit to the jury the question of whether Cobb was an employee of the newspaper publishing company? Although the burden was upon the plaintiffs to prove Cobb was an employee of appellee Benton Harbor News Palladium and that he was, at the time of the accident, acting in the course of his employment, all disputed facts were required to be resolved in plaintiffs' favor. *Durant* v. *Stahlin* (1965), 375 Mich 628.

The generally-accepted definitions of an independent contractor are stated in 41 Am Jur 2d, Independent Contractors, § 1, pp 737, 738, 739 as follows:

"There are many definitions of the term 'independent contractor.' One of the most frequently stated is to the effect that an independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the product or result of his work. An independent contractor has also been defined as one who carries on an independent employment in pursuance of a contract by which he has entire control of the work and the manner of its performance; as one who contracts to do a specific piece of work, furnishing his own assistants and executing the work in accordance with either entirely his own ideas or a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter with respect to the details of the work; * * * . Accordingly, very broadly speaking, where an employer may prescribe what shall be done, but not how it shall be done or

who shall do it, the person employed is an independent contractor. The fact that the work is to be done under the direction, and to the satisfaction of, a person representing the employer does not render the person contracting to do the work a servant.

"While the aforementioned definitions, with only slight variations, may be found in judicial opinions in most jurisdictions, it does not appear that a concise definition of the term 'independent contractor' can be laid down which will be sufficiently specific, and yet comprehensive enough, to apply to all situations that may arise."

It is stated in 41 Am Jur 2d, Independent Contractors, § 6, pp 746, 747, as follows:

"As indicated above, the most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant or employee is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is in fact independent in performing his work. Broadly stated, if the contractor is under the control of the employer, he is a servant; if he is not under such control, he is an independent contractor."

It is further stated in 41 Am Jur 2d, Independent Contractors, § 8, pp 751, 752, 753, as follows:

"As a practical proposition, every contract for work to be done reserves to the employer a certain degree of control, at least to enable him to see that the contract is performed according to specifications. The employer may exercise a limited control over the work without rendering the contractor a mere servant or employee, as a relation of master and servant or employer and employee is not inferable from a reservation of powers which do not deprive the contractor of his right to do the work according to his own initiative, so long as he does it

in accordance with the contract. The control of the work reserved in the employer which effects a master-servant relationship is control of the means and manner of performance of the work, as well as of the result; an independent contractor relationship exists where the person doing the work is subject to the will of the employer only as to the result, but not as to the means or manner of accomplishment. Thus, a person employed to perform certain work is not necessarily a mere servant because the contract provides that the work shall be subject to the approval or satisfaction of the employer. Such a provision is not an assumption by the employer of the right to control the person employed as to the details or method of doing the work, but is only a provision that the employer may see that the contract is carried out according to the plans. A requirement that the work be performed according to standards and specifications imposed by the owner is not sufficient to establish the degree of control necessary to make a presumably independent contractor the agent of the owner, but the retention of the right not only to insure conformity with specifications, but also the retention or exercise of the right to direct the manner in or means by which the work shall be performed, will destroy the independent status of the contractor."

In the very similar case of *Gall* v. *Detroit Journal Co.* (1916), 191 Mich 405, it is stated on pp 408, 409, 410:

"The contract between the Detroit Journal Company and Rebtoy constituted a very plain and simple arrangement for an employment of an equally plain and simple character. Omitting the provisions relating to default or failure in performance, it amounted to just this: Rebtoy was to deliver the papers to such persons, at such places, and on such time as the company should from day to day desig-

nate. Such delivery was the result to be obtained. And Rebtoy was to effect such delivery and obtain such result by any means and by any conveyance and in any way he saw fit. He could make the deliveries in person, or through others employed by him. It is shown by the evidence that those making deliveries for the company did occasionally employ others to do the work. He could use a horse, an automobile, or carry the papers on foot, provided he got them to the right persons, at the right places, and upon time. So far as the terms of the contract are concerned Rebtoy was certainly an independent contractor and not a servant. One whom the employer does not control, and has no right to control, as to the method, or means, by which he produces the result contracted for is an independent contractor. * * *

"Rebtoy did have a contract for a specific piece of work; that is, for the delivery of the papers. And it was none the less specific because the places to which the deliveries were to be made, and the persons to whom the papers were to be delivered, might change from day to day. The right, on the part of the company, to designate the persons and places was but a right to designate the result to be obtained, and did not give the company any control over the method for obtaining that result."

This Court stated in the case of *Kaniewski* v. *Warner* (1968), 12 Mich App 355, 358, as follows:

"At the present time the tort liability test for an independent contractor relationship is the right to control. *Gall* v. *Detroit Journal Co.* (1916), 191 Mich 405; *Holloway* v. *Nassar* (1936), 276 Mich 212. The facts now before us show that Warner could not exercise any supervision over Robson's method of operation. Warner did handle the financial aspects of Robson's accounts, but this limited involvement in the business does not amount to a right to control.

See *Sawtells* v. *Ekenberg Co.* (1919), 206 Mich 246. The trial court was correct in holding that Robson was an independent contractor.

"Plaintiff's second contention on appeal is that because Robson hauled nothing but Warner's oil from December, 1963, until the date of the accident, Warner had 'exclusive use' of the truck and was therefore 'renting' it within the meaning of CLS 1961, § 257.37 (Stat Ann 1960 Rev § 9.1837). We will not foster such a strained statutory interpretation. Robson's title and unfettered control of his truck clearly demonstrate that Robson was the sole owner of the vehicle."

The trial court in rejecting the plaintiffs' claimed aspects of the facts that would require the court to deny the motion for summary judgment stated in his ruling on the motion in part as follows:

"1. That Cobb could sell and deliver only in a certain mapped-out area and that when he gave up this particular territory he had to return the map to the Palladium. This, however, was the franchise Cobb sought and contracted to service and it is the one he secured. This is not determinative of his status as an employee or an independent contractor and goes not to control of the means or method but to the contract that was made between the parties and the franchise that was granted. Further, the agreement with Cobb did not prohibit him handling other newspapers as claimed by the plaintiffs in opposition to this motion for summary judgment, but provided only that he first get authority from the Palladium to do it. As Cobb and the circulation manager of the Palladium acknowledged in the deposition and the answers filed in this clause, Cobb could deliver other newspapers as long as he kept his Palladium business up. Actually Cobb himself in his deposition said he could carry other noon and afternoon papers and actually was transporting the

South Haven Tribune. I believe that is in the file here.

Off the record.

(*Discussion off the record.*)

"*The Court:* Now, strike 'actually' and anything after that.

"He said at page 32 of his deposition that he could carry the South Haven Tribune but did not carry it because they paid less than the News Palladium but that another routeman for the Palladium did carry the South Haven Tribune.

"2. That he had to buy papers at a certain price and sell at a certain price. Actually realizing his compensation was the difference between the two prices for which he contracted, this is, if anything, most indicative of an independent contractor status. In *Gall* v. *Detroit Journal Company, supra,* the carrier held to be an independent contractor had no discretion or voice in what he charged his customers.

"3. That he had to keep an up-to-date subscription list which was to be confidential between him and the Palladium and that the Palladium would inspect it every six or eight weeks. The list was to be returned when he gave up his route. What plaintiffs miss is that defendant by his own contract only leased the subscription list and the right to solicit new subscriptions within his territory. The lists belonged to the Palladium at all times. This fact does not dispute an independent contractor status, but actually supports it.

"4. That Cobb was encouraged to get new subscribers and was only to carry the Palladium. The latter point has been covered in an earlier mention in this opinion. Earning money by getting new subscribers was why Mr. Cobb sought the route and the same cause was why the Palladium gave the route, and financial profit is the usual genesis for independent contractor. This is obvious and Cobb's own statement in his deposition taken by the plaintiff that getting more customers benefited Cobb be-

cause more customers meant more money for him. In mentioning this matter of carrying only the Palladium, I'd like to note also here that an independent contractor can, without becoming an employee or losing his status as an independent contractor, agree to carry or to sell only one product.

"5. That occasionally three or four times during his employement a Palladium employee would ride with him on his route to help him if he had trouble, the words that Cobb used; that a rubber band supplied by the newspaper and paid for by Cobb had to be placed around the newspapers; that the papers had to be put in a plastic tube, which tubes Cobb was required to place for new customers and remove on cancelled subscriptions. Surely all of this taken as true for this motion goes only to the interest of the Palladium in the results of the defendant's work. It is inspection or such supervision as may be necessary to secure the ultimate result of the Cobb-Palladium contract, recognizing that the purpose of the contract was to keep the Palladium subscriptions up and its customers satisfied and Cobb and the Palladium making their respective profits. The Cobb deposition does not suggest in this court's opinion that the few times a Palladium employee rode with him that it was for control, but the court is left with the impression in reading the Cobb deposition at best it was to help him if he needed assistance. Cobb in his deposition said he had to buy the rubber bands and the Palladium did prefer the use of bands, but that he could also fold the papers as well. The tubes were the property of the Palladium and neither Cobb nor the customers paid for the tubes.

"6. That Cobb had to do his accounting and billing on a form submitted by the Palladium. Again this is not a control over the working of a person by another that would create in law an employment relationship, but rather it is the assistance by a party using an independent contractor to insure

that the financial results for both are realized. It should be noted here that the bills were in the name of Cobb who himself received the payments from the customers. In this connection see *Kaniewski* v. *Warner, supra.*

"7. That Cobb while he was permitted to cancel a customer for nonpayment could not cancel for other reasons without the Palladium's permission. Certainly a newspaper interested in the results, to-wit, its sales, has a right, without losing the independent contractor status of a routeman, to know why the routeman proposes to cancel a customer in an area which the newspaper itself built up.

"8. That two weeks before he quit, the Palladium required Cobb to train a replacement. How this would change Mr. Cobb from an independent contractor to an employee, I must admit, defies my reasoning.

"9. That Cobb couldn't sell his route to whom he wished. That is not unusual realizing that the route was the property of the Palladium and was only leased to Cobb.

"10. That the newspaper could cancel the route at any time for good faith or reason, as more specifically read earlier into the opinion, while Cobb had to give the notice of cancellation. This does not create a control over the means or methods of work of Cobb, but goes to the termination of an independent contractor relationship. It should be noted in *Gall* v. *Detroit Journal Company, supra,* the newspaper there, where the routeman was held to be an independent contractor, wasn't even required to use any reason or any basis before cancelling.

"11. That Cobb was to keep his vehicle in good mechanical condition. Actually in this file the only reference to that was Cobb in his deposition mentioned that this was stated in an advertisement seeking carriers, to which advertisement he responded. In the deposition of Cobb taken by the plaintiff,

Cobb said that during his route he was never told by the Palladium that he had to have his vehicle in good mechanical condition. Even if there was such a showing or application of such a requirement, this would not, in this court's opinion, change an independent contractor's relationship into that of an employee.

"Taken individually or collectively, all of the claims of plaintiffs do not deny or challenge sufficient to raise any jury question that Cobb was an independent contractor, and this court so finds that he was at the time of this particular event as a matter of law."

In plaintiffs' brief on appeal it is also asserted that a control as to methods and means of carrying out the agreement was exercised by the appellee newspaper over Cobb in that it required that Cobb deliver the newspaper by a specified time each day. On at least two occasions after complaints by customers were received, appellee newspaper brought to Cobb's attention that the papers were delivered late. In *Gall* v. *Detroit Journal Co., supra,* there was a provision in the contract requiring delivery of the newspapers according to a schedule and a penalty was also exacted for failure to deliver on time. Such a provision was held by the Court to be consistent with construing the contract as creating an independent contractor relationship.

Two depositions of Mr. Cobb were taken and considered by the court in determining the motion for summary judgment. We deem certain portions of these depositions suffiicently important to repeat them here:

"*Q.* Who paid the social security and withholding on the money that you made?

"*A.* I did.

"*Q*. So that you were required to keep track of social security and withholding tax yourself?

"*A*. Yes.

"*Q*. They told you you have to do this yourself?

"*A*. No, they didn't tell me, but I knew it.

"*Q*. How did you order the papers that you would need?

"*A*. Well, normally when I would pick up a new customer I would just call in and tell them to add one and drop one sample. I had 15 samples. They would add one paper and drop one sample.

"*Q*. The 15 samples were provided to you as a matter of course in promotional work?

"*A*. Yes.

"*Q*. This took place from the beginning and carried through all the time?

"*A*. Yes.

"*Q*. Were you permitted to leave the newspaper other than at a News Palladium tube?

"*A*. If the tube was missing I could put it in the mailbox. Occasionally I would throw it in their yard.

* * *

"*Q*. Did you ever get new customers that had been obtained for you by the News Palladium through its own circulation office? What I mean is, did you ever get notification that there would be an additional customer on your route?

"*A*. Yes.

"*Q*. That you had not gotten yourself?

"*A*. Yes.

"*Q*. Now, were you required to service that customer whether you wanted to or not, as long as the customer paid?

"*A*. No. It was strictly up to me. If I felt I had more than enough customers I could handle, I could refuse to leave papers at this customer.

* * *

"*Q*. Well, I'll ask you who provided the automobile?

"*A.* I did.
"*Q.* How about the gas?
"*A.* I did.
"*Q.* The oil and repairs?
"*A.* I did.
"*Q.* You did all those things?
"*A.* Yes.
"*Q.* You solicited customers?
"*A.* Yes.
"*Q.* Who picked the day that you collected?
"*A.* Me.
"*Q.* You selected the day that you'd —.
"*A.* Yes.
"*Q.* —collect from your customers?
"*A.* Yes.
"*Q.* I believe in the deposition that you testified that your wife sometimes rode the route with you, is that correct?
"*A.* Yes.
"*Q.* Where did you pick up those papers?
"*A.* Well, I originally started picking them up at Holly's Restaurant in South Haven, and then later on I had it changed to the Mobil Station in Covert. That was close to home.
"*Q.* In our answers to your interrogatories we said we believed you picked them up at Holly's Motel.
"*A.* Yes, its a restaurant and motel, together, combined.
"*Q.* You subsequently had that changed?
"*A.* Yes.
"*Q.* You had it changed?
"*A.* Yes."

We are constrained under the facts in this case to rule that the trial court properly determined that the plaintiffs failed to raise any issue as to a material fact pertaining to the liability of the appellee publishing company. *Durant* v. *Stahlin, supra.*

II.

Should the test for determining the tort liability of an employer to an injured third party be based upon the theory of economic reality heretofore adopted by the Michigan Supreme Court as the appropriate test for determining employment relationship in workmen's compensation cases?

This issue was not presented to or ruled upon by the trial court.

The plaintiffs urge us to extend the economic reality test adopted by our Supreme Court in the workmen's compensation case of *Tata* v. *Muskovitz* (1959), 354 Mich 695, to tort liability cases.

This we decline to do in view of the fact that we would have to depart from the established law in tort liability cases as delineated in our discussion of the first issue herein. Our Supreme Court no doubt has had an opportunity to extend the test of economic reality rule to tort cases during the interim years since the *Tata* case was decided in 1959. In the absence of such a declaration by our Supreme Court we will await their word on the matter.

Affirmed. Costs to defendants-appellees.

R. B. BURNS, P. J., concurred.

LEVIN, J. (*dissenting*). In the 55 years since *Gall* v. *Detroit Journal Co.* (1916), 191 Mich 405, was decided, the Michigan Supreme Court has decided six tort cases where the question presented was whether a person injured by the negligent automobile driving of a delivery man may recover from the business concern which hired him to deliver its goods under the circumstance that the delivery man owned the automobile and was purporting to act as an independent contractor. In each and every case

the Supreme Court ruled that the business concern was subject to liability. I have, therefore, concluded that *Gall* does not insulate a newspaper from liability for the negligent driving of a newsman delivering its newspapers.

A review of those six decisions is in order.

1. In *Eber* v. *Bauer* (1930), 252 Mich 571, a transit company appealed a jury verdict in favor of persons injured as a result of an automobile collision with a truck owned and driven by one Bauer. The Supreme Court declared that "the trial court was clearly right in holding that Bauer was an employee of the transit company" on the following facts: "The transit company was engaged in the delivery business. Bauer made trips for it from Chicago to points in Michigan and other states. He received instructions at the company's office in Chicago as to what merchandise or goods he should take, where to go for them, and where to deliver them". The Supreme Court declared:

"That he used his own truck instead of one furnished by the company did not change his status."

2. In *Marchand* v. *Russell* (1932), 257 Mich 96, 101, the Supreme Court held that on the record presented the relation of master and servant existed at the time of the automobile accident, and upheld a jury verdict against the defendant driver, a traveling salesman, and the company that he represented. The salesman was the owner of the automobile. He was required to call on dealers, collect amounts due the company, establish new dealers wherever possible and promote the sale of the company's products. The Supreme Court observed:

"Were it not for the fact that he used his own car, and that the expense of its operation and mainte-

nance, as well as his personal expenses when traveling about, was included in the weekly compensation paid him, the situation would be no different from that of the ordinary salesman traveling about and selling the goods of his employer."

3. In *Cooper* v. *Interstate Motor Freight Co.* (1933), 264 Mich 131, the defendant freight company, like the defendant newspaper company in *Gall,* sold a motor truck to a person who then entered into a contract with the freight company to deliver articles for it "as a contractor and not as an employee". The new owner of the truck was to use it exclusively in the service of the freight company and was to receive 70% of the actual freight charges. No specific tonnage was guaranteed. He agreed to maintain schedules, give proper and efficient service and deliver and haul freight for the freight company in accordance with its methods of handling. The truck was actually driven by the new owner's two sons. The Supreme Court declared "in the instant case a right of control was reserved and exercised by defendant to such a degree as to create the master and servant relationship", and, therefore, the new owner of the truck was the servant of the defendant freight company, not an independent contractor.

4. In *Lewis* v. *Summers* (1940), 295 Mich 20, 22, the defendant Summers, a beer distributor, engaged defendant Kass and his truck to make deliveries of beer. Kass was paid an agreed price per case of beer delivered. This was Kass' main employment. The Supreme Court declared that although Kass and not Summers owned the truck, "the issue of whether defendant Kass and his truck were in the employ of defendant Summers was for the jury".

5. In *Brinker* v. *Koenig Coal & Supply Co.* (1945), 312 Mich 534, the Supreme Court again upheld a jury verdict in favor of persons injured by a deliv-

ery truck delivering the defendant's goods although the truck was owned by the delivery man and not by the defendant. The truck was operated by an employee of Willie Sawyer, the owner of the truck. Sawyer had contracted with the defendant coal company to deliver its coal in his truck to customers of the coal company. The coal company selected the coal, weighed it and directed where coal should be delivered. Sawyer was paid $1.30 per ton for delivery plus a wheeling charge of 50¢ per ton, if the coal had to be wheeled in. The Supreme Court ruled: "Under the law as established in this state, we believe that the driver was defendant's employee".

6. Finally, in *Buehler* v. *Beadia* (1955), 343 Mich 692, a jury verdict for the plaintiff was affirmed by an equally-divided court. Four of the justices were of the view that the trial judge erred in concluding that the plaintiff was free from contributory negligence and did not reach the question whether the defendant truck driver was employed by the defendant truck company. The driver was the owner of the truck, and had entered into a formal lease hiring himself and the truck to transport freight and merchandise for the truck company. Mr. Justice BUTZEL, in an opinion signed by Justices TALBOT SMITH, BOYLES, and KELLY, declared that there could be no doubt that the freight company was the driver's employer in light of the facts "that he was told where and when to go; that the company paid him [a flat amount plus a percentage of the gross freight bill]; that he worked for the company exclusively; and that his routes were generally restricted, *et cetera*".

No tort cases presenting the employer-employee-independent contractor question have been decided by the Michigan Supreme Court since 1955.[1]

[1] *Cf. Schenk* v. *Packaging Corp. of America* (WD Mich, 1966), 267

In *Brinker, Lewis, Marchand,* and *Eber,* the Court relied on *Dennis* v. *Sinclair Lumber & Fuel Co.* (1928), 242 Mich 89, 92, a workmen's compensation case decided when the control test was still the standard by which the employer-employee relationship was determined in workmen's compensation cases.[2] In *Dennis,* John Dennis had been hired with the use of his truck to deliver coal in retail quantities to customers of a coal company. In holding that he was an employee, not an independent contractor, the Supreme Court observed:

"This Court has held that the test of the relationship is the right to control, whether in fact exercised or not [citation omitted]. Mr. Dennis served the lumber and fuel company, in accord with its direction as to each load, under its right to control his movements and command his services in carrying out its business requirements, and the company had a right to dispense with the same at will without liability."[3]

Recently, in *Osborn* v. *Recker* (1969), 16 Mich App 701, we declared that whether a milk truck driver was an agent of the defendant corporation was a question of fact.

F Supp 439, 440, where a United States district court, in granting a summary judgment to defendant packaging corporation, declared: "While it is possible that the Michigan Supreme Court will at some time in the future apply this principle [economic realities test] in the area of tort liability, at the present time the test for an independent contractor relationship is the right to control."

[2] In *Tata* v. *Muskovitz* (1959), 354 Mich 695, 699, and *Goodchild* v. *Erickson* (1965), 375 Mich 289, 293, the control test was abandoned as the exclusive criterion for determining the existence of an employer-employee relationship for purposes of remedial social legislation.

See *Foster* v. *Employment Security Commission* (1968), 15 Mich App 96, 99, 100.

[3] Similarly, see *Tuttle* v. *Embury-Martin Lumber Co.* (1916), 192 Mich 385, 400; *Van Simaeys* v. *George R. Cook Co.* (1918), 201 Mich 540, 546; *Hector* v. *Cadillac Plumbing & Heating Co.* (1924), 226 Mich 496, 503.

In the intervening period between the time *Gall* was decided and the present, I find but two cases decided in this state, one by the Supreme Court and the other by our Court, holding that a business concern named as a defendant and alleged by the plaintiff to be the driver's employer was not his employer.

Holloway v. *Nassar* (1936), 276 Mich 212, is distinguishable because in that case the traveling salesman only occasionally delivered goods. Most of the goods he sold were delivered by company trucks. Additionally, in contrast with the present case, he could attend customers by telephone as well as personally and could add new customers or drop old ones as he saw fit.

Kaniewski v. *Warner* (1968), 12 Mich App 355, was decided by our Court on the authority of *Gall* and *Holloway*. No mention was made of the other Supreme Court decisions above cited. In *Kaniewski* the owner-driver, Robson, was not obliged to purchase oil from defendant Warner and could, in contrast with the present case, have delivered someone else's oil products. Therefore, Robson, unlike newsman Cobb, could not have been put out of business at the whim of the enterprise defendant.

The facts of this case, as revealed in Cobb's depositions, demonstrate that it was at least a jury question whether he was an employee of the Benton Harbor News Palladium; a summary judgment should not have been granted. Cobb obtained his route in response to an ad for a motor route operator which he observed in the male help-wanted section of the Benton Harbor News. The route was owned by the newspaper; it was merely leased to Cobb under a lease cancellable by the newspaper at any time without notice "for good faith reason". Cobb agreed not to deliver other publications and he had no other occupation. He was paid $28 a

week as reimbursement for the cost of operating his automobile. When he experienced difficulty an agent of the newspaper would ride with him in an effort to iron out the problem; this occurred a number of times.

It is obvious that the nature of the task to be performed was such that there was little, if any, room for independence in performance by a news delivery man. The delivery procedure was structured so that he had hardly any individualized judgment to exercise except in the operation of his automobile.

The newspaper route customers were the newspaper's, including any new customers that Cobb might obtain. Cobb could not cancel a customer except for nonpayment without first consulting the defendant newspaper and receiving permission.

Defendant Benton Harbor News determined when the newspapers were to be picked up and the time within which they were to be delivered, a span of just a few hours. It directed the manner in which the newspapers were to be rolled, banded, and deposited in tubes, which it supplied, mounted on stands along the side of the road. It established billing procedures and credit policies and the manner of bookkeeping. It is hard to imagine what, if anything, was left for Cobb to decide.

Cases from other jurisdictions affirming verdicts against newspapers or setting aside directed verdicts in their favor where the plaintiff's injuries were caused by the neligence of a newsboy or distributor using his own vehicle include *Wilson* v. *Times Printing Co.* (1930), 158 Wash 95 (290 P 691); *Wallowa Valley Stages, Inc.* v. *The Oregonian Publishing Co.* (1963), 235 Or 594 (386 P2d 430); *Harris* v. *Cochran* (Tex Civ App, 1956), 288 SW2d 814;

Dispatch Publishing Company v. *Schwenk* (1941), 109 Ind App 223 (34 NE2d 150); *Femling* v. *Star Publishing Co.* (1938), 195 Wash 395 (81 P2d 293); *Semper* v. *American Press* (1925), 217 Mo App 55 (273 SW 186); *Hampton* v. *Macon News Printing Co.* (1940), 64 Ga App 150 (12 SE2d 425); *Joslin* v. *Idaho Times Publishing Co.* (1939), 60 Idaho 235 (91 P2d 386); *Gallaher* v. *Ricketts* (La App, 1939), 187 So 351; *Cooper* v. *Asheville Citizen-Times Publishing Co.* (1963), 258 NC 578 (129 SE2d 107).[4]

[4] See, generally, Restatement of the Law 2d, Agency, § 220, p 485, and accompanying commentary, regarding the criteria for determining who is a servant.

IN THE MATTER OF ROBERT P.

1. PARENT AND CHILD—ADOPTION—MOTHER'S RELEASE—PUTATIVE FATHER'S RIGHTS.

   Unmarried mother's release of her illegitimate child for adoption did not terminate the rights of the natural father where the father filed, only ten days after the release had been signed, his acknowledgment of paternity and the father, less than two weeks after he acknowledged paternity and within six weeks from the child's birth, filed an action seeking custody of the child.

2. PARENT AND CHILD—CHILD CUSTODY—BEST INTEREST.

   The welfare of the child is of paramount concern in custody cases and the superior rights of a parent are enforced only when they accord with the child's best interests.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 2 Am Jur 2d, Adoption § 26.
10 Am Jur 2d, Bastards § 62 *et seq.*

3. PARENT AND CHILD—CHILD CUSTODY—BEST INTERESTS—NATURAL PARENTS—PRESUMPTIONS.

In a custody dispute between a natural parent and a third party, a presumption exists that a child's best interests lie with his natural parent's exercise of custodial rights, absent a showing of the natural parent's unfitness or his neglect or abandonment of the child.

4. PARENT AND CHILD—ADOPTION—CHILD CUSTODY—BEST INTERESTS—PUTATIVE FATHER'S RIGHTS.

Granting custody to the 16-year-old putative father of an illegitimate child was proper even though the mother had released the child for adoption to a child placement agency where the agency failed to rebut the presumption that the child's best interests lay with her father, the actions of the father and his parents, who would aid in rearing the child, indicated their sincere affection for the child, and the child had not yet been adopted or placed in a familial relationship with adoptive parents.

Appeal from Macomb, Edward J. Gallagher, J. Submitted Division 2 October 13, 1971, at Detroit. (Docket No. 11490.) Decided October 21, 1971.

Petition by the guardian of Robert P., a minor and legally-acknowledged father of an illegitimate child, for order to show cause why Catholic Social Services for Macomb County should not release custody of the child to him. Judgment of custody for father. Catholic Social Services appeals. Affirmed.

Butler & Martin, for petitioner.

Neale, Steeh & Hader, for Catholic Social Services of Macomb County.

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

R. B. BURNS, J. This dispute concerns the custody of a 9-1/2-month-old child born out of wedlock.

Approximately one month after the child's birth the 16-year-old mother released the child for adoption to a nonprofit child placement agency.[1] Under Michigan law, the mother's release of the child to the agency permanently terminated her rights to the child.[2] *Gonzales* v. *Toma* (1951), 330 Mich 35; *In re Mark T.* (1967), 8 Mich App 122.

Exactly ten days subsequent to the mother's release of the child, the 16-year-old putative father acknowledged paternity in probate court. Shortly after this acknowledgment the father filed an order to show cause in circuit court why the child placement agency should not release custody of the child. After several hearings the circuit court awarded custody to the natural father and placed the child in a foster home pending this appeal.

In opposing the circuit court's decision the child placement agency argues that the mother's release terminated the rights of the natural father. This contention cannot be accepted without bringing into question serious constitutional problems concerning due process and equal protection. See *In re Mark T., supra,* p 144.

The constitutional problems need not be considered, however, since the agency's argument is unsupported by statute or case law. The statute in question[3] does not purport to terminate a putative father's natural rights to his child. In fact this Court in *In re Mark T., supra,* specifically refuted such a contention (p 142):

"The appellants [child placement agencies] assume that, since the mother's consent alone is required to authorize adoption of an illegitimate child,

[1] The Catholic Social Services of Macomb County, a Michigan nonprofit corporation.

[2] MCLA § 710.3 (Stat Ann 1962 Rev § 27.3178[543]).

[3] Fn 2, *supra.*

by her act alone a dispute concerning the custody of her child is finally resolved. We cannot agree."

If the child placement agency wants a hard and fast rule as to when a putative father relinquishes natural rights to his child it must wait for legislative fiat. Pending such a legislative command we must make decisions in situations such as this on a case to case basis.

In the present case, the putative father acted with expedition. Only ten days had elapsed from the time the mother signed the release until he filed his acknowledgment of paternity.[4] Less than two weeks after he acknowledged the child as his own, he, *via* his guardian, filed this custody action. Only six weeks had passed from the date of the child's birth to the date this custody action was initiated. The father's diligent efforts to secure custody in this case indicates his sincere desire to assert his rights of fatherhood. The current trend of legal thinking focuses on the proposition that since a putative father has statutory duties towards his child born out of wedlock then he should also, assuming he is a fit and proper person, have corresponding rights of custody.[5] This logic has merit, but even more convincing to this Court is the intangible concept of a father's natural love and affection for his child. Such a concept entails rights of the highest order, rights which should not be subject to easy elimina-

[4] The father's argument that his rapid acknowledgment pursuant to MCLA § 702.83 (Stat Ann 1971 Cum Supp § 27.3178[153]), which makes a child legitimate from birth, mandates his consent for release pursuant to MCLA § 710.3, *supra*, fn 2, cannot be accepted. Permitting a putative father to invalidate an otherwise valid release by the unwed mother by simply acknowledging paternity, months or perhaps years after the release would have a pernicious effect upon the stability of the adoption laws.

[5] See, *e.g.*, *State in Interest of M* (1970), 25 Utah 2d 101 (476 P 2d 1013).

tion by actions of a third party. It is apparent by the actions of the father in this case that he has diligently attempted to assert and thus preserve his rights.

The more important question, however, has not yet been answered, *i.e.*, given the natural rights of the father is it in the best interests of the child to award custody to the father? The welfare of the child is of paramount concern in custody cases and the superior rights of a parent are enforced only when they accord with the best interests of the child. *In re Ernst* (1964), 373 Mich 337; *Tarr* v. *Pollock* (1970), 25 Mich App 437. The natural parent is favored by a legal presumption:

"In deciding a dispute between a natural parent and a third party it is presumed that the child's best interests lie with his natural parents' exercise of custodial rights absent the showing of the natural parents' unfitness or their neglect or abandonment of the child and the trial court may not indulge in a comparison of the parental home with the proposed alternative."[6] *Rincon* v. *Rincon* (1970), 29 Mich App 150, 152, 153. See also, *In re Mark T., supra.*

The child placement agency has not rebutted this presumption. The agency's concern over the lack of a viable familial relationship between the father and child is understandable, but the father has not had time to establish such a relationship. If a familial relationship had been established between the child and some adoptive parents we would have a sub-

[6] The "Child Custody Act of 1970" (PA 1970, No 91, MCLA § 722.21, *et seq.* [Stat Ann 1971 Cum Supp § 25.312(1), *et seq.*]) became effective shortly after the trial court's award. This excellent piece of legislation sets out guidelines for the trial court in its determination of the "best interests" question and continues the presumption in favor of the natural parent *vis-a-vis* the placement agency.

stantially different question. But such is not the case before us.

Apparently the child will be reared by the father's parents as well as by the father. The actions of the father and his parents indicate their sincere affection for the child.

The trial court found that the child's best interest would be served by granting custody to the natural father. The Child Custody Act (see footnote 6) provides:

"To expedite * * * a child custody dispute * * * the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue."

Affirmed. Costs to plaintiff.

All concurred.

PEOPLE *v.* BOWMAN

1. CRIMINAL LAW—MISTRIAL—DEFENDANT'S CONSENT.

A defendant in a criminal case who consents to the declaration of a mistrial may not later complain that the grounds for declaring the mistrial were false or inadequate.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5, 6] 21 Am Jur 2d, Criminal Law §§ 180, 195.
[3] 58 Am Jur 2d, New Trial § 228.
[4] 21 Am Jur 2d, Criminal Law § 300.

2. CRIMINAL LAW—MISTRIAL—DOUBLE JEOPARDY—WAIVER.

Denial of defendant's motion for a mistrial, made in chambers at a conference he had requested, did not operate as a discharge of his waiver of a claim of double jeopardy where a few minutes later the trial court, after further in-chambers conference with the prosecutor and defense counsel, granted the mistrial without any objection by counsel or any indication that defendant wished to withdraw his motion for mistrial.

3. CRIMINAL LAW—MISTRIAL—LAW OF THE CASE.

A declaration of a mistrial leaves the parties in the same status as if no trial had ever begun; court rulings at the first trial may not in any way affect the rulings in a second trial.

4. CRIMINAL LAW—TRIAL—DEFENDANT'S PRESENCE.

A defendant's right to be present at his trial extends to all conferences or occurrences at the trial wherein or whereby his substantial rights may be affected, but this right may be waived by the defendant.

5. CRIMINAL LAW—TRIAL—CONFERENCES—DEFENDANT'S PRESENCE—WAIVER.

Defendant, by remaining seated in the courtroom while counsel conferred with the trial judge, and on one occasion also with a juror, in off-the-record conferences which occurred at the bench only a few feet away from defendant voluntarily waived his right to be present during these conferences.

6. CRIMINAL LAW—TRIAL—CONFERENCES—DEFENDANT'S PRESENCE—WAIVER.

A conference between court, counsel, and a juror, which clearly concerned a matter of defendant's substantive right to an impartial jury trial, and which was held in defendant's absence, did not violate defendant's right to be present where his attorney was present and had an opportunity to object but did not; therefore, defendant's absence at this conference must be attributed to the exercise of his own will.

Appeal from Wexford, William R. Peterson, J. Submitted Division 3 October 6, 1971, at Marquette. (Docket No. 8088.) Decided October 26, 1971. Leave to appeal denied, 386 Mich 783.

Daryl Bowman was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Stewart H. Freeman,* Assistant Solicitor General, and *Leo Maki,* Assistant Attorney General, for the people.

Patrick J. Wilson, for defendant.

Before: FITZGERALD, P. J., and BRONSON and T. M. BURNS, JJ.

FITZGERALD, P. J. Defendant was tried before a jury from July 28 to July 30, 1969, in the Circuit Court for the County of Wexford on a charge of first-degree murder.[1] The victim was Ronald Cronk, 19, a Ferris State College student, who had left Big Rapids to hitchhike home for the Thanksgiving recess. Death was caused by multiple wounds to the head, neck and chest.

Defendant was found guilty as charged and sentenced to life imprisonment on August 15, 1970. He appeals as of right, raising significant issues.

I

The trial which led to defendant's conviction was his second trial on this charge, an earlier attempted trial on April 17 and 18, 1969, ending in a mistrial. Defendant claims that upon the termination of the first trial he should have been discharged since any subsequent trial would constitute double jeopardy, prohibited by the Fifth Amendment of the United States Constitution and by our own Constitution of 1963, Art 1, § 15.

Primarily, defendant bases his claim on the premise that once his motion for a mistrial was denied, it could no longer be interpreted as his consent to a

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

mistrial, and as no manifest necessity for a mistrial existed when it was ultimately declared, former jeopardy had attached to the defendant, was not waived, and precluded any second trial. Defendant did raise this objection below prior to the second trial and the trial court ruled against this claim. The question now comes to this Court.

Records available to us on appeal reveal that the prosecutor was prepared to present the people's case at the first trial, although he apparently was both inexperienced and suffering the effects of a bad cold. Whatever the reason, his opening statement was less than auspicious, emphasized by the fact that the trial judge twice encouraged the prosecutor to amend his statements. The attempted additional statements produced no improvement in the situation. Defendant objected that the prosecutor failed to establish in his statements all of the requisite elements to prove the crime charged, and later also objected to the court's interference with the conduct of the prosecutor's argument. After this bad start, the first day's proceedings continued with testimony from the prosecution's first witness.

On the following day, the court and counsel met in chambers where the defense renewed its earlier objections and moved for a mistrial. The motion was denied. A few minutes later, while still in chambers, the following occurred:

(*At this point a discussion was held off the record at the request of the prosecutor.*)

"*The Court:* Well, if you want to concur, on that basis I'll grant the mistrial."

(*After some further discussion court and counsel returned to the courtroom.*)

The court then discharged the jury as follows:

"Ladies and gentlemen of the jury, the court has been hearing a motion for the past half hour.

"Counsel for the defense has made a motion for a mistrial and the prosecuting attorney has concurred that some of the procedure questions may have been such as to perhaps have prejudiced the prosecution of the case, and he concurred in the defendant's request for a mistrial; and I'm accordingly declaring a mistrial, discharging you, and the matter will be rescheduled for trial at another date."

We note that these occurrences were not objected to by the defendant and he did not at any time indicate a desire to withdraw his motion for a mistrial.

There is nothing in the record of this first trial to indicate a *manifest* necessity for a mistrial which would then justify such action by the court, even in absence of the defendant's consent. *People* v. *Anglin* (1967), 6 Mich App 666. The objections raised by defendant and upon which his motion for a mistrial was based were substantially without merit. However, where a mistrial is declared with the defendant's consent, he may not later complain that the grounds for declaring the mistrial were false or inadequate. *People* v. *Fochtman* (1924), 226 Mich 53; *People* v. *Henley* (1970), 26 Mich App 15; *Gori* v. *United States* (1961), 367 US 364 (81 S Ct 1523, 6 L Ed 2d 901).

Consequently, we are faced with the question as to whether or not the defendant manifested his consent to the mistrial. Of course such consent which would in fact waive a fundamental constitutional right must be clear and unequivocal. *People* v. *Iaconis* (1971), 29 Mich App 443; *People* v. *Carlton Brown* (1970), 23 Mich App 528. The fact that the defendant was the party who initially moved for a mistrial certainly seems to indicate a clear and unequivocal consent to waiving his claim of double

jeopardy. But since his original motion was denied, the defendant now claims that the denial operates as a discharge of this waiver; and when the motion was finally granted, this was at the request of the prosecutor so that the defendant's consent can no longer be implied.

Michigan courts apparently have not had an opportunity to decide what effect a denial has upon a motion for a mistrial and whether such denial forecloses defendant's consent to a mistrial when ultimately granted. *Fochtman, supra,* does, however, quote approvingly from a Georgia case wherein an analogous situation was presented. In *Brown* v. *State* (1900), 109 Ga 570 (34 SE 1031), defendant's demurrer to the affidavit and accusation was initially denied and the defendant ordered to trial. After the state had introduced one witness, the court reconsidered the demurrer, reversed its former ruling and quashed the accusation, all without defendant's objection. Defendant's double jeopardy claim, raised at a second trial for the same offense, failed. His conviction at the second trial was affirmed on the holding that since the defendant made the initial motion and remained silent when it was finally granted, he could not "question the propriety of a ruling which he himself invoked". See, also, *Selman* v. *State* (Alaska, 1965), 406 P2d 181; *Blocher* v. *State* (1912), 177 Ind 356 (98 NE 118); *Cambron* v. *State* (1922), 191 Ind 431 (133 NE 498); *Matter of Kamen* v. *Gray* (1950), 169 Kan 664 (220 P2d 160); *State* v. *Wolak* (1960), 33 NJ 399 (165 A2d 174); *People* v. *Montlake* (1918), 184 App Div 578 (172 NYS 102).

We are not unmindful that there are cases reaching contrary results upon similar fact situations. *Cody* v. *State* (1963), 237 Ark 15 (371 SW2d 143);

Cardenas v. *Superior Court of Los Angeles County* (1961), 56 Cal 2d 273 (363 P2d 889, 14 Cal Rptr 657); *State, ex rel. Manning,* v. *Himes* (1943), 153 Fla 711 (15 So 2d 613); *State* v. *Grayson* (Fla, 1956), 90 So 2d 710; *State* v. *Stiff* (1924), 117 Kan 243, *reh* 118 Kan 208 (234 P 700); *Sussman* v. *District Court of Oklahoma County* (Okl Cr, 1969), 455 P2d 724; *People* v. *McGrath* (1911), 202 NY 445 (96 NE 92); *Matter of Gershon* v. *Sardonia* (1966), 50 Misc 2d 423 (270 NYS2d 729). Some of these cases, however, are distinguishable by the added consideration that the defendant objected to the mistrial or attempted to withdraw his motion. In others, the motion was granted only to benefit the prosecutor, or as a result of the prosecutor's misconduct.

We do not doubt that in this case the prosecutor, with his poor health and his less than laudatory beginning, was happy to concur with the defendant's motion, but we cannot infer from this that the motion became his or was only for his benefit. If the defendant wished to proceed, he could have objected or he could have withdrawn his motion.

The prosecutor was quite prepared, our record shows, to continue, had the defense so desired. From what the trial judge told the jury, we may conclude that in his mind it was the defense motion that was being considered, that it was because of the defense motion that a mistrial was granted. The in-chambers conference was precipitated by the defendant in order to consider his motion for a mistrial. When it was over, the mistrial was granted. All these factors indicate to this Court that the first trial was ended with the defendant's consent.

At this point, we are constrained to report, an assistant attorney general was assigned by the state to conduct the second trial. The necessity for this ac-

tion may shed some light on the sagacity of the proposal for full-time prosecutors on a judicial circuit basis in the state's less densely populated areas.

We acknowledge the merit in the defendant's fear that by holding that a denial has no effect, any motion made by a defendant might be granted to his detriment at some later stage of the proceedings when his fortunes have changed. This, if allowed, would certainly dampen the efforts of the defendant's counsel to protect his client, making him fearful that any motion for a mistrial, though denied, may return to haunt him when the court decides to reverse its decision (perhaps because a prosecutor's case has not gone as well as it might have), and force the defendant into a second trial on a theory that the court was only finally doing what the defendant asked him to do.

We do not have that situation here. The position of the parties had not substantially changed between the denial of the motion and its allowance just a few moments later. Reality dictates that trial judges often must make rapid decisions and should be allowed an opportunity to change their minds, so long as the parties are not prejudiced thereby. Here, the trial judge did change his mind, and granted, without hearing a protest, defendant's motion. Defendant cannot now raise the issue of double jeopardy.

II.

Defendant suggests that since the prosecutor was limited by the court to the theory of felony murder at the first trial, that he was likewise limited to this theory at the second trial. When a mistrial has been declared, it is as though there has been no trial, the parties are left in the same status as if no trial had

ever begun. *People* v. *Dimitru* (1923), 224 Mich 670; *People* v. *Grimmett* (1970), 27 Mich App 509. Consequently, whatever rulings were made by the court at the first trial may not in any way affect the rulings in the second.

III.

Defendant also alleges that conferences between counsel and court and on one occasion between counsel, court and a member of the jury, during the second trial and out of the presence of the defendant, violated his right to be personally present during the trial,[2] his rights to an impartial jury, and his right to confront the witnesses against him. US Const, Am 6, Const 1963, art 1, § 20.

Generally, defendant's right to be present at his trial extends to all conferences or occurrences at the trial wherein or whereby his substantial rights may be affected. *Hopt* v. *Utah* (1884), 110 US 574 (4 S Ct 202, 28 L Ed 262). Nothing in the nature of evidence should be taken in the absence of the accused. *People* v. *Medcoff* (1955), 344 Mich 108. However, this is a right which may be waived, *People* v. *Gant* (1961), 363 Mich 407, and in some circumstances the error of proceeding without the defendant's presence may be harmless error. *United States* v. *Schor* (CA2, 1969), 418 F2d 26; *People* v. *Kregger* (1953), 335 Mich 457. Often courts distinguish defendant's right to be present when substantive matters are discussed from defendant's discretionary presence when matters of procedure of law are discussed. See 21 Am Jur 2d 318, Criminal Law, § 289; 23 CJS 897, Criminal Law, § 974.

Unfortunately, four of the conferences complained of were off the record so we cannot tell what was

[2] MCLA § 768.3 (Stat Ann 1954 Rev § 28.1026).

discussed. If anything "in the nature of evidence" was presented, we cannot see how defendant may have been harmed by these conferences, as, presumably, if the matters were out of the reporter's hearing, they were also out of the hearing of the jury. More than likely, making a logical inference from the context in which these conferences were held, matters of procedure or law were discussed. In any event, since these conferences occurred at the bench just a few feet away from the defendant, we may assume that, by remaining seated in the courtroom, defendant voluntarily waived his right to be present. *People* v. *Reading* (1943), 307 Mich 616; *People* v. *Gant, supra.*

Three in-chamber conferences were reported, and from the reports we can clearly see that, at two of these, matters of law were discussed. Defense counsel at none of these conferences objected to defendant's absence, and it appears again that defendant's absence was voluntary. In any event, two of these three conferences do not merit further discussion. See *People* v. *Townsend* (1970), 24 Mich App 286; *People* v. *Camak* (1967), 5 Mich App 655; *Stein* v. *United States* (CA9, 1962), 313 F2d 518.

However, the third conference clearly concerned a matter involving a substantive right of the accused; his right to an impartial jury trial. The conference was called at the request of a juror, Mr. Lamphere. The entire conference is so short that we set it out in full:

"*The Court:* Mr. Lamphere, I believe you had a question which you wanted to take up with the court and counsel.

"*Mr. Donald Lamphere, Juror:* Yes, your Honor, I was sitting up there in the box watching these people in the audience. There is one lady out there who looks very familiar to me. I wonder if it makes any

difference. I don't know if she is related or not or is the mother of one of the children I had in school. I am a school teacher. Personally, I wouldn't think it would change my mind that much. She looks familiar to me and looks like the mother of a child I had in school. I'm trying to remember the lady's name.

"*The Court:* I don't think we have any problem here, Mr. Lamphere. I'm glad you mentioned it, however. The matter is of no consequence but we had to find out what was on your mind.

"Are you ready to proceed with final arguments, counsel?

"*Mr. Maki* [*Assistant Attorney General*]: We are, your Honor."

The participants then all returned to the courtroom and the trial continued. No objection was raised by the defense attorney to the proceeding. As it turned out, Mr. Lamphere became the foreman of the jury.

People v. *Medcoff, supra,* contains some strong language inveighing against judicial conferences with jurors out of the defendant's presence. Indeed, that case, which, reversed for a new trial, has much in common with this case as, in both, jury members were interrogated by a judge while in the midst of a trial and, of course, out of the defendant's presence, to determine if any bias existed. But there exists one major difference between the *Medcoff* fact situation and the one now presented. In *Medcoff,* the judge conducted his inquest out of everyone's presence, excluding also both the prosecutor and the defense attorney. Thus, much of the heady *dicta* of *Medcoff* is incompatible with this case where defendant's counsel was present, where his opportunity to object came and passed, and where, again, defendant's own absence must be attributed to the exercise of his own will. *People* v. *Sumeracki* (1950), 326

Mich 748; *People* v. *O'Keefe* (1953), 281 App Div 409 (120 NYS2d 349); *Brister* v. *State* (1957), 231 Miss 722 (97 So 2d 654).

The conviction of defendant is therefore affirmed.

All concurred.

WEISBERG *v.* DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE

OPINION OF THE COURT

1. INSURANCE — AUTOMOBILES — EXCLUSIONARY CLAUSE — INTENTIONALLY-CAUSED INJURY TO INSURED.

An exclusion in an automobile insurance policy providing that the policy does not apply "to bodily injury to any named insured or bodily injury or property damage caused intentionally by or at the direction of the insured" is clear and unambiguous; such an exclusionary clause does not violate the public policy of the motor vehicle accident claims act and the insurance code, because both statutes are concerned with the protection of the rights and claims of third parties when a vehicle owner becomes liable to those third parties.

2. INSURANCE — AUTOMOBILES — UNINSURED MOTORIST COVERAGE — OWNER'S CAR — EXCLUSIONARY CLAUSE.

Plaintiff automobile owner who was injured while a passenger in his own car while the car was being driven with his permission was not entitled to uninsured motorist coverage under his insurance policy where the policy expressly provided that uninsured motorist coverage extended only to injuries from an

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REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Automobile Insurance § 7.

[2] 7 Am Jur 2d, Automobile Insurance § 136.

[3–9] 7 Am Jur 2d, Automobile Insurance § 135*et seq.*

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

"uninsured automobile" and an "uninsured automobile" was expressly defined as not to include a vehicle owned by the insured.

3. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—SCOPE OF ACT.

The motor vehicle accident claims act does not create a substitute for personal accident insurance, making injury and damage compensable merely by reason of the happening of an accident, the damage from which is otherwise uncollectible or uncompensable; the motor vehicle accident claims act provides payments to *certain* persons in *certain* cases, not payments to *all* persons in *all* cases from *any* injury not otherwise compensable or collectible (MCLA § 257.1101 *et seq.*).

4. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—UNINSURED MOTOR VEHICLE.

The motor vehicle accident claims act does not authorize recovery from the motor vehicle accident claims fund by an owner of an uninsured motor vehicle for damages he suffered while a passenger in his vehicle while the car was being driven by a person with the owner's consent, because under § 6(5) of the act the Secretary of State is required in every case to suspend the license and registration of such owner until the monies received from the fund are repaid or arrangements therefor are made and it is a logical contradiction that a claimant could first receive payment from the fund and then have his license and registration suspended until he repays the fund (MCLA § 257.1106).

DISSENT BY LEVIN, P. J.

5. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—UNINSURED MOTOR VEHICLE—UNINSURED DRIVER.

A motor vehicle is uninsured for purposes of the motor vehicle accident claims act unless both the owner and any driver using the vehicle with the owner's permission are insured against the liability imposed on them by law arising out of the negligent driving of the vehicle.

6. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—UNINSURED MOTOR VEHICLE.

The term "uninsured motor vehicle", as used in reference to the motor vehicle accident claims act, can be misleading because motor vehicles are not insured for public liability, owners and

drivers purchase insurance to cover their liability, not the vehicle's liability.

7. AUTOMOBILES—MOTOR VEHICLE ACCIDENT CLAIMS ACT—UNINSURED VEHICLE—UNINSURED DRIVER—INSURED OWNER.

A vehicle is uninsured under the motor vehicle accident claims act unless the motor vehicle accident claims fund is protected by insurance from exposure to an injured person arising out of the nonpayment of a judgment obtained against an uninsured driver even though the owner is insured for his responsibility under the civil liability act.

8. AUTOMOBILES — INSURANCE — EXCLUSIONARY CLAUSE — OWNER'S PERSONAL INJURY.

An exclusionary clause in an automobile insurance policy providing that personal injury coverage does not apply to any named insured is invalid.

9. INSURANCE—AUTOMOBILES—UNINSURED DRIVER—EXCLUSIONARY CLAUSE.

All Michigan residents who are injured in this state by an uninsured vehicle, which by statutory definition includes situations where the driver is uninsured, are able to recover from the Motor Vehicle Accident Claims Fund; to give effect to an automobile insurance policy exclusion which makes a driver of the owner policyholder's automobile uninsured for personal injuries caused the owner policyholder would be to enlarge the exposure of the fund and to contradict the legislative purpose that the fund would have no exposure to an insured vehicle (MCLA § 257.1101 et seq.*).*

Appeal from Wayne, Horace W. Gilmore, J. Submitted Division 1 December 8, 1970, at Detroit. (Docket No. 8237.) Decided October 26, 1971.

Complaint by James Michael Weisberg, administrator of the estate of Morrey Weisberg against the Detroit Automobile Inter-Insurance Exchange and the Secretary of State, as Director of the Motor Vehicle Accident Claims Fund, for declaratory judgment that an automobile insurance policy provided coverage and if the policy did not provide coverage, then redress could be had against the fund.

Judgment for defendants. Plaintiff appeals. Affirmed.

Sugar, Schwartz, Silver, Schwartz & Tyler (by *William Gage*), for plaintiff.

Rouse, Selby, Dickinson, Shaw & Pike (by *William H. Morman*), for defendant Detroit Automobile Inter-Insurance Exchange.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, *Joseph B. Bilitzke*, Assistant Attorney General, and *Alan Walt*, Special Assistant Attorney General, for the Secretary of State.

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

O'HARA, J. Morrey Weisberg,[1] in his lifetime, was the owner of an automobile insured with defendant insurance company. He was a passenger in his own automobile which was being permissibly operated by one Bunney LaCourt. She drove it into a utility pole. As a result he sustained injuries.

At the time of the collision, Morrey had a policy of insurance including both public liability and "uninsured motorists" coverage. He filed a claim with the company under both. The company denied both. He also asserted a claim against the Motor Vehicle Accident Claims Fund claiming that if denial of 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] Sometime subsequent to collision, Morrey Weisberg died from an unrelated cause. The administrator of his estate succeeded him as plaintiff. For purposes of clarity, we will refer to the original plaintiff as Morrey. The fact of the substitution of parties is immaterial.

coverage by the Exchange was valid, then he had redress against the fund because Miss LaCourt was, in that event, an uninsured motorist. The claim was rejected by the Secretary of State, as director of the fund. The action on his policy and against the fund were consolidated and formed the basis for his suit for a declaratory judgment. The trial court denied his motion for a summary judgment and entered judgment for the company and the fund, relieving them from liability. He appeals of right.

We consider first his claim under his liability coverage. It was denied by the Exchange because of "Exclusion (a)" which provided that the policy did not apply "to bodily injury to any named insured or bodily injury or property damage caused intentionally by or at the direction of the insured".

He argued that the operation of the quoted Exclusion (a) violated the public policy expressed by the Motor Vehicle Accident Claims Act, MCLA § 257.-1101 *et seq.* (Stat Ann 1968 Rev § 9.2801 *et seq.*) and § 3010 of the Insurance Code, MCLA § 500.3010 (Stat Ann 1971 Cum Supp § 24.13010). Moreover, he argued that the language of the exclusion drafted by the defendant insurance company was ambiguous and should be construed against it.

The language contained in Exclusion (a) is clear and unambiguous. Liability coverage does not, by its terms, extend to injuries to the named insured. Morrey was a named insured. See *Cottrill* v. *Michigan Hospital Service* (1960), 359 Mich 472. The exclusion is inherent in the concept of liability insurance. It contemplates protection of the insured against liability running from the insured to another. See *Detroit Automobile Inter-Insurance Exchange* v. *Bishop* (1970), 24 Mich App 90. The claim of ambiguity and need for construction is without merit.

Nor do we find any merit in plaintiff's claim that this exclusion is contrary to the public policy expressed in the two statutes cited. Both are concerned with the protection of the rights and claims of third parties when the vehicle owner becomes liable to those third parties. The ruling of the trial court that the defendant insurance company is not liable to plaintiff under the liability policy was proper.

Next, plaintiff argues that if he were not protected under the liability insurance clause of the policy, then Miss LaCourt was an uninsured motorist; hence, the provision providing for recovery for injury caused by an uninsured automobile obtained. The company, in its denial of this claim, relied upon the definition found in "Definition (d) (1)", of its uninsured motorists coverage, which provides:

" 'uninsured automobile' means (1) a motor vehicle with respect to the ownership, maintenance or use of which there is, with respect to Part (1), no bodily injury liability insurance policy or bond, or, with respect to Part (2), no property damage liability insurance policy or bond, applicable at the time of the accident with respect to any person or organization legally responsible for the use of such vehicle, and;"

and upon "Definition (e) (1)" which provides:

"an uninsured automobile shall not include (1) a motor vehicle owned by the insured or any resident of the same household."

Courts can rarely expect to find language more clear in its meaning and application. Uninsured motorists coverage extends only to injuries sustained by plaintiff from an "uninsured automobile". An uninsured automobile, for the purpose of the policy,

does not include a motor vehicle owned by the insured. Morrey owned the offending vehicle. Plaintiff, clearly, may not recover under the uninsured motorists coverage of his policy, because of the terms of his contract.

Plaintiff argues that such result is anomalous. Anomalous, or not, the fact that plaintiff is not covered under the liability clause of his policy and, at the same time, may not recover under his uninsured motorists coverage does not empower us to rewrite the contract.

There is available insurance, covering his own car, which plaintiff's decedent elected not to purchase. Parties have the right to contract as to the terms of an insurance policy and so long as the terms do not contravene statutory requirements of public policy, the courts will enforce an insurance contract as it would any other contract. *Burch* v. *Wargo* (1966), 378 Mich 200; *Eghotz* v. *Creech* (1962), 365 Mich 527.

Finally, plaintiff argued that if he is unable to recover from *his* insurance company under either theory, then he should be permitted to recover from the Fund under MCLA § 257.1106 (Stat Ann 1971 Cum Supp § 9.2806), which provides for recovery for personal injury to any person which is occasioned in this state by an uninsured motor vehicle.

The Motor Vehicle Accident Claims Act, MCLA § 257.1102 (d) (Stat Ann 1968 Rev § 9.2802[d], defines uninsured motor vehicles as follows:

"'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."

It is clear, as the trial court found, that the liability insurance policy issued by the defendant insurance company was a liability policy as contemplated by this subsection. Plaintiff's automobile was therefore not an uninsured motor vehicle within the meaning of the Motor Vehicle Accident Claims Act.

It is plaintiff's claim that inasmuch as he is barred from recovery under the terms of the liability policy then it cannot be said that the policy was "in force". There was a liability insurance policy. The policy was in force. This much is undeniable. It was not, however, in force as to this plaintiff. The question therefore becomes, "Does the fact that an exclusion bars this plaintiff's recovery vitiate the policy for the purpose of compliance with the Motor Vehicle Accident Claims Act?"

Logically, the answer must be found in the object of the statute. Constitutionally, its object must be expressed by its title (Const 1963, art 4, § 24). We examine it.

"An Act providing for the establishment * * * of a motor vehicle accident claims fund for the payment of damages * * * to * * * *certain* persons * * * in *certain* cases." (Emphasis supplied.)

This is a far cry from a legislative action creating a fund for the payment of damages to *all* persons in *all* cases resulting from *any* injury not otherwise compensable or collectible. If such were the legislative object, that object could have been very easily legislatively expressed. To reason from the premise that since there is an injured claimant who cannot recover against the offending owner or operator of a motor vehicle the fund must of necessity be liable, is impermissible. To do so, requires us to make an assumption that is not suggested to us in the statute, let alone expressly stated.

We do not read the Motor Vehicle Accident Claims Act as creating a substitute for personal accident insurance, making injury and damage compensable merely by reason of the happening of an accident, the damage from which is otherwise uncollectible or uncompensable.

Plaintiff's able counsel argues with vigor and persuasively that we should reach the contrary conclusion. We think to do so we would have to legislate judicially in violation of the constitutional separation of governmental powers.

If the Legislature had desired to provide access to the fund for any plaintiff who, for any reason, found himself unable to recover from an insurance company, we believe that it could have done so by specific statutory language. The Legislature has limited recovery to a specific class of plaintiffs, clearly defined by statute, and not including the plaintiff herein. Control over membership in the class of parties entitled to recovery being vested in a coordinate branch of government, we are not at liberty to revise and modify these definitions under the guise of "interpretation".

We are urged by the Attorney General to extend our holding to deny recovery to the owner of an uninsured automobile injured while a passenger therein on that ground itself. Because this case is of first impression, because of the importance of the holding in future cases, and because of the possibility of further review by the Supreme Court, we will commit ourselves decisionally.

As noted by the Attorney General in his brief:

"It is important to keep in mind that plaintiff seeks to recover against the fund for personal injuries sustained when a passenger in his *own* automobile, negligently being driven by another with his full knowledge, consent and authorization."

Analysis of § 6 of the act imparts to us that the Legislature never intended to authorize a monetary recovery by an owner of an uninsured motor vehicle for damages caused by *that same vehicle*, since under § 6(5) the secretary is required—in every case—to suspend the license and registration of such owner until the monies received from the fund are repaid or arrangements therefor are made. It is a logical contradiction that a claimant could first receive payment from the fund and then have his license and registration suspended until he repays the fund.

The interpretation which would allow an injured owner-occupant to recover against a fund of the same nature as ours has been passed upon in other jurisdictions.

The courts of our "friendly neighbor to the north" (which, in Detroit, is to the south)[2] have considered the question at least to the extent of property damage.

"The problem is whether recovery can be had from the unsatisfied judgment fund where the property damaged is the very motor vehicle which it is alleged occasioned the damage.

"In my opinion, the meaning to be attached to the word 'property' in the section of the Highway Traffic Act in question is not broad enough to include the motor vehicle which it is alleged occasioned the damage, and therefore the application will be dismissed with costs." *Smith* v. *Padfield* (1950), OWN 371, *aff'd* (1950), OWN 482, 3 DLR 512.

In *Re Donaldson* v. *Arno* (1959), OWN 363, the Ontario High Court of Justice again considered the question of the right of an owner of a vehicle to recover from the Ontario fund for damage to his own vehicle and rejected it.

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[2] A geographical fact difficult of comprehension for one who came originally from the Upper Peninsula.

It is but a short step from this judicial interpretation by the jurisdiction from which we, in large part, adopted our act, to the conclusion that the same reasoning applies in the case of one claiming against our fund for damages resulting from personal injury sustained by him while a passenger in his own vehicle driven by one who has the owner's consent to do so.

We here hold that recovery under these circumstances is repugnant to and inconsistent with the clear legislative intent as expressed in our statute. The owner-passenger may not recover from the fund.

For the reasons herein discussed and stated, the declaratory judgment entered by the trial court is affirmed. No costs, a public question.

ADDENDUM

Since the submission of this case, a decision by another panel of this Court has been released which deals with the same general issue. Our holding here, however, should be carefully distinguished from that case: *Allstate Insurance Company* v. *Motor State Insurance Company* (1971), 33 Mich App 469.

In *Allstate* the insured was the registered coowner of the alleged offending vehicle, but his operator's license had previously been suspended. To register the vehicle, the insured was required to furnish proof of financial responsibility. The policy issued contained this proviso:

"When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law such insurance as is afforded for bodily injury or property damage liability by this policy shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law."

In the instant case the foregoing proviso does not apply.

BRONSON, J., concurred in opinion and addendum.

LEVIN, P. J. (*dissenting*). Morrey Weisberg, claiming that he was injured by the negligence of the driver of an automobile in which he was riding as a passenger, commenced this action for a declaratory judgment concerning the liability for the damages he suffered of the defendant insurer, Detroit Automobile Inter-Insurance Exchange, and of the defendant Secretary of State, as director of the Motor Vehicle Accident Claims Fund.

Weisberg owned the automobile and he was the named insured in an automobile insurance policy issued by the defendant insurer covering the automobile for public liability. The policy not only protects Weisberg as to his liability to other persons arising out of the ownership or use of the automobile, it also provides like protection to any person "using" the automobile with Weisberg's permission. The person driving the automobile when Weisberg was injured was driving it with his permission.

But the policy provides that such liability coverage does not apply to injury to any named insured and that the uninsured motorist coverage of the policy does not apply to a motor vehicle owned by an insured.

The plaintiff, administrator of Weisberg's estate (see footnote 1 of majority opinion), contends that the exclusion in the policy of liability to a named insured is invalid with the result that the insurer is required to respond for the legal obligation of the driver to Weisberg arising out of the driver's negligent driving.

The driver was not otherwise insured. The plaintiff further contends that if the exclusion in the policy is valid, then the automobile was uninsured, with the result that the Motor Vehicle Accident Claims Fund is liable, and the insurer is also liable under the uninsured motorist coverage because the exclusion in respect to that coverage is also invalid.

The insurer denies liability claiming that the exclusions are valid; the fund denies liability on the ground that the vehicle was insured.

I.

If the challenged public liability exclusion is valid, then the driver who was driving Weisberg's automobile was not insured, under the policy issued in respect to that automobile, for the liability imposed on her by law for personal injury caused Weisberg.

The Motor Vehicle Accident Claims Act[1] provides that an "uninsured motor vehicle" is "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". The motor vehicle responsibility law provides that an owner's policy of liability insurance "shall insure the person named therein *and any other person,* as insured, *using* any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles".[2] (Emphasis supplied.)

Under that definition a vehicle is uninsured for the purpose of the accident claims act unless *both* the owner and any driver using it with the owner's per-

[1] MCLA § 257.1102(d) (Stat Ann 1968 Rev § 9.2802[d]).
[2] MCLA § 257.520(b) (Stat Ann 1968 Rev § 9.2220[b]).

mission are insured against the liability imposed on them by law arising out of negligent driving of the vehicle. The statute does not say that the insurer is authorized to except from the required coverage protection of a driver against the legal liability imposed on him by law on account of personal injuries he causes the owner by his negligent driving.

Since the policy issued to Weisberg did not, by reason of the challenged exclusion, insure drivers of his automobile against loss from the liability imposed on them by law for personal injury caused Weisberg arising out of the negligent use of his automobile, the policy issued to Weisberg did not in terms provide the coverage required by the financial responsibility law.

It follows that if the policy exclusion for personal injury caused the owner is valid, Weisberg's vehicle was, under the definition in the accident claims act, adopting the requirements of the financial responsibility law, an uninsured vehicle.

II.

The shorthand term "uninsured motor vehicle" can be misleading. To begin with, motor vehicles are not insured for public liability. Owners and drivers of motor vehicles purchase insurance to cover their liability, not the vehicle's liability. Actions to recover for personal injury arising out of the ownership or use of a motor vehicle are brought against the owner or driver or both, not *in rem* against the vehicle. More importantly, the accident claims act's definition of an uninsured motor vehicle controls; that definition explicitly provides that a vehicle is uninsured unless the accident claims fund is protected by insurance from exposure to an injured person arising out of the nonpayment of a

judgment obtained against an uninsured driver even though the owner is insured for his responsibility under the civil liability act.[3]

Without a requirement that the insurance cover the driver as well as the owner, in any case where the insurance covers only the owner and the damages assessed against the owner and the driver exceed the amount recoverable from the owner, the injured person could proceed against the fund if the driver did not pay the excess. By requiring that the owner's insurance cover the driver as well as the owner the Legislature sought to reduce claims against the accident claims fund arising out of unpaid claims against drivers. *Cf. Woods* v. *Progressive Mutual Insurance Company* (1968), 15 Mich App 335; *Collins* v. *Motorists Mutual Insurance Company* (1971), 36 Mich App 424, LEVIN, P. J., concurring.

The reasoning and holding of our Court in *Bennett* v. *Pitts* (1971), 31 Mich App 530, 534, establishes that whether an automobile is an insured motor vehicle or an uninsured motor vehicle does not depend solely on whether an insurance policy has or has not been written covering the vehicle as a named or specifically identifiable vehicle. In that case we ruled that an automobile is an *insured* vehicle even though the owner of the automobile does not have insurance where the driver has insurance covering him while driving the automobile. We said that the accident claims fund was not subject to liability in that case because the fund is only liable "when there is no liability insurance policy in force *with respect to* that vehicle. [The driver's] insurance policy was in force 'with respect to that vehicle'. *Ergo,* it was not uninsured. *Ergo,* the fund cannot be liable." (Emphasis by the Court.) The converse of that

[3] MCLA § 257.401 (Stat Ann 1968 Rev § 9.2101).

syllogism is also correct: There was no insurance "in force" covering the legal liability of a driver of Weisberg's automobile for personal injury caused Weisberg. *Ergo,* the vehicle was not insured. *Ergo,* the fund would be liable.

III.

Weisberg's vehicle was licensed as an insured vehicle without payment of the uninsured motor vehicle fee on the insurer's certification that the policy "complied" with the requirements of the accident claims act.

Recently in *Allstate Insurance Company* v. *Motor State Insurance Company* (1971), 33 Mich App 469, a panel of our Court held invalid an exception to the public liability coverage in an automobile liability policy for accidents caused while the vehicle is being operated by an "excluded driver".

We said in *Allstate* that, while the exclusion would have been valid before the enactment of the accident claims act, it was clear from the provisions of that act that "the Legislature intended that *no* automobile should be registered in this state unless certain requirements have been met. To obtain registration for an automobile one must *either* have a policy of liability insurance *or* pay the uninsured motor vehicle fee." (Emphasis supplied.) We further said that an exclusionary clause not authorized by the accident claims act was violative of the public policy expressed by the Legislature in that act.[4]

[4] "The public policy as delineated by the Legislature requires that the liability policy must be written in conformity with the statutory requirements. The statute does not provide for the type of exclusionary clauses as were contained in the instant policy. Thus, the exclusionary clauses are contrary to the public policy of this State and are therefore invalid and of no effect." *Allstate Insurance*

Similarly, the exclusionary clause in the liability policy now before us is invalid. Here, as in *Allstate,*

(1) the owner of the vehicle did not pay the uninsured motor vehicle fee; he had purchased a policy of liability insurance,

(2) the insurance company certified that the policy he had purchased complied with the requirements of the accident claims act; on the basis of that certification the state licensed the vehicle without payment of the uninsured motor vehicle fee, and

(3) the policy issued contained an exclusion not authorized by the statute.

One of the exclusions expressly permitted by the financial responsibility law is of "liability for damage to property owned by, rented to, in charge of, or transported by the *insured*".[5] (Emphasis supplied.) This express authorization of an exclusion for damage to the insured's property and the failure to authorize an exclusion for personal injury caused an insured further supports the view that no distinction may properly be drawn in the required personal injury insurance coverage based on whether the insured or someone else is injured or on whether the injury was caused by a driver using one vehicle or another.

To distinguish the exclusion before us from the exclusion in the *Allstate* case on the ground that the exclusion in the present case precludes the owner of the vehicle—the purchaser of the policy—rather than a third party does not comport with the legislative purpose of protecting persons injured by uninsured vehicles. An owner suffers just the some as a third party when injured. As a practical matter, an

Company v. *Motor State Insurance Co.* (1971), 33 Mich App 469, 473, 474.

[5] MCLA § 257.520(e) (Stat Ann 1968 Rev § 9.2220[e]).

owner is as likely to need such protection as a third party; in this very case the uninsured motorist protection which Weisberg purchased, like the liability coverage, does not in terms provide coverage in this situation.

The legislation which we construe is designed to protect the citizens of this state without regard to whether they might through the exercise of diligence and expenditure of funds otherwise protect themselves. The Legislature apparently concluded that the social problem of uncollected judgments against uninsured motorists requires such a paternalistic policy. There is no sound reason for supposing that the Legislature concluded that this comprehensive public policy should stop short of protecting an owner who is injured by a driver of the owner's vehicle.

I am satisfied that the Legislature intended that *all* Michigan residents, except those entitled to workmen's compensation benefits (§ 29 of the act),[6] who are injured in this state by an uninsured vehicle—which under the statutory definition includes situations where the driver is uninsured—would be able to recover from the accident claims fund.[7] To

[6] See MCLA § 257.1129 (Stat Ann 1968 Rev § 9.2829).

[7] My colleagues argue that the Secretary would have had the right under the accident claims act to recover back from Weisberg any amount paid to him by the fund and, therefore, he had no right of recovery against the fund. They refer to MCLA § 257.1106(5) (Stat Ann 1968 Rev § 9.2806[5]) which requires the Secretary of State to suspend the registration and operator's license "of the persons to whom the notice was forwarded under this section" until the fund is reimbursed, or the commencement of installment repayments in accordance with an agreement with the Secretary or proof of financial responsibility is filed. Under subparagraph (1) of that section any person who has a cause of action "against the owner *or* driver of the uninsured motor vehicle" (emphasis supplied) may make claim against the fund and under subparagraph (2) of that section notice of the claim is required to be forwarded to "the owner and driver of the uninsured motor vehicle against whom liability for damages is alleged". Clearly Weisberg, as owner of the vehicle, did not have any liability under the civil liability act

give effect to this insurance policy exclusion, which makes a driver of Weisberg's automobile uninsured for personal injuries caused Weisberg, would be to enlarge the exposure of the accident claims fund. I would, therefore, hold that this insurance policy exclusion is inconsistent with the breadth of the coverage provided in the accident claims act and the legislative expectation that the fund should have no exposure in respect to an insured vehicle.[8]

It is manifestly the intention of the Legislature, as our Court concluded in *Allstate,* to bar insurance companies from representing that automobile policies which they write comply with the requirements of the accident claims act—so that vehicles can be licensed as insured vehicles without payment of the $45 uninsured motor vehicle fee—and later claiming, when liability is asserted under a policy, that the vehicle is not insured by reason of an exclusion.

Now that our Court has declared § 29 of the act unconstitutional (*Bowser* v. *Jacobs* [1971], 36 Mich App 320), and, therefore, even those persons entitled to workmen's compensation benefits can recover from the accident claims fund, the result reached in this case leaves matters in this posture: all resi-

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to Weisberg, the person injured by the negligent driving of the driver—Weisberg could not have sued Weisberg. Thus, Weisberg was not an "owner * * * *against* whom liability for damages is alleged". (Emphasis supplied.) Accordingly, no notice could have been sent to him under subparagraph (2) and he would not have had any obligation of reimbursement under subparagraph (5).

Similarly, MCLA § 257.1110 (Stat Ann 1968 Rev § 9.2810) provides for the suspension of the license or registration of "the judgment debtor on whose behalf the payment [by the fund] is made". Clearly Weisberg could not be a judgment debtor in an action commenced by him against the driver. The provisions of MCLA § 257.1120 (Stat Ann 1968 Rev § 9.2820) concern actions against the Secretary directly where the identity of the uninsured driver is unknown (MCLA § 257.1113 *et seq.* [Stat Ann 1968 Rev § 9.2813 *et seq.*]); that is not this case.

[8] *Cf. Woods* v. *Progressive Mutual Insurance Company* (1968), 15 Mich App 335; *Collins* v. *Motorists Mutual Insurance Company* (1971), 36 Mich App 424, LEVIN, P. J., concurring.

dents of Michigan injured in this state by uninsured vehicles excepting only an owner of a vehicle who is injured by the negligent driving of the driver of his own vehicle may recover up to $10,000 either under a liability policy insuring against the negligence of the driver, or, if there is no insurance, from the accident claims fund. This narrow preclusion of an owner injured under those circumstances is not required by the language of the act; it is opposed to the language and the policy of the act and common sense.

I would hold that the exclusion in the liability portion of the policy is invalid to the extent of the statutorily-required policy limits, $10,000/$20,000/$5,000, and that the vehicle is, therefore, an insured vehicle with the consequences that the insurer has no liability under the uninsured motorist portion of the policy and that the accident claims fund has no liability to the plaintiff.

DALE *v.* WHITEMAN

AUTOMOBILES—NEGLIGENCE—OWNER LIABILITY STATUTE—INDEMNIFICATION—INDEPENDENT DUTY.

Plaintiff, an employee at a car wash, who was injured by defendant's car while it was being driven by another car wash employee may bring suit for damages against the owner of the car under the owner liability statute even though the car wash owner was paying workmen's compensation and the defendant may seek indemnification from the car wash owner because the owner breached the independent duty he owed defendant to operate the vehicle through the car wash without negligence (MCLA § 257.401).

Appeal from Genesee, Elza H. Papp, J. Submitted Division 2 September 5, 1971, at Lansing. (Docket Nos. 8570, 8571.) Decided October 26, 1971. Leave to appeal granted, 386 Mich 791.

Complaint by Robert A. Dale against Ernest Whiteman under the owner's liability statute for damages for injuries caused by another employee's negligence. Third-party complaint by Whiteman against Carl Goldfarb for indemnification. Counterclaim by Goldfarb against Whiteman for reimbursement for workmen's compensation benefits he had paid plaintiff. Summary judgment granted plaintiff on the issue of Whiteman's liability; summary judgment granting indemnification for Whiteman against Goldfarb. Judgment on a jury award for plaintiff

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REFERENCES FOR POINTS IN HEADNOTE

58 Am Jur, Workmen's Compensation § 55.

8 Am Jur 2d, Automobiles and Highway Traffic § 595 *et seq.*

against Whiteman; judgment on a jury verdict granting Whiteman indemnification for the same amount as the judgment for plaintiff against Whiteman; and judgment on a verdict of no cause of action against Goldfarb on his counterclaim against Whiteman. Defendant Whiteman and third-party defendant Goldfarb appeal. Affirmed in part and remanded.

Brownell, Gault & Andrews (by *Douglas M. Philpott*), for plaintiff.

Gault, Davison & Bowers, for defendant and third-party plaintiff Whiteman.

E. R. Whinham, Jr., for third-party defendant Goldfarb.

Before: QUINN, P. J., and DANHOF and TARGONSKI,* JJ.

QUINN, P. J. December 4, 1967, Whiteman took his automobile to a car wash owned by Goldfarb and turned it over to an attendant for washing. Whiteman had used this car wash before. The vehicle was pulled through the automatic car wash line by a chain; it was then driven to the drying area by Fox, an employee of Goldfarb. Plaintiff, an employee of Goldfarb, was drying another automobile. Fox drove Whiteman's car into plaintiff causing severe injuries.

Plaintiff filed his complaint against Whiteman under the owner's liability statute, MCLA § 257.401 (Stat Ann 1968 Rev § 9.2101). Whiteman filed a third-party complaint against Goldfarb claiming indemnification and Goldfarb filed a cross-complaint

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

seeking reimbursement for workmen's compensation benefits he had paid plaintiff.

Plaintiff moved for summary judgment (GCR 1963, 117.2) on the issue of Whiteman's liability. Whiteman moved for summary judgment of indemnification against Goldfarb and for summary judgment of no cause for action against plaintiff. Goldfarb moved for summary judgment of no cause for action as to Whiteman and summary judgment for reimbursement for workmen's compensation benefits paid plaintiff.

On the basis of the pleadings, depositions, undisputed facts, and the briefs of the parties, the trial court granted plaintiff's motion and Whiteman's motion for indemnification. All other motions were denied. A jury awarded plaintiff $100,000 damages against Whiteman; granted Whiteman $100,000 indemnification against Goldfarb, and gave a verdict of no cause for action against Goldfarb on his cross-claim against Whiteman. Judgments entered accordingly, and Whiteman and Goldfarb appeal.

At trial and here, Whiteman contends that the statute relied on by plaintiff is not applicable to the factual situation of this case. We find *Frazier* v. *Rumisek* (1960), 358 Mich 455, and *Ladner* v. *Vander Band* (1965), 376 Mich 321, *contra* and controlling.

We do not discuss Goldfarb's contention that a fact question existed as to liability because facts found in the depositions would support a finding of plaintiff's contributory negligence. Contributory negligence of plaintiff was not pleaded affirmatively, GCR 1963, 111.7.

A further issue raised by Goldfarb is that by MCLA § 411.4 (Stat Ann 1968 Rev § 17.144), plaintiff's exclusive remedy against Goldfarb is under the workmen's compensation act, and the effect of allow-

ing Whiteman indemnification is to transfer tort liability to an employer contrary to § 411.4. In *White* v. *McLouth Steel Corp.* (1969), 18 Mich App 688, this Court disposed of this question contrary to Goldfarb's position. (See also Larson Workmen's Compensation Law, § 76.00 *et seq.*, commencing at page 227.)

The applicable rule is fairly stated in the *Diamond State Telephone Company* v. *University of Delaware,* — Del —, 269 A2d 52, 56, 57 (1970):

"The right to maintain an action of this type by a third party against a negligent employer who has been paying workmen's compensation to his injured employee or his widow, is recognized in 2A Larson, Workmen's Compensation Law § 76.00 (1970). In this section it is pointed out that an employer may be held liable for indemnity if he has breached an independent duty owed a third party, or if in the circumstances there is a basis for finding an implied promise of indemnity. If such is the fact, then the exclusive remedy provision in the workmen's compensation law has no application and will not bar suit by the third party against the employer."

In the case before us, Goldfarb breached the independent duty he owed to Whiteman to operate the latter's vehicle through the car wash without negligence.

MCLA § 413.15 (Stat Ann 1968 Rev § 17.189) permits Goldfarb to have reimbursement for workmen's compensation benefits paid to plaintiff. Plaintiff's judgment against Whiteman shall be reduced by the amount of such benefits and Whiteman's judgment of indemnification against Goldfarb is similarly reduced.

Remanded for entry of judgments consistent with this opinion, otherwise affirmed. Costs to plaintiff

against Whiteman. Costs to Whiteman against Goldfarb.

All concurred.

BURRELL *v.* ANNAPOLIS HOSPITAL
KEY *v.* ROMULUS TOWNSHIP SCHOOLS

OPINION OF THE COURT

1. CIVIL RIGHTS—APPEAL AND ERROR—FINAL ORDERS—TRIAL DE NOVO.

   Appeals from final orders of the Civil Rights Commission shall be tried *de novo* in the circuit court (Const 1963, art 5, § 29).

2. CIVIL RIGHTS—APPEAL AND ERROR—FINAL ORDERS—JURY TRIAL.

   A jury trial is not available under any circumstances in cases where final orders of the Civil Rights Commission are appealed to circuit court.

3. CIVIL RIGHTS—APPEAL AND ERROR—TRIAL DE NOVO.

   The term "tried *de novo*" as applied to appeals to circuit court from final orders of the Civil Rights Commission means a full new evidentiary hearing before the circuit judge; however, the parties can, if they so choose and properly stipulate, agree to submission of the record made and transcribed before the Commission for a complete and independent reassessment by the circuit judge (Const 1963, art 5, § 29).

DISSENT IN PART AND CONCURRENCE IN PART BY V. J. BRENNAN, J.

4. CIVIL RIGHTS—APPEAL AND ERROR—CONSTITUTIONAL LAW.

   The provision governing appeals from the Civil Rights Commission, being a constitutional provision, does not violate the constitutional provision that no person exercising powers of

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REFERENCE FOR POINTS IN HEADNOTES

[1–6] 15 Am Jur 2d, Civil Rights § 63 *et seq.*

one branch of government shall exercise powers properly belonging to another branch except as expressly provided in the Constitution (Const 1963, art 3, § 2).

5. CIVIL RIGHTS—APPEAL AND ERROR—TRIAL DE NOVO.
Appellants from adverse final orders of the Civil Rights Commission are entitled to a complete new trial in circuit court, not merely some form of review based on the record before the Civil Rights Commission (Const 1963, art 5, § 29).

6. CIVIL RIGHTS—APPEAL AND ERROR—JURY TRIAL.
An appellant from a final order of the Civil Rights Commission is entitled to a jury trial upon demand if the nature of the relief sought is legal, not equitable, in nature; however, since the primary relief available to a complainant before the Civil Rights Commission is a cease and desist order, an equitable relief, trial by jury would usually be precluded.

Appeal from Wayne, Thomas J. Roumell, Theodore R. Bohn, and James N. Canham, JJ. Submitted Division 1 June 11, 1971, at Detroit. (Docket Nos. 8842, 8843.) Decided October 26, 1971.

Complaint before the Michigan Civil Rights Commission by Earleen Burrell against Annapolis Hospital (No. 8842). Complaint before the Civil Rights Commission by James A. Key against the Romulus Township Schools (No. 8843). Orders entered by the Commission against defendants. Defendants appealed to Wayne Circuit Court. Judgment for plaintiffs. Defendants appeal. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *William F. Bledsoe,* Assistant Attorney General, for the Civil Rights Commission.

Cozadd, Shangle & Smith, for Annapolis Hospital.

B. B. Mosier, for Romulus Township Schools.

Amicus Curiae: Chrysler Corporation, by *Dickinson, Wright, McKean & Cudlip* (by *Lawrence M. Kelly*).

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

O'HARA, J. In the main we agree with Judge BRENNAN in his interpretation of the constitutional language providing that appeals from final orders of the Civil Rights Commission shall be tried *de novo*.[1]

We cannot, however, agree that whether an appellant is entitled to a trial by jury, advisory or otherwise, is dependent on the "nature of the relief sought". We are obligated to say that such a conclusion is to us legally unsound.

Rather, we hold that trial by jury is not available to either party under any circumstance. We so hold for the following reasons: When the constitutional convention included specifically, in the granted trial *de novo* on appeal, both cease and desist orders and refusals to issue complaints along with all other final orders of the commission, it evidenced conclusively the intention that the nature of the trial *de novo* on appeal be uniform. We cannot read that language to mean a jury trial in some instances and not in others. Indeed, there is in such construction at least a suggestion of an equal protection clause question.

It seems to us manifest that there is simply no feasible manner in which to submit to a jury the question of whether a complaint should have issued. The practical problems are virtually insurmount-

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

[1] See Const 1963, art 5, § 29.

able. The evidentiary questions alone would extend such an appeal almost to infinity. By its very nature, this is the type of proceeding best handled by a judge sitting without a jury. Since the delegates were so pointedly explicit in their language in all other respects, if "tried *de novo* before the circuit court" had meant trial by jury the convention would have used language expressly providing for it.

In holding that "tried *de novo*" means a full new evidentiary hearing before the circuit judge, we do not mean that the parties cannot, if they so choose and properly so stipulate, agree to submission of the appeal on the record made and transcribed before the commission for a complete and independent reassessment thereof by the circuit judge. It seems to us that the foregoing construction of the new constitutional provision insures at once uniformity of appellate right, and also that degree of flexibility which would not necessitate in every case a full rehearing of all the witnesses who testified in the proceedings before the commission.

QUINN, P. J., concurred.

V. J. BRENNAN, J. (*dissenting in part and concurring in part*). The plaintiffs in this case allege to have been aggrieved by final orders of the Michigan Civil Rights Commission. They appealed to the Wayne County Circuit Court. The presiding judge of that court convened a three-judge panel to hear and decide certain issues common to these cases. The controversy sought to be resolved in this manner was the meaning of the following provision of the Michigan Constitution of 1963:

"Appeals from final orders of the [civil rights] commission, including cease and desist orders and

refusals to issue complaints, shall be *tried de novo* before the circuit court having jurisdiction provided by law." Const 1963, art 5, § 29. (Emphasis added.)

The three-judge panel construed this provision to mean that review of final orders of the Civil Rights Commission should be in the nature of *certiorari,* and that "the function of the circuit court in such a proceedings (*sic*) would be to review for legal error or arbitrary action the findings of fact and decisions of the civil rights commission".[1] From this judgment of the circuit court, plaintiffs appeal and argue that the cited provision of the Michigan Constitution entitles them to a complete new trial, not merely a review of the proceedings before the commission; in addition, plaintiff Romulus Township Schools argues that it is entitled to a jury trial upon demand.

The circuit court based its decision on two factors: first, the similarity between the language of art 5, § 29, *supra,* the appeal provision of the statute organizing the constitutionally-created Civil Rights Commission (MCLA § 37.4 [Stat Ann 1969 Rev § 3.548(4)]), and the statutory procedure for review of final orders of the now defunct Fair Employment Practices Commission (hereinafter referred to as FEPC) (MCLA § 423.308 and § 423.310 [Stat Ann 1968 Rev § 17.458(8) and § 17.458(10)], repealed by PA 1963 [2d Ex Sess], No. 45, § 7)[2]; and, second, the fact that the statute providing for appeals from final orders of the FEPC had been interpreted by the Michigan Supreme Court to provide for review in the nature of *certiorari. Lesniak* v. *Fair Employment Practices Commission* (1961), 364 Mich 495.

[1] Opinion of three-judge panel, Wayne County Circuit Court, filed December 11, 1969, page 5.

[2] These former provisions are reproduced in *Lesniak* v. *Fair Employment Practices Commission* (1961), 364 Mich 495.

It is clear that the constitutional language here in question was derived from the appeal provisions of the old FEPC. Delegate Higgs, who introduced the language here in question, as an amendment by addition to the portion of the constitution establishing the Civil Rights Commission, stated:

"The background of this particular sentence is actually a digest of MSA section 17.458(8), a part of the Michigan state fair employment practices act. * * * I think, in view of the experience that the state has had * * * that this practice has been satisfactory." 2 Official Record, Constitutional Convention 1961, p 3118.

It is also clear that the delegates to the constitutional convention had a definite opinion as to the meaning of the language chosen. Delegate Higgs explained that:

"The words '*de novo,*' of course, mean a new trial. It means that a person who is really aggrieved has the opportunity to re-present his evidence before a court of law." 2 Official Record, *supra.*

Delegate Garvin, speaking in favor of the amendment stated:

"I believe that the amendment of delegate Higgs is rather in line with the general intent to give the person aggrieved, whether he be plaintiff or defendant, the right to have a new trial before a court. '*De novo*' means 'anew', which means that they shall try the case from the beginning, before the circuit court." 2 Official Record, *supra.*

From the discussion of this language on the floor of the constitutional convention, three things become clear: (1), none of the delegates who spoke to this issue were aware of the decision of the Supreme

Court in *Lesniak, supra*[3]; (2), the delegates were of the opinion that the Fair Employment Practices Act provided for a new trial in the circuit court when a decision of the FEPC was appealed; and (3), it was the express intent of the delegates that appellants from final orders of the Civil Rights Commission be entitled to a complete new trial in the circuit court. Since the delegates placed their own interpretation on the language they had chosen, the fact that it is similar to statutory language which had been given a different interpretation is irrelevant.

Furthermore, the rationale used by the Supreme Court in *Lesniak* is inapplicable in construing the new constitutional language. In *Lesniak,* the Court held that interpreting the *de novo* review provision of the Fair Employment Practices Act to mean a new trial would violate a constitutional prohibition against one branch of government exercising the powers of another. That same provision exists in our present constitution. Article 3, § 2 provides, in pertinent part, that "No person exercising powers of one branch [of government] shall exercise powers properly belonging to another branch *except as expressly provided in this constitution*". (Emphasis added.)

The appeal provision for the FEPC, being *statutory* in origin, ran afoul of such a provision. The appeal provision for the Civil Rights Commission, being *constitutional* in origin, does not suffer the same fate. A constitutionally prescribed review procedure is not violative of a constitutional proscription which exempts other constitutional provisions from its ambit. I feel, therefore, that the constitution entitles appellants from adverse decisions of the Civil Rights Commission to a complete

[3] *Lesniak* was decided on November 30, 1961. The language here in question was added to the constitution on May 8, 1962.

new trial, and not merely some form of review based on the record before the Civil Rights Commission.

Having determined that plaintiffs are entitled to a new trial, I now consider the contention that they are entitled to trial by jury. Both the constitutional provision involved and the proceedings of the Constitutional Convention are silent on this point. From this silence I conclude that whether appellants from final orders of the Civil Rights Commission are entitled to a jury trial upon demand should be determined in the same manner that issue is resolved in all civil cases, *i.e.*, according to the nature of the relief sought. The primary relief available to complainants before the Civil Rights Commission, the cease and desist order, is equitable in nature. While legal issues may be involved, *e.g.*, a claim for back wages, the basic equitable nature of the action would preclude trial by jury. The trial judge would, however, still retain the option of impanelling an advisory jury pursuant to GCR 1963, 509.4.

Reversed and remanded.

In re LAKEHEAD PIPE LINE CO., INC.

1. COURTS—COURT OF APPEALS—JURISDICTION—PROBATE COURTS.
The Court of Appeals does not have jurisdiction over appeals from probate courts.

REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur 2d, Courts § 111 *et seq.*
[2] 27 Am Jur 2d, Eminent Domain §§ 393, 407.
[3] 27 Am Jur 2d, Eminent Domain § 396.

2. EMINENT DOMAIN—SUBSTITUTION OF COMMISSIONER—NOTICE.

No statute exists requiring a probate judge, sitting in a condemnation case, to give notice to the defendant that a commissioner has been appointed to replace a commissioner originally appointed but unable to serve (MCLA § 464.25).

3. EMINENT DOMAIN—CONDEMNATION PETITION—MISDESCRIPTION OF PROPERTY.

A condemnation petition's misdescribing the lands sought to be taken by including certain land not owned by the defendants did not constitute a jurisdictional defect where the description permitted the premises to be identified (MCLA § 464.18).

Appeal from Oakland, William John Beer, J. Submitted Division 2 October 6, 1971, at Lansing. (Docket No. 9334.) Decided October 26, 1971.

Petition by Lakehead Pipe Line Company, Inc., seeking condemnation for right-of-way purposes over land owned by Wallace G. Lee and Ileen Lee. Probate court granted commissioners' award. Defendants appealed to circuit court. Summary judgment for defendants, setting aside confirmation of award and remanding to probate court. Plaintiff appeals. Reversed and the probate court order of confirmation of the award reinstated.

Butzel, Long, Gust, Klein & Van Zile (by *Leslie W. Fleming*), for plaintiff.

Parenti, Treinen, Barry & Bobberts, for defendants.

Before: QUINN, P. J., and DANHOF and TARGONSKI,* JJ.

QUINN, P. J. February 13, 1969, appellant filed its petition with the Probate Court of Oakland County

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

seeking condemnation for right-of-way purposes over land of appellees. Attached to the petition was a notice of hearing for March 6, 1969. A copy of the petition and notice of hearing was personally served on appellees February 17, 1969. March 6, 1969, appellees having neither responded nor appeared, the probate judge granted the petition, set pretrial for March 13, 1969, and trial for March 27, 1969, and appointed three commissioners to determine necessity and compensation, if they found necessity. Appellees received a copy of this order about March 12, 1969, but they did not appear either March 13 or March 27, 1969.

March 27, 1969, trial was adjourned to April 24, 1969, and on the latter date, it was again adjourned to May 8, 1969. April 30, 1969, the probate judge appointed a new commissioner to replace one of the original appointees who could not act. May 8, 1969, the commissioners signed their oath and May 12, 1969, they filed their report which found necessity and awarded appellees $1,500 compensation. (We note appellees had been offered $3,069 prior to the commencement of these proceedings, and claimed they had been offered $4,000.)

May 13, 1969, appellant moved to confirm the report of the commissioners and gave notice that the motion would be heard on May 29, 1969. This motion and notice of hearing was served on appellees May 14, 1969, by mail. May 22, 1969, appellees appeared in the proceedings for the first time, and on June 2, 1969, they filed objection to confirmation of the award and moved for a new trial. After a hearing June 12, 1969, the probate judge confirmed the commissioners' report and denied the motion for a new trial.

July 1, 1969, appellees appealed to the circuit court and on October 22, 1969, they moved for sum-

mary judgment. After hearings on October 29, 1969, and November 5, 1969, the circuit judge granted the summary judgment, set aside the award of the commissioners and the order of confirmation, granted appellees a new trial, and remanded the matter to probate court. This appeal followed.

Appellant first contends that the circuit court had no jurisdiction on the appeal from probate court. In support of this position, appellant relies on CL 1948, § 464.23 (Stat Ann 1970 Rev § 22.226), which provides for appeal to the Supreme Court. Const 1963, art 6, § 4, provides:

"The supreme court shall have * * * appellate jurisdiction as provided by rules of the supreme court."

GCR 1963, 851 provides:

"Appeals to the Supreme Court may only be taken from appeals pending in the Court of Appeals or after decision by the Court of Appeals, as in these rules provided."

Jurisdiction of the Court of Appeals is provided by law, Const 1963, art 6, § 10. Our statutory jurisdiction does not include appeals from probate court, see MCLA 1971 Cum Supp § 600.308 (Stat Ann 1971 Cum Supp § 27A.308). The circuit court had jurisdiction.

The trial judge granted appellees relief because they were entitled to notice of the appointment of a substitute commissioner and they were not so notified. This was error.

MCLA § 464.25 (Stat Ann 1970 Rev § 22.229) authorizes the probate judge to appoint other commissioners in the place of any who are unable to serve. There is no statutory requirement for notice of such appointments, nor do we find any statutory require-

ment for notice other than the notice that was given in this case pursuant to the requirements of MCLA § 464.18 (Stat Ann 1970 Rev § 22.221).

The only other basis for the trial court's holding would be that due process required it. *Mullane* v. *Central Hanover Bank & Trust Company* (1950), 339 US 306 (70 S Ct 652, 94 L Ed 865), 314, 315, held:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Our Supreme Court adopted this language in *Rideneour* v. *County of Bay* (1962), 366 Mich 225, 240.

The notice appellees received February 17, 1969, afforded them ample opportunity to present their objections to these proceedings. They chose not to do so. Appellees do not question the necessity of the taking, and at the October 29, 1969 hearing in circuit court, they belatedly indicated they would accept the $3,000 offered by appellant prior to the commencement of these proceedings. It is apparent appellees elected to see what the commissioners would award them. Their disappointment in the amount of that award is not a denial of due process.

MCLA § 464.18 (Stat Ann 1970 Rev § 22.221) requires that the petition, "shall contain the description of all the real estate, property or franchises, or so much thereof as the company seeks to acquire under such petition in said county". The petition filed complied with the statute, but it misdescribed the lands of appellees by including in the description part of the east half of the southwest quarter of the northeast quarter, not owned by appellees. It is

claimed that this is a jurisdictional defect and we are cited to *Detroit, Springwells and Dearborn R. Co.* v. *George Gartner, Circuit Judge of Wayne County* (1893), 95 Mich 318, as authority therefor. Appellees say that the case stands for the proposition that, "The description and a petition for condemnation should be as definite as is necessary in a deed". Assuming *arguendo* the validity of the authority, "It is not necessary that a conveyance shall specifically describe premises sought to be conveyed. It is sufficient if its terms are such as to permit them to be identified". *Austin* v. *Dolbee* (1894), 101 Mich 292, 294. The description complained of permits appellees' premises to be identified.

Reversed and the probate court order of confirmation is reinstated with costs to appellant.

All concurred.

PEOPLE *v.* JAMES

PEOPLE *v.* BULLARD

1. ARREST—PROBABLE CAUSE—FAILURE TO PRODUCE DRIVER'S LICENSE.
   Police officer had reasonable cause to arrest the defendant, stopped for speeding, for violating the motor vehicle code where the defendant failed to produce a valid Michigan driver's license, the defendant had produced a Michigan vehicle registration certificate for his car which had Michigan plates, the defendant had an Alabama driver's license, had admitted that he resided and was employed in Michigan, and it was the usual procedure of the local police to issue a summons for driving without a valid driver's license at the police station rather than on the street.

2. ARREST—PROBABLE CAUSE—CONCEALED WEAPONS—PLAIN VIEW.
   Police officers had reasonable cause to believe that a concealed weapon was being carried in violation of law and were justified in arresting the defendant driver of an automobile, where the police observed a gun in plain view in the cabin of defendant's automobile when the defendant emerged from the car after the defendant had been validly arrested for driving without a Michigan driver's license.

3. SEARCHES AND SEIZURES—ILLEGAL SEARCH.
   A shotgun seized without a warrant from the trunk of defendants' car was inadmissible in defendants' trial for armed robbery where the search was made shortly after one of the defendants had been arrested for driving without a valid Michigan driver's license and both defendants had been arrested for carrying concealed weapons, and the police did not, at

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 5 Am Jur 2d, Automobiles and Highway Traffic § 43.
[4] 53 Am Jur, Trial § 482 *et seq.*
[5] 29 Am Jur 2d, Evidence §§ 425, 426.
[6–8] 58 Am Jur, Witnesses § 754.

the time of the arrests, have any knowledge of a connection between the defendants and the robbery, because the defendants were effectively in custody and could not possibly reach any weapon in the trunk, and there was no reason to believe that fruits of either offense for which the defendants had been arrested would be found in the trunk.

4. CRIMINAL LAW—EVIDENCE—ITEMS EXHIBITED TO JURY—FAILURE TO INTRODUCE.

Evidence exhibited to the jury in a criminal case but not offered or introduced is to all intents and purposes considered as evidence.

5. SEARCHES AND SEIZURES—EVIDENCE—MOTION TO SUPPRESS—DISCRETION.

A motion to suppress evidence known to have been seized must be made before trial; however, the trial judge may waive this requirement and allow a belated motion.

6. WITNESSES—IMPEACHMENT—PRIOR ARRESTS.

A witness's testimony may not be collaterally impeached by questioning him about prior arrests which did not result in convictions.

7. EVIDENCE—PRIOR ARREST—PROBATIVE VALUE.

The fact that a person has been arrested is legally without probative value.

8. CRIMINAL LAW—WITNESSES—IMPEACHMENT—PRIOR ARRESTS.

Prosecutor's questioning, for impeachment purposes, one of the defendants' alibi witnesses concerning an arrest without showing that the arrest resulted in conviction constituted reversible error where the issue of guilt or innocence turned on the jury's appraisal of the competing testimony of the prosecution's eyewitnesses and the defense's two alibi witnesses.

Appeal from Recorder's Court of Detroit, Robert L. Evans, J. Submitted Division 1 June 9, 1971, at Detroit. (Docket Nos. 9475, 9499.) Decided October 26, 1971.

Joseph M. James and Johnny Bullard were convicted of armed robbery. Defendants appeal. 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 *Gerard A. Poehlman,* Assistant Prosecuting Attorney, for the people.

D. Michael Kratchman, for defendant James on appeal.

Abba I. Friedman, for defendant Bullard on appeal.

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

LEVIN, P. J. Defendants Joseph Murphy James and Johnny Bullard were convicted of robbery armed.[1]

The robbery occurred at a bar in the City of Detroit at approximately 12:30 a.m. on December 7, 1968. Three eyewitnesses identified either one or both of the defendants as two of the men involved in the robbery. The defense presented two alibi witnesses who testified that the defendants were at a gas station having their automobile repaired at the time the robbery was committed.

I.

The first issue concerns the introduction into evidence of two handguns found in the cabin of the defendants' automobile when they were arrested. A police officer testified that the automobile was stopped for speeding within an hour after the robbery was committed. At the time the police were unaware of the robbery. The driver, defendant

[1] MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

James, produced an Alabama driver's license and a Michigan registration for his automobile which had Michigan license plates.

The police officer testified that James was asked to alight from the automobile and was placed under arrest for driving without a Michigan driver's license after he admitted during questioning at the scene that he resided at a Michigan address and was employed in this state. As James alighted, the officer said he observed a handgun on the floor near James' seat. The other passengers, one of whom was defendant Bullard, were ordered out of the vehicle and the second handgun was found in the cabin.

The police officer acted within his authority in arresting James. The officer had reasonable cause to believe that James' failure to produce a Michigan driver's license was a violation of the Motor Vehicle Code.[2] The officer testified that it is the usual procedure to issue a summons for driving without a valid license at a police station rather than on the street. His testimony is consistent with our understanding of the practice of the Detroit police in that regard. We could not rightly say on this record that the declared reason for stopping the defendants' vehicle or for James' arrest was not the real reason.[3]

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[2] MCLA § 257.301 (Stat Ann 1968 Rev § 9.2001); MCLA § 257.302 (Stat Ann 1971 Cum Supp § 9.2002).

[3] *Cf. People* v. *Marshall* (1970), 25 Mich App 376, 380; *People* v. *Lee* (1963), 371 Mich 563, 567.

Our case is similar to *People* v. *Kuntze* (1963), 371 Mich 419, 424, where our Supreme Court observed:

"We may note, parenthetically, that defendants make no claim, such as was made in *People* v. *Roache* [1927], 237 Mich 215; *People* v. *Anders* (1959), 167 Cal App 2d 65 (333 P2d 854); *Johnson* v. *State* (1950), 92 Okla Cr 63 (220 P2d 469), that the officers stopped them for a motor vehicle code violation merely as a pretext to afford the officers an opportunity to search defendants or their car. The only evidence received on the motion to suppress was the

When James emerged from the automobile and a gun was spotted in plain view,[4] the officers had reasonable cause to believe that a concealed weapon was being carried in violation of law[5] and were justified in making an arrest on that ground without a warrant.[6] The subsequent search of defendants and of the cabin of the automobile was a reasonable incident of lawful arrests.[7]

The defendants make two additional claims of error in relation to the admission in evidence of the two handguns. They claim that the guns were not connected to the robbery. In our opinion, however, the evidence of possession, one hour after the commission of the robbery, of guns which might have been used to commit it, had a logical and rational connection to the other evidence presented by the prosecutor.[8]

The defendants also contend that James' trial lawyer made a serious error in not having him testify at the hearing on the admissibilty of the seized evidence concerning his version of the facts at the time the defendants were stopped and arrested. We have no way of knowing why the lawyer failed to call James; perhaps James had made state-

officers' testimony and from that the trial judge was entitled to find, as he did, that defendants were stopped legally for a traffic violation."

[4] *People* v. *Tisi* (1970), 384 Mich 214, 221; *Harris* v. *United States* (1968), 390 US 234, 236 (88 S Ct 992, 19 L Ed 2d 1067).

[5] See MCLA § 750.227 (Stat Ann 1962 Rev § 28.424).

[6] MCLA § 764.15 (Stat Ann 1954 Rev § 28.874); *People* v. *Licavoli* (1928), 245 Mich 202.

[7] See *Chambers* v. *Maroney* (1970), 399 US 42, 48 (90 S Ct 1975, 26 L Ed 2d 419, 426); *Carroll* v. *United States* (1925), 267 US 132 (45 S Ct 280, 69 L Ed 543).

[8] See *People* v. *Hall* (1969), 19 Mich App 95, 106, fn 6. The trial judge's discretion to exclude evidence otherwise admissible because its probative value is overcome by the danger that introduction of the evidence will confuse, mislead, or prejudice the jury was not invoked in this case.

ments to his lawyer inconsistent with the claim now advanced. In this connection, we recently observed:

"A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately." *People* v. *Jelks* (1971), 33 Mich App 425.

II.

Shortly after the arrest of the defendants, the police searched the trunk of the automobile without a warrant and found a shotgun. Ultimately the trial judge ruled that the shotgun was inadmissible; we agree with that ruling. When the defendants were arrested the police were unaware of their possible connection with the robbery. There was no reason to believe that fruits of the driving without a license or concealed weapons offenses or evidence tending to establish those offenses would be found in the trunk. There was no need to search the trunk for weapons as the men were effectively in custody and could not possibly reach any weapons in the trunk.[9]

[9] See *People* v. *Marshall, supra; People* v. *Gonzales* (1959), 356 Mich 247; *People* v. *Trudeau* (1971), 385 Mich 276. In this case, after stopping the defendants' automobile, the police drove it to the stationhouse. There they opened the trunk and found a shotgun and a .22-caliber pistol inside separate suitcases. No search warrant had been obtained. Neither at the scene of the arrest nor at the time of the search did the police have probable cause to believe that evidence or fruits of the traffic or concealed weapon offenses was contained in the trunk of the automobile. See *Preston* v. *United States* (1964), 376 US 364 (84 S Ct 881, 11 L Ed 2d 777); *Chambers* v. *Maroney, supra; Coolidge* v. *New Hampshire* (1971), 403 US 443 (91 S Ct 2022, 29 L Ed 2d 564).

The defendants contend that they were prejudiced by the judge's postponement of an evidentiary hearing on the admissibility of the shotgun until after it was identified before the jury.

The shotgun was displayed on the prosecutor's table during the first two days of the four-day trial. During this period a witness identified the shotgun as looking like one of the guns used in the robbery. No objection was made to his identification or to the placing of the gun on the table during these first two days. At the beginning of the third day, defense counsel asked that the prosecutor not be allowed to display this gun before the jury, and the prosecutor then put the gun under his table.

At the close of the third day, the judge conducted a separate hearing on the admissibility of the seized evidence and it was then that he ruled that the seizure of the shotgun was the product of an illegal search and hence inadmissible. In his instructions to the jury, the judge cautioned that "in no circumstance should you consider the sawed-off shotgun as evidence in this case".

The rule in this state is that "evidence exhibited to the jury but not offered or introduced is to all intents and purposes considered as evidence".[10]

While a motion to suppress evidence known to have been seized must be made before trial, the judge may waive this requirement and allow a belated motion.[11] It appears that it has become the frequently followed practice in the Recorder's Court of the City of Detroit to allow the motion to be made at the outset of the trial and sometimes for the court to defer consideration of the motion until a propi-

[10] *People* v. *Brisco* (1968), 15 Mich App 428, 429, citing *People* v. *Rozewicz* (1924), 228 Mich 231. Similarly, see *Gale* v. *People* (1872), 26 Mich 157.

[11] *People* v. *Ferguson* (1965), 376 Mich 90.

tious time during the course of the trial. This may have the advantage of avoiding some duplication in the hearing of evidence but exposes the defendant to the risk of prejudice resulting from the jury learning about illegally obtained evidence before it is effectively suppressed.

We need not comment on the practice followed in this case, but if it is followed it is incumbent on the prosecutor and the judge to prevent reference to or exhibition before the jury of evidence that may be suppressed until after the judge rules on the suppression motion.

III.

The remaining assignment of error concerns the prosecutor's cross-examination of a defense alibi witness. This witness was one of two persons who testified that the defendants were at a gas station at the time the robbery occurred.

On cross-examination, the prosecutor did not establish any former relationship between the alibi witnesses and the defendants. The prosecutor then asked one of the witnesses whether he had ever been arrested. Defense counsel objected, and the jury was excused. A discussion followed and the judge said that he would "make a determination as to the appropriate cautionary instructions" when he gave the general instructions at the close of the case, but no instructions were given.[12] Defense counsel was allowed to meet the prosecutor's cross-examination by going into the details of the arrests and showing that they did not result in convictions.[13]

The extent of the allowable cross-examination of a witness on collateral matters, for the purpose of

[12] In *Cachola* v. *The Kroger Company* (1971), 32 Mich App 557, discussed *infra*, we said that the prejudicial effect of such evidence could not be overcome by a cautionary instruction.

[13] See *People* v. *Greenway* (1962), 365 Mich 547, 550.

impeaching his credibility, is a matter confided to the discretion of the trial judge. To that general rule there is a significant exception: a witness may not be examined concerning an arrest that did not result in conviction.

The exception limiting cross-examination concerning prior criminal record to convictions is recognized by the great weight of authority.[14] We are convinced that the law of this state is in accord.

The people cite no decision of our Supreme Court or of our Court in a criminal case affirming a conviction where the credibility of a witness called by the defendant was impeached by reference to an arrest which did not result in the witness's conviction. It appears upon examination of the cases cited to us and from our own research that the statements that a witness may be questioned about arrests were either *dictum*[15] or made in cases factually distinguishable.[16]

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[14] See Anno: Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution, 20 ALR 2d 1421, 1425:

"The rule prevailing in most jurisdictions and supported by the great weight of authority, subject to certain limitations, conditions, and exceptions hereinafter noted, is that it is not permissible to show that a witness has been arrested, or that he has been charged with or prosecuted for a criminal offense, or confined in prison, or to inquire as to such fact upon cross-examination, where no conviction is shown, for the purpose of impairing his credibility."

[15] The statement in *People* v. *MacCullough* (1937), 281 Mich 15, 27, that "one may be asked if he has been charged with crime" is taken from *Hamilton* v. *People* (1874), 29 Mich 173, 183, where the Court stated that a witness may be "asked if he had been charged with crime".

The briefs filed in *MacCullough* were 278 printed pages in length; it does not appear that the prosecutor questioned any witness concerning his arrest or conviction record or that any issue on that account was raised by the defendant or briefed on appeal in the Supreme Court. The above-quoted statement in *MacCullough*, set forth in the midst of an extended survey of earlier case law, was not germane to any issue in that case. *Hamilton*, likewise, is a lengthy opinion concerning multitudinous assignments of error. Hamilton's conviction was reversed because of a number of errors during his trial. Thus, the statement in *Hamilton* was not necessary to decision.

[16] The Court's statement in *Driscoll* v. *People* (1882), 47 Mich 413, is also based on *Hamilton* v. *People, supra,* and is also *dictum:*

In *People* v. *Brocato* (1969), 17 Mich App 277, we concluded, despite earlier statements and holdings by our Supreme Court,[17] that the credibility of a defendant in a criminal case who testifies in his own behalf may not be impeached by an arrest which did not result in conviction. We observe:

"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 exclusion."

The reasoning of our Court in *Brocato* applies with equal force in the case of a witness who is not a defendant; a distinction in this regard between the defendant and one of his witnesses cannot reasonably be drawn. Since the trier of fact is more likely to credit the testimony of disinterested third persons than the testimony of a keenly interested defendant, the defendant in many cases will be more

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the defendant was allowed to cross-examine the complaining witness and the Court's statement was in connection with general observations concerning the extent to which *additional* testimony or evidence concerning collateral matter offered to impeach credibility should be allowed.

The remaining cases are civil cases and, thus, cases where personal liberty was not at stake. See, *e.g.*, *Totten* v. *Totten* (1912), 172 Mich 565; *Jacobs* v. *Queen Insurance Company of America* (1917), 195 Mich 18; *Bay State Milling Co.* v. *Saginaw Baking Co.* (1923), 225 Mich 557. A *contra* civil case is *Dickinson and Hodges* v. *Dustin* (1870), 21 Mich 561, where the Court limited questions to previous criminal punishment or conviction; similarly, see *Cachola* v. *The Kroger Company*, *supra*, fn 12.

In *People* v. *Shugar* (1970), 29 Mich App 139, 143, and *People* v. *Haugabook* (1970), 23 Mich App 356, 359, we affirmed convictions in cases where the trial judge did not permit inquiry into a witness's arrest record for impeachment purposes. This indicates recognition on the part of trial judges of the impolicy of this line of inquiry; in this very case the judge indicated his doubt about this line of inquiry but by then the damage had been done.

[17] See *People* v. *Foote* (1892), 93 Mich 38, 40; *People* v. *Nixon* (1928), 243 Mich 630, 631; *People* v. *Statkiewicz* (1929), 247 Mich 260, 267.

dependent on the evidence offered by others than on his own testimony.

Recently, in *Cachola* v. *The Kroger Company* (1971), 32 Mich App 557, *leave to appeal denied* 385 Mich 775, we held that it is reversible error to cross-examine an opponent's witness concerning an arrest which did not result in conviction. In that case, an action for personal injuries suffered in one of the defendant's supermarkets, we granted a new trial because the defendant's lawyer asked one of the plaintiff's medical expert witnesses whether he was not under indictment for failing to report taxable income. We observed:

"This Court continues to have appeals wherein attorneys have deliberately attempted to introduce inadmissible evidence and ask objectionable questions for the calculated purpose of prejudicing the other party's right to a fair trial. The practice should stop. Attorneys who attempt such tactics should realize they risk a reversal."

The fact that a person has been arrested is legally without probative value; both the presumption of innocence and the need to preserve the integrity of the fact-finding process require that conclusion:

"Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness." *Michelson* v. *United States* (1948), 355 US 469, 482 (69 S Ct 213, 93 L Ed 168).

We could not properly declare a belief beyond a reasonable doubt[18] that the evidence that one of the defendants' alibi witnesses had been arrested did

[18] *People* v. *Liggett* (1967), 378 Mich 706, 717.

not contribute to the jury's verdict. The prosecutor offered the arrest-without-conviction evidence to undermine the credibility of one of the defendants' alibi witnesses. Having accomplished his purpose, he may not now be heard to say that the alibi witness's credibility was not adversely affected in the jury's eyes by the impeaching testimony.

The issue of the guilt or innocence of the defendants turned on the jury's appraisal of the competing testimony of the eyewitnesses offered by the people and of the two alibi witnesses offered by the defendants. It is beyond our province to say that the jury might not have chosen to credit the testimony of the alibi witnesses but for the impeaching evidence.

Reversed and remanded for a new trial.

All concurred.

AMERICAN & FOREIGN INSURANCE CO. *v.*
ALLIED PLUMBING & HEATING CO.

1. INSURANCE—BUILDER'S RISK INSURANCE—COMPLETION OF PROJECT—EVIDENCE—OCCUPANCY.

The fact that there is occupancy in an apartment building is merely supportive of a finding that the building was completed within the meaning of a builder's risk insurance policy covering the construction period; however, occupancy does not conclusively compel a finding of completion.

REFERENCES FOR POINTS IN HEADNOTES

[1–3, 5, 6] 43 Am Jur 2d, Insurance § 341.
Builder's risk insurance policies. 94 ALR2d 221.
[4] 43 Am Jur 2d, Insurance § 470.
Builder's risk insurance policies. 94 ALR2d 221.

2. INSURANCE—BUILDER'S RISK INSURANCE—COMPLETION OF PROJECT—OCCUPANCY—SUBSTANTIAL USE.

A building is ordinarily not completed within the meaning of a builder's risk insurance policy until the building is ready for the use or occupancy for which it was intended; "occupancy" does not occur until the building is put to a practical and substantial use for which it was designed.

3. INSURANCE—BUILDER'S RISK INSURANCE—COMPLETION OF PROJECT—OCCUPANCY.

A builder's risk insurance policy covering an apartment building while in the course of construction was still in effect even though a few of the apartments were being occupied where there was not such substantial occupancy as to amount to completion, because a building is not completed until it is put to the practical and substantial use for which it was designed.

4. INSURANCE—BUILDING CONSTRUCTION—INSURABLE INTEREST—CONTRACTOR'S INTEREST.

A contractor of a building under construction has an insurable interest in the building.

5. INSURANCE—CANCELLATION—CONSENT OF PARTIES—IMPLIED CANCELLATION.

A policy of insurance can be cancelled at any time before loss by agreement of the parties and such cancellation may be by the consent of the parties and may be either express or implied from the circumstances.

6. INSURANCE—BUILDER'S RISK INSURANCE—REPORTING POLICY—SUBSTITUTION OF POLICIES.

A permanent policy of insurance covering an apartment building complex replaced a builder's risk policy as to one of the apartment buildings where the man who handled all the negotiations for the insurance policies for the apartment builders, the general contractor, and the subcontractor testified that it was his intention that the coverages of the builder's risk and the permanent policies not overlap, the builder's risk policy was a monthly reporting policy, the history of the parties' transactions shows that the value of a building was removed from the builder's risk policy at or prior to the addition of the value of that building to the list of buildings covered by the permanent policy, the value of the particular apartment building in question was removed from coverage under the builder's risk policy 20 days before the building was

destroyed by fire, and a representative of the apartment complex builders told the responsible insurance broker 5 days before the fire that the building should be added to the permanent policy, even though the building was not completed at the time of the fire.

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 October 6, 1971, at Grand Rapids. (Docket No. 9925.) Decided October 26, 1971. Leave to appeal denied, 387 Mich 753.

Complaint by American & Foreign Insurance Company, subrogee of Indian Hills Apartments, Inc., against Allied Plumbing & Heating Company and Badger Construction Company for recovery of insurance monies paid for an apartment building fire. Third-party complaint by Allied and Badger against London & Lancashire Insurance Company alleging that if they were liable, any judgment should be paid by London. Judgment for third-party plaintiffs. Third-party defendant appeals. Third-party plaintiffs cross-appeal. Reversed.

Smith, Haughey, Rice, Roegge & Gould (by *Lawrence P. Mulligan*), for defendant and third-party plaintiff Badger Construction Company.

Cholette, Perkins & Buchanan (by *Sherman H. Cone*), for defendant and third-party plaintiff Allied Plumbing & Heating Company.

Allaben, Massie, Vander Weyden & Timmer and *Schmidt, Smith & Howlett* (by *Richard L. Spindle*), for third-party defendant London & Lancashire Insurance Company.

Before: FITZGERALD, P. J., and BRONSON, and T. M. BURNS, JJ.

FITZGERALD, P. J. This cause arose from a fire in apartment building B of the Indian Hills Apartments in Grand Rapids on January 20, 1969. At the time of the fire, the building was still under construction.

On or about January 15, 1969, Mr. Jacobson, representing Indian Hills Apartments, told Mr. Dobie, his independent insurance broker, that building B was nearing completion and that it should be added to the "permanent" policy issued by American and Foreign Insurance Company. It had been insured under a builder's risk policy issued by London and Lancashire Insurance Company during construction.

After the fire, American settled the claim with Indian Hills, became its subrogee, and commenced action against Badger and Allied. Badger was the general building contractor for building B and Allied was its subcontractor. American alleged negligence on the part of Allied in starting the fire and negligence on the part of Badger in selecting its subcontractor.

Badger and Allied brought a third-party action against London alleging that if they were liable, any judgment should be paid by London under the builder's risk policy.

London denied coverage, and by stipulation, the third-party action was heard by the court, sitting without a jury. The trial court found that the builder's risk policy issued by London was in full force and effect as to the burned building. From that finding, London filed a claim of appeal on July 23, 1970. Badger and Allied filed claims of cross-appeal on August 6, 1970.

Although not noted in the briefs, the record indicates that the original suit has since gone to trial;

and a jury returned a verdict on February 3, 1971, in favor of American Insurance in the amount of $210,814.67 against Badger, and a verdict of no cause of action against Allied. Badger thereupon, on February 19, 1971, moved for a directed verdict or, in the alternative, a judgment notwithstanding the verdict; moved for a mistrial, moved for a new trial, and moved that judgment be entered against London and Lancashire Insurance Company. At the time of filing in this Court, the motions have not yet been heard by the trial court.

Despite the multitude of issues raised at trial and in this appeal, the crux of the question resolves itself to whether the London policy was in force as to building B at the time of the fire.

Appellant London's arguments with respect to the question of the completion of the building, the lack of an insurable interest on the part of Badger and Allied, and the "other insurance" provisions are without merit. The question of whether building B was completed within the meaning of the policy issued by London is an odd mixture of questions of law and fact. There is ample evidence in the record to support the finding that there was still a great deal of work to be done in building B before the building would be totally completed. While there was evidence that a few of the apartments in building B were already occupied, the fact that there is occupancy is merely supportive of a finding of, but does not conclusively compel a finding of, completion. See *Hendrix* v. *New Amsterdam Casualty Company* (CA 10, 1968), 390 F2d 299. Ordinarily a building is not "completed" until it is ready for the use or occupancy for which it was intended, and is not "occupied" until it is put to a practical and substantial use for which it was designed. See 94 ALR2d 221, § 10, pp 240–247.

In the instant case, there would not appear to be such substantial occupancy as to amount to "completion" as a matter of law. It would not appear that it can be said that the trial court's determination that the building was not "complete" within the meaning of the policy was clearly erroneous. Had London wished their coverage to terminate because of *any* occupancy, they should have used restrictive language to that effect rather than "while in the course of construction".

Appellant's contention that Badger and Allied lacked an insurable interest in building B at the time of the fire is equally without merit. A contractor of a building under construction has an insurable interest in the building. See 3 Couch on Insurance (2d ed), § 24:29, p 112; 94 ALR2d 221, § 6, pp 234–237; see, also, *Atlantic Insurance Company* v. *Massey* (CA 10, 1967), 381 F2d 520. It would not appear that the trial court was clearly erroneous in determining that Badger and Allied had an insurable interest in building B at the time of the fire, even though Badger and Allied did not suffer any immediate out-of-pocket expenses.

By the same token, the "other insurance" provision of the London policy is not applicable to the instant case, in that the American policy did not cover Badger's and Allied's interest and the American policy was not payable to Badger and Allied, who were named insureds under the London policy. Since the American policy did not cover the same insurable interests as the London policy, the "excess coverage" provisions do not apply. See *Lubetsky* v. *Standard Fire Insurance Company* (1922), 217 Mich 654; *McCoy* v. *Continental Insurance Company* (1949), 326 Mich 261; *Atlantic Insurance Company* v. *Massey, supra.*

The sole question of any merit is thus whether the trial court was clearly erroneous in determining that the London policy coverage was not terminated as to building B at the inception of coverage on the same building under the American policy.

In order to understand the issue at hand, it is necessary to first understand the nature of the London policy. The London policy is what is called a "monthly reporting policy". Under this type of policy, the insured (in this case, Badger) makes a monthly report of the amount of property at risk during the previous month, and the premium is determined accordingly.

The advantage of a "monthly reporting policy" is that, as coverage is no longer needed under the builder's risk policy, a lower declared value is reported by the insured which in turn results in a lower premium for the insured. (For a general discussion of the nature and operation of a "monthly reporting policy" see *Federal Intermediate Credit Bank of Baltimore* v. *Globe & Rutgers Fire Insurance Company* [D Md, 1934], 7 F Supp 56, 58, 59.)

The trial court, in its opinion from the bench, found that:

"[T]he L & L builders risk policy was not terminated or cancelled or revoked by substitution but remained in full force and effect until such time as it was finally terminated in October of 1969, and I do this on the basis that the building was not completed under the terms of the L & L policy."

It would appear from the above that the trial court misapprehended the nature and operation of a "reporting" type policy and failed to allow for the doctrine of termination by substitution. The court appears to have looked only to the termination language of the policy, which provides for termination

of coverage when: (1) the interest of the insured ceases, (2) the building is completed, or (3) the policy expires or is terminated.

While the London coverage was not terminated by reason of the termination provisions of the policy, it is well established that a policy of insurance can be cancelled at any time before loss by agreement of the parties. Such cancellation may be by the consent of the parties, and may be either express or implied from the circumstances. See 43 Am Jur 2d, Insurance, § 432, p 474.

In the instant case, Mr. Jacobson, who handled the negotiations for all the policies of Indian Hills, Badger, and Allied, testified that it was his intention that the coverages of the London builder's risk policy and the American "permanent" policy should not overlap. It was for this reason that the London builder's risk policy was a reporting policy, *i.e.*, so that the coverage could be removed from the London policy when coverage was added under the American policy.

A review of the reporting forms submitted by Badger to London shows the following declared values for the noted time periods:

January 1968	$2,600,000
February 1968	$2,600,000
March 1968	$2,600,000
April 1968	$2,600,000
May 1968	$2,600,000
June 1968	$2,390,000
July 1968	$2,180,000
August 1968	$1,570,000
September 1968	$1,570,000
October 1968	$1,170,000[1]

[1] Although the reporting form states the October value as $1,700,000, apparently this was a mistake and it should have been $1,170,000. The premium was based upon $1,170,000.

November 1968	$1,170,000
December 1968	$1,170,000
January 1969	$ 770,000

A review of the American policy endorsements shows that the following buildings were added at the noted dates:

July 21, 1968	Townhouses #1 and #2
August 21, 1968	Apartment A
September 5, 1968	Townhouse #3
November 18, 1968	Apartment E
January 15, 1969	Apartment B

Since each townhouse had a valued limit of $210,000 and each apartment had a valued limit of $400,000 under the London policy, it is clear, when the declared values under the London policy are correlated with the endorsements under the American policy, that in the case of each building, the value of that building was taken off the declared value of the property at risk under the London policy at the beginning of the month in which the building was added to the American policy or in the month prior to the month in which it was added to the American policy.

The expressed intent that the two coverages should not overlap, with the prior history of removing buildings from the London builder's risk coverage at or prior to the addition of a building under the American coverage, and the reduction of the declared value under the London policy by $400,000, effective January 1, 1969, clearly evidences the intent that the London coverage be terminated when the American coverage commenced on building B. This intention is even more obvious when it is realized that Badger did not submit the January 1969 declaration of value indicating the $400,000 reduc-

tion as of January 1, 1969, until after the building had burned.

This Court determines that the trial court erred in determining that the American policy was not substituted for the London policy, with regard to the coverage of building B, as of January 15, 1969.

Badger and Allied further contend that both American and London are members of the Royal-Globe group of insurance companies and since they operate out of the same office in Detroit, it was a breach of fiduciary duty for American to settle under its policy, whereby Badger and Allied would become subject to the subrogation action.

There is no merit in this issue. This Court determines that the coverage under the London policy was terminated by substitution as to building B. Thus, there cannot be said to be any breach of the fiduciary duty by settling under the American policy, since it would be the only available policy of insurance covering building B at the time of the fire.

This Court therefore reverses the decision of the lower court because the American policy was substituted for the London policy prior to the fire in building B on January 20, 1969. Therefore, London is exonerated from liability and the third-party cross-appeal by Allied and Badger is likewise decided in accordance with this decision.

Reversed. Costs to appellants.

All concurred.

COSBY *v.* POOL

1. JUDGMENT—INTEREST—STATUTES.

   The amendatory statute which made the date of the filing of the complaint the date from which interest awardable on a judgment is to be computed is one relating to remedies or modes of procedure (MCLA § 600.6013).

2. STATUTES—IMPAIRMENT OF CONTRACT—RETROACTIVE OPERATION—CONSTITUTIONAL LAW.

   A statute which changes the substance of contracts cannot have retroactive effect, but a statute which changes only a remedy can be given retroactive operation without violating constitutional provisions protecting contracts (US Const, art 1, § 10; Const 1963, art 1, § 10).

3. JUDGMENT — INTEREST — STATUTES — IMPAIRMENT OF CONTRACT RETROACTIVE OPERATION.

   The 1965 amendatory statute making the date of the filing of the complaint the date from which interest awardable on a judgment is to be computed, being remedial or procedural in nature, becomes part of an insurance contract where the contract provides that the insurer would pay interest accruing on verdict or after judgment up to the date of payment or tender to the judgment creditor, even though the contract was issued in 1963 and complied with the statute then in effect.

4. INSURANCE—INSURER'S LIABILITY—INTEREST ON JUDGMENT.

   An insurer is liable for the interest on a judgment awarded against its insured only to the extent of the interest on the amount of risk the insurer has assumed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 45 Am Jur 2d, Interest and Usury §§ 94, 95.
[2–4] 45 Am Jur 2d, Interest and Usury § 8 *et seq.*

Appeal from Kalamazoo, Donald T. Anderson, J. Submitted Division 3 October 5, 1971, at Grand Rapids. (Docket No. 11096.) Decided October 26, 1971. Leave to appeal denied, 386 Mich 782, 783.

Complaint by Kenneth W. Cosby and Cecilia V. Cosby against John D. Pool and St. Paul Insurance Company for negligence. Judgment for plaintiffs. Plaintiff instituted supplementary proceedings against St. Paul Insurance Company to recover interest awarded. Summary judgment for St. Paul Insurance Company. Plaintiffs appeal. Reversed and remanded.

Cholette, Perkins & Buchanan (by *Sherman H. Cone*), for plaintiffs.

Plunkett, Cooney, Rutt & Peacock (by *Leonard E. Nagi*), for defendant St. Paul Insurance Company.

Before: FITZGERALD, P. J., and BRONSON and T. M. BURNS, JJ.

FITZGERALD, P. J. Defendants stipulate that the facts presented in plaintiffs' brief are accurate except for a few exceptions. This Court therefore adopts those facts, taking notice of the exceptions and clarifications stated in defendants' brief.

A jury awarded plaintiffs a negligence judgment against John D. Pool in the amount of $200,000 on behalf of plaintiff Kenneth W. Cosby and in the amount of $6,000 on behalf of plaintiff Cecilia V. Cosby, his wife, with the judgment further providing for interest in the total sum of $33,333 on behalf of Mr. Cosby and $1,000 on behalf of Mrs. Cosby. This represented interest at the rate of 5% per year

from the date that plaintiffs filed their complaint until the day of judgment as provided by the provisions of MCLA § 600.6013 (Stat Ann 1971 Cum Supp § 27A.6013). This judgment was settled between the parties except for the matter of interest from the date of the filing of the complaint to the date of judgment.

St. Paul Insurance Company carried a policy of insurance covering the liability of defendant Pool. Among the provisions of the policy was a section entitled "Special Conditions". Paragraph 2(b) of that section provides, in pertinent part, as follows:

"2. Defense, Settlement, Supplementary Payments. As respects such insurance as is afforded by the other terms of this insuring agreement, the company shall

* * *

"(b) pay in addition to the applicable limits of the insuring agreement (1) all costs taxed against the insured in any legal proceeding defended by the company according to the foregoing paragraph, *and interest accruing on verdict or after judgment up to the date of payment or tender to the judgment creditor,* or his attorney of record, by the company upon the company's share of such verdict or judgment rendered in connection therewith, (2) all premium charges on release of attachment or expenses incurred by the company for investigation, negotiation, and defense; and * * * ." (Emphasis supplied.)

This insurance contract, issued in 1963, complied with the statute in effect at that time. The statute was, however, later amended by MCLA § 600.6013 (PA 1965, No 240).

Following settlement of the judgment, except for the interest provided for therein from the date of the filing of plaintiffs' complaint to the date of

judgment, supplementary proceedings were instituted by plaintiffs against St. Paul Insurance Company seeking to recover the amount of said interest from St. Paul Insurance Company. St. Paul denied liability therefor and plaintiffs filed a motion for summary judgment with respect thereto, it being the contention of plaintiffs that the St. Paul Insurance Company, under the specific provisions of the above noted portion of the insurance policy, was liable to plaintiffs for said interest as a matter of law since the interest represented sums which accrued on the verdicts pursuant to statute.

The trial court entered a written opinion holding that although there was little doubt from the wording set forth in section 2 of the policy that St. Paul Insurance Company would be liable for interest under normal conditions, that, nevertheless, they could not be held liable for interest accruing on the judgment from the date of the filing of the complaint to the date of the judgment because the policy in question was made effective on March 15, 1963, when the applicable statute relating to interest allowed interest to be computed only from the time of entry of judgment. To so hold St. Paul Insurance Company liable would be in direct violation not only of the provisions of Article 1, § 10, of the United States Constitution, which provides that "no state shall pass any law impairing the obligation of contracts", but also Article 1, § 10, of the 1963 Michigan Constitution, which provides that "no bill of attainder, *ex post facto* law or law impairing the obligation of contracts shall be enacted". The reasoning of the court was that the statute relating to interest on judgments, as written on the date the policy was issued, became an integral part of the contract, fixing forever defendant St. Paul's liability for inter-

est under its policy. It was therefore an unconstitutional impairment of contract rights to hold St. Paul Insurance Company liable for the greater interest allowed as the result of amendments made to the interest statute after the policy was issued.

Pursuant to the court's opinion, summary judgment was entered in favor of St. Paul Insurance Company on January 14, 1971.

On appeal, the sole issue to be determined is whether the enactment of an amendment to MCLA § 600.6013 (Stat Ann 1971 Cum Supp 27A.6013), which provides interest to be calculated from "the date of filing the complaint" becomes a part of an insurance contract which was signed prior to the amendment. If so, it effectively amends the contract clause which provides that the insurer will pay "interest accruing on verdict or after judgment up to the date of payment".

Plaintiffs contend that the statute is a remedial statute which, when amended, is deemed retroactive and becomes a part of an insurance contract, thereby amending the insurance clause.

Defendant insurance company does not deny that plaintiffs are entitled to interest from the date of the filing of the complaint until the date of judgment. It simply disclaims responsibility for this sum, contending that it is only responsible for paying interest on the judgment as per its contractual agreement and that laws written subsequent to the contractual agreement cannot be incorporated into the contract without violating the constitutions of Michigan and of the United States.

It was recently determined that the statute in issue, PA 1961, No 236, § 600.6013, as amended by PA 1965, No 240, is an amendment which relates to remedies or modes of procedure. *Ballog* v. *Knight Newspapers, Inc.* (1969), 381 Mich 527.

In *Hansen-Snyder Company* v. *General Motors Corporation* (1963), 371 Mich 480, it was held (syllabus 1):

"Statutes related to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing will, in the absence of language clearly showing a contrary intention, be held to operate retrospectively and apply to all actions accrued, pending or future, there being no vested right to keep a statutory procedural law unchanged and free from amendment."

Therefore, it is clear that this remedial amendment is subject to retrospective operation. However, it is still necessary to determine how it relates to the insurance contract under which the defendant was insured.

A statute which changes the substance of contracts cannot be made retroactive, but if the statute changes only a remedy, it can be made retroactive. As stated in *Guardian Depositors Corp.* v. *Brown* (1939), 290 Mich 433, 439:

"Admittedly, a statute cannot be retroactive so as to change the substance of a contract previously entered into. The rule as to remedy has but recently been reiterated as follows:

" 'The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right.' *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.* (1937), 300 US 124, 128 (57 S Ct 338, 339; 81 L Ed 553, 555; 108 ALR 886, 889)."

Guardian was cited and partially quoted in *Byjelich* v. *John Hancock Mutual Life Insurance Company* (1949), 324 Mich 54, 61.

Defendant insurance company contends that laws written subsequent to the contractual agreement cannot be incorporated into the contract without violating the constitutions of Michigan and the United States. This argument is without merit. When the constitutional defense was raised in relation to an amendment dealing with a workmen's compensation statute in *Lahti* v. *Fosterling* (1959), 357 Mich 578, the Michigan Supreme Court adopted the reasoning in *Matter of Schmidt* v. *Wolf Contracting Co.* (1945), 269 App Div 201, 207, 208 (55 NYS2d 162, 170). That Court stated, at p 592:

"Liability under the workmen's compensation law is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the State may be exercised to affect the due process of law clause as well as the impairment of contract clause of the Federal Constitution.

"The subject matter of workmen's compensation reposes within the control of the legislature.

"A law enacted pursuant to rightful authority is proper, and private contracts are entered into subject to that governmental authority."

Lahti (at p 593) also adopted the dissenting opinion of Justice Hugo L. Black in *Wood* v. *Lovett* (1941), 313 US 362, 382 (61 S Ct 983, 992; 85 L Ed 1404, 1414), relating to the contract clause:

"Even though it is a dissenting opinion, Justice Hugo L. Black in *Wood* v. *Lovett* (1941), 313 US 362, 382 (61 S Ct 983, 992; 85 L Ed 1404, 1414), correctly states the rule with respect to the contract clause.

" 'Societies exercise a positive control as well over the inception, construction, and fulfilment of con-

tracts as over the form and measure of the remedy to enforce them. The accuracy of this statement cannot be questioned by one who reflects upon the extent to which contracts and agreements are a part of the daily activities of our society. For, so nearly universal are contractual relationships that it is difficult if not impossible to conceive of laws which do not have either direct or indirect bearing upon contractual obligations. *Therefore, it would go far towards paralyzing the legislative arm of State governments to say that no legislative body could ever pass a law which would impair in any manner any contractual obligation of any kind. * * * No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge.'"* (Emphasis supplied.)

This Court thus finds no merit in the defendant insurance company's constitutional contention. The amendment to the statute in contention was remedial or procedural. It in no way affects the substantive interests of the two parties. Therefore, the amendment has the effect of becoming a part of the contract and replaces the clause as written. Therefore, the interest must be calculated from the date of filing the complaint. This, however, is applicable only to that interest which accrues upon the defendant insurance company's portion of the verdict.

An insurer can limit the risk it assumes. *Cottrill* v. *Michigan Hospital Service* (1960), 359 Mich 472. It follows that the insurer should be liable only for the interest that accrues on the amount of risk it has assumed. Otherwise, it would be paying interest on

a risk it did not assume and for which it did not charge premiums. In this case, the judgment was for $200,000, while the insurer's liability was limited to $100,000.

Therefore, the case is remanded and the plaintiffs are granted the total interest of $34,333. However, the defendant insurer is liable only for the interest on its share of the judgment which is in the amount of $17,167.

Costs to appellants.

All concurred.

CORONA *v.* LENAWEE COUNTY ROAD COMMISSIONERS

SULLINS *v.* LENAWEE COUNTY ROAD COMMISSIONERS

1. HIGHWAYS—MUNICIPAL CORPORATIONS—NEGLIGENCE—STATUTES—NOTICE—CONSTITUTIONAL LAW.

   The former notice provision of the general highway statute which required a person injured because of the defective condition of a street or highway in a city or incorporated village to give written notice within 60 days to the city or village where required by law to do so was held by the Michigan Supreme Court to be constitutionally void as to a claimant physically disabled so as to be unable to serve the notice as depriving him of due process of law (CL 1948, § 242.8).

2. HIGHWAYS—COUNTY ROAD COMMISSIONS—NEGLIGENCE—STATUTES—NOTICE—CONSTITUTIONAL LAW.

   The notice provision of the general highway statute requiring

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 40 Am Jur 2d, Highways, Streets, and Bridges § 579.
56 Am Jur 2d, Municipal Corporations § 680 *et seq.*

that a person injured by reason of a defective highway under the jurisdiction of a county board of road commissioners give written notice within 60 days to the board of road commissioners is constitutionally void as to the personal representatives of minor decedents killed in an accident claimed to be caused by the county board of road commissioners where the personal representatives were not appointed until after the expiration of the 60-day period because it deprives the personal representatives of due process of law (MCLA § 224.21).

3. HIGHWAYS—COUNTY ROAD COMMISSIONS—NEGLIGENCE—NOTICE—PREJUDICE.

A county road commission and its insurer which were given timely notice of all the necessary facts concerning an intersectional collision in which plaintiffs' decedents were killed, including the assertion that an attempt would be made to hold them liable because a stop sign was covered by a considerable amount of debris, thus obscuring decedents' view, were not prejudiced by the fact that the notice was not given by the personal representatives of the decedents, who were not appointed until after the time given in the statute for service of notice, where the only defect in the notice was that the writer of it did not represent the decedents but only the insurer of the automobile owner and the defendant road commission and its insurer had proper and ample opportunity to investigate all the circumstances surrounding the accident (MCLA § 224.21).

Appeal from Lenawee, Robert W. McIntyre, J. Submitted Division 2 October 12, 1971, at Lansing. (Docket Nos. 10111, 10112.) Decided October 26, 1971. Leave to appeal denied, 387 Mich 762.

Complaints by Opal Corona, administratrix of the estate of Gregory Corona, deceased, and by Pauline Sullins, administratrix of the estate of Sherry Mason, deceased, against Lenawee County and the Lenawee County Board of Road Commissioners for wrongful death. Accelerated judgment for defendants. Plaintiffs appeal. Accelerated judgment for Lenawee County affirmed; accelerated judgment for

Lenawee County Board of Road Commissioners reversed and remanded with instructions.

Baker, Durst & Marr, for plaintiffs.

Hammond, Baker & Kralick, for defendant Lenawee County.

Foster, Lindemer, Swift & Collins, for defendant Lenawee County Board of Road Commissioners.

Before: MCGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

HOLBROOK, J. Plaintiffs' decedents, Gregory Corona and Sherry Mason, both 17 years of age, died of injuries resulting from an automobile accident at the intersection of two roads within the jurisdiction and control of defendants. Gregory Corona drove the automobile in which he and Sherry Mason were riding through a stop sign and was struck by an automobile being driven on the intersecting road.

Within 60 days of the accident, the Coronas' insurance carrier, through its attorney, served notice upon the county road commission, one of defendants, as follows:

"25 August 1969

"Charles Waid, Commissioner and
"Edith Myers, Clerk
"Lenawee County Road Commission
"Adrian, Michigan
"Dear Sir and Madame:

"This is to give you notice of property damage and personal injuries sustained by our clients, Auto

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

Owners Insurance Company and their insured, Joe and Opal Corona.

"The accident occurred on June 29, 1969 at 6:30 p.m. at the intersection of Wilmoth Highway and Laberdee Road, Raisin Township, Lenawee County, Michigan. At such time and place there was a motor vehicle accident involving a motor vehicle driven by Constance Wagner, whose passenger was Wanda Wagner. This motor vehicle was proceeding east on Laberdee Road. The motor vehicle owned by Joe and Opal Corona was being driven by Gregory Corona, who had a passenger, Sherry A. Mason. This vehicle was proceeding south on Wilmoth Highway. At the time of the accident, the Corona vehicle proceeded through a stop sign and an impact occurred at the approximate center of the intersection.

"It is the claim of our clients and Sherry A. Mason's estate that the reason that the Corona vehicle drove through the stop sign was because the Lenawee County Road Commission had piled a considerable amount of limbs, brush and considerable debris in the approximate location of the stop sign so that said sign was not readily discernible to the driver of the Corona vehicle.

"As a result of said accident said Constance Wagner has lost a foot and suffered other serious injuries; and said Wanda Wagner has suffered serious injuries, the exact nature of which are unknown. Gregory Corona and Sherry A. Mason died as a result of said accident, and there are certain matters of property damage including damage to the motor vehicles, clothing, jewelry and items of a similar nature.

"At the present time there are no other witnesses known to the claimants except for Constance and Wanda Wagner. It is the intention of Joe and Opal Corona and the estates of Gregory Corona and Sherry A. Mason to hold the Lenawee County Road Commission liable both for their own injuries and possibly for the injuries sustained by Constance and

Wanda Wagner in the event the said Constance and Wanda Wagner bring a cause of action against Joe and Opal Corona.

"Very truly yours,
"[*signed*] Prosser M. Watts, Jr.
"Prosser M. Watts, Jr."

On December 22, 1969, the defendants were apprised by letter of the limited authority of the writer of the August 25, 1969, letter to the defendant county road commissioners in response to an inquiry by defendant's insurance company. This letter reads as follows:

"December 22, 1969
"Michigan Mutual Liability Insurance Company
"1026 East Michigan Street
"Lansing, Michigan 48911
"In re: Wagner—Corona—Lenawee County Road Commission
"Gentlemen:

"Mr. Davenport has requested clarification as to whom we are representing in the above matter. Mr. Watts of our office was originally contacted by a representative of Auto Owners Insurance Company, who insured the owners of the Corona vehicle.

"Although we had been advised we were to be contacted by the Wagners; we never heard from anyone except Auto Owners. At this time our only client is Auto Owners Insurance Company who would evidently implead the Lenawee County Road Commission in the event action was brought against the driver and/or owner of the Corona vehicle by any injured party.

"Very truly yours,
"[*signed*] Wm. H. Walker
"William H. Walker"

An affidavit of Mr. Prosser M. Watts, Jr., further explaining the facts and circumstances surrounding

his giving the notice was admitted in evidence at the hearing on defendants' motion for accelerated judgment.

Opal Corona, mother of Gregory Corona, petitioned the probate court on December 24, 1969, to appoint her as administratrix of her son's estate. Also, Pauline Sullins, mother of Sherry Mason, petitioned the Probate Court for the County of Lenawee on December 24, 1969, to appoint her as administratrix of her daughter's estate.

The Probate Court for the County of Lenawee issued letters of administration to Opal Corona as administratrix of the estate of Gregory Corona on January 22, 1970. Letters of administration were issued to Pauline Sullins as administratrix of the estate of Sherry Mason on January 26, 1970.

A complaint was filed in the Lenawee County Circuit Court in the above cases on February 13, 1970. The defendants, Board of County Road Commissioners of the County of Lenawee, and the County of Lenawee, filed a motion to quash service, a motion for summary judgment and for an accelerated judgment in both of the above entitled causes.

The first hearing on this matter was held on March 2, 1970. By stipulation between counsel, service on the Board of County Road Commissioners of the County of Lenawee was quashed. Notices of claim were allegedly served on March 12, 1970, on the chairman and the clerk of the Board of County Road Commissioners, County of Lenawee, by Opal Corona as administratrix of Gregory Corona, and Pauline Sullins, as administratrix of Sherry Mason. After service of amended summons, the defendants renewed their motions for accelerated judgment and summary judgment on April 9, 1970. Hearing on such motions was held on April 20, 1970. After hearing arguments on the matter, the court filed

written findings on May 26, 1970, holding that defendants were entitled to accelerated judgments because proper notices of claim were not timely given by the *proper parties* pursuant to MCLA § 224.21 (Stat Ann 1958 Rev § 9.121), and citing as authority the case of *Morgan* v. *McDermott* (1969), 382 Mich 333.

A judgment pursuant to such findings was entered and filed on June 26, 1970. A motion for rehearing was made by plaintiffs and after hearing arguments was denied by the trial court by order filed August 19, 1970.

The trial court in ruling on the motion for accelerated judgment stated in reference to the August 25, 1969 letter constituting notice to the defendants, the following:

"The letter goes on to very carefully comply with the 60-day requirement in the statute by stating exactly when the accident occurred, where it occurred, who was involved, what injuries were inflicted, and the names of all known witnesses to the occurrence."

It is evident from the facts in the case that defendants did not know that the writer of the letter and notice of August 25, 1969, was not representing the plaintiffs' decedents, until December 22, 1969.

In fairness to the trial judge we point out that at the time of the trial court's ruling on defendants' motion for accelerated judgment and denial of the plaintiffs' motion for rehearing, the Michigan Supreme Court had not, as yet, determined the case of *Grubaugh* v. *City of St. Johns* (Nov, 1970), 384 Mich 165.[1]

In *Grubaugh*, plaintiff, 19 years old, was a passenger in an automobile involved in an accident claimed

[1] Referred to in Mr. Justice BLACK'S dissent in the case of *Morgan* v. *McDermott, supra,* p 370.

to be caused by a failure of the city to properly maintain its streets which resulted in plaintiff receiving serious injuries, including a brain concussion, fractured bones and loss of eyesight in both eyes. It was alleged that he was unable to serve the City of St. Johns with the 60-day notice required by MCLA § 242.8 (Stat Ann 1958 Rev § 9.598) and the city charter because of his physical disabilities. Nearly four months after the accident plaintiff filed a nomination of guardian with the Clinton County Probate Court naming Keith B. Grubaugh as his guardian. Keith Grubaugh, on behalf of plaintiff, filed a notice of claim with defendant city on September 5, 1961. The trial court granted a motion for accelerated judgment on rehearing in favor of defendant, based on the cases of *Boike* v. *City of Flint* (1965), 374 Mich 462 and *Trbovich* v. *City of Detroit* (1966), 378 Mich 79.

As we read *Grubaugh*, the Michigan Supreme Court deals squarely with the issue to be determined in the instant case as appears on pp 175, 176, 177:

"It is argued in this case that our Court in *Moulter* v. *Grand Rapids* (1908), 155 Mich 165, held (pp 168, 169):

"'It being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose. Whether the limitations imposed are reasonable or unreasonable in such cases are questions for the legislature, and not for the courts.' The logical result of such a rule under that holding, and as advocated by defendant in the instant case, would be to legislatively divest plaintiff, under legal disability as he was during the 60-day period, of a vested right without due process of law.

"Under the statute a plaintiff could institute suit on the first or fifty-ninth day after the injury. To

take away his cause of action on the sixty-first day because he could not meet the notice provisions of the act would deprive him of a vested right of action without due process of law.

"The reasons traditionally advanced for such differential treatment were expressed by our Court in *Pearll* v. *Bay City* (1913), 174 Mich 643, at p 647:

" 'The purpose of the charter provision is to furnish the municipal authorities promptly with notice that a claim for damages is made, and advise them of the time, place, nature, and result of the alleged accident, and a sufficient statement of the main facts, together with names of witnesses, to direct them to the sources of information that they conveniently may make an investigation.' See, also, *Northrup* v. *City of Jackson* (1935), 273 Mich 20; *Rottschafer* v. *East Grand Rapids* (1955), 342 Mich 43; *Harrington* v. *Battle Creek* (1939), 288 Mich 152; *Meredith* v. *City of Melvindale* (1969), 381 Mich 572.

"Even if we assume the above original policy considerations were once valid, today they have lost their validity and ceased to exist due to changed circumstances. In recent years most governmental units and agencies have purchased liability insurance as authorized by statute. MCLA § 691.1409 (Stat Ann 1969 Rev § 3.996[109]). In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents occurring on streets and highways. As a result these units and agencies are better prepared to investigate and defend negligence suits than are most private tort-feasors to whom no special notice privileges have been granted by the legislature.

"In view of the above, we reject and overrule the reasoning under the rule in *Moulter, supra,* and condem the purely capricious and arbitrary exercise of legislative power whereby a wrongful and highly injurious invasion of rights is sanctioned and the liti-

gant who fails to submit the required notice of claim is stripped of all real remedy.

"We hold that the notice provisions of § 8 of chapter 22 of the general highway statute are constitutionally void as depriving claimant of due process of law.

"Since we dispose of this case on the basis of this plaintiff's right to due process, we do not discuss the briefed argument that the 60-day notice requirement in every case violates the equal protection clauses of the state and Federal Constitutions. Such question will undoubtedly arise in some new case where a fully competent adult is the victim."

Both of plaintiffs' decedents in the instant case were 17 years of age at the time of the accident and their resulting deaths. They had no legal representatives to speak for them until after the expiration date delineated in the statute for service of notice. We conclude that *Grubaugh, supra,* is applicable because plaintiffs' decedents were killed in the accident claimed to be caused by the defendant and no one was legally able during the 60-day period to give the required notice. To rule otherwise would be to reward a defendant or defendants in the event a plaintiff was killed, rather than temporarily maimed and incapacitated, as a result of an accident claimed to be caused by a defendant public entity.

We hold that the notice provisions of MCLA § 224.21 (Stat Ann 1958 Rev § 9.121) are constitutionally void as depriving claimants of due process of law.

Defendant county road commission has not nor can it claim any prejudice in this case. A timely notice was given of all the necessary facts concerning the accident including the assertion that plaintiffs would attempt to hold them liable. The only defect in the notice was the fact that the writer of the no-

tice did not represent the plaintiffs and the insurer of the owner of the automobile, but only the latter. There appears no question but that defendant county road commission and its insurer had proper and ample opportunity to investigate all the circumstances surrounding the accident.

The defendant County of Lenawee was not a proper party defendant and the accelerated judgment in its favor is affirmed.

For the reasons mentioned herein, we set aside the accelerated judgment in favor of the Lenawee County Road Commission dismissing the cause of action and remand to the circuit court for further proceedings not inconsistent with this opinion.

Costs to plaintiffs from Lenawee County Road Commission defendant, and costs to defendant County of Lenawee from plaintiffs.

All concurred.

PEOPLE v. WILLIAM THOMAS

CRIMINAL LAW—PLEA OF GUILTY—TRUTHFULNESS OF PLEA.

A plea of guilty was improperly accepted where the defendant's testimony at the plea-taking proceeding was highly equivocal and indicated innocence and defendant denied any plan to commit a crime or that he received any of the money taken from the victim of the charged robbery.

Appeal from Recorder's Court of Detroit, Henry D. Arkison, J. Submitted Division 1 October 11,

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REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 484 *et seq.*

1971, at Detroit. (Docket No. 10171.) Decided October 26, 1971.

William Thomas was convicted, on his plea of guilty, of assault with intent to rob being armed. Defendant appeals. Reversed and remanded for trial.

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.

Robert Shulman, for defendant on appeal.

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

R. B. BURNS, J. The defendant and a codefendant, Willie Timmons, were charged with robbery armed. MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797). On the day set for trial the defendant pled guilty to assault with intent to rob, being armed. MCLA § 750.89 (Stat Ann 1962 Rev § 28.284).

On appeal the sole issue is whether the defendant's testimony was so equivocal that it was error for the trial court to accept his guilty plea.

MCLA § 768.35 (Stat Ann 1954 Rev § 28.1058) requires the trial court to vacate a guilty plea and order a trial if he has reason to doubt the truth of the plea. The statute reads:

"Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronounc-

ing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed."

The transcript reads in part:

"*The Court:* Were you working with this other fellow?

"*Defendant Thomas:* I didn't know at the time he was going to do this, your Honor. I was in the hotel with him.

"*The Court:* We will take a short recess.

"Will counsel approach the bench.

(*Discussion off the record*)

"*The Court:* Have you had an opportunity to reflect on this matter? Are you going to tell me what you did?

"*Defendant Thomas:* Your Honor, I was there when the robbery took place. If I had wanted to stop it, I couldn't do anything about it, your Honor.

"*The Court:* What did you do?

"*Defendant Thomas:* I was just there. I just stood there.

"*Mr. Katzer* [*defense counsel*]: Did you watch it going on?

"*Defendant Thomas:* Yes, I did.

"*Mr. Katzer:* You let it go on?

"*Defendant Thomas:* There was nothing I could do to stop it.

"*Mr. Katzer:* And you were with this man?

"*Defendant Thomas:* Yes, I was.

"*Mr. Katzer:* Did you share in what was taken from the girl?

"*Defendant Thomas:* He told me to tie the girl up.

"*The Court:* Did you tie her up?

"*Defendant Thomas:* No. I brought out some towels. He told me to get some towels, so, I got some towels.

"*The Court:* Counsel would you two please approach the bench.

(*Discussion off the record*)

* * *

"*The Court:* It happened on December 16, 1969?

"*Defendant Thomas:* Yes, your Honor.

"*The Court:* You participated in this with the other defendant; is that right?

"*Defendant Thomas:* Yes, your Honor.

"*The Court:* You went and got the towels which she was tied up with?

"*Defendant Thomas:* Yes, your Honor.

"*The Court:* And you also got some of the things that were taken from her; is that right?

"*Defendant Thomas:* I received none of the things that were taken. I told him that I didn't want any part of it."

This testimony of the defendant is highly equivocal, affirmatively raises doubts as to the truth of the plea, and presents a question for the trier-of-fact to decide. *People* v. *Richard E. Johnson* (1967), 8 Mich App 204; *People* v. *Mason* (1968), 13 Mich App 277; and *People* v. *Creger* (1969), 16 Mich App 59.

The recent case of *People* v. *Blewett* (1969), 382 Mich 793, *rev'g* 18 Mich App 327, is controlling. The only issue in that case is identical with the issue in this one. Was the defendant so equivocal in pleading guilty that the court should not have accepted his plea? This Court thought that he was not. The Michigan Supreme Court reversed without an opinion. Although Blewett was equivocal about his guilty plea, his testimony regarding the

facts of the crime clearly implicated him and he admitted that there was at least some preliminary discussion with his codefendant regarding the commission of the crime. Blewett also stated that he was the "lookout" and that he was the one who took the money. Precisely the converse is true in the present case. The defendant's testimony regarding the facts of the crime indicates innocence and he denies any plan to commit a crime or that he received any of the money taken from the victim.

Reversed and remanded for trial in accordance with MCLA § 768.35 (Stat Ann 1954 Rev § 28.1058).

All concurred.

PEOPLE v. INSLEY

1. ASSAULT AND BATTERY—INDICTMENT AND INFORMATION—LESSER INCLUDED OFFENSE—FELONIOUS ASSAULT.

A conviction of assault and battery may be obtained on an information or indictment charging felonious assault where the information alleges that a battery occurred.

2. WITNESSES—CRIMINAL LAW—SEPARATION.

Separation of witnesses in a criminal trial is discretionary with the trial judge.

3. WITNESSES—SEPARATION—CRIMINAL LAW—ABUSE OF DISCRETION.

Denial of a criminal defendant's motion to separate witnesses constituted an abuse of discretion where the judge gave no valid reason for his decision.

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur 2d, Indictments and Informations §§ 260, 306.
[2–5] 53 Am Jur, Trial §§ 31–33.
[6] 29 Am Jur 2d, Evidence § 320.

4. WITNESSES—CRIMINAL LAW—SEPARATION.
Denial of a criminal defendant's motion to separate witnesses was an abuse of discretion where the only reason stated for the denial was that the trial should be public because the reason given is not a valid reason (MCLA § 600.1420).

5. WITNESSES—CRIMINAL LAW—SEPARATION—HARMLESS ERROR.
The trial judge's denial of a criminal defendant's motion to separate witnesses, although an abuse of discretion because the denial was based solely on the reason that the trial should be public, was harmless error where the defendant has not shown that the decision resulted in such prejudice to his cause that the jury would have reached a different result had the motion been granted.

6. CRIMINAL LAW—EVIDENCE—SIMILAR PRIOR ACTS.
Evidence that defendant, charged with assaulting teenage boys standing near his property, discharged a shotgun while boys were on his property one year prior to the assault defendant was being tried for was inadmissible whether or not a cautionary instruction was given limiting the evidence's use to the establishment of motive or intent.

Appeal from St. Clair, Halford I. Streeter, J. Submitted Division 2 October 11, 1971, at Lansing. (Docket No. 10312.) Decided October 26, 1971.

David N. Insley was convicted of assault and battery. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Walter W. Turton,* Prosecuting Attorney, and *Delmer L. Cleland,* County Corporation Counsel, for the people.

William J. Giovan, for defendant.

Before: McGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

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

McGREGOR, P. J. Defendant was charged with felonious assault, contrary to MCLA § 750.82 (Stat Ann 1962 Rev § 28.277). He was convicted by a jury of assault and battery, contrary to MCLA § 750.81 (Stat Ann 1962 Rev § 28.276), and was sentenced to serve 90 days in jail or to pay a $100 fine. He appeals as of right.

On the evening of October 31, 1969, eight boys between the ages of 14 and 16 gathered at a residence near the defendant's home. These boys testified that at about 8:30 p.m. they were standing on property adjacent to the defendant's residence when defendant approached and ordered them to disperse. They turned and began to leave, and defendant started back toward his house. Suddenly, the defendant came back, pulled a pistol, and told them to line up. Defendant then jumped upon the complainant, strikin him behind the ear with a pistol, causing a slight injury.

Defendant's version of the assault was somewhat different from that presented by the prosecutor's witnesses. He related that he was informed of a disturbance at the rear of his property, that he went over to a hedge, and that a group of boys then ran toward the street. Defendant saw the boys on some adjacent property, walked over to them, and angrily told them to leave. He stated that he then turned back toward his residence, but when struck in the back of the head by a small object, he turned around and struck the boy nearest him with either a cap gun or a flashlight. Defendant denied having a real gun of any kind on his person, and alleged that he only had a cap gun for the purpose of making noise.

In rebuttal, the prosecution called one of the boys who had been a witness. This witness was not indorsed on the information and testified substantially the same as the other witnesses.

After hearing the testimony, the jury found the defendant guilty of assault and battery. This appeal raises eight assignments of error. For purposes of our consideration, we have consolidated those assignments to five issues.

The information in this cause charged "felonious assault." The defendant objected to the court's charge on the lesser included offense of "assault and battery", but the court overruled defendant's objection and gave the instruction. Defendant submits that this was error.

We find no reversible error here. Contrary to defendant's contentions, a conviction for assault and battery may be had on an indictment or information charging felonious assault. *People* v. *Burk* (1927), 238 Mich 485. The information in this cause charged a battery in the words, "make an assault, by means of a certain dangerous and offensive weapon, to wit: a revolver or pistol in him, the said Jay M. Kuhn (*sic*) did then and there beat, wound, bruise and ill-treat * * * ". Accordingly, assault and battery was included within the major offense. See also 2 Gillespie, Michigan Criminal Law and Procedure, § 1045, p 1439.

The trial court denied defendant's motion, made in chambers prior to taking proofs, to have the prosecution's witnesses separated from the courtroom, reasoning that it was a public trial and that they had a right to be in the courtroom. In so ruling, defendant submits, the trial court abused its discretion by showing no exercise of discretion at all.

The law is clear in Michigan that excluding of witnesses in a criminal trial is discretionary with the trial judge. *People* v. *Poe* (1970), 27 Mich App 422; *People* v. *Williams* (1967), 6 Mich App 412. In the case at bar, however, the trial judge's denial of de-

fendant's motion to separate did not show any considered judgment whatsoever. It was purely arbitrary and did not consider whether the witnesses should be sequestered. Furthermore, the reason given for not granting the motion—that the trial should be public—is unsupportable. Although a public trial is guaranteed by the Constitution, our Legislature has specifically provided that "for good cause" witnesses may be excluded. MCLA § 600.1420 (Stat Ann 1962 Rev § 27A.1420). Accordingly, we find the trial court's decision, giving no valid reasons, was an abuse of discretion.

Although the court's decision was erroneous, it alone does not constitute reversible error. *People* v. *Hall* (1882), 48 Mich 482, 487. Defendant has not shown that the failure to separate the witnesses resulted in such prejudice to his cause that the jury would have reached a different result had the motion been granted. *People* v. *Willie Lee Lewis* (1971), 31 Mich App 433, 438. Two of the witnesses testified substantially the same at the preliminary examination as they did at trial. *People* v. *Williams, supra.* More importantly, there was no major dispute among the prosecution's witnesses concerning the alleged assault, relative to defendant's actual behavior. Accordingly, this issue alone does not merit a reversal.

At trial, over defendant's objection, the prosecutor was allowed to elicit evidence from defendant and another witness regarding an incident that occurred one year prior to the alleged crime, when defendant discharged a shotgun while boys were on his property. The prosecutor, *inter alia,* argued that such evidence was admissible under MCLA § 768.27 (Stat Ann 1954 Rev § 28.1050), which permits evidence of other acts to establish motive, intent, ab-

sence of mistake, *et cetera,* when such evidence is material to the case.

The evidence was inadmissible, whether or not a cautionary instruction should have been given immediately or at all, and will not be a problem upon remand.

Richard Appel was called as a witness by the prosecutor during rebuttal. Mr. Appel was not indorsed on the information, was a *res gestae* witness, and had previously been called. Defendant asserts that the overruling of his objection to this witness was error.

This Court has said:

"At trial, after the defense rested, the prosecution, over defendant's objection, called two unindorsed *res gestae* witnesses in rebuttal. The allowance of their testimony was reversible error. The witnesses had not appeared before. Furthermore, no attempt had been made to indorse the witnesses and no legal cause explaining the prosecutor's failure to indorse is evident in the record. [Citing authority] Finally, the rebutting testimony was improper, since it tended to prove surrounding circumstances of the crime." *People* v. *Sacharczyk* (1969), 16 Mich App 710, 711.

Similarly, the witness called in rebuttal in the case at bar was an unindorsed *res gestae* witness. No attempt to indorse this witness was made and the prosecutor's contention that he was not known as a *res gestae* witness is belied by the preliminary examination transcript. Finally, Mr. Appel testified substantially the same as the other boys, *i.e.,* his testimony was not rebuttal at all. Accordingly, a reversal is clearly merited on this issue, also.

Finally, although defendant did not include in his request to charge a prepared theory of the case, he

alleges that GCR 1963, 516.7 clearly requires that the trial court present such theory on its own. Since the court did not include defendant's theory in his charge, defendant submits that this also was error. GCR 1963, 516.2 states:

"No party may assign the giving or the failure to give an instruction unless he object thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the ground of the objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Whether or not the trial judge was required to present defendant's theory of the case to the jury, the defendant's failure to object to the charge has waived the provision of GCR 1963, 516.7. Upon remand, however, if defendant requests that the trial court give the defendant's theory of the case, the above court rule should be complied with.

Reversed and remanded.

All concurred.

UNIROYAL, INC., *v.* KEN BROWN LEASING CORPORATION

1. AUTOMOBILES—MOTOR VEHICLES—WORDS AND PHRASES—TIRES.
A motor vehicle consists of an assembly of all of its component parts, including tires.

REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Automobiles and Highway Traffic § 1.
[2–4] 7 Am Jur 2d, Automobiles and Highway Traffic § 29 *et seq.*
[5] 53 Am Jur, Trover and Conversion § 176.

2. SALES—AUTOMOBILES—MOTOR VEHICLES—PASSAGE OF TITLE—TITLE TO TIRES.

The ownership of tires on a motor vehicle passes, in an ordinary sale of the vehicle, to the purchaser of the vehicle at the moment the title to the vehicle passes to the purchaser.

3. CONVERSION—AUTOMOBILES—CONVERSION OF TIRES—NOTICE.

Defendant purchaser of motor vehicles was not liable, as a matter of law, for the conversion of the tires on the vehicles by refusing a request, made after purchase, to deliver those tires to the plaintiff who owned the tires where the plaintiff did not establish that the defendant had actual notice of the plaintiff's interest in the tires.

4. AUTOMOBILES—MOTOR VEHICLES—TIRES—TITLE TO TIRES—NOTICE—SALES AGREEMENT.

Failure of a sales agreement covering motor vehicles to state that the sale included the tires on the vehicles was not evidence that the defendant purchaser had actual notice that one other than the seller owned the tires at the time of purchase, because a vehicle consists of all of its component parts, including tires, and separation of the title to tires from the title to the vehicle is not an ordinary circumstance about which a purchaser would normally inquire.

5. CONVERSION—INTEREST IN PROPERTY—NOTICE—BURDEN OF PROOF.

The party in a conversion action asserting that another had notice of his interest in the disputed property has the burden of proof.

Appeal from Wayne, James Montante, J. Submitted Division 1 May 6, 1971, at Detroit. (Docket No. 10404.) Decided October 26, 1971. Leave to appeal denied, 387 Mich 771.

Complaint by Uniroyal, Inc., against Ken Brown Leasing Corporation for conversion. Judgment for plaintiff. Defendant appeals. Reversed.

Kenney, Kenney, Chapman & Prather, for plaintiff.

John R. Hocking, for defendant.

Before: V. J. BRENNAN, P. J., and J. H. GILLIS and T. M. BURNS, JJ.

T. M. BURNS, J. This is an appeal as of right from a jury verdict awarding plaintiff $12,796.80 in an action for conversion.

On March 24, 1965, plaintiff entered into a Tire Mileage Agreement with Ray Fruehauf, Inc. Under the terms of the agreement, plaintiff purchased all of the tires on Fruehauf's vehicles and leased the tires back to Fruehauf. The agreement further provided that plaintiff would thereafter be in charge of repairing, maintaining, and replacing the tires as the need arose.

Plaintiff did not record its interest in the tires, file any security interest, or cause its interest to be indorsed on the certificates of title.

On April 6, 1965, and April 30, 1965, defendant purchased 45 of Fruehauf's tractors and trailers. In a lease-back agreement executed the same day, defendant leased the tractors and trailers back to Fruehauf.

On April 11, 1966, Fruehauf went into bankruptcy. The trustee who had control over the vehicles returned them to the defendant, apparently because the certificate of title showed only the defendant as having any interest therein.

It appears that as a result of the bankruptcy proceedings, plaintiff first learned of the sale of the vehicles by Fruehauf to the defendant. Plaintiff then demanded that the tires be returned, but defendant refused.

Plaintiff then brought this action seeking $17,897.70 in conversion damages. The jury found for the plaintiff in the amount of $12,796.80.

Defendant contends that it was error for the trial court to deny defendant's motion for a directed ver-

dict at the close of defendant's proofs, or, in the alternative, a judgment notwithstanding the verdict after the jury verdict. It is defendant's position that as a bona fide purchaser of the vehicles, it was also a bona fide purchaser of the tires; and since plaintiff did not record its interest in the tires and further since defendant had no actual notice of the Tire Mileage Agreement, that the court should have found for the defendant as a matter of law.

This court recently held that a car without tires and an engine was not an automobile:

"The term 'automobile' is applied generally to a self-moving vehicle designed to travel on common roads and, specifically, to a wheeled vehicle for use on roads without rails, which carries in itself a mechanical motor as its source of power.

"The body of a car stripped of its engine and wheels is not an 'automobile'. While it might closely resemble an automobile visually, there is no functional similarity because the stripped car does not have wheels and an engine and is, therefore, incapable of 'independent' movement. By definition it is not an 'automobile'."[1]

In our opinion a vehicle consists of an assembly of all of its component parts including tires. It is clear then that if defendant had no actual notice of plaintiff's interest in the tires, then it could not be held liable in an action for conversion. In the ordinary sale of a vehicle, ownership of the tires would pass to the purchaser of the vehicle at the moment title to the vehicle passed to the purchaser.

The first two paragraphs of the sales agreement between Fruehauf and defendant provide:

"[Seller] hereby sells, transfers, bargains, grants, and conveys to Buyer and its assigns, all of its right,

[1] *The Travelers Indemnity Company* v. *Duffin* (1970), 28 Mich App 142, 147.

title and interest in and to said motor vehicles and trailers as hereinafter described.

"Seller has the right to sell said vehicles and that said vehicles * * * are unencumbered and free from all liens or security interests whatsoever."

Plaintiff offered no direct proofs to establish that defendant had actual notice of plaintiff's ownership of the tires. They argued, however, that the failure of the sales agreement between Fruehauf and the defendant to specifically include the word "tires" provides inferential evidence of defendant's knowledge that the tires on the vehicles were not owned by Fruehauf.

However, we have just stated that in our opinion title to the tires would pass along with title to the vehicles to the purchaser of the vehicles. Therefore, it was not incumbent upon the defendant to include the word "tires" in its purchase agreement with Fruehauf any more than it would be required to include terms such as "steering wheel" or "engine".

Defendant offered three witnesses all of whom were employees or officers of defendant company and were involved in the transaction with Fruehauf. All of these witnesses testified that they did not know of plaintiff's Tire Mileage Agreement with Fruehauf until after the vehicles had been purchased. In addition, an executive with Fruehauf testified that he did not recall advising the defendant of the Tire Mileage Agreement.

Defendant did check in every possible location for any existing liens or interests in the vehicles and found none. We would also note that the separation of ownership of the tires from the rest of the vehicle is not an ordinary circumstance about which a purchaser would normally inquire.[2]

[2] An employee of the plaintiff admitted that a sale and lease-

The burden of proof in regard to notice is on the party asserting it. Since plaintiff did not offer any direct proofs to establish that defendant had actual notice of the Tire Mileage Agreement and we have also held that the failure to include the word "tires" in defendant's purchase agreement with Fruehauf could not operate as evidence that defendant had notice of the Tire Mileage Agreement, there is no evidence upon which the jury could have found that defendant knew that the tires were not owned by Fruehauf. It was therefore error not to have granted the directed verdict.

Reversed.

All concurred.

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back of tires was very unusual. He also stated that he was probably the only person in the courtroom who had ever heard of such an arrangement.

PEOPLE *v.* SUTTON

1. CRIMINAL LAW—VENUE—MOTION TO DISMISS.

Denial of a criminal defendant's motion to dismiss for failure to prove venue on the ground that the motion was not timely filed was error where the motion was filed seven days before trial began.

2. CRIMINAL LAW—VENUE—MOTION TO DISMISS.

The trial court erred in denying a criminal defendant's motion to dismiss for failure to prove venue where an examination of the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 56 Am Jur, Venue § 36.
21 Am Jur 2d, Criminal Law §§ 399, 434, 512, 513.

preliminary examination transcript reveals that venue was not established and the people admitted they did not establish venue at the preliminary examination.

Appeal from Clare, Robert H. Campbell, J. Submitted Division 3 September 7, 1971, at Grand Rapids. (Docket No. 10513.) Decided October 26, 1971.

Albert Sutton was convicted of the cruel punishment of his stepson. Defendant appeals. Remanded with instructions to vacate the judgment of conviction and to grant defendant's motion to dismiss the prosecution.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Jay F. Trucks,* Prosecuting Attorney, for the people.

Bicknell & Winter, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

T. M. BURNS, J. Defendant was charged with the cruel punishment of his stepson, a child under the age of 16 years. MCLA § 750.136 (Stat Ann 1962 Rev § 28.331). After a jury trial, defendant was found guilty and sentenced from 1 year, 6 months to 4 years.

Defendant raises three issues on appeal. However, only the issue of whether the trial court erred by the denial of a motion to dismiss which was based on the prosecution's failure to establish venue at the preliminary examination need be discussed. The other alleged errors occurred at trial, but if defendant was improperly bound over for trial, then all the

trial proceedings are nullified and the issues raised need not be discussed.

The trial court did not decide the issue of venue, but denied the motion because it was not timely filed. The motion was filed seven days before the trial began, and the arguments were heard in the judge's chambers before a jury was impaneled. The motion was timely as it was made before the trial began. *People* v. *Hall* (1965), 375 Mich 187. Since we have decided the motion was timely and we have the preliminary examination transcript before us, we can determine whether venue was established without the necessity of remanding the case for a determination of the issue. GCR 1963, 820.7.

We have made a very studious review of the preliminary examination transcript, but have not found any venue established. Also, in reviewing the arguments for the motion to dismiss, we have noted the people admitted they did not establish venue at the preliminary examination, and the trial court made note of this admission.

The case before us is controlled by *People* v. *Hall, supra,* pp 192, 193, where the Supreme Court held:

"Here we are concerned with a failure to prove venue *on examination* and a timely motion to quash before trial. As we previously noted the question in this case required disposition before the defendant was held to trial. Because the proof on examination was fatally inadequate, and timely motion challenging the binding over was made, the circuit court on the record made in the magistrate proceedings was powerless to hold defendant to trial. For this reason the judgment of conviction in the circuit court is vacated and the case is remanded with directions to grant the motion to quash."

In accordance with *Hall,* we are remanding this case to the circuit court with instructions to vacate

the judgment of conviction and grant the motion to dismiss.

All concurred.

PEOPLE v. WILKIE

1. CRIMINAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—CUSTODIAL INTERROGATION—DEFENDANT'S SILENCE.

   Admission of police officer's testimony, elicited by the prosecution, that defendant, while in custody, had not made a statement concerning the armed robbery for which he was arrested did not constitute reversible error and was, at most, harmless error where the evidence of defendant's guilt was overwhelming.

2. ROBBERY—ARMED—EVIDENCE—ESSENTIAL ELEMENTS—LESSER INCLUDED OFFENSES.

   Failure to instruct on the lesser included offenses of armed robbery, the crime charged, was proper where the evidence against defendant revealed all the elements of armed robbery, as opposed to unarmed or attempted robbery, and no evidence existed to support the conviction of defendant on a lesser offense.

Appeal from Jackson, Gordon W. Britten, J. Submitted Division 2 October 11, 1971, at Lansing. (Docket No. 10545.) Decided October 26, 1971. Leave to appeal denied, 386 Mich 787.

Matt A. Wilkie was convicted of armed robbery. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 778.
[2] 53 Am Jur, Trial §§ 796, 797.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Bruce A. Barton,* Prosecuting Attorney, and *Paula O. Hosick,* Chief Appellate Attorney, for the people.

Martin Reisig, State Appellate Defender's Office, for defendant.

Before: McGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

McGREGOR, P. J. Defendant was convicted of armed robbery, MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797), at a jury trial held in July 1970. The conviction stems from the alleged robbery of a gas station. A 16-year-old boy, alone at the station, testified against the defendant. Two police officers testified that defendant refused to make any statements while in custody; the defendant contends that such testimony was in violation of his constitutional privilege against self-incrimination.

The principal issues on appeal appear to be (1) whether the admission of the testimony of the two police officers, elicited by the prosecution, resulted in a denial to the defendant of a fair trial, where the testimony revealed that the defendant, while in custody, had not made a statement concerning the offense in question, and, if such was error, whether such error can be held reversible in this fact situation. Secondly, whether the trial court erroneously excluded lesser included offenses from the consideration of the jury.

Officer Stanley of the county sheriff's department,

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

called as a witness for the people, testified upon direct examination in pertinent part as follows:

"*Q.* Will you please state what, if anything concerning the matter in court today that you did concerning this matter in relation to the defendant Matt Wilkie?

"*A.* I was with Sgt. Elliott when he was advised of the warrant of armed robbery, and he was taken over for arraignment, and he was advised of his rights.

"*Q.* Was this by you or by somebody else?

"*A.* By Sgt. Elliott.

"*Q.* You were present then?

"*A.* Yes, sir.

"*Q.* Will you state whether or not you had occasion to hear any statements made by the defendant, Mr. Wilkie?

"*A.* Mr. Wilkie refused to sign the rights statement or talk about it.

"*Q.* I have no further questions, your Honor."

Officer Elliott, also of the county sheriff's department, testified upon direct examination as follows:

"*Q.* Will you state whether or not you had occasion to advise Mr. Wilkie of his rights in regard to this matter of McLain's Sunoco Station?

"*A.* Yes, sir.

"*Q.* And, after so advising him, did Mr. Wilkie make any statement to you concerning the robbery of McLain's Sunoco Station?

"*A.* No, sir, he didn't * * * .

"*Q.* I have no further questions, your Honor."

Defendant contends, despite defense counsel's failure to voice objection, he did not waive his right to assert the privilege against self-incrimination, which privilege was violated, citing *People* v. *Jordan* (1967), 7 Mich App 28, and *People* v. *Wilson* (1969), 20 Mich App 410.

The people claim that, in the event the admission of the testimony in question is deemed to have been error, it was no more than harmless error, in view of the overwhelming evidence of guilt against the defendant, citing *People* v. *Fry* (1969), 17 Mich App 229.

In *Fry, supra,* a police officer testified that when he and a fellow police officer advised the defendant that he was charged with stealing a radio, they tried to advise him of his constitutional rights and were told by the defendant that he knew his constitutional rights, that the police officers did not have to advise him, and the defendant refused to tell the officers anything else. This testimony was emphasized by the prosecution during oral argument. The defendant did not take the stand in his own behalf. The trial judge cautioned the jury (p 233) that:

"No presumption adverse to the defendant is to arise from the mere fact that he does not offer himself as a witness and testify in his own behalf, or that he does not respond to the police officer. That is his constitutional right."

Courts generally have held that the constitutional privilege against self-incrimination protects an accused person from the introduction at trial of evidence as to his silence, or that he claimed the privilege of silence in the face of an accusation made after he was taken into custody.

"While, under certain circumstances, the statements of a person in custody may be used in evidence against him, his silence may not." *People* v. *Gisondi* (1967), 9 Mich App 289, 294.

Counsel for defendant Fry did not voice an objection either to the police officer's testimony or to the

prosecutor's argument. See *Koepel* v. *St. Joseph Hospital* (1968), 381 Mich 440.

Our Court held in *Fry, supra,* p 234, that:

"The defendant should not, in our opinion, be granted a new trial because of the introduction of this testimony or the prosecutor's argument based thereon. In *Chapman* v. *California* (1967), 386 US 18 (87 S Ct 824, 17 L Ed 2d 705), *reh den* 386 US 987 (87 S Ct 1283, 18 L Ed 2d 241), the United States Supreme Court held that adverse comments by the prosecuting attorney regarding the defendant's failure to testify would not necessarily require reversal of a conviction following such comments, and laid down the rule, 'that before a Federal constitutional error can be held harmless, the court must be able to declare belief that it was harmless beyond a reasonable doubt.' We are convinced that the evidence and argument complained of did not contribute to the defendant's conviction, that it was harmless beyond a reasonable doubt and that were we to order a new trial the defendant Fry would again assuredly be convicted."

Michigan has wisely adopted a harmless error rule, which should be used in many cases where criminal defendants seek to avoid just sentences by technicalities, *viz.:*

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding shall construe these rules to secure the just, speedy, and inexpensive determination of every action so as to avoid the consequence of any error or defect in

the proceeding which does not affect the substantial rights of the parties." GCR 529.1.

"All 50 states have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 USC § 2111.[5] None of these rules on its face distinguishes between Federal constitutional errors and errors of state law or Federal statutes and rules. All of these rules, state or Federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."

Chapman v. *California* (1967), 386 US 18, 22 (87 S Ct 824, 827; 17 L Ed 2d 705, 709).

In view of the overwhelming evidence of defendant's guilt, such error as may have been committed was harmless beyond a reasonable doubt and had no adverse effect upon defendant's substantial constitutional rights.

Defendant further contends that the trial court, in its charge to the jury, erroneously excluded lesser included offenses from the jury's consideration. The error complained of is in the trial court's charge:

"If you are satisfied and beyond a reasonable doubt that the defendant is guilty of the charge contained in the People's information, then your verdict will be guilty as charged. If you are not so

[5] "28 USC § 2111 provides: 'On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.'

"Fed Rule Crim Proc 52(a) provides: 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'"

satisfied and beyond a reasonable doubt, then your verdict shall be not guilty."

Defendant cites and relies upon *People* v. *Lemmons* (1970), 384 Mich 1, where the Court recognized the distinction which defendant here tries to dilute. Relying upon *People* v. *Jones* (1935), 273 Mich 430, the Court stated, p 3:

"[I]n the absence of a request to charge, the court does not err in failing to instruct upon the included offenses. In *Jones* this Court went on to say: ' * * * *Here the court did more than fail to charge upon the included offenses. It affirmatively excluded them from the consideration of the jury.* This was error because, under 3 Comp Laws 1929, § 17325, the jury was authorized to find the defendant guilty of a lesser offense.' "

The court in *Lemmons* affirmatively excluded lesser offenses by stating in its instructions: "There are no included offenses". This was held to come within the interdiction of *Jones, supra,* and to require a new trial.

The evidence revealed the presence of the essential elements of robbery armed, MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797), as opposed to robbery unarmed, MCLA § 750.530 (Stat Ann 1954 Rev § 28.798) or attempted robbery, MCLA § 750.92 (Stat Ann 1962 Rev § 28.287), *i.e.,* that the perpetrator of the offense was armed, and that the execution of the robbery of the service station was completed; that no evidence existed to support the conviction of defendant on a lesser offense, *People* v. *Stevens* (1968), 9 Mich App 531; that *People* v. *Lemmons, supra,* is, on its facts, inapplicable to the case at hand; and that since the court properly did not instruct on lesser offenses, it cannot be said to

have affirmatively excluded the same from the jury's consideration.

In *People* v. *Stevens, supra,* pp 534–535, this Court stated:

"Under the circumstances, the court was not required to instruct on * * * a lesser offense, especially when the elements of that offense were not present and when no evidence of such offense existed. Where no evidence exists on which a verdict of a lesser offense could be returned, it is not error for the trial court to instruct the jury that the verdict must be guilty or not guilty of the crime charged. *People* v. *Netzel* (1940), 295 Mich 353; 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 674, pp 863–866."

Defendant does not point to evidence in the record which would justify the giving of an instruction as to lesser included offenses in the instant case. No evidence existed to support the defendant's conviction of a lesser offense and the trial court did not "affirmatively exclude them from the consideration of the jury." *People* v. *Lemmons, supra.*

Conviction affirmed.

All concurred.

PEOPLE *v.* BUTLER

1. CRIMINAL LAW—PLEA OF GUILTY—TRUTH OF PLEA—TRIAL RECORD.
   A trial judge, in order to ascertain the truth of a defendant's plea of guilty, may take notice not only of the plea-hearing record but of other elements of the record including facts revealed at a mistrial involving the defendant over which the judge presided.

2. CRIMINAL LAW—PLEA OF GUILTY—TRUTH OF PLEA—FACTUAL BASIS—TRIAL RECORD.
   Defendant's plea of guilty of assault with intent to do great bodily harm less than murder was properly accepted, even though the plea-taking record did not reveal that defendant had just committed a robbery in the complainant's store before defendant and complainant exchanged shots, where the trial judge had previously presided over a trial, which resulted in a mistrial, concerning the armed robbery count against defendant and there had been testimony regarding the armed robbery during the trial.

3. CRIMINAL LAW—PLEA OF GUILTY—VALIDITY—ADVICE OF COUNSEL.
   The validity of a guilty plea is not vitiated by defense counsel's failure to advise defendant as to two of many complex factors which must be analyzed in determining whether to tender a guilty plea.

4. CRIMINAL LAW—PLEA OF GUILTY—VOLUNTARINESS—ADVICE OF COUNSEL.
   Defendant's plea of guilty of assault with intent to commit great bodily harm less than murder was freely, understandingly, and voluntarily made even though defense counsel failed to

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 21 Am Jur 2d, Criminal Law § 484 *et seq.*
[5] 5 Am Jur 2d, Appeal and Error § 938.
21 Am Jur 2d, Criminal Law § 533.

advise defendant concerning a possible jeopardy bar to a further prosecution for armed robbery, for which the original prosecution had ended in a mistrial and where the assault to which defendant was pleading guilty had occurred during the armed robbery and even though counsel failed to advise the defendant of the difficulties which the prosecution might encounter when attempting to introduce into evidence a gun which had been used in the robbery and allegedly was the assault weapon.

5. CRIMINAL LAW—SENTENCING—CONSIDERING CHARGES AS CONVICTIONS.

Defendant's sentence of nine to ten years for assault with intent to commit great bodily harm less than murder, being within a statutory maximum, was not altered on appeal even though the trial judge declared, at the sentencing, that defendant, who was represented by counsel, was guilty of armed robbery and possibly of two other assaults, where the defendant had only been charged with, not convicted of, armed robbery and assault.

Appeal from Macomb, George R. Deneweth, J. Submitted Division 2 September 7, 1971, at Grand Rapids. (Docket No. 10985.) Decided October 26, 1971. Leave to appeal granted, 387 Mich 756.

Joseph Earl Butler was convicted, on his plea of guilty, 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, *George N. Parris,* Prosecuting Attorney, *Thaddeus F. Hamera,* Chief Appellate Lawyer, and *Stephen F. Osinski,* Assistant Prosecuting Attorney, for the people.

Herman C. Campbell, for defendant on appeal.

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

LESINSKI, C. J. Defendant pled guilty to the charge of assault with intent to do great bodily harm less than the crime of murder, MCLA § 750.84 (Stat Ann 1962 Rev § 28.279). Defendant appeals as of right.

Defendant was charged with armed robbery, MCLA § 750.529 (Stat Ann 1954 Rev § 28.797), and assault with intent to commit murder, MCLA § 750.83 (Stat Ann 1962 Rev § 28.278). Defendant went to trial on the armed robbery count, but the trial judge declared a mistrial on his own motion. Subsequently, defendant pled guilty to an added count of assault with intent to commit great bodily harm less than the crime of murder.

On appeal, defendant urges that the trial court failed to comply with the requirements of GCR 1963, 785.3 in accepting his plea of guilty. That rule requires the trial judge, upon accepting a plea of guilty, to examine the accused as to whether the plea was freely, understandingly, and voluntarily made. To conform with the rule, the trial court must question the accused as to the facts of the crime and his participation therein. *People* v. *Barrows* (1959), 358 Mich 267; *People* v. *Morris* (1971), 33 Mich App 654.

The plea hearing record in this case reveals that defendant, as he was leaving a store, was fired on by the store owner, and defendant returned the store owner's fire. Although the plea-taking record does not reveal that defendant had just committed a robbery in the store before he and the store owner exchanged shots, the trial judge had previously presided over mistrial proceedings involving the armed robbery count where there was testimony to this effect. This Court has often held that the trial court, in order to establish the truth of a plea, may

take notice not only of the plea hearing record, but other elements of the record in the case. Specifically, plea-taking proceedings have been approved when a factual basis was revealed by the preliminary examination transcript or sentencing transcript. *People* v. *Coates* (1971), 32 Mich App 52; *People* v. *Medley* (1970), 27 Mich App 195; *People* v. *Hinton* (1970), 27 Mich App 186. Similarly, the judge, in accepting a plea of guilty, may take notice of the facts revealed at a mistrial over which he presided.

Defendant further alleges that his plea was not freely, understandingly, and voluntarily made because his counsel at trial failed to notify him concerning a possible double jeopardy bar to further prosecution on the armed robbery count and the difficulties which the prosecution might encounter when attempting to introduce into evidence the gun alleged to be the assault weapon. If he had been fully informed as to these two factors, defendant maintains, he would not have pled guilty.

We reject this contention. The validity of a guilty plea is not vitiated by the failure of counsel to advise defendant as to two of many complex factors which must be analyzed in determining whether to tender a guilty plea. As the United States Supreme Court stated in *McMann* v. *Richardson* (1970), 397 US 759, 769, 770 (90 S Ct 1441, 1448; 25 L Ed 2d 763, 772, 773):

"The decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict

how the facts, as he understands them, would be viewed by a court. * * * Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

"That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing."

The advice which defendant received from his counsel below was certainly "within the range of competence demanded of attorneys in criminal cases." *McMann, supra,* p 771 (90 S Ct p 1449, 25 L Ed 2d p 773).

Additionally, defendant charges that the trial court committed error at the time of sentencing by stating:

"The Court: You know and I know on the basis of the testimony that came in in the somewhat garbled-up record we have at the partial trial before I claimed a mistrial, you are guilty of an armed robbery and you are also guilty of two possible assaults."

As authority for the proposition that it is error for the trial court to consider charges as actual convictions in determining defendant's sentence, defendant cites *Townsend* v. *Burke* (1948), 334 US 736 (68 S Ct 1252, 92 L Ed 1690). However, the *Townsend* decision is distinguishable from the present case. The United States Supreme Court emphasized repeatedly in *Townsend* that defendant was unrepresented by counsel at sentencing. Defendant here was represented by counsel.

It is well-settled law in this State that appellate courts will not disturb a sentence that is within the

statutory maximum. *People* v. *Krum* (1965), 374 Mich 356; *People* v. *Connor* (1957), 348 Mich 456; *People* v. *Pate* (1965), 2 Mich App 66. Defendant's sentence of nine to ten years in prison was within the statutory maximum and this Court accordingly will not alter it, despite the fact that the trial judge declared that the defendant was guilty of armed robbery and two possible assaults.

Affirmed.

All concurred.

CHARLES J. ROGERS, INC. *v.* DEPARTMENT OF STATE HIGHWAYS

1. CONTRACTS—LOSS OF ANTICIPATED PROFITS.

   A contract with a governmental agency which, by its express terms, precluded recovery at other than unit prices and for other than actual work performed and which stated that the quantities in the bid schedule were approximate only and could be decreased precluded recovery for loss of anticipated profits even though the contract materially overstated the amount of work to be performed.

2. CONTRACTS—BASIS OF PAYMENT—TERMS OF CONTRACT.

   A contract with a governmental agency which refers to a set of standard specifications which states that if the quantity of work varied from the original estimate by 25 per cent or less, payment could be had based only on unit price precludes recovery for loss of anticipated profits on the contract where the variance was 17.5 per cent.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 17 Am Jur 2d, Contracts §§ 82, 346, 347.
[4] 17 Am Jur 2d, Contracts § 263.

3. CONTRACTS—LOSS OF ANTICIPATED PROFITS—STANDARD SPECIFICATIONS—CHANGED CONDITIONS.

Plaintiff, who had entered into a highway construction contract with a governmental agency was not entitled to recover loss of anticipated profits on the ground that the decrease in quantity required was a "changed condition" within the meaning of the Standard Specifications for Road and Bridge Construction, even though the number of units required had been overestimated in the bid schedule by 17.5 per cent, where plaintiff did not show any change in unit cost as a result of the decrease in the units required.

4. CONTRACTS—INCORPORATION OF OTHER INSTRUMENT—CONSTRUCTION.

Separate instruments are construed together as the agreement of the parties where a written contract refers to another instrument and makes the terms of the other instrument a part of the written agreement.

Appeal from the Court of Claims, Earl E. Borradaile, J. Submitted Division 2 October 12, 1971, at Lansing. (Docket No. 11033.) Decided October 26, 1971. Leave to appeal denied, 387 Mich 752.

Complaint by Charles J. Rogers, Inc., and Charles J. Rogers Construction Company against the Department of State Highways and the State of Michigan for loss of anticipated profits in a highway construction contract. Summary judgment for defendants. Plaintiffs appeal. Affirmed.

Doyle & Smith, P. C. (by *Dan L. McNeal*), for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Louis J. Caruso,* Assistant Attorney General, and *Karl S. Vasiloff* and *Patrick J. Devlin,* Assistants Attorney General, for defendants.

Before: McGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

McGREGOR, P. J. Plaintiffs entered into a written highway construction contract with defendants. The contract called for an estimated 1,928, 214 units of embankment compacted in place at a unit price of $1.49 per unit. As the work progressed, defendants discovered a computational error which had resulted in an overestimate of 337,406 units. Though defendants notified plaintiffs of this decrease in the contract quantity, plaintiffs refused to agree to it and brought suit, claiming loss of anticipated profits. The trial court granted summary judgment for defendants; plaintiffs appeal as of right.

Plaintiffs attempt to avoid the express language of the contract and contend that the government is liable in damages for the loss caused to a contractor, where the government materially overstates the amount of work required to be done. In the instant case, there is no dispute that the appellees materially overstated the amount of work required to be done. It should be noted that the variance was not more than 25 per cent, but was approximately 17.5 per cent.

Plaintiffs further contend that, as a result of this error, plaintiffs have been damaged in that they have been deprived of the earned profits they made on the units actually performed by virtue of the fact that they are unable to recover fixed costs and overhead allocated to the units that were not required.

The contract precludes recovery at other than unit prices and for other than actually performed quantities.

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

The contract, in part, provided:

" * * * It being understood and agreed that said plans, specifications and proposal are to be considered as a part hereof."

The bid proposal provided:

"The undersigned [contractor] has examined the plans, specifications and the location of the work described herein and is fully informed as to the nature of the work and the conditions relating to its performance and understands that the quantities shown are approximate only and are subject to either increase or decrease.

"The undersigned hereby proposed to furnish all necessary machinery, tools, apparatus and other means of construction, do all the work, furnish all the materials except as otherwise specified herein; and, for the unit prices or lump sums named in the itemized bid, to complete the work herein described in strict accordance with the plans therefor and in strict conformity with the requirements of the current Standard Specifications For Road and Bridge Construction of the Michigan Department of State Highways and such other special provisions and supplemental specifications as may be a part of this proposal."

The Michigan Department of State Highways Standard Specifications for Road and Bridge Construction (1965) provided:

"1.02.03—The quantities appearing in the bid scheduled are approximate only and are prepared for the comparison of bids. Payment to the contractor will be made only for the actual quantities of work performed and accepted or materials furnished in accordance with the contract. The scheduled quantities of work to be done and materials to be furnished may each be increased, decreased, or omitted as hereinafter provided."

The contract also provided, in § 1.01.13:

"No adjustable items apply on this project."

The Standard Specifications define "adjustable item" as follows:

"Any item specifically designated in the contract for which the contract unit price may be adjusted due to a major increase or decrease in quantity. No adjustment in contract unit price will be made for increases or decreases in the quantity of any other item, regardless of the percentage of increase or decrease."[1]

By virtue of § 1.01.02, *supra,* it may be seen that the parties here contemplated that, regardless of actual quantities ultimately required for performance of the contract, no adjustment was to be made in the contract unit price.

Even if the contract itself had not so provided for unadjustability of items, § 1.04.03 of the Standard Specifications would preclude in the instant case any compensation other than at the contract unit price. Section 1.04.03 provides:

"The commission reserves and shall have the right under the contract to make increases and decreases in quantities and such changes, from time to time, in the plans, in the character of the work and the termini of the project, as may be necessary or desirable to insure the completion of the work in the most satisfactory manner.

"Unless otherwise provided in these specifications, proposal or plans, adjustments in unit prices for increased or decreased quantities shall be governed by the following:

"*If the quantity of any item of work required to complete the project varies from the original esti-*

[1] § 1.01.02.

mate for said items of work by 25 per cent or less, the payment for the quantity of said item shall be made at the contract unit price.

"Should the quantity of any adjustable item of work be increased more than 25 per cent above the original quantity, the contractor shall not proceed with such additional work until a written agreement has been executed adjusting the unit price for the amount of work over the original contract quantity.

"Should the quantity of any adjustable item of work be decreased more than 25 per cent from the original quantity, compensation will be made upon completion of the item involved based on the contractor's actual extra cost by reason of such decrease below the original contract quantity. Such adjustment in unit price shall be made on the basis of labor, material and equipment cost plus a proportionate amount of overhead and plant charges *and not including anticipated profits,* but in no case shall the product of the adjusted unit price and the number of units of work performed exceed the product of the contract unit price and 75 per cent of the contract quantity. When the final contract cost, the sum of the regular and extra estimates, is greater than the original contract price, overhead and plant charges will not be considered in arriving at the adjusted unit price.

* * *

"All other items of work will be paid for at the contract unit price for the quantity required to complete the work." (Emphasis added.)

The obvious conclusion is that, as the decrease in in the instant case is only about 17.5 per cent, plaintiffs are precluded, by the language of the contract itself, from compensation at other than the contract unit price and for other than actually performed work.

Plaintiffs argue that the decrease in quantity is a "changed condition" giving rise to the applicability

of § 1.04.05 of the Standard Specifications, which provides:

"Should the contractor encounter or the engineer discover, during the progress of the work, physical conditions at the site differing materially from those shown on the plans, or unknown physical conditions of a nature differing materially from those generally recognized as work of the character provided for in the contract, the engineer shall be promptly notified in writing before conditions are disturbed. The engineer will promptly investigate the condition and if he finds that they materially differ and cause an increase or decrease in the cost or the time required for performance of the contract, an equitable adjustment will be authorized. *Unless such alterations and increases or decreases materially change the character of the work or the cost thereof, the altered work will be paid for at the contract unit prices.* If, however, the character of the work or the unit cost thereof are materially changed, an allowance will be made on such basis as is agreed to in advance of the performance of the work." (Emphasis added.)

Even if this section is deemed applicable, it appears that plaintiffs have failed to assert in their pleadings any allegation of changed unit cost due to the reduction in quantity required.

Plaintiffs have attempted by exhibits to establish plaintiffs' unit cost; never did they show any change in unit cost as a result of the decrease in contract quantities required.

It is well-settled law in Michigan that, where a written contract refers to another instrument and makes the terms of the other instrument a part of the written agreement, the separate instruments are construed together as the agreement of the parties. *Whittlesey* v. *Herbrand Company* (1922), 217 Mich 625.

In addition, Michigan law holds that, if the language of the contract is plain and unambiguous, the intention expressed and indicated in the contract holds. *Michigan Chandelier Co.* v. *Morse* (1941), 297 Mich 41; *Sheldon-Seatz, Inc.* v. *Coles* (1947), 319 Mich 401.

Read in the most favorable light, plaintiffs' claim does not entitled them to the relief sought.

Affirmed. No costs ordered.

All concurred.

MIDWEST TEEN CENTERS, INC., *v.* CITY OF ROSEVILLE

1. LICENSES—LICENSE FEE—CONSIDERATION.
   Payment of a simple license or permit fee is not such consideration as will change a license relationship into a contractual relationship.
2. LICENSES—REVOCATION—DUE PROCESS.
   A license issued by a municipal corporation can be revoked only if the revocation procedure follows due process.
3. LICENSES—REVOCATION—WRONGFUL REVOCATION—MONEY DAMAGES.
   A licensee who has his license revoked in violation of procedural due process by the municipal corporation which issued the license cannot maintain a suit for money damages, because a licensee has no property right in his license.

Appeal from Macomb, Walter P. Cynar, J. Submitted Division 2 October 7, 1971, at Detroit. (Docket No. 11200.) Decided October 26, 1971.

REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur 2d, Licenses and Permits § 18.
[2, 3] 51 Am Jur 2d, Licenses and Permits §§ 88, 142.

Complaint by Midwest Teen Centers, Inc., against the City of Roseville for money damages for the wrongful revocation of a dance hall permit. Summary judgment for defendant. Plaintiff appeals. Affirmed.

Glotta & Adelman, for plaintiff.

Ross, Bruff & Rancilio, P. C., for defendant.

Before: LESINSKI, C. J., V. J. BRENNAN and O'HARA,* JJ.

LESINSKI, C. J. Plaintiff, Midwest Teen Centers, Inc., brought this action for money damages against defendant City of Roseville, a municipal corporation, alleging wrongful revocation of a dance hall permit. The trial court, pursuant to GCR 1963, 117.2(1), granted defendant's motion for summary judgment for failure to state a claim upon which relief could be granted. Plaintiff appeals as of right.

On April 4, 1967, defendant City of Roseville, acting through its city council, issued a permit to plaintiff authorizing it to operate the Hullabaloo Club, a teen dance center, in Roseville. Condition 19 of the permit established a procedure for revocation of this permit should plaintiff be charged with a violation of any of its terms. It states:

"19. That in the event the city, its agents or employees charge that a violation of this permit has been committed by the recipient hereof, then in that event the city, through its agents, *et cetera,* shall file a written complaint with the city council, and the city shall serve a copy of said written complaint

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

upon the recipient hereof, and in addition shall set a hearing before the city council giving the recipient hereof not less than ten (10) days prior notice of such hearing. A stenographic record shall be kept of the proceedings before the council hearing the complaint, and the city and the recipient hereof shall be given the right and opportunity to present witnesses concerning whatever matters may be deemed relevant and material to the issue. At the conclusion of the hearing, the city council shall make its decision known as to its finding on the complaint and shall have the absolute right to revoke this permit, in the event the recipient is found to be in violation of any of the conditions of this permit."

On October 9, 1968, the Roseville City Council revoked this permit. Plaintiff contends that the defendant failed to follow the procedure outlined in condition 19 for the revocation of this permit, and in so doing denied plaintiff due process of law.

Plaintiff claims that this permit was a contract between itself and defendant, and when defendant violated condition 19 it entitled plaintiff to money damages resulting from the wrongful revocation.

Our examination of the law in this case has failed to reveal any authority whatsoever that would establish that this permit is a contract. On the contrary, the only case plaintiff cites on this point, *Eastwood Park Amusement Co.* v. *Mayor of East Detroit,* 325 Mich 60 (1949), clearly points in the opposite direction; namely, that this permit is a license and not a contract. There, the Michigan Supreme Court stated at 76 its approval of the language used in *People* v. *Schafran,* 168 Mich 324, 330, 334 (1912), that:

"The licensee has no vested property right in his license; in fact, it would not be in the power of the

legislature to make an irrepealable contract as to that which affects the public morals or public health so as to limit the exercise of the police power over the subject matter. * * *

"We have already covered the first, second, and third request to charge and have said that a license to sell liquor is not a contract but only a promise to enjoy the privilege on the terms named for a specific time, unless it be sooner revoked. The granting of a license is an exercise of police power, and does not include any contractual relations whatsover. *Stone* v. *Mississippi,* 101 US 814; 25 L Ed 1079 (1880)."

The granting of this dance hall permit was clearly an exercise of the City of Roseville's police power. There is no evidence of any consideration running from plaintiff to defendant which is a basic ingredient of any contract. Payment of a simple license or permit fee is not such consideration as will support the existence of a contractual relationship. There is no indication that this permit was anything more than a written promise to enjoy the privilege of operating a teen club, in Roseville, on the terms named for the period specified, subject to the city's absolute right to revoke this privilege, pursuant to the procedure in condition 19. Indeed, plaintiff itself admits its status as a licensee when it states on p 5 of its brief:

"The *Eastwood Amusement Company* case established that in order to revoke a license, *such as the license involved in the present situation,* the licensee is entitled to proper notice of the exact charges and a prompt and fair hearing on those charges." (Emphasis supplied.)

The fact that this Court has determined that this permit is in actuality a license in no way detracts

from plaintiff's right to have procedural due process observed in its revocation. The Michigan Supreme Court in *Prawdzik* v. *Grand Rapids,* 313 Mich 376, 392 (1946), stated in regard to the revocation of a restaurateur's license, that:

"The commission may not revoke a license except on a specified showing after notice and hearing, with the further requirement that exact charges shall be filed. Nor may the license be revoked unless it is found that the licensee has refused to comply with the terms of the ordinance, or is unable to do so or is an habitual violator."

In *Eastwood Park Amusement Co.* v. *Mayor of East Detroit, supra,* at 72, the Michigan Supreme Court again reiterated a licensee's right to procedural due process in the revocation of his license.

"Had a good and proper notice of revocation been given setting forth the specific violation of section 16 and that the city was proceeding in accordance with section 21 to revoke the license, and had plaintiff thereupon been given a prompt hearing, it would have satisfied the due process clause to which plaintiff is entitled."

On appeal from the grant of defendant's motion for summary judgment, we must accept as true all of plaintiff's material allegations of fact. *Prawdzik* v. *Grand Rapids, supra,* p 380. On this basis the record would indicate that the plaintiff was afforded none of the procedural safeguards outlined by the Michigan Supreme Court in the *Prawdzik* and *Eastwood Park Amusement Co.* cases.

The fact, however, that plaintiff's license was not properly revoked does not mean that an action for money damages against the City of Roseville can be maintained.

A license is a mere privilege to carry on a business subject to the will of the grantor, and it is not property in the sense which is protected under the Constitution. *Eastwood Park Amusement Co.* v. *Mayor of East Detroit, supra,* at 76. Furthermore, a license ordinarily carries no property or contractual right free from impairment by subsequent legislative action and may generally be suspended or revoked in keeping with its terms at any time by the appropriate authority in the exercise of the police power. C. Rhyne, Municipal Law (1957 ed), § 27–1, pp 638–639. Plaintiff having no property right in this license, there is consequently no monetary damage which can be recognized even for its wrongful revocation.

Affirmed.

All concurred.

PEOPLE *v.* FREDERICKS

1. CRIMINAL LAW—DEFENSES—INSANITY—PSYCHIATRIC EXAMINATION.

   The trial court has the inherent right to order that a defendant submit to a psychiatric examination and such an examination does not *per se* violate the defendant's constitutional right against self-incrimination.

2. CRIMINAL LAW—PSYCHIATRIC EXAMINATION—PSYCHIATRIST'S TESTIMONY—PRIVILEGE AGAINST SELF-INCRIMINATION.

   Defendant's privilege against self-incrimination was not violated

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 48, 49.
[3] 29 Am Jur 2d, Evidence §§ 638–640.

where the trial court, having ordered the defendant to submit to a psychiatric examination, permitted the psychiatrist to testify concerning the defendant's sanity.

3. CRIMINAL LAW — PRIVILEGE AGAINST SELF-INCRIMINATION — SILENCE.

Permitting three witnesses to testify that on three occasions the defendant had nothing or nothing further to say after being warned of his constitutional rights did not constitute reversible error where the defendant testified freely concerning ihs participation and his version of the crime charged.

Appeal from Oakland, Frederick C. Ziem, J. Submitted Division 2 August 30, 1971, at Lansing. (Docket No. 11544.) Decided October 26, 1971. Leave to appeal granted, 387 Mich 755.

Gene Wallace Fredericks was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, and *Dennis Donohue,* Chief Appellate Counsel, for the people.

Fenton, Nederlander, Tracy, Dodge & Barris, P. C., for defendant on appeal.

Before: DANHOF, P. J., and McGREGOR and QUINN, JJ.

QUINN, J. August 5, 1970, a jury found defendant guilty of first-degree murder, MCLA 1971 Cum Supp § 750.316 (Stat Ann 1971 Cum Supp § 28.548). He was sentenced; his motion for new trial was denied, and he appeals.

We have examined each of the alleged errors hereinafter discussed in context with the record, briefs, and oral arguments. We affirm.

It is conceded that defendant shot and killed Neil Churchill in the early morning of June 3, 1970. At one time, defendant and decedent were in business together, and they and their wives went together socially. In 1968, Churchill and defendant's wife began having an affair. This became known to defendant; it led to marital difficulties between defendant and his wife which ultimately resulted in the wife filing for divorce. Subsequently, it appeared that the marriage could be saved, and then on the night of June 2, 1970, defendant's wife acknowledged to him that she could not give up Churchill.

Upset by this turn of events, defendant drove around in his car for awhile and then decided that he should talk to Churchill. Defendant drove to the rear of Churchill's place of business and found the latter preparing to depart therefrom. As to the ensuing events, defendant testified:

"I got out of my car, and I had my pistol on me, as I always did. And I had it in my belt. And as I was getting out of the car, as you get out of the car, and you have a pistol, you, by habit, make sure it doesn't fall. And as I got out of the car, and I hollered at him, 'Churchill, I've got to talk to you.' And he whirled around and he said 'You son-of-a-bitch.' He had his arm up in the air like this, lunging forward, and he had a gun in his hand. And the next thing I heard a gun go off and I didn't know whose gun had gone off. And I had saw him fall forward. And I hollered, 'Neil, Neil,' and I ran over to him. And I looked down at him. I could hear him breathing, but I could see blood."

Defendant called the police and requested an ambulance for a man who had been shot. Defendant surrendered voluntarily to the police. Defendant

knew Churchill carried a gun and Churchill knew defendant carried one also. The defense was self-defense and temporary insanity.

With respect to the instructions on self-defense, defendant contends that a portion thereof places the burden of proof on him, and that a portion thereof led the jury to believe that self-defense would only lie in the event of an actual, rather than apparent assault. By the usual method of selecting portions of the instructions which support his position, defendant supports these contentions. The invalidity of defendant's position is best demonstrated by quoting the entire instruction on self-defense:

"Now, concerning self-defense, an aggressor is not necessarily a person who may strike the first blow in a personal encounter, or make the first demonstration indicating an intent to strike; but, if a defendant with malice and hatred in his heart towards another person, seeks to provoke a difficulty, either by acts or words, with the intent to induce such other person to strike the first blow, or to make the demonstration, in order to form a pretext to take his life, then the defendant could not avail himself of the right of self-defense.

"If the defendant was the aggressor in the conflict, he cannot invoke the doctrine of self-defense as an excuse for the killing, unless he was, at that time, in immediate danger of losing his own life or suffering some grievous bodily injury and there was no retreat open for him and his only safety lay in shooting.

"Self-defense, in proper cases, is the right of every person but it will not justify the taking of human life, unless the jurors shall be satisfied from the testimony; first, that the defendant was not the aggressor in bringing on the difficulty, that is, he was without fault. Second, that there existed, at the time of the shooting, in his mind, a present and im-

pending necessity to shoot in order to save himself from death or some great bodily harm. And, third, that there must have been no way open whereby he could have retreated, as it appeared to him at the time of the shooting, to a place of safety and have thus avoided the conflict.

"Unless you find all three of these facts are established in this case, then the plea of self-defense fails.

"The burden of proof of all such matters is upon the people to show that the respondent is guilty beyond a reasonable doubt of the offense charged, and the people's testimony must be such as to satisfy the jurors that the killing was not done in self-defense.

"The burden is not on the defendant who makes the defense of self-defense to satisfy the jury of the truth of his claim.

"The defense of self-defense is one which is frequently made in homicide cases, and one which the defendant has a right to use. But it should be carefully scrutinzed by the jury. And the evidence on this point should be carefully considered and weighed, for the reason that if the defendant acted in self-defense at the time of the alleged killing, he ought not to be punished for the act.

"The evidence on this question ought to be carefully considered for another reason, and that is that due regard for the ends of justice and the peace and welfare of society demands it, to the end that parties charged with crime may not make use of the plea of self-defense as a means to defeat the ends of justice, and as a shield to protect themselves from criminal responsibility in case you find criminal responsibility exists.

"It is for you, members of the jury, to say whether this respondent was assault[ed] in the manner claimed. The law gives to every person the right to protect himself from unlawful assault.

"Where an assault is made, the right to resist exists; but the resistance must be in proportion to the danger which is apprehended. It is not every assault that would justify a person in resisting by using a deadly weapon. If, however, the person assailed honestly believes his life to be in danger, or, that he may suffer serious bodily harm, he has the right to resist even to taking the life of his assailant.

"The person assailed is to be judged by the circumstances and conditions as they honestly appeared to him at the time. The defense of self-defense necessarily assumes an assault. There can be no self-defense by a person until he is assailed by another. It is for you to say, from all the evidence in this cause, whether the respondent honestly believed he was in danger of losing his life or in danger of great bodily harm, and that it was necessary for him to fire this fatal shot in order to save himself from such apparent and threatened danger.

"If the testimony in this case creates in your mind a reasonable doubt as to whether or not the act was done in self-defense, the respondent is entitled to the benefit of the doubt, and it will be your duty to acquit him.

"It is not necessary to his defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to follow. The actions and conduct of the respondent are to be judged from the circumstances as they reasonably and honestly appeared to him at the time.

"One who is suddenly attacked by an adversary is not held to fine distinctions of judgment as to what is in the mind of his adversary, or, what his adversary is about to do, or to how much force it is necessary for him to use to protect his life or his person from serious bodily harm.

"In defending himself against the unlawful attack of another, a man is justified in resorting to such violence and the use of such force as the particular

circumstances of the case may require for his protection.

"Now, the degree of force to be employed in protecting one's person must be in proportion to the attack made, and must depend upon the circumstances in each particular case, and the imminence of danger as it appears to him at the time.

"The only purpose which justifies the employment of force against assault is to defend one's self; that is the object to be attained, and a man is only justified in using such an amount of force as may reasonably appear to him at the time to be necessary to accomplish that purpose.

"As soon as that object is attained, it is his duty to desist. If he uses a kind of force towards his assailant in excess, or, out of proportion to what may be reasonably necessary to his own defense, as it honestly appeared to him at that time, he himself is guilty of an assault.

"If you find that the defendant did use more force than was actually necessary for self-protection, but also find that he honestly believed at the time that he was using only so much force as was necessary for his own defense, and if he acted honestly and in good faith in coming to that conclusion, and if such a belief was reasonable on his part, under the circumstances surrounding him at that time, and the situation as it appeared to him, then you should find the defendant not guilty."

This instruction neither places the burden of proof on defendant, nor would it lead a jury to believe that self-defense was only available in the event of an actual assault. We find no error in this instruction on self-defense. This finding obviates discussion of defendant's contention that part of this instruction is erroneous and reversal is required under the doctrine of *People* v. *Eggleston* (1915), 186 Mich 510.

Defendant next contends that the trial court erred reversibly in ordering that defendant submit to a psychiatric examination, and further that his privilege against self-incrimination was violated when the psychiatrist testified. *People* v. *Sammy Martin* (1970), 26 Mich App 467, is *contra* and controls.

Over defendant's objection, three witnesses testified as to three occasions when defendant stated he had nothing (or nothing further) to say after being warned of his constitutional rights. Defendant contends this violated his right to remain silent. Assuming the error, it is not reversible error. Defendant testified fully as to his participation in and his version of the offense.

The remaining issues relating to alleged error in denying defendant's motion for new trial on the basis of newly discovered evidence and further alleged error in instructions are so insubstantial that discussion of them is not required.

Affirmed.

All concurred.

PEOPLE *v.* CAREY

1. CRIMINAL LAW—CARRYING CONCEALED WEAPON—STATUTORY EXCEPTIONS—BURDEN OF PROOF.

   The prosecution need not disprove statutory exceptions to the crime of carrying a concealed weapon without a license unless those exceptions have been advanced by the defendant (MCLA § 776.20).

2. CRIMINAL LAW—VENUE—FAILURE TO PROVE—TIMELY OBJECTION.

   The prosecution's failure to prove venue affirmatively in a criminal case does not constitute reversible error in the absence of a timely objection by the defendant (MCLA § 767.45).

3. INDICTMENT AND INFORMATION—MISJOINDER OF COUNTS—APPEAL AND ERROR—PRESERVING QUESTION.

   A defendant's contention of misjoinder of counts is not preserved for review where he has not made a timely objection to joinder at trial (MCLA § 767.76).

Appeal from Wayne, Edward S. Piggins, J. Submitted Division 1 October 5, 1971, at Detroit. (Docket No. 8555.) Decided October 27, 1971. Leave to appeal denied, 386 Mich 785.

James G. Carey was convicted of possession of a stolen motor vehicle and carrying a concealed weapon with a license. Defendant appeals. Conviction of possession of a stolen motor vehicle reversed; conviction of carrying a concealed weapon without a license affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 56 Am Jur, Weapons and Firearms §§ 15–18.
[2] 21 Am Jur 2d, Criminal Law §§ 398, 399, 401.
[3] 5 Am Jur 2d, Appeal and Error § 545.

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.

Gus Cifelli, for defendant on appeal.

Before: LESINSKI, C. J., and V. J. BRENNAN and O'HARA,* JJ.

PER CURIAM. Defendant, charged in Count I with possesion of a stolen motor vehicle (MCLA § 257.254 [Stat Ann 1968 Rev § 9.1954]) and in Count II with carrying a concealed weapon (MCLA § 750.227 [Stat Ann 1962 Rev § 28.424]), was convicted upon a jury verdict and appeals as of right.

We must reverse defendant's conviction for possession of a stolen motor vehicle on the authority of *People* v. *Morton* (1970), 384 Mich 38.

Regarding defendant's conviction for carrying a concealed weapon we find no error. The prosecution need not disprove statutory exceptions unless advanced by defendant. MCLA § 776.20 (Stat Ann 1971 Cum Supp § 28.1274[1]); *People* v. *Jiminez* (1970), 27 Mich App 633; *People* v. *Gilleylen* (1971), 31 Mich App 416.

No error lies in the prosecution's failure to affirmatively prove venue in view of defendant's failure to object. MCLA § 767.45 (Stat Ann 1954 Rev § 28.985); *People* v. *Eugene Collins* (1970), 28 Mich App 526.

Further, the evidence is sufficient to support the conviction.

* 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 contention of misjoinder of counts was never presented to the trial court and is thus not preserved for appeal. MCLA § 767.76 (Stat Ann 1954 Rev § 28.1016).

Reversed as to Count I and affirmed as to Count II.

PEOPLE *v.* STEWMAN

1. CRIMINAL LAW—PLEA OF GUILTY—UTTERING AND PUBLISHING—FACTUAL BASIS.

   Acceptance by the trial court of defendant's plea of guilty of uttering and publishing a forged check was reversibly erroneous where the court's only inquiry was limited to asking the defendant whether he in fact did utter and publish a check payable to the order of another on a certain date, because the inquiry did not establish a substantial factual basis for the plea nor establish the specific intent necessary for a conviction of uttering and publishing (GCR 1963, 785.3[2]).

2. CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS—COURT RULES.

   The failure of a trial court to comply with the court rule requiring the establishment of a substantial factual basis for a plea of guilty and the determination that the plea is true before accepting a plea of guilty constitutes reversible error (GCR 1963, 785.3[2]).

Appeal from Bay, Leon R. Dardas, J. Submitted Division 3 September 7, 1971, at Lansing. (Docket No. 8818.) Decided October 27, 1971.

Jesse W. Stewman was convicted, on his plea of guilty, of uttering and publishing a forged check. Defendant appeals. Reversed

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Eugene C. Penzien,* Prosecuting Attorney, and *Jack E. Frost,* Chief Assistant Prosecuting Attorney, for the people.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

Jesse W. Stewman, *in propria persona.*

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

PER CURIAM. Defendant was convicted in 1964 in the Bay County Circuit Court of uttering and publishing a forged check. MCLA § 750.249 (Stat Ann 1962 Rev § 28.446).

Defendant's argument, raised in a motion for a new trial and on appeal, is that the guilty plea must be vacated because of improper compliance with GCR 1963, 785.3(2) and because the plea was untruthful and involuntary.

Testimony, at a two-day hearing on defendant's motion to withdraw his plea and for a new trial, indicated that he was intoxicated and under the influence of drugs when he pleaded guilty.

GCR 1963, 785.3(2) requires the trial judge to determine whether the plea is true and whether there is a substantial factual basis for the plea. *People* v. *Seifert* (1969), 17 Mich App 187, 189; *People* v. *Donald T. Moore* (1970), 21 Mich App 150, 151.

In the present case the only inquiry the court made bearing on the crime and defendant's participation therein was:

"*Q.* You understand by pleading guilty you are saying you did in fact on August 10, 1964, utter and publish a check drawn on the Bank of the Commonwealth, Detroit, payable to F. E. Leonard?

"*A.* Yes, your Honor."

This limited inquiry does not establish either a sufficient factual basis for defendant's plea or the specific intent necessary to convict for uttering and publishing. Failure to comply with GCR 1963, 785-

.3(2) is reversible error. Defendant's motion to vacate his plea should have been granted. *People* v. *Barrows* (1959), 358 Mich 267; *People* v. *Wilkins* (1966), 3 Mich App 56; *People* v. *Palma* (1970), 25 Mich App 682, 686.

Reversed.

PEOPLE *v.* SAMUELSON

Appeal from St. Clair, Stanley C. Schlee, J. Submitted Division 2 September 7, 1971, at Lansing. (Docket No. 8970.) Decided October 27, 1971.

Kurt Samuelson was convicted of statutory rape. Defendant appeals. Affirmed.

Kurt E. Samuelson, *in propria persona.*

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

PER CURIAM. A jury found defendant guilty of statutory rape, MCLA § 750.520 (Stat Ann 1954 Rev § 28.788). He was sentenced and his appointed counsel moved for a new trial. This motion was denied. Defendant discharged his appointed counsel and appeals *in propria persona.*

During *voir dire* proceedings, the trial judge stated to the jury, among other things, "You'll be governed entirely from the testimony which comes from the witness stand, the exhibits that are introduced into evidence, the arguments of counsel and my instructions upon the law at the conclusion of the case". Defendant excerpts the following from this instruction and claims reversible error: "That you will be governed entirely from the * * * arguments of counsel". If error occurred, it was not

preserved for review, since no objection was made to this statement at trial.

Defendant next claims error in the admission of improper testimony over objection. This claim is not supported by the record. The witness defendant refers to did volunteer some conclusions which were objected to and the objection was sustained. Additionally, the cross-examination of this witness by defendant's counsel destroyed the force of the conclusions. Again we find no reversible error.

In closing argument, the prosecuting attorney made reference to the conclusions above referred to, but no objection was made. The error was not preserved. *People* v. *Pena* (1966), 3 Mich App 26.

The prosecuting attorney questioned defendant concerning prior convictions. Defendant contends this was error. This questioning was proper, *People* v. *Payne* (1970), 27 Mich App 133, 134.

Finally, defendant argues that he was denied a fair trial because of the foregoing errors which he has failed to establish.

Affirmed.

PEOPLE *v.* CLAUGHERTY

1. CRIMINAL LAW—WITNESSES—INDORSED WITNESS—NONPRODUCTION—DUE DILIGENCE—DISCRETION.

   Excusing the production by the prosecution of an indorsed witness is within the discretion of the trial court upon a showing of diligence.

2. CRIMINAL LAW—WITNESSES—INDORSED WITNESS—NONPRODUCTION—DUE DILIGENCE.

   A showing that the prosecution issued an appearance subpoena in an effort to produce an indorsed witness for trial but that the witness was on vacation for two weeks was a sufficient showing of due diligence to allow the trial judge to excuse the production of the witness.

3. CRIMINAL LAW—EVIDENCE—HEARSAY—OPENING DOOR.

   Testimony by the complaining witness, a state licensing investigator, upon redirect examination by the prosecution, that he had initiated his investigation of the defendant because of complaints which he did not receive personally was properly admitted into evidence where that testimony was offered to clarify the investigation procedure used and defense counsel in his cross-examination of the witness had asked a directly-related question.

4. CRIMINAL LAW—APPEAL AND ERROR—CURABLE ERROR—CAUTIONARY INSTRUCTION.

   A conviction will not be reversed where the defendant has permitted error which is curable by a cautionary instruction to go to the jury without raising an objection to that error.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Witnesses § 3.
[3] 29 Am Jur 2d, Evidence § 496.
[4] 5 Am Jur 2d, Appeal and Error § 545.

Appeal from Calhoun, Creighton R. Coleman, J. Submitted Division 3 October 7, 1971, at Marquette. (Docket No. 9009.) Decided October 27, 1971.

Dale Eugene Claugherty was convicted of attempting to procure the commission of an act of gross indecency with another male person. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *John M. Jereck,* Prosecuting Attorney, for the people.

Newman & Mackay, for defendant on appeal.

Before: FITZGERALD, P. J., and BRONSON and T. M. BURNS, JJ.

PER CURIAM. Defendant was charged with and convicted by a jury of attempting by word and deed to procure the commission of an act of gross indecency with and upon himself by another male person. MCLA § 750.338 (Stat Ann 1954 Rev § 28.570).

Carl Rencoski, investigator for the Michigan Department of Licensing and Regulation, with the knowledge and cooperation of the Albion City Police Department, called on defendant, a chiropractor, used a different name, and complained of fatigue and back pain. During the chiropractic examination that followed, testimony indicated there was provocative conversation, a solicitation to do reciprocal immoral acts, and a touching of Rencoski's private parts by the defendant. Defendant, testifying in his own behalf, denied that any criminal advances were made by him and accused Rencoski of being the aggressor.

On appeal, defendant raises five issues:

1. Did the trial court err in excusing the production of indorsed police witness Edward Sweet?

2. Was it error to allow, over defense's objection, hearsay testimony by Rencoski concerning the source of complaints which started his investigations?

3. Was it error for the prosecutor to state to the Albion Police Chief, "and you certainly have done a fine job," during trial and in the presence of the jury?

4. Did the court err in failing to instruct the jury on the issue of entrapment?

5. Was there sufficient evidence to sustain defendant's conviction?

Detective Edward Sweet was indorsed on the information. There was pretrial testimony that he only signed the report, but took no active part in the investigation.

The prosecutor testified that Sweet could not be present because he was somewhere in the South on vacation. The court excused the production of Sweet. Defendant contends that being on vacation is an insufficient reason to deprive him of his right to confrontation and cross-examination.

It is within the court's discretion to excuse the prosecution from producing an indorsed witness upon a showing of diligence. *People* v. *Costea* (1969), 19 Mich App 166; *People* v. *Tubbs* (1970), 22 Mich App 549; *People* v. *Alexander* (1970), 26 Mich App 321.

In this case there is proof of diligence. The trial started on May 14, 1969. On May 7, 1969, an appearance subpoena naming Edward Sweet issued from the prosecutor's office. On May 8, 1969, the server wrote on the back of the subpoena, "Det.—Sweet not reached; on vacation". Sweet's vacation was for two weeks.

The prosecutor did make an effort to produce the witness. There is a showing of diligence upon which the trial judge could correctly conclude that Sweet's attendance could not readily be secured. No clear abuse of judicial discretion is demonstrated.

On cross-examination of Rencoski, defense counsel asked:

"*Q.* But these cases (aid to police) were based upon complaints received by the police, by parties subjected to such things?
"*A.* Yes."

Rencoski then admitted that no complaints were made to him personally.

On redirect-examination which followed, the prosecutor asked the following question:

"*Q.* But there were complaints made by other parties to someone else, is that not true?
"*A.* Yes.
"*Defense Counsel:* I will object.
"*The Court:* I will take the answer on the basis that you opened up the subject in such a way. I think this would be a normal follow-up."

The testimony only establishes that Rencoski did not receive complaints personally, but from other sources. In view of defense counsel's initiation of a directly-related question it was not error to allow the prosecutor to clarify this procedure.

When questioning the Albion Police Chief, the prosecutor stated:

"*Q.* In your opinion as a police officer, *and you certainly have done a fine job,* * * * ."

Defendant contends this "pat on the back" was uncalled for and prejudicial. Defendant failed to ask for a corrective instruction or even to object to the prosecutor's remark.

A conviction will not be reversed where the defendant has permitted error which is curable by a cautionary instruction to go to the jury without raising an objection to the error. *People* v. *Humphreys* (1970), 24 Mich App 411; *People* v. *David Smith* (1969), 16 Mich App 198; *People* v. *Rowls* (1970), 28 Mich App 190.

Defendant further contends that the trial court erred in refusing to instruct the jury on defendant's theory of entrapment. Defendant denied doing any criminal act. The defense of entrapment is not available when the offense is denied. *People* v. *Murn* (1922), 220 Mich 555; *Tomita* v. *Tucker* (1969), 18 Mich App 559; *People* v. *Nelson White* (1970), 26 Mich App 35. The trial court's refusal was proper.

There is sufficient evidence which, if believed, would establish defendant's guilt. The jury's verdict is not against the great weight of the evidence.

Conviction affirmed.

PEOPLE *v.* BENEDICT

1. CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS—PRELIMINARY EXAMINATION TRANSCRIPT.

   The requirement that there be a factual basis for a plea of guilty does not rest solely on the plea-taking transcript where the preliminary examination record supports the plea (GCR 1963, 785.3[2]).

2. CRIMINAL LAW—PLEA OF GUILTY—JUDGE'S INTEREST.

   Trial judge did not violate the State Judicial Canons of Ethics by accepting the defendant's plea of guilty to breaking and entering a building of a wildlife conservation club with intent to commit a felony even though the trial judge was a member of the organization, where the defendant was informed of the judge's membership before the plea was accepted, the defendant stated that the disclosure had no effect on his desire to plead guilty, and the judge's membership did not in itself establish that the judge's personal interests were involved.

Appeal from Livingston, Paul R. Mahinske, J. Submitted Division 2 September 7, 1971, at Lansing. (Docket No. 9034.) Decided October 27, 1971.

Ronald D. Benedict was convicted of breaking and entering with the intent to commit a felony. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas Kizer, Jr.,* Prosecuting Attorney, and *A. John Pikkarainen,* Assistant Prosecuting Attorney, for the people.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

Sydney L. Ruby, for defendant on appeal.

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

PER CURIAM. Defendant Ronald D. Benedict was convicted upon a plea of guilty to the charge of breaking and entering. MCLA 1971 Cum Supp § 750.110 (Stat Ann 1971 Cum Supp § 28.305). He appeals as of right.

Defendant was present and represented by counsel at the preliminary examination. Testimony at the examination indicated that defendant broke a window of the Livingston County Wildlife Conservation Club, entered through it and proceeded to remove liquor from a storeroom inside. At arraignment on the information, defendant, represented by counsel, waived the reading of the information and stood mute. A plea of not guilty on his behalf was entered. Subsequently, defendant changed his plea to a plea of guilty to the offense charged. The record discloses that defendant was informed of his rights and was fully examined by the trial judge as to the nature of the charge, and that he voluntarily and understandingly tendered his plea of guilty.

Defendant contends that the inquiry of the trial court at the time of taking of the guilty plea failed to elicit a factual basis as to the breaking element of the crime of breaking and entering. Defendant consequently asserts that he was not properly informed of the nature of the accusation against him as required by GCR 1963, 785.3(2).

While the transcript does not specifically show an inquiry into the breaking of the window, the plea transcript does not stand alone. In *People* v. *Lown* (1971), 30 Mich App 121, 122, this Court stated:

"The testimony adduced at the preliminary examination supplies us, as it did the trial court, with the missing facts to substantiate the defendant's plea. The requirement that there be a substantial basis for the proffered plea of guilty is satisfied when it appears on the record that, upon trial, the defendant might well have been convicted."

The factual basis of defendant's plea of guilty is supported by the record of the preliminary examination.

Defendant next contends that the trial court violated Canon 29 of the State Judicial Canons of Ethics[1] in accepting a guilty plea to a crime against an organization in which the judge was a member. This contention is without merit. The fact that the trial judge was a member of the organization whose property was broken into does not in itself establish that his personal interests were involved in this matter. Furthermore, defendant was fully informed of the judge's membership before his plea of guilty was accepted.

Defendant not only failed to object, but in fact stated that the disclosure had no effect upon his desire to plead guilty. Defendant offers no authority to support his contention of error.

Affirmed.

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1 State Judicial Canons of Ethics 29. Self-Interest.

"A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy."

LEMARBLE *v.* LAING

Appeal from Antrim, Charles L. Brown, J. Submitted Division 3 October 5, 1971, at Grand Rapids. (Docket No. 10089.) Decided October 27, 1971.

Complaint by Adrian LeMarble as next friend of Yvonne LeMarble against George Laing for assault and battery. Judgment for defendant. Plaintiff appeals. Affirmed.

Dreyer & Porter, for plaintiff.

Zerafa & Zerafa, for defendant.

Before: FITZGERALD, P. J., and BRONSON and T. M. BURNS, JJ.

PER CURIAM. Complaint was filed June 11, 1968, seeking compensatory damages of $20,000 and exemplary damages of $50,000 from the 81-year-old defendant as the result of an alleged assault and battery upon the 13-year-old plaintiff. After a nonjury trial on June 5, 1970, an opinion and judgment of no cause for action were entered on July 27, 1970. Plaintiff appeals as of right, claiming the verdict of the trial judge was clearly erroneous.

The testimony elicited at trial from the several witnesses is conflicting as to the facts and circumstances surrounding the alleged assault and battery, which occurred in defendant's store.

On appeal, plaintiff asks this Court to decide that her proofs are credible whereas defendant's are not. The trial judge found precisely the opposite to be the case, in a cogent and well-reasoned opinion. Proofs exist which, if believed, support the verdict of the trial court, and we find no reason to reverse. GCR 1963, 517.1.

Affirmed. Costs to defendant.

PEOPLE *v.* SHELMIRE

1. CRIMINAL LAW—APPEAL AND ERROR—PRESERVING QUESTION—MANIFEST INJUSTICE.

   An appellate court will not review assignments of error where no objection is entered at trial unless manifest injustice is shown.

2. CRIMINAL LAW—VERDICTS—COERCED VERDICT.

   The trial judge did not coerce the jury, sitting in a murder case, into returning a verdict where the jury returned after only three hours of deliberation to announce a deadlock, the trial judge noted that he did not think the jury had deliberated for a sufficient period of time to determine that a deadlock had been reached in a case that took four days to try, and asked the jury members to reconsider their positions to see if it would be possible for them to reach a verdict, but did not demand or ask for a verdict.

Appeal from Recorder's Court of Detroit, Andrew C. Wood, J. Submitted Division 1 September 7, 1971, at Detroit. (Docket No. 10136.) Decided October 27, 1971.

Henry Shelmire was convicted of manslaughter. Defendant appeals. Affirmed.

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

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 545, 548, 549, 649.
[2] 53 Am Jur, Trial § 951.

Chief, Appellate Department, and *Michael R. Mueller,* Assistant Prosecuting Attorney, for the people.

Kenneth D. Kruse, for defendant on appeal.

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

PER CURIAM. Defendant was charged with first-degree murder (MCLA § 750.316 [Stat Ann 1954 Rev § 28.548]) and tried in Detroit Recorder's Court before a jury, which returned a verdict of guilty of manslaughter (MCLA § 750.321 [Stat Ann 1954 Rev § 28.553]). Defendant was sentenced to a term of 4 to 15 years. He appeals as of right.

Defendant raises two issues on appeal. He first contends that the trial judge's instructions concerning good character and intent were erroneous. No objection was raised below. This Court has repeatedly held that it will not review claimed errors in jury instructions where no objection is entered at trial unless manifest injustice is shown. *People* v. *Fry* (1970), 27 Mich App 169; *People* v. *Ray Clifton Smith* (1969), 20 Mich App 243. Defendant has shown no manifest injustice.

Defendant's second argument is that the trial judge's statements to the jury on sending it back for further deliberations coerced the jury into returning a verdict.

Whether or not a trial judge coerces a jury into returning a verdict must be decided on the facts of each case. We have made a thorough review of previous decisions made by this Court and the Supreme Court to help us determine whether the trial judge's statements, in the instant case, were coercive. *People* v. *De Meaux* (1916), 194 Mich 18; *People* v. *Kasem* (1925), 230 Mich 278; *Zeitz* v. *Mara* (1939),

290, Mich 161; *Decker* v. *Schumacher* (1945), 312 Mich 6; *People* v. *Chivas* (1948), 322 Mich 384; *Pierce* v. *Pierce* (1878), 38 Mich 412; *People* v. *Maxwell* (1966), 3 Mich App 264; *People* v. *Connors* (1970), 27 Mich App 47; *People* v. *Coles* (1970), 28 Mich App 300.

The jury had deliberated for only three hours when it returned to the courtroom to tell the trial judge that it had reached a deadlock. The trial judge noted that he did not think the jury had deliberated for a sufficient period of time to determine a deadlock had been reached in a case that took four days to try. He asked all the jury members to reconsider their positions to see if it would be possible for them to reach a verdict, but did not demand or ask for a verdict.

Having thoroughly reviewed the instructions in this case and having compared them with instructions previously approved, this Court concludes that the trial judge committed no error in his statements.

Affirmed.

PEOPLE *v.* FLY

1. CRIMINAL LAW—IN-COURT IDENTIFICATION—ILLEGAL LINEUP—HARMLESS ERROR.

   Admission of an in-court identification of defendant based upon a lineup at which the defendant allegedly was not represented by counsel was, even assuming the truth of the allegation, harmless error where other testimony of witnesses positively identified defendant as being present at the scene of the crime charged.

2. CRIMINAL LAW—TRIAL—REOPENED PROOFS—WITNESSES.

   Permitting the prosecutor to reopen his case and to introduce the testimony of three additional witnesses, who might have been *res gestae* witnesses, was not error where the trial judge specified that defendant's attorney would have the first opportunity to examine the witnesses, no significant testimony was elicited from these witnesses, the defendant was aware of the witnesses' existence and at no time objected to the prosecution's failure to indorse them on the information.

Appeal from Oakland, James S. Thorburn, J. Submitted Division 2 October 11, 1971. (Docket No. 10239.) Decided October 27, 1971.

Daniel R. Fly was convicted of second-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur 2d, Evidence §§ 367, 1143.
[2] 53 Am Jur, Trial §§ 123–127.

Prosecuting Attorney, and *Frank R. Knox,* Assistant Prosecuting Attorney, for the people.

Donald A. Brown, for defendant.

Before: McGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

PER CURIAM. Defendant was tried and convicted by a jury on a charge of second-degree murder, in violation of MCLA § 750.321 (Stat Ann 1954 Rev § 28.549), and sentenced to 25 to 50 years' imprisonment.

First, the defendant complains that the in-court identification was improperly admitted into evidence because of the allegation that the lineup was conducted without benefit of counsel. However different witnesses testified that the defendant had been seen in the Dequindre Party Store, where deceased Benjamin Newton worked, at around 1:30 a.m. on November 12, 1969. Between that time and 1:49 a.m., the deceased was shot several times with a handgun and died as a result of multiple gunshot wounds. The defendant was arrested on February 13, 1970. A gun found in his possession matched the description of the murder weapon.

On appeal defendant raises for the first time the issue that the trial court erred in permitting an in-court identification of the defendant based upon an illegal lineup. Defendant contends that he was not represented by counsel at the lineup and therefore the admission of identification testimony based upon the lineup was erroneous. Other testimony than that here complained of positively identifies the defendant as present at the scene of the crime. Assuming

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

arguendo that defendant was not represented by counsel, we conclude that the court's error in admitting the identification testimony was harmless beyond a reasonable doubt. Defendant's contention is without merit. See *People* v. *Hutton* (1970), 21 Mich App 312.

Defendant also contends that the court erred in permitting the prosecutor to reopen his case and introduce the testimony of three additional witnesses. The court, in permitting the testimony of additional witnesses provided that defendant's attorney would have the first opportunity to examine the witnesses. No testimony of significance was elicited from these witnesses. While it is true that they may have been *res gestae* witnesses, the defendant was aware of their existence and at no time objected to the prosecution's failure to indorse them on the information. In view of these circumstances we conclude that the admission of the testimony of the additional witnesses did not prejudice the defendant. No reversible error was committed. *People* v. *Nelson* (1971), 29 Mich App 251; *People* v. *McLaughlin* (1966), 3 Mich App 391.

Affirmed.

JAIKINS *v.* JAIKINS

1. DIVORCE—ALIMONY—MODIFICATION—CHANGED CIRCUMSTANCES—EVIDENCE.

An alimony award may be modified upon a showing of changed circumstances; however, a mere assertion, unsupported by an affirmative showing of changed circumstances, is not sufficient.

2. DIVORCE—ALIMONY—MODIFICATION—CHANGED CIRCUMSTANCES.

Denial of plaintiff's motion to terminate alimony was not error where plaintiff did not attempt to offer any proof that there had been a change in circumstances warranting such termination.

Appeal from Oakland, Frederick C. Ziem, J. Submitted Division 2 September 5, 1971, at Lansing. (Docket No. 10442.) Decided October 27, 1971.

James W. Jaikins, Jr., plaintiff, moved to modify a divorce judgment by terminating alimony payments to Marian E. Jaikins, defendant. Motion denied. Plaintiff appeals. Affirmed.

James G. Hartrick, for plaintiff.

Smith, Magnusson, Anderson & Chartrand, for defendant.

Before: QUINN, P. J., and DANHOF and TARGONSKI,* JJ.

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

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Divorce and Separation §§ 675–690.

PER CURIAM. The question presented is whether the trial court erred in refusing to modify a judgment of divorce by terminating alimony. We hold that there was no error.

The sequence of events immediately preceding this appeal is as follows: the defendant sought modification of the judgment in a number of respects. She also sought an order holding the plaintiff in contempt. The plaintiff opposed the defendant's request and as affirmative relief sought a termination of alimony. On August 19, 1970, a hearing was held in the Oakland County Circuit Court. The circuit court disposed of a number of issues at this hearing, but the only ruling before us on appeal is the denial of the motion to terminate alimony. The only witness at the hearing was the defendant; the plaintiff did not attempt to offer any proof. Shortly before the conclusion of the hearing the plaintiff requested a ruling on his motion to terminate alimony. The trial court denied the motion.

An alimony award may be modified upon a showing of changed circumstances. However, there must be a showing of changed circumstances, not merely an allegation. A mere assertion, unsupported by an affirmative showing of changed circumstances, is not sufficient to show changed circumstances. *Ashburn* v. *Ashburn* (1951), 329 Mich 314. In this case the plaintiff sought a ruling on his motion without attempting to prove his case. The denial of the motion was not error.

Affirmed.

PEOPLE *v.* HORACE

1. BURGLARY—BREAKING AND ENTERING—DWELLING HOUSE—OCCUPIED DWELLING.

   The elements of the crime of breaking and entering a dwelling house are the same regardless of whether the dwelling house is occupied or unoccupied; whether the house is occupied or unoccupied goes to the length of the sentence (MCLA § 750.110).

2. CRIMINAL LAW—PLEA OF GUILTY—VOLUNTARINESS—BREAKING AND ENTERING—UNOCCUPIED DWELLING.

   Plea of guilty of breaking and entering an unoccupied dwelling house was properly accepted even though defendant contended on appeal that he pled guilty of breaking and entering an occupied dwelling house where defendant was aware of the crime charged (GCR 1963, 785.3[2]).

3. CRIMINAL LAW—PLEA OF GUILTY—BREAKING AND ENTERING UNOCCUPIED DWELLING—EXPLANATION OF ELEMENTS OF CRIME.

   A trial judge need not explain to a defendant what constitutes an occupied or unoccupied dwelling place before accepting the the defendant's plea of guilty to the charge of breaking and entering an unoccupied dwelling.

Appeal from Berrien, Chester J. Byrns, J. Submitted Division 3 September 7, 1971, at Grand Rapids. (Docket No. 10473.) Decided October 27, 1971.

Stephen Horace was convicted, on his plea of guilty, of breaking and entering an unoccupied dwelling. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 13 Am Jur 2d, Burglary § 3 *et seq.*
[2, 3] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Ronald J. Taylor,* Prosecuting Attorney, for the people.

Rodger V. Bittner, for defendant on appeal.

Before: HOLBROOK, P. J., and MCGREGOR and T. M. BURNS, JJ.

PER CURIAM. Defendant, on April 8, 1970, pled guilty to breaking and entering an unoccupied dwelling contrary to MCLA § 750.110 (Stat Ann 1971 Cum Supp § 28.305). On May 18, 1970, he was sentenced to a term of four to ten years in prison.

On appeal, one issue is presented:

"Whether the examination of the defendant required by GCR 1963, 785.3(2) indicates that the plea of the defendant was understandingly entered?"

GCR 1963, 785.3(2) provides:

".3 Arraignment and Sentencing. In every prosecution wherein the accused is charged with a felony, the trial court shall conform to the following practice:

* * *

"(2) Imposing Sentence. If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly, and voluntarily made, without undue influence, compulsion, or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted."

MCLA § 750.110 (Stat Ann 1971 Cum Supp § 28.-305) provides:

"Any person who shall break and enter with intent to commit any felony, or any larceny therein, any tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat or ship, railroad car or any private apartment in any of such buildings or any unoccupied dwelling house, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years. Any person who breaks and enters any occupied dwelling house, with intent to commit any felony or larceny therein, shall be guilty of a felony punishable by imprisonment in the state prison for not more than 15 years. *For the purpose of this section 'any occupied dwelling house' includes one that does not require the physical presence of an occupant at the time of the breaking and entering but one which is habitually used as a place of abode.*" (Emphasis added.)

At defendant's arraignment the following colloquy, between the defendant and the court, transpired:

"*The Court:* All right. Did the—was the building in question an unoccupied dwelling house?

"*Defendant:* Yes, sir.

"*The Court:* Was it owned or occupied by a Norbert Cramer?

"*Defendant:* Yes, sir, it was."

Defendant now contends that it is, from the above, obvious that he did not understandingly plead guilty to breaking and entering an *unoccupied* dwelling.

Defendant relies upon *People* v. *Hunn* (1965), 1 Mich App 580; *People* v. *Mason* (1968, 13 Mich App 277; and *People* v. *Coats* (1969), 16 Mich App 652, to support his position that his plea was not understandingly made.

However, in *Hunn* and *Coates* the defendants' guilty pleas were not valid because of lack of knowledge and intent to commit the crimes charged or any crime. In *Mason* the defendant was trying to assert a defense thus invalidating his guilty plea.

The contentions of defendant herein, hinge around the statutory language "unoccupied dwelling". Basically, defendant asserts his guilty plea is invalid because the dwelling he broke and entered into was "occupied" within the statutory meaning, as the dwelling belonged to one Norbert Cramer.

The problem originated with the manner in which the information was drafted:

"Feloniously did then and there break and enter a certain *unoccupied dwelling house belonging to* the above-named *complainant,* situated at the above-designated location, with intent to commit the crime of larceny therein.

"Contrary to § 750.110, CL 1948, as amended by PA 1964, No 133." (Emphasis supplied.)

In *People* v. *William Turner* (1970), 26 Mich App 632, 637, 638 (citing MCLA § 767.57 [Stat Ann 1954 Rev § 28.997]) this Court held:

" 'In pleading a statute or a right derived therefrom it is sufficient to refer to the statute by its title, or in any other manner which identifies the statute and the court must thereupon take judicial notice thereof.'

"Furthermore, the record establishes beyond a doubt that defendant Turner was aware of the crime with which he was charged. At the first trial, Turner was convicted of first-degree murder. It was again noted at the *Walker* hearing that the charge was murder in the first degree."

Here, defendant was aware of the crime with which he was charged: the crime of breaking and en-

tering a dwelling house. Whether the house is occupied or unoccupied, goes to the length of sentence; however, the elements of the crime are the same in either case.

It was not necessary for the trial judge to explain to defendant what constitutes an occupied or unoccupied dwelling place.

In *People* v. *Morgan* (1970), 28 Mich App 594, 595, this Court held:

"On appeal he seeks to withdraw the plea claiming that the acceptance was invalid because of the failure of the trial judge to explain the differences between the elements of the offense originally charged and the offense to which he pleaded guilty. The people move to affirm.

"No such explanation is required. GCR 1963, 785.3(2); *People* v. *Torns* (1970), 23 Mich App 238; *People* v. *Bartlett* (1969), 17 Mich App 205. It is not necessary that the record affirmatively show that the defendant was aware of the elements of the crimes. *People* v. *Torns, supra; People* v. *Ferguson* (1968), 13 Mich App 362."

See also, *People* v. *Allen* (1971), 31 Mich App 183; *People* v. *Kuchulan* (1971), 31 Mich App 280.

As to the requirements of GCR 1963, 785.3(2), this Court has stated in *People* v. *Head* (1971), 31 Mich App 491, 496, 497:

"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. * * *

"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. * * *

"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 present to us, we are convinced that this defendant did freely, understandingly, and voluntarily plead guilty to the offense for which he was charged."

See also, *People* v. *Hatfield* (1971), 30 Mich App 258.

A review of the record here shows compliance with GCR 1963, 785.3(2) by the trial judge. Defendant has not protested his innocence, but rather, is now objecting to the sentence imposed, based on a claimed prior defect in the information. Any defect present was waived by his guilty plea. *People* v. *Harvey* (1970), 24 Mich App 363, 364; *People* v. *Demson* (1970), 25 Mich App 151, 152; and *People* v. *Patton* (1970), 25 Mich App 713, 714. No reversible error occurred.

Affirmed.

PEOPLE *v.* HENLEY

CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL OF PLEA.

A defendant was entitled to withdraw his plea of guilty of second-degree murder where the motion to withdraw the plea was made before sentencing, defense counsel, when making the motion, submitted statements from two psychiatrists which cast grave doubt on the defendant's sanity at the time of the offense and on his competency to plead, and the motion to withdraw the plea was made as soon as possible.

Appeal from Oakland, William John Beer, J. Submitted Division 2 October 8, 1971, at Lansing. (Docket No. 10506.) Decided October 27, 1971.

Paul F. Henley was convicted, on his plea of guilty, of second-degree murder. Defendant's motion to set aside the plea denied. Defendant appeals by leave granted. Reversed and remanded.

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.

Jon H. Kingsepp, for defendant on appeal.

Before: QUINN, P. J., and DANHOF and TARGONSKI,* JJ.

* Former circuit judge, 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 § 484 *et seq.*

PER CURIAM. On July 19, 1960, the defendant pled guilty to a charge of second-degree murder. MCLA § 750.317 (Stat Ann 1954 Rev § 28.549). On August 2, 1960, the date set for sentencing, the defendant moved to set aside the plea. The trial court denied the motion and proceeded to sentence the defendant to life imprisonment. Defendant now appeals, on leave granted, and we reverse the conviction and sentence and remand for further proceedings.

In *People* v. *Bencheck* (1960), 360 Mich 430, 432, the Supreme Court said:

"Generally, it is considered that there is no absolute right to withdrawal of a guilty plea. *People* v. *Case* [1954], 340 Mich 526; *People* v. *Banning* [1950], 329 Mich 1. See, also, 14 Am Jur, Criminal Law, § 286, [p 960]. But this Court's decisions suggest that the trial judge's discretion be exercised with great liberality when the motion is made prior to sentence or commencement of trial. *People* v. *Piechowiak* [1936], 278 Mich 550; *People* v. *Stone* [1940], 293 Mich 658; *People* v. *Sheppard* [1947], 316 Mich 665; *People* v. *Anderson* [1948], 321 Mich 533."

At p 433, the Court stated:

"Where, as here, a defense of innocence is asserted at the time of a request to withdraw the plea, and the request is not obviously frivolous and is made before commencement of trial and before sentence, the plea should be granted. The right we deal with here is the right to a jury trial, and even what may prove a well-founded belief in defendant's guilt on the part of the trial judge should not impede the exercise of that right."

In this case the request was manifestly not frivolous. When the motion was made counsel for the defendant submitted statements from two psychia-

trists. These statements cast grave doubt on the defendant's sanity at the time of the offense and on his competency to plead. The motion was made before sentencing and it appears from the record that it was made as soon as possible under the circumstances.

Reversed and remanded for further proceedings.

HUTCHINS *v.* HUTCHINS

1. DIVORCE—EXTREME CRUELTY—OPPROBRIOUS EPITHETS.
   Addressing one's spouse with opprobrious epithets is sufficient to constitute extreme cruelty in a divorce action.

2. DIVORCE—EXTREME CRUELTY—ACCUSATIONS OF MISCONDUCT.
   Making frequent unfounded accusations of a spouse's misconduct, in and out of the spouse's presence, which tended to degrade and humiliate the spouse and which, if believed by others, would cause the loss of friends and respect, constitutes extreme cruelty and warrants a judgment of divorce.

3. DIVORCE—PROPERTY AWARD.
   No rigid rules or mathematical formulas exist for dividing property in a divorce action; each case depends on the circumstances, including equitable factors such as the source of the property, contribution toward its acquisition, the years of married life, earning ability, and the cause of the divorce.

4. DIVORCE—PROPERTY AWARD—APPEAL AND ERROR.
   An appellate court will not reverse or modify a trial court's property award in a divorce action unless the reviewing court is convinced that a different result would have been reached had the appellate court occupied the position of the trial court.

Appeal from Oakland, Frederick C. Ziem, J. Submitted Division 2 October 12, 1971, at Lansing. (Docket No. 10512.) Decided October 27, 1971.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 24 Am Jur 2d, Divorce and Separation § 48 *et seq.*
[3] 24 Am Jur 2d, Divorce and Separation § 925 *et seq.*
[4] 5 Am Jur 2d, Appeal and Error § 868.
24 Am Jur 2d, Divorce and Separation § 925 *et seq.*

Complaint by Helen Hutchins against Lyle M. Hutchins for divorce. Judgment for plaintiff. Defendant appeals. Affirmed.

Powell, Peres, Carr & Jacques, for plaintiff.

Ingle & Burke, for defendant.

Before: MCGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

PER CURIAM. Defendant appeals from a circuit court judgment granting his wife a divorce on the ground of extreme cruelty, MCLA § 552.7 (Stat Ann 1957 Rev § 25.87).

A divorce action is equitable in nature and is, therefore, subject to *de novo* review; however, the appellate court gives great weight to the trial court's finding of facts. *Nickel* v. *Nickel* (1970), 29 Mich App 25; *Heckelman* v. *Heckelman* (1966), 3 Mich App 159. The defendant raises four issues for our review, but we find two issues to have little merit and are not persuasive.

The first issue is whether the testimony of the plaintiff and her witnesses was sufficient to grant a judgment of divorce. After a thorough reading of the record, we have determined that the defendant frequently addressed plaintiff with "opprobrious epithets" which is a sufficient ground for extreme cruelty. *Metcalf* v. *Metcalf* (1970), 28 Mich App 442. In addition, a reading of the record has shown that the defendant frequently, both in and out of the presence of the plaintiff, made unfounded accusations of her misconduct to others, which tended to degrade and humiliate plaintiff and which, if be-

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

lieved, would cause loss of friends and respect. This also is sufficient to constitute extreme cruelty and thus warrant divorce. *De Vuist* v. *De Vuist* (1924), 228 Mich 454; *Farley* v. *Farley* (1923), 222 Mich 459; *Brookhouse* v. *Brookhouse* (1938), 286 Mich 151. Thus, we find that the circuit court properly granted the judgment of divorce.

The second question defendant raises is whether the property settlement was inequitable. The rule in this state is that there are no rigid rules or mathematical formulas for the division of property, but each case depends on the circumstances and this includes equitable factors such as source of property, contribution towards its acquisition, the years of married life, earning ability, and the cause of divorce. *Dral* v. *Dral* (1967), 8 Mich App 663; *Johnson* v. *Johnson* (1956), 346 Mich 418; *Ross* v. *Ross* (1970), 24 Mich App 19. Alimony payments are within the discretion of the court, though the power is given through statute. *Ross* v. *Ross, supra; Ritzer* v. *Ritzer* (1928), 243 Mich 406; *Socha* v. *Socha* (1966), 5 Mich App 404; MCLA § 552.23 (Stat Ann 1971 Cum Supp § 25.103).

This Court does not reverse or modify a circuit court's property award unless it is convinced that a different result would have been reached had we occupied the position of the trial court. *Dral* v. *Dral, supra; Czuhai* v. *Czuhai* (1971), 30 Mich App 208; *Paul* v. *Paul* (1960), 362 Mich 43; *Ross* v. *Ross, supra.* We have examined the assets and the incomes of both plaintiff and defendant. From the record it is ascertained that the parties' assets were distributed to the parties by the trial court as follows:

I. A 1966 English Ford Cortina to the plaintiff; a 1968 English Ford Cortina to the defendant.

II. All household furniture, furnishings, appliances, dishes, linens, drapes, utensils, bedding, carpeting, fixtures, garden tools, and lawnmowers at the marital home were awarded to the plaintiff.

III. A collection of antiques valued at $5,351, started by the defendant prior to the marriage and continued by him during the marriage was ordered to be sold and the proceeds of such sale to be divided equally between the parties.

IV. The family home, the only real estate owned by the parties, valued at between $17,500 and $19,500 had been owned by the defendant prior to the marriage. The court awarded each of the parties a one-half interest in this real estate, as tenants in common, and the plaintiff was given exclusive possession of this real estate for five years.

V. The savings account was in plaintiff's name, and funds on deposit had been earned by the plaintiff; the court awarded the account in the amount of $3,800 to the plaintiff. The balance in the parties' checking account at the time of trial was about $9, which was awarded to the defendant.

Defendant was a former employee of the Ford Motor Company, retired on a medical retirement provision, from which his income is $69.23 per week. Plaintiff's part-time employment brought an income of $21 per week.

In addition to the property awards, plaintiff was awarded permanent alimony to be paid by defendant in the amount of $10 per week until such time as she should remarry.

Judgment of divorce is affirmed. No costs to either party as plaintiff failed to file a brief.

PEOPLE *v.* HILL

BURGLARY—BREAKING AND ENTERING—PLEA OF GUILTY—FACTUAL BASIS.

Trial court adduced a sufficient basis for defendant's plea of guilty of attempted breaking and entering an occupied dwelling house with intent to commit larceny, even though defendant contended that his testimony showed only an entry without breaking, where the defendant said that he gained entry through an open door after some of his boys had broken into the house, because the defendant could clearly have been found guilty of aiding and abetting and because a person who aids and abets in the commission of a crime may be prosecuted, indicted, tried, and, on conviction, punished as if he had directly committed the offense (MCLA § 767.39).

Appeal from Recorder's Court of Detroit, Elvin L. Davenport, J. Submitted Division 1 October 8, 1971, at Detroit. (Docket No. 10651.) Decided October 27, 1971.

Alvin C. Hill was convicted, on his plea of guilty, of attempted breaking and entering of an occupied dwelling house with intent to commit larceny. 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.

REFERENCE FOR POINTS IN HEADNOTES

21 Am Jur 2d, Criminal Law § 484 *et seq.*

Markus S. Simon, for defendant on appeal.

Before: LESINSKI, C. J., and V. J. BRENNAN and O'HARA,* JJ.

PER CURIAM. The defendant was charged with breaking and entering an occupied dwelling house with intent to commit larceny therein. MCLA § 750.110 (Stat Ann 1971 Cum Supp § 28.305). While represented by retained counsel, he waived the preliminary examination and pled guilty to attempted breaking and entering of an occupied dwelling house with intent to commit larceny therein. MCLA § 750.92 (Stat Ann 1962 Rev § 28.287). He was sentenced to a term of three and one-half to five years in prison.

Appointed appellate counsel filed a delayed motion for a new trial and an evidentiary hearing to determine the voluntariness of the plea based on the allegation that the defendant expected probation, not a prison sentence, when he offered the plea. The motion was denied. Defendant's argument that his plea of guilty was induced by promises of leniency was not briefed or raised on appeal, and is therefore considered abandoned. *People* v. *Williams* (1971), 29 Mich App 420.

On appeal the defendant argues that the trial court did not comply with MCLA § 768.35 (Stat Ann 1954 Rev § 28.1058) and GCR 1963, 785.3(2) when the defendant's plea was accepted. Specifically, he contends that his testimony showed only an entry without a breaking and that therefore the court should have questioned him in greater detail regarding the voluntariness of his plea.

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

The "testimony" referred to is as follows:

"*Q.* [*Court*]: Did you go into that house?
"*A.* [*Defendant*]: Yes sir.
"*Q.* What time of the day or night?
"*A.* About 12:30, 11:00 o'clock.
"*Q.* How did you get in?
"*A.* It was already open, some of our boys had broke into it. They were talking about going back and get the stuff so I went in and tried to get it before them."

Although this testimony does not establish that the defendant himself did the "breaking"[1] he could clearly have been found guilty of aiding and abetting. A person who aids and abets in the commission of a crime may be "prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCLA § 767.39 (Stat Ann 1954 Rev § 28.979).

Therefore, the trial court did adduce a sufficient factual basis for the plea and the court's inquiry into the voluntariness of the plea was sufficient.

Affirmed.

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[1] Even if defendant had pushed aside an already opened door, it would have been sufficient to constitute a breaking. *People* v. *Davis* (1970), 22 Mich App 70.

PEOPLE *v.* COUNCIL

1. CRIMINAL LAW—EVIDENCE—IDENTIFICATION—ADMISSIBILITY—APPEAL AND ERROR—PRESERVING QUESTION.

   An appellate court, as a general rule, will not consider allegations of improper admission of identification testimony at trial unless objections to that testimony were made in the trial court.

2. CRIMINAL LAW—DEFENDANT TESTIFYING—IMPEACHMENT—PRIOR CONVICTIONS—PERSISTENT QUESTIONING.

   Prosecutor's persistently questioning a defendant about whether he had been convicted of automobile theft, after defendant had repeatedly denied it, and the prosecutor's asking the defendant if he would still deny the theft if the defendant's FBI record showed the conviction, thus implying not only that defendant had an FBI record, but also that defendant was lying about having committed the automobile theft, resulted in reversible error even though defendant did not object to the prosecutor's tactics because such tactics by a prosecutor result in manifest injustice.

Appeal from Berrien, Chester J. Byrns, J. Submitted Division 3 October 7, 1971. (Docket No. 10678.) Decided October 27, 1971.

Pete Council was convicted of armed robbery. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, and *Ronald J. Taylor*, Prosecuting Attorney, for the people.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 5 Am Jur 2d, Appeal and Error §§ 515 *et seq.*; 553; 624 *et seq.*

William O. Lagoni, for defendant on appeal.

Before: FITZGERALD, P. J., and BRONSON and T. M. BURNS, JJ.

PER CURIAM. Defendant was convicted by a jury of the crime of robbery armed.[1] He was subsequently sentenced to a term of 30 to 40 years imprisonment. Defendant's motion for a new trial was denied and this appeal followed.

On January 1, 1970, a person entered a gas station in Berrien County, Michigan, and used the public telephone. Gary Cecci, the station attendant, overheard that individual say to whomever he was calling that he had been in a fight the night before and had gone to Mercy Hospital for treatment on his nose and that he had been "busted open". Shortly thereafter, the man pulled a gun, pointed it at Mr. Cecci, and robbed the station of approximately $150.

Immediately after the robbery, Mr. Cecci informed the police of the robbery and told them what he had heard the person say while using the telephone. The complaining witness had about 1–1/2 to 2 minutes to observe the person who robbed the station and noticed that that person had three bandaids across his nose, three bandaids on his forehead, and some bandages on his chin.

Two or three days after the robbery, the complaining witness was shown about eight to ten photographs and apparently picked the defendant's photograph from them. Sometime later, the complaining witness was shown recent pictures of the defendant in which he had scars on either side of his nose and about the same location as the bandaids had

[1] MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

been on the person who did the robbery. The witness positively identified the defendant as the robber.

Mr. Cecci testified at trial that the robber didn't have a beard or mustache and had a part in his hair. The defendant, testifying in his own behalf, said that on January 1, 1970, he had a mustache and didn't have a part in his hair. Mr. George Washington, a barber, who had cut the defendant's hair between January 1, 1970, and January 5, 1970, testified that prior to January 5, 1970, the defendant didn't have a part in his hair and that he had a mustache.

Mrs. Teola Johnson, testifying on defendant's behalf, stated that on January 1, 1970, defendant's eyes were "swollen bad" and that his left eye was "practically swollen closed". She also related that the defendant didn't have a part in his hair on January 1, 1970, and did have a mustache.

The jury, apparently believing the complaining witness's testimony, found the defendant guilty. This appeal followed, raising two assignments of error.

On appeal, defendant contends that the pretrial identification of the defendant by means of photographs was so necessarily suggestive and conductive to misidentification that it tainted subsequent in-court identification.

In *Simmons* v. *United States* (1968), 390 US 377, 384 (88 S Ct 967, 971; 19 L Ed 2d 1247, 1253), the United States Supreme Court addressed itself to the instant issue:

"We hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable

misidentification. This standard accords with our resolution of a similar issue in *Stovall* v. *Denno* [1967], 388 US 293, 301, 302 (87 S Ct 1967, 1972–1973; 18 L Ed 2d 1199, 1206), and with decisions of other courts on the question of identification by photograph."

In the present case, the pretrial photographic identification procedure, scrutinized in light of the totality of the surrounding circumstances, does not give rise to substantial likelihood of irreparable misidentification. Because the procedure was not so unduly prejudicial as to wholly taint the conviction of the defendant, this Court finds no merit in this contention by defendant.

Further, as a general rule, this Court will not consider allegations of improper admission of identification testimony at trial unless objections were made in the court below. *People* v. *Schram* (1970), 23 Mich App 91.

Since the defendant in this case did not make a motion for an evidentiary hearing outside the presence of the jury to determine elements of his claim that the pretrial photographic identification rendered the in-court identification by the complainant inadmissible, it is apparent that his claim was not properly preserved for review.

The second issue raised by defendant is whether the evidence presented in the court below was sufficient to support a jury verdict of guilty beyond a reasonable doubt.

This contention is without merit. The complainant positively identified the defendant as the man who robbed him and if such identification was not tainted by pretrial photographic identification, it was plainly sufficient to support a jury verdict beyond a reasonable doubt. Accordingly, this Court finds contrary to defendant's contention.

After an exhaustive examination of the record, however, a third issue not raised by defendant becomes obviously apparent. Despite lack of timely objection, error which reflects a clear injustice may be examined. *People* v. *Hicks* (1966), 2 Mich App 461.

In the instant case, the prosecutor continually asked the defendant whether he had been convicted of automobile theft in April 1962. The defendant repeatedly denied it, but the prosecutor continued to question him upon that point. Furthermore, when the prosecutor asked the defendant if he would still deny it if his FBI record showed it, he implied not only that the defendant had an FBI record, but also that he was lying about having committed the automobile theft. When a prosecutor repeatedly uses such tactics, tending to destroy the credibility of the defendant in the minds of the jurors, reversible error is committed. See *People* v. *Jones* (1971), 32 Mich App 309; and *People* v. *Di Paolo* (1962), 266 Mich 394, for situations parallel to the instant case.

Although defendant did not raise timely objection, to avoid manifest injustice this Court determines that defendant's conviction should be reversed and remanded for a new trial.

PEOPLE v. BERNSTEIN

1. CRIMINAL LAW—GAMBLING—MAINTAINING GAMBLING ESTABLISHMENT—EVIDENCE—PRIMA FACIE CASE.

   A *prima facie* case that defendant had committed the crime of knowingly keeping, maintaining, and suffering a gambling establishment was established where the evidence presented showed that the defendant owned the premises in question, that the defendant was present when the gambling took place, and that a cut was taken from the pot during each hand "for the house" (MCLA § 750.303).

2. CRIMINAL LAW—SENTENCING—PRESENTENCE REPORT—EXAMINATION BY DEFENDANT.

   The granting or denying of a defendant's request to see the presentence report is discretionary with the trial court.

3. CRIMINAL LAW—SENTENCING—PRESENTENCE REPORT—EXAMINATION BY DEFENDANT.

   The failure of the trial court to furnish the defendant with the presentence report at the time of sentencing or prior to sentencing was not error where neither the defendant nor his counsel requested the report.

Appeal from Ingham, Marvin J. Salmon, J. Submitted Division 2 October 14, 1971, at Lansing. (Docket No. 10752.) Decided October 27, 1971. Leave to appeal denied, 386 Mich 774.

William Bernstein was convicted of knowingly keeping, maintaining, and suffering a gambling establishment. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 38 Am Jur 2d, Gambling § 118 *et seq.*
[2] 21 Am Jur 2d, Criminal Law § 525 *et seq.*
[2, 3] Defendant's right to disclosure of presentence report. 40 ALR3d 681.

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.

Farhat & Burns, for defendant.

Before: McGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

PER CURIAM. Defendant and Herbert R. Fisher were charged with a two-count violation of MCLA § 750.303 (Stat Ann 1954 Rev § 28.535) in that they knowingly kept and maintained and suffered a gambling establishment. At the close of the people's proofs in a nonjury trial, a motion to dismiss was granted and an acquittal entered as to Herbert Fisher. Defendant was then convicted and sentenced to 2 years probation, $500 in fines, $250 in costs, and 60 days in the county jail. Defendant appeals from this conviction.

The evidence at the trial showed that the defendant owned the premises in question, that the defendant was present when the gaming activities took place, and that a cut was taken from the pot during each hand "for the house". The trial court found this was *prima facie* evidence that the crimes charged had been committed. The defendant's own testimony also tended to confirm that the crimes were committed.

The evidence presented by the people was sufficient, if believed, to prove each and every element required to justify the conviction of defendant of violating MCLA § 750.303 (Stat Ann 1954 Rev § 28.535).

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

People v. *Johns* (1953), 336 Mich 617. The trial court properly denied defendant's motion to dismiss.

The use and confidentiality of presentence reports is clearly established under both Michigan law and the United States Constitution. *People* v. *Camak* (1967), 5 Mich App 655; *People* v. *Beard* (1969), 17 Mich App 409; *People* v. *Giacalone* (1970), 23 Mich App 163; *People* v. *Moton* (1970), 25 Mich App 383; *People* v. *Stardevant* (1971), 33 Mich App 252; and *Williams* v. *New York* (1949), 337 US 241 (69 S Ct 1079, 93 L Ed 1337).

The instant case is similar to the case of *People* v. *Camak, supra*, wherein we stated at pp 661, 662 as follows:

"The record discloses no request by defendant or his counsel of the court to examine the presentence report, and as pointed out by defendant the record fails to disclose an offer by the court to defendant to examine it at the time of sentence."

Therein we ruled that there was no error in failing to furnish defendant the presentence report at the time of sentencing or prior thereto.

Furthermore, under the latest decision of our Supreme Court, *People* v. *Malkowski* (1971), 385 Mich 244, the granting or denial of a request by the defendant to see the presentence report is discretionary with the court. Defendant has failed to show any abuse of discretion by the trial court in the instant case.

Affirmed.

PEOPLE *v.* HOWARD HAYES

1. CRIMINAL LAW—WITNESSES—NONRESIDENT WITNESSES—EXAMINATION—DISCRETION.

   A motion in a criminal proceeding for the appointment of a commission to examine material witnesses who are residing out-of-state is addressed to the discretion of the trial court (MCLA §§ 767.7, 767.8).

2. CRIMINAL LAW—WITNESSES—NONRESIDENT WITNESSES—EXAMINATION.

   Denial of defendant's motion for a commission to examine nonresident witnesses was not an abuse of discretion where the motion was made only four weeks before trial and over three months after the case had been set for trial and there was nothing in the record to excuse the delay, and where there was no showing that the nonresident witnesses could not be present at trial (MCLA §§ 767.7, 767.8).

3. CRIMINAL LAW—WITNESSES—NONRESIDENT WITNESSES—EXAMINATION—AVAILABILITY.

   A mere assertion that an out-of-state material witness cannot be present at trial is insufficient to warrant the granting of a defendant's motion to have a commission appointed to examine that witness, absent any factual elaboration showing that the witness cannot be present (MCLA §§ 767.7, 767.8).

Appeal from Washtenaw, William F. Ager, Jr., J. Submitted Division 2 October 7, 1971, at Lansing. (Docket No. 10862.) Decided October 27, 1971.

Howard Hayes, charged with resisting arrest, moved for appointment of a commission to examine

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 58 Am Jur, Witnesses § 12.
21 Am Jur 2d, Criminal Law §§ 340, 345.

two out-of-state witnesses. Motion denied. Defendant appeals by leave granted. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *Karl V. Fink* and *Arthur E. Lux,* Assistant Prosecuting Attorneys, for the people.

Pauline R. Rothmeyer, for defendant.

Before: QUINN, P. J., and DANHOF and TARGONSKI,* JJ.

PER CURIAM. The defendant is charged with resisting arrest. MCLA § 750.479 (Stat Ann 1954 Rev § 28.747). Pursuant to MCLA §§ 767.77, 767.78 (Stat Ann 1954 Rev §§ 28.1017, 28.1018), the defendant moved for appointment of a commission to examine two witnesses who presently reside in California. The motion was denied and the defendant has appealed on leave granted. We affirm.

The statutes we must construe provide:

"Sec. 77. When an issue of fact shall be joined upon any indictment, the court in which the same is pending may, on application of the defendant, grant a commission to examine any material witnesses residing out of this state, in the same manner as in civil cases."

"Sec. 78. Interrogatories to be annexed to such commission shall be settled and such commission shall be issued, executed and returned in the manner prescribed by law in respect to commissions in civil cases, and the deposition taken thereon and returned shall be read in the same cases, and with like effect in all respects, as in civil suits."

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

We have found no Michigan cases that are in point. However, there are a number of Federal cases which construe a similar provision found in Rule 15 of the Federal Rules of Criminal Procedure.

A motion of this type is addressed to the discretion of the court. *United States* v. *Whiting* (CA2, 1962), 308 F2d 537, *cert den* (1963), 372 US 919 (83 S Ct 734, 9 L Ed 2d 725). *United States* v. *Hayutin* (CA2 1968), 398 F2d 944, *cert den* (1968), 393 US 961 (89 S Ct 400, 21 L Ed 2d 374). In *Whiting, supra,* at p 541, Judge, now Mr. Justice, Marshall stated:

"the moving party has the burden of demonstrating the availability of the proposed witnesses and their willingness to appear, *United States* v. *Ausmeier* (ED NY, 1946), 5 FRD 395, the materiality of the testimony which it is expected they will give, *United States* v. *Glessing, supra,* [(Minn, 1951), 11 FRD 501] and that injustice will result if the motion is denied, *United States* v. *Grado* (WD Mo, 1957), 154 F Supp 878. It is within the discretion of the trial court to deny the motion if it is made after 'unexcused delay,' *Heflin* v. *United States, supra,* [(CA 5, 1955), 223 F2d 371], or on the 'eve of trial.' *United States* v. *Broker* (CA 2, 1957), 246 F 2d 328, *cert den* (1957), 355 US 837 (78 S Ct 63, 2 L Ed 2d 49)."

In this case the motion was not timely. After several pretrial motions had been disposed of, on June 18, 1970 the case was set for trial. The trial date was October 26, 1970 with an alternate date of September 14, 1970. The defendant's motion for a commission was not filed until September 25, 1970. There is nothing in the record that would excuse the delay.

It has been held that a mere assertion that a witness cannot be present is insufficient, absent any

factual elaboration showing that the witness cannot be present. *United States* v. *Rosenstein* (SD NY, 1969), 303 F Supp 210. In the case at bar the defendant has made no showing that the witnesses cannot be present at the trial.

On the basis of the record in this case we cannot say that the trial court abused its discretion.

Affirmed.

WEIDEMAN *v.* WAYNE COUNTY

MURPHY *v.* WAYNE COUNTY

1. JUDGES—SALARY—REDUCING SALARY.
   A decrease in a judicial salary paid by the state is prohibited during a judicial term.

2. JUDGES—JUDICIAL SALARY—COUNTY SUPPLEMENT—REDUCING SUPPLEMENT.
   A county supplement which was part of a judicial salary during any judicial term cannot be reduced.

3. JUDGES — JUDICIAL SALARY — COUNTY SUPPLEMENT — REDUCING SALARIES.
   County's reducing the supplement it had been paying to judges was constitutionally impermissible even though the reduction was made simultaneously with an increase in the state judicial salary and the net salaries of the judges were actually increased.

Consolidated appeals from Wayne, John X. Theiler, J. Submitted Division 2 October 5, 1971, at Lansing. (Docket Nos. 11205, 11206.) Decided October 27, 1971. Leave to appeal denied, 386 Mich 776.

Complaint by Carl M. Weideman against Wayne County, Wayne County Board of Supervisors, and Wayne County Board of Auditors, to recover unpaid judicial salary. Summary judgment for plaintiff. Defendants appeal.

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 46 Am Jur 2d, Judges § 66 *et seq.*

Complaint by Marie H. Murphy, administratrix of the estate of Thomas J. Murphy, against Wayne County to recover unpaid judicial salary. Summary judgment for plaintiff. Defendant appeals. Affirmed as to both cases.

Fischer, Franklin & Ford (by *George Hogg, Jr.*, and *Francis E. Bentley*), for plaintiff Weideman.

Robert E. Murphy, for plaintiff Murphy.

William L. Cahalan, Prosecuting Attorney, *Aloysius J. Suchy,* Corporation Counsel, and *W. Leo Cahalan, Jr.,* and *Adam P. Angelas, Assistant* Prosecuting Attorneys, for defendants.

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

PER CURIAM. Each plaintiff has filed a motion to affirm upon the authority of *Deneweth* v. *Green* (1971), 385 Mich 763, with opposition thereto by defendants. The grounds relied on by them are:

First, that while a reduction of Wayne County's supplement to the involved judicial salaries was in fact made, it was made simultaneously with an increase in the state judicial salary, and that the net salaries of the plaintiffs were actually increased.

Second, defendants argue that the constitutional prohibition against reducing judicial salaries during a term relates to the total salary and is inapplicable to its component parts.

In essence, ground two is a restatement of ground one since it only is declaratory of *how* the result in ground one eventuated.

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

If the reduction made as stated in ground one is constitutionally infirm, irrespective of its effect upon the total net salary, the answer to the argument advanced in ground two is of necessity controlled by the holding as to ground one.

We are persuaded that *Deneweth, supra,* controls. Whether the reduction occurs by operation of an unconstitutional statute, as in *Deneweth,* or by the unconstitutional action of the county legislative body and its named agencies, as here, is not to the point.

What is constitutionally impermissible to the sovereignty itself acting through the Legislature, is impermissible to any lesser unit of government created by the Legislature. *Deneweth* interdicts a decrease in a judicial salary paid by the state during a judicial term. It likewise interdicts a reduction in a previously established county supplement which was a part of a judicial salary during any term.

Under the controlling law of *Deneweth,* the motions to affirm are granted.

PEOPLE v. BOONE

CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL OF PLEA.

The trial judge improperly denied defendant's motion to withdraw his plea of guilty where defendant alleged that the prosecutor would not accept any pleas of guilty from the defendant and his two alleged accomplices unless all pled guilty and that the other men threatened to testify against the defendant if he did not plead guilty, the defendant, on his motion to withdraw the plea, said that he had not signaled his attorney, when the jury was being impaneled, that he wished to plead guilty, the court concluded that the defendant had signaled his attorney that he wished to plead guilty, and the court based its decision to deny the motion on the defendant's lie about the signal; because the defendant's other allegations were not necessarily untrue, an inquiry into the other allegations must be held.

Appeal from Genesee, Philip C. Elliott, J. Submitted Division 2 September 7, 1971, at Lansing. (Docket No. 11365.) Decided October 27, 1971.

Raymond Lee Boone was convicted, on his plea of guilty, of assault with intent to rob while armed. Defendant appeals. 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.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 484 *et seq.*

Richard Ruhala, for defendant on appeal.

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

PER CURIAM. The defendant and two others, Ronald Thomas and Booker T. Washington, were originally charged with the crime of robbery armed (MCLA § 750.529 [Stat Ann 1971 Cum Supp § 28-.797]). The defendant pled guilty to the crime of assault with intent to rob while armed (MCLA § 750.89 [Stat Ann 1962 Rev § 28.284]) and was sentenced by the court to 12–1/2 to 20 years. Between entry of his guilty plea and sentencing, the defendant made a motion to withdraw his guilty plea.

Defendant alleged in support of this motion that the prosecutor would not accept any guilty pleas to the lesser offense unless all defendants pled guilty, and furthermore that defendant's alleged accomplices threatened to testify against him if he did not plead along with them to the lesser offense. The court had already begun to impanel a jury to try the defendants on the greater offense, when the defendant signaled his attorney that he was willing to plead guilty to the lesser offense. When the court later heard defendant's motion to withdraw his plea, defendant denied that he signaled his attorney at the commencement of the jury trial. After the court's contrary recollection was verified by defense counsel, the court stated:

"I know that what Mr. Boone said five minutes ago is a darned lie and I'm going to deny his motion to withdraw his plea."

While the defendant may have lied regarding the events which transpired at the commencement of his jury trial, and while he may indeed have signaled

his counsel that he was then ready to plead guilty, it does not follow that the other allegations of the defendant were untrue. We therefore remand for an inquiry into these allegations in light of *People* v. *Malone* (1971), 385 Mich 769.

MILLER *v.* MILLER

Appeal from Wayne, John D. O'Hair, J. Submitted Division 1 October 13, 1971, at Detroit. (Docket No. 11501.) Decided October 27, 1971.

Complaint for divorce by Charles R. Miller against Carol Jessie Miller. Defendant counterclaimed for divorce. Divorce and child custody granted to defendant. Plaintiff appeals the child custody determination. Affirmed.

Sidney Fershtman, for plaintiff.

Larson & Harms, for defendant.

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

PER CURIAM. Plaintiff and defendant were married in 1966. One daughter was born in 1967. She suffers from osteogenesis imperfecta, a bone disease which renders her susceptible to fractures and requires that she be given somewhat more supervision than would otherwise be needed. Plaintiff filed suit for divorce in 1970, alleging extreme cruelty. Defendant counterclaimed for divorce on the same grounds and was granted a divorce in March 1971. She was awarded permanent custody of the child. Plaintiff husband appeals the trial court's custody determination.

The record clearly shows that the trial judge correctly sought to ascertain the best interests of the child in resolving the difficult question of proper custody. *Tarr* v. *Pollock* (1970), 25 Mich App 437. His actions were consistent with the requirements of the Child Custody Act of 1970, MCLA 1971 Cum Supp § 722.21 *et seq.* (Stat Ann 1971 Cum Supp § 25.312[1] *et seq.*), although this statute did not take effect until after judgment had been entered.

MCLA 1971 Cum Supp § 722.28 (Stat Ann 1971 Cum Supp § 25.312[8]) specifies the standard for review of custody cases as follows:

"To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue."

We have reviewed the record and do not find any such error.

Affirmed. Costs to defendant.

PEOPLE *v.* MILTON

1. CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS.
   The requirement that there be a substantial factual basis for the proper acceptance of a plea of guilty is satisfied when it appears on the record that, upon trial, the defendant might well have been convicted (MCLA § 768.35; GCR 1963, 785.3 [2]).

2. CRIMINAL LAW—PLEA OF GUILTY—TRUTH—WEIGHT OF EVIDENCE.
   The trial court's task in evaluating a tendered plea of guilty is not to weigh the evidence, but to determine that the plea is truthful, and that it is freely, understandingly, and voluntarily made (MCLA § 768.35; GCR 1963, 785.3[2]).

Appeal from Oakland, James S. Thorburn, J. Submitted Division 2 October 11, 1971, at Lansing. (Docket No. 11746.) Decided October 27, 1971. Leave to appeal denied, 386 Mich 781.

L. B. Milton was convicted, on his plea of guilty, of attempted felonious assault. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, and *William G. Wolfram,* Assistant Prosecuting Attorney, for the people.

William R. Buesser, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 484 *et seq.*
Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR2d 549.

Before: McGREGOR, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

PER CURIAM. Defendant, charged with assault with intent to commit murder (MCLA § 750.83 [Stat Ann 1962 Rev § 28.278]), pleaded guilty while represented by counsel to the reduced charge of attempted felonious assault. MCLA § 750.82 (Stat Ann 1962 Rev § 28.277) and MCLA § 750.92 (Stat Ann 1962 Rev § 28.287). Defendant was sentenced to 1–1/2 to 2 years in prison, and appeals as of right, contending that the trial court did not elicit from him a factually sufficient basis for accepting his plea of guilty.

The requirement that there be a substantial factual basis for the proper plea of guilty is satisfied when it appears on the record that, upon trial, the defendant might well have been convicted. *People* v. *Lown* (1971), 30 Mich App 121, 122.

Additionally in reviewing the propriety of the acceptance of this guilty plea by the trial court, we have looked at the testimony taken at the preliminary examination and determine that it also shows a factual basis for the acceptance of the guilty plea. *People* v. *Zaleski* (1965), 375 Mich 71; *People* v. *Lown, supra.*

While it is true that a question of fact as to defendant's actual secret intent was raised which, upon a jury trial, would have been submitted to the jury, the record taken at the plea hearing reveals sufficient evidence of defendant's apparent intention to support a conviction. The trial court's task in evaluating a tendered guilty plea is not to weigh

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

the evidence, but to determine that the plea is truthful, and that it is freely, understandingly, and voluntarily made.

Affirmed.

PEOPLE *v.* HAYNES

CRIMINAL LAW—MOTOR VEHICLES—REMOVING PROPERTY VALUED OVER $5—ELEMENTS OF CRIME—VALUE.

The value of articles removed from a motor vehicle is an element of the crime of unlawfully removing property of the value of not less than $5 from a motor vehicle and the failure to prove the value of the goods requires that a defendant's properly-made motion for a directed verdict of not guilty at the close of the people's case be granted (MCLA § 750.356a).

Appeal from Recorder's Court of Detroit, Elvin L. Davenport, J. Submitted Division 1 September 7, 1971, at Detroit. (Docket No. 11835.) Decided October 27, 1971. Leave to appeal applied for.

Lorenzo Haynes was convicted of entering or breaking and entering a motor vehicle for the purpose of stealing or unlawfully removing property of the value of not less than $5. Defendant appeals. Reversed.

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

Jack J. Kraizman, for defendant.

REFERENCES FOR POINTS IN HEADNOTE

7 Am Jur 2d, Automobiles and Highway Traffic § 340.
50 Am Jur 2d, Larceny § 45 *et seq.*

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

PER CURIAM. Defendant's non-jury trial resulted in his conviction of entering or breaking and entering a motor vehicle for the purpose of stealing or unlawfully removing property of the value of not less than $5, MCLA § 750.356a (Stat Ann 1954 Rev § 28.588[1]). He was sentenced and he appeals.

At the close of the people's case, there was no proof of the value of the article defendant removed from the motor vehicle. He moved for a directed verdict of not guilty. The motion was denied, defendant rested and the judge found him guilty.

Defendant attacks his conviction on the ground that the people failed to prove all elements of the offense. The attack is valid and successful, *People* v. *Hanenberg* (1936), 274 Mich 698.

Reversed.

MEMORANDUM OPINIONS

PEOPLE *v.* YANCER. Appeal from Saginaw, Eugene Snow Huff, J. Submitted Division 3 October 6, 1971, at Lansing. (Docket No. 8019.) Decided October 28, 1971. Leave to appeal denied, 387 Mich 780.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George E. Thick II,* Prosecuting Attorney, and *David W. Oberschmidt,* Assistant Prosecuting Attorney, for the people.

Henry L. Greenwood, for defendant on appeal.

Before: QUINN, P. J., and DANHOF and TARGONSKI, JJ.

MEMORANDUM OPINION. Defendant was convicted by a jury of second-degree murder; he was sentenced, and he appeals.

An examination of the record and briefs discloses no prejudicial error.

Affirmed.

PEOPLE *v.* MAY; PEOPLE *v.* COPEMAN. Appeals from Genesee, Anthony Mansour, J. Submitted Division 2 October 7, 1971, at at Lansing. (Docket Nos. 8286, 9722.) Decided October 28, 1971.

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.

George R. Darrah, for defendant May on appeal.

Shaker Brackett, for defendant Copeman on appeal.

Before: QUINN, P. J., and DANHOF and TARGONSKI, JJ.

PER CURIAM. These codefendants were tried together before a jury and were convicted of breaking and entering with intent to commit a larceny. They were sentenced. About a year thereafter, the only witness who identified defendants and involved them in the crime recanted by letter to the trial judge and by affidavit, asserting the falsity of his trial testimony.

Each defendant moved for a new trial on the basis of this affidavit. At the hearing on each motion, the trial judge required the production of the recanting witness for examination. After hearing this witness in each case, the trial judge stated his reasons for disbelieving the recanting affidavit and denied the motions for

new trial. The record discloses evidence to support the reasons of the trial judge and we are not persuaded that he abused his discretion, *People* v. *Krogol* (1971), 29 Mich App 406, 414, 415.

The remaining issues raised on appeal either lack merit or were not saved for review, nor does the record disclose a miscarriage of justice.

Affirmed.

PEOPLE *v.* SCOTT; PEOPLE *v.* FISHER. Appeals from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 October 5, 1971, at Detroit. (Docket Nos. 8533, 9365.) Decided October 28, 1971. Leave to appeal denied, 386 Mich 790.

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.

Philip A. Gillis, for defendant Scott on appeal.

Jack J. Kraizman, for defendant Fisher on appeal.

Before: LESINSKI, C. J., and V. J. BRENNAN and O'HARA, JJ.

MEMORANDUM OPINION. Prescott Fisher and Barbara Jean Scott were convicted of armed robbery and appeal.

The record discloses evidence sufficient to support the verdict.

Affirmed.

PEOPLE *v.* HOLLOWAY. Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 October 5, 1971, at Grand Rapids. (Docket No. 8738.) Decided October 28, 1971.

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

Francis K. Young, for defendant on appeal.

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

MEMORANDUM OPINION. The defendant was tried by jury and convicted of breaking and entering and appeals. A motion to affirm has been filed by the people.

Upon an examination of the briefs and record it is manifest that the question sought to be reviewed is so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* PETERMAN. Appeal from Genesee, Stewart A. Newblatt, J. Submitted Division 2 October 7, 1971, at Lansing. (Docket No. 9105. Decided October 28, 1971.

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.

Carl H. Leiter, for defendant on appeal.

Before: QUINN, P. J., and DANHOF and TARGONSKI, JJ.

MEMORANDUM OPINION. Convicted by his plea of guilty, defendant was sentenced and he appeals.

Examination of the record and briefs discloses no prejudicial error.

Affirmed.

PEOPLE *v.* DARDIE. Appeal from Recorder's Court of Detroit, Robert J. Colombo, J. Submitted Division 1 September 21, 1971, at Grand Rapids. (Docket No. 9784.) Decided October 28, 1971.

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.

William Kray, for defendant on appeal.

Before: FITZGERALD, P. J., and R. B. BURNS and HOLBROOK, JJ.

PER CURIAM. Defendant appeals as of right from a jury conviction on a charge of armed robbery. MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797).

The evidence at trial was sufficient to warrant a verdict of guilty. In the absence of the judge who presided at trial, it was proper for defendant's motion for a new trial to be heard by another judge. There was no evidence which would require instructions as to lesser included offenses.

Affirmed.

PEOPLE *v.* RAY. Appeal from Wayne, Edward S. Piggins, J. Submitted Division 1 October 5, 1971, at Detroit. (Docket No. 9796.) Decided October 28, 1971.

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

Stephen K. Valentine, Jr., for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

MEMORANDUM OPINION. After trial by the court sitting without a jury, the defendant was convicted of assault with intent to commit rape. MCLA § 750.85 (Stat Ann 1962 Rev § 28.280). On appeal, he claims that the trial court's acceptance of his waiver of jury trial was inadequate and that the trial court abused its discretion in denying his motion for new trial on the ground of newly-discovered evidence; the people have filed a motion to affirm.

After a thorough review of the record, we conclude that it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

Affirmed.

PEOPLE *v.* WILSON. Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 September 7, 1971, at Lansing. (Docket No. 9827.) Decided October 28, 1971.

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.

Sherwin F. Biesman, for defendant on appeal.

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

PER CURIAM. This appeal from defendant's jury conviction and subsequent sentence for armed robbery, MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797), seeks appellate relief on the basis that the conduct and actions of the trial judge so prejudiced the jury as to deny defendant a fair trial. In support of this claim, defendant attacks the suggestion of the trial judge that defense counsel examine defendant by question and answer instead of continuing defendant's narrative recitation; the trial judge's statement to the jury that they would not be deliberating in the evening; and com-

ment by the trial judge during instructions respecting defendant's prior convictions.

Discussion of these claims is obviated because they were not saved for review by objection at trial. *People* v. *Goldsmith* (1970), 21 Mich App 473, 478. Nor has defendant demonstrated to this Court that his trial resulted in a miscarriage of justice.

Affirmed.

PEOPLE *v.* MARTINEZ. Appeal from Recorder's Court of Detroit, Thomas Poindexter, J. Submitted Division 1 June 10, 1971, at Detroit. (Docket No. 9870.) Decided October 28, 1971.

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

Gerald M. Lorence, for defendant on appeal.

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

PER CURIAM. The defendant, Frank Martinez, was convicted by a jury of possessing burglar's tools (MCLA § 750.116 [Stat Ann 1962 Rev § 28.311]) and appeals.

An examination of the record and briefs discloses no prejudicial error denying Martinez any substantial right.

Affirmed.

PEOPLE *v.* AMBURGY. Appeal from Macomb, Frank E. Jeannette, J. Submitted Division 2 September 7, 1971, at Detroit. (Docket No. 9978.) Decided October 28, 1971.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Thaddeus F. Hamera,* Chief Appellate Attorney, and *Stephen F. Osinski,* Assistant Prosecuting Attorney, for the people.

George E. Michaels, for defendant.

Before: LESINSKI, C. J., and QUINN and BRONSON, JJ.

PER CURIAM. Defendant, having been charged with the offense of assault with intent to commit murder, MCLA § 750.83 (Stat Ann 1962 Rev § 28.278), was convicted by a jury of the crime of felonious assault, MCLA § 750.82 (Stat Ann 1962 Rev § 28.277). The

trial judge sentenced defendant to a term of 15 months to 4 years in prison.

On appeal defendant claims that the trial court, in imposing sentence, was unduly influenced by its opinion as to defendant's guilt of the original charge. The sentence passed in the present case was authorized by statute. MCLA § 750.503 (Stat Ann 1954 Rev § 28.771). A sentence within the statutory maximum ordinarily will not be disturbed on appeal. *People* v. *Stroble* (1970), 28 Mich App 451.

Defendant further claims error in the court's instructions to the jury. Defense counsel did not object to the charge when given; did not request instructions; and additionally, expressed his approval of the instructions as given at trial. Defendant has, therefore, waived the right to present the claim on appeal. *People* v. *McClure* (1971), 29 Mich App 361; GCR 1963, 516.2.

Other assignments of error made by defendant were not raised in the trial court and will not be considered for the first time on appeal. *People* v. *Dailey* (1967), 6 Mich App 99.

Affirmed.

PEOPLE *v.* KINARD. Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 October 5, 1971, at Lansing. (Docket No. 10092.) Decided October 28, 1971.

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.

Philip A. Gillis, for defendant on appeal.

Before: MCGREGOR, P. J., and BRONSON and DANHOF, JJ.

MEMORANDUM OPINION. Defendant-appellant was convicted by a jury of armed robbery contrary to MCLA § 750.529 (Stat Ann 1971 Cum Supp § 28.797). This appeal of right followed, with the people moving to affirm.

Upon a reading of the briefs and record it is manifest that the questions presented are so unsubstantial as to warrant no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* KING. Appeal from Genesee, Earl E. Borradaile, J. Submitted Division 2 October 7, 1971, at Lansing. (Docket No. 10118.) Decided October 28, 1971. Leave to appeal denied, 386 Mich 789.

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 DANHOF and TARGONSKI, JJ.

PER CURIAM. After a jury trial the defendant was convicted of breaking and entering an occupied dwelling house with intent to commit larceny. MCLA § 750.110 (Stat Ann 1971 Cum Supp § 28.305). The defendant was sentenced to a term of not less than 10 nor more than 15 years and he appeals.

The defendant's first contention is that the evidence failed to establish his guilt beyond a reasonable doubt. There is evidence in the record which, if believed, will support a verdict of guilty beyond a reasonable doubt. Therefore we will not reverse. *People* v. *Williams* (1962), 368 Mich 494.

Defendant's second contention is that the trial court improperly considered unreliable and unsubstantiated reports in determining the length of his sentence. This contention is not supported by the record. The sentence is within the statutory maximum and will not be disturbed on appeal. *People* v. *Vandenboss* (1970), 25 Mich App 702.

Affirmed.

PEOPLE *v.* MILLARD CLARK. Appeal from Recorder's Court of Detroit, Frank G. Schemanske, J. Submitted Division 1 October 5, 1971, at Grand Rapids. (Docket No. 10227.) Decided October 28, 1971.

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

Charles Campbell, for defendant on appeal.

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

MEMORANDUM OPINION. Defendant was tried and convicted of robbery armed and appeals. A motion to affirm has been filed by the people.

Upon an examination of the briefs and record it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* ALFRED CLARK. Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted Division 1 October 5, 1971, at Detroit. (Docket No. 10434.) Decided October 28, 1971.

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.

Robert Mann, for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

MEMORANDUM OPINION. The defendant pled guilty to murder of the second degree, MCLA § 750.317 (Stat Ann 1954 Rev § 28.549), and was sentenced to a term of 20–30 years imprisonment.

An examination of the record and briefs discloses no prejudicial error.

The motion to affirm is granted.

KNIGHT *v.* IMLAY CITY COMMUNITY SCHOOLS DISTRICT 6. Appeal from Lapeer, James P. Churchill, J. Submitted Division 2 October 6, 1971, at Lansing. (Docket No. 10435.) Decided October 28, 1971. Leave to appeal denied, 387 Mich 798.

Craig, Fieger & Golden (by *Mark H. Cousens*), for plaintiff.

Morrice & Lengemann, for defendant.

Before: QUINN, P. J., and DANHOF and TARGONSKI, JJ.

MEMORANDUM OPINION. Plaintiff's appeal from the grant of defendant's motion for summary judgment, GCR 1963, 117.2(1), is controlled by *Caddell* v. *Ecorse Board of Education* (1969), 17 Mich App 632.

Affirmed.

PEOPLE *v.* COATES. Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 October 11, 1971, at Detroit. (Docket No. 10750.) Decided October 28, 1971. Leave to appeal denied, 386 Mich 783.

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.

Carl Ziemba, for defendant on appeal.

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

MEMORANDUM OPINION. Defendant appeals his conviction of kidnapping* assigning error because of: (1) the expression by the prosecutor of his personal opinion of complainant's credibility, (2) a suggestive pretrial showup and (3) certain objectionable testimony.

The alleged errors were not preserved for appellate review: (1) no objection was made to the prosecutor's argument, and such argument could have been cured by an appropriate instruction,** (2) the defendant was represented by counsel at the showing; no motion to suppress or objection was made at the trial concerning the showup*** and (3) no objection was made at the trial to the testimony.****

Affirmed.

HARRINGTON *v.* HARRIS MCBURNEY COMPANY. Appeal from Jackson, John C. Dalton, J. Submitted Division 2, September 5, 1971, at Lansing. (Docket No. 10858.) Decided October 28, 1971.

Glassen, Parr, Rhead & McLean, for plaintiffs.

Carl L. Reagh, for defendant.

Before: QUINN, P. J., and DANHOF and TARGONSKI, JJ.

MEMORANDUM OPINION. Defendant appeals from verdict and judgment in favor of plaintiffs claiming error in the trial court's refusal to give a requested instruction.

Review of the record discloses no evidence to support the requested instruction. *Hendershot* v. *Kelly* (1968), 11 Mich App 173.

Affirmed.

PEOPLE *v.* RONNIE WILLIAMS. Appeal from Oakland, Robert L. Templin, J. Submitted Division 2 October 5, 1971, at Lansing. (Docket No. 10960.) Decided October 29, 1971.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, and *Robert H. Roether,* Assistant Prosecuting Attorney, for the people.

Douglas Chartrand, for defendant on appeal.

Before: QUINN, P. J., and DANHOF and TARGONSKI, JJ.

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* MCLA § 750.349 (Stat Ann 1954 Rev § 28.581).

** *People* v. *Stroble* (1971), 31 Mich App 94.

*** *People* v. *Rowls* (1970), 28 Mich App 190.

**** *People* v. *Webb* (1968), 13 Mich App 625; *People* v. *Wilson* (1969), 20 Mich App 410.

MEMORANDUM OPINION. Defendant was convicted by a jury of breaking and entering with intent to commit a larceny; he was sentenced, and he appeals.

An examination of the record and briefs discloses no prejudicial error.

Affirmed.

DAVIS *v.* DAVIS. Appeal from Wayne, Thomas Roumell, J. Submitted Division 1 October 13, 1971, at Detroit. (Docket No. 11099.) Decided October 29, 1971.

William A. Ortman, for plaintiff.

Rowe A. Balmer, for defendant.

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

MEMORANDUM OPINION. In our *de novo* review of this case we are convinced that the trial court's original order awarding a $1500 attorney fee to plaintiff's attorney was correct and the trial court's subsequent order reducing the attorney fee to $500 was improper under the circumstances. We, therefore, reinstate the original order for attorney fees awarding plaintiff's counsel $1500.

Reversed. Costs to appellant.

PEOPLE *v.* OCHOA. Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 September 28, 1971, at Detroit. (Docket No. 11145.) Decided October 29, 1971. Leave to appeal denied, 387 Mich 752.

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.

Arthur J. Tarnow, State Appellate Defender, and *Larry R. Farmer,* Assistant Defender, for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

MEMORANDUM OPINION. Defendant appeals from his conviction upon a plea of guilty to the offense of assault with intent to rob while armed.* He has alleged first that the trial judge failed to ascertain that the guilty plea was understandably made, and secondly, that the trial judge erred in sentencing defendant by considering facts defendant now alleges are not true; the people have

* MCLA § 750.89 (Stat Ann 1962 Rev § 28.284).

filed a motion to affirm. GCR 1963, 817.5(3). Upon the record before us, it is manifest that the questions sought to be reviewed are so insubstantial as to need no argument or formal submission.

The motion to affirm is granted.

PEOPLE *v.* SMITH. Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted Division 1 September 21, 1971, at Detroit. (Docket No. 11146.) Decided October 29, 1971. Leave to appeal denied, 386 Mich 789.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Thomas M. Khalil,* 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 DANHOF, JJ.

MEMORANDUM OPINION. The people move to affirm defendant's conviction by a jury of murder in the first degree. MCLA § 750.316 (Stat Ann 1971 Cum Supp § 28.548).

An examination of the record and briefs discloses that the questions sought to be reviewed, on which the decision of the cause depends, are so unsubstantial as to need no argument or formal submission. Further, examination of the record reveals no reversible error.

Motion to affirm is granted.

PEOPLE *v.* ANDREWS. Appeal from Marquette, Bernard H. Davidson, J. Submitted Division 3 October 4, 1971, at Marquette. (Docket No. 11212.) Decided October 29, 1971.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Edward A. Quinnell,* Prosecuting Attorney, for the people.

Thomas P. Casselman, for defendant on appeal.

Before: FITZGERALD, P. J., and BRONSON and T. M. BURNS, JJ.

PER CURIAM. Defendant Ronald M. Andrews appeals his plea-based conviction of breaking and entering.* Defendant moved for a new trial on the grounds that his guilty plea was involuntary in that it was induced by a promise of leniency by a detective. The

* MCLA § 750.110 (Stat Ann 1971 Cum Supp § 28.305).

court below conducted a hearing and found as a matter of fact that there was no promise of leniency based on conflicting testimony offered by the defendant and the detective.

Credibility of witnesses is for the trier of facts. *People* v. *Clark* (1954), 340 Mich 411; *People* v. *Louzon* (1953), 338 Mich 146; *People* v. *Montgomery* (1970), 22 Mich App 87; *People* v. *Beck* (1969), 17 Mich App 659; *People* v. *Landrum* (1968), 14 Mich App 237; *People* v. *Foster* (1968), 12 Mich App 418; *People* v. *Askar* (1967), 8 Mich App 95. The issue of credibility can best be determined by the trier of facts who hears and sees the witnesses. *People* v. *Ritzema* (1966), 3 Mich App 637. This Court will not reverse the judgment of the trier of facts unless the evidence clearly preponderates in a direction opposite to the finding by the trial judge. *People* v. *Doris White* (1965), 2 Mich App 104.

In the instant case, the issue of credibility of conflicting and contradictory witnesses was for the trial court at the hearing on the motion for a new trial and a finding was made that there was no promise of leniency by the detective.

The evidence does not preponderate in favor of the defendant. On the contrary, when the transcript of the arraignment and sentencing are read where defendant maintained that his guilty plea was not induced by a promise of leniency in conjunction with the testimony of the detective, there is ample basis for the finding by the trial court. This Court, therefore, holds that there was no abuse of discretion by the trial court in not allowing defendant to withdraw his guilty plea after sentencing. *People* v. *Lang* (1968), 381 Mich 393, 398.

Affirmed.

PEOPLE *v.* PINEIRO. Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 September 28, 1971, at Lansing. (Docket No. 11248.) Decided October 29, 1971.

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.

M. Hector Cisneros, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

MEMORANDUM OPINION. The defendant appeals from his conviction of manslaughter and sentence of 7–1/2 to 15 years in prison, MCLA § 750.321 (Stat Ann 1954 Rev § 28.553).

An examination of the record shows evidence sufficient to support the verdict.

The motion to affirm is granted.

PEOPLE *v.* MORRIS. Appeal from Ingham, Jack W. Warren, J. Submitted Division 2 September 28, 1971, at Grand Rapids. (Docket No. 11338.) Decided October 29, 1971.

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.

Jerrold H. Keyworth, for defendant on appeal.

Before: FITZGERALD, P. J., and R. B. BURNS and HOLBROOK, JJ.

MEMORANDUM OPINION. Defendant-appellant was convicted by a jury of larceny in a building contrary to MCLA § 750.360 (Stat Ann 1954 Rev § 28.592). This appeal of right followed with the people moving to affirm.

Upon a reading of the briefs and record it is manifest that the questions presented are so unsubstantial as to warrant no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* FULLER. Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 October 12, 1971, at Grand Rapids. (Docket No. 11351.) Decided October 29, 1971.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Dominick E. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Dorean M. Koenig, for defendant on appeal.

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

MEMORANDUM OPINION. Defendant pled guilty to attempted breaking and entering an occupied dwelling with intent to commit larceny therein, and appeals. A motion to affirm has been filed by the people.

Upon an examination of the briefs and record it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* BERRY. Appeal from Wayne, Thomas Roumell, J. Submitted Division 1 September 28, 1971, at Detroit. (Docket No. 11413.) Decided October 29, 1971.

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.

Before: LESINSKI, C. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

MEMORANDUM OPINION. Defendant appeals as of right from his conviction upon a plea of guilty to the offense of indecent liberties with a child under 16 years of age.* Defendant questions the propriety of the guilty plea proceedings; the people have filed a motion to affirm. After reviewing the briefs and record, we conclude that the questions sought to be reviewed are so insubstantial as to need no argument or formal submission.

The motion to affirm is granted.

PEOPLE *v.* WATLEY. Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 October 5, 1971, at Lansing. (Docket No. 11687.) Decided October 29, 1971.

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.

Arthur G. Brauer, for defendant on appeal.

Before: MCGREGOR, P. J., and BRONSON and DANHOF, JJ.

MEMORANDUM OPINION. Defendant Thaddeus E. Watley was convicted on a plea of guilty of attempted larceny by conversion, was sentenced to a term in prison, and appeals. After briefs on appeal were filed, the people filed a motion to affirm.

A careful examination of the record, the briefs and the motion indicates that the issues raised are so unsubstantial as to need no argument or formal submission.

The motion to affirm is granted.

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* MCLA § 750.336 (Stat Ann 1954 Rev § 28.568).

PEOPLE *v.* HENDERSON. Appeal from Recorder's Court of Detroit, Samuel H. Olsen, J. Submitted Division 1 October 5, 1971, at Grand Rapids. (Docket No. 11798.) Decided October 29, 1971.

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.

Carl Ziemba, for defendant on appeal.

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

MEMORANDUM OPINION. Defendant pleaded guilty to a charge of unarmed robbery and appeals. A motion to affirm has been filed by the people.

Upon an examination of the briefs and record it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* THOMPSON. Appeal from Recorder's Court of Detroit, Robert L. Evans, J. Submitted Division 1 October 5, 1971, at Grand Rapids. (Docket No. 11996.) Decided October 29, 1971.

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.

Carl Ziemba, for defendant on appeal.

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

MEMORANDUM OPINION. Defendant pleaded guilty to a charge of unarmed robbery and appeals. A motion to affirm has been filed by the people.

Upon an examination of the briefs and record, it is manifest that the question sought to be reviewed is so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* TONY HAYES. Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 October 5, 1971, at Detroit. (Docket No. 11998.) Decided October 29, 1971.

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.

Carl Ziemba, for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and V. J. BRENNAN, JJ.

MEMORANDUM OPINION. The defendant pled guilty to assault with intent to rob being armed. MCLA § 750.89 (Stat Ann 1962 Rev § 28.284), and was sentenced to a term of 10 to 20 years imprisonment.

An examination of the record and briefs discloses no prejudicial error.

The motion to affirm is granted.

PEOPLE *v.* HAMILTON. Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted Division 1 September 14, 1971, at Grand Rapids. (Docket No. 12020.) Decided October 29, 1971.

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.

Carl Ziemba, for defendant on appeal.

Before: FITZGERALD, P. J., and R. B. BURNS and HOLBROOK, JJ.

PER CURIAM. Defendant, who was originally charged with receiving and concealing stolen property over the value of $100, contrary to MCLA § 750.535 (Stat Ann 1971 Cum Supp § 28.803), tendered a plea of guilty to the circuit court misdemeanor of use of a motor vehicle without authority but without intent to steal, contrary to MCLA § 750.414 (Stat Ann 1954 Rev § 28.646). Throughout the proceeding he was represented by counsel. He was subsequently sentenced in the Recorder's Court to 23 to 24 months in prison. This case is submitted on the people's motion to affirm pursuant to GCR 1963, 817.5(3). Defendant's sole contention presented in support of this appeal is that the trial court failed to determine with a reasonable degree of certainty whether he committed the offense charged.

A review of the transcript reveals that the trial court fulfilled its responsibilities under GCR 1963, 785.3(2). See *People* v. *Fargo* (1970), 23 Mich App 81.

The motion to affirm is granted.

PEOPLE *v.* PRICE. Appeal from Recorder's Court of Detroit, Elvin L. Davenport, J. Submitted Division 1 September 28, 1971, at Lansing. (Docket No. 12140.) Decided October 29, 1971. Leave to appeal denied, 386 Mich 785.

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.

Sidney Kraizman, for defendant on appeal.

Before: QUINN, P. J., and MCGREGOR and BRONSON, JJ.

MEMORANDUM OPINION. The defendant was convicted of larceny from a person and sentenced to a term of five to ten years in prison. MCLA § 750.357 (Stat Ann 1954 Rev § 28.589).

An examination of the record and briefs discloses no prejudicial error.

The motion to affirm is granted.

PEOPLE *v.* SHANNON. Appeal from Recorder's Court of Detroit, Donald S. Leonard, J. Submitted Division 1 October 5, 1971, at Lansing. (Docket No. 12273.) Decided October 29, 1971.

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.

Jack J. Kraizman, for defendant on appeal.

Before: MCGREGOR, P. J., and BRONSON and DANHOF, JJ.

MEMORANDUM OPINION. Defendant pleaded guilty to the lesser offense of assault with intent to rob being armed, and appeals. A motion to affirm has been filed by the people.

Upon examination of the briefs and record, it is manifest that the question sought to be reviewed is so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* HARRIS. Appeal from Recorder's Court of Detroit, John R. Murphy, J. Submitted Division 1 October 12, 1971, at Grand Rapids. (Docket No. 12287.) Decided October 29, 1971.

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 L. Belanger, for defendant on appeal.

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

MEMORANDUM OPINION. Defendant pleaded guilty to a charge of attempted breaking and entering of an occupied dwelling with intent to commit larceny therein, and appeals. A motion to affirm has been filed by the people.

Upon an examination of the briefs and record it is manifest that the question sought to be reviewed is so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

PEOPLE *v.* JOHNSON. Appeal from Recorder's Court of Detroit, John R. Murphy, J. Submitted Division 1 October 5, 1971, at Grand Rapids. (Docket No. 12288.) Decided October 29, 1971.

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 L. Belanger, for defendant on appeal.

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

MEMORANDUM OPINION. Defendant pleaded guilty to the reduced offense of manslaughter and appeals. A motion to affirm has been filed by the people.

Upon examination of the briefs and record it is manifest that the question sought to be reviewed is so unsubstantial as to need no argument or formal submission.

Motion to affirm granted.

MARTIN *v.* FOWLER

1. LANDLORD AND TENANT—LIABILITY OF LESSOR FOR LESSEE'S TORTS —NEGLIGENCE.

   The condition of being a lessor does not impose liability for torts of the lessee without negligent acts or failures to act by the lessor.

2. NEGLIGENCE—SUMMARY JUDGMENT—BAILEE SERVICE STATION—FORESEEABILITY OF THEFT AND INJURY.

   Summary judgment for failure to state a claim upon which relief can be granted should not have been granted to defendant owners of an automobile service station in an action in negligence by plaintiffs who were injured in a collision with an automobile which had been stolen from defendants' station where it had been left for repairs where the plaintiffs alleged in their complaint that the thief had taken the car keys from a board which was located where anyone inside the station would have easy access to it, that the automobile was parked in a place easily accessible to a thief, and that the defendants' suspicion should have been aroused by the thief's unusual appearance and activity in that he was seen loitering around the station on the day of the theft and was seen looking at the keys on the keyboard, since plaintiffs' allegations could lead a reasonable man to conclude that the defendants had placed the automobile and keys in places where they might be stolen and that it was foreseeable that a theft and injury would result (GCR 1963, 117.2[1]).

3. NEGLIGENCE—CAUSATION—SUMMARY JUDGMENT.

   The causation element of actionable negligence must be considered in light of the totality of circumstances involved in each case, and where the record is silent regarding the time

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REFERENCES FOR POINTS IN HEADNOTES

[1] 49 Am Jur 2d, Landlord and Tenant § 908 *et seq.*
[2] 41 Am Jur, Pleading § 340 *et seq.*
[3] 41 Am Jur, Pleading § 340 *et seq.*

which has elapsed between the act and the injury and regarding the possibility of intervening causes, the granting of a summary judgment on the issue of negligence is inappropriate (GCR 1963, 117).

Appeal from Macomb, Alton H. Noe, J. Submitted Division 2 October 5, 1971, at Lansing. (Docket Nos. 8334, 8335.) Decided November 22, 1971.

Complaints by Arthur K. Martin and Paula Martin and by Joanne Martin and Michael Martin by their next friend, Paula Martin, against Ronald G. Fowler, The Shell Oil Company, Pete McManamon, Leo Lazuruk, and others for damages from injuries suffered by the Martins when their automobile collided with one stolen by Fowler from the service station owned by Shell and leased by McManamon and Lazuruk. Summary judgment for defendants. Plaintiffs appeal as to defendants Shell, McManamon, and Lazuruk. Affirmed in part and reversed in part.

Bush, Luce, Henderson, Black & Bankson, for plaintiffs.

Nunneley, Nunneley, Hirt & Rinehart, for defendant Shell Oil Company.

McIntosh, Oppliger, Mugan & Huegli, for defendants McManamon and Lazuruk.

Before: QUINN, P. J., and DANHOF and TARGONSKI,* JJ.

DANHOF, J. The plaintiffs commenced this action seeking to recover for damages allegedly sustained

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

when the automobile in which they were riding collided with an automobile being operated by defendant Fowler. Defendants McManamon and Lazuruk and Shell Oil Company moved for summary judgment under GCR 1963, 117.2(1).[1] The trial court held that the plaintiffs had failed to state a claim against these defendants upon which relief could be granted and granted the motions. The plaintiffs have appealed. We affirm the summary judgment granted to Shell Oil; however, we reverse the judgment granted to McManamon and Lazuruk.

McManamon and Lazuruk operated a service station in the City of Dearborn, known as Pete and Leo's Shell Service. The station was owned by Shell Oil Company and leased to McManamon and Lazuruk. Defendants Thomas Phillips and Richard W. Phillips owned an automobile which they left at Pete and Leo's Shell Service for repairs. While the automobile was at the service station it was stolen by Fowler who drove it to Sanilac County where the injury occurred.

In their second amended complaint the plaintiffs' sole allegation against Shell Oil is that it is the owner and lessor of the service station. There are no other allegations of acts or failure to act contained in the complaint. While under some circumstances the lessor may be liable for the torts of his lessee, the condition of being a lessor does not in and of itself impose liability. Thus, with regard to Shell Oil Company the plaintiffs have failed to state a claim upon which relief can be granted.

However, the summary judgment granted to McManamon and Lazuruk must be reversed. We hold

[1] The plaintiffs have appealed only the judgments rendered for Shell Oil and McManamon and Lazuruk. Several other defendants were granted summary judgments from which no appeal has been taken and the cause is still pending with regard to defendant Fowler.

that the plaintiffs' second amended complaint contains allegations, which if true, state a claim upon which relief could be granted and therefore summary judgment was improper under GCR 1963, 117.2(1).

The plaintiffs based their claim against McManamon and Lazuruk on the following allegations. The car being driven by Fowler at the time of the injury had been stolen from the service station. The car had been parked in a place where Fowler had easy access to it. Fowler had obtained the keys from a keyboard that was hanging inside the station. The keyboard was located in a place where anyone inside the station would have easy access to it. Defendants' suspicion should have been aroused by Fowler's unusual and distinctive appearance. Fowler had been seen loitering around the station on the day of the theft. The defendants' employees had observed Fowler looking at the keyboard and in particular at the keys to the Phillips vehicle.

In *Davis* v. *Thornton* (1970), 384 Mich 138, the Supreme Court set forth the test to be used in determining whether summary judgment is proper. At p 142 the Court stated:

"A judgment for the defendant, in an action such as this, can properly be made only upon a determination a) that the defendant did act as a reasonably prudent man would have acted under the same or similar circumstances, or b) that the plaintiff suffered no injury, or c) the defendant's negligence did not cause the plaintiff's injury, or d) that the injury caused plaintiff was too insignificantly connected to or too remotely effected by the defendant's negligence."

In the instant case there are two issues: were the defendants negligent, and if so was their negligence

significantly enough connected to the plaintiffs' injuries so that it can be considered a proximate cause of the injuries.

In a motion for summary judgment on the ground of failure to state a claim upon which relief can be granted, all well-pleaded material allegations must be taken as true. *Brunn* v. *Weiss* (1971), 32 Mich App 428. Accepting all that the plaintiffs say as true, the doctrine of *Davis, supra,* compels reversal.

We recognize that factually *Davis* is somewhat removed from this case. However, we still regard *Davis* as controlling. The most obvious distinction between *Davis* and this case is that the keys were not left in the ignition of the car as in *Davis,* but were placed on a keyboard inside the station. We emphasize that we are not holding that it is negligent to make use of a keyboard in a service station, but the plaintiffs have alleged more than that and we must accept their allegations as true. What we have here is essentially the same situation found in *Davis.* The plaintiffs have alleged facts which, if taken as true, could lead a reasonable man to conclude that the defendants placed the automobile and the keys in places where they might be stolen and that it was foreseeable that they would be stolen and injury would result. Therefore, the plaintiffs have properly stated a claim on the issue of negligence and summary determination is inappropriate.

The question of causation is also inappropriate for summary determination. Again we find *Davis* controlling. As we understand *Davis* it holds that whenever it is doubtful whether or not a cause is too remote to be considered a proximate cause the issue should be left to the fact finder and should not be determined summarily.

Davis also requires that we, and the trial court, consider the totality of the circumstances. Two con-

siderations which are of importance are the amount of time elapsed between the theft and the injury, and what, if any, intervening causes are present. In this case the record does not show how much time elapsed, and it is also silent on the question of intervening causes. Therefore, summary judgment was inappropriate.

Affirmed in part and reversed in part.

All concurred.

PEOPLE *v.* MORAN

PEOPLE *v.* SIMMONS

PEOPLE *v.* HANES

1. CRIMINAL LAW—MISTRIAL—PREJUDICE.

A police officer-witness's walking into the jury room with exhibits while the jury was deliberating did not necessitate the granting of a mistrial where the evidentiary hearing held on this incident did not establish that anything prejudicial to the defendants' rights occurred.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 234 *et seq.*

[2] 21 Am Jur 2d, Criminal Law § 442 *et seq.*

41 Am Jur 2d, Indictments and Informations §§ 232 *et seq.*; 277 *et seq.*

[3] 40 Am Jur 2d, Homicide § 290.

[4] 21 Am Jur 2d, Criminal Law § 234 *et seq.*

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

[5] 58 Am Jur, Witnesses § 379.

Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution. 38 ALR2d 570.

2. INDICTMENT AND INFORMATION—QUASHING INFORMATION—PRELIMINARY EXAMINATION—INACCURATE RECORDING.

A trial court's refusal to quash an information because testimony at the preliminary examination was inaccurately recorded by the electronic recording equipment is not error.

3. HOMICIDE—MURDER BY CODEFENDANT—COMPLICITY.

Defendant was entitled to a directed verdict of acquittal on a murder charge where the uncontroverted evidence established that defendant was in police custody prior to the commission of the murder by defendant's codefendant.

4. JUDGES—DISQUALIFICATION—ACTUAL PREJUDICE.

A judge may be disqualified only for prejudice or bias actually shown.

5. HUSBAND AND WIFE—CRIMINAL LAW—EVIDENCE—SPOUSE TESTIFYING—PRIVILEGE.

The ex-husband of a defendant may testify where the parties were divorced prior to trial and the testimony did not relate to any communications between the parties during their marriage.

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 October 7, 1971, at Lansing. (Docket Nos. 8423, 8509, 8510, 11008, 11009.) Decided November 22, 1971.

John Moran, Orvel Simmons, and Constance Hanes were convicted of two charges of first-degree murder, assault with intent to murder, and robbery armed. Defendants appealed separately and the appeals were consolidated. Reversed as to one of the murder convictions as to defendant Moran; affirmed as to all defendants as to all other convictions.

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.

Lyndon Lattie, for defendant Moran on appeal.

James Lang, for defendant Simmons on appeal.

Earl S. Clark, for defendant Hanes on appeal.

Before: QUINN, P. J., and DANHOF and TARGONSKI,* JJ.

QUINN, P. J. Following a joint trial, defendants were convicted by a jury of two charges of first-degree murder, assault with intent to murder, and robbery armed. They were sentenced and each defendant appealed separately. The appeals were consolidated for submission and disposition.

Late in the evening of January 4, 1969, defendants entered a bar in Flint where they encountered the husband of defendant Hanes. Defendants threatened and beat James Hanes. With gun drawn, defendant Simmons took money from the cash register. Officer Fritcher appeared at the front door of the bar and Officer Johnson appeared at the rear door. Both were shot at by defendants Moran and Simmons; Johnson was shot in the hand and Fritcher was mortally wounded.

Defendants fled through the front door but Moran was soon apprehended. Shortly after Moran was taken into custody, there was further gunfire in the area which occurred when Simmons shot and killed one Terrance Jones.

The appeals raise a multitude of issues, several of which are not properly before us. Issues raised by defendants Hanes and Moran respecting instructions are precluded from consideration for lack of objection below, GCR 1963, 516.2. For failure to

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

object to the alleged improper argument of the prosecuting attorney, we do not consider Moran's issue on this point, *People* v. *Rosborough* (1970), 22 Mich App 410. Moran's issue on the weight of the evidence was not preserved by motion for new trial, *People* v. *Mattison* (1970), 26 Mich App 453. The record does not establish a miscarriage of justice arising from the alleged errors which we do not consider.

Defendants Hanes and Simmons claim error in the trial court's denial of their motion for mistrial because a police officer witness entered the jury room with exhibits while the jury was deliberating. The testimonial hearing conducted by the trial court when apprised of this incident does not establish that anything prejudicial to the rights of the defendants occurred. We do not reverse a denial of mistrial unless prejudice is affirmatively shown, *People* v. *Qualls* (1968), 9 Mich App 689.

Defendants Hanes and Simmons assert error in the trial court's refusal to quash the information because the recording equipment at preliminary examination failed accurately to record testimony. *People* v. *Cash* (1970), 28 Mich App 1, is *contra* and controls.

Defendant Moran claims it was reversible error for the trial court to deny his motion for directed verdict of acquittal on the murder of Terrance Jones. The motion was based on the fact that uncontradicted testimony of police officers placed Moran in police custody prior to the Jones killing. We agree with defendant. There was no proof to sustain the charge, *People* v. *Hansen* (1962), 368 Mich 344. The reliance of the trial court and the people on *People* v. *Podolski* (1952), 332 Mich 508, is misplaced. *Podolski* is factually inapposite. Podolski was at the scene and under no restraint,

and there was no intervening cause in the chain of events.

Defendant Simmons alleges reversible error occurred when the district judge failed to disqualify himself from conducting the preliminary examination. Simmons moved for the disqualification on the ground that as an assistant prosecuting attorney, the district judge had prosecuted defendant on another charge. Prejudice or bias in fact must be shown to warrant disqualification, *Kolowich* v. *Ferguson* (1933), 264 Mich 668. No such showing appears on this record. The error relied on is not established, nor is the alleged bias and prejudice of the trial judge established.

The issue defendant Simmons raises with respect to sentence is so insubstantial it merits no discussion.

Defendant Hanes claims the trial court erred reversibly when it denied her request for a separate trial because her husband was an expected prosecution witness. The claim is specious. The parties were divorced prior to trial, and the husband's testimony did not relate to any communication between the parties during marriage. MCLA § 600.2162 (Stat Ann 1962 Rev § 27A.2162) is not applicable.

Affirmed except as to Moran's conviction for the murder of Terrance Jones, which is reversed.

All concurred.

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AMENDMENT—See
PLEADING (1, 2, 3)

AMENDMENT OF ORDINANCES—See
ZONING (2, 3)

ANSWER TO INTERROGATORY—See
DISCOVERY (2, 3)

ANTICIPATED PROFITS—See
CONTRACTS (5, 7)

APPEAL AND ERROR
1. An appellate court will not set aside a jury verdict unless the evidence preponderates in the opposite direction. Lowe v. *Hotel & Restaurant Employees Union*, 68.

See
CIVIL RIGHTS (1–6)
COURTS (1)
CRIMINAL LAW (12, 13, 42, 45, 53, 65, 97, 106, 108, 144, 147, 154)
DIVORCE (10)

APPEAL AND ERROR—Continued

INDICTMENT AND INFORMATION (3)
NEW TRIAL (1)
UNEMPLOYMENT COMPENSATION (1)
WORKMEN'S COMPENSATION (1)

APPEARANCE

1. An unauthorized general appearance of an attorney is ineffective for any purpose, including the waiver of defects in the service of process. *Wright* v. *Estate of Treichel,* 34.

2. The general appearance of an attorney on behalf of an estate did not subject the estate to the court's jurisdiction and did not waive the defects in the service of process upon the attorney where the attorney had been hired and had worked for the administrator of the estate, not the estate itself, and the administrator had died before the attorney was served. *Wright* v. *Estate of Treichel,* 34.

APPRISAL OF CHARGE—See

INDICTMENT AND INFORMATION (2)

ARGUMENT OF COUNSEL—See

CRIMINAL LAW (3, 20, 21, 60, 61, 72–77, 93, 94, 111, 112)

ARMED ROBBERY—See

CRIMINAL LAW (4)
ROBBERY (1, 2)

ARREST

1. Articles seized from a defendant upon his arrest may, as a general rule, be admitted into evidence if they may logically connect the defendant with the crime charged. *People* v. *Dupree,* 138.

2. Police officer had reasonable cause to arrest the defendant, stopped for speeding, for violating the motor vehicle code where the defendant failed to produce a valid Michigan driver's license, the defendant had produced a Michigan vehicle registration certificate for his car which had Michigan plates, the defendant had an Alabama driver's license, had admitted that he resided and was employed in Michigan, and it was the usual procedure of the local police to issue a summons for driving without a valid driver's license at the police station rather than on the street. *People* v. *James,* 550.

3. Police officers had reasonable cause to believe that a concealed weapon was being carried in violation of law and were justified in arresting the defendant driver of an automobile, where the police observed a gun in plain view in the cabin of defendant's automobile when the defendant emerged from the car after the defendant had been validly arrested for driving without a Michigan driver's license. *People* v. *James,* 550.

See

SEARCHES AND SEIZURES (2)

ASSAULT

1. A conviction of felonious assault requires the prosecution to prove only that the assault was made with a dangerous weapon (MCLA § 750.82). *People* v. *Hooper*, 123.
2. Admitting into defendant's trial for assault with intent to commit murder a blouse and coat, both worn by the victim at the time defendant shot the victim and both bearing bloodstains and bullet holes was not an abuse of discretion, because such evidence could assist the trier of fact in weighing the victim's testimony and in assessing the probability of defendant's suggestion that the location of the wounds indicated an absence of intent to kill. *People* v. *Ingram*, 160.

ASSAULT AND BATTERY

1. A conviction of assault and battery may be obtained on an information or indictment charging felonious assault where the information alleges that a battery occurred. *People* v. *Insley*, 593.

ASSAULT WITH INTENT TO ROB—See

CRIMINAL LAW (29)

ASSISTANCE OF COUNSEL—See

CRIMINAL LAW (46, 47, 50–52, 57–59)

ASSOCIATION—See

CRIMINAL LAW (66–68, 70)
ROBBERY (3)

ATTEMPT—See

CRIMINAL LAW (29)

ATTEMPTED UNLAWFUL POSSESSION—See

CRIMINAL LAW (33)

ATTORNEY AND CLIENT

1. An attorney's representation of a person during that person's lifetime does not give the attorney the authority to act on behalf of the person's estate. *Wright* v. *Estate of Treichel*, 33.
2. The authority of an attorney is revoked and the attorney-client relationship is terminated when the client dies. *Wright* v. *Estate of Treichel*, 34.
3. The death of the administrator of an estate terminated the authority of the attorney representing the administrator to act further on behalf of the estate where it was the administrator who hired the attorney and it was for the administrator, not the estate itself, for whom the attorney was employed; the attorney had no official capacity with respect to the estate. *Wright* v. *Estate of Treichel*, 34.

See

APPEARANCE (1, 2)
CRIMINAL LAW (51, 59)
JUDGMENT (1)
PROCESS (1)

ATTORNEY FEES—See
COSTS (1, 2, 3)

AUTOMOBILES

1. Negligent operation of a government-owned motor vehicle may occur even though the vehicle is standing still, as long as the vehicle is being used or employed in some specific function or to produce some desired work or effect. *Orlowski* v. *Jackson State Prison,* 113.

2. The faulty latching of the tailgate of a prison truck by a prison officer could constitute negligent operation of the vehicle by a governmental employee where, at the time and place of plaintiff's fall from the truck, the vehicle was being used to transport plaintiff, normally a cook, and other inmates to help curtail a fire that had broken out on the prison grounds, because, at the time of the failure to lock the tailgate, the truck was being used in some specific function or to produce some desired work or effect (MCLA §§ 257.401, 691.1405). *Orlowski* v. *Jackson State Prison,* 113.

3. Intent to steal is not an element of the crime of unlawfully driving away an automobile of another. *People* v. *Davis,* 164.

4. The purpose of the Motor Vehicle Accident Claims Act is to render relief to those who suffer damage attributable to uninsured motorists and who have no meaningful recovery (MCLA § 257.1101 *et seq.*). *Bowser* v. *Jacobs,* 320.

5. The section of the Motor Vehicle Accident Claims Act which prevents those covered by workmen's compensation from applying to the Motor Vehicle Accident Claims Fund for payment for damages after being injured by an uninsured motorist is unconstitutionally discriminatory, because in several other instances the act allows other persons to reach alternative indemnities without prohibiting recovery fom the fund (MCLA § 257.1101 *et seq.*). *Bowser* v. *Jacobs,* 320.

6. *The statutory classification that prevents those covered by workmen's compensation from applying to the Motor Vehicle Accident Claims Fund for payment after being involved in an automobile accident with an uninsured motorist must be sustained if there is a reasonable basis for the classification; the Court of Appeals must, in light of the decisions of the United States and Michigan Supreme Courts, proceed on the assumption that it may not balance the competing interests, comparing the relative importance to the discriminated class of the governmental benefit denied and the asserted state interest advanced in support of the classification (MCLA § 257.1101 et seq.).* *Bowser* v. *Jacobs,* 321.

7. *The state, not the claimant, has the burden of showing the reasonableness of the classification precluding those entitled to workmen's compensation from recovering from the Motor Vehicle Accident Claims Fund on account of an accident with an uninsured motorist; the burden is on the state because of the universality of the social problem sought to be dealt with by the Motor Vehicle Accident Claims Act, the omnipresence of the risk ameliorated, the breadth of the general right of*

AUTOMOBILES—Continued

recovery—all state residents, and the narrow exclusion—those residents injured in the course of their employment so that they are covered by workmen's compensation (MCLA § 257.1101 et seq.). Bowser v. *Jacobs,* 321.

8. *Motor Vehicle Accident Claims Act and the act amending the insurance code providing that any policy protecting a person from personal injury also protects against loss caused by an uninsured motorist unless uninsured motorist protection has been rejected are* in pari materia; *the amendment to the insurance code sought to encourage the purchase of uninsured motorist coverage and, thus, reduce the number of claims against the Motor Vehicle Accident Claims Fund. Bowser* v. *Jacobs,* 322.

9. *The legislative purpose in barring those covered by workmen's compensation from recovery from the Motor Vehicle Accident Claims Fund for damages caused by an uninsured motorist was not based on the policy that the employees already had an adequate minimum source of recovery, because the* only *group having a collateral source of recovery barred from proceeding against the fund were injured employees entitled to workmen's compensation (MCLA § 257.1101 et seq.). Bowser* v. *Jacobs,* 322.

10. *The Legislature's purpose in prohibiting employees who are covered by workmen's compensation from suing the Motor Vehicle Accident Claims Fund for injuries caused by uninsured motorists was simply to reduce the fund's exposure by eliminating a readily identifiable group of potential claimants who, arguably, were in less need of protection (MCLA § 257.1101 et seq.). Bowser* v. *Jacobs,* 322.

11. *The reasonableness of the classification barring claims for damages from uninsured motorists against the Motor Vehicle Accident Claims Fund by employees entitled to workmen's compensation must be judged in the light of the objective sought to be served by the classification—the preservation of the fund's financial soundness; if the classification bears no reasonable relationship to the purpose of protecting the fund's actuarial soundness, the classification is irrational. Bowser* v. *Jacobs,* 323.

12. *Actions questioning the constitutionality of the provision barring those covered by workmen's compensation from suing the Motor Vehicle Accident Claims Fund for injuries caused by uninsured motorists must be remanded for the taking of additional evidence, showing the fund's present financial condition, because the constitutionality of the provision depends on whether it is reasonably related to the preservation of the fund's actuarial soundness (MCLA § 257.1101 et seq.). Bowser* v. *Jacobs,* 323.

13. The motor vehicle accident claims act does not create a substitute for personal accident insurance, making injury and damage compensable merely by reason of the happening of an accident, the damage from which is otherwise uncollectible or uncompensable; the motor vehicle accident claims act pro-

AUTOMOBILES—Continued

vides payments to *certain* persons in *certain* cases, not payments to *all* persons in *all* cases from *any* injury not otherwise compensable or collectible (MCLA § 257.1101 *et seq.*). *Weisberg* v. *Det. Auto. Inter-Ins. Ex.*, 514.

14. The motor vehicle accident claims act does not authorize recovery from the motor vehicle accident claims fund by an owner of an uninsured motor vehicle for damages he suffered while a passenger in his vehicle while the car was being driven by a person with the owner's consent, because under § 6(5) of the act the Secretary of State is required in every case to suspend the license and registration of such owner until the monies received from the fund are repaid or arrangements therefor are made and it is a logical contradiction that a claimant could first receive payment from the fund and then have his license and registration suspended until he repays the fund (MCLA § 257.1106). *Weisberg* v. *Det. Auto. Inter-Ins. Ex.*, 514.

15. A motor vehicle is uninsured for purposes of the motor vehicle accident claims act unless both the owner and any driver using the vehicle with the owner's permission are insured against the liability imposed on them by law arising out of the negligent driving of the vehicle. Weisberg v. *Det. Auto. Inter-Ins. Ex.*, 514.

16. The term "uninsured motor vehicle", as used in reference to the motor vehicle accident claims act, can be misleading because motor vehicles are not insured for public liability, owners and drivers purchase insurance to cover their liability, not the vehicle's liability. Weisberg v. *Det. Auto. Inter-Ins. Ex.*, 514.

17. A vehicle is uninsured under the motor vehicle accident claims act unless the motor vehicle accident claims fund is protected by insurance from exposure to an injured person arising out of the nonpayment of a judgment obtained against an uninsured driver even though the owner is insured for his responsibility under the civil liability act. Weisberg v. *Det. Auto. Inter-Ins. Ex.*, 515.

18. An exclusionary clause in an automobile insurance policy providing that personal injury coverage does not apply to any named insured is invalid. Weisberg v. *Det. Auto. Inter-Ins. Ex.*, 515.

19. Plaintiff, an employee at a car wash, who was injured by defendant's car while it was being driven by another car wash employee may bring suit for damages against the owner of the car under the owner's liability statute even though the car wash owner was paying workmen's compensation and the defendant may seek indemnification from the car wash owner because the owner breached the independent duty he owed defendant to operate the vehicle through the car wash without negligence (MCLA § 257.401). *Dale* v. *Whiteman*, 533.

AUTOMOBILES—Continued

20. A motor vehicle consists of an assembly of all of its component parts, including tires. *Uniroyal, Inc.*, v. *Ken Brown Leasing*, 599.

21. Failure of a sales agreement covering motor vehicles to state that the sale included the tires on the vehicles was not evidence that the defendant purchaser had actual notice that one other than the seller owned the tires at the time of purchase, because a vehicle consists of all of its component parts, including tires, and separation of the title to tires from the title to the vehicle is not an ordinary circumstance about which a purchaser would normally inquire. *Uniroyal, Inc.*, v. *Ken Brown Leasing*, 600.

See
BURGLARY (2)
CONVERSION (1)
INSURANCE (1–8)
SALES (1)

AVAILABILITY OF WITNESS—See
CRIMINAL LAW (161)

BAIL—See
HABEAS CORPUS (1)

BAILEE—See
NEGLIGENCE (8)

BASIS OF PAYMENT—See
CONTRACTS (6)

BEST INTERESTS—See
PARENT AND CHILD (2–4)

BLOODSTAINED CLOTHING—See
ASSAULT (2)

BOND—See
CRIMINAL LAW (49)

BORROWING STATUTE—See
LIMITATION OF ACTIONS (2, 3)

BREACH OF DUTY—See
LABOR RELATIONS (7–11)

BREAKING AND ENTERING—See
BURGLARY (3, 4)
CRIMINAL LAW (151)

BREAKING AND ENTERING UNOCCUPIED DWELLING—See
CRIMINAL LAW (152)

BUILDER'S RISK INSURANCE—See
INSURANCE (9–12, 14)

BUILDING CONSTRUCTION—See
INSURANCE (12)

BURDEN OF PROOF—See
AUTOMOBILES (7)
CONVERSION (2)
CRIMINAL LAW (28, 137)
LABOR RELATIONS (7)

BURGLARY

1. Testimony that defendant was the man who had left the burglarized store carrying a package and then had returned, coupled with the arresting officers' testimony that defendant was inside the store when they approached the scene, was sufficient evidence on which the jury could base a finding of breaking and entering a business place with intent to commit larceny. *People* v. *Stewart*, 93.
2. The trunk of a motor vehicle is a depository within the meaning of the statute making it illegal to possess burglar tools adapted to breaking open any building, room, vault, safe, or *other depository*, because an automobile trunk is clearly a place where things are deposited or stored for safekeeping or convenience, and as such is within the scope of the statute (MCLA § 750.116). *People* v. *Smith*, 180.
3. The elements of the crime of breaking and entering a dwelling house are the same regardless of whether the dwelling house is occupied or unoccupied; whether the house is occupied or unoccupied goes to the length of the sentence (MCLA § 750-.110). *People* v. *Horace*, 666.
4. The trial court adduced a sufficient basis for defendant's plea or guilty of attempted breaking and entering an occupied dwelling house with intent to commit larceny, even though defendant contended that his testimony showed only an entry without breaking, where the defendant said that he gained entry through an open door after some of his boys had broken into the house, because the defendant could clearly have been found guilty of aiding and abetting and because a person who aids and abets in the commission of a crime may be prosecuted, indicted, tried, and, on conviction, punished as if he had directly committed the offense (MCLA § 767-.39). *People* v. *Hill*, 679.

CANCELLATION—See
INSURANCE (13)

CARRYING CONCEALED WEAPONS—See
CRIMINAL LAW (28, 137)

CAR TRUNK—See
BURGLARY (2)

CAUSATION—See
NEGLIGENCE (9)

CAUTIONARY INSTRUCTION—See
CRIMINAL LAW (144)

CHANGED CIRCUMSTANCES—See
DIVORCE (5, 6)

CHANGED CONDITIONS—See
CONTRACTS (7)
STATUTES (6)

CHANGES IN WORK CONDITIONS—See
UNEMPLOYMENT COMPENSATION (4–7)

CHARACTER WITNESSES—See
CRIMINAL LAW (64)

CHILD CUSTODY—See
PARENT AND CHILD (1–4)

CIRCUIT COURTS—See
UNEMPLOYMENT COMPENSATION (1–3)

CITY CHARTER—See
MUNICIPAL CORPORATIONS (1, 2, 3, 5)

CIVIL RIGHTS

1. Appeals from final orders of the Civil Rights Commission shall be tried *de novo* in the circuit court (Const 1963, art 5, § 29). *Burrell* v. *Annapolis Hospital*, 537.
2. A jury trial is not available under any circumstances in cases where final orders of the Civil Rights Commission are appealed to circuit court. *Burrell* v. *Annapolis Hospital*, 537.
3. The term "tried *de novo*" as applied to appeals to circuit court from final orders of the Civil Rights Commission means a full new evidentiary hearing before the circuit judge; however, the parties can, if they so choose and properly stipulate, agree to submission of the record made and transcribed before the Commission for a complete and independent reassessment by the circuit judge (Const 1963, art 5, § 29). *Burrell* v. *Annapolis Hospital*, 537.
4. *The provision governing appeals from the Civil Rights Commission, being a constitutional provision, does not violate the constitutional provision that no person exercising powers of one branch of government shall exercise powers properly belonging to another branch except as expressly provided in the Constitution (Const 1963, art 3, § 2). Burrell* v. *Annapolis Hospital*, 537.
5. *Appellants from adverse final orders of the Civil Rights Commission are entitled to a complete new trial in circuit court, not merely some form of review based on the record before the Civil Rights Commission (Const 1963, art 5, § 29). Burrell* v. *Annapolis Hospital*, 538.
6. *An appellant from a final order of the Civil Rights Commission is entitled to a jury trial upon demand if the nature of the*

CIVIL RIGHTS—Continued

relief sought is legal, not equitable, in nature; however, since the primary relief available to a complainant before the Civil Rights Commission is a cease and desist order, an equitable relief, trial by jury would usually be precluded. Burrell v. *Annapolis Hospital,* 538.

CLASSIFICATION—See
AUTOMOBILES (5–7, 11, 12)
CONSTITUTIONAL LAW (1)
STATUTES (2, 4, 5, 7)

CLIENT'S DEATH—See
ATTORNEY AND CLIENT (2)

COERCED VERDICT—See
CRIMINAL LAW (148)

COERCION—See
CRIMINAL LAW (18, 19)

COERCION OF VERDICT—See
CRIMINAL LAW (99, 100)

COMMENT BY JUDGE—See
CRIMINAL LAW (89)

COMMENT ON PRIVILEGE—See
CRIMINAL LAW (40)

COMMISSIONERS—See
EMINENT DOMAIN (1)

COMMON-LAW OFFENSES—See
HOMICIDE (10)

COMMUNICATIONS DURING MARRIAGE—See
HUSBAND AND WIFE (1)

COMPENSATION—See
CONTRACTS (1, 2)

COMPETENCE—See
CRIMINAL LAW (153)
WITNESSES (1)

COMPETITION—See
CONTRACTS (4)

COMPLETION OF PROJECT—See
INSURANCE (9–11)

COMPROMISE VERDICT—See
NEW TRIAL (2)

COMPULSORY PROCESS—See
CRIMINAL LAW (23, 24)

CONCEALED WEAPONS—See
ARREST (3)

CONDEMNATION—See
EMINENT DOMAIN (1, 2)

CONFERENCES—See
CRIMINAL LAW (120, 121)

CONFESSIONS—See
CRIMINAL LAW (10)

CONFISCATION—See
ZONING (5)

CONFLICTING EVIDENCE—See
CRIMINAL LAW (15)

CONFLICTING TESTIMONY—See
CRIMINAL LAW (1)

CONFUSION—See
CRIMINAL LAW (82)

CONSCIOUSNESS OF GUILT—See
CRIMINAL LAW (18)

CONSENT—See
CRIMINAL LAW (116, 117)
INSURANCE (13)

CONSIDERATION—See
LICENSE (1)

CONSTITUTIONAL LAW

1. *A classification does not violate this state's Equal Protection clause if there is a reasonable basis for the classification; the reasonable basis test must be used because it is the most recent pronouncement of the United States Supreme Court and because the Michigan Supreme Court has previously declared that the Michigan Equal Protection clause means the same thing as the Federal Equal Protection clause. Bowser* v. *Jacobs*, 321.
2. *A defendant's failure to make a formal record-entered demand for a speedy trial constitutes a waiver of his constitutional right to a speedy trial under controlling Michigan precedent. People* v. *Collins*, 400.
3. *An accused person awaiting trial is protected from undue delay in the prosecution of the charge made against him by both the constitutional right to a writ of habeas corpus and the constitutional right to a speedy trial. People* v. *Collins*, 400.

CONSTITUTIONAL LAW—Continued

4. *A criminal defendant is entitled to a speedy trial even where he is at large on bail. People* v. *Collins*, 401.
5. *Prejudice is conclusively presumed when a criminal defendant is denied a speedy trial. People v. Collins*, 401.
6. *A defendant's failure to demand a speedy trial formally bars him from being discharged for not receiving a speedy trial. People* v. *Collins*, 401.
7. *The requirement that a defendant make a demand on the record for a speedy trial to enforce his right undermines the right to a speedy trial. People* v. *Collins*, 401.
8. *The rule that the burden is on a defendant in a criminal case to demand a speedy trial rather than on the prosecution and the courts to see to it that he is given a speedy trial is inconsistent with the constitution and with the language of statutes providing for a speedy trial; cases holding that a defendant must make a formal demand on the record for a speedy trial in order to enforce his right should be overruled. People* v. *Collins*, 401.

See
AUTOMOBILES (5, 6)
CIVIL RIGHTS (1, 4, 5)
HABEAS CORPUS (2)
HIGHWAYS (1, 2)
JUDGES (2–4)
STATUTES (2–4, 6, 7, 9)
ZONING (1)

CONSTRUCTION OF CONTRACTS—See
CONTRACTS (5–8)

CONSTRUCTION OF STATUTES—See
AUTOMOBILES (8–10)
INSURANCE (4)
STATUTES (1, 8)
UNEMPLOYMENT COMPENSATION (2)

CONTRACTOR'S INTEREST—See
INSURANCE (12)

CONTRACTS

1. The rate of compensation or a definite method for ascertaining the rate of compensation must, as a general rule, be included as a part of an employment contract; however in this state, employment contracts are interpreted the same as other contracts, the main object being to effect the intention of the parties. *Bruno* v. *Detroit Inst. of Technology*, 61.
2. A contract of employment appointing a teacher to a position for a two-year period, the salary for the first year being fixed at $7,500 and the salary for the second "to be reviewed", did not fail, as a matter of law, to be a contract, even though it was contended that the rate of compensation was not specified for the second year, where for several years plaintiff teacher had been offered and had accepted yearly contracts

CONTRACTS—Continued

with raises each year, because the word "reviewed" as interpreted in reference to the conduct of the parties meant that the rate of compensation was at least $7,500 in both years with the possibility of a raise in the second year. *Bruno* v. *Detroit Inst. of Technology*, 61.

3. A covenant not to compete, contained in a contract of the sale of a business, is valid if reasonable (MCLA §§ 445.731, 445.761, 445.766). *Brillhart* v. *Danneffel*, 359.

4. A covenant made by the sellers of a restaurant not to compete within a ten-mile area with the purchaser of the restaurant for a five-year period was reasonable and, thus, valid where the sellers knew what they were contracting for, the sellers' own agent drew the instrument, the sellers voluntarily signed the instrument, and the business sold was located in a small, rural area and any similar business in the immediate area would be in competition with the business sold. *Brillhart* v. *Danneffel*, 359.

5. A contract with a governmental agency which, by its express terms, precluded recovery at other than unit prices and for other than actual work performed and which stated that the quantities in the bid schedule were approximate only and could be decreased precluded recovery for loss of anticipated profits even though the contract materially overstated the amount of work to be performed. *C. J. Rogers, Inc.* v. *Highway Dept.*, 620.

6. A contract with a governmental agency which refers to a set of standard specifications which states that if the quantity of work varied from the original estimate by 25 per cent or less, payment could be had based only on unit price precludes recovery for loss of anticipated profits on the contract where the variance was 17.5 per cent. *C. J. Rogers, Inc.* v. *Highway Dept.*, 620.

7. Plaintiff, who had entered into a highway construction contract with a governmental agency was not entitled to recover loss of anticipated profits on the ground that the decrease in quantity required was a "changed condition" within the meaning of the Standard Specifications for Road and Bridge Construction, even though the number of units required had been overestimated in the bid schedule by 17.5 per cent, where plaintiff did not show any change in unit cost as a result of the decrease in the units required. *C. J. Rogers, Inc.* v. *Highway Dept.*, 621.

8. Separate instruments are construed together as the agreement of the parties where a written contract refers to another instrument and makes the terms of the other instrument a part of the written agreement. *C. J. Rogers, Inc.* v. *Highway Dept.*, 621.

See
COSTS (2, 3)
DAMAGES (1)
LICENSES (1)
MUNICIPAL CORPORATIONS (5)

CONTROL—See
MASTER AND SERVANT (3)

CONVERSION
1. Defendant purchaser of motor vehicles was not liable, as a matter of law, for the conversion of the tires on the vehicles by refusing a request, made after purchase, to deliver those tires to the plaintiff who owned the tires where the plaintiff did not establish that the defendant had actual notice of the plaintiff's interest in the tires. *Uniroyal, Inc.*, v. *Ken Brown Leasing*, 600.
2. The party in a conversion action asserting that another had notice of his interest in the disputed property has the burden of proof. *Uniroyal, Inc.*, v. *Ken Brown Leasing*, 600.

COSTS
1. Attorney fees cannot be charged as included in costs taxed against the party who does not prevail in a trial in the absence of statutory authority or court rule except in an equity case where the court bases the taxation upon a showing that under the circumstances an equitable result requires it. *Brillhart* v. *Danneffel*, 360.
2. Attorney's expenses incurred in an action to enforce a contract or to recover money damages for the contract's breach are not ordinarily allowable in the absence of a statute or court rule authorizing the award. *Brillhart* v. *Danneffel*, 360.
3. Including attorney's fees in the award of cost was improper where the evidence in plaintiff's suit to enforce a covenant not to compete, did not show that the defendants' acts were unlawful. *Brillhart* v. *Danneffel*, 360.

COUNSEL—See
CRIMINAL LAW (46, 47, 50–52, 57–59, 91, 131)

COUNTY ROAD COMMISSIONS—See
HIGHWAYS (2, 3)

COURT OF APPEALS—See
COURTS (1)

COURT ORDER—See
DISCOVERY (2, 3)

COURT RULES—See
CRIMINAL LAW 140, 163, 164)
JUDGMENT (1, 2)

COURTS
1. The Court of Appeals does not have jurisdiction over appeals from probate courts. *In re Lakehead Pipe Line Co., Inc.*, 544.

See
CRIMINAL LAW (134)
DIVORCE (2)
TRIAL (2)

COVENANT NOT TO COMPETE—See
CONTRACTS (3, 4)
DAMAGES (1)

CREDIBILITY—See
CRIMINAL LAW (5, 7, 16, 17, 30, 54, 92)
WITNESSES (2)

CREDIT CARD—See
CRIMINAL LAW (33)

CREDIT FOR TIME SERVED—See
CRIMINAL LAW (95)

CRIME-CONNECTED EVIDENCE—See
ARREST (1)

CRIMINAL LAW

1. Failure to give a criminal defendant's requested instruction to jury that if the testimony of different witnesses is in direct conflict and both versions as given cannot be true and there is reasonable doubt as to which story is true, the jury must accept the version consistent with the innocence of defendant was not error where the trial judge charged the jury fully concerning the presumption of innocence, reasonable doubt, and tests for determining credibility of witnesses. *People* v. *Berry*, 1.
2. A defendant, charged as an accessory, was not denied his right of confrontation where a defense witness, a principal in the crime charged, testified but refused to answer two of defense counsel's questions and six of the prosecutor's questions on Fifth Amendment grounds, where defense counsel successfully extracted the desired answers by rephrasing the questions and where defendant was not prejudiced by the refusal to answer the prosecutor's questions. *People* v. *Berry*, 1.
3. Prosecutor's statement to the jury that he believed the defendant was guilty of armed robbery, did not constitute error where the prosecutor, after making that statement, went on to tell the jury that they would have to disregard the testimony of five eyewitnesses to the armed robbery to come to any other conclusion, because a prosecutor may argue from the testimony that a defendant is guilty and may state what evidence convinces him and should convince the jury of defendant's guilt. *People* v. *Fuston Thomas*, 23.
4. A witness's mentioning the penalty for the crime for which defendant was being tried was improper; however, the mentioning of the penalty did not constitute reversible error where defense counsel had elicited the testimony concerning the penalty and where the trial judge instructed the jury that the penalty was no concern of theirs and was a matter solely for the court. *People* v. *Fuston Thomas*, 23.
5. A defendant was not entitled to have the trial court advise the jury of the penalty for perjury on the theory that if

CRIMINAL LAW—Continued

the jury were advised that a defense witness was running the risk of being prosecuted for perjury, the jury would be more inclined to believe the witness's otherwise unbelievable testimony; an instruction on perjury in such a situation would have been error. *People* v. *Fuston Thomas,* 23.

6. Prosecutor's failure to indorse the names of two *res gestae* witnesses on the information was not error where defendant and his attorney had the circuit court history in defendant's case for some ten months before trial and knew that the names of the two witnesses were missing. *People* v. *Fuston Thomas,* 24.

7. A defendant in a criminal prosecution is not entitled to have his criminal record suppressed so that he can testify in his own behalf with the knowledge that he cannot be questioned about past convictions; the people have a statutory right to cross-examine a testifying defendant concerning his criminal convictions in order to assist the jury in determining the defendant's credibility (MCLA § 600.2158). *People* v. *Fuston Thomas,* 24.

8. The decision concerning joint or separate trials for two jointly-indicted defendants is within the trial judge's discretion; the trial judge's determination will not be overturned, absent an affirmative showing that a joint trial prejudiced the substantial rights of one or both defendants. *People* v. *Angers,* 28.

9. A denial of a motion for separate trials of jointly-indicted defendants is not an abuse of discretion where the defendants are charged with the same crime and the same evidence is to be used to implicate both defendants in the joint commission of the crime. *People* v. *Angers,* 29.

10. A motion for a mistrial was properly denied where the motion was based on the ground that defendant was inculpated, rather than exculpated, by a defense witness's purported confession that he, not the defendant, had committed the crime, in that the confession placed the defendant in the company of defendant's codefendant, positively identified as one of two robbers, before the armed robbery occurred and where defendant failed to object to the introduction of the confession into evidence. *People* v. *Angers,* 29.

11. The trial judge is obligated to require the court reporter to read back to him and both counsel the wording of the instruction to the jury as the reporter has taken it down and as it would be transcribed where a timely question has been raised as to the precise wording of the instruction as given and the court and counsel disagree as to that wording; if it appears that there is a disagreement between the reporter's notes and the instruction as the judge claimed it was given, even though back-up electronic equipment shows that the instruction given was proper, the instruction must be repeated to the jury either as agreed upon by the court and counsel or as the court determines that it should be given,

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thus preserving an unequivocal record for reveiw. *People* v. *Nodine*, 80.

12. An appellate court will not presume that the trial court did not erroneously instruct the jury as to the elements of the crime charged where the court reporter's notes of the instruction show a garbled, patently prejudicial and erroneous instruction, even though it is unlikely that the trial judge gave the instruction as the court reporter's notes show the instruction; under such circumstances, the case must be remanded for a new trial because of the possible prejudice to the defendant. *People* v. *Nodine*, 81.

13. An appellate court, in determining whether the prosecution has negated all theories consistent with a defendant's innocence, must look at the record in the light most favorable to the prosecution and decide whether sufficient evidence was adduced, which, if believed by the jury, could support a finding of guilt beyond a reasonable doubt. *People* v. *Stewart*, 93.

14. Evidence that establishes no more than a choice between reasonable alternative conclusions cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal. *People* v. *Stewart*, 94.

15. Conflicting versions as to what defendant was doing in a store which had been burglarized did not present a choice between reasonable alternative conclusions but merely a choice between two different accounts of the incident; therefore, the jury could properly reject the defense version and accept the account of the prosecution witness. *People* v. *Stewart*, 94.

16. Alibi witnesses, who have chosen to testify for a defendant, place their credibility in issue and can be questioned concerning the relationship between them and the accused and all the attendant circumstances thereof. *People* v. *Falkner*, 102.

17. Prosecutor's asking alibi witnesses about their membership in a group known as the Black Messengers did not constitute reversible error where the defendant, charged with first-degree murder, was a member of the group, even though the murder the defendant was being tried for was purportedly a racially-motivated murder of a white by a black. *People* v. *Falkner*, 102.

18. Prosecutor's eliciting testimony from a witness concerning defendant's threat that anyone who testified against him would be killed was proper, because testimony showing conduct and declarations of the defendant subsequent to commission of a crime is admissible where the behavior indicates a consciousness of guilt or is inconsistent with innocence. *People* v. *Falkner*, 102.

19. Evidence of attempts by a defendant to induce witnesses not to testify may be considered by the fact-finders. *People* v. *Falkner*, 102.

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20. Prosecutor's comment upon defendant's failure to call one who was alleged by a defense witness to have been able to substantiate defendant's alibi was permissible where the defense case was based on alibi and the noncalled witness was available. *People* v. *Falkner*, 102.

21. Prosecutor's stating that the reason a person, who a defense witness had stated could support defendant's alibi, had not been called by the defense was that she was a "go-between" for defense witnesses did not constitute reversible error where the prosecutor's remark was not reiterated, the trial judge *sua sponte* cautioned the jury that the verdict was to be based on the evidence adduced, not the argument of the attorneys, defendant did not object to the remark nor request any instructions, and defendant did not move for a mistrial. *People* v. *Falkner*, 102.

22. Prosecution witness's conducting herself in a supposedly "unruly, flippant, and evasive manner" during cross-examination did not deny defendant his right of confrontation where any difficulties in questioning the witness were due to the defendant's decision to proceed in proper person and to limit the assistance of his counsel, a respected member of the bar, to an advisory role; the trial judge was constitutionally powerless to deny the defendant's free and unequivocal demands to defend himself. *People* v. *Falkner*, 103.

23. Granting of compulsory process to obtain witnesses requested by a criminal defendant is a decision within the discretion of the trial court. *People* v. *Ergie Williams*, 118.

24. Denial of defendant's request that a certain witness be produced to testify on his behalf was not an abuse of discretion where defendant presented his request at the end of the first day of a two-day trial, and where an attempt was made to procure the requested witness's attendance, but the witness could not be produced until a time when presentation of evidence would be concluded but where the parties stipulate to that witness's testimony, and defendant at no time claimed that the method employed prejudiced his rights. *People* v. *Ergie Williams*, 118.

25. Failure to rule on the prosecution's motion for a mistrial did not result in reversible error where the motion was made because the defendant shouted out the penalty for the crime he was being tried for. *People* v. *Benson*, 121.

26. The failure of the trial court to provide for a substantial period intervening between the minimum and maximum terms of a sentence was not error where the court exercised discretion in imposing the sentence, having evaluated defendant as an individual, and the sentence was within the statutory maximum. *People* v. *Hooper*, 123.

27. Police officer's testimony, upon direct examination, that he knew defendant "from previous occasions" did not constitute reversible error where the remark was a voluntary and unresponsive answer to a proper question. *People* v. *Hooper*, 123.

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28. The state does not have the burden of proving that a defendant, charged with carrying a concealed weapon, did not have a license to carry that weapon (MCLA §§ 750.227, 776.20). *People* v. *Hooper*, 123.

29. The crime of attempted assault with intent to rob does not exist. *People* v. *Maxwell*, 127.

30. 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 question is to impeach the defendant's credibility as a witness. *People* v. *Ryan*, 129.

31. 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 (MCLA § 768.35; GCR 1963, 785.3[2]). *People* v. *Charles Thomas*, 135.

32. A plea of guilty, freely, voluntarily, and understandingly made, establishes the crime charged and the guilty-pleading defendant's participation in the crime. *People* v. *Charles Thomas*, 135.

33. A sufficient factual basis for a plea of guilty of attempted possession of a credit card with intent to circulate or sell it without the consent of the cardholder was established where the nature of the offense had been explained to the defendant, the defendant indicated that he wished to plead guilty, and the defendant indicated the place and time the crime occurred (MCLA §§ 750.92, 750.157p). *People* v. *Charles Thomas*, 135.

34. Failure to object to the admission into evidence of a knife taken from the defendant at the time of his arrest for the rape and robbery of the complainant, the arrest occurring ten days after the crimes, precluded review of the question of the knife's admissibility, even though there was no logical connection between the knife taken from the defendant and the crimes charged in that the complainant testified that the knife admitted into evidence was not the knife used by her assailant. *People* v. *Dupree*, 138.

35. The trial court, before accepting a guilty plea, need not make an exhaustive examination as to possible defenses, even if the testimony of the accused gives some indication that defenses might have been raised at trial, where the defendant is represented by counsel. *People* v. *Garcia*, 141.

36. A conviction based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *People* v. *Wilkins*, 143.

37. Defendant's waiver of his right to trial by jury was valid where the waiver was regular on its face and the defendant did not contend that the waiver was not made in open court,

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that he did not first consult with counsel, or that he was in any way coerced. *People* v. *Jones*, 150.

38. A person granted probation is entitled to a summary hearing before his probation can be revoked; however, a person convicted of a crime is not entitled to a summary hearing where sentencing has only been delayed. *People* v. *Clyne*, 152.

39. Defendant, convicted of a crime, was not placed on probation by the trial court's delaying sentencing for a period of six months and the requirements that the defendant refrain from drinking alcoholic beverages, stay away from bars and taverns, and report weekly to a probation officer, where the requirements were imposed to aid the court's determination whether the defendant would be eligible for probation when the six-month period ended (MCLA §§ 771.1, 771.4). *People* v. *Clyne*, 152.

40. A police officer's testimony, during cross-examination, that defendant had stated at the time of his arrest that he did not want to make any statements and wanted to talk to an attorney did not violate defendant's constitutional or statutory rights. *People* v. *Ingram*, 160.

41. Giving the standard instruction regarding intoxication applicable to a general intent crime, followed by the standard instruction regarding intoxication as a defense to specific intent crimes was not prejudicially confusing and misleading where the jury could have convicted defendant of one of two crimes, one requiring general intent, the other specific intent, because it was essential for the trial judge to instruct regarding the role of intoxication as a defense to each type of crime. *People* v. *Ingram*, 160.

42. The Court of Appeals does not consider objections raised for the first time on appeal in a criminal case in the absence of manifest injustice. *People* v. *Ruffin*, 166.

43. A conviction need not be reversed in a criminal case where the prosecution knew that a *res gestae* witness would not be available for trial and failed to notify the defense of this fact, no request for a continuance was made by the defense so that the defendant might try to locate the witness when it first learned of this, no objections were made, and where the record establishes that there has been no miscarriage of justice. *People* v. *Ruffin*, 166.

44. Denial of defendant's motion to withdraw his plea of guilty was not an abuse of discretion where the affidavit in support of the motion did not state facts, which, if true, would substantiate the claim that defendant's plea was not freely, voluntarily, and understandingly made and where there was no other substantiating affidavit nor any other evidence of any kind offered at the hearing on the motion. *People* v. *Wanzer*, 169.

45. The failure of defense counsel to object to the prosecutor's improper statement in closing argument that certain facts were uncontroverted barred appellate review where the error could

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have been cured by an instruction upon timely objection. *People* v. *Bukoski*, 171.

46. The constitutionality of a lineup, held without affording defendant his right to counsel, cannot be raised for the first time on appeal; any objection to such a lineup must first be made in the trial court. *People* v. *Daniels*, 173.

47. Trial court was not obligated to hold an evidentiary hearing regarding the constitutionality of a lineup where trial counsel, although knowing that the lineup was possibly constitutionally defective, failed to raise the constitutional issue in the trial court. *People* v. *Daniels*, 173.

48. A motion to withdraw a plea of guilty must be based upon a miscarriage of justice where the motion to withdraw was made after conviction and sentence. *People* v. *Van Bragt*, 177.

49. Trial judge's failure to inform a defendant, who pled guilty to family nonsupport, that the nonsupport statute provided for the posting of bond was not reversible error where defendant did not make an attempt to post bond, defendant did not claim to have attempted to post bond, and defendant did not claim that he would have entered into such a bond arrangement had he been advised of the statutory bonding provision (MCLA § 750.161). *People* v. *Van Bragt*, 177.

50. A lineup conducted without the presence of counsel and without a waiver of counsel by the defendant himself violates the defendant's constitutional right to counsel at this stage of the proceedings and is, therefore, illegal. *People* v. *Robert Thomas*, 190.

51. A lineup conducted without the presence of the attorney retained to represent the defendant and without a waiver of counsel by the defendant himself was illegal even though the defendant's attorney refused an invitation by the police to attend the lineup. *People* v. *Robert Thomas*, 190.

52. An evidentiary hearing was required on the issue whether an in-court identification of the defendant was of an origin independent of a prior lineup identification even though no request for an evidentiary hearing was made in the trial court where the lineup was illegal in that defendant did not have counsel at the lineup and defendant himself had not waived counsel. *People* v. *Robert Thomas*, 190.

53. A failure by the defendant to object in the trial court to an illegal pre-trial identification lineup does not preclude appellate review of the issue; a full evidentiary hearing at the trial level focused on the identification procedure is generally required and an appellate court may not attempt such a determination on the record made in connection with the trial. *People* v. *Robert Thomas*, 190.

54. The credibility of the complainant's identification of the defendant as one of the robbers was a question for the trier of fact where the complainant was unable to recall, on cross-examination, whether the robber, whose unmasked face she had seen for several seconds during the robbery, had a beard,

or a moustache, or a goatee, the defendant and another defense witness had testified that the defendant had a beard or goatee at the time the crime was committed, and the defense had contended that the identification was tainted by a conversation after the robbery with another person who had said that the robber resembled the defendant. *People* v. *Charles Williams,* 195.

55. An instruction to the jury which affirmatively excludes lesser included offenses does not constitute reversible error where the record shows that defense counsel agreed with the trial court that there were no included offenses and additionally said that a statement covering included offenses would be inconsistent with the theory of the defense; an affirmative exclusion of that which neither litigant wishes the jury to consider does not require reversal or a new trial. *People* v. *Charles Williams,* 195.

56. *An instruction to the jury cannot affirmatively exclude from the jury's consideration lesser included offenses, even though defense counsel tried the case on an alibi defense and stated to the court that a statement covering any included offenses would not be consistent with the defense. People* v. *Charles Williams,* 196.

57. Defendant received the effective assistance of counsel, even though trial counsel at defendant's second trial, after the defendant's first trial had ended in a mistrial, failed to call two alibi witnesses called at the first trial, where the attorney at the second trial consulted with the attorney from the first trial about calling the witnesses, the attorneys agreed that it would be a tactical error to call the witnesses, especially since one witness could have been discredited, and the defendant was allowed to make the final decision whether to call one of the witnesses. *People* v. *Melvin Harris,* 231.

58. To the extent that a claim of ineffective assistance of counsel depends on facts not of record, the appealing defendant must, before filing his brief in the appellate court, make a testimonial record at the trial level in connection with a motion for a new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately. *People* v. *Melvin Harris.* 232.

59. A defendant is deemed to have waived the attorney-client privilege to the extent necessary to permit an inquiry concerning the adequacy of the representation received from his attorney where the defendant in connection with a motion for a new trial causes a hearing to be held in order to make a testimonial record of facts not of record necessary to support his claim of ineffective assistance of counsel. *People* v. *Melvin Harris,* 232.

60. Every positive statement by the prosecutor is not an expression of a personal opinion concerning the defendant's guilt, necessitating a new trial. *People* v. *Evans,* 238.

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61. Prosecutor's stating, during closing argument, that the defendants were both guilty did not constitute the expression of the prosecutor's personal opinion or reversible error where the prosecutor immediately pointed to the evidence showing guilt and where any waywardness in the prosecutor's argument could have been overcome by a cautionary instruction, if such an instruction had been requested. *People* v. *Evans,* 238.

62. Prosecutor's referring to the defendant's nickname, "Wolf", was not improper where defendant had the same nickname for many years and the nickname was relevant to the case in that some of the witnesses stated that the murderer, when seeking entrance to the victim's house, said his name was "Wolf". *People* v. *Basemore,* 256.

63. Loss of statements given by witnesses, shortly after the crime with which the defendant was charged was committed, that one of the murderers, when entering the victim's house had said his name was "Wolf" did not entitle the defendant, nicknamed "Wolf", to have the prosecution suppressed where there was no claim that the statements were deliberately lost and the defense brought out at trial that some of the witnesses had said the name given was "Walt". *People* v. *Basemore,* 256.

64. Prosecutor's asking a witness, who testified concerning the defendant's good reputation and character, whether he was aware that the defendant had been convicted of an offense while in the army was not error where the defendant had already testified concerning his army conviction. *People* v. *Basemore,* 256.

65. Prosecutor's asking the defendant, charged with murder, if he had ever owned a gun did not constitute reversible error where defendant's lawyer objected and, after an off-the-record conference in the absence of the jury, the defendant's lawyer was satisfied to let the matter drop, the lawyer and defense counsel did not ask for a cautionary instruction, did not attempt to develop the facts regarding defendant's ownership of a gun, if he did own one, and defense counsel did not claim that irreparable damage had been done to the defendant's case or ask for a mistrial. *People* v. *Basemore,* 256.

66. *Defendant's association with a man identified as one of a group that committed a robbery is not evidence relevant to defendant's participation in the robbery where it was expectable that they would have had contacts with each other since they were of the same race, in the same age group, and living in a relatively small town. People* v. *Bailey,* 273.

67. *An 18-year-old defendant's association with a 21-year-old man identified as one of a group that committed a robbery is inadmissible in defendant's trial for participating in the robbery where they were two of less than 600 Negro males between the ages of 15 and 24 in their town of 45,000, and, therefore, it is expectable that they would have contacts with one another. People* v. *Bailey,* 273.

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68. *A reasonable doubt as to defendant's innocence should not be resolved against him merely because he was friendly with a man positively identified as one of a group that had committed the crime. People* v. *Bailey,* 273.

69. *In a criminal case where the only evidence—other than the objected-to evidence—was the uncertain identification by the victim, it should be assumed that but for the objected-to testimony the defendant would have been found innocent. People* v. *Bailey,* 273.

70. *The fact that defendant had associations with one of a group of men accused of committing a crime should not be provable by itself, and to allow the people to prove that association as some evidence of the likelihood of defendant's participation in the crime would be a dangerous precedent to all who value the right of free association. People* v. *Bailey,* 274.

71. *Detective's testimony that he was in charge of investigating serious crime and that he had come to know defendant and another accused of the robbery and had seen them together on a number of occasions was improperly admitted since it tended to show that defendant, who did not testify, was under police surveillance and implied that the accused had committed other crimes or had a disposition toward conduct similar to the offense charged. People* v. *Bailey,* 274.

72. A new trial is required where the prejudice to the defendant created by the prosecutor's improper argument could not have been cured by instructions to the jury. *People* v. *Farrar,* 294.

73. The prosecutor's statements, during a trial for assault committed against a police officer, that "Every day [policemen] are called pigs and people assault them with their fists and words" and that "[policemen] don't bring these things into court unless they really happened", were improper arguments whose prejudice could not be cured by instructions. *People* v. *Farrar,* 294.

74. The failure of defense counsel to object to improper argument of the prosecutor does not preclude an appellate court from considering that issue on appeal where that argument created such prejudice that it could not have been cured by instructions. *People* v. *Farrar,* 294.

75. The prosecutor must refrain from argument which, by injecting issues broader than the guilt or innocence of the accused, would divert the jury from its duty to decide the case on the evidence. *People* v. *Farrar,* 294.

76. The prosecutor may not subtly subvert the presumption of innocence by appealing to the jurors to perform a civic duty to support the police, especially where policemen testified as prosecution witnesses. *People* v. *Farrar,* 295.

77. The prosecutor may not express a personal belief in the guilt of the defendant. *People* v. *Farrar,* 295.

78. The prosecutor's questioning of a criminal defendant on cross-examination as to whether he had been arrested and convicted

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of attempted murder was improper where the defendant had merely been charged with attempted murder but had pled guilty to the charge of aggravated assault. *People* v. *Farrar*, 295.

79. A trial judge is not required to allow a prosecutor to impeach a criminal defendant by referring to the defendant's prior conviction record; the judge may, in the exercise of discretion, refuse to allow any questioning of a defendant concerning his previous criminal record (MCLA §§ 600.2158, 600.2159). *People* v. *Farrar*, 295.

80. It is error for a trial judge to refrain from exercising his discretion as to the admissibility of a defendant's prior conviction record for impeachment purposes if defendant requests its exclusion. *People* v. *Farrar*, 295.

81. Among the factors to be considered by the trial judge in exercising his discretion as to the admissibility of the criminal defendant's prior conviction record for impeachment purposes are: (a) the probative relevance of the prior conviction to the issue of credibility, and (b) the prejudicial effect on the decisional process if the accused does not testify out of fear of impeachment by prior convictions. *People* v. *Farrar*, 295.

82. The prosecutor may not ordinarily introduce evidence of crimes other than the one the defendant is charged with committing, but when the other crime occurs shortly before or after the charged offense it may be provable unless the probative value of the proferred evidence is overcome by the danger that introduction of the evidence will confuse, mislead, or prejudice the jury. *People* v. *Farrar*, 296.

83. Evidence, introduced without undue emphasis or detail, of an incident in which the defendant allegedly shot his brother was properly introduced by the prosecutor in a trial in which the defendant was charged with the felonious assault of a police officer where the felonious assault occurred when the police responded to a call to investigate the brother's shooting, and the closeness in time between the two incidents make it almost impossible to conduct the felonious assault trial without reference to the earlier incident. *People* v. *Farrar*, 296.

84. A defendant who has exercised his privilege against self-incrimination at any time cannot be impeached by the prosecution's showing that the defendant exercised his constitutional right. *People* v. *Dailey*, 312.

85. Prosecutor's cross-examining a testifying defendant as to why the defendant had not told the arresting officer why he (the defendant) was hiding in the bushes and what he was doing there, and prosecutor's commenting during summation as to why defendant, in a letter to the complainant, did not deny that he had stolen complainant's automobile, denied defendant due process and a fair trial by improperly commenting on defendant's exercise of his constitutional right to remain silent. *People* v. *Dailey*, 312.

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86. It is reversible error for a court to instruct the jury on a theory for the prosecution where there is no evidence tending to establish the theory. *People* v. *Schafer*, 316.

87. Denial of defendant's request to be furnished a surveyor to survey the area of the homicide charged to determine distances involved was not reversible error where the trial court furnished defendant with a city map, which contained pertinent distances, and photographs of the street block where the crime occurred. *People* v. *Griffen*, 368.

88. Denial of defendant's request for the production of an FBI artist who had made a composite sketch for a police "wanted" circular of a man witnesses saw at the scene of the crime charged was not error where the artist was in Washington, D. C., at the time of defendant's trial, the sketch was not introduced into evidence, and two eyewitnesses testified that the sketch did not resemble the man they saw. *People* v. *Griffen*, 368.

89. Trial judge's comment, during his charge, that he did not believe the jury would have much difficulty in arriving at the conclusion that a felonious homicide had been committed and that the homicide was second-degree murder was improper, but not reversible error where the fact that a homicide had been committed was not disputed at trial and the defendant's defense was that he did not commit the crime. *People* v. *Griffen*, 368.

90. Permitting portions of a prosecution witness's direct examination testimony, relating to defendant's statements made to the witness while they were in county jail together, to be read back to the jury without also reading that witness's cross-examination testimony was not reversible error where there was no direct conflict between the witness's testimony on direct and cross-examination and the jury had requested to be read only those portions that were read back. *People* v. *Griffen*, 369.

91. Defendant was not denied his right to proceed *in propria persona* where the trial judge granted defendant's request to dismiss assigned counsel who, at the judge's request, remained to help defendant, if needed, and counsel did conduct the *voir dire* examination of the jury and cross-examined some witnesses. *People* v. *Griffen*, 369.

92. The prosecutor, although allowed much latitude in cross-examining to test credibility, cannot bring out independent issues involving other alleged crimes that are entirely dissimilar both in nature and motive and have nothing whatsoever to do with the issue involved. People v. *Griffen*, 369.

93. Prosecutor's introducing into defendant's trial for murder and arguing to the jury the defendant's failure to register for the draft, defendant's employment record, defendant's alleged operation of a blind pig, defendant's alleged ownership of handguns, the testimony of a prosecution witness that defendant had done something to the witness, who had formerly

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worked as a barmaid for defendant, and the prosecutor's asking defense counsel in front of the jury why, after having been allowed to read the statement the prosecution witness had given the police about what the defendant had done to her, he had not cross-examined her concerning what was allegedly done to her exceeded the permissible bounds of cross-examination and argument; the meritorious issue of who killed the victim may well have been resolved against defendant because the jury was deflected from temperate consideration of the real issue by the introduction of irrelevant, inflammatory testimony. People v. *Griffen*, 369.

94. *Prosecutor's challenging defense counsel in the presence of the jury in a murder trial to explain why there had been no cross-examination concerning a prosecution witness's testimony that she had once gone to the police and had given them a statement about what the defendant had done to her, even though defense counsel had been allowed to read the statement was impermissible as a challenge in the presence of the trier of fact to waive a legal right. People* v. *Griffen*, 370.

95. The Court of Appeals orders a convicted defendant to be credited with 217 on his sentence days where the record shows that he is entitled to 217 days credit rather than 10 days credit allowed by the trial judge (MCLA § 769.116). *People* v. *Collins*, 400.

96. *An indicted person held in prison shall, if he require it, be tried at the next term of the court after the expiration of six months from the time he was imprisoned, or shall be bailed upon his own recognizance unless it appears that the people's witnesses have been enticed, detained, kept away or prevented from attending court (MCLA § 767.38). People* v. *Collins*, 400.

97. Instructions to the jury, whether comprised of only a principal charge or a principal and supplemental charges, are reviewed in their entirety in an effort not so much to determine whether errors were made on any isolated issue but to ascertain whether their effect was prejudicial, where the defendant claims on appeal that the instructions given denied him a fair trial. *People* v. *Pepper*, 437.

98. A supplemental instruction responding to questions submitted by the jury, which reiterated the previously enunciated elements of the offense charged, the lesser included offenses, and the possible verdicts, gave an approved definition of intent clarifying the principal charge, and admonished them of the necessity that they reach a verdict was not so prejudicial as to deny the defendant a fair trial where the instruction did not unduly emphasize the element of intent even though the definition might more appropriately have been included in the principal charge, did not direct the jury that they had a duty to infer intent, and did not coerce a verdict from them. *People* v. *Pepper*, 437.

99. A supplementary instruction in a trial for homicide in which the trial court cautioned the jurors to deliberate slowly, with

a mind open to the arguments of others and a willingness to re-examine personal beliefs, explained to them the time and expense involved in every trial, and encouraged them that no 12 citizens were any better suited to decide the issues presented was not improper, because it did not suggest that personal beliefs were to be compromised, coerce a verdict, or contradict the principal instruction that the verdict was the responsibility of each juror. *People* v. *Pepper*, 438.

100. Additional instructions to the jury which correctly state the law will not be held erroneous merely because they were given at one time rather than another and will not be presumed to be given for the purpose of coercing a verdict, nor so found, except upon convincing evidence. *People* v. *Pepper*, 438.

101. Comments by the trial court in a jury instruction that no claim of self-defense appeared on the record in the homicide case before it was permissible where there was no evidentiary support for that defense, and did not obligate the court to instruct the jury as to the defense of accident for which the defendant had submitted proof where there had been no request made by the defendant to have the jury instructed on that theory of defense (MCLA § 768.29). *People* v. *Pepper*, 438.

102. The trial court may not instruct the jury in terms of "presumption" rather than in terms of "permissible inference" unless it is prepared to take an issue from the jury on the ground that the law conclusively presumes a fact from underlying facts; all that a judge may properly say to jurors where the prosecution has introduced evidence sufficient to give rise to a presumed fact is that if they find that underlying facts have been established, they may, *not must, infer the fact that the prosecution seeks to establish and he may not tell the jury that if they find that the underlying facts have been established, the fact inferred from them must be presumed. People* v. *Pepper*, 440.

103. The concept of a conclusive or mandatory presumption conflicts with the overriding presumption of innocence with which the law endows an accused in a criminal case and which extends to every element of the crime. People v. *Pepper*, 440.

104. The law deduces intent from the act itself for purposes of shifting the burden of going forward with the evidence, but does not deduce intent as a substitute for decision by the jury, and it is misleading to instruct the jury in terms of the presumption regarding intent without a clear statement by the judge of the limited purpose for which the law deduces a presumed fact from the underlying facts. People v. *Pepper*, 440.

105. The trial judge has a duty in a criminal case to instruct the jury as to the law applicable to the case even in the absence of a request to charge. People v. *Pepper*, 441.

106. Failure to object at trial to the prosecuting attorney's alleged improper cross-examination, to the prosecutor's alleged prej-

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udicial argument in summation to the jury, and to alleged error in jury instructions precluded the defendant from appellate relief where no clear injustice was shown. *People* v. *McColor*, 455.

107. *A defendant who takes the stand may not be asked on cross-examination why he did not tell the police at the time of his arrest the story he related at trial. People* v. *McColor*, 455.

108. *Defense counsel's failure to object to the prosecutor's asking the defendant at trial why he did not tell the police at the time of his arrest the same story he told at trial does not necessarily preclude defendant from raising that issue on appeal. People* v. *McColor*, 455.

109. *Prosecutor's asking the defendant why he had not told the police when he was arrested the version of the facts which defendant gave on direct examination was not harmless error where the issue of guilt depended on the jury's assessment of the credibility of the defendant and the complainant. People* v. *McColor*, 455.

110. *Prosecutor's statement in closing argument that from the evidence, he believed defendant was properly charged and that defendant was guilty violated the rule which precludes a prosecutor from expressing a personal opinion concerning the guilt of the accused. People* v. *McColor*, 456.

111. *Prosecutor's suggesting, during closing argument, that the jury should show its "sincerity" by convicting the defendant was improper. People* v. *McColor*, 456.

112. *Prosecutor's suggestion in summation to the jury that defendant was a member of the criminal class was improper. People* v. *McColor*, 456.

113. *A prosecutor should stick to the pertinent facts and should not try to convict a defendant through innuendo and character assassination by the introduction of extraneous side issues. People* v. *McColor*, 456.

114. *Prosecutor's asking the defendant's father and the defendant's wife, who were not present when the defendant shot complainant and who had no personal knowledge of the facts surrounding the shooting, whether they would shoot the prosecutor in the back and whether they believed it to be wrong to shoot anyone in the back was improper, because the issue in defendant's trial was whether the defendant acted properly at the scene of the assault: whether the defendant assaulted the complainant or whether the complainant assaulted the defendant, and whether the defendant acted feloniously or criminally in the matter. People* v. *McColor*, 456.

115. *A supplemental instruction to the jury, in a trial for assault with intent to do great bodily harm less than murder, in which the judge listed the various grades of assault in descending order, said that he could not mention punishment, and twice stated that assault and battery is a misdemeanor, given in response to a question about the difference between assault and battery and felonious assault, emphasized unduly*

CRIMINAL LAW—Continued

that felonious assault is a lower grade of felony than the crime charged and that assault and battery is a misdemeanor, and thus improperly stressed the difference in possible punishment. People v. *McColor,* 456.

116. A defendant in a criminal case who consents to the declaration of a mistrial may not later complain that the grounds for declaring the mistrial were false or inadequate. *People* v. *Bowman,* 502.

117. Denial of defendant's motion for a mistrial, made in chambers at a conference he had requested, did not operate as a discharge of his waiver of a claim of double jeopardy where a few minutes later the trial court, after further in-chambers conference with the prosecutor and defense counsel, granted the mistrial without any objection by counsel or any indication that defendant wished to withdraw his motion for mistrial. *People* v. *Bowman,* 503.

118. A declaration of a mistrial leaves the parties in the same status as if no trial had ever begun; court rulings at the first trial may not in any way affect the rulings in a second trial. *People* v. *Bowman,* 503.

119. A defendant's right to be present at his trial extends to all conferences or occurrences at the trial wherein or whereby his substantial rights may be affected, but this right may be waived by the defendant. *People* v. *Bowman,* 503.

120. Defendant, by remaining seated in the courtroom while counsel conferred with the trial judge, and on one occasion also with a juror, in off-the-record conferences which occurred at the bench only a few feet away from defendant voluntarily waived his right to be present during these conferences. *People* v. *Bowman,* 503.

121. A conference between court, counsel, and a juror, which clearly concerned a matter of defendant's substantive right to an impartial jury trial, and which was held in defendant's absence, did not violate defendant's right to be present where his attorney was present and had an opportunity to object but did not; therefore, defendant's absence at this conference must be attributed to the exercise of his own will. *People* v. *Bowman,* 503.

122. Evidence exhibited to the jury in a criminal case but not offered or introduced is to all intents and purposes considered as evidence. *People* v. *James,* 551.

123. Prosecutor's questioning, for impeachment purposes, one of the defendants' alibi witnesses concerning an arrest without showing that the arrest resulted in conviction constituted reversible error where the issue of guilt or innocence turned on the jury's appraisal of the competing testimony of the prosecution's eyewitnesses and the defense's two alibi witnesses. *People* v. *James,* 551.

124. Plea of guilty was improperly accepted where the defendant's testimony at the plea-taking proceeding was highly equivocal and indicated innocence and defendant denied any plan to

CRIMINAL LAW—Continued

commit a crime or that he received any of the money taken from the victim of the charged robbery. *People* v. *William Thomas*, 589.

125. Evidence that defendant, charged with assaulting teenage boys standing near his property, discharged a shotgun while boys were on his property one year prior to the assault defendant was being tried for was inadmissible whether or not a cautionary instruction was given limiting the evidence's use to the establishment of motive or intent. *People* v. *Insley*, 594.

126. Denial of a criminal defendant's motion to dismiss for failure to prove venue on the ground that the motion was not timely filed was error where the motion was filed seven days before trial began. *People* v. *Sutton*, 604.

127. The trial court erred in denying a criminal defendant's motion to dismiss for failure to prove venue where an examination of the preliminary examination transcript reveals that venue was not established and the people admitted they did not establish venue at the preliminary examination. *People* v. *Sutton*, 604.

128. Admission of police officer's testimony, elicited by the prosecution, that defendant, while in custody, had not made a statement concerning the armed robbery for which he was arrested did not constitute reversible error and was, at most, harmless error where the evidence of defendant's guilt was overwhelming. *People* v. *Wilkie*, 607.

129. A trial judge, in order to ascertain the truth of a defendant's plea of guilty, may take notice not only of the plea-hearing record but of other elements of the record including facts revealed at a mistrial involving the defendant over which the judge presided. *People* v. *Butler*, 615.

130. Defendant's plea of guilty of assault with intent to do great bodily harm less than murder was properly accepted, even though the plea-taking record did not reveal that defendant had just committed a robbery in the complainant's store before defendant and complainant exchanged shots, where the trial judge had previously presided over a trial, which resulted in a mistrial, concerning the armed robbery count against defendant and there had been testimony regarding the armed robbery during the trial. *People* v. *Butler*, 615.

131. The validity of a guilty plea is not vitiated by defense counsel's failure to advise defendant as to two of many complex factors which must be analyzed in determining whether to tender a guilty plea. *People* v. *Butler*, 615.

132. Defendant's plea of guilty of assault with intent to commit great bodily harm less than murder was freely, understandingly, and voluntarily made even though defense counsel failed to advise defendant concerning a possible jeopardy bar to a further prosecution for armed robbery, for which the original prosecution had ended in a mistrial and where the assault to which defendant was pleading guilty had occurred during the armed robbery and even though counsel failed to advise

CRIMINAL LAW—Continued

the defendant of the difficulties which the prosecution might encounter when attempting to introduce into evidence a gun which had been used in the robbery and allegedly was the assault weapon. *People* v. *Butler*, 615.

133. Defendant's sentence of nine to ten years for assault with intent to commit great bodily harm less than murder, being within a statutory maximum, was not altered on appeal even though the trial judge declared, at the sentencing, that defendant, who was represented by counsel, was guilty of armed robbery and possibly of two other assaults, where the defendant had only been charged with, not convicted of, armed robbery and assault. *People* v. *Butler*, 616.

134. The trial court has the inherent right to order that a defendant submit to a psychiatric examination and such an examination does not *per se* violate the defendant's constitutional right against self-incrimination. *People* v. *Fredericks*, 632.

135. Defendant's privilege against self-incrimination was not violated where the trial court, having ordered the defendant to submit to a psychiatric examination, permitted the psychiatrist to testify concerning the defendant's sanity. *People* v. *Fredericks*, 632.

136. Permitting three witnesses to testify that on three occasions the defendant had nothing or nothing further to say after being warned of his constitutional rights did not constitute reversible error where the defendant testified freely concerning his participation and his version of the crime charged. *People* v. *Fredericks*, 633.

137. The prosecution need not disprove statutory exceptions to the crime of carrying a concealed weapon without a license unless those exceptions have been advanced by the defendant (MCLA § 776.20). *People* v. *Carey*, 640.

138. The prosecution's failure to prove venue affirmatively in a criminal case does not constitute reversible error in the absence of a timely objection by the defendant (MCLA § 767.45). *People* v. *Carey*, 640.

139. Acceptance by the trial court of defendant's plea of guilty of uttering and publishing a forged check was reversibly erroneous where the court's only inquiry was limited to asking the defendant whether he in fact did utter and publish a check payable to the order of another on a certan date, because the inquiry did not establish a substantial factual basis for the plea nor establish the specific intent necessary for a conviction of uttering and publishing (GCR 1963, 785.3[2]). *People* v. *Stewman*, 643.

140. The failure of a trial court to comply with the court rule requiring the establishment of a substantial factual basis for a plea of guilty and the determination that the plea is true before accepting a plea of guilty constitutes reversible error (GCR 1963, 785.3[2]). *People* v. *Stewman*, 643.

141. Excusing the production by the prosecution of an indorsed witness is within the discretion of the trial court upon a showing of diligence. *People* v. *Claugherty*, 648.

CRIMINAL LAW—Continued

142. A showing that the prosecution issued an appearance subpoena in an effort to produce an indorsed witness for trial but that the witness was on vacation for two weeks was a sufficient showing of due diligence to allow the trial judge to excuse the production of the witness. *People* v. *Claugherty*, 648.

143. Testimony by the complaining witness, a state licensing investigator, upon redirect examination by the prosecution, that he had initiated his investigation of the defendant because of complaints which he did not receive personally was properly admitted into evidence where that testimony was offered to clarify the investigation procedure used and defense counsel in his cross-examination of the witness had asked a directly-related question. *People* v. *Claugherty*, 648.

144. A conviction will not be reversed where the defendant has permitted error which is curable by a cautionary instruction to go to the jury without raising an objection to that error. *People* v. *Claugherty*, 648.

145. The requirement that there be a factual basis for a plea of guilty does not rest solely on the plea-taking transcript where the preliminary examination record supports the plea (GCR 1963, 785.3[2]). *People* v. *Benedict*, 653.

146. Trial judge did not violate the State Judicial Canons of Ethics by accepting the defendant's plea of guilty to breaking and entering a building of a wildlife conservation club with intent to commit a felony even though the trial judge was a member of the organization, where the defendant was informed of the judge's membership before the plea was accepted, the defendant stated that the disclosure had no effect on his desire to plead guilty, and the judge's membership did not in itself establish that the judge's personal interests were involved. *People* v. *Benedict*, 653.

147. An appellate court will not review assignments of error where no objection is entered at trial unless manifest injustice is shown. *People* v. *Shelmire*, 658.

148. The trial judge did not coerce the jury, sitting in a murder case, into returning a verdict where the jury returned after only three hours of deliberation to announce a deadlock, the trial judge noted that he did not think the jury had deliberated for a sufficient period of time to determine that a deadlock had been reached in a case that took four days to try, and asked the jury members to reconsider their positions to see if it would be possible for them to reach a verdict, but did not demand or ask for a verdict. *People* v. *Shelmire*, 658.

149. Admission of an in-court identification of defendant based upon a lineup at which the defendant allegedly was not represented by counsel was, even assuming the truth of the allegation, harmless error where other testimony of witnesses positively identified defendant as being present at the scene of the crime charged. *People* v. *Fly*, 661.

150. Permitting the prosecutor to reopen his case and to introduce the testimony of three additional witnesses, who might have

CRIMINAL LAW—Continued

been *res gestae* witnesses, was not error where the trial judge specified that defendant's attorney would have the first opportunity to examine the witnesses, no significant testimony was elicited from these witnesses, the defendant was aware of the witnesses' existence and at no time objected to the prosecution's failure to indorse them on the information. *People* v. *Fly*, 661.

151. Plea of guilty of breaking and entering an unoccupied dwelling house was properly accepted even though defendant contended on appeal that he pled guilty of breaking and entering an occupied dwelling house where defendant was aware of the crime charged (GCR 1963, 785.3[2]). *People* v. *Horace*, 666.

152. A trial judge need not explain to a defendant what constitutes an occupied or unoccupied dwelling place before accepting the defendant's plea of guilty to the charge of breaking and entering an unoccupied dwelling. *People* v. *Horace*, 666.

153. A defendant was entitled to withdraw his plea of guilty of second-degree murder where the motion to withdraw the plea was made before sentencing, defense counsel, when making the motion, submitted statements from two psychiatrists which cast grave doubt on the defendant's sanity at the time of the offense and on his competency to plead, and the motion to withdraw the plea was made as soon as possible. *People* v. *Henley*, 672.

154. An appellate court, as a general rule, will not consider allegations of improper admission of identification testimony at trial unless objections to that testimony were made in the trial court. *People* v. *Council*, 682.

155. Prosecutor's persistently questioning a defendant about whether he had been convicted of automobile theft, after defendant had repeatedly denied it, and the prosecutor's asking the defendant if he would still deny the theft if the defendant's FBI record showed the conviction, thus implying not only that defendant had an FBI record, but also that defendant was lying about having committed the automobile theft, resulted in reversible error even though defendant did not object to the prosecutor's tactics because such tactics by a prosecutor result in manifest injustice. *People* v. *Council*, 682.

156. A *prima facie* case that defendant had committed the crime of knowingly keeping, maintaining, and suffering a gambling establishment was established where the evidence presented showed that the defendant owned the premises in question, that the defendant was present when the gambling took place, and that a cut was taken from the pot during each hand "for the house" (MCLA § 750.303). *People* v. *Bernstein*, 687.

157. The granting or denying of a defendant's request to see the presentence report is discretionary with the trial court. *People* v. *Bernstein*, 687.

158. The failure of the trial court to furnish the defendant with the presentence report at the time of sentencing or prior to

CRIMINAL LAW—Continued

sentencing was not error where neither the defendant nor his counsel requested the report. *People* v. *Bernstein,* 687.

159. A motion in a criminal proceeding for the appointment of a commission to examine material witnesses who are residing out-of-state is addressed to the discretion of the trial court (MCLA §§ 767.7, 767.8). *People* v. *Howard Hayes,* 690.

160. Denial of defendant's motion for a commission to examine nonresident witnesses was not an abuse of discretion where the motion was made only four weeks before trial and over three months after the case had been set for trial and there was nothing in the record to excuse the delay, and where there was no showing that the nonresident witnesses could not be present at trial (MCLA §§ 767.7, 767.8). *People* v. *Howard Hayes,* 690.

161. A mere assertion that an out-of-state material witness cannot be present at trial is insufficient to warrant the granting of a defendant's motion to have a commission appointed to examine that witness, absent any factual elaboration showing that the witness cannot be present (MCLA §§ 767.7, 767.8). *People* v. *Howard Hayes,* 690.

162. The trial judge improperly denied defendant's motion to withdraw his plea of guilty where defendant alleged that the prosecutor would not accept any pleas of guilty from the defendant and his two alleged accomplices unless all pled guilty and that the other men threatened to testify against the defendant if he did not plead guilty, the defendant, on his motion to withdraw the plea, said that he had not signaled his attorney, when the jury was being impaneled, that he wished to plead guilty, the court concluded that the defendant had signaled his attorney that he wished to plead guilty, and the court based its decision to deny the motion on the defendant's lie about the signal; because the defendant's other allegations were not necessarily untrue, an inquiry into the other allegations must be held. *People* v. *Boone,* 697.

163. The requirement that there be a substantial factual basis for the proper acceptance of a plea of guilty is satisfied when it appears on the record that, upon trial, the defendant might well have been convicted (MCLA § 768.35; GCR 1963, 785.3 [2]). *People* v. *Milton,* 702.

164. The trial court's task in evaluating a tendered plea of guilty is not to weigh the evidence, but to determine that the plea is truthful, and that it is freely, understandingly, and voluntarily made (MCLA § 768.35; GCR 1963, 785.3[2]). *People* v. *Milton,* 702.

165. The value of articles removed from a motor vehicle is an element of the crime of unlawfully removing property of the value of not less than $5 from a motor vehicle and the failure to prove the value of the goods requires that a defendant's properly-made motion for a directed verdict of not guilty at the close of the people's case be granted (MCLA § 750.356a). *People* v. *Haynes,* 705.

CRIMINAL LAW—Continued

166. A police officer-witness's walking into the jury room with exhibits while the jury was deliberating did not necessitate the granting of a mistrial where the evidentiary hearing held on this incident did not establish that anything prejudicial to the defendants' rights occurred. *People* v. *Moran*, 730.

See
ARREST (1, 2)
ASSAULT (2)
ASSAULT AND BATTERY (1)
AUTOMOBILES (3)
BURGLARY (1–4)
CONSTITUTIONAL LAW (2–8)
EVIDENCE (1–3)
HABEAS CORPUS (1, 2)
HOMICIDE (1, 6–24)
HUSBAND AND WIFE (1)
INDICTMENT AND INFORMATION (1)
LARCENY (1)
NEW TRIAL (1, 2)
POISONS (1)
ROBBERY (1–3)
SEARCHES AND SEIZURES (1)
TRIAL (1)
WITNESSES (11–16)

CROSS-EXAMINATION—See
CRIMINAL LAW (22, 114)

CRUELTY—See
DIVORCE (7, 8)

CURABLE ERRORS—See
CRIMINAL LAW (144)

CURATIVE INSTRUCTIONS—See
CRIMINAL LAW (72, 73)

CUSTODIAL INTERROGATION—See
CRIMINAL LAW (128)

DAMAGES

1. An award of damages was improper as based on speculative evidence where the plaintiff buyer had sought damages due to a breach of a covenant not to compete, contained in the contract of sale of defendants' restaurant business, the evidence of damages consisted of the testimony of the plaintiff himself regarding the amount of profits lost due to the defendants' violation of the covenant and mainly showed only that the plaintiff did not take in as much money in six months as the defendants had taken in during the last six months of their operation of the business, other evidence showed that the plaintiff had lost some customers to the defendants, that two other restaurants had recently come into competition with the plain-

DAMAGES—Continued

tiff, and that plaintiff had been closing his resturant two and one-half hours earlier in the day than had the defendants when they operated the business. *Brillhart* v. *Danneffel*, 359.

See
LICENSES (3)

DANGEROUS WEAPONS—See
HOMICIDE (4)

DANGER TO LIFE—See
UNEMPLOYMENT COMPENSATION (6, 7)

DEADLY WEAPON—See
HOMICIDE (13)

DEATH OF ADMINISTRATOR—See
ATTORNEY AND CLIENT (3)
EXECUTORS AND ADMINISTRATORS (1)

DEATH OF CLIENT—See
ATTORNEY AND CLIENT (2)

DEFAULT JUDGMENT—See
JUDGMENT (1, 2)

DEFECTIVE SERVICE—See
APPEARANCE (1, 2)
PROCESS (1)

DEFECTIVE SIDEWALKS—See
NEGLIGENCE (1–7)

DEFECTS—See
INDICTMENT AND INFORMATION (1)

DEFENDANT'S CONSENT—See
CRIMINAL LAW (116)

DEFENDANT'S GUILT—See
CRIMINAL LAW (3)

DEFENDANT'S PRESENCE—See
CRIMINAL LAW (119–121)

DEFENDANT TESTIFYING—See
CRIMINAL LAW (7, 30, 65, 78–81, 84, 85, 107, 136, 155)

DEFENSES—See
CRIMINAL LAW (16, 17, 20, 21, 35, 41, 101, 134)
HOMICIDE (19–24)

DEFENSE WITNESSES—See
CRIMINAL LAW (5, 10, 23, 24)

DEFERRED SENTENCE—See
CRIMINAL LAW (38, 39)

DEFINITIONS—See
AUTOMOBILES (20)
INSURANCE (1)
WORDS AND PHRASES (1)

DELAY IN TRIAL—See
CONSTITUTIONAL LAW (3)
CRIMINAL LAW (96)

DELEGATION—See
ZONING (1)

DELIBERATION—See
HOMICIDE (6, 7, 11, 12)

DEMAND—See
CONSTITUTIONAL LAW (2, 6–8)

DENIAL OF PERMIT—See
ZONING (4, 7)

DEPOSITIONS—See
CRIMINAL LAW (159–161)

DEPOSITORY—See
BURGLARY (2)

DESCRIPTION OF DEFECT—See
NEGLIGENCE (2)

DETERMINATION OF ADMISSIBILITY—See
EVIDENCE (2)

DIFFERENCE IN VALUE—See
ZONING (5)

DIRECTED VERDICT—See
CRIMINAL LAW (165)
HOMICIDE (25)

DISCHARGE—See
HABEAS CORPUS (1)

DISCOVERY

1. An action should not be dismissed because a party's response to an interrogatory failed to comply with a court order compelling an answer to the interrogatory where it has been established that the party's failure to comply was due to inability, and not to wilfulness, bad faith, or any fault on his part (GCR 1963, 313.2[2][c]). *Martin* v. *Hess Cartage Co.*, 243.
2. Court order compelling plaintiff to comply with defendant's request that plaintiff furnish a detailed and accurate report,

DISCOVERY—Continued

stated in dollars, concerning the physical damage done to plaintiff's vehicle, was unclear as to whether a report submitted by the plaintiff could constitute compliance with the order or whether nothing other than a report prepared by an independent, disinterested person, such as a garage or repair shop, could constitute compliance. *Martin* v. *Hess Cartage Co.*, 243.

3. Dismissal of complaint with prejudice on the ground that plaintiff had failed to comply with a court order that plaintiff supply defendant with a detailed and accurate report, stated in dollars, concerning the physical damage done to plaintiff's vehicle was error where plaintiff furnished defendant with his own affidavit detailing damages, the dismissal was based on the ground that only a garage repair bill or a garage report would have constituted compliance, and the trial court's construction of its order had never been communicated to plaintiff or his lawyer. *Martin* v. *Hess Cartage Co.*, 243.

DISCRETION—See

CRIMINAL LAW (8–10, 23, 24, 26, 44, 80, 81, 141, 153, 159–162)
DIVORCE (3)
HOMICIDE (18)
NEW TRIAL (1)
PLEADING (1, 2)
WITNESSES (10, 13–15)

DISMISSAL—See

DISCOVERY (1, 3)

DISMISSAL OF COUNSEL—See

CRIMINAL LAW (91)

DISQUALIFICATION—See

JUDGES (1)
WORKMEN'S COMPENSATION (2)

DIVISIBLE DIVORCE—See

DIVORCE (4)

DIVORCE

1. A court cannot amend or modify a judgment of divorce to reduce or eliminate the payment of alimony in gross provided by the original judgment except on a showing of fraud. *Schmidt* v. *Schmidt*, 185.
2. A Nevada decree of absolute divorce, which was rendered during the pendency of Michigan proceedings and which involved the same parties, subject matter, and proposed relief, was void because the Michigan court, which first obtained jurisdiction, had the exclusive right to decide the matter. *Owen* v. *Owen*, 203.
3. Amended judgment for separate maintenance requiring the husband to pay the wife defendant $60 per week and to pay

DIVORCE—Continued

for all reasonable necessary medical requirements of the wife was not an abuse of discretion where the husband had previously been ordered to pay $40 per week, to make payments of $146 per month on the mortgage on the house that the wife was occupying, and to pay premiums for the wife's hospital and medical insurance, the husband had failed to pay anything, and, because of the husband's failure to pay anything, the wife was left homeless when the mortgage was foreclosed. *Owen* v. *Owen*, 203.

4. *A Nevada judgment granting the husband an absolute divorce was entitled to full faith and credit to the extent that it affected the marital status of the parties where a Michigan court, before the Nevada suit had been filed, had granted separate maintenance to the wife; the Nevada judgment was not void in its entirety. Owen* v. *Owen*, 203.
5. An alimony award may be modified upon a showing of changed circumstances; however, a mere assertion, unsupported by an affirmative showing of changed circumstances, is not sufficient. *Jaikins* v. *Jaikins*, 664.
6. Denial of plaintiff's motion to terminate alimony was not error where plaintiff did not attempt to offer any proof that there had been a change in circumstances warranting such termination. *Jaikins* v. *Jaikins*, 664.
7. Addressing one's spouse with opprobrious epithets is sufficient to constitute extreme cruelty in a divorce action. *Hutchins* v. *Hutchins*, 675.
8. Making frequent unfounded accusations of a spouse's misconduct, in and out of the spouse's presence, which tended to degrade and humiliate the spouse and which, if believed by others, would cause the loss of friends and respect, constitutes extreme cruelty and warrants a judgment of divorce. *Hutchins* v. *Hutchins*, 675.
9. No rigid rules or mathematical formulas exist for dividing property in a divorce action; each case depends on the circumstances, including equitable factors such as the source of the property, contribution toward its acquisition, the years of married life, earning ability, and the cause of the divorce. *Hutchins* v. *Hutchins*, 675.
10. An appellate court will not reverse or modify a trial court's property award in a divorce action unless the reviewing court is convinced that a different result would have been reached had the appellate court occupied the position of the trial court. *Hutchins* v. *Hutchins*, 675.

DOUBLE JEOPARDY—See
CRIMINAL LAW (117)

DRIVER'S LICENSE—See
ARREST (2)

DRIVING AWAY AUTOMOBILE OF ANOTHER—See
AUTOMOBILES (3)

DUE DILIGENCE—See
CRIMINAL LAW (141, 142)

DUE PROCESS—See
HIGHWAYS (1, 2)
LICENSES (2, 3)
ZONING (6)

DWELLING HOUSE—See
BURGLARY (3)

ECONOMIC REALITY—See
MASTER AND SERVANT (4)

ELECTRONIC EQUIPMENT—See
CRIMINAL LAW (11)

ELEMENTS OF CRIME—See
ASSAULT (1)
AUTOMOBILES (3)
CRIMINAL LAW (165)
HOMICIDE (16)
LARCENY (1)
RAPE (3)
ROBBERY (4)

ELIGIBILITY FOR BENEFITS—See
UNEMPLOYMENT COMPENSATION (4, 5, 7)

EMINENT DOMAIN
1. No statute exists requiring a probate judge, sitting in a condemnation case, to give notice to the defendant that a commissioner has been appointed to replace a commissioner originally appointed but unable to serve (MCLA § 464.25). *In re Lakehead Pipe Line Co., Inc.*, 545.
2. A condemnation petition's misdescribing the lands sought to be taken by including certain land not owned by the defendants did not constitute a jurisdictional defect where the description permitted the premises to be identified (MCLA § 464.18). *In re Lakehead Pipe Line Co., Inc.*, 545.

EMPHASIS—See
CRIMINAL LAW (115)

EMPLOYMENT CONTRACTS—See
CONTRACTS (1, 2)

EQUAL PROTECTION—See
AUTOMOBILES (6, 7)
CONSTITUTIONAL LAW (1)
STATUTES (4)

ERRONEOUS INSTRUCTION—See
TRIAL (1)

ESTATES OF DECEDENTS—See
APPEARANCE (2)
ATTORNEY AND CLIENT (1, 3)
EXECUTORS AND ADMINISTRATORS (1)
LIMITATION OF ACTIONS (1)
PROCESS (1)

EVIDENCE

1. Identification of a defendant by his voice alone requires that the identification testimony be reasonably positive and certain and that there be some reason to which the witness can attribute his ability to make the voice identification, such as familiarity with the peculiarity of the voice identified. *People* v. *Bozzi*, 15.
2. Instruction to the jury that testimony had been received conditionally and could be considered by them only if they first determined that it was not obtained by an illegal search and seizure is reversible error. *People* v. *Moore*, 87.
3. Photographs are not inadmissible into evidence simply because they might prejudice the jury; the test of their admissibility is whether the probative value of such otherwise admissible photographs outweighs their probable prejudicial effect. *People* v. *Falkner*, 101.
4. Testimony which is not offered to prove the truth or falsity of a witness's testimony but to contradict it is not hearsay as that term is used in the law of evidence. *People* v. *Rodgers*, 211.
5. The contents of a memorandum containing a verbatim transcription of a witness's prior inconsistent out-of-court statement to the police are admissible to impeach the witness where a proper foundation is laid. *People* v. *Rodgers*, 211.
6. *A witness's out-of-court inconsistent statement offered to impeach his credibility is not regarded as hearsay because it is not offered as substantive evidence to prove the truth of the statement attributed but rather to discredit the witness's at-trial testimony.* *People* v. *Rodgers*, 212.
7. *The fact that a prior inconsistent statement was made must be proved before the statement is admissible in evidence.* *People* v. *Rodgers*, 213.
8. *An unsigned written memorandum made by the hearer of a witness's prior inconsistent out-of-court statement is hearsay, regardless of whether the statement recorded in it is offered as substantive evidence or for the purpose of impeaching a witness's at-trial testimony, because the writing is an out-of-court statement by its writer that the other person said what is contained in the writing.* *People* v. *Rodgers*, 213.
9. *A witness who does not have a present recollection of facts about which he is to testify may refer to a written memorandum to refresh his recollection, and when he speaks from a memory thus revived his testimony is what he says, not the writing; therefore a party who uses a memorandum to refresh the memory of a witness may not introduce the writing*

EVIDENCE—Continued

in evidence or have it read to the jury. People v. *Rodgers,* 213.

10. *A writing may be introduced in evidence under the past recollection recorded exception to the hearsay rule only where the witness has no present recollection of the facts and, upon reference to the document, his memory is not refreshed; it is the writing, not refreshed recollection, that is the evidence. People* v. *Rodgers,* 213.

11. *It was error to permit a police officer to read a written memorandum of a witness's prior inconsistent statement, without regard to whether the statement was offered to impeach the witness's credibility, where the memorandum was unsigned by the witness and was taken only three days before the officer testified, and where the officer was neither asked if he had any present recollection of what the witness had said nor if his recollection could be refreshed by reference to the writing. People* v. *Rodgers,* 213.

12. *Permitting a police officer to read into evidence his written memorandum of a witness's prior inconsistent statement was not harmless error where there was a close factual question on the identity of the defendant as one of those who beat and robbed the complaining witness for the jury to decide, the defense was alibi, and where the reading of the memorandum tended to discredit not only the witness being impeached by the statement, but all of the defendant's alibi witnesses. People* v. *Rodgers,* 213.

13. The proper test for the admissibility of evidence is whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness. *People* v. *Bailey,* 272.

14. The jury performs the function of assigning persuasive values to relevant evidentiary matters and the judicial duty of excluding evidence from this jury function should be exercised with great caution. *People* v. *Bailey,* 273.

15. The fact that a person has been arrested is legally without probative value. *People* v. *James,* 551.

See

ARREST (1)
ASSAULT (2)
BURGLARY (1)
CRIMINAL LAW (10, 14, 15, 18, 19, 34, 54, 63, 64, 66, 67, 69–71, 82, 83, 86, 102, 122, 125, 128, 129, 143, 156)
DAMAGES (1)
DIVORCE (5)
HOMICIDE (1–3, 7–9, 12–15, 17, 18)
HUSBAND AND WIFE (1)
INSURANCE (9)
LABOR RELATIONS (10)
MOTIONS (1)
NEW TRIAL (1)
POISONS (1)
RAPE (1, 2)

EVIDENCE—Continued

ROBBERY (1–4)
SEARCHES AND SEIZURES (1–3)
WITNESSES (3–7)

EVIDENTIARY HEARINGS—See
CRIMINAL LAW (52, 53)
ZONING (3)

EXAMINATION—See
CRIMINAL LAW (159–161)

EXAMINATION BY DEFENDANT—See
CRIMINAL LAW (157, 158)

EXCEPTIONS—See
CRIMINAL LAW (137)

EXCLUSIONARY CLAUSE—See
AUTOMOBILES (18)
INSURANCE (6–8)

EXCLUSION FROM RECOVERY—See
AUTOMOBILES (9-12)

EXCLUSION OF EVIDENCE—See
EVIDENCE (14)

EXCULPATORY STATEMENT—See
CRIMINAL LAW (10)

EXCUSABLE HOMICIDE—See
HOMICIDE (5)

EXECUTORS AND ADMINISTRATORS

1. Plaintiffs' contention that if they were not allowed to serve the attorney for an estate whose administrator had died they would be without legal remedy in that there was no one who could be served with process is without merit because, as provided by statute, plaintiffs simply had to petition the court for the appointment of a successor administrator who, once appointed, could be served with process (MCLA § 702.51). *Wright* v. *Estate of Treichel*, 34.

See
APPEARANCE (2)
ATTORNEY AND CLIENT (3)
LIMITATION OF ACTIONS (1)
PROCESS (1)

EXHAUSTION OF REMEDIES—See
LABOR RELATIONS (1, 2)

EXHIBIT TO JURY—See
CRIMINAL LAW (122)

EXPERT WITNESSES—See
HOMICIDE (18)
WITNESSES (10, 11)

EXPLANATION OF ELEMENTS OF CRIME—See
CRIMINAL LAW (152)

EXTREME CRUELTY—See
DIVORCE (7, 8)

FACTUAL BASIS—See
CRIMINAL LAW (130)

FACTUAL BASIS OF PLEA—See
BURGLARY (4)
CRIMINAL LAW (31–33, 139, 140, 145, 163)

FAILURE TO CALL WITNESS—See
CRIMINAL LAW (20, 21)

FAILURE TO INTRODUCE—See
CRIMINAL LAW (122)

FAILURE TO PRODUCE DRIVER'S LICENSE—See
ARREST (2)

FAILURE TO PROVE VENUE—See
CRIMINAL LAW (138)

FAILURE TO REPLY—See
DISCOVERY (1)

FAILURE TO RULE—See
CRIMINAL LAW (25)

FAIR REPRESENTATION—See
LABOR RELATIONS (2–11)

FEES—See
LICENSES (1)

FELONIOUS ASSAULT—See
ASSAULT (1)
ASSAULT AND BATTERY (1)
CRIMINAL LAW (83)

FINAL ORDERS—See
CIVIL RIGHTS (1, 2)

FINDINGS OF FACT—See
WORKMEN'S COMPENSATION (1)

FIRST-DEGREE MURDER—See
HOMICIDE (1, 5–15, 17)

FOREIGN CLAIMS—See
LIMITATION OF ACTIONS (2, 3)

FOREIGN DIVORCE—See
DIVORCE (4)

FORESEEABILITY—See
NEGLIGENCE (8, 9)

FOUNDATION—See
EVIDENCE (7)
WITNESSES (11)

FREEDOM OF ASSOCIATION—See
CRIMINAL LAW (70)

FROM THE PERSON—See
LARCENY (1)

FULL FAITH AND CREDIT—See
DIVORCE (4)

FUTILE GESTURE—See
MUNICIPAL CORPORATIONS (5)

GAMBLING—See
CRIMINAL LAW (156)

GENERAL INTENT—See
CRIMINAL LAW (41)

GOOD-FAITH REPRESENTATION—See
LABOR RELATIONS (4, 5, 9, 10)

GOVERNMENTAL FUNCTION—See
MUNICIPAL CORPORATIONS (4)

GOVERNMENTAL LIABILITY—See
AUTOMOBILES (1, 2)

GRIEVANCE PROCESS—See
LABOR RELATIONS (5, 8, 10, 11)

HABEAS CORPUS

1. *The privilege of the writ of* habeas corpus *is, at least, the right of a person to be admitted to bail if he is not indicted and to be discharged if not tried within a clearly defined period of time. People* v. *Collins*, 401.

2. *The right to a writ of* habeas corpus *is absolute and cannot be denied where the preconditions of the habeas corpus act have been met; it is therefore incumbent on courts to implement this constitutional right by providing clearly defined, unequivocal procedures for the release of persons held in jail*

HABEAS CORPUS—Continued

for undue periods of time awaiting trial. People v. *Collins,* 401.

See

CONSTITUTIONAL LAW (3)

HARMLESS ERROR—See

CRIMINAL LAW (149)
WITNESSES (16)

HEARSAY—See

CRIMINAL LAW (143)
EVIDENCE (4, 6, 8)
WITNESSES (6)

HIGHWAYS

1. The former notice provision of the general highway statute which required a person injured because of the defective condition of a street or highway in a city or incorporated village to give written notice within 60 days to the city or village where required by law to do so was held by the Michigan Supreme Court to be constitutionally void as to a claimant physically disabled so as to be unable to serve the notice as depriving him of due process of law (CL 1948, § 242.8). *Corona* v. *Lenawee Road Commissioners,* 579.
2. The notice provision of the general highway statute requiring that a person injured by reason of a defective highway under the jurisdiction of a county board of road commissioners give written notice within 60 days to the board of road commissioners is constitutionally void as to the personal representatives of minor decedents killed in an accident claimed to be caused by the county board of road commissioners where the personal representatives were not appointed until after the expiration of the 60-day period because it deprives the personal representatives of due process of law (MCLA § 224.21). *Corona* v. *Lenawee Road Commissioners,* 579.
3. A county road commission and its insurer which were given timely notice of all the necessary facts concerning an intersectional collision in which plaintiffs' decedents were killed, including the assertion that an attempt would be made to hold them liable because a stop sign was covered by a considerable amount of debris, thus obscuring decedents' view, were not prejudiced by the fact that the notice was not given by the personal representatives of the decedents, who were not appointed until after the time given in the statute for service of notice, where the only defect in the notice was that the writer of it did not represent the decedents but only the insurer of the automobile owner and the defendant road commission and its insurer had proper and ample opportunity to investigate all the circumstances surrounding the accident (MCLA § 224.21). *Corona* v. *Lenawee Road Commissioners,* 580.

See

NEGLIGENCE (1–7)

HOMICIDE

1. Admitting color photographs of the corpse of a decedent, who was killed by a shotgun fired at close range, in defendant's trial for first-degree murder was not an abuse of discretion where the photographs clarified and illustrated testimony relating to the victim's appearance and condition immediately after death and where, except for defendant's contention that the photographs were prejudicial, the photographs were otherwise admissible. *People* v. *Falkner*, 101.

2. *The test for admitting possibly inflammatory photographs in a murder trial should not be whether the photographs clarify and illustrate testimony, because all photographs clarify and illustrate; the photographs are admissible only if their probative value outweighs their probable prejudicial effect. People* v. *Falkner*, 103.

3. *Color photographs showing the deceased, killed by shotgun fire at close range, were improperly admitted into defendant's trial for first-degree murder where the photographs were admitted to clarify and illustrate testimony relating to the victim's appearance and condition immediately after death, there was no issue as to the victim's identity, his manner of death, or the defendant's alleged malice, and there was ample testimony detailing the extent of the victim's wounds. People* v. *Falkner*, 103.

4. Malice may be inferred where death results from a dangerous weapon. *People* v. *Garcia*, 141.

5. An intent to kill coupled with an accidental death cannot constitute either first- or second-degree murder. *People* v. *Schafer*, 316.

6. Murder in the first degree is a killing of another which is deliberate and premeditated, but the length of time before the act when the purpose to kill another was deliberately formed and the act premeditated is unimportant; it is enough that the purpose was deliberately formed and preceded and induced the act (MCLA § 750.316). *People* v. *Watkins*, 380.

7. Deliberation and premeditation, elements of the crime of first-degree murder, can be proved by inference from evidence showing the character of the weapon used, the wound inflicted, and the circumstances surrounding the killing (MCLA § 750.316). *People* v. *Watkins*, 380.

8. The appellate court, in determining whether there was sufficient evidence presented at trial to warrant an instruction to the jury on first-degree murder, must take the state's evidence as true and view it in the light most favorable to the state giving the prosecution the benefit of every reasonable inference to be drawn from its evidence (MCLA § 750.316). *People* v. *Watkins*, 380.

9. The evidence produced by the prosecution, viewed in the light most favorable to it, was sufficient to warrant submission to the jury of the issue of first-degree murder where the two witnesses upon whose testimony the case was submitted stated that there was no evidence of animosity between the defendant and the victim, and that after the witnesses had retired

HOMICIDE—Continued

to an adjoining bedroom and while they were engaged in an act of sexual intercourse, the defendant came into the bedroom and told them to get the victim before he killed him, left the bedroom, and then a short time later came back and reported that the victim had been cut, and where the record shows that the defendant had stabbed the victim with a butcher knife (MCLA § 750.316). *People* v. *Watkins*, 380.

10. *First-degree murder is a statutory offense, the common-law offense of murder with the added element that the murder is "willful, deliberate, and premeditated" (MCLA § 750.316). People* v. *Watkins*, 381.

11. *What is done on sudden impulse or hastily is not done deliberately within the meaning of the statute defining first-degree murder (MCLA § 750.316). People* v. *Watkins*, 381.

12. *Evidence that a homicide occurred during an affray whose nature would not permit cool and orderly reflection is insufficient to warrant submission to the jury of the issue of first-degree murder since it would not support a finding that there was deliberation and premeditation (MCLA § 750.316). People* v. *Watkins*, 381.

13. *The use of a deadly weapon in a homicide is not alone sufficient evidence of premeditation to warrant submission to the jury the issue of first-degree murder (MCLA § 750.316). People* v. *Watkins*, 381.

14. *Evidence that a homicide was committed with a deadly weapon is insufficient to establish the element of premeditation necessary to submit to the jury the issue of first-degree murder where there is no evidence of 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 (MCLA § 750.316). People* v. *Watkins*, 381.

15. *The evidence produced by the prosecution, viewed in the light most favorable to it, was insufficient to warrant submission to the jury of the issue of first-degree murder where the two witnesses upon whose testimony the case was submitted stated that there had been no evidence of animosity between the defendant and his victim but that after the witnesses had retired to an adjoining bedroom and while they were engaged in an act of sexual intercourse the defendant came into the bedroom and told them that they had better get the victim before he killed him, left the bedroom, and then seconds later came back and reported that the victim had been cut, nothing in the record would support a finding that the defendant had deliberated and reflected in a cool state of blood upon a decision to kill the victim even though the evidence showed that he stabbed the victim with a butcher knife, and the first statement he made to the witnesses does not evidence an intention both premeditated and deliberated upon, to kill the victim, but*

HOMICIDE—Continued

rather a desire to prevent the killing (MCLA § 750.316). People v. *Watkins,* 382.

16. A supplemental instruction to the jury that a reasonable doubt need only exist as to any one of the elements of homicide in order to allow an acquittal was not erroneous where the principal instruction had precisely and accurately defined the doctrine regarding the existence of a reasonable doubt. *People* v. *Pepper,* 438.

17. Testimony regarding hostile feelings between the decedent and a defendant being tried on a charge of first-degree murder sufficiently supported an instruction to the jury on the lesser included offense of manslaughter (MCLA § 750.321). *People* v. *Pepper,* 438.

18. Admission of the testimony of a police officer concerning the particular propensities of the gun which caused the death of the decedent, used to rebut the defendant's testimony that it had accidentally discharged, was not an abuse of discretion where the officer had been qualified as an expert on guns by evidence showing that he had worked in the area of firearms identification for 17 years whereby he obtained vast knowledge concerning the individual characteristics of such weapons. *People* v. *Pepper,* 439.

19. *Instructions to the jury that self-defense was not present in the homicide case before them had the effect of implying to the jury that the only defense available was self-defense, was misleading and confusing, and was reversibly erroneous where that instruction was inconsistent with the defense of accident for which the defendant submitted proofs and where the court did not instruct the jury that accident was a good and valid defense even though, as an aside in a supplementary instruction, the court mentioned that accident was a possible defense. People* v. *Pepper,* 439.

20. *There are two categories of innocent homicide for which there is no criminal liability: justifiable homicide authorized or commanded by law, and excusable homicide in which death is a result of an accident where the actor was not criminally negligent. People* v. *Pepper,* 439.

21. *An instruction to the jury that if it found that the defendant caused the death of the victim the law presumes that he did so intentionally was erroneous because it was tantamount to a peremptory instruction that the jury had the duty to find that the killing was intentional and had the effect of eliminating altogether the defense of accident for which the defendant had submitted proofs. People* v. *Pepper,* 439.

22. *A criminal intent, coupled with an accidental occurrence, cannot constitute either first or second-degree murder. People* v. *Pepper,* 440.

23. *An instruction to the jury in a homicide case that they must return a verdict of guilty of some degree of felonious homicide if they found that the defendant intended to kill the victim but which failed to charge them regarding the defense of*

HOMICIDE—Continued

accidental shooting was erroneous where the defendant had submitted proofs for his defense of accident. People v. *Pepper*, 441.

24. Failure to instruct the jury on the defense of accident in a homicide case was reversibly erroneous even in the absence of a request by the defendant for that instruction where the question of accident was made pivotal in the case by the defendant's proofs at trial. People v. *Pepper*, 441.

25. Defendant was entitled to a directed verdict of acquittal on a murder charge where the uncontroverted evidence established that defendant was in police custody prior to the commission of the murder by defendant's codefendant. *People* v. *Moran*, 731.

See
CRIMINAL LAW (17, 101)
NEW TRIAL (2)

HUSBAND AND WIFE

1. The ex-husband of a defendant may testify where the parties were divorced prior to trial and the testimony did not relate to any communications between the parties during their marriage. *People* v. *Moran*, 731.

IDENTIFICATION—See
CRIMINAL LAW (36, 52–54, 62, 66–70, 149, 154)
EVIDENCE (1)
RAPE (1, 2)
ROBBERY (3)

ILLEGAL LINEUP—See
CRIMINAL LAW (52, 53)

ILLEGAL POSSESSION—See
POISONS (1)

ILLEGAL SEARCH—See
SEARCHES AND SEIZURES (2)

ILLEGITIMATE CHILDREN—See
PARENT AND CHILD (1, 4)

IMPAIRMENT OF CONTRACT—See
JUDGMENT (4)
STATUTES (9)

IMPEACHMENT—See
CRIMINAL LAW (30, 78–81, 84, 85, 123, 155)
EVIDENCE (4, 5, 7, 8, 11, 12)
WITNESSES (3–9, 12)

IMPLIED CONSENT—See
INSURANCE (13)

IMPROPER ARGUMENT—See
CRIMINAL LAW (111)

IMPROPERLY-ADMITTED EVIDENCE—See
CRIMINAL LAW (34)

INACCURATE RECORDING—See
INDICTMENT AND INFORMATION (4)

INACCURATE TRANSCRIPT—See
CRIMINAL LAW (11)

INCEST—See
RAPE (3, 4)

INCIDENTS TO ARREST—See
SEARCHES AND SEIZURES (2)

INCLUDED OFFENSES—See
CRIMINAL LAW (55, 56)
RAPE (3, 4)

INCORPORATION BY REFERENCE—See
CONTRACTS (8)

INDEMNIFICATION—See
AUTOMOBILES (19)

INDEPENDENT CONTRACTORS—See
MASTER AND SERVANT (1–6)

INDICTMENT AND INFORMATION

1. A plea of not guilty waives any defect in the information. *People* v. *Berry*, 1.

2. The defendant did not suffer any prejudice even though the language in the information returned to the circuit court differed from the language of the original complaint and warrant and from the language of the warrant and complaint as amended at the preliminary examination where all of these documents specifically and clearly apprised the defendant of what he was charged with. *People* v. *Nodine*, 80.

3. A defendant's contention of misjoinder of counts is not preserved for review where he has not made a timely objection to joinder at trial (MCLA § 767.76). *People* v. *Carey*, 640.

4. A trial court's refusal to quash an information because testimony at the preliminary examination was inaccurately recorded by the electronic recording equipment is not error. *People* v. *Moran*, 731.

See
ASSAULT AND BATTERY (1)
CRIMINAL LAW (6)
KIDNAPPING (1)

INDORSED WITNESSES—See
CRIMINAL LAW (6, 141, 142)

INDUSTRIAL SOLVENTS—See
WORKMEN'S COMPENSATION (2)

INEFFECTIVE COUNSEL—See
CRIMINAL LAW (57–59)

INFERENCES—See
CRIMINAL LAW (1, 20, 102)
HOMICIDE (4, 7)

INFLAMMATORY PHOTOGRAPHS—See
HOMICIDE (2, 3)

INNOCENCE—See
CRIMINAL LAW (1, 68, 76)

INNOCENT HOMICIDE—See
HOMICIDE (20)

INNUENDO—See
CRIMINAL LAW (113)

INQUIRY BY COURT—See
CRIMINAL LAW (35)

INSANITY—See
CRIMINAL LAW (134, 153)

INSTRUCTIONS TO JURY—See
CRIMINAL LAW (1, 5, 11, 12, 41, 55, 56, 72, 73, 86, 89, 97–102, 104, 105, 115, 144, 148)
EVIDENCE (2)
HOMICIDE (16, 17, 19, 21, 23, 24)
LARCENY (1)
NEW TRIAL (2)
RAPE (4)
TRIAL (1)
WITNESSES (6)

INSURABLE INTEREST—See
INSURANCE (12)

INSURANCE

1. A decedent who was leaning over the trunk of his friend's disabled automobile when he was struck by an uninsured motorist and who had been in the car shortly before he was struck, was "occupying" an automobile within the meaning of insurance policies which define "occupying" as being "in or upon, entering into or alighting from" an automobile. *Collins* v. *Motorists Mut. Ins. Co.*, 424.
2. An insurance policy which reduces the liability of the insurer under uninsured motorist coverage where the insured has

INSURANCE—Continued

recourse to other insurance does not comply with the statute requiring all policies of automobile liability insurance to provide coverage in the minimum statutory amounts for the protection of persons insured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles (MCLA §§ 257.504, 500.3010). *Collins* v. *Motorists Mut. Ins. Co.*, 424.

3. An insurer cannot limit its liability under the uninsured motorist coverage required by statute through "other insurance" clauses; therefore, an "other insurance" clause must be read out of an automobile liability insurance policy which must be deemed to include the coverage mandated by statute (MCLA §§ 257.504, 500.3010). *Collins* v. *Motorists Mut. Ins. Co.*, 424.

4. *The motor vehicle claims act and the section of the insurance code requiring uninsured motorist protection in automobile insurance policies unless rejected in writing by the insured are* in pari materia, *and when they are read together, it is apparent that the legislative purpose in adding the provision concerning uninsured motorist insurance to the insurance code was to reduce claims against the motor vehicle accident claims fund (MCLA §§ 257.1122, 257.1123, 500.3010). Collins* v. *Motorists Mut. Ins. Co.*, 425.

5. *Automobile insurance carriers cannot eliminate or reduce their liability in situations where the insured person has or can recover under other insurance since this would defeat the objective of encouraging the purchase of uninsured motorists insurance—so that persons who are injured by uninsured motorists will recover part or all of their damages from their own insurance, thereby reducing claims against the motor vehicle accident claims fund—and would therefore be contrary to the intent of the Legislature in enacting the provision concerning uninsured motorist insurance; therefore, an "other insurance" clause is invalid to the extent of the statutorily-required $10,000/$20,000 uninsured motorist insurance protection (MCLA §§ 257.1123, 500.3010, 500.3012). Collins* v. *Motorists Mut. Ins. Co.*, 425.

6. An exclusion in an automobile insurance policy providing that the policy does not apply "to bodily injury to any named insured or bodily injury or property damage caused intentionally by or at the direction of the insured" is clear and unambiguous; such an exclusionary clause does not violate the public policy of the motor vehicle accident claims act and the insurance code, because both statutes are concerned with the protection of the rights and claims of third parties when a vehicle owner becomes liable to those third parties. *Weisberg* v. *Det. Auto. Inter-Ins. Ex.*, 513.

7. Plaintiff automobile owner who was injured while a passenger in his own car while the car was being driven with his permission was not entitled to uninsured motorist cover-

INSURANCE—Continued

age under his insurance policy where the policy expressly provided that uninsured motorist coverage extended only to injuries from an "uninsured automobile" and an "uninsured automobile" was expressly defined as not to include a vehicle owned by the insured. *Weisberg* v. *Det. Auto. Inter-Ins. Ex.*, 513.

8. *All Michigan residents who are injured in this state by an uninsured vehicle, which by statutory definition includes situations where the driver is uninsured, are able to recover from the motor vehicle accident claims fund; to give effect to an automobile insurance policy exclusion which makes a driver of the owner policyholder's automobile uninsured for personal injuries caused the owner policyholder would be to enlarge exposure of the fund and to contradict the legislative purpose that the fund would have no exposure to an insured vehicle (MCLA § 257.1101 et seq.). Weisberg* v. *Det. Auto. Inter-Ins. Ex.*, 515.

9. The fact that there is occupancy in an apartment building is merely supportive of a finding that the building was completed within the meaning of a builder's risk insurance policy covering the construction period; however, occupancy does not conclusively compel a finding of completion. *Amer. & F. Ins.* v. *Allied Plumbing*, 561.

10. A building is ordinarily not completed within the meaning of a builder's risk insurance policy until the building is ready for the use or occupancy for which it was intended; "occupancy" does not occur until the building is put to a practical and substantial use for which it was designed. *Amer. & F. Ins.* v. *Allied Plumbing*, 562.

11. A builder's risk insurance policy covering an apartment building while in the course of construction was still in effect even though a few of the apartments were being occupied where there was not such substantial occupany as to amount to completion, because a building is not completed until it is put to the practical and substantial use for which it was designed. *Amer. & F. Ins.* v. *Allied Plumbing*, 562.

12. A contractor of a building under construction has an insurable interest in the building. *Amer. & F. Ins.* v. *Allied Plumbing*, 562.

13. A policy of insurance can be cancelled at any time before loss by agreement of the parties and such cancellation may be by the consent of the parties and may be either express or implied from the circumstances. *Amer. & F. Ins.* v. *Allied Plumbing*, 562.

14. A permanent policy of insurance covering an apartment building complex replaced a builder's risk policy as to one of the apartment buildings where the man who handled all the negotiations for the insurance policies for the apartment builders, the general contractor, and the subcontractor testified that it was his intention that the coverages of the builder's risk and the permanent policies not overlap,

INSURANCE—Continued

the builder's risk policy was a monthly reporting policy, the history of the parties' transactions shows that the value of a building was removed from the builder's risk policy at or prior to the addition of the value of that building to the list of buildings covered by the permanent policy, the value of the particular apartment building in question was removed from coverage under the builder's risk policy 20 days before the building was destroyed by fire, and a representative of the apartment complex builders told the responsible insurance broker 5 days before the fire that the building should be added to the permanent policy, even though the building was not completed at the time of the fire. *Amer. & F. Ins.* v. *Allied Plumbing*, 562.

15. An insurer is liable for the interest on a judgment awarded against its insured only to the extent of the interest on the amount of risk the insurer has assumed. *Cosby* v. *Pool*, 571.

See
AUTOMOBILES (18)

INSURANCE CODE—See
AUTOMOBILES (8)

INTEMPERATE LANGUAGE—See
TRIAL (2)

INTENT—See
ASSAULT (2)
AUTOMOBILES (3)
CONTRACTS (1)
CRIMINAL LAW (41, 104, 139)
HOMICIDE (5, 21–23)
KIDNAPPING (1)

INTENTIONALLY-CAUSED INJURY—See
INSURANCE (6)

INTENTIONAL MISCONDUCT—See
WORKMEN'S COMPENSATION (2)

INTEREST—See
JUDGMENT (3, 4)

INTEREST IN PROPERTY—See
CONVERSION (2)

INTEREST OF JUDGE—See
CRIMINAL LAW (146)

INTEREST ON JUDGMENT—See
INSURANCE (15)

INTERROGATORIES—See
DISCOVERY (1–3)

INTERVENING CAUSES—See
NEGLIGENCE (9)

INTIMIDATION—See
CRIMINAL LAW (18, 19)

INTOXICATION—See
CRIMINAL LAW (41)

INVITED ERROR—See
CRIMINAL LAW (4)

IRRELEVANT ISSUES—See
CRIMINAL LAW (92, 113)

ISSUE OF FACT—See
MASTER AND SERVANT (2, 6)

JEOPARDY BAR—See
CRIMINAL LAW (132)

JOINDER—See
INDICTMENT AND INFORMATION (3)

JOINT TRIAL—See
CRIMINAL LAW (8, 9)

JUDGES

1. A judge may be disqualified only for prejudice or bias actually shown. *People* v. *Moran*, 731.
2. A decrease in a judicial salary paid by the state is prohibited during a judicial term. *Weideman* v. *Wayne County*, 694.
3. A county supplement which was part of a judicial salary during any judicial term cannot be reduced. *Weideman* v. *Wayne County*, 694.
4. County's reducing the supplement it had been paying to judges was constitutionally impermissible even though the reduction was made simultaneously with an increase in the state judicial salary and the net salaries of the judges were actually increased. *Weideman* v. *Wayne County*, 694.

See
CRIMINAL LAW (146)

JUDGE'S COMMENTS—See
CRIMINAL LAW (89)

JUDGMENT

1. The four-month limitation governing a motion to set aside a default judgment must be met even though the attorney of the party against whom the default was entered was inexcusably remiss in handling the case (GCR 1963, 520.4). *Lawrence* v. *Cook*, 156.
2. Requirement that seven days notice be given a party who has appeared in an action before a default judgment can be

JUDGMENT—Continued

entered against that party is mandatory; a default judgment was set aside where the judgment was entered three days after the date set for trial of the matter and the hearing held thereon, even though the application to set the default aside was not made until over five months after the default was entered (GCR 1963, 520.2[2], 520.4). *Lawrence* v. *Cook*, 156.

3. The amendatory statute which made the date of the filing of the complaint the date from which interest awardable on a judgment is to be computed is one relating to remedies or modes of procedure (MCLA § 600.6013). *Cosby* v. *Pool*, 571.
4. The 1965 amendatory statute making the date of the filing of the complaint the date from which interest awardable on a judgment is to be computed, being remedial or procedural in nature, becomes part of an insurance contract where the contract provides that the insurer would pay interest accruing on verdict or after judgment up to the date of payment or tender to the judgment creditor, even though the contract was issued in 1963 and complied with the statute then in effect. *Cosby* v. *Pool*, 571.

See

DIVORCE (1)
INSURANCE (15)

JUDICIAL CONSTRUCTION—See

STATUTES (1)

JUDICIAL NOTICE—See

CRIMINAL LAW (129)

JURISDICTION—See

COURTS (1)
DIVORCE (2)
EMINENT DOMAIN (2)
UNEMPLOYMENT COMPENSATION (1–3)

JURY—See

CRIMINAL LAW (90, 148, 166)
EVIDENCE (14)

JURY TRIAL—See

CIVIL RIGHTS (2, 6)
CRIMINAL LAW (37)

JUVENILE RECORD—See

WITNESSES (8, 9)

KIDNAPPING

1. The failure to include in the information in a prosecution for kidnapping an allegation of specific intent, *i.e.*, intent either to cause such person to be secretly confined or imprisoned against his will or held to service against his will, did not cause the

KIDNAPPING—Continued

information to be infirm where the information charged that the defendant had feloniously, wilfully, maliciously, and without lawful authority forcibly confined and imprisoned another against that person's will, because the kidnapping statute makes it a felony to wilfully, maliciously, and without lawful authority confine forcibly *or* secretly confine or imprison another; there was no necessity to charge specific intent, because the defendant was charged with having confined another forcibly or secretly (MCLA § 750.349). *People* v. *Nodine*, 80.

LABOR DISPUTE—See

UNEMPLOYMENT COMPENSATION (4–7)

LABOR RELATIONS

1. An aggrieved union member must, as a general rule, exhaust his intra-union remedies before seeking judicial redress. *Lowe* v. *Hotel & Rest. Employees Union*, 66.
2. An aggrieved union member need not exhaust his intra-union remedies prior to seeking judicial redress where resort to those remedies would be ineffective, if not futile, or where the member alleged facts from which it may be reasonably inferred that the union has breached its duty of fair representation. *Lowe* v. *Hotel & Rest. Employees Union*, 66.
3. The fiduciary duty of a union to fairly represent its members in the administration and enforcement of collective bargaining agreements is correlative to the right of the union to represent all the employees in a bargaining unit as their exclusive agent, despite opposition from a minority. *Lowe* v. *Hotel & Rest. Employees Union*, 66.
4. Part of a union's duty of fair representation is to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Lowe* v. *Hotel & Rest. Employees Union*, 66.
5. The doctrine of fair representation does not confer on a union member the absolute right to press his grievance all the way through the last stage of the grievance procedure as provided in the collective bargaining agreement; the union has the power and right to abandon processing of a grievance which it determines in good faith to be meritless and to settle disputes between the employer and the union member short of arbitration. *Lowe* v. *Hotel & Rest. Employees Union*, 67.
6. Refusal of a union to take an employee member's grievance to arbitration does not *per se* amount to a breach of the union's duty of fair representation. *Lowe* v. *Hotel & Rest. Employees Union*, 67.
7. A union member who claims that his union breached its duty to fairly represent him in his grievance with his employer must show that the union's motivation was improper or hostile; the member must establish that the union's conduct toward him was arbitrary, discriminatory, or in bad faith. *Lowe* v. *Hotel & Rest. Employees Union*, 67.

LABOR RELATIONS—Continued

8. To establish a union's breach of its duty of fair representation in processing a grievance, the complaining union member must demonstrate more than that his grievance, viewed with hindsight, had merit; lack of success in the redress of a grievance cannot be equated with bad faith representation. *Lowe* v. *Hotel & Rest. Employees Union*, 67.
9. The test to determine whether a union has breached its duty of fair representation is not success or failure, nor whether the grievance had merit, but rather whether the union dealt with its member's claim in a bad faith or arbitrary manner. *Lowe* v. *Hotel & Rest. Employees Union*, 67.
10. The union member's evidence, considered in the light most favorable to the member, did not establish a breach of the member's union's duty of fair representation when processing the member's grievance with his employer where the record shows that the member had been involved in an altercation with his supervisor and was discharged, that the member had previously received two warning letters from the supervisor, a thorough investigation was made by the union after which the member was given numerous opportunities to present his version of the incident, and several union hearings and rehearings were held before the union decided not to press the grievance to arbitration, because there was no evidence showing that the decision of the union was made with hostility or dishonestly. *Lowe* v. *Hotel & Rest. Employees Union*, 67.
11. *A question of fact was created as to whether defendant union breached its duty to fairly represent the plaintiff union member in his grievance with his employer where, even though the record shows that the plaintiff was discharged by his employer because of an altercation with the plaintiff's supervisor and that the plaintiff had previously received two disciplinary letters, the record also shows that the plaintiff testified that he had not been in a fight with the supervisor, that he had brought the disciplinary letters to the attention of the union but that nothing had been done even though no cause existed for the letters' issuance, that at the various meetings with the union concerning his dismissal and grievance, he was given no consideration, and that he had been told by his employer that the employer and the union had decided together to discharge him; a jury verdict in plaintiff's favor should not be reversed because there was sufficient evidence to support such a verdict.* *Lowe* v. *Hotel & Rest. Employees Union*, 68.

LANDLORD AND TENANT

1. The condition of being a lessor does not impose liability for torts of the lessee without negligent acts or failures to act by the lessor. *Martin* v. *Fowler*, 725.

LARCENY

1. Instructions to the jury in a prosecution for larceny from the person of another in which the judge read the statute and then the information charging that defendants committed the offense by stealing a purse "from the person of the said com-

LARCENY—Continued

plainant", instructed that to convict the jury must find that the property "was taken from the person of the owner by the defendants with the intent to commit larceny", and then summed up in the next sentence but did not again say that the taking must be "from the person" could not have misled or confused the jury, especially where defendants' lawyer did not object to the instructions and the evidence was uncontroverted that two men had snatched the victim's purse and the only disputed issue was whether the defendants were the thieves (MCLA § 750.357). *People* v. *Evans*, 238.

LAW OF THE CASE—See
CRIMINAL LAW (118)

LEGISLATIVE DISCRETION—See
CONSTITUTIONAL LAW (1)
STATUTES (2, 3, 7)

LEGISLATIVE INTENT—See
STATUTES (8)

LESSER INCLUDED OFFENSES—See
ASSAULT AND BATTERY (1)
CRIMINAL LAW (115)
HOMICIDE (17)
ROBBERY (4)

LESSER OFFENSES—See
CRIMINAL LAW (55, 56)
RAPE (3, 4)

LIABILITY OF LESSOR—See
LANDLORD AND TENANT (1)

LICENSES

1. Payment of a simple license or permit fee is not such consideration as will change a license relationship into a contractual relationship. *Midwest Teen Centers* v. *Roseville*, 627.
2. A license issued by a municipal corporation can be revoked only if the revocation procedure follows due process. *Midwest Teen Centers* v. *Roseville*, 627.
3. A licensee who has his license revoked in violation of procedural due process by the municipal corporation which issued the license cannot maintain a suit for money damages, because a licensee has no property right in his license. *Midwest Teen Centers* v. *Roseville*, 627.

See
CRIMINAL LAW (137)

LICENSE TO CARRY—See
CRIMINAL LAW (28)

LIMITATION OF ACTIONS

1. The statute of limitations is tolled during the time when an estate is without an administrator (MCLA §§ 600.5852, 708-.20). *Wright* v. *Estate of Treichel*, 35.
2. Statutes which borrow the limitational period of the jurisdiction where a claim accrued were enacted to prevent forum-shopping and to avoid the interminable tolling of the statutes of limitations where the defendant is a nonresident of the jurisdiction where the action is brought. *Wilson* v. *Eubanks*, 287.
3. The public policy which engendered the borrowing statutes which adopt a statute of limitations of the jurisdiction where a claim accrued does not apply to a case where the claim accrued in Ontario, a few miles from Detroit, but where both the plaintiffs and defendant were residents of Detroit and the action was commenced in Michigan. *Wilson* v. *Eubanks*, 287.

See
MUNICIPAL CORPORATIONS (1)
PLEADING (3)

LIMITED HAZARD—See
UNEMPLOYMENT COMPENSATION (5)

LINEUP—See
CRIMINAL LAW (46, 47, 50–53)

LOSS OF PROFITS—See
CONTRACTS (5, 7)

LOSS OF STATEMENTS—See
CRIMINAL LAW (63)

MAINTAINING GAMBLING ESTABLISHMENT—See
CRIMINAL LAW (156)

MALICE—See
HOMICIDE (4)

MANIFEST INJUSTICE—See
CRIMINAL LAW (43, 147, 155)
RAPE (4)

MANSLAUGHTER—See
HOMICIDE (17)

MARIJUANA—See
POISONS (1)

MASTER AND SERVANT

1. The right to control determines whether the relationship between an employer and his employee is that of master and servant or employee and independent contractor, and is the test for vicarious tort liability of the employer. *Sliter* v. *Cobb*, 471.

MASTER AND SERVANT—Continued

2. The trial court did not err in determining that plaintiffs had failed to raise any issue of material fact and in granting summary judgment for defendant newspaper publisher on the ground that, as a matter of law, its deliveryman who had been in an automobile collision with plaintiffs was an independent contractor and not a servant where plaintiffs urged the following as making the deliveryman a servant and not an independent contractor: 1.) That the deliveryman could sell and deliver only in a mapped-out area and that when he gave up this particular territory he had to return the map to the publisher, and that he could not carry other newspapers without the written consent of the publisher; 2.) That he had to buy papers at a certain price and sell at a certain price; 3.) That he had to keep an up-to-date subscription list which was to be confidential, that the publisher would inspect it every six to eight weeks, and that it would be returned when he gave up his route, where the agreement between the publisher and the deliveryman provided that he leased the list; 4.) That he was encouraged to get new subscribers; 5.) That occasionally, three or four times during his employment, an employee of the publisher would ride with him to help him if he had trouble, that a rubber band supplied by the publisher and paid for by the deliveryman had to be placed around the newspapers, and that the newspapers had to be put in plastic tubes, furnished by the publisher and placed by the deliveryman for new customers, and removed by him when a subscription was cancelled; 6.) That the deliveryman had to do his accounting and billing on a form furnished by the publisher; 7.) That the deliveryman could cancel a subscription for nonpayment but could not cancel for other reasons without the publisher's permission; 8.) That the publisher required the deliveryman to train a replacement two weeks before he quit; 9.) That the deliveryman could not sell his route to whom he wished; 10.) That the newspaper could cancel the route at any time for good faith reasons, while the deliveryman had to give a notice of cancellation; and 11.) That the deliveryman was required to keep his vehicle in good mechanical condition. *Sliter* v. *Cobb*, 471.

3. A newspaper publisher's action in bringing to its deliveryman's attention that its papers had been delivered late on at least two occasions after it had received complaints from customers was not inconsistent with the deliveryman's status as an independent contractor. *Sliter* v. *Cobb*, 472.

4. The economic reality test adopted by the Michigan Supreme Court in workmen's compensation cases will not be extended to determine tort liability of an employer to an injured third party, in the absence of any declaration by the Supreme Court that the test is applicable to tort cases. *Sliter* v. *Cobb*, 472.

5. *A newspaper publisher is not insulated from liability for the negligent automobile driving of a man delivering its news-*

MASTER AND SERVANT—Continued

papers even though the deliveryman owns the delivery vehicle and purports to act as an independent contractor. Sliter v. *Cobb*, 473.

6. *Whether newspaper deliveryman was a servant of defendant newspaper publisher or an independent contractor was a question of fact for the jury and summary judgment for defendant was improper where the pleadings and depositions showed that the deliveryman obtained his newspaper route in response to an ad for a motor route operator which he saw in the male help-wanted section of defendant's newspaper; that the defendant owned the route and merely leased it to the deliveryman under a lease cancellable by the defendant at any time without notice for "good faith" reason; that the deliveryman, who had no other occupation, agreed not to deliver other publications besides defendant's newspaper; that the defendant paid the deliveryman $28 a week as reimbursement for the cost of operating his own automobile; that when the deliveryman experienced difficulty, which occurred a number of times, an agent of the defendant would ride with him in an effort to iron out the problem; that the delivery procedure was structured so that the deliveryman had little, if any, room for exercising independence in his work performance and hardly any individualized judgment to exercise except in the operation of his automobile; that the deliveryman could not cancel a newspaper customer except for nonpayment, without first consulting with, and receiving permission from, defendant; that the defendant determined not only the pickup and delivery times for the newspapers but also directed the manner in which the newspapers were to be rolled, banded, and deposited in roadside tubes which the defendant supplied; and that the defendant established the billing procedures, credit policies and the manner of bookkeeping. Sliter* v. *Cobb*, 473.

MEMORANDUM—See
EVIDENCE (5, 7–12)
WITNESSES (5)

MENTIONING PENALTY TO JURY—See
CRIMINAL LAW (4)

MINIMUM SENTENCE—See
CRIMINAL LAW (26)

MISCARRIAGE OF JUSTICE—See
CRIMINAL LAW (43, 48, 74)

MISDESCRIPTION OF PROPERTY—See
EMIMENT DOMAIN (2)

MISJOINDER—See
INDICTMENT AND INFORMATION (3)

MISTRIAL—See
CRIMINAL LAW (10, 25, 116–118, 166)

MODIFICATION OF JUDGMENT—See
DIVORCE (1, 5, 6)

MOTHER'S RELEASE—See
PARENT AND CHILD (1)

MOTIONS
1. Taking a motion to suppress evidence under advisement does not constitute a denial of the motion, but leaves the question open for a later decision. *People* v. *Moore*, 87.

See
CRIMINAL LAW (25)
MASTER AND SERVANT (2, 6)
NEW TRIAL (1)

MOTION TO DISMISS—See
CRIMINAL LAW (126, 127)

MOTION TO SUPPRESS—See
MOTIONS (1)
SEARCHES AND SEIZURES (3)

MOTOR VEHICLE ACCIDENT CLAIMS ACT—See
AUTOMOBILES (4–17)

MOTOR VEHICLES—See
AUTOMOBILES (20, 21)
CRIMINAL LAW (165)
SALES (1)

MUNICIPAL CORPORATIONS
1. A section in a home rule city's charter, providing that unless the city has been notified of a claim against it within a specific period after the claim arises, an action on that claim is barred is, as a general rule, valid, except to the extent that the provision contains a period of limitation which has the effect of shortening the statutory period of limitations. *Fulco* v. *Martin Tropf & Sons*, 39.
2. A home rule city charter provision requiring that claims against the city be presented to the governing body as a condition precedent to an action in tort or contract is, as a general rule, valid; the provision gives the governing body the opportunity to investigate the claim and determine whether to allow it, settle it, or prepare a defense. *Fulco* v. *Martin Tropf & Sons*, 40.
3. A presentation of claims provision in a city charter, requiring that claims be presented to the city's governing body as a condition precedent to an action on that claim, will, as a general rule, bar an action unless the claim against the city arose from a function of the city which was proprietary; where the city was acting in a proprietary function the presentment of claims

MUNICIPAL CORPORATIONS—Continued

provision does not apply and suit may be initiated as against a private party. *Fulco* v. *Martin Tropf & Sons*, 40.

4. The City of Detroit was operating in a governmental capacity, not a proprietary capacity, in having hangars constructed for its municipal airport (MCLA § 259.132). *Fulco* v. *Martin Tropf & Sons*, 40.

5. The failure of a contractor, with whom the City of Detroit had contracted to build hangars at its municipal airport, to present its contract claim against the city's common council for audit and allowance prior to institution of an action against the city did not bar suit even though the presentation of claims provision in the city charter was valid where the city, before the suit had been filed, had, by resolution, declared the contractor in default of the contract, because the contractor's presenting his claim would have been a useless gesture (Detroit Charter, Title 6, ch 7, § 11). *Fulco* v. *Martin Tropf & Sons*, 40.

See
HIGHWAYS (1)
NEGLIGENCE (1–7)

MURDER—See
CRIMINAL LAW (17)
HOMICIDE (1–15, 17, 22, 25)
NEW TRIAL (2)

NAMES—See
CRIMINAL LAW (62)

NAMES OF WITNESSES—See
NEGLIGENCE (5)

NARCOTICS—See
POISONS (1)

NATURAL PARENTS—See
PARENT AND CHILD (3)

NATURE OF INJURY—See
NEGLIGENCE (6)

NEGLIGENCE

1. The purpose of the statute requiring that an injured party give notice to the responsible city for an injury sustained due to a defect in a city highway is to provide the governmental agency with an opportunity to investigate the claim while the evidentiary trail is still fresh and to remedy the defect before other persons are injured (MCLA § 691.1404). *Hussey* v. *Muskegon Heights*, 264.

2. Plaintiff's timely notice to the city responsible that she suffered an injury due to a defect in the city's sidewalk in front of 2042 Park Street substantially complied with the statutory

NEGLIGENCE—Continued

notice requirement concerning the nature of the defect, even though the city did not concede that it had no difficulty locating the defect, where the record indicates that the city located the defect without difficulty and there was no suggestion that after the accident another person was injured because of the defect (MCLA § 691.1404). *Hussey* v. *Muskegon Heights*, 264.

3. The notice of injury and defect required to be made as a condition precedent to an action against a city for an injury sustained because of a defect in the city's sidewalk will not be regarded as insufficient because of a failure to comply literally with all the statutory criteria; substantial compliance will suffice (MCLA § 691.1404). *Hussey* v. *Muskegon Heights*, 264.
4. Deficiencies in a notice of injury and defect, required by statute to be given the responsible city for an injury sustained because of the city's defective highway, are not of jurisdictional import and an injured person may not be denied his day in court on that account absent a showing by the governmental agency that it has been prejudiced by the deficiency (MCLA § 691.1404). *Hussey* v. *Muskegon Heights*, 265.
5. Plaintiff's failure to state the names of witnesses to her accident in the statutorily-required notice to the responsible city for an injury sustained due to the city's defective highway does not render the notice defective if the plaintiff was unaware of any witnesses; even a failure to state the names of witnesses of whom the plaintiff was aware would not necessarily cause the notice to be so defective as to require a dismissal of plaintiff's suit against the city (MCLA § 691.1404). *Hussey* v. *Muskegon Heights*, 265.
6. Plaintiff's failure to state the nature of her injuries in her notice of injury and defect to the city which was responsible for the allegedly defective sidewalk which caused plaintiff's injury did not warrant dismissal of plaintiff's suit against the city where the deficiency was not shown to have been prejudicial to the city; the plaintiff's failure to state, as was stated in the complaint, that she had suffered serious ankle and knee injuries probably did not impede the city's investigation or defense. *Hussey* v. *Muskegon Heights*, 265.
7. The failure to serve personally or by certified mail, as required by statute, the notice of claim against a city for an injury sustained due to the city's defective highway is inconsequential where the notice was timely received (MCLA § 691.1404). *Hussey* v. *Muskegon Heights*, 265.
8. Summary judgment for failure to state a claim upon which relief can be granted should not have been granted to defendant owners of an automobile service station in an action in negligence by plaintiffs who were injured in a collision with an automobile which had been stolen from defendants' station where it had been left for repairs where the plaintiffs alleged in their complaint that the thief had taken the car keys from a board which was

NEGLIGENCE—Continued

located where anyone inside the station would have easy access to it, that the automobile was parked in a place easily accessible to a thief, and that the defendants' suspicion should have been aroused by the thief's unusual appearance and activity in that he was seen loitering around the station on the day of the theft and was seen looking at the keys on the keyboard, since plaintiffs' allegations could lead a reasonable man to conclude that the defendants had placed the automobile and keys in places where they might be stolen and that it was foreseeable that a theft and injury would result (GCR 1963, 117.2[1]). *Martin* v. *Fowler*, 725.

9. The causation element of actionable negligence must be considered in light of the totality of circumstances involved in each case, and where the record is silent regarding the time which has elapsed between the act and the injury and regarding the possibility of intervening causes, the granting of a summary judgment on the issue of negligence is inappropriate (GCR 1963, 117). *Martin* v. *Fowler*, 725.

See

AUTOMOBILES (1, 2, 19)
HIGHWAYS (1–3)
LANDLORD AND TENANT (1)

NEWSPAPER DELIVERYMAN—See

MASTER AND SERVANT (5)

NEW TRIAL

1. The issue of the weight of the evidence must first be presented to the trial court by a motion for a new trial; absent a motion for a new trial, the discretionary power of the court has not been invoked and, therefore, there cannot have been an abuse of discretion. *People* v. *Smith*, 180.

2. *Defendant's conviction of second-degree murder should be reversed and he should be entitled to a new trial where he was charged with first-degree murder and the jury was instructed on that charge but returned a verdict of guilty of second-degree murder and where the evidence submitted by the prosecution would not support a finding of deliberation and premeditation, thus making the instruction on first-degree murder unwarranted and the possibility of a compromise verdict nonexcludable (MCLA §§ 570.316, 750.317).* *People* v. *Watkins*, 382.

NICKNAMES—See

CRIMINAL LAW (62)

NONPRODUCTION—See

CRIMINAL LAW (141, 142)

NONPRODUCTION OF WITNESSES—See

CRIMINAL LAW (43)

NONRESIDENT WITNESSES—See
CRIMINAL LAW (159–161)

NONSUPPORT—See
CRIMINAL LAW (49)

NOTICE—See
AUTOMOBILES (21)
CONVERSION (1, 2)
EMINENT DOMAIN (1)
HIGHWAYS (1–3)
MUNICIPAL CORPORATIONS (1–3, 5)
NEGLIGENCE (1–7)

OBJECTION TO INSTRUCTIONS—See
CRIMINAL LAW (11)

OCCUPANCY—See
INSURANCE (9–11)

OCCUPIED DWELLING—See
BURGLARY (3)

"OCCUPYING"—See
INSURANCE (1)

OPENING DOOR—See
CRIMINAL LAW (143)

OPERATION OF AIRPORT—See
MUNICIPAL CORPORATIONS (4)

OPINION—See
WITNESSES (1, 11)

OPPROBRIOUS EPITHETS—See
DIVORCE (7)

ORDINANCES—See
ZONING (1–3, 6, 7)

OTHER CHARGES—See
CRIMINAL LAW (133)

OTHER CRIMES—See
CRIMINAL LAW (71, 82, 83, 92)

OTHER INSURANCE—See
INSURANCE (2, 3, 5)

OWNER LIABILITY—See
AUTOMOBILES (19)

OWNER'S INJURY—See
AUTOMOBILES (18)

PARENT AND CHILD

1. Unmarried mother's release of her illegitimate child for adoption did not terminate the rights of the natural father where the father filed, only ten days after the release had been signed, his acknowledgment of paternity and the father, less than two weeks after he acknowledged paternity and within six weeks from the child's birth, filed an action seeking custody of the child. *In the Matter of Robert P.*, 497.
2. The welfare of the child is of paramount concern in custody cases and the superior rights of a parent are enforced only when they accord with the child's best interests. *In the Matter of Robert P.*, 497.
3. In a custody dispute between a natural parent and a third party, a presumption exists that a child's best interests lie with his natural parent's exercise of custodial rights, absent a showing of the natural parent's unfitness or his neglect or abandonment of the child. *In the Matter of Robert P.*, 498.
4. Granting custody to the 16-year-old putative father of an illegitimate child was proper even though the mother had released the child for adoption to a child placement agency where the agency failed to rebut the presumption that the child's best interests lay with her father, the actions of the father and his parents, who would aid in rearing the child, indicated their sincere affection for the child, and the child had not yet been adopted or placed in a familial relationship with adoptive parents. *In the Matter of Robert P.*, 498.

PASSAGE OF TITLE—See
SALES (1)

PAST RECOLLECTION RECORDED—See
EVIDENCE (10)

PENALTY FOR PERJURY—See
CRIMINAL LAW (5)

PERJURY—See
CRIMINAL LAW (5)

PERSISTENT QUESTIONING—See
CRIMINAL LAW (155)

PERSONAL BELIEF—See
CRIMINAL LAW (77)

PERSONAL OPINION—See
CRIMINAL LAW (60, 61)

PHOTOGRAPHIC IDENTIFICATION—See
CRIMINAL LAW (36)

PHOTOGRAPHS—See
EVIDENCE (3)
HOMICIDE (1–3)

PLAIN VIEW—See
ARREST (3)

PLEADING

1. Allowance of an amendment to a pleading rests in the trial judge's discretion, but his discretion in that regard is not unbounded, and where a rule good for all cases can be stated, it is the responsibility of an appellate court to state the rule rather than to leave the matter in unstructured discretion. *Wilson* v. *Eubanks*, 287.
2. The tendency of disposition should be to disallow an amendment to a pleading where allowance of the amendment will prevent consideration of the controversy on the merits. *Wilson* v. *Eubanks*, 287.
3. A failure to plead the bar of a foreign statute of limitations in the first responsive pleading is not amendable in an action, commenced in Michigan between litigants all of whom are domiciliaries of Michigan, which is timely brought but for the provision of the Revised Judicature Act borrowing the foreign limitational period (MCLA § 600.5861[2]). *Wilson* v. *Eubanks*, 288.

See
ASSAULT AND BATTERY (1)
MASTER AND SERVANT (2, 6)
NEGLIGENCE (8)
ZONING (2)

PLEA OF GUILTY—See
BURGLARY (4)
CRIMINAL LAW (31–33, 35, 44, 48, 49, 124, 129–132, 139, 140, 145, 146, 151, 153, 162–164)
INDICTMENT AND INFORMATION (1)

POISONS

1. The prosecution need not prove that the marijuana seized from a defendant is not from that portion of the marijuana plant the possession of which is not prohibited by statute (MCLA § 335.153). *People* v. *Ergie Williams*, 118.

See
WORKMEN'S COMPENSATION (2)

POLICE ARTIST—See
CRIMINAL LAW (88)

POSSESSION OF BURGLAR TOOLS—See
BURGLARY (2)

POWER OF COURTS—See
CRIMINAL LAW (134)

PREJUDICE—See
CONSTITUTIONAL LAW (5)
CRIMINAL LAW (2, 72–74, 82, 98, 166)
HIGHWAYS (3)
NEGLIGENCE (4)

PRELIMINARY EXAMINATION—See
CRIMINAL LAW (145)
INDICTMENT AND INFORMATION (4)
ROBBERY (1)

PREMEDITATION—See
HOMICIDE (6, 7, 12, 13, 14)

PRESENCE AT TRIAL—See
CRIMINAL LAW (119–121

PRESENTATION OF CLAIMS—See
MUNICIPAL CORPORATIONS (1–3, 5)

PRESENTENCE REPORT—See
CRIMINAL LAW (157, 158)

PRESERVING QUESTION—See
CRIMINAL LAW (34, 42, 45, 47, 53, 65, 106, 108, 138, 144, 147, 154)
INDICTMENT AND INFORMATION (3)
NEW TRIAL (1)

PRESUMPTIONS—See
CONSTITUTIONAL LAW (5)
CRIMINAL LAW (1, 68, 69, 76, 102–104)
HOMICIDE (21)
PARENT AND CHILD (3)
TRIAL (1)

PRIMA FACIE CASE—See
CRIMINAL LAW (156)

PRIOR ARRESTS—See
CRIMINAL LAW (30, 123)
EVIDENCE (15)
WITNESSES (12)

PRIOR CONVICTIONS—See
CRIMINAL LAW (7, 27, 64, 78–81, 155)
WITNESSES (2)

PRIOR INCONSISTENT STATEMENT—See
EVIDENCE (5–8, 11, 12)
WITNESSES (3–7)

PRIOR SHOOTING INCIDENT—See
CRIMINAL LAW (83)

PRIVILEGE—See
CRIMINAL LAW (40, 59, 84, 85, 107–109, 128, 135, 136)
HUSBAND AND WIFE (1)

PROBABLE CAUSE—See
ARREST (2, 3)
ROBBERY (1)

PROBATE COURTS—See
COURTS (1)

PROBATION—See
CRIMINAL LAW (38, 39)

PROBATIVE VALUE—See
EVIDENCE (15)

PROCEDURE—See
JUDGMENT (3, 4)
STATUTES (9)

PROCEEDING IN PROPRIA PERSONA—See
CRIMINAL LAW (91)

PROCESS

1. Service of process on an attorney who had represented the administrator of an estate was ineffective to give a court jurisdiction over the estate where the administrator of the estate, who had hired the attorney and for whom the attorney worked, had died before the attorney was served. *Wright* v. *Estate of Treichel*, 34.

See
CRIMINAL LAW (23, 24)

PRODUCTION OF WITNESSES—See
CRIMINAL LAW (141, 142)

PROPENSITY OF WEAPON—See
HOMICIDE (18)

PROPERTY DIVISION—See
DIVORCE (9, 10)

PROPRIETARY FUNCTION—See
MUNICIPAL CORPORATIONS (3, 4)

PROSECUTION THEORY—See
CRIMINAL LAW (86)

PROSECUTOR'S BELIEF—See
CRIMINAL LAW (3, 110)

PROSECUTOR'S COMMENTS—See
CRIMINAL LAW (20, 21, 45, 60–62, 72–77, 84, 85, 93, 94, 108, 109, 111–114)

PROXIMITY IN TIME—See
CRIMINAL LAW (83)

PSYCHIATRIC EXAMINATION—See
CRIMINAL LAW (134, 135)

PUBLIC POLICY—See
LIMITATION OF ACTIONS (2, 3)

PUNISHMENT—See
CRIMINAL LAW (115)

PUTATIVE FATHER'S RIGHTS—See
PARENT AND CHILD (1, 4)

QUALIFICATION OF EXPERTS—See
WITNESSES (10)

QUASHING INFORMATION—See
INDICTMENT AND INFORMATION (4)

QUESTION OF FACT—See
LABOR RELATIONS (11)

QUESTION OF LAW—See
SEARCHES AND SEIZURES (1)

RAISING ISSUE—See
CRIMINAL LAW (47)
NEW TRIAL (1)

RAPE

1. Identification by his voice of a defendant charged with rape was sufficient to go to the jury on the issue of identification where the victim was positive in her testimony and had opportunity to become familiar with the defendant's voice both by previous meetings and by conversation of some duration within a few hours before the crime. *People* v. *Bozzi*, 15.
2. Voice identification of the defendant was sufficient, if believed by the jury, to support a conviction of assault with intent to commit rape, where the lack of light prevented the victim, a babysitter, from making a visual identification, and the assailant spoke during the course of the assault in an unnatural voice except in two instances where, after the victim screamed, he said "shut up", and after the baby awakened "look at what you did", and she had had prior opportunity to become familiar with the defendant's voice both by previous meetings and by conversation of some duration within a few hours before the crime. *People* v. *Bozzi*, 15.
3. Incest is not a lesser included offense of statutory rape; a *prima facie* case of statutory rape does not, of necessity, include a showing of any consanguinity between the parties, whereas such showing of consanguinity between the parties is essential to a *prima facie* case of incest (MCLA §§ 750.333, 750.520). *People* v. *Hawk*, 147.

RAPE—Continued

4. Instructing the jury that incest was a lesser included offense of statutory rape did not constitute reversible error where defendant made no objection to the instruction and the defendant suffered no manifest injustice from the instruction, as shown by the facts that defendant had been charged with statutory rape, the jury had been given the choice of six possible verdicts, and the defendant was found guilty as charged. *People* v. *Hawk*, 147.

RATE OF COMPENSATION—See
CONTRACTS (1, 2)

READING TESTIMONY—See
CRIMINAL LAW (90)

REASONABLE BASIS—See
AUTOMOBILES (6, 7, 11, 12)
CONSTITUTIONAL LAW (1)
STATUTES (5)

REASONABLE DOUBT—See
HOMICIDE (16)

REASONABLENESS—See
CONTRACTS (4)

RECORD—See
CRIMINAL LAW (129, 130, 145)
INDICTMENT AND INFORMATION (4)

RECORD ON APPEAL—See
CRIMINAL LAW (12, 58)

REFRESHING RECOLLECTION—See
EVIDENCE (9)

REFUSAL TO ANSWER—See
CRIMINAL LAW (2)

REFUSAL TO ARBITRATE—See
LABOR RELATIONS (6)

REFUSAL TO ATTEND—See
CRIMINAL LAW (51)

RELEVANCE—See
CRIMINAL LAW (66, 67)

RELIGION—See
WITNESSES (1)

REMEDIAL STATUTE—See
JUDGMENT (4)
STATUTES (9)

REMOVING PROPERTY VALUED OVER $5—See
CRIMINAL LAW (165)

REOPENED PROOFS—See
CRIMINAL LAW (150)

REPRESENTATION—See
LABOR RELATIONS (3, 4)

REPRESENTATION OF ESTATE—See
ATTORNEY AND CLIENT (1)

REPUTATION WITNESSES—See
CRIMINAL LAW (64)

REQUESTED READING—See
CRIMINAL LAW (90)

REQUESTED WITNESS—See
CRIMINAL LAW (87, 88)

REQUEST TO CHARGE—See
CRIMINAL LAW (105)

REQUEST TO DISMISS COUNSEL—See
CRIMINAL LAW (91)

RES GESTAE WITNESSES—See
CRIMINAL LAW (6, 43, 150)

RESIDENCE—See
UNEMPLOYMENT COMPENSATION (1)

RETROACTIVITY—See
JUDGMENT (4)
STATUTES (9)

REVERSIBLE ERROR—See
CRIMINAL LAW (86)

"REVIEW"—See
CONTRACTS (2)
WORDS AND PHRASES (1)

REVOCATION OF LICENSE—See
LICENSE (2, 3)

RIGHT OF CONFRONTATION—See
CRIMINAL LAW (2, 22)

RIGHT OF SILENCE—See
CRIMINAL LAW (40)

RIGHT TO COUNSEL—See
CRIMINAL LAW (46, 47, 50–52)

ROBBERY

1. Evidence introduced at defendant's preliminary examination was sufficient to bind him over for armed robbery where the evidence showed that defendant's general characteristics fit those of one of the two robbers, as given by witnesses, defendant's car was used in the robbery, and defendant was arrested with a man positively identified as one of the robbers shortly after the robbery was committed, because although the evidence may not have required a finding of probable cause, neither did it preclude such a finding. *People* v. *Angers*, 28.
2. Evidence was sufficient to support a verdict that defendant was guilty of armed robbery where the evidence showed that defendant owned the automobile used in the robbery, that defendant was arrested while driving that car approximately 30 minutes after the robbery, that defendant was arrested in the company of a man who was positively identified by a witness as being one of the two robbers, that defendant fit the general description of one of the robbers, and that the defendant and the other man arrested had planned to be together on the night of the robbery; even though the evidence was circumstantial, well-authenticated circumstantial evidence can be more positive than direct evidence. *People* v. *Angers*, 29.
3. Police officer's testimony that defendant had frequently associated with another man was admissible in defendant's trial for robbery where the complainant, who had given a not-so-positive identification of the defendant as one of the five bandits who had robbed her, had positively identified the other man as one of the bandits, because the defendant's and the other man's association before the crime, when considered with the positive identification of the other man, would tend to support the identification of defendant. *People* v. *Bailey*, 273.
4. Failure to instruct on the lesser included offenses of armed robbery, the crime charged, was proper where the evidence against defendant revealed all the elements of armed robbery, as opposed to unarmed or attempted robbery, and no evidence existed to support the conviction of defendant on a lesser offense. *People* v. *Wilkie*, 607.

See

CRIMINAL LAW (29)

SAFETY RULES—See

WORKMEN'S COMPENSATION (2)

SALARY—See

CONTRACTS (1, 2)

SALE OF BUSINESS—See

CONTRACTS (3, 4)

SALES

1. The ownership of tires on a motor vehicle passes, in an ordinary sale of the vehicle, to the purchaser of the vehicle

SALES—Continued

at the moment the title to the vehicle passes to the purchaser. *Uniroyal, Inc.* v. *Ken Brown Leasing,* 600.

SALES AGREEMENT—See
AUTOMOBILES (21)

SEARCHES AND SEIZURES

1. The question of the legality of a search and seizure raised by a motion to suppress evidence is a question of law to be decided by the court and not by the jury. *People* v. *Moore,* 87.
2. A shotgun seized without a warrant from the trunk of defendants' car was inadmissible in defendants' trial for armed robbery where the search was made shortly after one of the defendants had been arrested for driving without a valid Michigan driver's license and both defendants had been arrested for carrying concealed weapons, and the police did not, at the time of the arrests, have any knowledge of a connection between the defendants and the robbery, because the defendants were effectively in custody and could not possibly reach any weapon in the trunk, and there was no reason to believe that fruits of either offense for which the defendants had been arrested would be found in the trunk. *People* v. *James,* 550.
3. A motion to suppress evidence known to have been seized must be made before trial; however, the trial judge may waive this requirement and allow a belated motion. *People* v. *James,* 551.

SECOND-DEGREE MURDER—See
HOMICIDE (5)

SELF-INCRIMINATION—See
CRIMINAL LAW (40, 84, 85, 107–109, 128, 135, 136)

SELF-REPRESENTATION—See
CRIMINAL LAW (91)

SENTENCE—See
CRIMINAL LAW (26, 38, 39, 95, 133, 157, 158)

SEPARATE MAINTENANCE—See
DIVORCE (3)

SEPARATE TRIAL—See
CRIMINAL LAW (9)

SEPARATION—See
WITNESSES (13–16)

SERVICE OF NOTICE—See
NEGLIGENCE (7)

SERVICE OF PROCESS—See
APPEARANCE (1, 2)
EXECUTORS AND ADMINISTRATORS (1)
PROCESS (1)

SERVICE STATION—See
NEGLIGENCE (8)

SETTING ASIDE JUDGMENT—See
JUDGMENT (1, 2)

SIDEWALKS—See
NEGLIGENCE (1, 2, 5–7)

SILENCE—See
CRIMINAL LAW (40, 84, 85, 128, 136, 107–109)

SIMILAR PRIOR ACTS—See
CRIMINAL LAW (125)

SPECIAL PERMITS—See
ZONING (1, 3–7)

SPECIFIC INTENT—See
CRIMINAL LAW (41, 139)
KIDNAPPING (1)

SPECULATIVE DAMAGES—See
DAMAGES (1)

SPEEDY TRIAL—See
CONSTITUTIONAL LAW (2, 3–8)
CRIMINAL LAW (96)
HABEAS CORPUS (1, 2)

SPOUSE TESTIFYING—See
HUSBAND AND WIFE (1)

STANDARD SPECIFICATIONS—See
CONTRACTS (7)

STATUTES

1. Legislative amendment of a statute must be taken as approval of a prior judicial construction of the language of the statute where the amendment does not change the language previously construed by the court. *Perez* v. *Chrysler Corp.*, 9.
2. The Legislature is given great latitude in drawing classifications to effect social, economic, or regulatory legislation. *Bowser* v. *Jacobs*, 320.
3. *A classification in a statute is not an invidious discrimination merely because the classification lacks the force of compelling logic or is incongruous; unless the classification is invidious, the courts may not interfere with the legislative judgment.* *Bowser* v. *Jacobs*, 320.

STATUTES—Continued

4. *The courts have not been commissioned to substitute their concepts of fairness and common sense for the practical legislative judgments and compromises which must be made in order to enact innovative legislation addressed to the social problems of our times; if the courts, when passing on the constitutionality of such statutes, ignore the need for rough accomodations, the courts may discourage the Legislature from dealing with a problem at all. Bowser* v. *Jacobs*, 321.

5. *The state may for sound reasons of public policy grant benefits to some and deny like benefits to others. Bowser* v. *Jacobs*, 322.

6. *A classification in a statute which does not foster the objective which impelled it is not rational. Bowser* v. *Jacobs*, 322.

7. *A change in facts, conditions, or circumstances may render unconstitutional a statute valid when enacted. Bowser* v. *Jacobs*, 323.

8. Judicial interpretation of a statute in terms of legislative intent is not required where the wording of the statute is clear and unambiguous. *Collins* v. *Motorists Mut. Ins. Co.*, 424.

9. A statute which changes the substance of contracts cannot have retroactive effect, but a statute which changes only a remedy can be given retroactive operation without violating constitutional provisions protecting contracts (US Const, art 1, § 10; Const 1963, art 1, § 10). *Cosby* v. *Pool*, 571.

See
AUTOMOBILES (4–6, 8–10, 19)
BURGLARY (2)
CONSTITUTIONAL LAW (1)
CRIMINAL LAW (7, 28, 63, 137)
HIGHWAYS (1, 2)
HOMICIDE (10, 11)
INSURANCE (3–5)
JUDGMENT (3, 4)
LIMITATION OF ACTIONS (2, 3)
UNEMPLOYMENT COMPENSATION (2, 3)
WITNESSES (1, 8, 9)

STRIKES—See
UNEMPLOYMENT COMPENSATION (4–7)

SUBSTANTIAL COMPLIANCE—See
NEGLIGENCE (2, 3)

SUBSTANTIAL EVIDENCE—See
ZONING (4)

SUBSTANTIAL USE—See
INSURANCE (10)

SUBSTITUTION OF COMMISSIONER—See
EMINENT DOMAIN (1)

SUBSTITUTION OF POLICIES—See
INSURANCE (14)

SUCCESSOR ADMINISTRATORS—See
EXECUTORS AND ADMINISTRATORS (1)

SUFFICIENCY—See
BURGLARY (1)

SUFFICIENCY OF ANSWER—See
DISCOVERY (2, 3)

SUFFICIENCY OF EVIDENCE—See
CRIMINAL LAW (13–15)
HOMICIDE (8, 9, 12–15)
RAPE (2)
ROBBERY (1, 2)

SUFFICIENCY OF NOTICE—See
NEGLIGENCE (2–7)

SUMMARY HEARING—See
CRIMINAL LAW (38)

SUMMARY JUDGMENT—See
MASTER AND SERVANT (2, 6)
NEGLIGENCE (8, 9)

SUPPLEMENTAL INSTRUCTIONS—See
CRIMINAL LAW (98–100, 115)
HOMICIDE (16)

SUPPORT—See
DIVORCE (3)

SUPPRESSION—See
MOTIONS (1)

SUPPRESSION OF EVIDENCE—See
SEARCHES AND SEIZURES (3)

SURVEILLANCE—See
CRIMINAL LAW (71)

SURVEYOR—See
CRIMINAL LAW (87)

TACTICS—See
CRIMINAL LAW (57)

TAXABLE COSTS—See
COSTS (1–3)

TERMINATION OF RELATIONSHIP—See
ATTORNEY AND CLIENT (2, 3)

TERMS OF CONTRACT—See
CONTRACTS (5, 6)

TESTIMONY—See
CRIMINAL LAW (54)

THEORIES OF INNOCENCE—See
CRIMINAL LAW (13)

THEORY OF DEFENSE—See
CRIMINAL LAW (101)

THREATS—See
CRIMINAL LAW (18, 19)

TIME—See
HOMICIDE (6)

TIRES—See
AUTOMOBILES (20, 21)
CONVERSION (1)
SALES (1)

TITLE—See
AUTOMOBILES (21)
SALES (1)

TOLLING OF STATUTE—See
LIMITATION OF ACTIONS (1)

TOLUENE ADDICTION—See
WORKMEN'S COMPENSATION (2)

TORT LIABILITY—See
MASTER AND SERVANT (1, 4)

TRANSCRIPT—See
CRIMINAL LAW (145)

TRANSFERRING VENUE—See
UNEMPLOYMENT COMPENSATION (3)

TRIAL—See

1. *Conflicting instructions to the jury, one of which is erroneous, require reversal of the jury's verdict because it is presumed that the jury may have followed that which was erroneous. People* v. *Pepper*, 440.
2. *A trial court has the duty to check and control any intemperance of zeal or language that is not warranted by the facts and circumstances shown by the proofs. People* v. *McColor*, 456.

See
CONSTITUTIONAL LAW (3)
CRIMINAL LAW (57, 96, 119–121, 148, 150)

TRIAL DE NOVO—See
CIVIL RIGHTS (1–3, 5, 6)

TRUTH OF PLEA—See
CRIMINAL LAW (124, 129, 130, 140, 164)

UNAUTHORIZED APPEARANCE—See
APPEARANCE (1, 2)

UNCOOPERATIVE WITNESS—See
CRIMINAL LAW (22)

UNDISPUTED FACTS—See
CRIMINAL LAW (89)

UNEMPLOYMENT COMPENSATION

1. The statute setting forth the appropriate circuit court before which review of a decision of the Employment Security Commission Appeal Board may be brought is a jurisdictional statute, not merely a statute concerning venue; a motion for review of a decision of the appeal board was properly dismissed where the claimant, who moved for review, was not a resident of the county of the circuit court before which the motion was made (MCLA § 421.38). *Perez* v. *Chrysler Corp.*, 9.
2. The statute governing the limitation of jurisdiction of circuit courts to review decisions of the Employment Security Commission Appeal Board has not been rendered merely a matter of venue by a subsequent provision in the Revised Judicature Act giving circuit courts venue-transferring power, because the provision in the Revised Judicature Act is not a jurisdiction provision, but deals only with venue and because the Legislature has amended the provisions governing review of unemployment compensation cases, after the Michigan Supreme Court interpreted the provisions as imposing jurisdictional limits, and the Legislature chose not to change the language in the statute (MCLA §§ 421.38, 600.1651). *Perez* v. *Chrysler Corp.*, 9.
3. A provision of the Revised Judicature Act giving cicuit courts venue-transferring power does not enable a circuit court, before which an appeal from the Employment Security Commission Appeal Board has erroneously been brought because the claimant is a resident of another county, to merely transfer the appeal to the county of the claimant's residence; the circuit court must dismiss the appeal for lack of jurisdiction (MCLA §§ 421.38, 600.1651). *Perez* v. *Chrysler Corp.*, 10.
4. Employees who protest a change in working conditions by a work stoppage are usually ineligible for unemployment compensation. *Erickson* v. *Universal Oil*, 466.
5. Grievance procedures, not ordinarily a work stoppage, must be used by workers in order to be eligible for unemployment compensation benefits where a change in working conditions represents a hazard. *Erickson* v. *Universal Oil*, 466.

UNEMPLOYMENT COMPENSATION—Continued

6. The Legislature, in denying men unemployment compensation for work missed because of a labor dispute, did not expect men to continue to work where the employer's unilateral change in working conditions expose the men to a serious risk of immediate loss of life or limb. *Erickson* v. *Universal Oil,* 466.

7. Denial of plaintiffs' claim for unemployment compensation was error where the Employment Security Appeal Board refused to consider the plaintiffs miners' claim that their employer's unilateral change in signalling procedures used during the raising and lowering of a mancar used to carry men in and out of a mine created such an immediate danger to life and limb as to justify their refusal to work. *Erickson* v. *Universal Oil,* 466.

UNINSURED MOTORIST—See
AUTOMOBILES (14, 15, 17)
INSURANCE (8)

UNINSURED MOTORIST COVERAGE—See
INSURANCE (2, 3–5, 7)

UNINSURED MOTOR VEHICLE—See
AUTOMOBILES (15–17)

UNIONS—See
LABOR RELATIONS (1–11)

UNOCCUPIED DWELLING—See
BURGLARY (3)
CRIMINAL LAW (151)

UNRESPONSIVE ANSWER—See
CRIMINAL LAW (27)

UTTERING AND PUBLISHING—See
CRIMINAL LAW (139)

VALIDITY OF PLEA—See
CRIMINAL LAW (131)

VALUE—See
CRIMINAL LAW (165)

VALUE OF PROPERTY—See
ZONING (5)

VARIANCE FROM COMPLAINT—See
INDICTMENT AND INFORMATION (2)

VENUE—See
CRIMINAL LAW (126, 127, 138)
UNEMPLOYMENT COMPENSATION (1–3)

VERDICT—See
APPEAL AND ERROR (1)
CRIMINAL LAW (99, 100, 148)

VOICE IDENTIFICATION—See
EVIDENCE (1)
RAPE (1, 2)

VOLUNTARINESS—See
CRIMINAL LAW (31)

VOLUNTARINESS OF PLEA—See
CRIMINAL LAW (132, 151)

WAIVER—See
APPEARANCE (1, 2)
CONSTITUTIONAL LAW (2)
CRIMINAL LAW (37, 50, 51, 116, 117, 120, 121)
INDICTMENT AND INFORMATION (1)

WEAPONS—See
ARREST (3)
CRIMINAL LAW (28, 137)
HOMICIDE (4, 18)
SEARCHES AND SEIZURES (2)

WEIGHT OF EVIDENCE—See
EVIDENCE (14)
NEW TRIAL (1)

WITHDRAWAL OF PLEA—See
CRIMINAL LAW (44, 48, 153, 162)

WITNESSES
1. Prosecutor's single reference to the Black Muslims, during cross-examination of a defense witness, did not contravene the statute providing that witnesses may not be questioned about their opinions on religion, either before or after being sworn (MCLA § 600.1436). *People* v. *Falkner*, 102.
2. The credibility of witnesses may be attacked by questions concerning convictions of crime (MCLA § 600.2158). *People* v. *Falkner*, 103.
3. A witness may be impeached by showing that his testimony upon a material matter is inconsistent with a prior statement made by him. *People* v. *Rodgers*, 212.
4. A witness may be impeached by producing written statements which are inconsistent with the testimony given at trial and a written statement made at the direction of the witness to be later used to impeach his prior testimony. *People* v. *Rodgers*, 212.
5. A police officer's written memorandum of his interview with a witness which contradicts the witness's in-court testimony is admissible for purposes of impeachment regardless of whether the memorandum is a verbatim transcription of the

WITNESSES—Continued

interview or the conclusions of the police officer. *People* v. *Rodgers*, 212.

6. Instruction to the jury that a witness's prior inconsistent statement as testified to by a police officer could only be considered to test the credibility of the witness and could neither be considered for its truth nor as substantive evidence was correct. *People* v. *Rodgers*, 212.
7. *The people are entitled to impeach the credibility of a witness who testified in support of a defendant's alibi by showing that he told a story to the police which was inconsistent with his testimony at trial.* *People* v. *Rodgers*, 212.
8. A person's history of juvenile offenses may not be used under the statute "against" him, but it can be used to impeach a witness's credibility when he testifies against someone else (MCLA § 721A.23). *People* v. *Basemore*, 257.
9. Refusal to allow defense counsel to place before the jury for impeachment purposes the juvenile records of two prosecution witnesses in a trial for murder was error, where one of the witnesses was the only witness who identified defendant both at a lineup and at trial as one of two assassins, and the other was unable so to identify defendant at the lineup but identified him at trial. *People* v. *Basemore*, 257.
10. The determination of a witness's qualifications to testify as an expert is within the discretion of the trial court. *People* v. *Pepper*, 439.
11. An expert witness in a criminal trial may state his opinion concerning the propensities of the gun which caused the death of the decedent in a homicide case without first giving the factual data upon which that opinion is based unless an inquiry into that factual data is pursued by the opposing party. *People* v. *Pepper*, 439.
12. A witness's testimony may not be collaterally impeached by questioning him about prior arrests which did not result in convictions. *People* v. *James*, 551.
13. Separation of witnesses in a criminal trial is discretionary with the trial judge. *People* v. *Insley*, 593.
14. Denial of a criminal defendant's motion to separate witnesses constituted an abuse of discretion where the judge gave no valid reason for his decision. *People* v. *Insley*, 593.
15. Denial of a criminal defendant's motion to separate witnesses was an abuse of discretion where the only reason stated for the denial was that the trial should be public because the reason given is not a valid reason (MCLA § 600.1420). *People* v. *Insley*, 594.
16. The trial judge's denial of a criminal defendant's motion to separate witnesses, although an abuse of discretion because the denial was based solely on the reason that the trial should be public, was harmless error where the defendant has not shown that the decision resulted in such prejudice to his cause that the jury would have reached a different result had the motion been granted. *People* v. *Insley*, 594.

WITNESSES—Continued

See
CRIMINAL LAW (2, 5–7, 10, 16–24, 27, 43, 54, 64, 78–81, 87, 88, 92, 114, 123, 141, 142, 150, 159–161)
EVIDENCE (1, 4–12)
NEGLIGENCE (5)
RAPE (1)

WORDS AND PHRASES

1. "Review" means to examine again or to go over or examine critically or deliberately. *Bruno* v. *Detroit Inst. of Technology*, 61.

See
AUTOMOBILES (20)
INSURANCE (1)

WORKMEN'S COMPENSATION

1. An appellate court must sustain any issue of fact which the Workmen's Compensation Appeal Board determines, if the finding of fact is supported by the record (MCLA § 418.861). *Shepard* v. *Brunswick Corporation*, 307.
2. Workmen's compensation claimant's intentional violation of a strictly-enforced safety rule requiring all employees to wear a mask covering their noses and mouths while they were in an area containing vats of toluene constituted intentional and wilful misconduct disqualifying claimant from compensation because he became addicted to toluene. *Shepard* v. *Brunswick Corporation*, 308.

See
AUTOMOBILES (5–7, 9–12)

WORK STOPPAGE—See
UNEMPLOYMENT COMPENSATION (4, 5)

WRITTEN STATEMENT—See
WITNESSES (4, 5)

WRONGFUL REVOCATION—See
LICENSES (3)

ZONING

1. A zoning ordinance which requires a Board of Zoning Appeals to issue a special exception permit for a use otherwise not permitted if the conditions and safeguards listed in the ordinance are met is not an unlawful delegation of the legislative function. *Mobil Oil Corp.* v. *City of Clawson*, 46.
2. A zoning ordinance passed subsequent to the denial of plaintiffs' application for a special exemption permit to build a gasoline station controls plaintiffs' suit for declaratory judgment and other equitable relief where the subsequent zoning ordinance, containing new standards for granting special exemptions, was properly pled by the plaintiff. *Mobil Oil Corp.* v. *City of Clawson*, 46.

ZONING—Continued

3. A Zoning Board of Appeals must grant a full evidentiary hearing to applicants for a special use permit under an amended zoning ordinance which provided an entirely new test for the granting of special use permits different from that in effect when the board denied the original application for the permit. *Mobil Oil Corp.* v. *City of Clawson,* 46.

4. The record of a Board of Zoning Appeals hearing discloses material and substantial evidence supporting denial of plaintiffs' request for a special exemption permit to build a gasoline service station where letters in the record from the city engineer, the city manager, and the police chief state that the proposed gasoline service station would create additional traffic problems and hazards out of proportion to other uses of property in the district, and where at the hearing specific foreseeable problems were stated, pictures and accident-spot maps were shown, and reports on traffic studies related to gasoline service stations in other cities were read. *Mobil Oil Corp.* v. *City of Clawson,* 46.

5. The difference in the value of property with its present permitted uses and the use contemplated if a special use permit was granted is one of the factors to be considered in determining whether a Board of Zoning Appeals denial of the special use permit was unreasonably discriminatory against the owner's right in his property; a difference in value of one to three times the present value does not approach the proportionate differences ordinarily required to be held confiscatory. *Mobil Oil Corp.* v. *City of Clawson,* 47.

6. A zoning ordinance requiring a special use permit to construct a gasoline service station is not an unreasonable and arbitrary discrimination against the use of property and a violation of due process where the zoning ordinance requires a special permit to be obtained to construct a gasoline station, the ordinance requires the showing of specific standards before issuing the permit, and plaintiff has failed to plead or prove that the city excludes all gasoline service stations. *Mobil Oil Corp.* v. *City of Clawson,* 47.

7. *Circuit court had no proper record to review a Board of Zoning Appeals denial of plaintiffs' request for a special use permit where the board's hearing was based on a prior ordinance and a subsequent ordinance, providing for an entirely new test, was enacted and properly pled. Mobile Oil Corp.* v. *City of Clawson,* 47.