MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

June 24, 1974 to August 13, 1974

HOWARD L. ELLIS
SUPREME COURT REPORTER

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

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COURT OF APPEALS

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	TERM EXPIRES
T. JOHN LESINSKI, DETROIT	Jan. 1, 1979

CHIEF JUDGE PRO TEM

TIMOTHY C. QUINN, EAST LANSING	Jan. 1, 1979

JUDGES

ROBERT B. BURNS, GRAND RAPIDS	Jan. 1, 1977
JOHN H. GILLIS, GROSSE POINTE	Jan. 1, 1977
DONALD E. HOLBROOK, CLARE	Jan. 1, 1979
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[1] From June 24, 1974.

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	Term Expires
1. KENNETH G. PRETTIE, Hillsdale	Jan. 1, 1979
2. CHESTER J. BYRNS, St. Joseph	Jan. 1, 1979
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3. VICTOR J. BAUM, Detroit	Jan. 1, 1975
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4. GORDON W. BRITTEN, Grass Lake	Jan. 1, 1977
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5. WILLARD L. MIKESELL, Charlotte	Jan. 1, 1977
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6. WILLIAM R. BEASLEY, Birmingham	Jan. 1, 1979
WILLIAM JOHN BEER, Berkley	Jan. 1, 1975
WILLIAM P. HAMPTON, Bloomfield Hills	Jan. 1, 1977
RICHARD D. KUHN, Pontiac	Jan. 1, 1981
ARTHUR E. MOORE, Royal Oak	Jan. 1, 1977

		Term Expires
	JOHN N. O'BRIEN, Pontiac	Jan. 1, 1981
	FARRELL E. ROBERTS, Bloomfield Hills	Jan. 1, 1979
	ROBERT L. TEMPLIN, Birmingham	Jan. 1, 1979
	JAMES S. THORBURN, Royal Oak	Jan. 1, 1977
	ROBERT B. WEBSTER, Birmingham	Jan. 1, 1975
	FREDERICK C. ZIEM, Pontiac	Jan. 1, 1975
7.	JOHN W. BAKER, Flint	Jan. 1, 1979
	OLLIE B. BIVINS, Jr. Flint	Jan. 1, 1975
	PHILIP C. ELLIOTT, Flint	Jan. 1, 1975
	DONALD R. FREEMAN, Flint	Jan. 1, 1979
	HARRY B. McARA, Flint	Jan. 1, 1975
	THOMAS C. YEOTIS, Flint	Jan. 1, 1975
8.	LEO B. BEBEAU, Belding	Jan. 1, 1979
9.	DONALD T. ANDERSON, Kalamazoo	Jan. 1, 1977
	RAYMOND W. FOX, Kalamazoo	Jan. 1, 1979
	LUCIEN F. SWEET, Kalamazoo	Jan. 1, 1975
10.	HAZEN R. ARMSTRONG, Saginaw	Jan. 1, 1979
	FRED J. BORCHARD, Saginaw	Jan. 1, 1977
	EUGENE SNOW HUFF, Saginaw	Jan. 1, 1975
	JOSEPH R. McDONALD, Saginaw	Jan. 1, 1975
11.	WILLIAM F. HOOD, Manistique	Jan. 1, 1979
12.	STEPHEN D. CONDON, Hancock	Jan. 1, 1979
13.	WILLIAM R. BROWN, Traverse City	Jan. 1, 1979
	JAMES M. FITZPATRICK, Traverse City	Jan. 1, 1975
14.	CHARLES A. LARNARD, Jr., Muskegon	Jan. 1, 1975
	JOHN H. PIERCEY, Muskegon Heights	Jan. 1, 1975
	JAMES F. SCHOENER, Muskegon	Jan. 1, 1979[1]
15.	MARK S. ANDREWS, Coldwater	Jan. 1, 1979
16.	HOWARD R. CARROLL, Mount Clemens	Jan. 1, 1977
	WALTER P. CYNAR, Warren	Jan. 1, 1979
	GEORGE R. DENEWETH, Mount Clemens	Jan. 1, 1977
	EDWARD J. GALLAGHER, Warren	Jan. 1, 1977
	FRANK E. JEANNETTE, Mount Clemens	Jan. 1, 1979
	ALTON H. NOE, Mount Clemens	Jan. 1, 1975
	HUNTER D. STAIR, Mount Clemens	Jan. 1, 1975
17.	GEORGE V. BOUCHER, Grand Rapids	Jan. 1, 1977
	STUART HOFFIUS, East Grand Rapids	Jan. 1, 1977
	JOHN T. LETTS, Grand Rapids	Jan. 1, 1979
	ROMAN J. SNOW, Grand Rapids	Jan. 1, 1979
	JOHN H. Vander WAL, East Grand Rapids	Jan. 1, 1975
18.	LEON R. DARDAS, Bay City	Jan. 1, 1975
	JOHN X. THEILER, Bay City	Jan. 1, 1979
19.	CHARLES A. WICKENS, Baldwin	Jan. 1, 1979
20.	GEORGE R. CORSIGLIA, Allegan	Jan. 1, 1975
	JAMES E. TOWNSEND, Holland	Jan. 1, 1979
21.	ROBERT H. CAMPBELL, Clare	Jan. 1, 1979
	DONALD E. HOLBROOK, Jr., Clare	Jan. 1, 1981
22.	WILLIAM F. AGER, Jr., Ann Arbor	Jan. 1, 1977
	ROSS W. CAMPBELL, Jr., Ann Arbor	Jan. 1, 1975
	PATRICK J. CONLIN, Ann Arbor	Jan. 1, 1979
	EDWARD D. DEAKE, Ypsilanti	Jan. 1, 1979

[1] Resigned June 30, 1974.

	Term Expires
23. ALLAN C. MILLER, East Tawas	Jan. 1, 1979
24. ARTHUR M. BACH, Bad Axe	Jan. 1, 1979
25. BERNARD H. DAVIDSON, Negaunee	Jan. 1, 1979
26. PHILIP J. GLENNIE, Alpena	Jan. 1, 1979
JOSEPH P. SWALLOW, Alpena	Jan. 1, 1981
27. HAROLD Van DOMELEN, Hart	Jan. 1, 1979
28. WILLIAM R. PETERSON, Cadillac	Jan. 1, 1979
29. LEO W. CORKIN, St. Johns	Jan. 1, 1979
30. THOMAS L. BROWN, Lansing	Jan. 1, 1975
RAY C. HOTCHKISS, Lansing	Jan. 1, 1977
JAMES T. KALLMAN, Lansing	Jan. 1, 1979
DONALD L. REISIG, Lansing	Jan. 1, 1977
JACK W. WARREN, Lansing	Jan. 1, 1979
31. ERNEST F. OPPLIGER, Port Huron	Jan. 1, 1975
HALFORD I. STREETER, Port Huron	Jan. 1, 1975
32. DONALD L. MUNRO, Ontonagon	Jan. 1, 1979
33. MARTIN B. BREIGHNER, Petoskey	Jan. 1, 1975[1]
34. CARL L. HORN, Standish	Jan. 1, 1979
35. JAMES M. TEAHEN, Jr., Owosso	Jan. 1, 1979
36. DAVID ANDERSON, Jr., Paw Paw	Jan. 1, 1979
37. CREIGHTON R. COLEMAN, Battle Creek	Jan. 1, 1979
RONALD M. RYAN, Battle Creek	Jan. 1, 1975
38. JAMES J. KELLEY, Jr., Monroe	Jan. 1, 1979
WILLIAM J. WEIPERT, Jr., Monroe	Jan. 1, 1975
39. REX B. MARTIN, Adrian	Jan. 1, 1979
40. NORMAN A. BAGULEY, Lapeer	Jan. 1, 1975
JAMES P. CHURCHILL, Vassar	Jan. 1, 1979
41. ERNEST W. BROWN, Iron Mountain	Jan. 1, 1979
42. JAMES R. ROOD, Midland	Jan. 1, 1979
43. JAMES E. HOFF, Dowagiac	Jan. 1, 1975
44. PAUL R. MAHINSKE, Howell	Jan. 1, 1975
45. ROBERT E. A. BOYLE, Sturgis	Jan. 1, 1977
46. DANIEL F. WALSH, Gaylord	Jan. 1, 1979

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[1] Appointed July 15, 1974.

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County	Seat	Circuit
Alcona	Harrisville	23
Alger	Munising	11
Allegan	Allegan	20
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	28
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	26
Chippewa	Sault Ste. Marie	11
Clare	Harrison	21
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	35
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	21
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	24
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	19
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	33
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	19
Mecosta	Big Rapids	27
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	21
Oscoda	Mio	23
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RICHARDSON v SCHLOSSER

PHYSICIANS AND SURGEONS—MALPRACTICE—DIRECTED VERDICT—QUESTION OF FACT.

A directed verdict for a defendant surgeon in a medical malpractice case was not proper where the record establishes that fact questions existed as to whether the defendant surgeon was negligent in not adequately securing the decedent's split sternum in a first operation and in inadvertently lacerating the decedent's heart in a subsequent operation; these were questions of fact and should properly have been submitted to the jury.

Appeal from Kent, John H. Vander Wal, J. Submitted Division 3 April 4, 1974, at Lansing. (Docket No. 15838.) Decided June 24, 1974.

Complaint by Katherine Richardson, executrix of the estate of Jack A. Richardson, deceased, against Ralph J. Schlosser, James T. Lee, Deane T. Smith, and Butterworth Hospital for medical malpractice. Judgment for defendants. Plaintiff appeals. Reversed and remanded as to defendant Schlosser, affirmed as to other defendants.

Sinas, Dramis, Brake, Turner, Boughton & McIntyre, P. C., for plaintiff.

Hillman, Baxter & Hammond, for defendant Schlosser.

Cholette, Perkins & Buchanan (by *Edward D.*

REFERENCES FOR POINTS IN HEADNOTE

61 Am Jur 2d, Physicians and Surgeons §§ 198, 213.

Malpractice: diagnosis of fractures or dislocations. 54 ALR2d 273.

Wells), for defendants Smith, Lee, and Butterworth Hospital.

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

QUINN, J. This is a wrongful death action arising out of the death of plaintiff's husband allegedly caused by the medical malpractice of the defendants. At the conclusion of plaintiff's proofs, the trial court granted defendants' motions for directed verdicts of no cause of action. Judgments in favor of defendants entered and plaintiff appeals.

At defendant hospital on February 7, 1969, defendant Schlosser, assisted by Dr. Lee, performed a left internal mammary artery implant operation on Jack A. Richardson. In order to reach the site of the operation, the patient's sternum had to be split and spread open. At the conclusion of the operation, the two sides of the sternum were approximated and held in place by two strands of no. 18 stainless steel wire.

After some recovery, the decedent still experienced movement in his chest. A postoperative examination by defendant Schlosser on April 28, 1969 disclosed a nonunion of the two sides of the sternum. May 5, 1969, a second operation was performed at defendant hospital by defendant Schlosser, assisted by defendant Smith, to repair the nonunion of the sternum.

Due to adhesions which had formed between the heart and the underside of the sternum, it was necessary to dissect the heart from the sternum before repair of the nonunion of the sternum could be accomplished. During the dissecting, the patient's heart was inadvertently lacerated one and one-half to two inches causing bleeding from the

heart. The patient died from cardiac arrest due to hemorrhage.

In her complaint, plaintiff alleged the following acts of negligence on the part of defendant Schlosser:

(a) Failure to completely close and suture the tunnel site in the operation of February 7, 1969.

(b) Failure to proximate and adequately to secure the split sternum.

(c) Failure to discover the nonunion of the sternum until April 28, 1969.

(d) "That said defendant failed to carefully evaluate the complications that might be present in connection with the operation of May 5, 1969, so that all possible precautions could be taken."

(e) "That said defendant failed to recognize that the extensive adhesions encountered on the May 5, 1969 operation presented a hazard or risk of injury to the heart itself, which was too great to justify going ahead with the operation without first making special preparations to minimize the risk to the extent possible."

(f) Failure to identify tissues lying under the sternum before cutting into them.

(g) Further cutting of these tissues after bleeding occurred from a laceration of the heart causing a second laceration of the heart.

(h) Failure to make advance preparation for repairing a laceration to the heart.

(i) Failure to x-ray before operating to repair sternum.

By amended complaint, plaintiff alleged that defendant Schlosser failed to obtain an informed consent from decedent before the operation of May 5, 1969.

As to defendant Smith, plaintiff alleged he was negligent in not suggesting that an x-ray be or-

dered prior to the operation of May 5, 1969 and in not suggesting that defendant Schlosser seek help in consultation after the first laceration of the heart. Defendant Smith was not charged with lacerating the heart.

Defendant hospital was charged with failing to establish and enforce procedures and safeguards to insure that a qualified heart surgeon was in charge of the operation and to insure necessary back-up personnel for the operation.

Viewed in the light most favorable to plaintiff, the record establishes jury submissible fact questions on the following allegations of negligence with respect to defendant Schlosser:

1. Defendant Schlosser's failure to proximate and adequately secure the split sternum at the operation of February 7, 1969.

2. Defendant Schlosser's inadvertent laceration of the heart. The expert testimony and the doctrine of *Higdon v Carlebach,* 348 Mich 363; 83 NW2d 296 (1957), create this fact question.

Similarly viewed, the record discloses no factual support for the allegations of negligence on the part of defendants Smith and Butterworth Hospital.

In the event of retrial, plaintiff may, on proper foundation laid, offer proof of future losses arising from decedent's death.

Affirmed as to defendants Smith and Butterworth Hospital with costs to these defendants.

Reversed and remanded as to defendant Schlosser with costs to plaintiff.

All concurred.

PEOPLE v INMAN

1. CRIMINAL LAW—INCULPATORY STATEMENTS—VOLUNTARINESS—MENTAL AGE.

   A question of voluntariness of a confession is decided on the totality of the circumstances; therefore, a 17-year-old defendant's "mental age" of ten years and ten months was not enough, by itself, to render his confession involuntary where he did not come within the classification of "retarded" and was in fact considered "educable" by school officials, where the defendant had obtained a driver's license and must have possessed an ability to sufficiently understand questions which the driver education teacher had read to him, where defendant was able to handle his own money, feed and clothe himself, and travel about town by himself, and where the Court of Appeals found that the defendant was capable of comprehending the meaning and effect of his confession.

2. CRIMINAL LAW—JUVENILES—INCULPATORY STATEMENTS—VOLUNTARINESS—RIGHT TO COUNSEL—ADULT ADVISOR.

   A 17-year-old defendant's confession was not rendered involuntary merely because it was made in the absence of an adult advisor where the defendant was sufficiently advised of his right to the presence of an attorney or parent.

3. CRIMINAL LAW—INCULPATORY STATEMENTS—VOLUNTARINESS—HEARING—DEFENDANT TESTIFYING—CREDIBILITY.

   The credibility of a defendant, at a hearing to determine the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 29 Am Jur 2d, Evidence §§ 573–576.
Mental subnormality of accused as affecting voluntariness or admissibility of confession. 69 ALR2d 348.

[2] 29 Am Jur 2d, Evidence §§ 574, 1134.
Voluntariness and admissibility of minor's confession. 87 ALR2d 624.

[3, 5, 6] 29 Am Jur 2d, Evidence §§ 582, 584, 585, 587.
Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession. 102 ALR 605.

[4] 5 Am Jur 2d, Appeal and Error § 948.

[7] 21 Am Jur 2d, Criminal Law §§ 219, 484.
47 Am Jur 2d, Jury §§ 72–80.

voluntariness of his confession, was not improperly weighed in light of innocence or guilt despite the judge's statement that he would be giving the defendant a "license to commit crime" if he quashed the confession, where the court also determined that the defendant had the ability to comprehend the proceedings and that he was able to understand his constitutional rights, accepted defendant's statement that he had not been abused, threatened, or promised anything, felt that defendant's mental capacity was sufficient to enable him to make a voluntary waiver of his rights, and held that the people had met their burden of proof to establish that defendant's confession was voluntary.

4. APPEAL AND ERROR—CRIMINAL LAW—CONFESSIONS OF ERROR.

The Court of Appeals is not bound by a prosecutor's confession of error.

5. CRIMINAL LAW—INCULPATORY STATEMENTS—VOLUNTARINESS—HEARING—TRIAL—JUDGES.

No absolute rule prohibits a trial judge from presiding over both a hearing to determine the voluntariness of a defendant's confession and the nonjury trial of the defendant, especially where the defendant raises no objection to the procedure and where the trial judge did not hear anything at the hearing which later was deemed to be inadmissible at trial.

6. CRIMINAL LAW—COMPETENCY TO STAND TRIAL—HEARING—SUA SPONTE ORDER.

Failure of a trial court to *sua sponte* order a hearing to determine whether a defendant was competent to stand trial was not error where the defendant gave no indication to the court that he was unable to understand the trial proceedings or assist defense counsel (MCLA 767.27a; GCR 1963, 786.2).

7. CRIMINAL LAW—RIGHT TO JURY TRIAL—WAIVER.

A defendant's waiver of his right to a jury trial was valid and effective where the trial court explained to defendant the meaning of a jury trial and the effect of waiving the same, read a written waiver and explained it to the defendant, and had the defendant sign the form, and defense counsel presented it to the court (MCLA 763.3).

Appeal from Midland, James R. Rood, J. Submitted Division 3 May 7, 1974, at Grand Rapids. (Docket No. 15989.) Decided June 24, 1974.

Jerry L. Inman was convicted of larceny in a dwelling. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward G. Durance,* Prosecuting Attorney, and *John P. Higgins,* Assistant Prosecuting Attorney, for the people.

Steven L. Schwartz, Assistant State Appellate Defender, for defendant.

Before: ALLEN, P. J., and J. H. GILLIS and QUINN, JJ.

ALLEN, P. J. July 18, 1972, the trial court, sitting without a jury, found defendant guilty of larceny in a dwelling. MCLA 750.360; MSA 28.592. He received a sentence of three years probation and was required to make restitution. He appeals.

Prior to trial, defense counsel filed a motion to suppress as evidence a statement taken by a police officer from defendant shortly after his arrest. Defendant signed a waiver of his *Miranda* rights.[1] His statement was typed by the officer, and defendant signed it. An evidentiary hearing was held pursuant to *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965), and defendant's motion to suppress was denied. The statement was subsequently admitted into evidence at defendant's trial.

Both during the *Walker* hearing and on appeal, defendant asserts that he lacked the mental ability to sufficiently understand his constitutional rights and make a voluntary waiver thereof. According to *People v Robinson,* 386 Mich 551; 194 NW2d 709 (1972), our Court must examine the

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966).

entire record and make an independent determination on the question of voluntariness. See also *People v Mosley,* 51 Mich App 105, 106–107; 214 NW2d 564 (1974).

The record reveals that defendant had dropped out of high school when he was 16 years old and in the 10th grade. Defendant testified that he could not read nor write, although he was able to write his name. An assistant principal at a junior high school testified that defendant participated in the school's special education program. That program was for "so-called educable students". A counselor at the junior high school testified that a person with a below-70 IQ would be considered retarded. The director of a local mental health clinic testified that defendant's IQ was 75, somewhere between the "mildly retarded" and "dull-normal intelligence" level. He said that defendant's mental age was 10 years, 10 months.

Relying upon *People v King,* 27 Mich App 619; 183 NW2d 843 (1970), and *People v Stanis,* 41 Mich App 565; 200 NW2d 473 (1972), defendant argues that he was unable to make a voluntary confession and waive his *Miranda* rights. Our independent review of the record persuades us to the contrary. Defendant's situation is not as severe as that found in *King, supra,* and *Stanis, supra.* As noted in *Stanis,* the court must look at the "totality of the circumstances" of each case. 41 Mich App 565, 576. *King* referred to *People v Lara,* 67 Cal 2d 365, 381; 62 Cal Rptr 586, 597; 432 P2d 202, 213 (1967), which noted that the admissibility of a 17-year-old's confession was not dependent merely upon age, but should be viewed in combination with his age, intelligence, education, experience, and the ability to understand and comprehend the meaning of his statement. 27 Mich App 619, 623.

While defendant had the mental age of 10 years, 10 months, he did not come within the classification of "retarded" and was in fact considered "educable" by school officials. Although he had failed second and third grades and had left high school while in the middle of tenth grade, we find that defendant was capable of comprehending the meaning and effect of his confession. We note that defendant had obtained a driver's license, and must have possessed an ability to sufficiently understand and comprehend the questions which the driver education teacher had read to him. Defendant was able to handle his own money, feed and clothe himself, and travel about town by himself. In view of these factors, we find that defendant's "mental age" was not enough, by itself, to render defendant's confession involuntary. See 87 ALR2d 624, 625, Anno: *Voluntariness and admissibility of minor's confession,* and 69 ALR2d 348, 350, Anno: *Mental subnormality of accused as affecting voluntariness or admissibility of confession.*

The absence of a parent, guardian, attorney, or other adult advisor does not necessarily mean that defendant's confession should have been excluded. *State v Stewart,* 176 Ohio 156, 159–160; 198 NE2d 439, 442 (1964), *cert den,* 379 US 947; 85 S Ct 443; 13 L Ed 2d 544 (1964), held that the law does not require a finding that "any confession made by a person who is not yet 18 years old is involuntary unless one of his parents or his attorney is present". *Gallegos v Colorado,* 370 US 49, 54–55; 82 S Ct 1209, 1212–1213; 8 L Ed 2d 325, 329 (1962), while reversing a 14-year-old boy's conviction on the grounds that his confession was involuntary, noted that there was no specific "guide to the decision of cases such as this, except the totality of circumstances" involved in each particular case. In

the instant case, defendant was arrested late in the afternoon and signed his statement shortly after 6 p.m. The police officer testified that he advised defendant of his right to an attorney, and asked defendant whether or not he desired to have a relative or a parent present. Defendant replied to the effect that he did not want anything to do with his parents, stating "I got in this myself, I will get out of it myself". While defendant initially stated on direct examination that he was never told of his right to have counsel appointed, he was later on cross-examination unsure as to whether or not the police officer so advised him, and testified that no promises or threats had been made to him. Based upon the "totality of circumstances" present in this case, we find that defendant's confession was not rendered involuntary merely because of the absence of an adult advisor, and find that defendant was sufficiently advised of his right to the presence of an attorney or parent.

According to *People v Hummel,* 19 Mich App 266, 271–272; 172 NW2d 550 (1969), *lv to app den,* 383 Mich 793 (1970), it is reversible error for a judge presiding at a *Walker* hearing "to weigh defendant's credibility in light of his innocence or guilt". At the conclusion of the hearing held in the instant case, the court said:

> "If I were to quash these confessions in this case I'd be giving these boys a license to commit crime, because the next time they get involved, if they do they will have the same defense, we aren't responsible, we don't understand."

The trial court's opinion was not limited merely to the above. It was determined that defendant had the ability to comprehend the proceedings and that he was able to understand his *Miranda* rights.

The court accepted defendant's statement that he had not been abused, threatened, or promised anything. The court felt that defendant's mental capacity was sufficient to enable him to make a voluntary waiver of his rights, and held that the people had met their burden of proof to establish that defendant's confession was voluntary. We find that the trial court's statement does not come within the strictures of *Hummel,* and that defendant's credibility was not weighed in light of his innocence or guilt.

Defendant contends that the trial court committed reversible error in presiding over both the *Walker* hearing and the nonjury trial held subsequent thereto. At oral argument, the prosecutor confessed error on this issue but stated that it is for the Court to determine whether the error was of such magnitude to be reversible. We initially note that we are not bound by the prosecutor's confession of error. *People v Bosanic,* 28 Mich App 234, 236; 184 NW2d 255 (1970). Our Court has generally held that in such a situation, error has not been committed. *People v Yacks,* 38 Mich App 437, 441–442; 196 NW2d 827 (1972). No absolute rule prohibits a trial court from presiding over both the *Walker* hearing and the nonjury trial, especially where defendant raises no objection to that procedure and where the trial court did not hear something at the *Walker* hearing which later was deemed to be inadmissible at trial. See *People v Boyd,* 49 Mich App 388, 403–404; 212 NW2d 333 (1973), *remanded,* 391 Mich 779 (1974) and *People v Powell,* 53 Mich App 306; 218 NW2d 763 (1974).

We find that the error, if any, was harmless. First, it has in effect been determined that the act of the trial court presiding over both the *Walker* hearing and nonjury trial is not "so offensive to

the maintenance of a sound judicial process that it never can be regarded as harmless". Second, we find that the error was harmless beyond a reasonable doubt. See *People v Mobley,* 390 Mich 57, 65; 210 NW2d 327 (1973), and cases cited therein. Defendant has been unable to show how he was prejudiced, and no miscarriage of justice is present in this case. MCLA 769.26; MSA 28.1096.

We find that the trial court did not commit reversible error by failing to *sua sponte* order a hearing pursuant to GCR 1963, 786.2 and MCLA 767.27a; MSA 28.966(11), to determine whether or not defendant was competent to stand trial. Defense counsel made no request for such a hearing, and defendant gave no indication to the trial court that he was unable to understand the trial proceedings or assist defense counsel. In this situation the trial court had no duty to *sua sponte* order a competency hearing. *People v Allen,* 34 Mich App 650, 651; 192 NW2d 63 (1971). See also *People v Boyd,* 49 Mich App 388, 393; 212 NW2d 333 (1973).

Defendant argues that he did not make an effective waiver of his right to a jury trial. At the beginning of trial, the court had before it defendant's written waiver of his right to a jury trial. MCLA 763.3; MSA 28.856. The trial court explained to defendant the meaning of a jury trial and the effect of waiving the same. The court then read the written waiver, and explained it to defendant. The court then had defendant sign the form, and defense counsel presented it to the court. Defendant's waiver of his right to a jury trial was "valid and effective". *People v Jones,* 36 Mich App 150, 151; 193 NW2d 197 (1971).

Affirmed.

All concurred.

PEOPLE v LAWRENCE

1. STATUTES—CONSTRUCTION—DRIVING UNDER THE INFLUENCE OF ALCOHOL—DRIVING WHILE IMPAIRED—SECOND OFFENSE.

A conviction of a defendant under the second offense provision of the statute which proscribes driving while visibly impaired, where his first conviction was for operating a motor vehicle while under the influence of alcohol, was proper; when interpreting statutes relating to the same subject matter or having the same general purpose although containing no reference to each other, they should be construed together (MCLA 257.625a, 257.625b[b]).

2. STATUTES—CONSTRUCTION—LEGISLATIVE INTENT.

The purpose of the Legislature must be effectuated and other rules of construction serve only as a guide in ascertaining that intent, when interpreting statutes.

3. STATUTES—CONSTRUCTION—LEGISLATIVE INTENT—SECOND OFFENSE—DRIVING UNDER THE INFLUENCE OF ALCOHOL—DRIVING WHILE IMPAIRED.

The spirit and purpose of a statute should prevail over its strict letter; therefore, although the Legislature did not specifically state that a previous conviction of driving under the influence of alcohol could be utilized to convict under the second offense provision of the impaired driving statute, the apparent purpose of the Legislature in adopting the second offender provisions was to deter persons who were once convicted under those statutes from repeatedly violating them (MCLA 257.625a, 257.625b[b]).

Appeal from Recorder's Court of Detroit, Andrew C. Wood, J. Submitted Division 1 May 9, 1974, at Detroit. (Docket No. 16056.) Decided June 24, 1974.

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 73 Am Jur 2d, Statutes §§ 272, 275.

Clifford Thomas Lawrence, Jr., was convicted under the subsequent offender provision of the statute which proscribes driving while visibly impaired. 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.

Raymond L. Miller, for defendant.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

BASHARA, J. Defendant was convicted under the second offender statute contrary to MCLA 257.625b(b); MSA 9.2325(2)(b), driving while visibly impaired. He had previously been found guilty of operating a motor vehicle while under the influence of alcohol. MCLA 257.625a; MSA 9.2325(1). He appeals to this Court as a matter of right.

The sole issue presented is whether a defendant can be convicted under the subsequent offender provision of MCLA 257.625b(b) when he has been first convicted of driving under the influence of alcohol but is later convicted of driving while visibly impaired.

Defendant argues that in a second offender prosecution under MCLA 257.625b (b); MSA 9.2325(2) (b) a conviction cannot be upheld unless the prior offense was also driving while visibly impaired. Defendant adopts a literal interpretation of the above statute which reads:

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

"Any person convicted of a violation of this section may be imprisoned in the county jail for not more than 90 days or fined not more than $100.00, or both, together with costs of the prosecution. On a second and subsequent conviction under this section or a local ordinance substantially corresponding thereto, he may be imprisoned for not more than 1 year or fined not to exceed $1,000.00, or both. The division of driver and vehicle services, within 10 days after the receipt of a properly prepared abstract, shall record 4 points for each conviction under this section."

This Court declines to adopt defendant's narrow interpretation. Both of the sections involved, driving while under the influence of intoxicants and driving while impaired, prescribe additional sanctions for repeated violations of each section. When interpreting statutes relating to the same subject matter, or having the same general purpose, although containing no reference to each other they should be construed together. *Detroit v Michigan Bell Telephone Co,* 374 Mich 543; 132 NW2d 660 (1965).

At first glance, these sections would indicate that to convict, as a subsequent offender, the defendant must have been previously convicted of precisely the same offense. However, when interpreting statutes, the purpose of the legislature must be effectuated and other rules of construction serve only as a guide to ascertaining that intent. *People v Pichitino,* 337 Mich 90; 59 NW2d 100 (1953); *Dussia v Monroe County Employees Retirement System,* 386 Mich 244; 191 NW2d 307 (1971).

The apparent purpose of the legislature in adopting the second offender provisions was to deter persons who were once convicted under those statutes from repeatedly violating them. Although the legislature did not specifically state that a previous conviction under MCLA 257.625a could

be utilized to convict under MCLA 257.625b (b) the spirit and purpose of a statute should prevail over its strict letter. *Aikens v Department of Conservation,* 387 Mich 495; 198 NW2d 304 (1972); *People v Adams,* 34 Mich App 546; 192 NW2d 19 (1971). We therefore hold that for purposes of MCLA 257.625b(b) a prior conviction for driving under the influence of alcohol may be considered in determining whether a defendant is a subsequent offender.

Affirmed.

All concurred.

HILL v HUSKY BRIQUETTING, INC.

PRODUCTS LIABILITY—MANUFACTURED PRODUCTS—WARNINGS—STANDARD OF CARE IN TRADE OR INDUSTRY.

A manufacturer who has undertaken to explain or give warnings on the label concerning the use or propensities of its product has not discharged its duty, as a matter of law, to make a statement which is adequate under all the facts and circumstances where the explanation or warning is "the average standard in the industry"; the adequacy of the warning must be determined by the jury and a directed verdict in favor of the defendant manufacturer of charcoal briquettes was error where pleadings and stipulations of the parties showed that a bag of briquettes bore the legend on the bottom of both sides "CAUTION—FOR INDOOR USE—COOK ONLY IN PROPERLY VENTILATED AREAS" and death and injury resulted after plaintiff was using defendant's briquettes in a grill or brazier in a bedroom to provide heat for both herself and her children.

Appeal from Wayne, J. Richard Ernst, J. Submitted Division 1 March 5, 1974, at Detroit. (Docket No. 16101.) Decided June 24, 1974. Leave to appeal granted and Court of Appeals affirmed, 393 Mich —.

Complaint by Helen R. Hill, for herself and as administratrix of the estate of Anita L. Hill, deceased, and as next friend of Betty Jo Hill, a minor, against Husky Briquetting, Inc., for damages resulting from the wrongful death of Anita L. Hill and injuries to Betty Jo Hill. Directed verdict for defendant. Plaintiffs appeal. Reversed and remanded for trial.

REFERENCES FOR POINTS IN HEADNOTE

63 Am Jur 2d, Products Liability §§ 53–56.

Liability of manufacturer or seller for injury caused by firearms, explosives, or flammables. 80 ALR2d 488.

Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury. 76 ALR2d 9.

Kozlow, Jasmer & Woll, for plaintiffs.

Harvey, Kruse & Westen, P. C., for defendant.

Before: DANHOF, P. J., and BRONSON and BOYLE,* JJ.

BRONSON, J. Plaintiffs are appealing from a directed verdict entered in favor of defendant prior to the impaneling of the jury.[1] Certain facts relevant to decision of a controlling point of law were stipulated by the parties.

Plaintiffs commenced their action against the defendant charcoal briquette manufacturer and others[2] for the wrongful death of Anita L. Hill and injuries to Betty Jo Hill.

Helen R. Hill, mother of the deceased and injured children, was using defendant's briquettes in a grill or brazier in their bedroom to provide heat for both herself and the children. Mrs. Hill's husband left her during 1970 and she was receiving sustenance for herself and her five children from Aid to Families with Dependent Children. Mrs. Hill was purchasing an old home in Detroit for which ADC had provided the requisite down payment. This home had formerly been heated by a gas space heater but, following a long running dispute concerning the gas bill, the gas had been cut off. The termination of the gas supply occurred some weeks prior to the incident presently in question. The previously mentioned gas heater was

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

[1] This unusual procedure was consented to by the plaintiff in order to settle questions of law on stipulated facts and to preclude the necessity of a long trial in the event the ruling was adverse.

[2] The remaining defendants were dismissed upon various motions prior to trial and are not therefore involved in this appeal.

the only source of heat, there being no usable furnace anywhere else in the house.

The bag of briquettes bore the following legend at the bottom of both sides: *"CAUTION—FOR INDOOR USE—COOK ONLY IN PROPERLY VENTILATED AREAS"*

It was stipulated by the parties for purposes of this motion that there were no other precautionary words, warnings, instructions, or other directions on the package of briquettes.

The parties further stipulated that Mrs. Hill had read and understood this language and that before retiring she "cracked open" a window in the bedroom. Mrs. Hill was not sure whether the window was still cracked open in the morning.

Upon arising in the morning, the family having slept late because it was Thanksgiving, Mrs. Hill found that Anita, age 11, had expired and that other members of the family needed emergency care. One daughter, Betty Jo, required in-patient treatment at the hospital.

Again for purposes of this motion the parties stipulated that the briquettes manufactured by defendant have as burning characteristics the fact that they consume oxygen, leaving fumes of carbon monoxide and carbon dioxide in its place. These gases are colorless and thus invisible, as well as odorless. They are noxious when accumulated and potentially lethal. Plaintiff and defendant stipulated further that defendant's evidence would show that there were approximately 20 charcoal briquette manufacturers in the United States, and that before January 1, 1966, none of them provided any warning or instruction on their bags at all. After that date, partly because the same became a requirement of a New York stat-

ute,[3] the quoted words were used by most charcoal manufacturers.

Many states legislate minimum standards of labeling regulating particular types of products. The policy inherent in these acts is that it is often beneficial to the particular consumer and the general public to provide a higher and surer degree of protection than is provided by the common law remedies. See, generally: Frumer and Friedman, Products Liability, § 8.07[1], pp 186.30–186.31. Commenting on these statutes, Frumer and Friedman concluded:

"Many of these statutes, ordinances and regulations are pertinent to the duty to warn. They do not necessarily impose any greater general duty than does the present common law. But they may set out minimum standards for labeling, violation of which is negligence per se, or at least evidence of negligence." (Citations omitted, Frumer and Friedman, Products Liability, § 8.07[1], pp 186.31–186.32.)

[3] The New York statute referred to by the parties provides, in pertinent part:

"§ 197-*l. Charcoal*

"Charcoal and charcoal briquettes shall be sold by weight and each container in which charcoal or charcoal briquettes is sold or delivered in quantities of one hundred pounds or less shall be plainly and conspicuously marked to show the net quantity of the contents in letters and figures commensurate with the size of the container as shall be determined and fixed by the commissioner of agriculture and markets, and shall also bear the legend 'CAUTION—FOR INDOOR USE—COOK ONLY IN PROPERLY VENTILATED AREAS', or a substantially similar legend as may be approved by the commissioner, in a size commensurate with the size of the container and so placed on the container as shall be determined and fixed by the commissioner. This section shall apply to the city of New York, the provision of section one hundred ninety-seven-m of this article notwithstanding."

(1966 New York Session Laws, Ch 569, approved and effective June 14, 1966.) The version of the above legend as printed in the annotated laws differs in a material respect. The annotated version of § 197-*l* "Charcoal" quotes the legend without the second dash as: "CAUTION —FOR INDOOR USE COOK ONLY IN PROPERLY VENTILATED AREAS". The difference in emphasis which this provides could be significant.

The legend above quoted demonstrates that the defendant has undertaken to warn or instruct consumers concerning the proper use and propensities of its products. The sole question for our review on this record is to determine whether the legend was adequate. We state the issue as:

Where a manufacturer of a product undertakes to explain or give warnings on the label concerning the use or propensities of its product and the explanation or warning is stipulated to be "the average standard in the industry", has the manufacturer, as a matter of law, *discharged its assumed duty to make a statement which is adequate under all the facts and circumstances?*

In its determination of the motion for directed verdict the trial court relied upon *Barton v Myers,* 1 Mich App 460; 136 NW2d 776 (1965). The *Barton* decision involved a warning label on contact bond cement. The defendant in *Barton* apparently proved that the warning on the label complied with the standard of the industry. Plaintiff claimed that the warning supplied was not adequate. The *Barton* Court affirmed the directed verdict for the defendant at the close of proofs, citing *Cheli v Cudahy Brothers Co,* 267 Mich 690, 695; 255 NW 414 (1934), for the proposition that "no one is held liable to a higher degree of care than the average in the trade or business in which he is engaged".

Dean Prosser, in his treatise on torts, has placed the relationship of custom and the industry standard, as it applies to the standard of reasonable conduct test, in proper perspective.[4] Dean Prosser concluded that an industry may not be allowed to

[4] "Since the standard is a community standard, evidence of the usual and customary conduct of others under similar circumstances is normally relevant and admissible * * * . Custom also bears upon what others will expect the actor to do, and what, therefore, reasona-

set its own standard without incurring the possibility that careless practices will be perpetuated.

Further relevant comments are found in Frumer and Friedman, Products Liability, wherein the authors discuss the different functions of instructions for use and warnings on labels, concluding:

"There is substantial authority that the manufac-

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ble care may require him to do; upon the feasibility of taking precautions, the difficulty of change, and the actor's opportunity to learn the risks and what is called for to meet them.

"In a particular case, where there is nothing in the evidence or in common experience to lead to the contrary conclusion, this inference may be so strong that it calls for a directed verdict on the issue of negligence. * * * Some few courts formerly made the effort to treat all customs in this manner, and to enlarge the normal inference into an 'unbending test' of negligence, under which the ordinary usages of a business or industry became the sole criterion as to what the actor should, as a reasonable man, have done.

"Such an arbitrary rule proved in the long run impossible to justify. First of all, customs which are entirely reasonable under the ordinary circumstances which give rise to them in the first instance, may become entirely unreasonable in the light of a single fact altering the situation in the particular case. * * * But beyond this, customs and usages themselves are many and various; some are the result of careful thought and decision, while others arise from the kind of inadvertence, carelessness, indifference, cost-paring and corner-cutting that normally is associated with negligence. There can certainly be such a thing as customary negligence, as the unchecked habit of jaywalking in some communities will suggest.

"*Even an entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard.* The fact that all other beverage bottlers use the same slipshod methods cannot serve as absolution for the bottler who is being sued. And if the only test is to be what has been done before, no industry or group will ever have any great incentive to make progress in the direction of safety. Cases will no doubt be infrequent in which any defendant will be held liable for failing to do what no one in his position has ever done before; but there appears to be no doubt that they can arise. Much the better view, therefore, is that of the great majority of the cases, that every custom is not conclusive merely because it is a custom, and that it must meet the challenge of 'learned reason,' and be given only the evidentiary weight which the situation deserves. It follows that where common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent; and that there will be extreme cases where it is so clearly negligent in itself that it may even be excluded from evidence." (Citations omitted; emphasis supplied.) Prosser, Torts (4th ed), pp 166–168.

turer must give both adequate directions for use and adequate warning of potential danger. Directions and warnings serve different purposes. Directions are required to assure *effective* use, warnings to assure *safe* use. It is clear from the better-reasoned cases that directions for use, which merely tell how to use the product and which do not say anything about the danger of foreseeable misuse, do not necessarily satisfy the duty to warn." (Emphasis in original—citations omitted.) Frumer and Friedman, Products Liability, § 8.05, pp 186–186.1.[5]

The text writers disagree with the result of the majority in *Barton. Barton* itself contains the seeds of its own destruction. The concurring opinion of now Justice T. G. KAVANAGH declared that:

" * * * [T]he better rule is that the reasonableness of care should be determined by the jury in accord with the principle enunciated by Mr. Justice Holmes in *Texas & P R Co v Behymer,* 189 US 468; 23 S Ct 622; 47 L Ed 905 (1903), at page 470".

Justice KAVANAGH concluded that negligence should seldom if ever be determined as a matter of law.

Barton was subjected to further criticism and limited in both *Witt v Chrysler Corp,* 15 Mich App 576; 167 NW2d 100 (1969), and *Farr v Wheeler Manufacturing Corp,* 24 Mich App 379; 180 NW2d 311 (1970). Finally, it must be regarded as at least limited to the facts by the Michigan Supreme Court's decision in *Marietta v Cliffs Ridge, Inc,* 385 Mich 364; 189 NW2d 208 (1971), wherein the Court, discussing *Witt,* said:

"The standard by which the negligent or nonnegligent character of the defendant's conduct is to be

[5] Adequacy of required warning. *See, generally:* 1 American Law of Products Liability, § 2:40, *et seq.;* Dillard and Hart, *Product Liability: Directions for Use and the Duty to Warn,* 41 Va L Rev 145 (1955).

determined is that of a reasonably prudent man under the same or similar circumstances. *McKinney v Yelavich,* 352 Mich 687; 90 NW2d 883 (1958). *The customary usage and practice of the industry is relevant evidence to be used in determining whether or not this standard has been met. Such usage cannot, however, be determinative of the standard.* As stated by Justice Holmes:

" 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' *Texas and Pacific R Co v Behymer,* 189 US 468, 470; 23 S Ct 622; 47 L Ed 905 (1903).

"The danger inherent in allowing an 'industry' standard to be the sole criteria for determining whether or not the defendant exercised due care was recognized in *Witt v Chrysler Corp,* 15 Mich App 576, 583; 167 NW2d 100 (1969):

" 'To adopt this view would permit the industry to set its own standard of care.' "

Similarly, Judge Learned Hand also enumerated the dangers of allowing an industry standard to be determinative of negligence:

" 'Indeed, in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages.' *The T J Hooper,* 60 F2d 737, 740 (CA 2, 1932).

"The question of whether the defendant in fact met the standard of reasonable prudence required of him is ordinarily one for the jury:

" ' "It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered one of law for the court." ' *Ackerberg v Muskegon Osteopathic Hospital,* 366 Mich 596, 600; 115 NW2d 290 (1962), quoting *Grand Trunk R Co v Ives,* 144 US 408, 417; 12 S Ct 679; 36 L Ed 485." (Emphasis supplied.) *Marietta v Cliffs Ridge, Inc,* 385 Mich 364, 369–370; 189 NW2d 208 (1971).

The reasoned rule expressed by the commentators and supported fully by *Marietta* requires that the question of adequacy of the warning be determined by the jury.[6] In this case and on this record the facts were not so clear that all men would draw the same conclusion. The question, although close, is properly for the jury to consider.

Reversed and remanded for trial. Costs to plaintiff-appellant.

All concurred.

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[6] *Accord: Tampa Drug Co v Wait,* 103 So 2d 603 (Fla, 1958); *Edwards v California Chemical Co,* 245 So 2d 259 (Fla, Dist Ct of App, 1971); and *Thomas v Arvon Products Co,* 424 Pa 365; 227 A2d 897 (1967).

PEOPLE v CHARRON

OPINION OF THE COURT

1. WEAPONS—CARRYING CONCEALED WEAPON—CONCEALMENT—QUESTION OF FACT.

   The question of concealment is one for the jury in a prosecution for carrying of a concealed weapon, and the fact that the weapon is in plain view at one point does not negate, as a matter of law, a finding that the necessary concealment was there under any particular set of circumstances; thus, where the blade of a knife sticking from a defendant's pocket was visible to a police officer when the defendant was in the act of sitting down or standing up, there was a question of fact whether there was concealment within the meaning of the statute (MCLA 750.227).

2. WEAPONS—CRIMINAL LAW—EVIDENCE—RES GESTAE EVIDENCE—PREJUDICE.

   Testimony which was admitted as part of the res gestae showing that a defendant's companion at the time of arrest had a cut on his throat was not necessary or relevant to the prosecution on a charge of carrying a concealed weapon, and was prejudicial where the prosecutor, by his questioning and his closing argument, made it clear that he felt the defendant was guilty of inflicting the wound upon the companion (MCLA 750.227).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 56 Am Jur, Weapons and Firearms § 9 *et seq.*

[3, 7] 5 Am Jur 2d, Appeal and Error § 545 *et seq.*

[4] 21 Am Jur 2d, Criminal Law §§ 303, 324, 337, 584, 585.

Defendant's right to disclosure of presentence report. 40 ALR3d 681.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

[5, 6] 29 Am Jur 2d, Evidence §§ 320, 321, 333.

Admissibility in criminal case of evidence relevant to the crime charged, as affected by incidental disclosure of another crime by defendant. 170 ALR 306.

[6] 29 Am Jur 2d, Evidence § 288.

3. APPEAL AND ERROR—PRESERVING QUESTION—PROSECUTORS—TRIAL STRATEGY—CLOSING ARGUMENTS—INSTRUCTIONS TO JURY.

A question of the propriety of the prosecutor's trial strategy was properly preserved for appellate review, even though there was no objection at trial to the prosecutor's closing argument or to the jury charge as given, where defense counsel had fully argued before the trial judge that references to a companion's cut throat in a trial for carrying a concealed weapon and an exhibition of the scar to the jury was prejudicial as inferring an additional crime, had objected to the prosecutor's trial strategy throughout, and had secured the assurance of the trial court that a cautionary instruction would be given to the jury but no such instruction was given in fact.

4. CRIMINAL LAW—SENTENCING—PRESENTENCE REPORTS.

A defendant has no right to demand that the judge proceed with sentencing without the presentence report.

DISSENT BY V. J. BRENNAN, P. J.

5. CRIMINAL LAW—WEAPONS—PROSECUTORS—BURDEN OF PROOF—EVIDENCE—RES GESTAE—FACTS—SURROUNDING ARREST—OTHER CRIMES.

The prosecution in a criminal case has the burden of showing all the facts surrounding an alleged crime; thus admission of testimony which constituted a part of the res gestae of the offense of carrying a concealed weapon was clearly proper where that testimony served to show the facts which directed the arresting officers' attention to the defendant and his companion and which aroused the officers' suspicions and illuminated for the jury the circumstances under which the officers observed the concealed weapon on the defendant, and such testimony was not rendered inadmissible simply because it tended to suggest that defendant may have committed another crime (MCLA 750.227).

6. WEAPONS—CRIMINAL LAW—PROSECUTORS—EVIDENCE—OTHER CRIMES—CORROBORATING TESTIMONY.

Reversal of a defendant's conviction of carrying a concealed weapon is not required because the prosecutor had the defendant's companion exhibit a scar on his throat to the jury, thereby allegedly implying that defendant was guilty of inflicting the wound, where the fact that the companion had a cut on his throat was already properly before the jury and no claim was made that the scar was of such a nature as to inflame the

passions of the jurors; the exhibition merely served to corroborate the earlier testimony.

7. CRIMINAL LAW—APPEAL AND ERROR—PRESERVING QUESTION—PROSECUTORS—CLOSING ARGUMENTS—INSTRUCTIONS TO JURY.

A defendant was not deprived of a fair trial because of improper closing arguments by the prosecutor or incomplete instructions to the jury by the judge where no objections were made at the trial to the arguments or to the instructions given and the error complained of could have been remedied had defendant objected to the arguments and the final charge.

Appeal from Wayne, George E. Bowles, J. Submitted Division 1 November 14, 1974, at Detroit. (Docket No. 16258.) Decided June 24, 1974.

Charles K. Charron was convicted of carrying a concealed weapon. 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 *Luvenia D. Dockett,* Assistant Prosecuting Attorney, for the people.

Allan C. Miller, Assistant State Appellate Defender, for defendant.

Before: V. J. BRENNAN, P. J., and T. M. BURNS and VAN VALKENBURG,* JJ.

VAN VALKENBURG, J. Defendant was found guilty by a jury of carrying a concealed weapon contrary to MCLA 750.227; MSA 28.424, was sentenced to two to five years in prison and appeals as of right.

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

The proofs adduced at trial showed that in the early morning hours of August 22, 1972 a plain-clothes police officer, while having a cup of coffee in an all-night restaurant, observed two men entering the establishment. The officer's attention was drawn to these men by reason of the fact that one of the men had what appeared to be a severe cut on his neck. As the men sat down the officer observed what appeared to be a knife protruding from the rear pocket of the pants of the uninjured man. The officer immediately went out to his automobile and radioed to the station and requested that uniformed officers be dispatched to that location. The officer waited outside the restaurant until the uniformed officers arrived. When the uniformed officers approached the pair and began to question the injured man about the wound, the uninjured man, defendant herein, became belligerent and started mouthing obsenities. Defendant was arrested as a disorderly person. As defendant arose from the table, one of the officers observed the knife blade sticking from defendant's rear pocket, whereupon defendant was immediately arrested on the charge of carrying a concealed weapon.

The defense asserted by defendant at trial, after an unsuccessful attempt to have the knife suppressed as the fruit of an illegal search, was that since the knife was sufficiently visible to come within the "plain view doctrine", it was not a concealed weapon within the meaning of the statute. At the close of proofs defendant moved for a directed verdict of acquittal on the ground that the people had failed to prove the necessary element of concealment. The trial court denied the motion on the basis that the question of concealment was one for the jury to determine under the particular circumstances.

On appeal defendant asserts that the trial court erred in denying the motion for a directed verdict. We find no merit in this assertion. As stated in *People v Jones,* 12 Mich App 293, 296; 162 NW2d 847, 849 (1968):

> "The evident statutory purpose is reflected in the general rule applied in other jurisdictions that absolute invisibility is not indispensable to concealment of a weapon on or about the person of a defendant, and that a weapon is concealed when it is not discernible by the ordinary observation of persons coming in contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life."

The touchstone is thus whether the weapon is discernible as such by the ordinary observations of those coming in contact with the person carrying the weapon. The fact that the weapon is in plain view at one point in time does not negate, as a matter of law, the finding that under any particular set of circumstances there was the necessary concealment. Even though the blade of the knife was visible to the officers when defendant was in the act of sitting down or standing up, there was a question of fact whether there was concealment within the meaning of the statute. See also, *People v Stirewalt,* 16 Mich App 343; 167 NW2d 779 (1969); *People v Iacopelli,* 30 Mich App 105; 186 NW2d 38 (1971).

While there was sufficient evidence upon which the jury could find guilt beyond a reasonable doubt, we are nevertheless compelled to reverse defendant's conviction and remand the matter for a new trial. Prior to the trial, defense counsel sought to have references to the fact that defendant's companion had a cut throat suppressed, since such references were not germane to the charge at hand and were highly inflammatory, particularly

in light of the absence of any evidence showing that defendant cut the companion's throat. The people argued that such testimony was admissible as part of the res gestae and under the "similar act statute".[1] The trial court, recognizing that such references would indeed be highly prejudicial, indicated that he would instruct the jury that there was no evidence linking the defendant to the cut throat. The court further held that since the charged crime was not a specific intent crime, the manner in which the injured party received the cut throat was not admissible under the statute, since the question of motive, scheme, plan or intent was not at issue. The court did, however, rule that the people could, as part of the res gestae, show that defendant's companion had a cut throat when he was in the restaurant.

Had the prosecutor limited his references to the cut throat to the fact that it was this condition that originally caused the plainclothes officer to notice the pair, we would be inclined to hold that such reference was properly admitted as part of the res gestae, although even that reference was hardly necessary to the proof of the charged crime; however, the prosecutor was not content with that. The prosecutor in questioning the plainclothes officer brought out, over defense counsel's objection, not only the fact that defendant's companion had a cut on the neck, but also that there was great quantities of blood on the injured party's shirt, that the cut was not what one would associate with a shaving nick but rather much larger and that the officer also observed blood on defendant's clothes. In questioning the arresting officers, the prosecutor asked if they had observed anything on the knife found in defendant's pocket

[1] MCLA 768.27; MSA 28.1050.

which would appear to be blood, to which was replied there were red spots on the knife. The prosecutor again took the opportunity to bring out the fact that there was a great quantity of blood emanating from the cut. The prosecutor called the injured companion and proceeded to inquire how his throat was. The prosecutor then had this person show the scar on his neck to the jury over a defense objection.

Not content by the prejudice engendered by these references, the prosecutor launched into a closing statement which could leave the jury with little doubt that the prosecutor felt that there was a much more far-reaching question than merely a concealed weapons charge. After demonstrating to the jury with his keys that an object would be concealed if sat upon, the prosecutor stated:

"But, if I stand up like this, these keys are there and the fellow over across the table, across from me who has his throat cut and the knife isn't concealed anymore; it is apparent.

"So, I guess I am saying before I get rid of my keys I guess what I'm saying is you know it is a matter of whether or not the knife is concealed, whether you intend it to be concealed. If you are carrying a gun, you can have it concealed and the gun butt can be sticking out.

"But, if your coat is wide open and the man can see it, it is not concealed anymore.

"So, what is your intention? All right, now I will give you the facts. I will also give you the fact that the fellow may be drunk and therefore not as good as he should be when he is sober in concealing things, but he might stick a fairly large knife in his pocket and be of the opinion that nobody is going to see it.

"You know what you, as an ordinary type citizen think about someone who carries a knife around that size and if you are carrying it around that size do you have any reason for carrying it around? When it is that

size, are you a cook? You are just off duty or something like that, what do you want it for? Stick it in your pocket so it is hard to see, part of it sticking out, what have you got it for?

"You know, I ask you to think of the scene in this restaurant. It is an all night Beanery where you have got a booth, got a table, and got a guy sitting on one side and you have got a guy sitting on the other side and one of the fellows has got his throat cut. He didn't die, but you saw the scar up there. What's that all about? Is he a butcher coming home from his place of business and got a knife in his pocket?

"Is he a hunter; is he a fisherman? What is the situation? What should you as jurors do with a set of facts? Is it criminal or is it not criminal? That's what is before you.

"Not simply is it a single issue, I am sure you are going to think hard about it. That's what the case is all about."

Just as it is evident to this panel that the prosecutor felt that defendant should be on trial on some greater charge than carrying a concealed weapon, it must be obvious to the jury that the prosecutor felt that defendant was guilty of inflicting the wound upon the injured companion. There can be no question that despite the salutary pronouncements of the trial court prior to trial, the prosecutor was allowed to proceed in a manner which is repugnant to the very concept of a fair trial. Defendant was called upon to answer not only to the charged crime, but also answer to other charges which the prosecutor could not bring.[2] As if to add insult to injury, the trial court failed to give the promised instruction to the jury with respect to the absence of any proof of any other criminal activity on defendant's part.

[2] It appears that defendant was at one point also charged with felonious assault but the charge was dismissed, apparently because the supposed victim refused to testify against defendant.

Under these circumstances, the absence of an objection to the prosecutor's closing argument and to the jury charge as given will not restrain this Court from reviewing the impact of these actions upon the right of the defendant to secure a fair trial. Since defense counsel had fully argued the question of the possible prejudice before the trial judge, had objected to the prosecutor's trial strategy throughout, and had secured the assurance of the trial court that a cautionary instruction would be given to the jury, the question of the propriety of that trial strategy, including the prosecutor's closing argument and the failure to give the promised instruction, is properly preserved for appellate review. The interjection and continuing amplification by the prosecutor of the evidence relating to the cut throat, coupled with the prosecutor's implication that the question before the jury was something more than merely that of carrying a concealed weapon, denied defendant a fair trial with respect to the charged crime; accordingly, we reverse and remand for a new trial.

Although defendant's remaining allegations of error relate to matters which may not occur upon retrial, and thus will not be dealt with in this opinion, we would note that any problems relating to the giving of the standard instruction vis-a-vis the fact that defendant did not testify could be avoided by the trial court inquiring of the defendant, prior to giving the charge to the jury, what his wishes are with respect to such a charge. We would further note that even assuming *arguendo* that defendant has the *power to waive* the preparation of a presentence report before sentencing,[3]

[3] *See* the majority opinion in *People v Amos (On Rehearing)*, 44 Mich App 484; 205 NW2d 274 (1973); *but see People v Amos*, 42 Mich App 629; 202 NW2d 486 (1972) and the dissent in *Amos (On Rehearing), supra.*

it would not appear that under any circumstances can it be said that the defendant has the right to demand that the judge proceed with sentencing without the presentence report.

Reversed and remanded for a new trial.

T. M. BURNS, J., concurred.

V. J. BRENNAN, P. J. *(dissenting).* I respectfully disagree with the decision reached by my colleagues in this case. My examination of the record in the case at bar fails to disclose any error warranting or requiring reversal of this defendant's conviction.

Defendant was convicted by a jury in the Wayne County Circuit Court of carrying a concealed weapon contrary to the provisions of MCLA 750.227; MSA 28.424. The evidence presented below was, as my colleagues recognize, clearly sufficient to support this determination. Defendant contends, however, that his conviction should be reversed because the trial judge admitted certain testimony of the arresting officers as to the condition of his companion. Defendant asserts that the admission of this testimony constituted reversible error because it was highly prejudicial to his cause and had no probative value. I find myself unable to agree with this contention. In a criminal case the prosecution has the burden of showing all the facts surrounding an alleged crime. In other words the prosecution is required to present the entire res gestae at trial. *People v Kayne,* 268 Mich 186; 255 NW 758 (1934); 1 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 434, pp 527–528. Such a requirement is imposed on the prosecution to assure not only that a defendant receives a fair trial, but also to guarantee that the jury makes its determination on the true facts of a case. The trial

judge admitted the complained-of testimony on the basis that it constituted a part of the res gestae of the offense. This was clearly proper. The testimony served to show the facts which directed the officers' attention to defendant and his companion and which aroused the officers' suspicions. The complained-of testimony illuminated for the jury the circumstances under which the officers observed the concealed weapon on defendant. This testimony was not rendered inadmissible simply because it tended to suggest that defendant may have committed another crime. *People v Savage,* 225 Mich 84; 195 NW 669 (1923); *People v Sheehy,* 31 Mich App 628; 188 NW2d 231 (1971), *lv den,* 384 Mich 844 (1971); *People v Skidmore,* 28 Mich App 677; 185 NW2d 137 (1970), *lv den,* 385 Mich 753 (1971). Nor was it rendered inadmissible because its prejudicial effect outweighed its probative value. The only prejudicial effect I can discern from this testimony is that it constituted evidence damaging to defendant's position. This is clearly not a sufficient basis to justify excluding legally admissible evidence.

Similarly, the fact that the prosecutor had defendant's companion exhibit the scar on his throat to the jury does not require reversal of defendant's conviction. The fact that defendant's companion had a cut on his throat was already properly before the jury. This exhibition, therefore, merely served to corroborate the earlier testimony of the officers. No claim is made that the scar was of such a nature as to inflame the passions of the jurors. Accordingly, I fail to see how reversible error could here have been committed.

Defendant finally asserts that the prosecutor's closing argument and the failure of the trial judge to give an instruction to the jury served to deprive

him of a fair trial. Defendant did not, however, object to the prosecutor's closing argument nor to the final charge given the jury. The "promise" to give an instruction relied on by defendant in his claim of reversible error was made before jury selection and in terms somewhat less definite than defendant asserts. Defendant never reminded the Court of the need for such an instruction and never objected to the final charge. It is clear that had defendant done so the errors here complained of, including those alleged to have occurred during the prosecutor's closing argument, could have been remedied. I would not, therefore, reverse defendant's conviction on the basis of these alleged errors.

For all of the foregoing reasons I would affirm defendant's conviction.

DURBIN v K-K-M CORPORATION

1. WITNESSES—REFRESHING RECOLLECTION—IMPEACHMENT.

The purpose of refreshing a witness's recollection is to awaken memory and not to impeach or contradict the witness.

2. WITNESSES—REFRESHING RECOLLECTION—MEMORANDA—NECESSITY —EVIDENCE—ADMISSIBILITY.

An essential requirement in using memoranda to revive a witness's present recollection is the necessity to resort to the memoranda to refresh memory; however, it is not necessary to place the memoranda or notes in evidence because the recollection and not the memoranda is the evidence.

3. WITNESSES—REFRESHING RECOLLECTION—MEMORANDA—DISCRETION.

The extent to which witnesses may refer to or read from refreshing memoranda and the extent to which such memoranda may be reviewed by counsel or the jury is usually a matter within the discretion of the trial court, and the trial court will not be reversed in the absence of abuse of discretion.

4. WITNESSES—REFRESHING RECOLLECTION—PRIOR INCONSISTENT STATEMENTS—DISCRETION—IMPEACHMENT—APPEAL AND ERROR.

Allowing defense counsel to use a prior inconsistent extrajudicial statement to refresh the recollection of a witness for the plaintiffs was not an abuse of discretion where the witness manifested much difficulty in recalling details and in fact noted that, to some degree, the statement had revived some memory;

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 58 Am Jur, Witnesses § 578 *et seq.*
[5] 53 Am Jur, Trial § 914.
[6] 58 Am Jur, Witnesses § 821 *et seq.*
[7] 29 Am Jur 2d, Evidence § 661.
[8] 29 Am Jur 2d, Evidence § 590.
[9, 11–13] 45 Am Jur 2d, Intoxicating Liquors §§ 561–614.
[10] 58 Am Jur, Witnesses § 851 *et seq.*
[14] 58 Am Jur 2d, New Trial §§ 101, 212, 213.
Manifestation of emotion by party during civil trial as ground for mistrial, reversal, or new trial. 69 ALR2d 954.
[15] 5 Am Jur 2d, Appeal and Error §§ 702, 726.

in any event the statement was properly used for impeachment purposes as a prior inconsistent statement and, on this ground alone, the action of the trial court was not erroneous because a right conclusion will not be disturbed on appeal even though based on the wrong theory.

5. WITNESSES—CREDIBILITY—EVIDENCE—WEIGHT—JURY.

A jury is the sole judge of credibility of witnesses and the weight to be accorded their testimony.

6. WITNESSES—CREDIBILITY—PRIOR STATEMENTS—TRUTH—IMPEACHMENT.

Prior statements introduced for impeachment purposes bear solely upon the credibility of the witness and are not considered for the purpose of establishing the substance or truth of the prior statements.

7. EVIDENCE—ADMISSIONS—ADOPTIVE ADMISSIONS.

An adoptive admission is the express adoption of another's statement as one's own on the part of a party which manifests circumstantially that party's assent in the truth of a statement made by another.

8. EVIDENCE—HEARSAY—HARMLESS ERROR.

Admitting into evidence a portion of a deposition which referred to a statement allegedly given by the deposed witness to an investigator was error as hearsay where the witness was unavailable at trial for cross-examination and where it was not shown that the statement made to the investigator was the witness's statement for impeachment purposes; however, where two other witnesses testified regarding the same events covered by the deposition, and a review of the record does not show a miscarriage of justice, the parties complaining were not prejudiced so as to warrant reversal and another trial (MCLA 769.26).

9. INTOXICATING LIQUORS—DRAMSHOP ACT—EVIDENCE—PRIOR DRINKING HABITS—SELF-SERVING TESTIMONY.

Testimony of a decedent's drinking habits given by his wife in a dramshop action was properly excluded as self-serving where the decedent's wife had no personal knowledge of his state of intoxication on the day in question.

10. WITNESSES—EXPERT WITNESSES—HYPOTHETICAL QUESTIONS—EVIDENTIARY BASIS.

Hypothetical questions to expert witnesses must be based on firsthand knowledge or upon facts in the record at the time the

expert gives his opinion or a combination of the two; therefore, allowance of hypothetical questions posed by defense counsel was not error where the questions were not completely afield of the issues at trial, and did not seek abstract answers.

11. INTOXICATING LIQUORS—DRAMSHOP ACT—INSTRUCTIONS TO JURY.

Plaintiffs in a dramshop action were not prejudiced by the trial court's failure to read the entire dramshop statute in instructing the jury where the instructions adequately informed the jury that any person who sold intoxicating liquor to an intoxicated person would be liable for any injuries sustained as a result of the intoxication (MCLA 257.625a).

12. INTOXICATING LIQUORS—DRAMSHOP ACT—CIRCUMSTANTIAL EVIDENCE.

An action under the dramshop act may be proved by circumstantial evidence.

13. INTOXICATING LIQUORS—DRAMSHOP ACT—PRESUMPTION OF INTOXICATION—INSTRUCTIONS TO JURY—PRESERVING QUESTION.

Failure of a trial court in a dramshop action to instruct the jury on the statutory presumption of intoxication was not properly preserved for appeal where no objection was made at trial and where no manifest injustice is shown (MCLA 257.625a; GCR 1963, 516.2).

14. NEW TRIAL—DISCRETION—PREJUDICE.

The granting or denying of a motion for new trial rests within the sound discretion of the trial court and reversal of such an order is a function of whether prejudicial error was committed and an abuse of discretion is found.

15. APPEAL AND ERROR—JURY VERDICT—MISCARRIAGE OF JUSTICE.

The Court of Appeals will not substitute its judgment for that of a jury unless a careful review of the record reveals a miscarriage of justice.

Appeal from Macomb, Hunter D. Stair, J. Submitted Division 2 April 10, 1974, at Detroit. (Docket No. 16332.) Decided June 24, 1974. Leave to appeal applied for.

Complaint by Sharon K. Durbin, for herself and as next friend of her five minor children, against the K-K-M Corporation for damages under the

dramshop act. Judgment for defendant. Plaintiffs appeal. Affirmed.

Frank R. Langton & Associates (by *Sidney R. Borders),* for plaintiffs.

Baun & Van Tiem, for defendant.

Before: J. H. GILLIS, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

HOLBROOK, J. In 1970 James Lee Durbin was a man of 34 years of age. At around 7 in the evening of March 13th of that year, Mr. Durbin was involved in an automobile accident, injuries from which caused his death. A state police officer detected odors of alcohol on his breath. He was taken to a hospital where he was pronounced dead on arrival and a blood sample was taken. Analysis showed that the percentage of alcohol in the decedent's blood was sixteen one-hundredths of one percent.

The decedent had been employed by the Interstate Manufacturing Company and worked from 12 midnight until 8 a.m. on the morning of the accident. It appears that he and a number of coworkers left work and went to the Town Pump Bar in Romeo to cash their checks. Thereafter, they and other friends traveled on to go bowling. After being unable to bowl at the first bowling alley they sought out, they continued on to the Colonial Lanes. Colonial Lanes is owned and operated by K-K-M Corporation, defendant in this action. It appears that at approximately 2 in the afternoon, the decedent left the Colonial Lanes for

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

the Starlite Inn.[1] At around 7 that evening the decedent left the Starlite Inn and after traveling some distance apparently attempted to pass a number of cars on the lefthand side of the road and continued through a stop sign into the path of an oncoming car.

Plaintiffs, wife and children of the decedent, brought the present action under the dramshop act, MCLA 436.22; MSA 18.993, to recover damages for the death of Mr. Durbin. After a lengthy and hard-fought trial, a jury returned a verdict of no cause of action. Thereafter, plaintiffs filed a motion for new trial which was denied. Plaintiffs here appeal asserting a number of errors. The assertions of error concern: (1) the use of a prior statement by defendant in cross-examination of plaintiffs' witness Mrs. Lila Skinner; (2) the use of portions of a deposition of a witness not before the court which referred to an extrajudicial statement; (3) exclusion of decedent's wife's testimony as to her husband's drinking habits; (4) the use of hypothetical questions propounded by the defense counsel to expert witnesses; (5) the jury instructions; (6) failure to grant plaintiffs' motion for a new trial; and (7) a claim that the jury verdict was against the great weight of evidence.

Further facts will be found where relevant to discussion of the particular issues.

I

Plaintiffs called Mrs. Lila Skinner, a coworker of

[1] The Starlite Inn was owned and operated by one Glora Simi, who was originally designated as a defendant in this action. A consent judgment was entered on behalf of the plaintiffs against defendant Simi. It is to be noted that at trial Simi was the only one testifying that the defendant had been in her place of business in the morning from approximately 9 to 10 rather than in the afternoon and early evening.

the decedent, who had been with Mr. Durbin during the course of the day of the accident. She testified that they remained at the Town Pump for approximately 30 minutes and that the decedent there had a bottle of beer. She also testified that she and the decedent went bowling at the Colonial Lanes and that while there the decedent had drunk a number of bottles of beer, although she was unsure as to how many. During the course of direct examination, plaintiffs' counsel refreshed Mrs. Skinner's recollection by reading from her deposition. Defense counsel objected that this was improper unless plaintiffs' counsel was going to impeach the witness and, because surprise or hostile witness status had not been shown, impeachment was improper. This objection was overruled and testimony from the deposition was read.

A review of the record reveals that defense counsel in cross-examining this witness was faced with a reluctant, somewhat unwilling, and forgetful witness. Defense counsel produced a statement signed by Mrs. Skinner taken by an investigator. After Mrs. Skinner identified her signature on the "piece of paper" defense counsel proceeded to begin to read the statement. Plaintiffs' counsel objected on the basis that there was an insufficient foundation. While Mrs. Skinner admitted that the signature was her own, she denied remembering having read the statement. The trial court ruled that the statement could be read for purposes of refreshing recollection with the condition that the investigator who took the statement be produced at trial. Plaintiffs here assert that there was an improper foundation laid to refresh the witness's recollection or for admission into evidence, that the statement was not admissible for the purpose of refreshing recollection, and that there was not a

proper foundation laid for admission into evidence of the statement for impeachment purposes.

It has been said that the purpose of refreshing is to awaken memory and not to impeach or contradict a witness. *People v Thomas,* 359 Mich 251, 262; 102 NW2d 475, 482 (1960). An essential requirement in using memoranda to revive present recollection is the necessity to resort to the memoranda to refresh memory. *Battle Creek Food Co v Kirkland,* 298 Mich 515, 527; 299 NW 167, 172 (1941); *People v Bentley,* 47 Mich App 150, 158; 209 NW2d 333, 337 (1973). In *Battle Creek Food Co,* p 528; 299 NW 172, the Court said that it was not necessary to place the memoranda or notes in evidence as it was the recollection and not the memoranda which was evidence.

The extent to which witnesses may refer to or read from refreshing memoranda and the extent to which such memoranda may be reviewed by counsel or the jury is usually a matter within the discretion, of the trial court and, in the absence of abuse of discretion, the trial court will not be reversed. 82 ALR2d 473, § 4, p 489; 3 Wigmore on Evidence, § 765, p 145. *Hileman v Indreica,* 385 Mich 1, 8–9; 187 NW2d 411, 413 (1971), was an action brought under the dramshop act. The Court there wrote:

"The purpose of all witness-examination is that of getting at the truth, and the rule which denies to the voucher of credibility all right of impeachment should not be stretched into denial of his right to call to the attention of the witness the latter's previous statements, writings, affidavits or depositions which, upon the face or faces thereof, are apparently inconsistent with his trial testimony; the purpose and object being that of memory refreshment as set forth by Jones. [5 Jones, Blue Book of Evidence (Bancroft-Whitney ed of 1914).] Among our cases wherein this evidentiary prac-

tice has been upheld, on direct examination as well as cross-examination, are *Beaubien v Cicotte,* 12 Mich 459 (1864); *Stone v The Standard Life & Accident Insurance Co,* 71 Mich 81; 38 NW 710 (1888); *Prentis v Bates,* 88 Mich 567; 50 NW 637 (1891); *Pickard v Bryant,* 92 Mich 430; 52 NW 788 (1892); *People v Case,* 105 Mich 92; 62 NW 1017 (1895); *People v Palmer,* 105 Mich 568; 63 NW 656 (1895); *People v O'Neill,* 107 Mich 556; 65 NW 540 (1895); *Dillon v Pinch,* 110 Mich 149; 67 NW 1113 (1896); *People v Johnson,* 186 Mich 516; 152 NW 1096 (1915); *Bresch v Wolf,* 243 Mich 638; 220 NW 737 (1928); *Mitchell v DeVitt,* 313 Mich 428; 21 NW2d 111 (1946); *Higdon v Kelley* [339 Mich 209; 63 NW2d 592 (1954)].

"Admittedly, as in *Bresch,* the *rule relating to the refreshment of a witness' memory is largely one of judicial discretion."* (Emphasis supplied.)

The case was reversed "[f]or fair discretion the trial judge was just a little too hasty, and too far ahead of what might have been shown, when he found an effort to impeach rather than refresh", p 16; 187 NW2d 417. Further, the Court held that the fullest permissible examination into the question of the degree of intoxication was in order from a witness who had much knowledge on that question, p 12; 187 NW2d 414–415.

As to the allowance of defense's use of this statement, we find no abuse of discretion. We do note that the method chosen was incorrect in that the statement should initially have been shown to the witness for her perusal and comments. McCormick on Evidence (2d ed), § 28, p 56. Further, a review of the record does reveal that the witness manifested much difficulty in recalling details and in fact noted that, to some degree, the statement had revived some memory. Moreover, the statement was properly used for impeachment purposes as a prior inconsistent statement. McCormick (2d ed), § 36, p 70. *Cf. People v Nankervis,* 330 Mich 17, 20–21; 46 NW2d 592, 594–595 (1951). An inves-

tigator testified at trial that he had talked to Mrs. Skinner, written the statement, and that she had signed the statement. On this latter ground alone, the action of the trial court was not erroneous in that a right conclusion will not be disturbed on appeal even though based on wrong theory. 2 Michigan Law & Practice, Appeal, § 282, p 136. See, also, *People v Rodgers,* 36 Mich App 211, 223; 193 NW2d 412, 417 (1971), LEVIN, J., dissenting, adopted by Supreme Court in 388 Mich 513, 519; 201 NW2d 621, 624 (1972).

We can here see no substantial injustice arising from the trial court's decision as credibility must have been a major factor in the outcome of this case. The jury is the sole judge of credibility of witnesses and the weight to be accorded their testimony. *Obeginski v James,* 4 Mich App 90, 93; 143 NW2d 579, 581 (1966).

> "[T]he meaning of impeachment, which is not a matter of law for the court, but [is] an evidentiary question of what may properly be laid before a jury to assist it in judging the credibility of witnesses. The trial judge properly left this to the jury." *Winekoff v Neisner's Automotive Supply, Inc,* 12 Mich App 51, 54; 162 NW2d 341, 343 (1968).

Prior statements, introduced for impeachment purposes, bear solely upon the credibility of the witness and are not considered for the purpose of establishing the substance or truth of the prior statements. *Gabrish v Morse,* 361 Mich 39, 43; 104 NW2d 757, 759 (1960). *Cf. Osberry v Watters,* 7 Mich App 258, 262–263; 151 NW2d 372, 374–375 (1967); and *Gorman v McCleaf,* 369 Mich 237, 241; 119 NW2d 636, 638 (1963). We here find that whatever error may have occurred caused no prej-

udice to the plaintiffs. See, generally, *Oppenheim v Rattner,* 6 Mich App 554, 559; 149 NW2d 881, 883 (1967).

II

A deposition was taken from Mrs. Shirley Jean Childs in Huntsville, Alabama, for discovery, pursuant to Michigan Court Rules pertaining to depositions and their admissions. GCR 1963, 302. Mrs. Childs was unavailable at the time of trial. The deposition was read into evidence. The portions to which the plaintiffs have objected refer to a statement taken from Mrs. Childs and her then husband, Norman, by an investigator. This statement was signed by both Norman and Mrs. Childs and initialed. The plaintiffs objected on the ground that any reference to the statement, which, they assert, was basically Norman's, was hearsay. The defense answered saying that the statement was adopted by Mrs. Childs and that it was an admissible exception to the hearsay rule as being a part of the res gestae. Moreover, defendant asserts that this was properly used and admitted for the purpose of impeachment.

It appears that Mr. and Mrs. Childs were in the company of the decedent at various times and places during the course of the day in which the accident occurred. Mrs. Childs said in the deposition that she personally gave a statement to no one and that she was in the kitchen of their home while her husband was giving the statement.[2] The following excerpt from the trial transcript is demonstrative of the problem we here face.

[2] Norman Childs was not called as a witness. A deposition was taken from Mr. Childs on June 3, 1972, in Nashville, Tennessee. It was not introduced at trial.

" 'Q. *[Mr. Baun, defense attorney]:* And you signed those, didn't you, Ma'am?

" 'A. I signed something and I don't remember what they were.

" 'Q. Is this your signature on here?

" 'A. I told you it looks like my signature.

" 'Q. Did you read the pages?

" 'A. No.

" 'Q. Why not?

" 'A. Norman was sitting there. He read them and said it was all right.'

"*Mr. Langton [plaintiffs' attorney]:* I object to anything that Norman said.

"*The Court:* Overruled.

" 'Q. All right. Now, did you hear your husband tell this man on February 2, 1971 in your house at—'

"*Mr. Langton:* I object, your Honor.

"*Mr. Baun:* Make your objections.

"*Mr. Langton:* I object—

"*The Court:* Overruled.

"*Mr. Langton:* To what she heard her husband say. That's hearsay.

"*The Court:* Overruled.

" 'Q. Did you hear your husband say at that time that Mr. James Durbin was intoxicated when he left the Colonial Lanes?

" 'A. I didn't hear anything he said. I heard very little of it.

" 'Q. And did you hear your husband tell the investigator that Mr. Durbin's speech was not slurred and he did not stagger and his eyes were not bloodshot in the Colonial Lanes?

" 'A. No.

" 'Q. And yet you signed this statement where he did say that?

" 'A. As I said—'

"*Mr. Langton:* Objection. There is no foundation laid. We made a record on this.

" 'Q. Your husband did say to you, " 'Well, it's okay, go ahead and sign this paper.' "?

" 'A. Yes.'

"*Mr. Langton:* Objection, your Honor.

"'*Q.* These look like the papers, don't they?'

"*Mr. Langton:* Objection, your Honor. I have an objection, your Honor.

"*The Court:* Overruled."

In passing upon admissibility, the trial court said:

"It's the opinion of this court that the testimony of Mrs. Skinner, Mrs. Simi and the deposition of Mrs. Childs is highly suspect. Fortunately, the jury has not gotten into the problem with Mr. Childs, but as far as this court is concerned these are all going to be facts for the jury to determine—why it is that these parties would make statements and sign statements on one date and then reverse themselves on another, and as I say, the statement of Mr. Childs and what he got himself involved in, which isn't going to be before the jury, should not prejudice them. These statements are going to be, I think, should all go before the jury. Let them make up their minds when are these people telling the truth and when are they not.

"As to the exhibits, with reference to the exhibits specifically they state, 'I have read this, and it is correct.' There are corrections all along the way with her initials. Now that is, to me, enough to go to the jury and let the jury decide. They heard, the jury heard her testimony. They heard what she said about her statement, and so let's let the jury have everything. Let them find out what part they are going to believe and what part they aren't going to believe. That's the reason they are here, they are here to discover the truth."

In *Rice v Jackson,* 1 Mich App 105, 110; 134 NW2d 366, 368 (1965), Judge (now Justice) FITZGERALD wrote:

"The hearsay rule 'prohibits the use of a person's assertion, as equivalent to testimony of the fact asserted, unless the asserter is brought to testify in court on the stand, where he may be probed and cross-exam-

ined as to the grounds of his assertion and of his qualifications to make it' (5 Wigmore on Evidence [3d ed], § 1364, p 9). In application, if a witness in court testified to what another person out of court stated to him and the court or jury is asked to believe that the statement is true, this testimony would be hearsay and not admissible in evidence.

"Hearsay is generally prohibited because credibility depends not on the sworn and cross-examined witness, but on the unsworn and un-cross-examined, absent narrator. (2 Jones on Evidence [5th ed], § 268, p 514.)"

See, also, 5 Callaghan's Michigan Pleading & Practice (2d ed), Evidence, § 36.470, pp 8–9; and *Greenman v O'Riley,* 144 Mich 534, 539; 108 NW 421, 423 (1906).

An adoptive admission is the express adoption of another's statement as one's own. It is conduct on the *part of a party* which manifests circumstantially that party's assent in the truth of a statement made by another. The mere fact that a party had declared that he or another person made the statement is not in and of itself sufficient for a finding of adoption. In order to find adoptive approval of the other's statement the circumstances surrounging the other's declaration must be examined. McCormick (2d ed), § 269, p 649. Mrs. Childs stated that she signed the statement only at the request of her husband. The circumstances do not suffice for a finding of an adoptive admission and, moreover, in the normal course of affairs, adoptive admissions refer only to party-opponents. Mrs. Childs was a witness, not a party. See *Thompson v Village of Mecosta,* 141 Mich 175, 179–180; 104 NW 694, 695 (1905); *cf. Ruhala v Roby,* 379 Mich 102, 113; 150 NW2d 146, 150 (1967).

Rice v Jackson, supra, 111; 134 NW2d 368, sets out the standards by which to review assertions of res gestae exceptions to the hearsay rule.

"In Michigan, the law regarding *res gestae* is clear. From *Rogers v Saginaw-Bay City R Co,* 187 Mich 490; 153 NW 784 (1915), to *Holtz v L J Beal & Son, Inc.* 339 Mich 235; 63 NW2d 627 (1954), the conditions upon which such statements will be allowed in evidence are (1) that there is a startling occasion, startling enough to produce nervous excitement, and render the utterance spontaneous and unreflecting; (2) that the statement must have been made before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it.

"The 'startling occasion' called for under point (1) has been applied by the Michigan Supreme Court to explosions, collisions, accidental injuries, shootings, and a variety of occurrences."

While the statement referred to in the deposition related the circumstances of the occurrence, the utterance was not spontaneous and unreflected and there certainly was time to contrive and misrepresent. Thus, it is readily apparent that the statement here in question is not within the res gestae exception.

It is further apparent that, as Mrs. Childs was unavailable at the time of trial, the necessity for the introduction of reference to the statement was not shown. Thus, there was an insufficient foundation laid. See *Ebel v Saginaw County Board of Road Commissioners,* 386 Mich 598, 608; 194 NW2d 365, 369 (1972); *cf. Ruhala, supra,* p 115; 150 NW2d 151.

As the witness was unavailable at trial for cross-examination and it has not been shown that the statement was hers for impeachment purposes, its use was erroneous. However, in review of six volumes of transcript from this seven-day trial, we cannot see that plaintiffs were prejudiced so as to warrant reversal and another trial. Mrs. Skinner testified to basically the same material as Mrs.

Childs. Further, another individual who was present at the Colonial Lanes was produced by plaintiffs. A review of the entire cause does not show that the error has resulted in substantial injustice.[3] GCR 1963, 529.1.

III

The trial court refused to allow testimony of decedent's drinking habits by Mrs. Durbin on the bases of lack of foundation, conclusion, and that it would be self-serving. Plaintiffs contend that Mrs. Durbin had 14 years of experience in dealing with the deceased's drinking capacity and habits and, as such, her testimony would have been confined to facts within her personal knowledge and observation, and state that numerous cases have held that evidence of habit is admissible to show like conduct on the occasion in question. The cited cases are distinguishable, *e.g., Hoffman v Rengo Oil Co, Inc,* 20 Mich App 575; 174 NW2d 155 (1969). In *Hoffman* plaintiff's decedent was struck by a motor vehicle while crossing a highway. The path followed by the deceased was disputed. The Court held, per curiam, that evidence of habit was admissible to show the probable path the decedent took on the day in question. Likewise, the cases upon which the plaintiffs have relied for the proposition that "[i]n numerous actions by a wife, widow, or mother for damages for the unlawful sale of intoxicating liquor to her husband or minor

[3] We do note that it would have been well for the trial court to have given a cautionary instruction that the statement was not to be used as substantive evidence. *People v Durkee,* 369 Mich 618, 627; 120 NW2d 729, 733 (1963). The trial court here cautioned that the statement should be considered only as to whether it was the adopted statement of Mrs. Childs. While harmless, this instruction was deficient.

son, evidence has been held admissible to the drinking habits of the husband or son", are distinguishable. *Sisson v Lampert,* 159 Mich 509; 124 NW 513 (1910), was an action against two saloon keepers to recover damages caused by the death of plaintiff's husband while intoxicated on the ground that the intoxication was induced by liquor sold by the two dealers. The Court held that there was no error in permitting various witnesses to testify as to the intoxicated condition of the deceased on the day of his death. The Court went on to hold that testimony as to the decedent's drinking habits was competent and admissible. There is, however, nothing in the opinion to indicate that such testimony was given by decedent's wife or other relatives. *Brockway v Patterson,* 72 Mich 122, 129; 40 NW 192, 195 (1888), held that testimony as to decedent's drinking habits was admissible as "a pertinent subject of inquiry *as bearing upon the question of damages".* (Emphasis supplied.)

In cases of similar peripheral analogy testimony has been excluded as being self-serving, *e.g., Meyers v Ermolik,* 301 Mich 284, 290; 3 NW2d 276, 279 (1942). McCormick has written:

> "[T]he judge should possess the discretion usual in this field of circumstantial evidence to exclude if the habit is not sufficiently regular and uniform, or the circumstances sufficiently similar, to outweigh the danger, if any, of prejudice or confusion." § 195, p 463.

Due to the fact that the testimony could indeed be viewed as self-serving and that the decedent's wife had no personal knowledge of his state of intoxication on the day in question, we can discern no abuse of discretion in the disallowance of this testimony.

IV

Plaintiffs question hypothetical questions posed by defense counsel in the cross-examination of one witness and the direct examination of another. Plaintiffs assert that the elicited testimony was "based on facts not justified by the evidence" and assumed facts deviating from the testimony and relying on rebutted facts.

Hypothetical questions to expert witnesses must be based on firsthand knowledge or upon facts in the record at the time the expert gives his opinion or a combination of these two facts. McCormick, supra, § 14, p 31; *In re Anderson Estate,* 353 Mich 169, 177; 91 NW2d 356, 360 (1958). In *Bosch v Damm,* 296 Mich 522, 528–529; 296 NW 669, 671 (1941), Justice BUSHNELL wrote:

"One of the requisites of rendering opinion testimony competent, under the record being reviewed, is that there shall be produced before the jury testimony of the facts and circumstances upon which the expert bases his opinion. This is of first importance, because if any essential fact on which the opinion is based is not found by the jury to exist, the answer of the witness is *(Ballance v Dunnington,* 241 Mich 383; 217 NW 329 [1928]; 57 ALR 262; *Thornton v Berry,* 259 Mich 529; 244 NW 152 [1932]) without probative force and must be disregarded by the jury. To propound a question which in a wholesale fashion permits an expert witness to base his opinion answer on 'other circumstances that you found existing out there,' without in any way indicating in the question what circumstances or facts are included therein, wholly prevents the jury from fairly and intelligently weighing and applying the answer of the expert.

" 'Counsel, in propounding a hypothetical question to an expert witness, may assume any state of facts which the evidence tends to establish, and may vary the questions so as to cover and present the different theo-

ries of fact. But there must be evidence in the case tending to establish all of the facts stated in the question.' *Russ v Railway Company,* 112 Mo 45; 20 SW 472; 18 LRA 823 [1892]."

A careful review of the record does not reveal that it is "entirely barren of facts forming a basis for the hypothetical questions" as in *Mapes v Berkowitz,* 304 Mich 278, 283; 8 NW2d 65, 67 (1943). We do not find that the questions propounded by defense counsel were completely afield of the issues at trial, nor did they seek abstract answers. Further, the court refused a question, propounded by plaintiffs, based upon a hypothetical man who could drink "nine bottles of beer in one hour" which found no supporting facts on the record.

We find that plaintiffs have not carried their burden of showing clearly that any error, prejudicial or otherwise, occurred.

V

Plaintiffs claim that reversible error was committed by (1) the trial court's refusal to read the dramshop act, MCLA 436.22; MSA 18.993, in its entirety; (2) the trial court's refusal to give standard jury instruction 1.03 pertaining to circumstantial evidence; and (3) the trial court's refusal to read to the jury the statute regarding the presumption of intoxication, MCLA 257.625a; MSA 9.2325(1). As to the dramshop act, the trial court instructed the jury as follows:

"Now, the substance of the act, and I am going to read it—I am going to read the important part right from the statute, it is as follows:

" 'Every wife, husband, child, parent, guardian or other person who shall be injured in person or property,

means of support or otherwise, by an intoxicated person by reason of the unlawful selling, giving or furnishing to any such person any intoxicating liquor, shall have a right of action in his or her name against the person who shall by such selling or giving of any such liquor have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injuries.' "

Plaintiffs specifically objected to the court's failure to instruct on the dramshop statute in its entirety and have thus saved this issue for appeal. GCR 1963, 516.2.

"It is a time-honored rule that the failure to give legally accurate, properly requested instructions in the precise language submitted is not error, *providing the substance is embodied in the instructions as given.* Thus, in the instant case we must view the instructions as a whole with this principle in mind." (Emphasis in original.) *McKine v Sydor,* 387 Mich 82, 86; 194 NW2d 841, 843 (1972).

See, also, *Britten v Updyke,* 357 Mich 466, 473; 98 NW2d 660, 664 (1959); *People v Spaulding,* 42 Mich App 492, 496; 202 NW2d 450, 452 (1972), *lv den,* 388 Mich 809 (1972); and *Shreve v Leavitt,* 51 Mich App 235; 214 NW2d 739 (1974).

The instructions, *in toto,* adequately informed the jury that any person who sold intoxicating liquor to an intoxicated person would be liable for any injuries sustained as a result of the intoxication. Plaintiffs have not been prejudiced by the trial court's excerpting from the statute.

The admissibility of circumstantial evidence is a well recognized principle and not subject to challenge. *Villa v Golich,* 42 Mich App 86, 88–89; 201 NW2d 349, 351 (1972). An action under the dramshop act may be proved by circumstantial evidence, *Mason v Lovins,* 24 Mich App 101; 180

NW2d 73 (1970); finding for plaintiffs may be founded upon inferences drawn from such circumstantial evidence, *Fletcher v Flynn,* 368 Mich 328, 334; 118 NW2d 229, 232 (1962).

The instruction given the jury reads:

"In determining whether any fact has been proved, you shall consider all of the evidence bearing on that fact without regard to which party produced the evidence. You have a right to consider all the evidence in the light of your own general knowledge and experience in the affairs of life and to take into account whether any particular evidence seems reasonable and probable."

Due to much conflicting testimony, it is difficult to discern what inferences the jury might have drawn. Moreover, circumstantial evidence was not required, as there was direct evidence. See 29 Am Jur 2d, Evidence, § 264, p 312. We find no error or prejudice in this issue. See, generally, *Nowicki v Suddeth,* 7 Mich App 503, 511–512; 152 NW2d 33, 37 (1967).

As to plaintiffs' assertion of error in not instructing on the presumption of intoxication found in MCLA 257.625a; MSA 9.2325(1),[4] no objection was made. Accordingly, this issue has not been properly perfected for appeal and, finding no manifest injustice, we do not pass thereupon. GCR 1963, 516.2.

VI

The granting or denying of a motion for new

[4] The jury was instructed as to intoxication, thusly:

"Now, the definition for 'intoxicated' is: 'A person is " 'intoxicated' " when, as a result of drinking intoxicating liquors, his mental or physical senses are impaired.' The definition for 'intoxicating liquor' is: 'Intoxicating liquor, includes beer and wine as well as other alcoholic beverages.' "

trial rests within the sound discretion of the trial court and reversal of such order is a function of whether prejudicial error was committed and an abuse of discretion is found. *Witt v Chrysler Corp,* 15 Mich App 576, 579; 167 NW2d 100, 102 (1969); *Parker v Severn,* 37 Mich App 231, 232; 194 NW2d 432, 433 (1971). Having found no prejudicial error and no abuse of discretion, the trial court was correct in denying plaintiffs' motion.

VII

Finally, plaintiffs-appellants contend that the jury verdict was against the great weight of the evidence.

This Court will not substitute its judgment for that of the jury unless a careful review of the record reveals a miscarriage of justice. *Williams v Fiedlar,* 22 Mich App 179; 177 NW2d 461 (1970), *aff'd,* 386 Mich 221; 191 NW2d 52 (1971). Judge (now Justice) LEVIN has written:

> "In an action under the dramshop act, the plaintiff has the burden of proving that the defendant tavern sold intoxicating beverages to a person who, at the time of sale, was already intoxicated, and that there is a causal connection between the unlawful sale and the injuries for which the plaintiff seeks to recover." *Mason v Lovins,* 24 Mich App 101, 106; 180 NW2d 73, 75 (1970).

We may not substitute an alternate determination as we find no miscarriage of justice. It appears that plaintiffs merely did not carry their burden to the satisfaction of the jurors. It is noteworthy that the verdict was unanimous.

Moreover, testimony revealed that the decedent had absented himself from the defendant's place of

business for some five or more hours before the accident occurred.

Affirmed. Costs to appellees.

All concurred.

PEOPLE v HOLT

1. CRIMINAL LAW—EVIDENCE—IMPEACHMENT OF TESTIMONY—DISCRETION.

   A trial court cannot be faulted for permitting the impeachment of a defendant's testimony by reference to prior unspecified misdemeanors where the defendant made no objection to the admission of the testimony and thus did not invoke the judge's discretion.

2. ESCAPE—CRIMINAL LAW—VALIDITY OF COMMITMENT—INSTRUCTIONS TO JURY.

   An instruction to the jury that in order to convict a defendant of prison escape they would have to find beyond a reasonable doubt that the defendant had been committed under the terms of a mittimus was proper and did not require a charge that the jury must find that the defendant was legally imprisoned under a valid mittimus; the fact that the defendant's conviction was later reversed does not affect the validity of the mittimus and does not justify an escape from prison.

3. CRIMINAL LAW—SENTENCING—PRIOR CONVICTION.

   Taking into consideration in sentencing a defendant a prior conviction which has been reversed by the Court of Appeals is error.

Appeal from Jackson, Gordon W. Britten, J. Submitted Division 2 April 9, 1974, at Lansing. (Docket No. 16388.) Decided June 24, 1974.

Kenneth L. Holt was convicted of escape from

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 762.

[2] 27 Am Jur 2d, Escape, Prison Breaking, and Rescue §§ 10, 18.

What justifies escape or attempt to escape, or assistance in that regard. 70 ALR2d 1430.

[3] 21 Am Jur 2d, Criminal Law § 533 *et seq.*

prison. Defendant appeals. Affirmed and remanded for resentencing.

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

Dennis H. Benson, Assistant State Appellate Defender, for defendant.

Before: McGREGOR, P. J., and R. B. BURNS and O'HARA,* JJ.

McGREGOR, P. J. At the time of the instant offense of escape from prison, contrary to MCLA 750.193; MSA 28.390, defendant was incarcerated in the State Prison of Southern Michigan as a result of his plea to the offense of attempted rape. Defendant was sentenced on December 4, 1970, to serve a 4 year term for this offense. Defendant's motion to have his guilty plea vacated in the trial court was denied. See *Holt v State Bar Grievance Board,* 388 Mich 50; 199 NW2d 195 (1972). Defendant's appeal to this Court was filed on April 20, 1972.

On June 21, 1970, defendant filed a complaint with the State Bar Grievance Board against his appointed counsel, alleging inadequate representation and professional misconduct. The Grievance Board dismissed the complaint as groundless on September 8, 1971. Subsequent to the decision of the Grievance Board, this Court, based upon a brief submitted by defendant's appointed counsel, found that defendant's case was wholly frivolous

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

and dismissed defendant's appeal. Leave to appeal to the Supreme Court was denied.

Defendant appealed the Grievance Board's dismissal to the Supreme Court. *(Holt v State Bar Grievance Board, supra.)* That Court found that the issues which defendant sought to raise through his appointed counsel with respect to his guilty plea were substantial and, further, that defendant's plea had been improperly accepted. After the decision in *Holt, supra,* the defendant filed a "motion for peremptory reversal" of the attempted rape conviction in the trial court. Upon denial there, he filed a similar motion in this Court, which was granted October 30, 1972 *(People v Holt,* No. 14849).

Among other errors, defendant contends that the trial court abused its discretion in permitting the impeachment of defendant's testimony by reference to prior unspecified misdemeanors.

An examination of the transcript indicates that, although defense counsel requested a limiting instruction with respect to the permissible use of the impeachment testimony, he did not object to its admission. Since defendant did not object to the admission of the testimony, "he did not invoke the judge's discretion [and] cannot fault the judge for failing to exercise it when he allowed impeachment on the basis of prior convictions". *People v Moore,* 391 Mich 426, 435; 216 NW2d 770 (1974); *People v Jones,* 44 Mich App 633; 205 NW2d 611 (1973). *Cf. People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974).

Defendant next argues that the trial court's instructions to the jury were reversibly erroneous in that they failed to include an integral element of the crime of prison escape, to wit: that the defendant was legally imprisoned under a valid mittimus at the time of his escape.

The fact that the conviction for which defendant was serving time in prison was later reversed does not justify his escape. As noted in *People v Mullreed,* 15 Mich App 538, 539; 166 NW2d 820 (1969):

> "Under the modern view, a defendant may not successfully contend that an escape from *lawful* confinement is not a crime because the conviction leading to his imprisonment was allegedly faulty. (Citations omitted.) One does not challenge the law by violating its mandates. (Citations omitted.) There are procedural means available to attack a conviction arguably tainted by reversible error. But those means do not include the freedom to defy lawful imprisonment with impunity. An individual is not justified in escaping from prison if he was validly sentenced and confined under color of law." (Emphasis in original.)

In this case, the trial court did instruct the jury that, in order to convict the defendant, they would have to find beyond a reasonable doubt that he was committed under the terms of a mittimus. Since the fact that defendant's conviction for attempted rape was later reversed does not affect the validity of the mittimus, the trial court's instructions were not reversibly erroneous in the absence of an objection. Thus, this case is distinguishable from *People v Alexander,* 39 Mich App 607; 197 NW2d 831 (1972), where the defendant's conviction for prison escape was reversed in light of the fact that he could reasonably believe that his imprisonment was without color of law. Similarly, *People v Hamaker,* 92 Mich 11; 52 NW 82 (1892), is not controlling, because the mittimus in that case was invalid on its face, since based on a conviction without foundation in either common or statutory law.

Finally, defendant urges that the trial court

erroneously considered a vacated conviction in imposing sentence on defendant.

It will be recalled that, on October 30, 1972, this Court issued an order reversing defendant's conviction for attempted rape. On November 8, 1972, defendant appeared before the trial court for the purpose of sentencing on his conviction for escape. At that time, the following colloquy took place:

"*The Court:* * * * That is the information as you have given to them.

"*A.* Right. Well, I am not guilty of no rape charge or attempted rape.

"*The Court:* This girl was a deaf mute, isn't that right?

"*A.* No, she wasn't.

"*The Court:* Oh. The report here also in the presentence from before Judge Gallagher that it was a forcible rape and that she is a deaf mute and the judge stated in his statement to the—looks like a judge's statement to the prison—I assume you have seen the judge's statement, haven't you?

"*A.* No, I haven't."

This and similar portions of the sentencing transcript clearly support defendant's contention that the trial court, in sentencing defendant, took into consideration the conviction for attempted rape which had been reversed by this Court. Further, it is clear that the defendant denied any involvement in the attempted rape. In these circumstances, we think it necessary to remand the case for resentencing before a different judge. *People v Grimmett,* 388 Mich 590; 202 NW2d 278 (1972), and *People v Zachery Davis,* 41 Mich App 683; 200 NW2d 779 (1972).

Conviction affirmed. Case remanded to the trial court for resentencing.

All concurred.

MOSHIER v CITY OF ROMULUS

1. MUNICIPAL CORPORATIONS—TAXPAYERS—STANDING TO SUE—MISUSE OF PUBLIC FUNDS.

   A plaintiff taxpayer has standing to maintain an action against a municipality for misuse of public funds even if his interest in the outcome is financially insignificant; the misuse of public funds generally affects all taxpayers and entitles one to take action against such wrongful acts.

2. DEDICATION—PRIVATE ROADS—PUBLIC USES—INSUFFICIENCY OF PUBLIC ACTION.

   A road was properly found to be private and never dedicated to the public, where the cost of repair had always been borne by the residents adjacent to the road and the city had never reported the road as public for purposes of state reimbursement, continually taxed abutting owners to the center of the road, and required anyone building adjacent to the road to maintain it in front of his property.

3. DEDICATION—INTENT.

   In order to find that a piece of property has been dedicated to the public use by the owner of the property, there must appear a clear intent to do so; all of the facts and circumstances must positively and unequivocally disclose the requisite intention.

4. INJUNCTION—MISUSE OF PUBLIC FUNDS—SUFFICIENCY OF HEARINGS.

   The use of a permanent injunction is an appropriate form of relief in a suit to enjoin misuse of public funds, and such an injunction was properly issued following a show cause hearing where several hearings had taken place, memoranda of law had been filed, testimony received, and no motion had been made by the defendant to take additional proofs.

Appeal from Wayne, George E. Bowles, J. Sub-

REFERENCES FOR POINTS IN HEADNOTES

[1] 74 Am Jur 2d, Taxpayers' Actions § 16 *et seq.*
[2] 39 Am Jur 2d, Highways, Streets, and Bridges § 3.
[3] 23 Am Jur 2d, Dedication §§ 1, 19, 21, 76, 77, 79.
[4] 74 Am Jur 2d, Taxpayers' Actions § 41.

mitted Division 1 May 9, 1974, at Detroit. (Docket No. 16613.) Decided June 24, 1974.

Complaint by Bill B. Moshier and Carol Moshier against the City of Romulus for injunctive relief. Injunction granted. Defendant appeals. Affirmed.

B. B. Moshier, for plaintiffs.

Elsman, Young & O'Rourke, for defendant.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

BASHARA, P. J. Plaintiffs brought suit to enjoin the defendant, City of Romulus, from expending public funds for the care and maintenance of a private road located in that city. The trial court after hearing the proofs and argument of the parties, issued a permanent injunction prohibiting further expenditure of public funds. Defendant appeals the court's order raising both errors of law and findings of fact.

Defendant first argues that plaintiffs do not have standing to maintain this action. The city admits that plaintiffs are taxpayers, but asserts that their interest in the outcome is so financially insignificant as to preclude a finding of proper standing. Defendant cites *McManus v City of Petoskey,* 164 Mich 390; 129 NW 681 (1911), for support of its argument that plaintiffs must have an interest of over $100 in the suit to maintain the action. The statute involved in that case, however, was repealed nearly 70 years ago. In *Bacon v Detroit,* 282 Mich 150; 275 NW 800 (1937), the Court considered a question similar to the one at bar:

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

"The statute, Act No. 183, Pub Acts 1903, requiring taxpayers to show interest or damage of $100 to maintain suit to restrain a threatened misuse of city funds was repealed by Act No. 216, Pub Acts 1905, and is not now the law. 3 Comp Laws 1929, § 13943. Plaintiff may maintain the suit. *Carrier v State Administrative Board,* 225 Mich 563 [196 NW 182 (1923)]; *Freeland v City of Sturgis,* 248 Mich 190 [226 NW 897 (1929)]."

The plaintiffs here are likewise not precluded from maintaining this action. The misuse of public funds generally affects all taxpayers and entitles one to take action against such wrongful acts, except as limited by GCR 1963, 201.2(3).

The second issue raised by defendant is whether it acted wrongfully in attempting to repair and maintain the subject road. It is defendant's contention that the road became "public" through dedication by the former owners to the City of Romulus. *Laug v Ottawa County Road Commission,* 37 Mich App 757, 761; 195 NW2d 336, 338 (1972), stands for the proposition that certain elements must be shown for proving dedication:

"In order to find that a piece of property has been dedicated to the public use by the owner of the property, there must appear a clear intent on the part of the owner to dedicate his property for such use. * * * It is true that intent may be found from the actions of individuals, but such actions must be unequivocal. * * *

"In determining the existence of an intention to dedicate, all of the facts and circumstances bearing on the question must be considered and, to be sufficient, they must positively and unequivocally disclose the requisite intention. * * * "

We have reviewed the record and agree with the trial court's finding that the controverted road was never dedicated and remained private. The court found that except for two instances, the cost of

repair had always been borne by the residents. The city had never reported the road as public for purposes of state reimbursement, and continually taxed the abutting owners to the center of the road. Furthermore, as late as July, 1972, the defendant required anyone building adjacent to the road to agree to maintain it in front of his property. In finding the road to be private the trial court properly restrained the further expenditure of public funds since they may not be used for repair or improvement of private property. Const 1963, Art III, § 6; *Bates v City of Hastings,* 145 Mich 574; 108 NW 1005 (1906).

Defendant next questions the propriety of issuing a permanent injunction as a remedy to plaintiff's action. The use of permanent injunctions has long been recognized as an appropriate form of relief in suits to enjoin misuse of public funds. *Attorney General v Detroit,* 26 Mich 263 (1872); *McManus, supra.*

Defendant's final allegation was that a permanent injunction should not issue from a show cause hearing. The facts do not support his allegation, but indicate that the order was issued only after several hearings had taken place, memoranda of law had been filed, testimony received, and no motion was made by defendant to take additional proofs. The order of the trial court was proper under the circumstances of this case. *Thomson v Dearborn,* 347 Mich 365; 79 NW2d 841 (1956).

Affirmed, costs to plaintiff.

All concurred.

PEOPLE v CARTER

1. INDICTMENT AND INFORMATION—PRELIMINARY EXAMINATION—RETROACTIVE APPLICATION.

A holding of the Michigan Supreme Court that a defendant has a right to a preliminary examination following indictment by a grand jury is not retroactive.

2. COURTS—DECISIONS—RETROACTIVE APPLICATION—PROSPECTIVE APPLICATION.

The three factors to be used in determining whether a law should be applied retroactively or prospectively are: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.

3. CONTINUANCE—DISCRETION—COURT RULE.

The granting or denial of a continuance is subject to the discretion of the trial court and absent a clear abuse of discretion the decision will not be overturned (GCR 1963, 503.2).

4. CRIMINAL LAW—PRIOR CONVICTIONS—ASSISTANCE OF COUNSEL—TRIAL STRATEGY.

Defense counsel's questioning of the defendants and cross-examination of the people's witnesses concerning the sentences they were *currently* serving in a case where prison inmates killed another inmate was not a "serious mistake" requiring reversal, where the jury was taken to the prison for a view, and defense counsel's actions were part of trial strategy in light of the jury's knowledge.

Appeal from Jackson, Paul R. Mahinske, J. Sub-

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 442–451.

[2] 20 Am Jur 2d, Courts §§ 64, 67, 69.

[3] 17 Am Jur 2d, Continuance §§ 3, 4.

Withdrawal or discharge of counsel in criminal case as ground for continuance. 66 ALR2d 298.

[4] 58 Am Jur, Witnesses §§ 718, 723. .

mitted Division 2 May 8, 1974, at Lansing. (Docket No. 16693.) Decided June 25, 1974.

Eulis Carter, Thomas Martin, John Ballard, and Willie Brown, Jr., were convicted of first-degree murder and conspiracy to commit murder. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Bruce A. Barton,* Prosecuting Attorney, and *James M. Justin,* Chief, Appeals Division, for the people.

Steven L. Schwartz, Assistant State Appellate Defender, for defendants.

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

BRONSON, P. J. Appellants, Eulis Carter, John Ballard, Thomas Martin, and Willie Brown, Jr., were all indicted on January 19, 1971, for the homicide of Shad Green, Jr., their fellow inmate at Jackson Prison. The Jackson County citizens' grand jury indicted appellants for first-degree murder (MCLA 750.316; MSA 28.548, and see MCLA 767.71; MSA 28.1011) and conspiracy to commit murder (MCLA 750.157a; MSA 28.354[1]). Beginning May 17, 1971, appellants were tried before a jury and were all found guilty as charged on June 4, 1971. Appellants were all sentenced on July 1, 1971, to serve concurrent life sentences on each conviction to begin at the end of their present terms.

Prior to trial appellants moved for a preliminary examination on the indictments. These motions

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

were properly denied based on procedural law then existing. Appellants now contend that *People v Duncan,* 388 Mich 489; 201 NW2d 629 (1972), decided October 31, 1972, approximately one year and three months *after* their trial, requires reversal.

Duncan, supra, p 502, declared:

"We hold that in each case, and in all pending cases in which the right to a preliminary examination was asserted prior to trial and is presently being asserted, such right shall be accorded to the defendant. In all future cases wherein a defendant is accused of a felony, the right to a preliminary examination shall exist." See, also, *People v Barbara,* 390 Mich 377; 212 NW2d 14 (1973).

In *People v Lazaroff,* 50 Mich App 84; 212 NW2d 743 (1973), a panel of this Court held, "We do not read this language *[Duncan, supra]* as requiring application of *Duncan* to a case tried before *Duncan". Lazaroff, supra,* at 88. Leave to appeal the *Lazaroff* decision was denied. 390 Mich 815 (1973). *People v Harris,* 47 Mich App 757; 209 NW2d 793 (1973), in apparent conflict with the decision in *Lazaroff,* was decided by another panel of this Court. We think that the decision in *Lazaroff* more accurately reflects the policies involved in the determination of when a procedural rule should be given retroactive application. See: *People v Hampton,* 384 Mich 669; 187 NW2d 404 (1971).

In *Hampton, supra,* the Michigan Supreme Court, relying on prior decisions of the United States Supreme Court, adopted three factors to be used in determining whether a law should be applied retroactively or prospectively. The three key factors are:

"(1) the purpose of the new rule; (2) the general

reliance on the old rule; and (3) the effect on the administration of justice." *(Hampton, supra,* at 674.)

In *Duncan* the Court submitted for adoption a new court rule (788) incorporating their new decision. This decision was made as a matter of *criminal procedure* in the exercise of the Court's inherent power and not as a matter of constitutional right. *Duncan, supra,* 502.

We do not believe that the purpose of the new procedure established in *Duncan* requires reversal. This is especially true where, as here, the defendants had the transcript of the grand jury proceeding, were able to cross-examine witnesses aided by this transcript, and where no prejudice has been shown.

Prior to *Duncan* three circuit judges relied upon the then existing law to determine this case. To reverse here would be equivalent to asking a circuit judge to anticipate new procedural rules, guess at their effective dates, and then rule in direct opposition to presently establish precedent. The reliance of the trial bench on the old rule will not be overturned.

The last factor is the most cogent reason, in this case, for denying *Duncan* retroactivity. In this appeal, for reasons not clearly appearing of record, the time from jury verdict to present exceeds two years and nine months. Had the appeal run a normal and expeditious course, it is possible that it would have been completed *prior* to *Duncan.* Foot-dragging, for whatever reason, should not be rewarded.

A reversal would have no beneficial effect on the administration of justice. We therefore repeat our holding in *Lazaroff* that *Duncan* is inapplicable to cases tried before *Duncan.*

The defendants' second contention relates to the record of the grand jury proceeding. The complete grand jury transcript was not received until four days before trial. A continuance was denied. The granting or denial of a continuance is subject to the discretion of the trial court and absent a clear abuse of such discretion the decision will not be overturned. GCR 1963, 503.2, and *People v Knox,* 364 Mich 620; 111 NW2d 828 (1961). The defense claimed a witness was unavailable. The prosecution offered to stipulate to admit the grand jury testimony of this witness. The defense also complained about insufficient time to prepare for cross-examination but this is not supported by the record, which shows vigorous cross-examination. We find no clear abuse of discretion.

In this case defense counsel questioned the defendants and cross-examined the people's witnesses concerning the sentences they were *currently* serving. No objections were made at trial. Furthermore, this was a prison murder, the jury was taken to the prison for a view, and it seems defense counsel's actions were part of trial strategy in light of the jury's knowledge. The argument is neither preserved nor supported by authority.

Appellate counsel asserts that this strategy was a "serious mistake" requiring reversal per *People v Degraffenreid,* 19 Mich App 702; 173 NW2d 317 (1969). For the reasons stated, we do not agree and find no reversible error.

In a supplemental brief appellants raise additional claims of error. These have been carefully considered. The claims were either not preserved on appeal or do not require decisional discussion. We find no reversible error.

Affirmed.

All concurred.

PEOPLE v POGUE

1. CRIMINAL LAW—PLEA OF GUILTY—PRELIMINARY EXAMINATION—WAIVER.

   A defendant who enters a voluntary plea of guilty while represented by counsel waives all nonjurisdictional defects in prior stages of the proceedings; thus a defendant was not entitled to a preliminary examination where a request for examination was denied prior to entry of a plea of guilty which was later set aside, and no further request for preliminary examination was made at the time defendant entered a second plea of guilty.

2. CRIMINAL LAW—PRELIMINARY EXAMINATION—PLEA OF GUILTY—WAIVER.

   Any defect in a defendant's preliminary examination, including improper waiver of it, is waived by a plea of guilty which has been properly accepted.

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 May 8, 1974, at Lansing. (Docket No. 16697.) Decided June 25, 1974.

Gwendolyn Pogue was convicted, on her plea of guilty, of manslaughter. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *F. Jack Belzer,* Assistant Prosecuting Attorney, for the people.

James W. Lang, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 446, 447.

Defendant's plea to indictment or information as waiver of lack of preliminary examination. 116 ALR 550.

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

BRONSON, P. J. Defendant's first conviction in this case resulted from a plea of guilty later set aside for failure to comply with *People v Jaworski,* 387 Mich 21; 194 NW2d 868 (1972). Her second plea, on November 8, 1972, resulted in her conviction for manslaughter, MCLA 750.321; MSA 28.553, and a sentence of 8 to 15 years passed December 14, 1972.

Defendant claims error on the basis of *People v Duncan,* 388 Mich 489; 201 NW2d 629 (1972). *Duncan, supra,* extended the right to a preliminary examination to felony defendants accused by grand jury indictments. See: *People v Barbara,* 390 Mich 377; 214 NW2d 833 (1973). In this case the defendant was indicted on an open charge of murder on December 16, 1970, approximately two years *prior* to *Duncan.* Counsel for defendant moved for a preliminary examination and the motion was denied. On May 18, 1971, defendant entered her first guilty plea. Her new trial to correct the first improper plea was set for September 20, 1972, but it was adjourned to November 8, 1972 (eight days after *Duncan, supra,* was decided on October 31, 1972), at which time the defendant entered her second plea. No further request was made for a preliminary examination after the request prior to the first plea.

We need not decide whether defendant's case comes within the literal language of *Duncan.* It is clear that defendant has waived any right to preliminary examination. It is well established that a defendant who enters a voluntary plea of guilty while represented by counsel waives all nonjuris-

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

dictional defects in prior stages of the proceedings. *People v Collins,* 380 Mich 131; 156 NW2d 566 (1968). Additionally, any defect in a defendant's preliminary examination, including improper waiver thereof, is waived by a properly accepted plea of guilty. *People v Wilkins,* 25 Mich App 235; 181 NW2d 281 (1970), *reversed on other grounds,* 384 Mich 773 (1970).

The effect of the *Duncan* decision was to give future defendants charged by grand jury indictment the same rights as defendants charged by information, specifically a preliminary examination. However, as we observed above, the right to a preliminary examination can be waived. The defendant has waived any right she might have had if *Duncan* applied by entering her voluntary guilty plea.

Affirmed.

All concurred.

PEOPLE v BUSH

1. CRIMINAL LAW—EVIDENCE—WITNESSES—COMPETENCY—DISCRETION.

Allowing a witness who stood charged with a murder and had been declared to be incompetent to stand trial on that charge to testify as a witness in another murder case was a proper exercise of discretion where a hearing was held to determine whether or not the witness was competent, counsel were permitted to participate, and at the conclusion of the hearing the court determined the witness to be a competent witness.

2. EVIDENCE—LIE-DETECTOR TEST—ADMISSIBILITY.

The results of polygraph tests are not admissible in evidence and their admission results in prejudicial error; neither the fact of the taking of a lie-detector test nor the results of such a test are admissible in evidence.

3. CRIMINAL LAW—EVIDENCE—INCONSISTENT TESTIMONY—WITNESSES—CREDIBILITY—LIE-DETECTOR TEST.

A prosecution witness whose credibility was vital to the defense, who sought to bolster her trial testimony which was inconsistent with her prior testimony given on preliminary examination by referring to a lie-detector test which she had apparently passed, brought to the attention of the jury not only the fact of the taking of the test, but also its results, thereby accomplishing by indirection what the people could not have accomplished directly; the admission of such testimony was reversible error.

Appeal from Recorder's Court of Detroit, Geraldine Bledsoe Ford, J. Submitted Division 1 April 5, 1974, at Detroit. (Docket No. 16828.) Decided June 25, 1974. Leave to appeal denied, 393 Mich —.

London Bush, Jr., was convicted of second-degree

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 102 *et seq.*

[2, 3] 29 Am Jur 2d, Evidence §§ 551, 831.

murder. Defendant appeals. Reversed and remanded for a new trial.

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. Slameka, for defendant on appeal.

Before: BASHARA, P. J., and BRONSON and CARLAND,* JJ.

CARLAND, J. On the evening of November 30, 1971, the defendant and one Nora Ware entered a taxicab, the driver of which was allegedly shot and killed by the defendant following a brief altercation. The defendant was charged with first-degree murder and ultimately convicted of murder in the second degree, MCLA 750.317; MSA 28.549. From such conviction, the defendant appeals as a matter of right.

Prior to the presentment of proofs, the court and defense counsel were advised that no charge would ever be brought against Miss Ware as the result of the events which occurred on November 30th. Some confusion attends as to whether this fact was made plain to the members of the jury.

It was likewise brought to the attention of the court that Miss Ware stood charged with another murder and had been declared to be incompetent to stand trial on that charge. A hearing was then held to determine whether or not she was a competent witness in the instant case. During this

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

hearing, both counsel were permitted to participate and at its conclusion the court determined Miss Ware to be a competent witness. We believe that this was a proper exercise of the court's discretion.

In the course of the trial, Miss Ware's testimony became of the utmost significance. Except for such testimony the people's case was largely circumstantial. It was her testimony which placed the defendant at the scene of the crime. It was her testimony that placed a gun which might have shot the deceased in the possession of the defendant. From her testimony arises the ground upon which we reverse.

Although at the trial on direct examination the witness testified the defendant was in possession of a gun, it appeared from the transcript taken at the preliminary examination that she had on that occasion denied seeing the defendant with a gun. Thus, it became of supreme importance that her credibility be attacked and on cross-examination the following questions and answers were given:

"*Q.* You said at an earlier point that you didn't see him with the gun?

"*A.* I denied seeing him. But I did.

"*Q.* You didn't tell the truth, is that right?

"*A.* That's right.

"*Q.* You lied at some point?

"*A.* That's right. And my lie-detector test will show that I lied when asked if he had the gun in his hand."

Defense counsel immediately moved to strike on the ground that the answer was not responsive. The court, holding the answer to be responsive, overruled the motion and the answer was allowed to stand as not being prejudicial to the defendant. No clarifying statement was offered by the court

nor was any curative instruction given to the jury. There is no showing that defense counsel knew that the witness had ever submitted to the test referred to or that he deliberately sought the answer received. He only asked "You lied at some point?", and the only responsive answer was "That's right". The balance of the answer was totally unresponsive and should have been stricken.

Our Supreme Court has consistently held that neither the fact of the taking of a lie-detector test nor the results of such a test are admissible in evidence. The rationale for such holdings has been that it has never been established that reasonable certainty follows from such tests, *People v Frechette,* 380 Mich 64; 155 NW2d 830 (1968); *People v Davis,* 343 Mich 348; 72 NW2d 269 (1955); *People v Becker,* 300 Mich 562; 2 NW2d 503 (1942).

Similarly, in every case where the credibility of a witness was being tested and where either by design or inadvertence either the witness or the police have sought to bolster the testimony being given by the disclosure of the fact of a polygraph test and its results, this Court has reversed, *People v Sinclair,* 21 Mich App 255; 175 NW2d 893 (1970); *People v Leroy Goodwin,* 40 Mich App 709; 199 NW2d 552 (1972); *People v Lawson,* 48 Mich App 662; 211 NW2d 96 (1973). This has been true whether or not objection has been made to such testimony or whether cautionary instructions have been given. It is a long-standing rule that the results of polygraph tests are not admissible in evidence and their admission results in prejudicial error. In *People v Goodwin, supra,* the Court on page 714 spoke as follows:

"This rule includes polygraph tests given to both the defendant and any witnesses."

The holdings of our Courts are consistent with the holdings of courts of our sister states where the question has come before them. *Mattox v State,* 240 Miss 544; 128 So 2d 368 (1961); *People v Schiers,* 19 Cal App 3d 102; 96 Cal Rptr 330 (1971); *State v Parsons,* 83 NJ Super 430; 200 A2d 340 (1964).

In the case at bar, the witness whose credibility was vital to the defense sought to bolster her trial testimony which was inconsistent with her prior testimony given on preliminary examination by referring to a lie-detector test which she had apparently passed. In so doing, she brought to the attention of the jury not only the fact of the taking of the test, but also its results. She thereby accomplished by indirection what the people could not have accomplished directly. The error was further compounded by the failure of the court to strike the prejudicial testimony and the failure to give any cautionary or curative instructions.

The defendant through no fault of his own was left in an impossible situation. No avenue was available to him whereby he might dispute or overcome this testimony. Even had the results been different than those claimed by the witness, because of our prior rulings the true results could not have been introduced by the defendant.

The jury without the benefit of cautionary instructions and aided by the direct ruling of admissibility might well have been controlled by testimony to the effect that the lie-detector test had established that the witness was now telling the truth. Despite the consistent holdings of our Courts that such tests or the results are not admissible in evidence, this test and its results were received. We express grave doubt that such error is curable by striking or by instruction but lacking

such attempts to cure, reversible error surely occurred and we reverse and remand for new trial.

Because there must be a new trial, we do not discuss the other issues raised by the defendant, except to hold that on retrial the fact (if such be the fact) that Nora Ware is not to be charged in connection with the offense here alleged against the defendant must be made clear to the jury.

Reversed.

All concurred.

C. R. MECHANICAL, INC. v TEMP-SAN CORPORATION

1. PROCESS—SERVICE—BURDEN OF PROOF.

Corroboration and convincing proof are necessary to impeach a process server's return of service and the burden of proof is on the party who claims he was not served.

2. PROCESS—SERVICE—JUDGMENT—DEFAULT JUDGMENT—PREPONDERANCE OF EVIDENCE.

Setting aside a default judgment against a garnishee defendant who failed to file a disclosure on the ground that process was not served was error where the testimony of the defendant and his son that defendant was not served did not preponderate over the server's testimony and a corroborating affidavit that a writ had been served, and where no satisfactory explanation was offered by defendant as to why defense counsel originally filed a motion to set aside the default acknowledging service of the writ of garnishment and basing his request for relief instead on lack of liability.

Appeal from Oakland, Robert L. Templin, J. Submitted Division 2 May 7, 1974, at Detroit. (Docket No. 16951.) Decided June 25, 1974. Leave to appeal applied for.

Complaint by C. R. Mechanical, Inc., against Temp-San Corporation. A writ of garnishment was issued against George Glover. Judgment was granted against defendant Temp-San Corporation, and default judgment was entered against the garnishee defendant for failure to file disclosure. Upon the garnishee defendant's motion, the default judgment against him was set aside. Plaintiff appeals. Reversed.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 62 Am Jur 2d, Process §§ 164–182.

Failure to make return as affecting validity of service or court's jurisdiction. 82 ALR2d 668.

Keywell & Rosenfeld (by *Sidney L. Frank),* for plaintiff.

Williams, Schaefer, Ruby & Williams, P. C., for defendant George Glover.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

MCGREGOR, J. On February 22, 1971, plaintiff filed summons and complaint against the principal defendant, Temp-San Corporation. On the same day, two writs of garnishment were issued; one against the Huron Valley National Bank, and the other against George Glover, the garnishee defendant herein. Proofs filed indicate that service was obtained on Huron Valley National Bank on February 22, 1971, and against George Glover on February 25, 1971. As a result of this writ, Huron Valley Bank made disclosure; Glover did not.

On November 10, 1971, judgment was granted against the defendant Temp-San Corporation. On January 11, 1972, a default judgment was entered against George Glover for failure to file a disclosure to the garnishment.

On June 2, 1972, Glover filed a motion to set aside the default judgment. This motion conceded service of the writ of garnishment, but contended that there was no liability on the part of Glover to the defendant Temp-San. On June 21, 1972, the motion to set aside the default judgment was denied. On June 28, 1972, Glover filed a motion for rehearing.

On December 11, 1972, a hearing was held. After testimony, the trial judge ruled that there

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

had not been service of the writ of garnishment on Glover and ordered that the default judgment be set aside. Plaintiff filed a motion for rehearing to present additional testimony; this motion was denied.

The first issue on appeal is whether the evidence adduced at the hearing was sufficient to support the trial judge's finding that the writ of garnishment had not been served.

At the hearing, defendant testified that he was not served with the writ of garnishment nor given a check for $1. He also testified that, on February 25, 1971, the alleged date of service of the writ, he had moved into a new office building. Defendant identified the process server in court because he had been served papers by him previously, but testified that in all his years in the construction business he had never failed to answer a writ. He also testified that he had had a conversation with the process server about seven or eight weeks prior to the hearing, at his office. He testified that the process server wanted to borrow $500 to go to Alabama, and had remarked that he would stay there for six or eight weeks and would not be able to appear at the hearing on the writ. Glover testified that he refused the loan request because it might be misinterpreted.

Daniel Glover, son of the defendant, testified that he had met the process server at a meeting seven or eight weeks before the hearing, that the purpose of this meeting was to try to determine if service had actually taken place. He testified that the server had said that service was accomplished in a trailer and that a check had been given; that he was then asked to leave the room and that the server had told him that proof of service would be delivered to him at a later time; and that, in

addition, he had been with his father most of the day and that his father was not served.

The process server testified to the usual procedure in serving a writ, authenticated his signature on the proof of service, and that of the notarization; further, that he would never have completed the proof of service if the service of the writ had not been completed. In addition, testified the process server, he received a call from Glover's attorney who indicated that he wanted to talk about the service. The process server testified that he took his lunch hour to see Glover's attorney, but the attorney did not have time to see him. A few days later, the server received a call from Glover; he went to see Glover, and they discussed the service. The server told Glover that he believed the service had been performed on the first floor of the building, that he remembered giving a check, but had been unable to locate it for the hearing because an accountant had the books. He further told Glover that if he could get $500 he was going to Alabama for five or six weeks.

In *Schlussel v Ruhf,* 249 Mich 647; 229 NW 514 (1930), a very similar fact situation was before our Supreme Court, which reversed a trial judge's finding that service of process had not been made on the defendant. There, the defendant was an attorney who swore that he never received a summons. The process server testified that he had made service upon the defendant, that he had kept an accurate record of such service. The trial judge stated that he did not believe the defendant was the kind of man who would make a misstatement or neglect a summons. The Supreme Court acknowledged that the trial judge was in a superior position to pass on the credibility of the witnesses, but held that a careful review of the record required that it find that service had been had. The

Court stated that the defendant did not sustain the burden of showing that he was not served.

In *Alpena National Bank v Hoey,* 281 Mich 307; 274 NW 803 (1937), defendants claimed that they had not been served with a summons in a foreclosure suit. Trial was held some nine years after the alleged service and the process server could not remember the details of the particular service, but did testify as to his usual practice in serving papers. The Supreme Court stated:

"The security of judicial proceedings demands that the showing to impeach an officer's return of service of process shall be clear and convincing, *Garey v Morley Brothers,* 234 Mich 675; 209 NW 116 (1926), and with substantial corroboration of a defendant's denial of service, *August v Collins,* 265 Mich 389; 251 NW 565 (1933)." *Alpena National Bank v Hoey, supra,* 312.

The Court found that the defendant's testimony was not convincing and that circumstances impeached it, stating:

"Moreover, a mere recollection of family visits of nine years before without convincing corroboration would be a dangerous standard of proof sufficient to impeach an official return. Judicial proceedings would have little stability if the showing at bar were enough to impeach the return."

In *August, supra,* and *Garey, supra,* the Court emphasized that corroboration and convincing proof were necessary to impeach an officer's return of service:

"But even though a return of service may be contradicted, it is presumptively correct and can only be overcome by a clear and unequivocal showing; and in some States requires the testimony of more than one witness. It would work the greatest mischief if after a

judgment is taken it could be set aside upon the slippery memory of the defendant, perhaps years thereafter, that he had not been served. * * *

"[T]hat courts should proceed with caution in overturning the certificate of an officer charged with the duty of serving process, and should require unequivocal, clear, and convincing evidence of the falsity of the returns attacked before doing so." *Garey v Morley Brothers, supra,* 677–678.

In the instant case, the consideration before us is whether the testimony below was substantially corroborated and whether it was clear and convincing.

The testimony of Glover and his son, although substantially the same, did not preponderate over the server's testimony and a corroborating affidavit that a writ had been served. The question arises of why Glover's counsel filed a motion to set aside the default acknowledging service of the writ of garnishment and basing his request for relief instead on the lack of liability. No satisfactory explanation has been given to this conundrum.

The standards set out in *Alpena, supra, Garey, supra,* and *August, supra,* have not been met in this case.

The order of the lower court, setting aside the default judgment against George Glover, is set aside and reversed. Costs to plaintiff.

All concurred.

PEOPLE v BRADLEY

1. CRIMINAL LAW—INSTRUCTIONS TO JURY—CONFESSION—APPEAL AND ERROR—PRESERVING QUESTION.

   A defendant may not claim upon appeal that an instruction to the jury that the trial judge had considered the defendant's confession and found it to be voluntary was erroneous where the defendant had failed to object to such an instruction.

2. APPEAL AND ERROR—INSTRUCTIONS TO JURY.

   The Court of Appeals will review a jury instruction as a whole, rather than portions of it, to ascertain whether it has resulted in prejudice to a defendant.

3. CRIMINAL LAW—INSTRUCTIONS TO JURY—PRESUMPTIONS—POSSESSION OF STOLEN PROPERTY.

   An instruction to the jury that possession of stolen property raises a presumption that the possessor was the thief did not result in such manifest injustice as to require reversal where the defendant had admitted the theft, the court correctly instructed the jury on the presumption of innocence and the burden of proof, and the defendant did not object to the instruction when it was given.

4. CRIMINAL LAW—INSTRUCTIONS TO JURY—LESSER INCLUDED OFFENSES.

   Failure to instruct the jury on lesser included offenses was not reversible error where the defendant did not request such an instruction nor object to the instruction as given and did not

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 824.

[2] 5 Am Jur 2d, Appeal and Error §§ 891–894.

[3] 53 Am Jur, Trial § 677.

[4] 21 Am Jur 2d, Criminal Law § 494.

[5] 21 Am Jur 2d, Criminal Law § 321.

Right of defendant in criminal case to discharge of, or substitution of other counsel for, attorney by court to represent him. 157 ALR 1225.

[6] 21 Am Jur 2d, Criminal Law §§ 245, 253, 254.

[7] 29 Am Jur 2d, Evidence §§ 555–557.

rely upon any theory of attempt, and where the trial court did not affirmatively limit the jury's consideration of lesser included offenses.

5. CRIMINAL LAW—ATTORNEY AND CLIENT—COURT-APPOINTED COUNSEL—SUBSTITUTION OF COUNSEL.

A defendant who failed to show the existence of a bona fide dispute between himself and his court-appointed counsel was properly denied a substitution of counsel; an indigent defendant is entitled to a substitution of appointed counsel only when discharge of the first attorney is for good cause and does not disrupt the judicial process.

6. CRIMINAL LAW—CONSTITUTIONAL LAW—SPEEDY TRIAL—DEMAND FOR SPEEDY TRIAL—EXTRADITION—PREJUDICE.

A defendant was not denied his constitutional right to a speedy trial, even though 13 months elapsed from the time of his arrest until his trial, where during that time he was in custody in two other states, Michigan had immediately begun extradition proceedings, and the defendant was actually in Michigan only 3-1/2 months prior to his trial, where the delay cannot be attributed to any deliberate attempt to hamper the defense nor was its cause the fault of the prosecutor, where sufficient showing of prejudice has not been made, and where no timely demand for a speedy trial was made to the trial court.

7. CRIMINAL LAW—CONSTITUTIONAL LAW—RIGHT TO REMAIN SILENT—CONFESSION—VOLUNTARINESS OF CONFESSION.

A finding that a defendant's confession was voluntarily made and therefore admissible was not clearly erroneous where the testimony indicates that the defendant was informed of his rights and acknowledged that he understood them, that he did not at any time intend to exercise his right to remain silent, and that he never made an unconditional demand that all questioning cease.

Appeal from Van Buren, David Anderson, Jr., J. Submitted Division 3 March 5, 1974, at Grand Rapids. (Docket No. 16961.) Decided June 25, 1974.

William Bradley, Jr., was convicted of breaking and entering. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A.*

Derengoski, Solicitor General, and *William C. Buhl,* Prosecuting Attorney, for the people.

Steven L. Schwartz, Assistant State Appellate Defender, for defendant.

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

T. M. BURNS, P. J. Defendant William Bradley, Jr., was tried before a jury for the offense of breaking and entering. MCLA 750.110; MSA 28.305. He was convicted on January 17, 1973, and was sentenced on February 5, 1973, to a term of from 10 to 15 years in prison with 132 days credit for time spent in the county jail prior to the disposition of his case. Defendant now appeals his conviction as of right.

1. *After conducting a hearing in accordance with* People v Walker, *374 Mich 331; 132 NW2d 87 (1965) (On Rehearing), and determining that a confession was voluntarily made, was it prejudicial error for the trial court to instruct the jury that he had considered the confession and had determined that it was voluntary?*

In *People v Williams,* 46 Mich App 165; 207 NW2d 480 (1973), on which defendant relies, a similar challenge to similar instructions was made. The court in the *Williams* case held that although it would be better practice not to inform the jury that the court had found the confession voluntarily made, the defendant's failure to object precluded the assignment of error. Since defense counsel made no objection to the court's instructions in the present case, defendant is likewise precluded from assigning error. GCR 1963, 516.2; MCLA 769.26; MSA 28.1096; *People v Keiswetter,*

7 Mich App 334; 151 NW2d 829 (1967); *People v Williams, supra.*

2. *Was it reversible error for the trial court to instruct the jury that the presumption of innocence is not to be a shield for the guilty?*

Absent a showing of manifest injustice, this Court will not entertain allegations of erroneous jury instructions where no timely objection to those instructions was interposed before the jury retired to consider its verdict. GCR 1963, 516.2; *People v Peace,* 48 Mich App 79; 210 NW2d 116 (1973); *People v Spaulding,* 42 Mich App 492; 202 NW2d 450 (1972), *lv den* 388 Mich 809 (1972). Defendant made no objection in this case. Therefore, we must consider whether the trial court's instruction resulted in manifest injustice.

When reviewing an instruction to ascertain whether a defendant has been prejudiced, we will review the instruction as a whole rather than in small excerpts. *People v Peace, supra; People v Spaulding, supra.* The instructions by the trial court on the presumption of innocence and burden of proof as a whole correctly informed the jury of their duty under the law. Accordingly, we find that the instruction complained of did not unduly prejudice the defendant or result in manifest injustice.

3. *Was it reversible error for the trial court to instruct the jury that there is a presumption that a possessor of stolen goods is the person who committed the theft?*

Defendant contends that by charging the jury that possession of stolen property gives rise to a presumption that the possessor was the thief, the trial court improperly shifted the burden of proof onto defendant. We disagree.

The rule in Michigan to which defendant refers

was stated in *People v McDonald,* 13 Mich App 226, 236–237; 163 NW2d 796 (1968):

"[U]nexplained possession of property recently stolen, unaccompanied by other facts or circumstances indicating guilt, will not sustain a conviction for *breaking and entering,* even though it is some evidence that the possessor is guilty of *theft."* (Emphasis in original.)

And in *People v Helcher,* 14 Mich App 386, 388; 165 NW2d 669 (1968), we said:

"Possession of recently stolen property permits an inference that the possessor committed the theft."

While we feel that "presumption" was not the correct word for the trial court to use to describe the relationship between possession of stolen property and the conclusion that the possessor was the thief, we do not feel that such incorrect usage mandates reversal in the instant case.

Defendant's confession in this case was complete and included an admission of the theft. Also, as previously stated, the trial court's instructions on the presumption of innocence and burden of proof as a whole correctly informed the jury of their duty under the law.

These two factors, coupled with the fact that the defendant did not object to the instruction now challenged on appeal, leads this Court to the conclusion that the instruction complained of did not result in manifest injustice to the defendant. See *People v Peace, supra; People v Spaulding,* supra.

4. *Was it reversible error for the trial court to fail to instruct the jury concerning the possibility of conviction of lesser included offenses?*

No request was made by defendant for instructions on lesser included offenses, nor did defendant object to the instructions given by the trial court.

Furthermore, there is no indication that the defense relied upon any theory of attempt nor did the evidence support that theory. Moreover, the trial court did not affirmatively move to limit the jury's consideration of lesser included offenses. Under these circumstances, we find no error. See *People v Lemmons,* 384 Mich 1; 178 NW2d 496 (1970); *People v Membres,* 34 Mich App 224; 191 NW2d 66 (1971); and *People v Midgyett,* 49 Mich App 663; 212 NW2d 754 (1973).

5. *Did the trial court abuse its discretion in denying defendant's motion for a substitution of appointed counsel?*

Defendant requested a substitution of appointed counsel and now argues that it was reversible error for the trial court to deny such substitution, citing *People v Charles O Williams,* 386 Mich 565; 194 NW2d 337 (1972).

In *Williams,* our Supreme Court found an abuse of discretion since (1) the defendant was asserting a constitutional right—the right to counsel, (2) a bona fide dispute existed with his attorney as to whether to call alibi witnesses, (3) the defendant was not guilty of negligence, (4) the trial court was incorrect in stating that defendant had caused the trial to be adjourned several times.

In the present case, defendant was asserting the same constitutional right as that asserted in *Williams, supra.* A careful review of the record discloses no negligence on defendant's part nor any prior adjournments.

Therefore, the only question remaining is whether a bona fide dispute existed between defendant and his counsel. As evidence of such dispute, defendant claims that his counsel made a deal with the prosecution to his prejudice. Defendant did not submit any evidence to prove the

existence of such a deal, nor did he offer to show how this alleged deal prejudiced his defense.

An indigent defendant is entitled to counsel. He is not entitled to counsel of his choice nor is he entitled to different counsel whenever and for whatever reason dissatisfaction arises with counsel provided for him. *People v Henley,* 26 Mich App 15, 26; 182 NW2d 19 (1970); *People v Grenier,* 34 Mich App 93; 190 NW2d 742 (1971); *People v Williams,* 2 Cal 3d 894; 88 Cal Rptr 208; 471 P2d 1008 (1970); *People v Bentley,* 47 Mich App 150; 209 NW2d 333 (1973). A defendant is only entitled to a substitution of appointed counsel when discharge of the first attorney is for "good cause" and does not disrupt the judicial process. *People v Wilson,* 43 Mich App 459; 204 NW2d 269 (1972); *People v Holcomb,* 47 Mich App 573; 209 NW2d 701 (1973).

In this case defendant could have elected to proceed *in propria persona.* Since he made no such election and advanced no persuasive arguments to support his motion for change of counsel, the trial court did not err in requiring him to proceed with his appointed counsel.

Defendant also claims that his court-appointed counsel did not spend sufficient time conferring with him to adequately prepare his defense. Defendant asserts that his counsel only visited with him on the day of the *Walker*[1] hearing and once thereafter. To rebut this contention, defense counsel offered to submit to the trial court records of his visits to defendant in jail.

It is impossible to enunciate a strict standard as to what constitutes adequate preparation and for that reason it is left to the sound discretion of the trial court. Defendant has failed to show that this

[1] *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965).

alleged lack of preparation prejudiced his defense. Additionally, a review of the record fails to show any inadequacy by defense counsel due to a lack of preparation. For these reasons, we believe that the trial court's denial of defendant's motion for substituted counsel on this ground was proper and was not an abuse of discretion. See *People v Russell,* 47 Mich App 320; 209 NW2d 476 (1973).

6. *Was defendant denied a speedy trial?*

Four factors must be balanced in determining whether a criminal defendant was denied a speedy trial: length of delay, reason for delay, the defendant's demand for a speedy trial, and the amount of prejudice suffered by the defendant due to the delay. *People v Chism,* 390 Mich 104; 211 NW2d 193 (1973).

Defendant was arrested in Indiana on November 26, 1971, and tried in Michigan on January 17, 1973, some 13 months after his arrest. Since a six-month delay is presumptively prejudicial, we must examine the remaining factors. MCLA 767.38; MSA 28.978; MCLA 780.131; MSA 28.969(1); *People v Collins,* 388 Mich 680; 202 NW2d 769 (1972); *People v Chism, supra.*

After defendant was arrested in Indiana, he was held in that state on another charge of breaking and entering, convicted, and given a suspended sentence. Immediately thereafter, in March of 1972, he was sent from Indiana to Arizona as a parole violator. On April 5, 1972, Michigan requested that Arizona extradite defendant for trial. On September 21, 1972, defendant waived extradition and ultimately was returned to Michigan.

Defendant received a preliminary examination on October 5, 1972, a *Walker* hearing on November 17, 1972, and a jury trial on January 17, 1973. Therefore, it is clear from the record that while 13

months elapsed from the time of defendant's arrest until the time of the trial, defendant was in Michigan only 3-1/2 months before his trial.

The record indicates that the Michigan authorities did not delay in making known their desire to extradite defendant. The Michigan warrant served on defendant in Indiana in November, 1971, contained a note that he was to be extradited. When he was instead sent to Arizona as a parole violator, Michigan immediately began extradition proceedings.

We conclude, therefore, that the length of the delay, that is, only 3-1/2 months in Michigan, is not sufficiently prejudicial to warrant further inquiry into the speedy trial claim. However, even if this were not the case, defendant would still be unsuccessful in arguing that he was denied his right to a speedy trial. The delay cannot be attributed to any deliberate attempt to hamper the defense, nor as pointed out earlier, was the cause for the delay the fault of the prosecutor. Finally, defendant has not made a sufficient showing of prejudice resulting from the delay nor has he made a timely demand for speedy trial to the trial court other than his demand on the date of trial. These factors when taken together fail to establish that defendant has been denied his constitutional right to a speedy trial.

7. *Did the trial court err in finding defendant's confession voluntary and admissible?*

The standard of review to be used when a defendant challenges the outcome of a *Walker* hearing is whether the trial court's finding was clearly erroneous. *People v Hummel,* 19 Mich App 266; 172 NW2d 550 (1969); *People v Werner,* 26 Mich App 109; 182 NW2d 13 (1970); *People v Patterson,* 39 Mich App 467; 198 NW2d 175 (1972). Under the

clearly erroneous standard, a trial court can be reversed even though there was sufficient evidence to lead a reasonable man to the same result if the appellate court has the "definite and firm conviction that a appellate court has the "definite and firm conviction that a mistake has been committed". *People v Werner, supra; People v Summers,* 15 Mich App 346; 166 NW2d 672 (1968); *People v Pallister,* 14 Mich App 139; 165 NW2d 319 (1968); *People v Hummel, supra.*

Defendant claims that his confession was taken in violation of Miranda[2] in that he asked for the questioning to stop, and after such a request, he may not again be interrogated except at his own request. Were these allegations true, defendant might indeed have a meritorious claim. However, the record of the *Walker* hearing does not support defendant's claim.

At the *Walker* hearing, defendant testified that he did not request all questioning to cease. Instead, he told the officers questioning him that he would not talk to them any more until he had seen a Mr. Seymour, who had allegedly signed a statement implicating defendant. Thus, defendant never made an unconditional demand that all questioning cease. His only request was that he be allowed to talk to his alleged accomplice, Mr. Seymour, before he answered any more questions. After talking to Mr. Seymour and learning that he had given the police a confession, defendant voluntarily confessed. It is important to note that defendant testified at the *Walker* hearing that before he made his statement, he was again read his rights and also acknowledged that he understood the rights read to him.

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[2] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966).

After a careful and thorough review of the transcript of the entire *Walker* hearing, we are convinced that at no time did defendant intend to exercise his right to remain silent. Therefore, it is our opinion that the trial court was not clearly erroneous in holding that the confession was voluntary, and, therefore, admissible.

We have carefully considered defendant's remaining allegations of error and based upon our review of the record and briefs find no reversible error.

Affirmed.

All concurred.

KOZLOWSKI v CHRYSLER CORPORATION

OPINION OF THE COURT

1. WORKMEN'S COMPENSATION—APPEAL AND ERROR—APPEAL BOARD—ORDERS.

The Court of Appeals has jurisdiction to decide questions presented to it by an appeal from an order of the Workmen's Compensation Appeal Board where the board's "order" was its final determination and where six members of the board signed the order which contained its findings of fact, even though a majority of the board did not concur in an "opinion".

2. WORKMEN'S COMPENSATION—APPEAL AND ERROR—APPEAL BOARD—EVIDENCE—SUFFICIENCY.

A finding by the Workmen's Compensation Appeal Board that a plaintiff failed to sustain the burden of proof imposed upon her will not be reversed where there was sufficient evidence contained in the record to support the board's finding that the plaintiff had not lost the industrial use of her legs as a direct consequence of the injury sustained in the course of her employment.

DISSENT BY V. J. BRENNAN, P. J.

3. WORKMEN'S COMPENSATION—APPEAL AND ERROR—APPEAL BOARD—FINDINGS OF FACT.

It is not the function of the Court of Appeals to sit as a factfinder in cases where the Workmen's Compensation Appeal Board has not made findings of fact with consideration for the proper legal standard.

Appeal from Workmen's Compensation Appeal Board. Submitted Division 1 January 17, 1974, at Detroit. (Docket No. 17024.) Decided June 25, 1974. Leave to appeal applied for.

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 58 Am Jur, Workmen's Compensation § 530.

Claim by Amy T. Kozlowski against Chrysler Corporation for additional workmen's compensation payments for loss of industrial use of her legs. Additional compensation denied. Plaintiff appeals by leave granted. Affirmed.

Kelman, Loria, Downing & Schneider, for plaintiff.

Lacey & Jones (by *E. R. Whinham, Jr.),* for defendant Chrysler Corporation.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Phillip Dean* and *A. C. Stoddard,* Assistants Attorney General, for Second Injury Fund.

Before: V. J. BRENNAN, P. J., and BASHARA and CARLAND,* JJ.

CARLAND, J. The plaintiff filed an application pursuant to section 10(b)(7) of Part II of the Workmen's Compensation Act (now MCLA 418.361; MSA 17.237[361]) for specific loss benefits alleging total and permanent disability by reason of loss of the industrial use of both legs. The referee awarded benefits; the appeal board reversed in a split decision. On appeal to this Court, we reversed and remanded for further proceedings stating that as the result of a misapplication of the law by the appeal board, there had been no finding of fact by a majority of that board. *Kozlowski v Chrysler Corporation and Second Injury Fund,* 25 Mich App 392; 181 NW2d 785, *lv den,* 384 Mich 782 (1970).

The mandate of the Court of Appeals for further review was couched in the following language:

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

"Of necessity then, for the error of law, we set aside the holding for further consideration of the record already made. The reconsideration should contain specific findings of fact on the question presented by the self-contained test in subsection (7). That question is whether plaintiff lost the 'industrial use' of both legs, as the quoted term is used in the statute, and not as it was used in the *Hutsko* opinion where subsection (7), and its own particular test was not involved.

"If total and permanent disability is found on the basis of the test in subsection (7), there should be a further finding of fact as to when it occurred, particularly in relation to the date of the amendment adding this loss to the specific loss schedule."

In response to the directives so given, the board of appeals in an opinion dated March 30, 1973, concurred in by three members, determined that "[t]he plaintiff has not met the burden of proving that she lost the industrial use of her legs within the period prescribed by statute". Three other members of the board concurred in the result. An order bearing the same date as the opinion referred to and signed by six members of the board makes a determination of fact in the following language:

"It is ordered, that the decision of the referee shall be and it hereby is reversed, the board finding that the plaintiff did not meet the burden of proving that she lost the industrial use of her legs within the period prescribed by statute".

Plaintiff appeals on leave granted.

As provided in MCLA 418.861; MSA 17.237(861), "[t]he court of appeals and the supreme court shall have power to review questions of law involved in any final order of the board".

Therefore, the question here involved is whether the order of March 30, 1973, is a final order

reviewable by this Court and whether it is in fulfillment of the mandate contained in *Kozlowski, supra.* In other words, does the fact that "a majority" has not concurred in an "opinion" render this Court without jurisdiction to decide the questions presented to it.

On December 31, 1969, the statute in force (MCLA 408.21; MSA 17.6[21]) was repealed and replaced by MCLA 418.261; MSA 17.237(261). This statute provides in the second paragraph thereof as follows:

"Any matter pending on review may be assigned to 4 members of the board for disposition. The composition of panels shall be alternated so that each member of the board serves on panels with other members of the board with a frequency which is as substantially equal as possible. If the 4 members concur in the result, it shall be final. If there is disagreement, the matter shall be reviewed by the full board and its order shall be final."

Therefore, this section of the statute makes it clear that the appeal board's "order" is its final determination. The statute speaks of the finality of such an "order". Here six members of the appeal board signed the order here involved which contained its finding of fact. It must, therefore, follow that this appeal is properly before this Court. In making its decision that the plaintiff has failed to sustain the burden of proof imposed upon her, the board has said that it does not believe that the proofs offered by her outweigh those offered in opposition thereto. In *Carter v General Motors Corp,* 361 Mich 577, 582–583; 106 NW2d 105 (1960), the Court spoke as follows:

"The order of the appeal board is attacked, among other reasons, because no 2 members of the 3 member

board found plaintiff's disability compensable under the same section of the act. Nevertheless, the decision of 2 of the 3 members of the board was that plaintiff suffered a compensable injury. Section 11 of chapter 1A of the act creating the workmen's compensation appeal board (CLS 1956, § 408.11 [Stat Ann 1959 Cum Supp, § 17.6(17)]) provides that the 'decision of a majority of the board shall be the decision of the board'. It is not unusual for members of a body performing a judicial function to arrive at the same conclusion via diverse reasoning. (See for example, *Samels v Goodyear Tire & Rubber Co,* 317 Mich 149; 26 NW2d 742 [1947], where 6 justices of this Court voted to affirm an award of compensation, 3 justices grounding their decision on part 2 and 3 justices on part 7.) The decision of the board is within the statutory mandate."

MCLA 418.861; MSA 17.237(861) provides as follows:

"The findings of fact made by the board acting within its powers, in the absence of fraud, shall be conclusive."

We conclude that there is sufficient evidence contained in the record to support the board's finding that plaintiff has not lost the industrial use of her legs as a direct consequence of the injury sustained in the course of her employment at Chrysler.

We affirm.

BASHARA, J., concurred.

V. J. BRENNAN, P. J. *(dissenting).* I find I am unable to agree with the decision reached by my colleagues in this case. My reading of the opinion written by appeal board member Mumper leads me to conclude that the decision rendered below was again reached through the application of an erroneous legal standard.

Plaintiff was originally awarded workmen's compensation benefits for a back injury she suffered in a work-related accident. At the expiration of 500 weeks, plaintiff sought to recover further benefits for total and permanent disability due to the alleged loss of industrial use of her legs.[1] Testimony adduced at the hearing on plaintiff's claim reveals that the disabling condition upon which plaintiff was relying to seek further benefits was due either to the effect protracted leg use had on her work-related back injury, certain psychological problems, or a combination of the two. In order for the appeal board to make a proper determination of the instant case it was required to ascertain whether:

"[t]he use of one or both legs, whether or not injured, triggers an employment-related injury or malady in any part of the body, including one or both legs, that causes pain or other condition that prevents use of both legs in industry."[2]

If plaintiff satisfied the above test then the fact that plaintiff's condition may also have been aggravated by psychological problems does not preclude her from receiving further compensation. See *Crosby v Sterner Sheet Metal & Roofing Co,* 51 Mich App 311; 214 NW2d 868 (1974); *Lockwood v Continental Motors Corp,* 27 Mich App 597; 183 NW2d 807 (1970).

In reviewing the evidence presented at the hearing on plaintiff's claim, the appeal board, member

[1] Formerly MCLA 412.10(b)(7); MSA 17.160(b)(7), now MCLA 418.361(2)(g); MSA 17.237(361)(2)(g).

[2] *Burke v Ontonagon County Road Commission,* 391 Mich 103, 114; 214 NW2d 797 (1974), reaffirming the decisional validity of *Paulson v Muskegon Heights Tile Co,* 371 Mich 312; 123 NW2d 715 (1963), and *Lockwood v Continental Motors Corp,* 27 Mich App 597; 183 NW2d 807 (1970). See also *DeGeer v DeGeer Farm Equipment Co,* 391 Mich 96; 214 NW2d 794 (1974).

Storie dissenting, found that plaintiff did not suffer the loss of industrial use of her legs. In reaching this decision the appeal board focused on whether there was direct medical evidence establishing physical injury to plaintiff's legs. In so doing the appeal board employed an erroneous legal standard. Since it is not our function to sit as a factfinder in cases where the appeal board "has not made findings of fact with consideration for the proper legal standard",[3] I would again remand this case for consideration in conformance with the proper legal standard.

[3] *Wright v Thumb Electric Cooperative,* 49 Mich App 714, 718; 212 NW2d 607 (1973).

AMMONS v DUNBAR & SULLIVAN CONSTRUCTION COMPANY

1. WORKMEN'S COMPENSATION—DEATH BENEFITS—DEPENDENTS—PARTIAL DEPENDENTS.

   A plaintiff mother claiming benefits under the Workmen's Compensation Act as a dependent of her deceased son was only entitled to benefits as a partial dependent where the plaintiff received a pension and social security income amounting to $115 per month even though the decedent during his lifetime had paid the entire cost of maintaining the home he occupied with the plaintiff and an unmarried sister.

2. WORKMEN'S COMPENSATION—DEATH BENEFITS—PARTIAL DEPENDENTS—STATUTES.

   A plaintiff mother claiming death benefits under the Workmen's Compensation Act who was only partially dependent upon her deceased son is entitled to weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed to her maintenance by the deceased son bears to the annual earnings of the deceased at the time of his injury; it must be determined from proofs offered which part of the total sum contributed for the maintenance cost of a home occupied by the decedent, plaintiff, and an unmarried sister was for the plaintiff's support as distinguished from the total expenses of the family (MCLA 418.321).

Appeal from the Workmen's Compensation Appeal Board. Submitted Division 1 April 3, 1974, at Detroit. (Docket No. 17027.) Decided June 25, 1974.

Claim by Lillie May Ammons against Dunbar & Sullivan Construction Company and Liberty Mutual Insurance Company for workmen's compensation as a dependent of Archie Lee Ammons. Com-

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation §§ 180, 441.

pensation granted. Defendants appeal. Reversed in part and remanded for further proceedings.

Charles Burke, for plaintiff.

LeVasseur, Werner, Mitseff & Brown (by *Grahame G. Capp),* for defendants.

Before: BASHARA, P. J., and BRONSON and CARLAND,* JJ.

CARLAND, J. The plaintiff is the mother of Archie Lee Ammons who was fatally injured on July 14, 1970 while employed by the defendant employer. As a result of the injuries so received, the employee died on July 28, 1970.

For some eight years prior to his death, the deceased together with his mother and an unmarried sister occupied the same dwelling house. During all of this time it is conceded that the entire cost of maintaining the home was paid by the deceased. The proofs show that the cost of maintenance was approximately $400 per month. The sister, although employed, paid none of the cost. The plaintiff, who during these years was receiving certain pension and social security benefits which on the date of death amounted to $115 per month, had consistently banked all of these benefits and had made no contribution toward the household expense. A petition for hearing was filed on September 28, 1970 by plaintiff as mother of the deceased seeking benefits under the Workmen's Compensation Act as a dependent.

Under these circumstances and facts the question arose as to the extent of plaintiff's depen-

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

dency. Was it whole or only partial? On January 11, 1972, the referee determined as follows:

"In consideration of the fact that the residents of the household included deceased, his mother and his sister, and that the latter contributed no money toward rent, food or household expenses, it is the considered opinion of this trier of the facts that petitioner is a partial dependent of the deceased and is entitled to 60 percent of the amount which she would receive if totally dependent ($75 per week) or $45 per week until further order of the bureau."

On March 27, 1973, the appeal board while recognizing the $115 monthly income of the plaintiff reversed the referee and found the plaintiff to be totally dependent upon her son. The defendants appeal on leave granted.

The essential question to be answered on this appeal is whether the plaintiff was wholly or partially dependent upon the earnings of her son at the time of his death. That she was dependent in some degree is beyond cavil.

"Generally, a 'dependent', within the meaning of the statute, is one who relies in whole or in part upon the workman for the reasonable necessities of life at the time of the accidental injury." *Mullan Construction Co v Day,* 218 Md 581, 586; 147 A2d 756, 759 (1958).

Webster's Third New International Dictionary defines the word "wholly" as follows:

"To the full or entire extent: without diminution or reduction: altogether, completely, totally."

Applying this definition to the case at bar it is apparent that, while the plaintiff may have chosen to depend wholly upon her son's contribution despite her regular independent income, because of

such income she was not wholly dependent upon the earnings of the deceased.

The decision of the Workmen's Compensation Appeal Board was issued prior to the publication of the decision in *Rose v Paper Mills Trucking Co,* 47 Mich App 1; 209 NW2d 305 (1973). In *Rose* it was held that one who receives social security benefits which are saved because his living expenses have been paid for by the deceased is only partially dependent upon the deceased for support. In view of this holding in *Rose,* we must find that the plaintiff is only partially dependent and that the Workmen's Compensation Appeal Board's decision in the present case is clearly erroneous and must be reversed.

Since plaintiff was only partially dependent, what was the degree of her dependency? MCLA 418.321; MSA 17.237(321) sets forth the death benefits due any dependent of a deceased employee. The statute is specific as to the method to be used to determine the amount owing to a partial dependent and provides as follows:

> "If the employee leaves dependents only partially dependent upon his earnings for support at the time of his injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury."

Therefore the referee, having determined as a matter of fact that the deceased had contributed to the entire household from January 1, 1970 to July 14, 1970 at the rate of $400 per month or a total sum of $2,600, in accordance with the statute divided this last sum by $3700, this being the net earnings for that period of time. As a result of this

computation, he determined that the deceased had made a total contribution equal to 70% of his net earnings. To this point we are in agreement with the procedures followed by the referee. However, he then arbitrarily and without support from the record concluded that the deceased had in fact only contributed 60% to the plaintiff.

While it is patently obvious that the son's earnings constituted in fact plaintiff's means of livelihood, it must be determined from proofs offered which part of the $400 was contributed for plaintiff's support as distinguished from the total expenses of the family. This finding may not rest on conjecture or caprice of the referee but must rest upon facts disclosed by the record. Since the record contains no such facts, the determination may not stand.

The defendant would have us determine that the $400 should be divided three ways and thus find that the plaintiff only received $133 per month. This determination would be equally arbitrary when unsupported by facts. We express grave doubts that household expenses rise or fall in direct proportion to the increase or decrease in the number of persons being supported therein. There are certain fixed charges such as rent which are not changed or altered whether the family be large or small.

For the reasons given we reverse in part and remand for further hearing to determine the extent of plaintiff's partial dependency.

All concurred.

In re SIMMANS

PEOPLE v SIMMANS

1. EXTRADITION—HABEAS CORPUS—SCOPE.

The scope of extradition habeas corpus proceedings is limited to a determination of a defendant's identity as the wanted man, a determination of fugitivity, and a review of the regularity of the extradition proceedings.

2. EXTRADITION—FUGITIVE—STATUTES—WORDS AND PHRASES.

A defendant is a "fugitive" under the Uniform Criminal Extradition Act where he is ascertained to be the person wanted in the demanding state and was present in the demanding state at the time the alleged offense occurred; therefore, a person may be extradited even though he left the demanding state with the knowledge and consent of officials of that state (MCLA 780.1 *et seq.).*

3. EXTRADITION—BASES FOR APPLICATION—FUGITIVE—STATUTES.

The section of the Uniform Criminal Extradition Act providing the requirements to be followed before an extradition application can be recognized does not set out all of the bases of fugitivity to the exclusion of others but is a compilation of the most common bases on which a defendant is determined to be a fugitive (MCLA 780.3).

4. EXTRADITION—HABEAS CORPUS—DELAY—SPEEDY TRIAL.

A claim that delay in initiating extradition proceedings is a denial of a speedy trial is not an issue which may be raised in a habeas corpus proceeding challenging the validity of the extradition process but must be adjudicated in the demanding state.

Appeal from Cass, James E. Hoff, J. Submitted

REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur 2d, Extradition §§ 26, 64, 65.

[2, 3] 31 Am Jur 2d, Extradition §§ 14–20, 53.

[4] 31 Am Jur 2d, Extradition § 25.

Division 3 May 7, 1974, at Grand Rapids. (Docket No. 17035.) Decided June 25, 1974.

Complaint by Edward N. Simmans for a writ of habeas corpus to determine validity of an extradition warrant. Writ denied. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Michael E. Dodge,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Howard C. Marderosian,* Acting Director, and *William P. Weiner,* Special Assistant Attorney General, of counsel), for the people.

O'Connor, Feldman & Tushla, for defendant.

Before: ALLEN, P. J., and J. H. GILLIS and QUINN, JJ.

ALLEN, P. J. Defendant appeals from denial by the circuit court of a writ of habeas corpus challenging the validity of an extradition warrant directing defendant's return to Ohio.

January 17, 1968, defendant was found guilty by jury in the Common Pleas Court of Lucas County on four counts of obtaining money on signature by false pretenses. He was sentenced to imprisonment for one to three years on each count, the sentences to be served concurrently, and released on bond pending appeal to the Court of Appeals for Lucas County. At the time of the alleged offenses defendant was employed as Safety Service Director of the City of Port Clinton, Ohio. In a split decision in May, 1969, the judgment was reversed by the Court of Appeals and the defendant "ordered dis-

charged". *State v Simmans,* 18 Ohio App 2d 143; 247 NE2d 785 (1969).

On December 2, 1969, defendant left Ohio and took up residence in Dowagiac, Michigan, where he became gainfully employed, at one time as City Manager of Dowagiac and presently in private employment. His leaving Ohio was apparently with the knowledge and consent of Ohio officials who at all times knew of defendant's whereabouts in Michigan. On March 25, 1970, the Ohio Supreme Court reversed the Court of Appeals and reinstated the conviction and sentence. *State v Simmans,* 21 Ohio St 2d 258; 257 NE2d 344 (1970). The final paragraph of the Supreme Court's opinion reads:

> "The mere fact that defendant is at liberty through a misapprehension of the law by the lower courts or its clerks, or even by the prosecuting attorney in this case, does not divest this court of jurisdiction of the appeal or of the defendant. The conclusions stated in *State v Aspell,* 5 Ohio App 2d 230 [214 NE2d 834 (1966)], and relied upon by the defendant, are disapproved. The defendant is amenable to process by the state to resecure custody over him at any time."

In January 1972, some 20 months after the decision by the Ohio Supreme Court, the Fourth District Court of Michigan issued a fugitive warrant against defendant pursuant to a complaint filed the same day by the sheriff of Cass County, Michigan. This complaint was dismissed by the district court because extradition proceedings had not been perfected by Ohio and no warrant had been issued by Michigan. Following perfection of extradition proceedings, defendant was then arrested under a warrant issued May 23, 1972 by Governor William G. Milliken of Michigan, and brought before the circuit court for arraignment,

at which time defendant challenged the validity of the extradition and requested a writ of habeas corpus. On June 20, 1972, an evidentiary hearing was held before the circuit court, following which the court denied the writ of habeas corpus but granted stay of execution so that defendant could appeal to this court.

In *Williams v North Carolina,* 33 Mich App 119, 123 fn 4; 189 NW2d 858 (1971), *lv den,* 386 Mich 753 (1971), this Court noted that the scope of extradition habeas corpus proceedings is limited to a determination of defendant's identity as the wanted man, a determination of fugitivity and a review of the regularity of the extradition proceedings. The issue of identity is not raised in this appeal, the main thrust of the defendant's challenge to the extradition proceedings being to the issue of fugitivity. Defendant contends that because the demanding state judicially sanctioned his release from the custody of its law-enforcement officials placing no restrictions upon his return and because his release was effected with the full knowledge and approval of law-enforcement officials, defendant is not a "fugitive" as that term is used in the Uniform Criminal Extradition Act. MCLA 780.1 *et seq.;* MSA 28.1285(1) *et seq.* On this issue there is no Michigan decision directly on point. However, similar factual situations have been considered in other jurisdictions which have consistently concluded that an individual may be extradited even though he left the demanding state with the knowledge and consent of officials of that state.[1]

[1] *See Grogan v Welch,* 55 SD 613; 227 NW 74 (1929), where upon arraignment in North Dakota on charges of theft of an automobile the prosecuting attorney dismissed the charges and allowed defendant to return without condition to South Dakota. Later, the charges were reinstated and extradition from South Dakota sought. Defendant challenged the proceedings on the ground he was not a fugitive since

"The fact that the alleged fugitive from justice left the state with the consent or knowledge of the state authorities or of complainant does not affect his status as a fugitive from justice, where he refuses to return or there is a second indictment or complaint." 35 CJS, Extradition, § 10, p 396.

"If knowledge of, or consent by, state officers is ineffectual against subsequent interstate rendition, much less is the knowledge or consent of the complaining witness effectual." *In the matter of Roberts,* 186 Wash 13, 22; 56 P2d 703, 707 (1936).

In conformity with the decisions in other states, we hold that "fugitivity" is shown when, as in the case now before us, defendant is ascertained to be the person wanted in the demanding state and was present in the demanding state at the time the alleged offense occurred.

"So that the simple inquiry must be whether the person whose surrender is demanded is in fact a fugitive from justice, not whether he *consciously* fled from justice in order to avoid prosecution for the crime with which he is charged by the demanding state. A person

North Dakota had given him permission to leave. To similar effect *see Basing v Cady,* 208 US 386; 28 S Ct 392; 52 L Ed 540 (1908), where defendant, indicted in New York for grand larceny, was released on motion of the district attorney and returned to Rhode Island. Later, a second indictment was issued for the same offense and an extradition warrant issued by the Governor of Rhode Island. Defendant's claim he was not a fugitive because of consent given to return to Rhode Island was rejected. *See also Ex parte Williams,* 71 SD 95; 21 NW2d 593 (1946), where defendant, charged with two counts of forgery and four counts of issuing checks without sufficient funds in Nebraska, was allowed to return to South Dakota after the prosecuting attorney moved to dismiss four of the charges and defendant agreed to pay restitution and fines on the other two counts. Defendant fully complied, but the four charges were never dismissed, and the trial court failed to sentence defendant, failed to file a judgment of dismissal, conviction or sentence, and failed to accept defendant's payment in discharge of the fines. Defendant's challenge to the extradition warrant on the grounds that he was not a fugitive was rejected, the South Dakota Supreme Court noting that the "demands of the law of the State of Nebraska * * * " had not been satisfied. 71 SD 95, 97; 21 NW2d 593, 594.

charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime leaves the state—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another state must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state." *Appleyard v Massachusetts,* 203 US 222, 227; 27 S Ct 122, 123; 51 L Ed 161, 163 (1906).

Defendant next attacks the regularity of the extradition proceedings, contending that the statutory requirement of § 3(3) of the Uniform Criminal Extradition Act was not followed. MCLA 780.3; MSA 28.1285(3). That section provides that the extradition application shall not be recognized unless accompanied by

"a statement by executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole."[2]

No such statement was included for the obvious reason that defendant had not escaped from confinement or broken terms of bail, probation or parole.

In *Commonwealth v Price,* 405 Pa 384; 175 A2d

[2] *See Campbell v Genesee County Sheriff,* 15 Mich App 210, 215; 166 NW2d 267 (1968), where the same challenge was made as to the regularity of the demanding state's application but which challenge was not passed upon by the Court, reversal being had on other grounds.

852 (1961), the Governor's statement could not be worded in the statutory language since none of the categories were applicable. This was found to be harmless error. In *Commonwealth ex rel Taylor v Superintendent Philadelphia County Prison,* 382 Pa 181, 185–186; 114 A2d 343, 345 (1955), a similar problem was raised and the Court said:

> "No technical or formal objections to the proceedings, such as have been presented here, should be allowed to prevail. To require that the allegations be in the specific words of the Act would be unduly strict; and if the meaning of the allegations made, reasonably and substantially amount to the charge required, the proceedings will be upheld."

It would subvert the purpose of the Uniform Criminal Extradition Act to hold that § 3(3) sets out all of the bases of fugitivity to the exclusion of others. We hold that this section is a compilation of the most common bases on which a defendant is determined to be a fugitive. We further find that the statement of Ohio authorities sufficiently set out the averments showing defendant to be a fugitive.

Defendant's remaining claim of error is that the 20-month delay between the decision of the Ohio Supreme Court and the institution of extradition proceedings denied defendant a speedy trial and was a violation of his constitutional rights. This claim was not raised either in defendant's application for writ of habeas corpus or in the proceedings held thereon in the circuit court. The appellate court is not the appropriate forum for first raising such issue. *People v Sterbins,* 32 Mich App 508, 511; 189 NW2d 154 (1971). A claim that delay in initiating extradition proceedings is a denial of a speedy trial is not an issue which may be raised

in a habeas corpus proceeding challenging the validity of the extradition process, but must be adjudicated in the demanding state. *People ex rel Arnold v Hoy,* 32 Misc 2d 824, 825–826; 223 NYS2d 759, 761 (1961). *Roberts v Hocker,* 85 Nev 390, 395; 456 P2d 425, 428 (1969); *State ex rel Garner v Gray,* 59 Wis 2d 323, 329–330 fn 11; 208 NW2d 161, 164 (1973).

Finally, we would observe that the delay is hardly a denial of a speedy trial since, in the present case, trial had already been held.

Affirmed.

All concurred.

JONES v SLAUGHTER

1. AUTOMOBILES—NEGLIGENCE—PRIOR JUDGMENT—PARTIES—COLLATERAL ESTOPPEL.

A defendant automobile owner in an action in circuit court seeking damages resulting from an automobile accident was sufficiently a party in a prior action in common pleas court involving the driver of the owner's automobile to claim conclusive defensive effect on the issue of the plaintiff's negligence which was actually litigated and established in the common pleas action by jury verdict and judgment where the defendant in circuit court had been a party to the common pleas action until, prior to trial, the plaintiff in circuit court (defendant in the common pleas action) made full and final settlement with the owner in exchange for a binding release, and where, but for the settlement, the defendant in circuit court would have remained a party in the prior suit until judgment, and, had he done so, the jury's verdict would have required the same result that the settlement imposed.

2. NEGLIGENCE—PRIOR JUDGMENT—COLLATERAL ESTOPPEL.

A plaintiff's action in circuit court for negligence must fail under the doctrine of collateral estoppel where the plaintiff's own negligence was established in a prior action in common pleas court involving the same parties and the same event.

3. AUTOMOBILES—NEGLIGENCE—NEGLIGENT ENTRUSTMENT—CAUSAL CONNECTION.

A plaintiff seeking to recover damages on a theory of negligent entrustment of an automobile must prove that the entrustment was causally connected with the injury of which he complains; even assuming that the entrustment was negligent, the causal chain between it and a plaintiff's injury was broken where the plaintiff was himself negligent.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 46 Am Jur 2d, Judgments § 404 *et seq.*

[3] 8 Am Jur 2d, Automobiles and Highway Traffic § 1002.

[4] 41 Am Jur 2d, Husband and Wife § 457 *et seq.*

4. AUTOMOBILES—NEGLIGENCE—LOSS OF CONSORTIUM—CONSOLIDATED ACTIONS.

A recovery by a plaintiff's wife for loss of consortium resulting from an automobile accident is contingent upon recovery by her husband for his injuries when their actions are consolidated; therefore, where his action fails, her action must likewise fail.

Appeal from Wayne, George T. Martin, J. Submitted Division 1 March 5, 1974, at Detroit. (Docket No. 17037.) Decided June 25, 1974.

Complaint by James Jones and Katie Jones against Ronald Slaughter and Langston Slaughter for damages resulting from an automobile accident. The Secretary of State intervened as a party defendant pursuant to the Motor Vehicle Accident Claims Act. Accelerated judgment for defendants. Plaintiffs appeal. Affirmed.

Barbara & Wisok, P. C., for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Joseph B. Bilitzke* and *Carl K. Carlsen,* Assistants Attorney General, for defendants.

Before: DANHOF, P. J., and BRONSON and BOYLE,* JJ.

DANHOF, P. J. This suit arises out of an automobile-motorcycle accident that occurred on July 4, 1971. The motorcycle was driven by plaintiff, James Jones. The uninsured automobile was driven by defendant Ronald Slaughter and owned by defendant Langston Slaughter. Subsequent to said accident, a lawsuit was instituted in the Common Pleas Court for the City of Detroit on behalf of Langston Slaughter, Ronald Slaughter, and oth-

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

ers against James Jones. Prior to trial of the common pleas action, James Jones made a full and final settlement with Langston Slaughter for the latter's claimed property damage. The common pleas action went to trial with Ronald Slaughter as the remaining party plaintiff. The common pleas jury, in response to special questions submitted, found James Jones guilty of negligence and Ronald Slaughter guilty of contributory negligence. Accordingly, a judgment of no cause of action was entered on the jury's verdict.

The present lawsuit was filed subsequent to the trial of the common pleas action. The complaint alleged negligence on the part of Ronald Slaughter and Langston Slaughter, and contains an allegation of negligent entrustment on the part of Langston Slaughter. The Secretary of State intervened as a party defendant pursuant to the Motor Vehicle Accident Claims Act, MCLA 257.1101 *et seq.;* MSA 9.2801 *et seq.,* and filed a motion for accelerated judgment, GCR 1963, 116.1(5), alleging the prior common pleas judgment as a bar to the present action. The trial court granted the motion and dismissed this action as against both defendants.

Upon oral argument of this cause, plaintiffs' counsel stated that plaintiffs do not appeal the dismissal of their claims against defendant Ronald Slaughter. This appeal, therefore, involves only the propriety of the trial court's dismissal as against defendant Langston Slaughter.

Plaintiffs contend that the defense of collateral estoppel is not available to Langston Slaughter because he was not a party to the common pleas action. They cite *Howell v Vito's Trucking & Excavating Co,* 386 Mich 37; 191 NW2d 313 (1971). It should be noted that *Howell* involved an at-

tempt by the plaintiff, who was not a party to the previous action, to use collateral estoppel offensively, thereby foreclosing the issue of defendant's negligence and leaving only the question of plaintiff's damages for the jury's consideration. The instant action involves a defensive use of the collateral estoppel doctrine.

Assuming, however, that *Howell* is controlling, plaintiffs' claim that defendant Langston Slaughter was not a party to the previous action is not supported by the facts. Langston Slaughter had been a party to the previous suit until, prior to trial, James Jones made full and final settlement with him in exchange for a binding release. This settlement was prompted by the *"Hoxie"* doctrine which provides that the contributory negligence of the driver is not imputed to the owner, thus allowing the owner to recover his property damage upon proof of a defendant's negligence. *Universal Underwriters Insurance Co v Hoxie,* 375 Mich 102; 133 NW2d 167 (1965). But for the settlement, generally encouraged by the courts, Langston Slaughter would have remained a party to the prior suit until judgment. And, had Langston Slaughter remained in the common pleas action until judgment, the jury's verdict would have required the same result that the settlement imposed. We hold, therefore, that Langston Slaughter was sufficiently a party to the common pleas action to claim conclusive defensive effect to the issue of James Jones' negligence which was actually litigated and decided therein.

James Jones' negligence having been established by the prior action, his cause of action against Langston Slaughter for Ronald Slaughter's negligence must fail. Moreover, in order to prevail on a theory of negligent entrustment, James Jones

must prove that the entrustment was causally connected with the injury of which he complains. *Perin v Peuler (On Rehearing),* 373 Mich 531; 130 NW2d 4 (1964). Assuming as we must that the entrustment was negligent, nevertheless the causal chain between it and plaintiffs' injury has been broken by the prior jury's determination that plaintiff was himself negligent. Finally, recovery by Katie Jones for loss of consortium being contingent upon recovery by James Jones for his injuries when their actions are consolidated, her action must likewise fail. *Dewey v Perkins,* 295 Mich 611; 295 NW 333 (1940). *Morrison v Grass,* 314 Mich 87; 22 NW2d 82 (1946).

Affirmed, costs to the intervening defendant.

All concurred.

PEOPLE v DUCK

CRIMINAL LAW—PLEA OF GUILTY—CONSTITUTIONAL LAW—ADVICE OF RIGHTS.

A defendant who was advised at an arraignment of his right to a trial by jury or without a jury, his right to confront his accusers, and his right against self-incrimination, was sufficiently advised of his rights even though he was not again informed of these rights at the time that he subsequently offered a plea of guilty; as long as it is clear from the record that a defendant had knowledge of his rights when he entered his plea of guilty, it is unimportant how or when he received the information.

Appeal from Calhoun, Creighton R. Coleman, J. Submitted Division 3 June 3, 1974, at Lansing. (Docket Nos. 17140, 17141.) Decided June 25, 1974. Leave to appeal denied, 392 Mich 818.

Randall Lee Duck was convicted, on his plea of guilty, of larceny from the person. Defendant appeals. Affirmed.

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

Dennis H. Benson, Assistant State Appellate Defender, for defendant.

Before: MCGREGOR, P. J., and R. B. BURNS and O'HARA,* JJ.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 484 *et seq.*

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

R. B. BURNS, J. Defendant pled guilty to two separate charges of larceny from a person. MCLA 750.357; MSA 28.589. He appeals, claiming that he was not advised of his rights as set forth in *People v Jaworski,* 387 Mich 21; 194 NW2d 868 (1972). He was originally charged with armed robbery. MCLA 750.529; MSA 28.797.

Defendant was arraigned in case No. 17140 on April 26, 1971. He stood mute at the arraignment. He was arraigned in case No. 17141 on August 23, 1971, at which time he was advised of his right to a trial by jury or by the court without a jury, his right to confront his accusers, and his privilege against self-incrimination.

The guilty pleas, in both cases, were accepted by the court on October 5, 1971, at which time the trial judge did not inform the defendant of his *Jaworski* rights.

People v Washington, 43 Mich App 551; 204 NW2d 541 (1972), held that the thrust of *Jaworski* was to insure that the defendant was aware of his rights and that it was unimportant how or when he received the information, as long as it was clear from the record that the defendant had such knowledge when he entered his plea.

Affirmed.

All concurred.

PRICE v MANISTIQUE AREA PUBLIC SCHOOLS

1. NEGLIGENCE—SCHOOL BUS—REGULATIONS—NEGLIGENCE PER SE—INSTRUCTIONS TO JURY.

   A school bus driver's violation of two provisions of a pupil transportation handbook published by the state board of education did not render the driver and his school district employer negligent as a matter of law in an action for damages for wrongful death of a pupil-passenger because, while violation of a statute is negligence per se, violations of duties imposed by such rules and regulations are evidence of negligence; therefore, instructions to the jury that the bus driver had the duty to use ordinary care for the safety of plaintiff's decedent and that the provisions of the handbook could be considered with all the other evidence in deciding whether the driver was negligent were proper.

2. NEGLIGENCE—SCHOOL BUS—JURY QUESTION.

   Reasonable men could differ on the question of whether a school bus driver was negligent in leaving a six-year-old passenger at the edge of a highway accompanied by his ten-year-old brother and two playmates knowing that the child would have to cross the highway to reach his destination; therefore, the question of negligence was properly left for the jury's determination in an action against the bus driver and his school district employer for damages for the child's wrongful death.

3. NEGLIGENCE—PROXIMATE CAUSE—JURY QUESTION.

   The question of whether one's act or breach of duty is a proximate cause of a plaintiff's injury is for a jury to determine.

4. NEGLIGENCE—INTERVENING CAUSE.

   An intervening cause will not sever whatever connection there may be between a plaintiff's injuries and a defendant's negligence if that intervening event was reasonably foreseeable.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 57 Am Jur 2d, Negligence §§ 9, 136, 137.

[4, 5] 57 Am Jur 2d, Negligence §§ 153, 199–205, 212, 219.

5. NEGLIGENCE—SCHOOL BUS—FORESEEABILITY—DIRECTED VERDICT.

Reasonable men could differ on the question of whether a defendant school bus driver could have reasonably foreseen that a passenger of his bus would be struck by another vehicle after leaving the bus; therefore, upon viewing the evidence in a light most favorable to the defendant driver and his school district employer, it was not error for the trial court to deny the plaintiff's motion for a directed verdict in an action for wrongful death.

Appeal from Schoolcraft, William F. Hood, J. Submitted Division 3 May 10, 1974, at Grand Rapids. (Docket No. 17232.) Decided June 25, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Richard W. Price, Sr., administrator of the estate of Richard W. Price, Jr., against the Manistique Area Public Schools and Edwin H. Johnson for damages for wrongful death. Judgment for defendants. Plaintiff appeals. Affirmed.

Nino E. Green, for plaintiff.

Hansley, Neiman, Peterson & Beauchamp, for defendants.

Before: ALLEN, P. J., and J. H. GILLIS and QUINN, JJ.

ALLEN, J. Plaintiff brought action for wrongful death, MCLA 600.2922; MSA 27A.2922, arising when plaintiff's six-year-old son was struck by a vehicle driven by Frank Carpenter. Originally a party to this suit, Carpenter died before trial, and his wife, who as administratrix of his estate had been substituted as a party, successfully obtained an accelerated judgment on the grounds that she was served with process when she was no longer administratrix of the estate and that plaintiff's claim was filed more than three months after her husband's estate had been closed. MCLA 701.19;

MSA 27.3178(19), MCLA 704.56; MSA 27.3178(307) and GCR 1963, 116.1(1) and (5). The jury rendered its verdict in favor of defendants, and plaintiff has appealed.

The fatality occurred July 31, 1968, when plaintiff's decedent was crossing US-2, a highway located in Mueller Township in Schoolcraft County. Prior to the accident, Richard, Jr., a participant in the Doyle School Head Start program, was returning home in a Manistique school bus driven by defendant Edwin H. Johnson. Upon stopping at the Price residence, Johnson was advised by Gordon Letson, Richard, Jr.'s, ten-year-old half-brother and a fellow passenger on the bus, that the two boys were to be taken to their grandmother's home.

Decedent, his older brother, and Jay and Douglas Tuttle were the last children aboard defendant's bus to be taken to their homes. Decedent's grandmother lived across US-2 from the Tuttle residence. When Johnson reached the Tuttle home, he pulled the bus onto the shoulder to let the children off the bus. Gordon told Johnson that he was going to his grandmother's mailbox, located some 90 feet in front of the bus on the Tuttle side of US-2. Johnson told Gordon to stand near the Tuttle driveway and wait until traffic cleared to cross the road. Johnson advised Gordon not to go to the mailbox.

Johnson then resumed his travel down US-2. He testified that as the bus proceeded down the road, he watched the children through his rear view mirrors, and said that the children remained standing near the Tuttle driveway.

Gordon Letson then proceeded to his grandmother's mailbox, leaving his six-year-old half-brother standing near the Tuttle's mailbox. As he ap-

proached his grandmother's mailbox, Gordon heard a "thud", and turned and saw his half-brother "flying across the road".

A major issue presented at trial was the length of time between the departure of the children from the school bus and the accident. Gordon testified that he was able to see the school bus when it was approximately one-half mile from the Tuttle residence at the time of the accident. Mrs. Tuttle testified that the children were usually brought home at 11:45 a.m. and that the bus was on time on the day in question. She testified that the accident occurred five to ten minutes after the bus had delivered the children, but later stated that the accident occurred "just a few minutes" thereafter. However, Mrs. Tuttle testified that she had called the police immediately after the accident. According to the testimony of a state police trooper, the police received a telephone report of the accident at 1:04 p.m., approximately 1-1/4 hours after the bus's "usual" arrival time. Alice Fitzpatrick, a cook at the Doyle School, traveling in a vehicle in the direction toward the Tuttle residence on US-2, said that she saw the school bus approximately three-quarters of a mile from the Tuttle residence. When she passed that residence, there was no sign of an accident.

At the close of proofs, plaintiff moved for a directed verdict on the issue of defendants' liability. The trial court denied the motion for a directed verdict, stating that the question of defendants' liability was one of fact for the jury. The jury then returned a verdict of no cause of action against plaintiff.

The State Board of Education has the "powers and duties" to regulate "school bus transportation". MCLA 388.1010(c); MSA 15.1023(10)(c). It

may "prescribe rules and regulations" to implement its powers and duties. The Michigan Pupil Transportation Handbook Bulletin No. 431, published August, 1965, contained the following two provisions which plaintiff argues established a duty for school bus drivers:

> "4. To supervise the activities of children leaving the bus until they have crossed the highway in safety or are otherwise not subject to hazards.
>
> "5. To have children pass in front of bus when leaving bus and crossing highway."

It is plaintiff's contention that defendant violated those provisions, and that such violation rendered defendant negligent as a matter of law.

While violation of a statute is "negligence *per se*", it has been held that "violations of duties imposed by such rules and regulations are evidence of negligence". *Douglas v Edgewater Park Co,* 369 Mich 320, 328; 119 NW2d 567 (1963). *Douglas* said "[t]he rigidity of the negligence *per se* doctrine should not be extended to administrative rules and regulations". 369 Mich 320, 328. In the instant case, the trial court instructed the jury that defendant had the duty "to use ordinary care for the safety of plaintiff's decedent" and further instructed the jury that the provisions of the above handbook could "be considered * * * together with all the other evidence in deciding whether defendant was negligent". The trial court was correct, and we are unpersuaded by plaintiff's argument that defendant was negligent as a matter of law. We also note that no objection was made to the trial court's instructions, and in such a situation the issue is usually held to have not been preserved for appellate review. *Hunt v Deming,* 375

Mich 581, 584–585; 134 NW2d 662 (1965). GCR 1963, 516.2.

Plaintiff also argues that under the common law defendant bus driver was negligent in leaving plaintiff's six-year-old decedent at the edge of US-2 accompanied only by his ten-year-old half-brother and two playmates, knowing that the child would have to cross the highway to reach his destination. In view of the evidence presented in this case, we find that reasonable men could differ on the question of whether or not defendant was indeed negligent as alleged by plaintiff. Accordingly, the question was properly one left for the jury's determination. See *Davis v Thornton,* 384 Mich 138, 142–146; 180 NW2d 11 (1970).

Assuming, *arguendo,* that defendant owed a legal duty to plaintiff's decedent, and that defendant breached that duty, plaintiff still had to prove that defendant's breach was a proximate cause of plaintiff's damages. Generally, the question of whether one's act or breach of a duty is a proximate cause is a question for the jury to determine. *Davis v Thornton, supra.* Defendants argue that even if they were negligent, an intervening event occurred which could not have been foreseen by defendant bus driver as a matter of law. Thus, we must determine whether the intervening cause, the striking of plaintiff's decedent by the Carpenter vehicle, was so reasonably foreseeable by the school bus driver that a jury could not come to any other conclusion than to find the bus driver negligent. An intervening cause will not "[sever] whatever connection there may be between the plaintiff's injuries and the defendant's negligence" if that intervening event "was reasonably foreseeable". 384 Mich 138, 148. *Davis v Thornton, supra,* approvingly referred to 2 Restatement Torts, § 447,

p 1196. 384 Mich 138, 148–149. Currently found in 2 Restatement Torts 2d, § 447, p 478, the applicable principle is as follows:

"The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

"(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

"(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

"(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."

Johnston v Harris, 387 Mich 569, 574; 198 NW2d 409 (1972), quoting from 2 Restatement Torts 2d, § 449, p 482, noted:

"If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."

There is no Michigan authority concerned with the application of the above-accepted principles of law to the unique factual situation presented in the instant case. We therefore look to other jurisdictions for guidance. A school board and bus driver are not relieved of liability by the intervening event when a violation of a school board regulation is found to be negligence per se.[1] A bus

[1] *Sammons v Ridgeway,* 293 A2d 547, 549 (Del, 1972).

driver's violation of a statute was found to give rise to absolute liability in *Van Gaasbeck v Webatuck Central School Dist No 1,* 21 NY2d 239, 242; 287 NYS2d 77, 79; 234 NE2d 243, 244 (1967).[2] However, the question of proximate cause was one for the jury. 21 NY2d 246; 287 NYS2d 82; 234 NE2d 247. Cases unencumbered with the doctrines of negligence per se or absolute liability have generally noted that the issue of causation is one for the jury.[3]

A case very similar to the instant one is *McDonald v Central School Dist No 3,* 289 NY 800; 47 NE2d 50 (1943). In *McDonald,* the board of education had apparently passed a rule, which had been "conveyed to the children and the driver",[4] that the children, after departing from a school bus, should cross the street directly in front of the bus. The infant plaintiff in that case did so, but was struck by a passing vehicle. *McDonald* affirmed the intermediate appellate court's decision that:

"the question whether the bus operator should have anticipated in exercise of reasonable care the operator of automobile which struck the child would fail to stop

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[2] The statute in *Van Gaasbeck* required the bus driver to instruct the pupils to cross the road in front of the bus, and to remain on the roadway with his signals flashing until the children reached the other side of the road. 21 NY2d 244; 287 NYS2d 81; 234 NE2d 246. Despite the provisions of the above statute, *Pratt v Robinson,* 71 Misc 2d 509, 511; 336 NYS2d 612, 614 (1972), held that the school district did not have the duty to establish bus stops so that the children could avoid the necessity of crossing streets. Safe delivery to the bus stop, rather than stopping the bus at a point from which the children could arrive home without crossing a street, was held to be the bus driver's duty in *Sanderlin v Central School Dist 13 J of Polk County,* 6 Or App 429, 432; 487 P2d 1399, 1400 (1971).

[3] *Earl W Baker & Co v Lagaly,* 144 F2d 344, 346 (CA 10, 1944) and *Raymond v Paradise Unified School Dist of Butte County,* 218 Cal App 2d 1, 7–8; 31 Cal Rptr 847, 851 (1963). *See also Slade v New Hanover County Board of Education,* 10 NC App 287, 295; 178 SE2d 316, 321 (1971), *cert den,* 278 NC 104; 179 SE2d 453 (1971), which affirmed the Industrial Commission's finding that the facts were sufficient to hold defendant liable.

[4] See 179 Misc 333; 39 NYS2d 103 (1941).

automobile before passing the bus * * * was for the jury * * * ." 47 NE2d 50.

Review of the above-noted cases leads us to conclude that in the case now before us the intervening cause was not so reasonably foreseeable that a jury could not reach any other conclusion than to find defendant negligent. Michigan lacks a statutory mandate that school bus drivers must remain halted in the roadway until the children pass in front of the bus to reach the other side of the road. The transportation handbook does not have the force of law, and its alleged violation is not negligence per se. Wide variations in testimony as to the length of time elapsing between the children stepping off the bus and the occurrence of the intervening event—differences of from a few minutes to more than an hour—make the issue a jury question.

Therefore, it was not error for the trial court to deny plaintiff's motion for a directed verdict. According to *Mackey v Island of Bob-Lo Co,* 39 Mich App 64, 65; 197 NW2d 151, 152 (1972):

> "The test for reviewing a refusal of a directed verdict and a judgment notwithstanding the verdict is whether, viewing the facts most favorably to the opposing party, reasonable men could differ. If they can, the question is for the jury. *Little v Borman Food Stores, Inc,* 33 Mich App 609; 190 NW2d 269 (1971)."

Viewing the evidence in a light most favorable to defendant, we conclude that reasonable men could differ on the question of whether or not defendant could have reasonably foreseen the event involving the Carpenter vehicle, and find that the "totality of the circumstances" was such that this question was properly left to the jury. See *Davis v Thornton,* 384 Mich 138, 150; 180 NW2d 11 (1970).

Affirmed, costs to defendant.

All concurred.

SKOWRONSKI v AJAX FORGING & CASTING COMPANY

1. WORKMEN'S COMPENSATION—DATE OF INJURY—LOSS OF HEARING—EVIDENCE.

   The appropriate date of injury for workmen's compensation purposes, where evidence shows that the worker's injury was due to a slow erosion of his hearing capabilities over a span of 20 years due to the pernicious environment in which he worked and not the result of a single event, is the last day of work in the employment in which a worker was last subjected to the conditions resulting in disability (MCLA 418.301[1]).

2. WORKMEN'S COMPENSATION—FINDINGS OF FACT—APPEAL BOARD—EVIDENCE—APPEAL AND ERROR.

   The findings of fact made by the Workmen's Compensation Appeal Board are conclusive on appeal; however, the appeal board's decision will be overturned when it is contrary to the law, misapplies legal standards, or is not supported by competent, material, and substantial evidence of the whole record.

3. WORKMEN'S COMPENSATION—APPORTIONMENT OF LIABILITY—LOSS OF HEARING—OCCUPATIONAL DISEASE—STATUTES.

   A noise-induced hearing loss is not an occupational disease within the meaning of the Workmen's Compensation Act of 1969 for compensation purposes; it is an injury not attributable to a single event and a kind of disability excluded from the coverage of the apportionment section of the Workmen's Compensation Act (MCLA 418.301[1], 418.401[c], 418.411, 418.435).

Appeal from Workmen's Compensation Appeal Board, Submitted Division 2 May 13, 1974, at Detroit. (Docket No. 17241.) Decided June 26, 1974. Application for leave to appeal dismissed with prejudice by stipulation.

Claim by Stanislaw Skowronski against Ajax

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 245.

[2] 58 Am Jur, Workmen's Compensation §§ 526, 530.

[3] 58 Am Jur, Workmen's Compensation § 243 *et seq.*

Forging & Casting Company and Aetna Casualty & Surety Company for workmen's compensation. Allegheny Ludlum Steel Corporation and Michigan Mutual Liability Insurance Company added as defendants. Award for plaintiff against Allegheny and Michigan Mutual. Allegheny and Michigan Mutual appeal. Reversed and remanded with instructions.

Ripple & Chambers, P. C. (by *James O. Flynn),* for plaintiff.

LeVasseur, Werner, Mitseff & Brown, for Ajax Forging & Casting Company and Aetna Casualty & Surety Company.

E. R. Whinham, Jr., for Allegheny Ludlum Steel Corporation and Michigan Mutual Liability Insurance Company.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

R. B. BURNS, J. This is an appeal from the Workmen's Compensation Appeal Board which affirmed a referee's award in favor of the plaintiff, Stanislaw Skowronski, and against defendant, Allegheny Ludlum Steel Corporation, hereinafter referred to as Allegheny, and its insurer, Michigan Mutual Liability Insurance Company, hereinafter referred to as Michigan Mutual. Defendants Allegheny and Michigan Mutual appeal.

Plaintiff began working for Allegheny on July 30, 1950, as a blacksmith. He held that job and worked in the same factory location until he was unable to work on April 27, 1970. Allegheny was

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

plaintiff's employer until July 31, 1967, at which time the facilities were sold to Ajax Forging and Casting Company, hereinafter referred to as Ajax, and Ajax became plaintiff's employer.

Plaintiff's position as a blacksmith required him to operate various heavy hammers. The hammers raised a great amount of dust, produced noxious fumes, and made extremely loud noises. Plaintiff worked in this environment for 20 years. Eventually the dust, fumes, and, especially, the noise caused plaintiff to become almost entirely deaf and to suffer dizziness and headaches. The conditions led to an ear infection that ultimately required an operation in November, 1969. Plaintiff was able to work full time at his job prior to the operation, and he continued to work after the operation until April 27, 1970, when the working conditions gave him such headaches, dizziness, and blackout spells that he was forced to give up his employment.

Upon learning of plaintiff's disability, Ajax filed a notice of dispute with the Workmen's Compensation Bureau. Plaintiff petitioned for a hearing, naming Ajax as his employer. Ajax obtained an order adding Allegheny and its insurer as defendants pursuant to the apportionment liability provisions in MCLA 418.435; MSA 17.237(435). The referee found that plaintiff received a personal injury on November 24, 1966 arising from his employment.

The Workmen's Compensation Appeal Board found that the plaintiff's injury was noise-induced and agreed with the referee that plaintiff's injury arose from his employment. With regard to the date of injury, the board said:

"The objective signs of plaintiff's ear problems began manifesting themselves in 1965 by draining ears, infec-

tion of the ears, and substantially complete hearing loss.

"On November 24, 1969, plaintiff was admitted to the hospital to undergo an operation described as 'left modified radical mastoidectomy.' The hospital record contains the following entry in the history sheet:

" 'Present Illness: This 54 year old white male is admitted to this hospital with complaint of hearing loss and profuse ear discharge for the last 18 years. *He lost completely his hearing for the last three years.*' (Emphasis in original.)

"It appears that in determining the proper injury date the Referee went back three years from the date of hospitalization and came up with November 24, 1966. Since from then on plaintiff's condition remained constant, 'bad * * * ' as he * * * stated at the hearing * * * , the Referee did not commit error in not establishing the injury date as the last day worked."

The board used this finding to moot the question of apportionment between the employers, Ajax and Allegheny.

The first issue concerns statute MCLA 418.301(1); MSA 17.237(301)(1), which reads in part:

"Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury *not attributable to a single event shall be the last day of work* in the employment in which the employee was last subjected to the conditions resulting in disability or death." (Emphasis added.)

The referee and the board failed to apply this portion of the statute to the present case. Instead, they treated plaintiff's injury as if it was attributable to a single catastrophic event. The above-quoted portion of the board's opinion shows the inappropriateness of this treatment. The first paragraph states that plaintiff began demonstrating signs of hearing loss in 1965, fully a year before

the supposed date of injury. In the next paragraph the board quotes a hospital report showing plaintiff's hearing troubles began within a year of the time he started work with Allegheny and 15 years before the supposed date of injury. Even now, plaintiff has not lost his sense of hearing, though it has continued to deteriorate. The combined effect of these factors indicates that plaintiff's injury was due to a slow erosion of his hearing capabilities over a span of 20 years due to the pernicious environment in which he worked and not the result of a single event. Consequently, the appropriate date of injury would be the last day of work in the employment in which the plaintiff was last subjected to the conditions resulting in disability. *Beelman v Boice Bird & Sons,* 34 Mich App 607; 192 NW2d 35 (1971), and *Fields v G M Brass & Aluminum Foundry Co,* 332 Mich 113; 50 NW2d 738 (1952).

The findings of fact made by the WCAB are conclusive on appeal. *DeMott v Goodwill Industries,* 51 Mich App 127; 214 NW2d 554 (1974). However, the appeal board's decision will be overturned when it is contrary to the law, misapplies legal standards, or is not supported by competent, material, and substantial evidence of the whole record. *Tillotson v Penn-Dixie Cement Corp,* 47 Mich App 427; 209 NW2d 611 (1973), and *Medacco v Campbell, Wyant & Cannon Foundry Co,* 48 Mich App 217; 210 NW2d 360 (1973). In this case, the board's decision must be overturned. It attempted to apply the wrong legal standard to the facts to determine the plaintiff's date of injury. Plaintiff's injury was not attributable to a single event; therefore, the date of injury must be the last day of work in the employment in which the plaintiff was last subjected to the conditions result-

ing in his disability, April 27, 1970. MCLA 418.301(1); MSA 17.237(301)(1).

The next issue is whether defendants Ajax and Aetna Casualty & Surety Company have a right of apportionment against defendants Allegheny and Michigan Mutual. In our opinion, they do not. The only relevant apportionment statute is MCLA 418.435; MSA 17.237(435) which reads in part:

"The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the *disease* was due and in which it was contracted. If any dispute or controversy arises as to the payment of compensation or as to liability therefor, the employee shall give notice to and make claim upon the last employer only and apply for a hearing against the last employer only. If the employee was employed by prior employers in an employment to the nature of which the *disease* was due and in which it was contracted, the hearing referee to whom the case is assigned or the director on motion * * * shall join any or all prior employers * * * ." (Emphasis added.)

This statute is obviously predicated upon the assumption that the employee must be suffering from an occupational disease before the rest of the section is to apply. As has already been stated, the board found that plaintiff's injury was noise-induced. We are bound to agree. *DeMott, supra.* We do not believe that a noise-induced hearing loss is an occupational disease within the meaning of the Workmen's Compensation Act of 1969 for compensation purposes. The act does not clearly define what an occupational disease is, but MCLA 418.301(1); MSA 17.237(301)(1) makes an unmistakable distinction between a disease and an injury not attributable to a single event. This distinction is reverberated in MCLA 418.401(c); MSA 17.237(401)(c) and MCLA 418.411; MSA

17.237(411). Having gone to such lengths to maintain this distinction throughout the new act, the Legislature was obviously aware of it when it approved an apportionment section that mentioned only disease-caused disabilities. The legislative failure to specifically include the other kinds of disabilities, which had been repeatedly distinguished from diseases, must be viewed as a deliberate exclusion from the coverage of the apportionment section. Therefore, it would be improper to consider plaintiff's injury covered by the apportionment section.

Reversed and remanded for further proceedings and determinations in accord with the principles announced in this opinion.

All concurred.

GAYDOS v WHITE MOTOR CORPORATION

1. MASTER AND SERVANT—CONTRACTS—UNILATERAL CONTRACTS—CONSIDERATION—SEVERANCE PAY.

   A policy adopted by a defendant corporation providing for severance pay when employees were terminated at the company's request was not merely a unilaterally promulgated policy or a gratuity; the adoption of the policy by the company constituted an offer of a contract and consideration for a unilateral contract upon which the employees had the right to rely was supplied as the employees continued to work thereafter.

2. CONTRACTS—INTERPRETATION OF CONTRACTS—AMBIGUITY OF TERMS—EVIDENCE—EXTRANEOUS EVIDENCE.

   The conduct of the parties cannot be used to prove that a contract means something other than what appears on its face when the contract is clear and unambiguous; only in cases of ambiguity in the terms of a written contract will courts resort to the use of extraneous evidence.

3. CONTRACTS—INTERPRETATION OF CONTRACTS—PAROL EVIDENCE—UNILATERAL CONTRACTS.

   Refusal to allow introduction of parol evidence offered by a defendant to support its interpretation of a unilateral contract written by the defendant was proper; such evidence would have resulted in a one-sided, self-serving interpretation of the defendant's intention and construction of the contract.

4. TRIAL—DIRECTED VERDICT—EVIDENCE—TERMINATION OF EMPLOYMENT—SEVERANCE PAY.

   Denial of a defendant's motion for a directed verdict in an action

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 53 Am Jur 2d, Master and Servant § 81.

Construction and effect of severance or dismissal pay provisions of employment contract or collective labor agreement. 147 ALR 151, s. 40 ALR2d 1044.

[2] 17 Am Jur 2d, Contracts §§ 78, 294.

[3] 17 Am Jur 2d, Contracts §§ 5, 77.

[5] 53 Am Jur, Trial § 580.

[6] 53 Am Jur, Trial § 555.

by employees for severance pay as a result of a sale of a unit of the defendant corporation was proper where there was evidence that the employees had in fact been terminated by the defendant corporation, because a court must view the evidence in the light most favorable to the party against whom such a motion is directed; the question of whether the defendant's severance pay contract applied to the plaintiffs was for the jury.

5. TRIAL—INSTRUCTIONS TO JURY—EVIDENCE.

Refusal to give a requested charge to the jury was proper where the evidence did not warrant such an instruction and the instruction which was given was legally and factually correct.

6. TRIAL—CONFUSION OF JURY—ARGUMENTS OF COUNSEL—EVIDENCE—INSTRUCTIONS TO JURY.

A defendant corporation whose counsel in an action by employees for severance pay was allowed to argue in his closing statement regarding the past practices in application of a severance pay policy, where testimony regarding those practices was not allowed and a proposed jury instruction on those practices was rejected, cannot complain upon appeal that the jury was thereby confused; any such confusion would necessarily have resulted from the action of defendant's counsel.

Appeal from Ingham, Marvin J. Salmon, J. Submitted Division 2 May 9, 1974, at Lansing. (Docket No. 17269.) Decided June 26, 1974. Leave to appeal denied, 392 Mich 800.

Complaint by John Gaydos and others against White Motor Corporation for payment of severance pay. Judgment for plaintiffs. Defendant appeals and 12 plaintiffs cross-appeal. Affirmed.

Fraser, Trebilcock, Davis & Foster (by *Eugene F. Townsend, Jr.* and *Michael E. Cavanaugh),* for plaintiffs.

Foster, Lindemer, Swift & Collins, P. C. (by *David C. Coey),* for defendant.

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

HOLBROOK, J. The plaintiffs, numbering 135, in this action were former employees of defendant White Motor Corporation. They had been employed by defendant for a period of at least six months prior to July 1, 1971. They were employees of what was designated as the P.E.C. Unit, a part of the Diamond Reo Truck Division of defendant. That unit maintained facilities in Chicago, Illinois, and in Lansing, Michigan. Thirty-six of the plaintiffs were employed in Lansing and the remainder in Chicago.

On July 1, 1971, the P.E.C. Unit was sold by defendant to AM General Corporation. Included in the sale agreement was a provision that: "Seller shall cooperate with Buyer to endeavor to persuade the employees of the P.E.C. Division to become employees of Buyer after the Closing Date". The plaintiffs in this action continued to be employed at their same jobs, but as employees of AM General Corporation. Plaintiffs were salaried, non-union personnel. In accordance with the agreement to cooperate, defendant neither offered nor solicited other employment within White Motor Corporation to plaintiffs;[1] such action would have necessitated "bumping someone else". A letter from defendant's personnel director was sent to all P.E.C. employees which provided:

"This is to advise you that the P.E.C. operation has been acquired by the AM General Corporation, effective July 1, 1971.

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

[1] Union employees had been informed that they could remain with White Motor, if they so desired; no such acknowledgment was given to non-union employees.

"As a result you will be employed by AM General, who will continue operations under the same general terms and conditions that are now in effect.

"You will be advised of further developments within a short period of time."[2]

At the time of closing, the plaintiffs were taken off the White Motor payroll. Herman Everhardus, Director of Personnel at the time of sale, testified that if any employees wished to stay with defendant corporation, they would have to come to him and request to so do.

By memo specifying the effective date to be July 15, 1966, the White Motor Corporation adopted a general office policy and procedure on severance pay. On April 11, 1967, A. A. Axline, Director of Personnel, dispersed to all the department heads a memo on severance pay which was, in effect, a somewhat shortened version of the previously promulgated general office policy on severance pay. On the day before, Axline had dispersed to all department heads the following general memorandum:

"The following severance pay policy has been approved for this Division:

"Severance pay is given to non-exempt non-union salary employees with more than six (6) months' service terminated at the Company's request. Severance pay is given the employee instead of two (2) weeks' termination notice. An employee who retires, resigns, is discharged for cause, or is terminated for any reason at age 65 or over does not receive severance pay."[3]

On August 9, 1971, plaintiffs filed suit against

[2] This letter effectively informed all P.E.C. employees that they would no longer be employed by White Motor Corporation.

[3] AM General Corporation had no provision for severance pay and individuals terminated since the acquisition of the P.E.C. Unit by that corporation have not received severance pay.

defendant based on contract for recovery of severance pay. With the exception of ten of the named plaintiffs, none testified personally.[4] Defendant contended that the severance pay contract was partially oral and that, as such, parol evidence should be admitted to supplement and facilitate interpretation of the written memorandum. The trial court held that the contract was complete and unambiguous and refused to admit parol evidence. At the conclusion of plaintiffs' case in chief and again at conclusion of trial, defendant moved for a directed verdict, which motion was denied on both occasions. The jury returned a verdict in favor of the plaintiffs. Defendant here appeals and asserts that it was entitled to a directed verdict as to all plaintiffs from whom nothing was heard as to the surrounding circumstances of their change of employment. Defendant argues that the trial court erred by excluding from the jury evidence of the application of its "unilaterally promulgated policy". Defendant further asserts as erroneous the court's refusal to give an instruction as requested, and that it was prejudiced due to the confusion arising from the trial court's refusal to permit evidence of defendant's conduct in similar circumstances while permitting argument thereon.

Twelve of the plaintiffs have taken a cross-appeal and contend that the verdict was erroneous in that their recovery should have been for a greater amount. They contend that the "years of service" to be used in calculating the amount of severance pay should include that time spent with the Diamond Reo Company prior to its acquisition by White Motor in 1957. Their appeal is taken from denial of a judgment notwithstanding the verdict.

Defendant argues that while the plaintiffs' rela-

[4] Depositions of four were read into evidence.

tionship with the defendant terminated there was no termination within the purview of the severance pay policy, *i.e.,* the policy was inapplicable where employees did not become unemployed. Defendant, thus, contends that parol evidence of application of the policy in other instances should have been admitted to facilitate understanding by the jury of what, in effect, was a condition of the severance pay policy. In its answer to plaintiffs' complaint, defendant pled an affirmative defense that "the defendant's policy concerning severance pay was merely an expression of desire or good intention, without any binding commitment for the benefit of the employees concerned".[5] We cannot agree that the severance pay provision was merely a "unilaterally promulgated policy" or a gratuity. The adoption of the described policy by defendant constituted an offer of a contract. *Cain v Allen Electric & Equipment Co,* 346 Mich 568, 579; 78 NW2d 296, 302 (1956). As the employees continued to work thereafter, consideration was supplied for a unilateral contract, upon which the employees had the right to rely. *Cain, supra; Clarke v Brunswick Corp,* 48 Mich App 667; 211 NW2d 101 (1973); see, also, *Anthony v Jersey Central Power & Light Co,* 51 NJ Super 139; 143 A2d 762 (1958); *Adams v Jersey Central Power & Light Co,* 36 NJ Super 53; 114 A2d 776 (1955), *aff'd* 21 NJ 8; 120 A2d 737 (1956); *Chinn v China National Aviation Corp,* 138 Cal App 2d 98; 291 P2d 91 (1955); *Hunter v Sparling,* 87 Cal App 2d 711; 197 P2d 807 (1948); *Hercules Powder Co v Brookfield,* 189 Va 531; 53 SE2d 804 (1949); *Mace v Conde Nast Publications, Inc,* 155 Conn 680; 237 A2d 360 (1967); and, generally, 40 ALR2d 1044, 1046–1048.

[5] It is noteworthy that defendant's counsel stated, during oral argument, that he had no disagreement with "the law in plaintiffs' brief", which "law" asserts that the "policy" was a unilateral contract.

In *Willets v Emhart Mfg Co,* 152 Conn 487, 490–491; 208 A2d 546, 548 (1965), the Supreme Court of Errors of Connecticut held that separation pay is not analogous to unemployment compensation but rather is "a kind of accumulated compensation for past services and a material recognition of their past value".

Thus, the focus of the case was interpretation of a unilateral contract. Only in cases of ambiguity in the terms of a written contract will courts resort to the use of extraneous evidence. *Stott v Stott Realty Co,* 306 Mich 492, 499; 11 NW2d 215, 218 (1943); 17 Am Jur 2d, Contracts, § 273, p 683. When the contract is clear and unambiguous, the conduct of the parties cannot be used to prove that the contract means something other than what appears on its face. 17 Am Jur 2d, *supra,* § 274, p 688; 17A CJS, Contracts, § 295, p 59.

> "While the construction placed on a contract by one of the parties may have bearing on the meaning to be accorded to the agreement, and a party's construction of his own language in a contract is the highest evidence of his own intention, the meaning of the contract cannot be established by the construction placed on it by one of the parties, or by only some of the parties, unless such interpretation has been made to and relied on by the other party or parties, or has been known to, and acquiesced in, by the other party or parties, or, according to some authorities, it is against the interest of the party making it." 17A CJS, Contracts, § 325(2), pp 248–249.

Where parol seeks to change the clear scope, effect, and obligation of the written contract, it should be rejected. *Jackson National Life Insurance Co v Bakaian,* 16 Mich App 26, 32; 167 NW2d 462, 465 (1969). A onesided, self-serving interpretation is of no assistance in interpretation. *Davis v Kramer Brothers Freight Lines, Inc,* 361 Mich 371,

376; 105 NW2d 29, 31–32 (1960); *WJ Howard & Sons, Inc v Meyer,* 367 Mich 300, 308; 116 NW2d 752, 756 (1962). The allowance by the trial court of the evidence desired to be introduced by the defendant would have been erroneous in that it would have been a onesided, self-serving interpretation of the defendant's intention and construction of the contract. Moreover, the trial court possesses a great deal of discretion in ruling on the admissibility of evidence. *Boyer v Boyer,* 30 Mich App 623, 626; 186 NW2d 842, 843 (1971); *Battle Creek Food Co v Kirkland,* 298 Mich 515; 299 NW 167 (1941). We here find no abuse of discretion.

When a trial judge is faced with a motion for directed verdict, he must view the evidence in the light most favorable to the party against whom the motion is directed. *Cullins v Magic Mortgage, Inc,* 23 Mich App 251, 256; 178 NW2d 532, 534 (1970). Clearly, the 135 employees were no longer employed by White Motor Corporation and therefore terminated; likewise it was clear that this was so not because of any action on their part. The interpretation of whether the severance pay contract applied to the plaintiffs was for the jury. See *Guilmet v Campbell,* 385 Mich 57, 69; 188 NW2d 601, 606 (1971). The trial court correctly denied the defendant's motion as there was evidence of termination of all plaintiffs and each need not have testified personally. There was testimony by the comptroller of Diamond Reo at the time of sale, the manager of salaried employees, and the president of White Motor Corporation, among others, to the effect that the employees of the P.E.C. Unit *had been terminated.* Further, all employees of the P.E.C. Unit were sent a letter from the secretary and general counsel of White Motor which provided:

"I understand that you have inquired on behalf of the employees of our former Diamond Reo Division as to the status of the Common Stock purchased for their account under the White Motor Corporation Employee Stock Purchase Savings Plan.

"This is to assure you and those employees involved that our Board of Directors has amended Section 12.02 of the Plan, subject to approval of the Internal Revenue Service, to provide *that employees terminated as a result of the disposition of the P.E.C. unit* and the sale of the Diamond Reo Division will not lose the Common Stock of White Motor Corporation purchased for their account with the Company contributions. In effect, such employees will lose none of their rights except the right to continue as members of the Plan." (Emphasis supplied.)

Also, it was evident that none of the plaintiffs had retired, resigned, been discharged for cause or were terminated after age 65.

Defendant further contends that the trial court erred in refusing its "proffered instruction number three, or any instruction, to the effect that the jury could take into consideration what the practice was of White Motor Corporation pertaining to severance pay on other occasions in determining the terms and conditions of the severance pay policy". The jury was instructed that:

"White Motor Corporation contends the severance policy was adopted for the Diamond Reo Truck Division because so much of its work was subject to government contract and consequently the work might terminate on fairly short notice without any long term job-continuity. Therefore, as an alternative to that lack of job security it was the purpose of severance pay to provide some financial carry-over in the event there was a layoff with the employee being out of work through no fault of their own and because company operations put the employee out of a job. White Motor Corporation contends however that it was only where the employee

suffered a loss of his job, that the severance pay would apply. It is White's contention that the policy providing for severance pay was never applied, or intended to apply, to a situation where the employee's job never terminated and he continued right on in the same job, at the same place and for the same pay without being put out of work."

As to defendant's assertion, the trial court opined that much of the proposed instruction was included in the jury charge given and that refusal to charge on past practices was based upon the fact that such evidence had been ruled inadmissible. The evidence did not warrant the proposed charge and the instruction given was legally and factually correct. See *Grenawalt v Nyhuis,* 335 Mich 76, 86; 55 NW2d 736, 741 (1952); *Fulton v Ewing,* 336 Mich 51, 56; 57 NW2d 441, 444 (1953).

Lastly, defendant argues that error may be predicated upon what it asserts was "hopeless confusion in the collective mind of the jury". This, defendant says, was created by the inconsistencies of not allowing testimony of past practices or instructing on such practices, but allowing argument thereupon. First, a review of the record does not reveal that the jury was necessarily prejudicially confused and, secondly, defendant cannot now be allowed to complain on the basis of its argument to the jury as allowed by the trial court. It would be incongruous for us to allow defendant to base reversal upon confusion, if any, which necessarily resulted from its counsel's action.

By cross-appeal, 12 of the plaintiffs have taken a position which is polar to their position as appellees in the appeal. They argue that the term "years of service" in the severance pay policy was so ambiguous as to necessitate the introduction of parol evidence to explain its meaning. The trial

court denied parol testimony for this purpose. Consistent with our discussion above, we find that the policy as promulgated was plain, clear and concise, and that, therefore, parol testimony was not available. The trial court was correct in denying cross-appellants' request for judgment notwithstanding the verdict on this point. This was a proper question for jury determination and one not to be decided as a matter of law. See, generally, 4 Callaghan's Michigan Pleading & Practice, § 36.361, pp 376–379.

Affirmed. Costs to plaintiffs, except the 12 who have failed to prevail on their cross-appeal.

All concurred.

WALDRON v ARMSTRONG RUBBER COMPANY

1. LIMITATION OF ACTIONS—NEGLIGENCE—PERSONAL INJURIES—ACCRUAL OF ACTION—CONFLICT OF LAWS—STATUTES.

The shorter Indiana two-year statute of limitations applicable to actions to recover for personal injuries was properly applied with respect to a plaintiffs' claim alleging common-law negligence, where the cause of action accrued in Indiana, the place of injury (MCLA 600.5861).

2. LIMITATION OF ACTIONS—PRODUCTS LIABILITY—BREACH OF WARRANTY—CONFLICT OF LAWS—CHARACTERIZATION OF ACTIONS—STATUTES.

To the extent that characterization of a cause of action is necessary to determine which of two arguably applicable foreign statutes of limitations governs, as a procedural matter, the law of Michigan applies; therefore, a cause of action for breach of warranty to recover damages for injuries received in an accident in Indiana occasioned by a defective tire sounded in tort, in accordance with Michigan precedent, and a two-year Indiana statute of limitations applicable to actions to recover for personal injuries applied (MCLA 600.5861).

Appeal from Wayne, James L. Ryan, J. Submitted Division 1 May 7, 1974, at Detroit. (Docket Nos. 17327, 17328.) Decided June 26, 1974. Leave to appeal granted, order vacated, and remanded to the Court of Appeals for reconsideration applying Indiana law, 393 Mich —.

Complaint by Lester K. Waldron and Ramona Waldron against Armstrong Rubber Company and Sears, Roebuck & Company for damages resulting from a defective tire. Complaint by Accidental Fire & Casualty Company of North Carolina, as a subrogee, against Armstrong Rubber Company and

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 51 Am Jur 2d, Limitation of Actions §§ 66, 71, 75.

Construction, application, and effect of statute of forum which admits bar of statute of limitation of other state. 75 ALR 203, s. 149 ALR 1224.

Sears, Roebuck & Company for reimbursement. Accelerated judgment for defendants. Plaintiffs appeal. Affirmed.

Kiefer, Allen & Ryan (Demetre J. Ellias, of counsel), for plaintiffs.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen (by *B. I. Stanczyk* and *Sarah Wildgen Sweet),* for defendants.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

MCGREGOR, J. Plaintiffs appeal as of right from a trial court order of May 24, 1973, granting defendants' motion for accelerated judgment on the basis that plaintiffs' "claim is barred because of * * * [the] statute of limitations". GCR 1963, 116.1(5). We affirm.

This products liability suit arises out of an accident which was allegedly caused by a defective tire manufactured by defendant Armstrong Rubber Company and sold by defendant Sears, Roebuck & Company. Each plaintiff's complaint contained three counts: negligence, breach of express warranty, and breach of implied warranties of fitness and merchantability. Plaintiffs alleged that on or about August 27, 1968, a truck tire was purchased by Robert E. Crakes, from defendant Sears, Roebuck & Company, in Michigan City, Indiana. The truck tire was purchased for a 1963 International tractor used to haul a Fruehauf trailer. On July 15, 1969, plaintiff Lester K. Waldron was operating the tractor in the State of Indiana when the left front tire blew out, causing him to lose control

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

of the tractor-trailer. At the time of the accident, the tire was approximately 1 year old and had an estimated cumulative mileage of 75,000 miles. Although the only apparent connection between the accident and the State of Michigan is the fact that plaintiffs reside in Union Pier, suit was filed in Wayne Circuit Court on July 6, 1972, in both cases.[1] On July 7, 1972, defendants filed answers in which they raised the affirmative defense of the statute of limitations. Thereafter, a motion for accelerated judgment was filed which alleged that the statute of limitations had expired because plaintiffs' cause of action was barred by the two-year statute of limitations of Indiana. On May 24, 1973, defendants' motions for accelerated judgment as to all counts were granted by the trial court.

The sole issue before us is whether the trial court erred in ruling that the two-year Indiana statute of limitations applicable to claims for personal injuries bars plaintiffs' cause of action.

With respect to plaintiffs' claim of negligence, the cause of action accrued in Indiana, where the injury was sustained. *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich 146; 200 NW2d 70 (1972). Thus, the shorter Indiana two-year statute of limitations applicable to actions to recover for personal injuries applies. MCLA 600.5861; MSA 27A.5861. Accordingly, with respect to plaintiffs' counts alleging common-law negligence, the trial court was correct in granting defendants' motion for accelerated judgment, on the basis of the statute of limitations. See *Parrish v B F Goodrich Co,* 46 Mich App 85; 207 NW2d 422 (1973).

[1] Defendants have not contended, either here or in the court below, that Michigan lacks jurisdiction over them with respect to plaintiffs' action.

The propriety of accelerated judgment with respect to plaintiffs' allegations of breach of implied warranty poses conceptual difficulties requiring a more detailed analysis.

Preliminarily, it must be recalled that the Michigan borrowing statute, cited above, provides that where an action accrues in a foreign jurisdiction and suit is instituted here, the statute of limitations of the jurisdiction which bars the action is applied. Since delivery of the allegedly defective tire in this case took place in Indiana, plaintiffs' cause of action accrued there (MCLA 440.2725[2]; MSA 19.2725[2]; *Parrish v Goodrich Co, supra)* and the borrowing statute applies.

Let us now assume, as plaintiffs contend, that Indiana applies a four-year statute of limitations to actions brought to recover for personal injuries sustained as the result of a seller's breach of an implied warranty. Michigan, of course, applies its general three-year statute of limitations (MCLA 600.5805[7]; MSA 27A.5805[7]), to actions instituted to recover for personal injuries, irrespective of whether the action is predicated upon common-law negligence or breach of warranty. *State Mutual Cyclone Ins Co v O & A Electric Cooperative,* 381 Mich 318; 161 NW2d 573 (1968). This is so, because "Michigan has treated actions for breach of warranty seeking recovery for personal injury as sounding in tort". *Parrish v Goodrich Co, supra,* 88. With these considerations in mind, the problem is apparent: if the Michigan trial court, in accordance with Michigan precedent, characterizes the action as sounding in tort, and then applies the borrowing statute, the shorter two-year Indiana statute of limitations governing tort claims bars the suit. However, if the trial court first applies the borrowing statute and then character-

izes the action under Indiana law, as subject to the four-year Indiana statute of limitations, the shorter three-year Michigan statute arguably allows maintenance of the suit. The question thus refined becomes whether the nature of the action is characterized by the law of the forum (Michigan) or the law of the place of the injury (Indiana).

The nature of the problem is made clearer and a possible solution suggested by the following quotation from 16 Am Jur 2d, Conflict of Laws, § 3, pp 8–10:

"In a conflict of laws situation, a court must determine at the outset whether the problem presented to it for solution relates to torts, contracts, property, or some other field, or to a matter of substance or procedure, in order to refer to the appropriate law; that is, the court initially must, whether consciously or not, go through the process of determining the nature of the problem, because otherwise it will not know which choice-of-law rule to apply to the case. This process is generally called 'characterization,' and sometimes 'classification' or 'qualification,' but it has not very often been articulated by the courts. On occasion the court may be faced with the further question as to whether the characterization should be made by the law of the forum or by the law of the other state with which the problem to be resolved is connected. According to which course the court follows, the choice of law as well as the outcome of the litigation may differ, as for instance where the facts are regarded by the law of the forum as involving the question of contract, but by the law of the other state as a question of tort, where the laws of the two states differ as to the meaning of a connecting factor, such as domicil or place of contracting, or where the views of the forum and the other state differ as to whether the applicable foreign law selected by the forum should be regarded as substantive or procedural. The courts for the most part have shown no express awareness of the problem, but in a few instances they have said that in deciding how a matter should be

characterized for conflict of laws purposes the law of the forum should control, or that the characterization of actions should be made in accordance with the law of the forum. One apparent exception to this view is that the law of the situs of tangible property determines whether it is to be classified or characterized as real or personal property." (Footnotes omitted.)

In *Parrish v B F Goodrich Co, supra,* 88, this Court noted that:

"To the extent characterization of a warranty theory into a niche of named form of action is necessary to determine where it accrued, we first make it clear that, as a procedural matter, the law of Michigan applies." (Footnote omitted.)

Likewise, in this case, we hold that, to the extent that characterization is necessary to determine which of two arguably applicable foreign statutes of limitations governs, as a procedural matter, the law of Michigan applies. Accordingly, plaintiffs' cause of action for breach of warranty sounded in tort and the two-year Indiana statute of limitations barred suit. The trial court did not, therefore, err in granting defendants' motions for acclerated judgment.

Affirmed.

All concurred.

SAGINAW COUNTY v STATE TAX COMMISSION
KALAMAZOO COUNTY v STATE TAX COMMISSION
SANILAC COUNTY v STATE TAX COMMISSION

1. CONSTITUTIONAL LAW—STATUTES—AMENDMENT OF STATUTES—TAXATION.

A statute which abolishes and transfers the authority and functions of the State Board of Equalization without republishing at length the statutory framework thus amended for state equalization of property taxes does not offend a provision of the state constitution which requires that laws which are revised, altered or amended must be re-enacted and published at length; the statute is the result of a constitutional mandate to reorganize the executive branch of state government which required implementation by law within a set timetable and the Court cannot presume that the framers intended that all the compiled laws affected should be re-enacted and republished at length in the process (Const 1963, art 4, § 25, art 5, § 2; MCLA 16.186).

2. CONSTITUTIONAL LAW—STATUTES—AMENDMENT OF STATUTES—EXECUTIVE ORGANIZATION ACT—NOTICE.

A major reason for requiring statutes which are revised or amended to be re-enacted and republished at length is to give notice to the Legislature and the public of what is being changed, and the Executive Organization Act of 1965, which consists of a sequence of several consolidations, transfers, and abolitions, satisfies the requirement of notice; the Constitutional provisions must be given a reasonable and practical interpretation (Const 1963, art 4, § 25; MCLA 16.101 *et seq.).*

3. ADMINISTRATIVE LAW—TAXATION—STATE TAX COMMISSION—ADMINISTRATIVE PROCEDURES ACT—EQUALIZATION—CONTESTED CASES—APPEALS.

State equalization proceedings by the State Tax Commission are

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 73 Am Jur 2d, Statutes §§ 21, 66.
[3, 4] 72 Am Jur 2d, State and Local Taxation §§ 799-801, 810.
[5, 6] 72 Am Jur 2d, State and Local Taxation § 753 *et seq.*
[7] 72 Am Jur 2d, State and Local Taxation §§ 777, 778.
[8] 72 Am Jur 2d, State and Local Taxation §§ 787, 820, 827.

exempt from the contested-case provisions of the administrative procedures act; an equalization appeal could have a drastic effect upon the operations of local government, and therefore the policy which favors exemption of individual assessment appeals from the procedural requirements of the administrative procedures act furnishes even stronger reason for excluding equalization proceedings and appeals (MCLA 24.201 *et seq.*, 211.152).

4. TAXATION—EQUALIZATION—PUBLIC BOARD MEETINGS ACT—VIOLATION OF STATUTE—PREJUDICE.

Equalized property values set by the state tax commissioners were not rendered void because the commissioners, following adjournment to consider statements of county representatives, did not reconvene their meeting to announce completion of their task before release of their final report, where, even if such procedure violated the public board meetings act, the record does not indicate that the plaintiff counties were prejudiced or that equalizations were based on factors other than those discussed or available to all in attendance at the public session (MCLA 15.251 *et seq.*).

5. TAXATION—TRUE CASH VALUE.

True cash value of taxable property is the usual selling price or fair market value; there is no support for an argument that "true cash value" means "net proceeds in the hands of the hypothetical seller".

6. TAXATION—EQUALIZATION—TRUE CASH VALUE—EQUALITY OF TREATMENT.

A definition of true cash value of taxable property which would exclude the expenses of closing a sale, even if otherwise acceptable, would not furnish a basis for judicial intervention into state equalization proceedings where the taxable wealth of all 83 counties was determined by the same standard of usual selling price or fair market value; where there is a conflict, equality of treatment should predominate over standards of cash value.

7. TAXATION—EQUALIZATION—INCREASED VALUATION—FRAUD.

An increase of 30% in a county's equalized valuation was not shown to be fraudulent where the record did not disclose any indication that the increase was due to any factors other than general inflation, new construction within the county, and overdue revaluation.

8. ADMINISTRATIVE LAW—STATE TAX COMMISSION—APPEAL AND ERROR—BASIS FOR REVIEW.

Judicial review of a decision by the State Tax Commission relating to valuation is limited to questions of fraud, error of law, or adoption of wrong principles (Const 1963, art 6, § 28).

Appeal from State Tax Commission. Submitted Division 2 May 14, 1974, at Lansing. (Docket Nos. 17462, 17463, 17468.) Decided June 26, 1974. Leave to appeal applied for by Saginaw and Kalamazoo Counties.

Saginaw, Kalamazoo, and Sanilac Counties appeal from a decision of the State Tax Commission by leave granted, seeking a declaration that the 1973 state equalized valuations of taxable property were improperly adopted and are therefore void. Decision of State Tax Commission affirmed.

Smith, Bovill, Joseph & Wolf, P. C., for plaintiff Saginaw County.

Donald A. Burge, Prosecuting Attorney, and *Duane T. Triemstra,* Chief of Civil Division, for plaintiff Kalamazoo County.

Drillock & Atkins, for plaintiff Sanilac County.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard R. Roesch,* Assistant Attorney General, for defendant.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

DANHOF, P. J. On May 29, 1973, the State Tax Commission (STC) adopted the 1973 equalized valuations for all 83 counties in Michigan. Saginaw, Kalamazoo and Sanilac counties appeal that decision by leave granted November 15, 1973. The

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

cases were consolidated for review because each raises a common issue of constitutional significance for our consideration.

I

Plaintiffs contend that MCLA 16.186; MSA 3.29(86)[1] violates Const 1963, art 4, § 25, which reads:

"No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length."[2]

The statute in issue reads:

"The state board of equalization created under section 1 of Act No. 44 of the Public Acts of 1911, as amended, being section 209.1 of the Compiled Laws of 1948, is transferred by a type III transfer to the state tax commission, and the state board of equalization is abolished."

Plaintiffs argue that the abolition of the State Board of Equalization and the transfer of its functions, duties and powers to the STC is null and void. They rely on *Alan v Wayne County,* 388 Mich 210, 285; 200 NW2d 628, 665 (1972), which indicates that when the Legislature intends to amend or alter existing statutes, the intention should be stated specifically "and those statutes must be amended or altered directly and republished as contemplated by Const 1963, art 4, § 25". The statute at issue abolishes and transfers the authority and functions of the State Board of Equalization without republishing at length the

[1] 1965 PA 380, § 86.

[2] The same mandate has been in every Constitution since 1850. Const 1850, art 4, §§ 20, 25; Const 1908, art 5, § 21.

statutory framework thus amended for state equalization.[3] Therefore, plaintiffs argue that all equalizations set by the STC are void.

Prior to *Alan, supra,* statutes which similarly abolished existing departments or offices, substituted the duties of various officials, or transferred powers to newly created entities without republishing at length the acts amended had been held not to violate the predecessors of art 4, § 25.[4] The *Alan* Court, though agreeing with Justice COOLEY in *Mahaney* that the constitutional provision must be given a reasonable interpretation, set nevertheless a higher standard for compliance with the plain words of the Constitution in light of the more highly sophisticated legislative tools available today.[5]

Nevertheless, the *Alan* Court acknowledged that it was not confronted with a situation requiring republication of a lengthy body of laws.[6] In the instant case, MCLA 16.186, *supra,* is but one of approximately 190 sections comprising the Executive Organization Act of 1965.[7] The entire act constitutes a sequence of similar consolidations, transfers and abolitions. The theory advocated by plaintiffs applies with equal force to the entire act because none of its sections republishes at length the statutes affected. To strike one section is to strike the entire act sooner or later. Yet the act itself is a result of the people's mandate in art 5, § 2 of the same Constitution which it allegedly offends:

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[3] MCLA 209.1 *et seq.;* MSA 7.601 *et seq.*

[4] See *People v Mahaney,* 13 Mich 481 (1865); *Fornia v Wayne Circuit Judge,* 140 Mich 631; 104 NW 147 (1905); *People v Stimer,* 248 Mich 272; 226 NW 899 (1929).

[5] See *Alan, supra,* 388 Mich 210, 268–288; 200 NW2d 628, 656–666.

[6] *Alan, supra,* 388 Mich at 282; 200 NW2d at 663.

[7] 1965 PA 380.

"All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes."

This mandate was not self-executing, but required implementation by law.[8] Reorganization by statute was to be completed within two years after the Constitution took effect on January 1, 1964.[9]

One of the most basic rules of statutory construction is to read statutes as a whole. Provisions should be read in context, not in isolation, and should be harmonized to give effect to all. Common sense dictates that the same approach be taken when the Constitution is the subject of inquiry. By art 5, § 2, the delegates to the Constitutional Convention envisioned consolidation and reorganization of the executive departments. In view of the time limitation on reorganization by statute, we cannot presume that the framers intended that all the compiled laws effected should be re-enacted and republished at length in the process. "The Constitution is a practical instrument", as Justice Catron remarked about its Federal brother, "made by practical men * * * ".[10] A contrary holding would bring the wheels of government screeching to a halt and would produce a situation where, "from mere immensity of material, it would be

[8] *McDonald v Schnipke,* 380 Mich 14; 155 NW2d 169 (1968).

[9] If reorganization remained incomplete at the expiration of that period, the Governor was given authority to make the initial allocation within one year thereafter by Executive Order. Const 1963, Schedule & Temporary Provisions, § 12.

[10] *Smith v Turner,* 48 US (7 How) 283, 449; 12 L Ed 702, 772 (1849).

impossible to tell what the law was".[11]

A major reason for the language of art 4, § 25 "is to require that notice be given to the Legislature and the public of what is being changed and the content of the act as revised, altered or amended".[12] In the unique context of this case, and giving the provision a reasonable and practical interpretation,[13] we hold that this notice requirement is satisfied by the 1965 act and that neither the Legislature nor the people were misled or deceived as to the act's scope and effect.

II

Saginaw and Kalamazoo Counties contend that equalization proceedings are subject to the Administrative Procedures Act of 1969.[14] *Republic Development Corp v State Tax Commission,* 38 Mich App 166; 195 NW2d 923 (1972), and *Fisher-New Center Co v Detroit,* 38 Mich App 750; 197 NW2d 272 (1972), held that § 152, as amended, of the general property tax act[15] exempted the STC from the contested case provisions of the Administrative Procedures Act. Plaintiffs, while recognizing these cases, find them distinguishable because they were concerned with individual assessment appeals, rather than appeals from state equalization. We disagree. State equalization is an integral part of individual assessment determinations because it finalizes local assessed valuations which are

[11] *People v Mahaney, supra,* 13 Mich at 497.

[12] *Advisory Opinion re Constitutionality of 1972 PA 294,* 389 Mich 441, 472; 208 NW2d 469, 477 (1973).

[13] *Advisory Opinion, supra,* 389 Mich at 476; 208 NW2d at 479.

[14] 1969 PA 306, being MCLA 24.201 *et seq.;* MSA 3.560(101) *et seq.*

[15] 1969 PA 270, being MCLA 211.152; MSA 7.210. See also MCLA 24.312; MSA 3.560(212) whereby a reference to the 1952 administrative procedures act in any other law is deemed to be a reference to the 1969 act.

merely the tentative tax base.[16] Whereas individual assessment appeals do not have a drastic effect upon the operations of local government, an equalization appeal could have such an effect. Therefore, the policy which favors exemption of individual assessment appeals from the procedural requirements of the administrative procedures act furnishes even stronger reason for excluding equalization proceedings and appeals from a time-consuming process which would necessarily impede the apportionment and collection of taxes.

III

Saginaw and Kalamazoo Counties contend that the STC violated the public board meetings act[17] by voting their final report in private session. The STC agrees that its final equalization proceedings are subject to the act, but argues that the proceedings of May 29, 1973 fully complied therewith. The purpose of the public board meetings act is to provide members of the public with the opportunity to be present and observe the manner in which the public business is transacted.[18] Plaintiffs do not deny that the May 29 session was open to the public and attended by the representatives of the several counties (including plaintiffs), members

[16] *School District No 9, Pittsfield Twp, Washtenaw County v Washtenaw County Board of Supervisors,* 341 Mich 388; 67 NW2d 165 (1954); *Calumet & Hecla, Inc v Township of Allouez,* 363 Mich 671; 110 NW2d 585 (1961): MCLA 211.34; MSA 7.52.

[17] 1968 PA 261, being MCLA 15.251 *et seq.;* MSA 4.1800(1) *et seq.* Section 1 defines "board," *inter alia,* as a "commission or other governing body of any state * * * department created by law which has for its purpose the performance of an essential governmental function." "Public meeting" is defined, *inter alia,* as "that part of any meeting of a board during which it votes upon any * * * official action * * * dealing with * * * the fixing of personal or property rights, privileges, immunities, duties or obligations of any person or group of persons."

[18] *Haven v City of Troy,* 39 Mich App 219; 197 NW2d 496 (1972).

of the press, the Legislature and others. Their claim is rather that the equalizations are void because the commissioners, following adjournment to consider the statements of the county representatives, did not reconvene their meeting to announce completion of their task before release of their final report. Assuming *arguendo* noncompliance with the act, the record is barren of any indication that plaintiffs were prejudiced thereby or that equalizations were based on factors other than were discussed or available to all in attendance.

IV

Saginaw and Kalamazoo Counties contend that the STC erred when it rejected the argument that "true cash value"[19] means "net proceeds in the hands of the hypothetical seller." Plaintiffs argue that the expenses of closing a sale do not represent economic benefit to the seller and that therefore the true cash value of taxable property does not include expenses customarily incurred for abstracting, deed preparation, realtor's commission, revenue stamps, termite inspection and financing points. Plaintiffs cite no authority for this proposition. There is authority which we find persuasive and which holds that such a construction would be inconsistent with the term "true and fair value" contained in the Constitution of the State of Washington.[20] Furthermore, assuming that we could accept plaintiffs' definition of true cash value, still this would furnish no basis for judicial intervention in plaintiffs' behalf into the 1973 state equalization proceedings since the taxable wealth of all

[19] Const 1963, art 9, § 3.

[20] *State ex rel Morgan v Kinnear,* 80 Wash 2d 400; 494 P2d 1362 (1972).

83 counties was determined by the same standard of usual selling price or fair market value. Where there is conflict between the standards of cash value and equality of treatment, the latter should predominate.[21]

V

Sanilac County contends that the 1973 increase in its equalized value amounts to fraud and that equalization should have been fixed at 30% less than what the STC determined it to be. This claim is considerably weakened when it is seen that the 1973 equalized value ($189,069,293) for taxable real property[22] in the County is only 15% above the estimate made by the County Board of Commissioners ($164,319,474) and only 8% above the figure ($175,000,000) proposed by the County's representative at the session of May 29. It further appears that the increase complained of was partially the result of substantial information gathered by the STC's field staff concerning current assessment levels and needed revaluation in eight townships bordering on the more populated and faster growing counties of Lapeer, St. Clair and Tuscola. Plaintiff's figure of a 30% increase arises from a comparison between the county's 1972 state equalized valuation and the 1973 state equalized valuation. On the record before us, there is no indication that this increase was due to factors other than those claimed by the STC, *i.e.,* general inflation, new construction within the county and overdue revaluation.

[21] *Allied Supermarkets, Inc v Detroit,* 391 Mich 460; 216 NW2d 755 (1974).

[22] There was no disparity between the equalized value of taxable personal property recommended by the Sanilac County Board of Commissioners and that adopted by the STC.

Other issues raised by plaintiffs do not merit decisional discussion. Suffice it to say that our review is limited to questions of fraud, error of law or adoption of wrong principles.[23] The annual task of ascertaining "whether the relative valuation between the several counties is equal and uniform",[24] like the intermediate steps of local assessment and county-wide equalization, necessarily involves resolution of conflicting factual claims. Where reasonable minds could differ as to the facts, we have neither the expertise nor the authority to intervene.[25]

Affirmed. No costs, a public question.

All concurred.

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[23] Const 1963, art 6, § 28.

[24] MCLA 209.4; MSA 7.604.

[25] *Auditor General v Wayne County Supervisors,* 216 Mich 256; 185 NW 157 (1921).

MELICK v NAUMAN VANDERVOORT, INC.

1. ACCORD AND SATISFACTION—CONSIDERATION—SIGNED WRITING—ORAL AGREEMENT—STATUTES.

Consideration is not necessary where an accord and satisfaction is in writing and signed by the party against whom enforcement is sought; but where the accord and satisfaction is oral, additional consideration is required (MCLA 566.1).

2. ACCORD AND SATISFACTION—CHECKS—ACCEPTANCE—MEETING OF THE MINDS—INFERENCES.

Acceptance of a check received and designated as payment in full constitutes settlement and satisfaction of the debt where there is a dispute of the amount due; there is no condition that there must be a meeting of the minds in fact between the parties in order to effect an accord and satisfaction, and a meeting of the minds "by implication" can be inferred from the actions of the parties to establish the accord and satisfaction.

3. COMPROMISE AND SETTLEMENT—DISPUTES.

Settlements of disputes are favored by the law.

4. ACCORD AND SATISFACTION—CHECKS—NEGOTIATION—CERTIFICATION—ACCEPTANCE—STATUTES.

Indorsement of checks from a corporation and delivery by parties to their attorneys constituted negotiation of the checks, and the attorneys by having the checks certified discharged the corporation from liability for the amounts thereof and effectively transferred the funds from the corporation; these actions of the parties constituted acceptance of an accord and satisfaction where the checks were tendered as full and final payment of a disputed debt (MCLA 440.3202, 440.3411).

REFERENCES FOR POINTS IN HEADNOTES

[1] 1 Am Jur 2d, Accord and Satisfaction §§ 12, 13.
[2] 1 Am Jur 2d, Accord and Satisfaction §§ 4, 11, 33, 44, 48.
[3] 15 Am Jur 2d, Compromise and Settlement §§ 1, 2.
[4] 1 Am Jur 2d, Accord and Satisfaction §§ 8, 17.
[5] 1 Am Jur 2d, Accord and Satisfaction § 24.

5. ACCORD AND SATISFACTION—RESCISSION—RESTORATION OF STATUS QUO.

A party seeking to avoid an accord and satisfaction must tender back amounts already paid pursuant to the accord and satisfaction, thus returning both parties to the status quo, before instituting suit.

Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 May 9, 1974, at Detroit. (Docket No. 17528.) Decided June 26, 1974. Leave to appeal applied for.

Complaint by John Melick, Jr., and Cornelius Phillips, Jr., against Nauman Vandervoort, Inc., for damages resulting from the incorrect valuation of their stock which had been redeemed by defendant corporation. Judgment for plaintiffs. Defendant appeals. Reversed.

Hartman, Beier, Howlett, McConnell & Googasian (by *Eric J. McCann),* for plaintiffs.

Poole, Littell & Sutherland (by *J. Patrick Martin),* for defendant.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

MCGREGOR, J. After a trial on the merits, judgment was entered against the defendant by the trial court on plaintiffs' action for damages resulting from the incorrect valuation of plaintiffs' stock which had been redeemed by defendant corporation. Damages were assessed by the trial court in the amount of $7,720 for plaintiff Melick and $3,860 for plaintiff Phillips.

An agreement was entered into between plain-

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

tiffs and the defendant whereby the defendant corporation would redeem its stock, owned by the plaintiffs, for its book value per share, as determined by acceptable accounting principles. The parties agreed that the redemption value of the stock would be determined as of July 31, 1970. On August 28, 1970, defendant notified the plaintiffs by letters that the book value of their stock, as of July 31, 1970, was 95 cents per share. Included in these letters to the plaintiffs were checks drawn on defendant's account to the order of the plaintiffs for the full amount due and owing on the redemption of their stock, computed at the value of 95 cents per share. On the reverse side of each check, defendant had inscribed the words "Final Payment" and attached to each check was defendant's voucher which stated "Final Payment re purchase Capital Stock". In the accompanying letters, defendant stated that the checks were submitted "in full and final settlement of our agreement".

Neither plaintiff was satisfied with defendant's valuation of their stock and both protested to the defendant. Defendant refused to change its valuation of plaintiffs' stock and plaintiffs commenced this action on October 8, 1970.

However, prior to commencing this action, plaintiffs endorsed their checks to the order of their attorneys, on September 18, 1970, and the checks were presented by the attorneys at defendant's bank and were certified. The checks were not presented for payment at the defendant's bank until January 6, 1971, after the circuit court's order of December 21, 1970, which allowed the transfer of the funds to an interest-bearing account. Plaintiffs testified that the purpose of having the checks certified was to provide security in

the event that the defendant later was unable to pay the amounts of the checks.

During trial, the principal issue between the parties concerned the correct valuation of plaintiffs' stock and the methods used by defendant to arrive at that valuation. The trial court resolved this dispute in favor of plaintiffs, by finding that defendant had wrongfully deducted several items from the corporation assets when it computed the redemption value of plaintiffs' stock. The redemption value of the stock was recomputed, and the trial court entered its award of damages on the basis of the difference between the two valuations. The trial court specifically found that the parties did not intend an accord and satisfaction by the action of the plaintiffs in holding the checks and the certification of the same by their attorneys. The court based this finding on the fact that there had been no agreement between the plaintiffs and the defendant on an accord and satisfaction.

On appeal, the defendant contends that the payee's endorsement and certification of a check which bears the inscription "Final Payment" and which is offered in full and final payment of a disputed indebtedness operates as an accord and satisfaction, absent any intention by the payee to effect an accord in satisfaction of an additional claim.

It should be noted that the defendant does not now dispute any of the trial court's findings of fact. The question before us is purely one of law as to the effect of plaintiffs' endorsements and certifications of their checks, which contained express conditions that they were tendered as final payment of plaintiffs' disputed claims against the defendant.

Further, it is noted that the parties are appar-

ently in agreement that the debt owed by defendant to plaintiffs was unliquidated, because the amount was dependent upon the corporation's assets, and that such amount was subject to interpretation and valuation upon which reasonable minds could differ. This fact is corroborated by the trial court's award of damages to the plaintiffs relative to their claim for damages.

Plaintiffs claim that the total amount due them for their redeemed stock was $21,900. The trial court calculated the value of plaintiffs' stock differently, and awarded damages to the plaintiffs in the amount of $11,580. These varying valuations given to plaintiffs' stock lead inescapably to the conclusion that defendant's debt to the plaintiffs, predicated on the stock's value, was unliquidated because the exact amount of the claim could not be ascertained merely by arithmetic computation. 14 CJS, Claim, p 1186.

Plaintiffs contend that there was no accord and satisfaction because there was no consideration, since the defendant sent checks to the plaintiffs in an amount only equal to what the defendant determined was due to them, citing *Puett v Walker,* 332 Mich 117; 50 NW2d 740 (1952), and hold that defendant was merely doing what it was legally bound to do under the agreement between these parties and that such payment, therefore, could not constitute consideration. Plaintiffs' reliance on *Puett* is misplaced because, there, the claim was not unliquidated.

Puett, supra, is further distinguishable on its facts, because there, "the tender of the check was not a conditional one nor in final settlement of the rights of the parties". *Lafferty v Cole,* 339 Mich 223, 230; 63 NW2d 432 (1954). The Court, in *Puett,* did not consider the effect of MCLA 566.1; MSA

26.978(1), which provides that an agreement to change any contract or obligation is not invalid because of the absence of consideration, provided the modification is in writing and signed by the party against whom enforcement is sought.

This statute has been construed to apply to a creditor's cashing of a check from a debtor which had a condition above the space for the creditor's endorsement providing that the payment was in full discharge of any and all obligations. *Belt v Wolpin Co,* 39 Mich App 40, 43–44; 197 NW2d 129 (1972). Thus, where an accord and satisfaction is in writing and signed by the party against whom enforcement is sought, as in the instant case with the checks at issue, no consideration is necessary, albeit where the accord and satisfaction is oral, additional consideration is required. *Green v Millman Bros, Inc,* 7 Mich App 450; 151 NW2d 860 (1967).

Plaintiffs further contend that no accord and satisfaction was accomplished in the instant case, because there was never a meeting of minds between the parties to such effect; that the plaintiffs continually and constantly protested as insufficient the amounts of the checks tendered to them.

The fundamental error of the trial court in this matter was to confuse a meeting of the minds in fact with a meeting of minds in law.

Plaintiffs rely primarily on the decisions in *Puett, supra,* and *Green, supra,* for their proposition that a meeting of the minds of the parties is an essential requisite to a valid accord and satisfaction. This proposition was also relied on by the trial court in its holding that there was no valid accord and satisfaction in the instant case.

The decision in *Puett* is clearly distinguishable because, there, the tender of the check was not in

final settlement of the rights of the parties. *Lafferty, supra.*

The holding in *Green, supra,* is not so easily reconciled. There, this Court recognized the long-established rule in Michigan that a creditor's acceptance of a check with the legend on the reverse side indicating that it was payment in full constitutes an accord and satisfaction. *Hoey v Ross,* 189 Mich 193; 155 NW 375 (1915); *Green, supra,* 459.

It has been held consistently that, where there is a dispute of an amount due, acceptance of a check received and designated as payment in full constitutes settlement and satisfaction of the debt. The additional condition that there be an agreement in fact as to settlement of the debt has never before been attached to the conditional-check-compromise situation. *Puffer v State Mutual Rodded Fire Ins Co,* 259 Mich 698, 702; 244 NW 206 (1932); *Eisenberg v Battenfeld Oil Co,* 251 Mich 654; 232 NW 386 (1930); *Road Commissioners v Midland Contracting Co,* 247 Mich 222, 225; 225 NW 539 (1929); *Deuches v Grand Rapids Brass Co,* 240 Mich 266; 215 NW 392 (1927); *Shaw v United Motors Products Co,* 239 Mich 194, 196; 214 NW 100 (1927); *Hoey, supra,* 197; *Golden v Bartlett Illuminating Co,* 114 Mich 625; 72 NW 622 (1897); accord, *Omscolite Corp v Federal Ins Co,* 374 Mich 344, 348; 132 NW2d 154 (1965).

From the language of this Court, in *Green, supra,* it is conceivable that there was no intention to change the Michigan rule and attach a condition that there must be a meeting of the minds in fact between the parties in order to effect an accord and satisfaction in the context of a retained conditional check tendered in full payment of an unliquidated debt. Thus, this Court specifically recognized the situation where a meeting of the

minds "by implication" could be inferred from the actions of the parties to establish an accord and satisfaction. *Green, supra,* 460. But, in *Green,* there was no evidence presented at trial from which a meeting of minds of the parties could be implied.

The instant case is distinguishable because plaintiffs negotiated their checks and effectively dispossessed defendant of its funds, at a time when the correct amount of defendant's debts to the plaintiffs were in dispute. Since defendant's checks to the plaintiffs were tendered as full and final payment of the disputed debt, the retention of the checks by the plaintiffs, who were fully informed of the condition, constituted a meeting of minds of the parties by implication, because there could be no severance of the condition from their acceptance. *Shaw, supra; Puffer, supra.*

Albeit plaintiffs may not have understood the legal significance of their retention of defendant's checks as effecting an accord and satisfaction, such mistake is not sufficient to set aside the settlement. *Booth Fisheries Co v Circuit Judge,* 170 Mich 611, 616; 135 NW 1063 (1912); accord, *Jackson v Circuit Judge,* 341 Mich 55, 60; 67 NW2d 471 (1954). This is in accordance with the long-established policy that settlements of disputes are favored by the law. *Pratt v Castle,* 91 Mich 484; 52 NW 52 (1892); *Streeter v Michigan Consolidated Gas Co,* 340 Mich 510; 65 NW2d 760 (1954).

In these circumstances, the trial court's finding that because plaintiffs did not understand the legal significance of their holding defendant's checks, there was no accord and satisfaction, is reversible error. There was no misunderstanding or uncertainty in the instant case as to which claims of plaintiffs the checks were intended to satisfy. Com-

pare *Gitre v Kessler Products Co,* 31 Mich App 1; 187 NW2d 257 (1971).

There is no doubt that plaintiffs' endorsement and delivery of their checks to their attorneys constituted negotiation of the same. MCLA 440.3202; MSA 19.3202. Moreover, their attorneys' certification of the checks discharged the defendant from liability for the amounts thereof and effectively transferred the funds from defendant. MCLA 440.3411; MSA 19.3411. Clearly, these actions of the plaintiffs constituted acceptances of their checks. See *Belt v Wolpin Co,* 39 Mich App 40, 43; 197 NW2d 129 (1972).

This Court has explicitly held that one seeking to avoid an accord and satisfaction must tender back amounts already paid pursuant to the accord and satisfaction, thus returning both parties to the status quo, before instituting suit. *Chapman v Ross,* 47 Mich App 201; 209 NW2d 288 (1973). In the instant case, plaintiffs never tendered back to defendant the funds represented by the checks, which had been removed from defendant's account. Plaintiffs are, therefore, precluded from challenging the validity of the accord and satisfaction with defendant.

Judgment of the circuit court for plaintiffs is reversed. Costs to defendant.

All concurred.

Reversed 393 Mich 774 (1974)
trial court's finding of fact not
clearly erroneous

SHURLOW TILE & CARPET, INC. v DAHLMANN BUILDING COMPANY

1. CORPORATIONS—CORPORATE POWERS—ENFORCEMENT OF CONTRACTS —SUSPENDED CHARTER—STATUTES.

A profit corporation may maintain an action based upon a contract entered into during the time that its charter was void for failure to pay its annual fees or file its annual reports for two consecutive years upon compliance with statutory provisions which enable the corporation, by filing the delinquent reports and paying the delinquent fees, to have the voidance waived and to be revived in full force and effect (MCLA 450.87, 450.91, 450.431, 450.432).

2. CORPORATIONS—CORPORATE POWERS—ENFORCEMENT OF CONTRACT— SUSPENDED CHARTER—CONSTITUTIONAL LAW—STATUTES—TITLE OF ACT.

The body of an act which provides that profit corporations whose charters have become void for failure to file annual reports and to pay fees may have the voidance waived and that all contracts entered into during such intervals shall become valid is germane to the general purpose of the act set forth in its title and is not constitutionally infirm for embracing more than one object (Const 1963, art 4, § 24; MCLA 450.431, 450.432).

Appeal from Kalamazoo, Lucien F. Sweet, J. Submitted Division 3 April 3, 1974, at Grand Rapids. (Docket No. 17682.) Decided June 26, 1974.

Complaint by Shurlow Tile & Carpet, Inc., against Dahlmann Building Company for breach of contract. Defendant's motions for accelerated and summary judgment denied. Defendant appeals by leave granted. Affirmed.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 18 Am Jur 2d, Corporations §§ 76–80, 345.

Rhoades, McKee & Boer (by *Arthur C. Spalding),* for plaintiff.

Brown, Colman & DeMent (by *Robert W. Ionta),* for defendant.

Before: ALLEN, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. The defendant appeals by leave granted from the trial court's denial of its motions for accelerated judgment and summary judgment, which motions sought dismissal of plaintiff's suit on the ground that the plaintiff's corporate charter had become void under MCLA 450.91; MSA 21.91, at the time that the plaintiff contracted with the defendant, thus rendering the contract unenforceable. The facts are not in dispute and a concise statement of facts has been stipulated. We affirm the trial court.

The plaintiff was incorporated in 1966, but failed to pay its annual fees or file its annual reports for the years 1968 and 1969, as a consequence of which its corporate charter became void under § 91 on May 15, 1970. On January 22, 1971 the plaintiff contracted with the defendant to furnish materials and labor for installation of counter tops and tile work in an apartment project. This contract was made and partially performed after the plaintiff's charter had become void under § 91. Disagreements arose between the parties as a result of which plaintiff failed to complete the contract. The plaintiff seeks damages from an alleged breach of contract by the defendant. A complaint was filed on January 17, 1972. Because

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

of the status of the plaintiff's charter this action was dismissed without prejudice.

The plaintiff then complied with MCLA 450.431; MSA 21.248(1) as a result of which its corporate charter was reinstated on December 29, 1972, whereupon plaintiff, on January 18, 1973, commenced the present action seeking damages for the alleged breach of contract. The defendant filed motions for summary judgment and accelerated judgment and the trial court denied both motions, commenting in part:

> "It is the conclusion and decision of this court that to give meaning, to give life, to give vitality to [MCLA 450.432; MSA 21.248(2)], it must be held that upon compliance and upon return of its charter the plaintiff corporation is in a position to bring an action based upon a contract entered into during the time that its charter was suspended or invalid by reason of the nonpayment of fees or filing of necessary reports."

The first question presented is whether a profit corporation that contracts at a time when its corporate charter is void under § 91 can sue on that contract after the corporation has complied with the Michigan Corporation Act and has had its corporate charter reinstated. There are several statutory sections that are relevant to this question.

MCLA 450.87; MSA 21.87, provides that any corporation that neglects to file its annual report and/or pay any fees required shall have its corporate powers suspended during the period of default and shall not maintain any action in any court of this state upon any contract entered into during the time of such default.

MCLA 450.91; MSA 21.91, provides that any profit corporation that is in default for two consecutive years in filing its annual reports or payment

of any required fees shall have its corporate charter declared void without any judicial proceeding.

MCLA 450.431; MSA 21.248(1), provides that any profit corporation whose charter has become void under the provisions of § 91 may file such delinquent reports and pay such delinquent fees in which event the voidance of its charter shall be waived and it shall be revived in full force and effect.

MCLA 450.432; MSA 21.248(2), provides that:

"Upon compliance with the provisions of this act, the rights of such corporation shall be the same as though no forfeiture had been operative and all contracts entered into during such intervals shall become valid."

The defendant argues that it would be incongruous to allow a profit corporation to maintain an action upon a contract entered into while its corporate charter was void under § 91 when the express language of § 87 provides that contracts entered into while corporate powers are suspended may never be the subject of action in any court of this state. The defendant argues that the greater evil is rewarded while the lesser evil is punished. The defendant further argues that the punitive effect of § 87 continued on into the period covered by § 91 and cites *Dawn Construction Co v Paris Home Builders, Inc,* 360 Mich 281; 103 NW2d 410 (1960), and *Kupski v Bal Investment Co,* 35 Mich App 680; 192 NW2d 519 (1971). Both of these cases involve contracts entered into during the period of suspension under § 87 and neither opinion mentions MCLA 450.432; MSA 21.248(2).

The language of the aforementioned statutes is plain and unequivocal. In construing § 87 the courts have been compelled to reach a harsh result because of the language and history of the statute.

Irvine & Meier v Wienner, 212 Mich 199; 180 NW 492 (1920); *Stoneleigh Homes, Inc v Jerome Building Co,* 31 Mich App 542; 188 NW2d 152 (1971). In this case we are under no such compulsion and we will not construe a statute to work so harsh a result absent a clear legislative intent to do so. We hold, as did the trial court, that to give meaning and vitality to MCLA 450.432; MSA 21.248(2), we must hold that upon compliance with MCLA 450.431; MSA 21.248(1), a corporation may legally maintain an action based upon a contract entered into during the time that its charter was void under § 91.

We must now address ourselves to the second issue raised by the defendant. The defendant contends that MCLA 450.432; MSA 21.248(2), is constitutionally infirm because it violates art 4, § 24 of the Constitution of 1963 which provides:

"No law shall embrace more than one object, which shall be expressed in its title."

The title to the act reads as follows:

"An act to provide the terms and conditions upon which certain profit corporations whose charters have become void through operation of law may be reinstated and a voidance of charter waived."

The above title refers to the terms and conditions upon which corporate powers may be restored. The body of the act sets forth the requirements to be undertaken by the corporation and the results of such action. It seems clear that the body of the act is germane to the general purpose set forth in the title. See *People ex rel Wayne Prosecuting Attorney v Sill,* 310 Mich 570; 17 NW2d 756 (1945). Reasonable men would hardly be misled by the above title and would not be surprised to see that

the act reads as it does. See *Kull v Michigan State Apple Commission,* 296 Mich 262; 296 NW 250 (1941).

Affirmed. Costs to the plaintiff.

All concurred.

VAN HAAFTEN v MILLER-DAVIS COMPANY

OPINION OF THE COURT

1. JUDGMENT—DEFAULT JUDGMENT—MOTION TO SET ASIDE—DISCRETION.

Denial of a defendant's motion to set aside a default and a default judgment in a personal injury negligence action was not an abuse of discretion where the defendant conceded liability, a review of the record discloses evidentiary support for the damages awarded, and an award of $20,000 to an 85-year-old woman, who in addition to pain and suffering had to give up many of the things she enjoyed doing in retirement, does not shock the conscience of the Court of Appeals.

DISSENT BY J. H. GILLIS, J.

2. JUDGMENT—DEFAULT JUDGMENT—MOTION TO SET ASIDE—DISCRETION—COURT RULES.

Failure to set aside a default and a default judgment in a personal injury negligence action was an abuse of discretion where good cause for failure of the defendant to make timely response was shown in that the defendant's insurance carrier mislaid the summons and complaint until after the default judgment had been entered, where, despite an admission of liability, defendant had a meritorious argument that the damages assessed were substantially prejudicial, and where the required affidavit of facts was filed (GCR 1963, 520.4).

3. DAMAGES—EXCESSIVE DAMAGES—EVIDENCE.

An award of damages of $20,000 in a personal injury negligence action was not justified by the evidence and shocks the judicial conscience where the plaintiff claimed about $200 in medical expenses and an impairment of retirement activity, but showed no loss of wages nor other out-of-pocket expenses.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 46 Am Jur 2d, Judgments § 682.

[3] 22 Am Jur 2d, Damages § 363 *et seq.*

Appeal from Kalamazoo, Donald T. Anderson, J. Submitted Division 3 May 8, 1974, at Grand Rapids. (Docket No. 17806.) Decided June 26, 1974. Leave to appeal denied, 392 Mich 792.

Complaint by Elizabeth Van Haaften against Miller-Davis Company for damages resulting from negligence. Default judgment for plaintiff. Defendant's motion to set aside the default judgment denied. Defendant appeals. Affirmed.

Troff, Lilly, Piatt, File & Doyle, for plaintiff.

Smith, Haughey, Rice, Roegge & Gould (by *Lance R. Mather),* for defendant.

Before: ALLEN, P. J., and J. H. GILLIS and QUINN, JJ.

QUINN, J. Defendant appeals from the July 9, 1973 order of the trial court which denied defendant's motion to set aside a default and default judgment entered against it in this personal injury negligence action. In the trial court and here, defendant admits liability and only desires to contest the amount of damages.

November 4, 1970, plaintiff was injured. Negotiations for settlement between plaintiff's attorney and defendant's insurer failed, and plaintiff's action was filed December 29, 1972. January 2, 1973, copies of the summons and complaint were served on defendant who forwarded them to the local agent of defendant's insurer. January 3, 1973, the local agent mailed the papers to the Grand Rapids claims office of defendant's insurer which received them January 5, 1973. Apparently, someone in the latter office misplaced the papers. In any event, defendant's insurer took no further action until June 1973.

January 29, 1973, plaintiff filed defendant's default and April 11 and 20, 1973, plaintiff presented proofs in support of her claim. At the conclusion of proofs, the trial court found for plaintiff in the amount of $20,000 and costs, and judgment pursuant thereto entered April 24, 1973.

June 14, 1973, the claims manager of defendant's insurer's Grand Rapids office first learned of plaintiff's default judgment in a conversation with her attorney. June 19, 1973, defendant moved to set aside the default and default judgment. This motion was argued June 25, 1973 and it was denied. An order of denial entered July 9, 1973.

In spite of the seven points raised in defendant's brief on appeal, we perceive only one decisional issue. Did the trial court clearly abuse its discretion in denying defendant's motion to set aside the default and default judgment?

This case is not similar to *Walters v Arenac Circuit Judge,* 377 Mich 37; 138 NW2d 751 (1966), which contained no controlling language in any event. Here we have a default judgment and admitted liability. *Walters, supra,* involved only a default and a probable contest over liability.

The case at bar more nearly resembles *Asmus v Barrett,* 30 Mich App 570; 186 NW2d 819 (1971). In *Asmus,* the trial court refused to set aside a default judgment for failure to establish a meritorious defense and the trial court was affirmed by this Court. Here, defendant concedes liability.

For us to find a clear abuse of discretion on the part of the trial judge, the record must lack evidentiary support for the damages awarded, or the award must be one that shocks our conscience. Our review of the record discloses evidentiary support for the damages awarded.

Plaintiff was 85 years old and in good health

when injured. She was enjoying an active retirement. In addition to pain, suffering and discomfort, treating with a doctor for nearly a year, purchasing and taking pain remedies and tranquilizers, wearing a cervical collar, plaintiff had to give up many of the things she enjoyed doing in retirement. The evidence indicates that her activities will be curtailed in the future because the injury she suffered aggravated a condition brought on by her age. Activity as opposed to inactivity for a retired person is as difficult to measure in dollars and cents as is pain and suffering, but an award of $20,000 in this case in 1973 does not shock our conscience.

Affirmed with costs to plaintiff.

ALLEN, P. J., concurred.

J. H. GILLIS, J. *(dissenting).* The majority indicates that *Walters v Arenac Circuit Judge,* 377 Mich 37; 138 NW2d 751 (1966), is dissimilar and contains no controlling language. I disagree. Here, defendant forwarded the summons and complaint to its local insurance agent, which thereafter forwarded the papers to the insurer. Apparently because of careless office procedures, the summons and complaint lay undiscovered in a desk drawer until after a $20,000 default judgment had been rendered. The facts of both cases are parallel.

In *Walters,* ruling that the circuit court did not abuse its discretion in setting aside the default, Justice O'HARA sensibly concludes at 46–47:

"The doctor averred he did what any reasonably prudent person would do under the circumstances when he was personally served. He turned the 'papers' over to his insurance company. We do not consider him obligated to call daily to see whether the insurer did what it had contracted and accepted a premium to do.

We find no neglect on his part disclosed by the record before us.

"The culpable negligence was that of the involved insurer. *The question is then whether that negligence of the unnamed defendant liability insurer, should be imputed to and be conclusive upon the defendant doctor.*

"We recognize that in the realities of this situation, irrespective of the named defendant, the real defendant, to the extent of the policy provisions, was the insurer. This conclusion is record-supported by the fact that when counsel received the term calendar showing the named doctor-defendant to be in default, he communicated not with the doctor but with his insurer. It seems an inescapable conclusion that the insurer directed the communicating counsel to appear and answer.

"On the merits of the main case, the doctor-defendant may have been blameless beyond question. He may have been in legal dimension answerable. The question is not before us. It has not been meritoriously litigated under our system of determination of that issue.

"*The trend of our jurisprudence is toward meritorious determination of issues.* The complexities of our economic system placed the named defendant-doctor in the position of having no way to reach trial on the merits because his insurer was negligent. The money judgment, if such resulted, might have to be paid in full or in part by the insurer. Absent doing violence to the rules of the jurisprudential game, *we think the doctor should be entitled to his day in court.*

"By this holding we would not be understood to dilute the well-settled law of this jurisdiction that the neglect of a personally served defendant, nor that of his counsel, may not ordinarily be grounds for setting aside a default regularly entered. See *White v Sadler, supra,* at p 522." (Emphasis supplied.)

Walters, supra, without doing violence to *White v Sadler,* 350 Mich 511; 87 NW2d 192 (1957), concludes that the neglect of the insurance carrier

intermediary can be grounds to set aside a regularly entered default.

I do not see the majority's manner of distinguishing *Walters, supra,* as decisionally relevant. The insurance carrier's loss of papers can be excusable neglect within the meaning of the court rule. To the extent *Freeman v Remley,* 23 Mich App 441; 178 NW2d 816 (1970), concludes otherwise, I decline to follow it.

Applying *Asmus v Barrett,* 30 Mich App 570; 186 NW2d 819 (1971), I reach an opposite conclusion than the majority. *Asmus* provides at 574:

"We assume, but do not decide, that the personnel problems in the insurance company's office did constitute good cause for defendants' failure to make timely response to plaintiffs' complaint. However, a default 'may' be set aside only when three conditions are all fulfilled. First, good cause for failure to make timely response must be shown. Second, a meritorious defense must be established. Third, the showing of a meritorious defense must be based on an 'affidavit of facts.' GCR 1963, 520.4. Whether these three conditions are fulfilled is a matter within the discretion of the trial judge. *Walters v Arenac Circuit Judge,* 377 Mich 37, 47; 138 NW2d 751, 754 (1966); *Freeman v Remley,* 23 Mich App 441; 178 NW2d 816 (1970)."

Judge QUINN concludes that admission of liability precludes a meritorious defense. I do not. If the court rule intended the majority result, the language should have provided: "A meritorious defense on the issue of liability must be presented". Why is the meritorious *defense* requirement included? Honigman & Hawkins explain:

"Formerly, when a default was attacked because of such procedural irregularities it was held that the requirement of an affidavit of merits was not applicable. *Flewelling v Prima Oil Co,* 291 Mich 281; 289 NW 160

(1939). The new rule, however, literally requires an affidavit of facts showing a meritorious defense in every case except when the motion to set aside a default is grounded on want of jurisdiction over defendant. Subrule 520.4. This is in keeping with the underlying spirit of the new rules, that errors in procedure will vitiate judicial action only if the substantial rights of the parties have been prejudiced thereby. See Rules 13, 110.3, and 529.1. Thus, *if the court had jurisdiction over defendant, even though there may have been a clear defect or irregularity in the proceedings leading up to the default, if the defendant has no basis upon which to make a defense against the action, no substantial injustice was done by entry of the default judgment and it may not be set aside."* 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 663. (Emphasis supplied.)

The term "defense" ordinarily extends to both liability and damages. Admission of fault does not automatically yield admission of damages. Further, I think defendant's argument as to damages assessed reveals substantial prejudice. That showing satisfies the court rule's intendment.

The third requirement, an affidavit of facts, was met and needs no further discussion.

Error arose in these circumstances. The judge abused his discretion in failing to set aside the default.

While the plaintiff in this case is deserving of our sympathy, my judicial conscience is shocked by this award. Plaintiff can point to about $200 in medical expenses and an impairment of retirement activity. She lost no wages, nor suffered other out-of-pocket expenses. I cannot justify a $20,000 award on this evidence and would overturn it. Moreover, appellant's statement of facts contains the following: "A motion to set aside the default * * * was filed * * * [and] defendant filed

an offer of judgment for $7,000, the highest figure plaintiff or her attorney had ever sought in settlement". This was not denied in the counterstatement of facts.

Inasmuch as liability is not seriously questioned and the only error appears to be the excessiveness of the judgment, the motion to set aside the default judgment should be denied on condition that within ten days the plaintiff-appellee consents in writing to the entry of judgment in the amount of $7,000. If such written consent is not filed, the motion to set aside the default judgment should be granted.

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v BABCOCK

1. INSURANCE—CONTRACTS—PRINCIPAL AND AGENT—AUTHORITY.

Insurance companies are bound by all acts and contracts made by their agents which are within the apparent scope of authority conferred upon them; such authority, while not actually granted, is that which insurance companies knowingly permit agents to exercise or which is held out to the public and is not narrowed by limitations not communicated to the person with whom the agent deals.

2. INSURANCE—CONTRACTS—BINDERS—COVERAGE—PRINCIPAL AND AGENT—AUTHORITY—ESTOPPEL.

An insurance company is estopped from denial of coverage where its agent had apparent authority to issue a binder, he was in possession of binders and letterheads showing him to be the insurer's agent, he had application blanks which set out no restrictions on his powers, he was licensed and registered as an insurance agent in the state where there was a holding out of ability to transact business, and the insured and the Secretary of State relied on the agent's authority and ability to extend coverage.

3. INSURANCE—CONTRACTS—BINDERS.

An insurance binder is a contract of temporary insurance to be effective insurance coverage until a formal policy is drafted and issued, is evidence of a contractual obligation to be expressed in complete written form at a later date, is used when a policy is not immediately issued to evidence that insurance coverage attaches at a specific time, and continues until the policy is issued or the risk is declined and notice thereof is given.

REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur 2d, Insurance §§ 204–206.
[2–5, 7] 43 Am Jur 2d, Insurance §§ 165, 206, 216 *et seq.*
[6] 43 Am Jur 2d, Insurance § 51 *et seq.*
[7] 7 Am Jur 2d, Automobile Insurance § 3.
[8] 43 Am Jur 2d, Insurance § 404 *et seq.*

4. INSURANCE—CONTRACTS—BINDERS.

The rights and liabilities of parties to a valid insurance binder are determined by reference to the conditions of the policy expected although that policy may never issue, and all ordinary provisions and exclusions of policies issued to cover similar risks will be read into the temporary binder unless there was an express agreement at the time of the issuance of the binder which would make such provisions and exclusions inconsistent with the intent of the binder agreement.

5. INSURANCE—CONTRACTS—BINDERS.

A binder of insurance is an insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until the insurer gives notice of its election to terminate.

6. INSURANCE—CONTRACTS—STATUTES—MANDATORY STATUTORY PROVISIONS.

Insurance contracts are subject to statutory regulation and are construed in light of statutory requirements; mandatory statutory provisions are read into insurance contracts.

7. INSURANCE—CONTRACTS—BINDERS—MOTOR VEHICLE INSURANCE—CANCELLATION—STATUTES—NOTICE.

An insurer who has issued a binder and certified to the bureau of motor vehicles that the insured has obtained insurance is barred from asserting that the coverage failed to attach on the date of issuance, or that it failed to continue in force during the period in which the certificate of insurance remains uncancelled, that is, until the insurer has given the statutory notice required for cancellation.

8. INSURANCE—CASUALTY INSURANCE—CANCELLATION—STATUTES—NOTICE.

A valid binder of casualty insurance, excepting workmen's compensation, but including all classes of motor vehicle coverage, is subject to all statutory provisions; statutory cancellation notice provisions require a written ten-day notice of cancellation addressed to the insured (MCLA 500.3020).

Appeal from Wayne, William J. Weipert, Jr., J. Submitted Division 2 April 9, 1974, at Detroit. (Docket No. 17815.) Decided June 26, 1974. Application for leave to appeal dismissed with prejudice by stipulation.

Complaint by State Automobile Mutual Insur-

ance Company against Dale Babcock and other individual defendants and Progressive Casualty Insurance Company and Boss Agency, Inc. for a declaratory judgment on the validity of a binder of insurance. Summary judgment for defendants Progressive and Boss. Plaintiff appeals. Reversed and remanded for further proceedings.

Conklin & Maloney, for plaintiff.

Taub & Still, P. C., for defendant Progressive Casualty Insurance Company.

Before: J. H. GILLIS, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

HOLBROOK, J. On June 8, 1970, Dale Babcock, a young soldier on leave from Viet Nam, purchased a used car from Quality Motors, a used car dealer in Monroe, Michigan. Realizing that in order to secure license plates for the car insurance was necessary, he went to the Boss Insurance Agency on that day and spoke to Mr. Robert Boss personally. The Boss Agency was a licensed insurance agency and registered to do business for the Progressive Insurance Group. Babcock explained to Mr. Boss that he desired to purchase insurance for his car and answered questions put to him by Mr. Boss. An automobile insurance application with the letterhead of Progressive Casualty Insurance Company, 3600 Euclid Avenue, Cleveland, Ohio 44115, was filled out by Mr. Boss and signed by Mr. Babcock. This application specified coverage for bodily injury, liability of $10,000 for each person and $20,000 for each accident and property damage liability of $5,000 for each accident. The

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

period of time for coverage on the application was six months. Mr. Babcock had informed Mr. Boss that he desired insurance only for 30 days, which was the period of his leave. The application called for a total premium of $242. Mr. Boss received from Babcock a check for $121 and issued a receipt. Babcock was given a certificate of insurance which he took to an office of the Secretary of State. Thereafter, he was issued license plates and vehicle registration.

STATE OF MICHIGAN

CERTIFICATE OF INSURANCE

(Name of Insurance Company or Companies operating as a Group.)

Progressive Casualty Ins. Co.

INC. A-804 MONROE JUN 11 1970

an authorized Michigan insurer, certifies that it has issued a policy complying with the Motor Vehicle Accident Claims Act applicable to the described motor vehicle.

Year	Make	Vehicle No.
1962	Oldsmobile	628M21648

(NAME OF INSURED)

TO

Dale H. Babcock
127 W. 8th St.
Monroe, Michigan

AL 6885 (Ed. 11-65) UNIFORM PRINTING & SUPPLY DIV.

POLICY NO. Bound Application NFH 873

EXPIRATION DATE 7-8-70

BY _____
Authorized Representative

on this 8th (Day) June (Month) 1970 (Year)

NOTICE—This is not a guarantee that the policy will remain in effect until the stated expiration date.

READ CAREFULLY PENALTY FOR FALSE CERTIFICATION

Any person who furnishes false evidence of insurance upon the issuance or transfer of registration under this section is guilty of a misdemeanor. In addition his operator's or chauffeur's license or motor vehicle registration, or both, may be suspended by the secretary for a period of not more than 1 year. (Sec. 3, Sub-sec. 4, Act 198, P.A. 1965.)

It is the obligation of the owner to maintain proper insurance coverage and in the event his insurance is terminated for any reason he must (1) pay the appropriate uninsured motor vehicle fee or (2) obtain insurance before operating the vehicle upon the highways of this state. (Sec. 3, Sub-sec. 5, Act 198, P.A. 1965.)

THIS FORM MAY BE PRESENTED AS EVIDENCE OF INSURANCE WITH YOUR APPLICATION FOR LICENSE PLATES AT ANY SECRETARY OF STATE LICENSE PLATE BRANCH OFFICE.

(Emphasis supplied.)

On June 13th Babcock received a copy of a letter dated June 11, 1970, under the letterhead of the Progressive Insurance Company, addressed to the Boss Agency, which stated: "We are returning the enclosed application as we are not in a position to issue a policy at this time". The letter further stated that: "By our returning the application, we are relieving ourselves of any binders placed on this applicant and all coverages previously considered bound are hereby null and void". After receipt of this copy, Babcock contacted the Boss Agency and requested advice in light thereof. He was informed that the agency would contact the Progressive Company and indicated to Babcock that he should refrain from driving the car, if possible.

On June 14th, Babcock, driving his newly purchased automobile, was involved in an accident in Monroe County. The second vehicle involved was driven by William C. Lewis and was owned by passengers Rosetta Brown and Willie S. Brown. Rosetta Brown and Willie S. Brown suffered injuries and damages. Also, due to injuries resulting from the accident, William C. Lewis died. The Lewis-Brown vehicle was insured with plaintiff, State Automobile Mutual Insurance Company. Among the coverages provided in the policy with plaintiff was "uninsured motorists coverage". This coverage provided that injury or death resulting from an accident with an uninsured motorist who was at fault was covered by State Automobile Mutual up to the policy limits.

The Browns and Charles Lewis, successor administrator of the estate of William Lewis, made claim upon plaintiff under the uninsured motorists coverage based upon the assertion that Babcock was at fault and that he was not insured. Plaintiff took

the position that Babcock was, in fact, insured at the time of the accident, carrying public liability insurance with defendant Progressive Casualty Insurance Company; and, therefore, the uninsured motorists coverage under the Brown policy would not apply. On this ground, plaintiff instituted suit for declaratory judgment, naming as defendants Babcock, the Browns, Laura Lewis, and the Progressive Casualty Insurance Company. Charles Lewis was substituted as defendant for Laura Lewis. Progressive thereafter filed a third-party complaint against the Boss Agency, admitting that Boss was its agent, but alleging that Boss had violated the agency agreement and instructions in the rating manual by issuing temporary coverage to Babcock. Progressive sought reimbursement from Boss for any judgment which might be rendered against it.

At a hearing on April 27, 1973, the trial judge was faced with numerous motions, *viz.:* (1) State Automobile Mutual's motion for summary judgment against all the defendants, praying that the court hold that Progressive had valid public liability insurance on the Babcock car at the time of the accident, (2) a motion for accelerated judgment by the Boss Agency on the third-party complaint of Progressive, (3) a motion by the Browns to file counterclaims against both insurance companies, (4) a motion by Laura Lewis for permission to file a counterclaim against both insurance companies, and (5) a motion by Progressive against Boss for summary judgment, if State Automobile's motion for summary judgment was granted. The trial judge held that there was no policy of insurance by Progressive issued or in force or effect on the day of the accident. He found that there had not been a "binding binder" but rather merely an application for insurance. Emphasis was placed on

the fact that Babcock admitted that he had notification that the application for insurance had been declined, yet continued to drive. The court denied plaintiff's motion, *sua sponte* rendered summary judgment of dismissal in favor of Progressive and summary judgment of dismissal in favor of Boss. Thereafter, the parties stipulated, and the trial judge ordered, that the motion for summary judgment of Progressive against Boss be withdrawn.

Plaintiff here appeals the dismissal of its motion for summary judgment and sets out seven issues. Defendant Progressive answers that, in reality, there are only two issues involved. For purposes of our review here, we consider the case on the basis of three questions: (1) was there authority to issue coverage?; (2) was Babcock issued a binder of insurance?; and (3) was the coverage of Progressive in effect at the time of the accident?

I

In its third-party complaint against the Boss Agency, Progressive admitted that the Boss Agency was an agent for sale of insurance through the Progressive Companies; however, it claimed that Boss exceeded proper authority in not abiding by guidelines set out in the company manual. The pertinent part of the rating manual provides: "COVERAGE CANNOT BE BOUND on a SERVICEMAN, unless he is: 1. At least 21 years of age and married, or 2. If single, 25 years of age or older, and 3. Stationed in the state, for the policy term, in which the producing agent is resident".

Insurance companies are bound by all acts and contracts made by their agents which are within the apparent scope of authority conferred upon them; such authority, while not actually granted,

is that which insurance companies knowingly permit agents to exercise or which is held out to the public. 43 Am Jur 2d, Insurance, § 156, p 212; 12 ALR3d, Temporary Automobile Insurance, § 3, p 1309. In *Ames v Auto Owners Insurance Co,* 225 Mich 44, 49; 195 NW 686, 687 (1923) the Court wrote:

"The general public transact their business with insurance companies through representatives of such companies without actual notice of any limit upon the authority of such representatives. The agent is usually clothed with at least apparent authority to transact the business in hand, *i.e.,* the effectuating of insurance. In *Tubbs v Insurance Co,* 84 Mich 646; 48 NW 296 (1891), we quoted with approval the following language from *Insurance Co v Wilkinson,* 80 US (13 Wall) 222; 20 L Ed 617 (1871):

" 'The powers of the agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.'

"See, also, *Pollock v [German Fire-] Insurance Co,* 127 Mich 460; 86 NW 1017 (1901); *Greenwich Ins Co v Waterman,* 54 F 839 (CA 6, 1893); *Walsh v Insurance Co,* 30 Iowa 133, 145; 6 Am Rep 664 (1870). In the last cited case it was said:

" 'The defendant cannot be permitted to escape liability from the acts or representations of an agent in the course of its business which he is authorized to transact, whereby a party dealing with it is induced to pay money in the belief that he will receive security in return. The agent of defendant, as we have seen, was empowered to receive payments made to defendant in the course of its business. Plaintiff could well rely upon the representations of the agent that the payment to him was the regular course to pursue in order to obtain the permit required. If the acts of defendant and its agent induced the belief on the part of plaintiff that the permit was issued upon the payment of the money to the agent, defendant is estopped to deny it.' "

See, also, *Rorick v State Mutual Rodded Fire Ins Co,* 263 Mich 169, 171–172; 248 NW 584, 585 (1933); and, *Voss v American Mutual Liability Ins Co,* 341 SW2d 270, 275 (Mo App, 1960). Among other indicia which have resulted in a finding of apparent authority are the agent's possession of binders and letterheads showing him to be the insurer's agent and application blanks which set out no restriction on the agent's powers. 12 ALR3d, *supra,* § 18, pp 1333–1334. The Boss Agency filled out an application under the letterhead of the Progressive Companies, was licensed and registered as an insurance agent in the state and there was a holding out to the public of ability to transact insurance business. It is clear that both Babcock and, secondarily, the Secretary of State relied upon the Boss Agency's authority and ability to extend coverage to Babcock, in that license plates and registration were issued to Babcock and he drove his newly purchased automobile. Moreover, in situations such as this, actual authority is not necessary, apparent authority will suffice to estop denial of coverage.

II

The plaintiff asserts that when Babcock left the Boss Agency he was covered through a binder of insurance. The defendant asserts that what transpired amounted to nothing more than a mere application for insurance. The trial court found that what had been issued to Babcock was in effect not a binding binder.

An application for automobile insurance is a form containing various questions as to the applicant's name, age, occupation, description of the automobile, other matters and appropriate spaces

for coordinate information. *Voss v American Mutual Liability Ins Co, supra,* p 274.

"*An insurance binder is a contract of temporary insurance to be effective insurance coverage until a formal policy is drafted and issued. It is not a complete contract in a sense, but is evidence of the existence of a contractual obligation to be expressed in complete written form at a later date. Lester v Century Indemnity Co,* 356 Pa 15; 50 A2d 678 (1947). *A binder is used when a policy is not immediately issued to evidence that insurance coverage attaches at a specific time and continues until the policy is issued or the risk is declined and notice thereof is given. Harris v Sachse,* 160 Pa Super 607; 52 A2d 375 (1947). Like all contracts, a binder requires agreement of the minds of the parties and must have in contemplation the terms to be incorporated later in the written policy." (Emphasis supplied.) *Carideo v The Phoenix Assurance Co of New York,* 317 F Supp 607, 610 (ED Pa, 1970).

See, also, 7 Am Jur 2d, Automobile Insurance, § 3, pp 295–296. A binder may be written or oral and founded upon words or deeds of an agent. The common expression is "you are covered", but it has also been said that "a receipt for premiums may constitute a binder if the circumstances would lead a reasonable man to conclude that such was the intention". 12 ALR3d, *supra,* § 5(b), p 1314, citing *Mackwiz v Resolute Ins Co,* 123 F Supp 142 (D Alas, 1954). Such contract of temporary insurance is construed as subject to the terms of the policy to be issued or the policy ordinarily used by the company. 44 CJS, Insurance, § 230(e), p 960. In *Bankers Indemnity Ins Co v Pinkerton,* 89 F2d 194, 197 (CA 9, 1937) it was said: "The necessary elements to effectuate an oral contract of insurance are: (a) Subject-matter; (b) the risk; (c) premium; (d) duration of the risk; (e) the amount of insurance". In some sources, an additional ele-

ment is the identity of the parties. 43 Am Jur 2d, *supra,* § 217, p 276; 12 ALR3d, *supra,* § 4, p 1310. The essential elements constituting a valid automobile insurance binder in this case have been clearly met.[1]

The rights and liabilities of parties to these informal preliminary contracts are determined by reference to the conditions of the policy expected, although that policy may never issue. Vance on Insurance (3d ed), § 36, p 219. Judge VAN VALKENBURG has written:

"All ordinary provisions and exclusions of policies issued to cover similar risks will be read into the temporary binder, *unless there was an express agreement at the time of the issuance of the binder which would make such provisions and exclusions inconsistent with the intent of the binder agreement.* See *Robinson v United States Benevolent Society,* 132 Mich 695; 94 NW 211 (1903); *State Automobile Mutual Insurance Co v Lloyd,* 54 Tenn App 587; 393 SW2d 17 (1965); *Jennings v Illinois Automobile Club,* 319 Ill App 587; 49 NE2d 847 (1943); *Salisbury v Hekla Fire Insurance Co,* 32 Minn 458; 21 NW 552 (1884)." (Emphasis supplied.) *Harmon v American Interinsurance Exchange Co,* 39 Mich App 145, 148; 197 NW2d 307, 309–310 (1972).

A binder of insurance is in effect until properly rejected by the insurance company. *Cf: Phillips v Hirsch,* 292 Mich 693, 701; 291 NW 196, 199 (1940).[2]

Thus, we here conclude that Babcock was issued a binder of insurance which "is insurer's bare acknowledgment of its contract to protect the

[1] For a discussion of the differences between an application for insurance and an insurance binder, generally, *see,* 43 Am Jur 2d, Insurance, § 216, p 275.

[2] Binders are not contracts in an ordinary sense but rather are contracts of adhesion between parties not equally situated. 43 Am Jur 2d, Insurance, § 217, p 276.

insured against casualty of a specified kind until a formal policy can be issued, or until insurer gives notice of its election to terminate". *Moore v Adams Electric Co, Inc,* 264 NC 667, 673; 142 SE2d 659, 664 (1965).

III

Insurance contracts are subject to statutory regulation and are construed in light of statutory requirements, *i.e.,* mandatory statutory provisions are read into insurance contracts. *Galkin v Lincoln Mutual Casualty Co,* 279 Mich 327, 331; 272 NW 694, 695 (1937); *Chrysler Corp v Hardwick,* 299 Mich 696, 700; 1 NW2d 43, 45 (1941); *Wendel v Swanberg,* 384 Mich 468, 478; 185 NW2d 348, 352–353 (1971); *Raptis v Safeguard Ins Co,* 13 Mich App 193, 197; 163 NW2d 835, 836 (1968); *Dasen v Frankenmuth Mutual Ins Co,* 39 Mich App 582, 584; 197 NW2d 835, 836 (1972); *Bibb v Dairyland Ins Co,* 44 Mich App 440, 445; 205 NW2d 495, 498 (1973).

At the time of the accident, the pertinent statutory language read:

"No policy of casualty insurance, excepting workmen's compensation, but including all classes of motor vehicle coverage, shall be issued or delivered in this state by any insurer authorized to do business in this state *for which a premium or advance assessment is charged,* unless there shall be contained within such policy a provision whereby the policy may be cancelled at any time at the request of the insured, in which case the insurer shall, upon demand and surrender of the policy, refund the excess of paid premium or assessment above the customary short rates for the expired time; and whereby *the policy may be cancelled at any time by the insurer by mailing to the insured at his address last known to the insurer or its authorized agent, with postage fully prepaid, a 10 days' written notice of*

cancellation with or without tender of the excess of paid premium or assessment above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand and the notice of cancellation shall state that the excess premium (if not tendered) will be refunded on demand. The cancellation shall be without prejudice to any claim originating prior thereto. The mailing of notice shall be prima facie proof of notice. Delivery of such written notice shall be equivalent to mailing. *A notice of cancellation of a motor vehicle liability policy shall be accompanied by a statement that the insured must not operate or permit the operation of the motor vehicle to which notice of cancellation is applicable, or operate any uninsured motor vehicle, without first obtaining liability insurance or paying the $35.00 uninsured motor vehicle fee, as required by the Michigan motor vehicle accident claims act."*[3] (Emphasis supplied.) 1967 PA 202; MCLA 500.3020; MSA 24.13020.

In the present case, the notice of rejection was not mailed to Babcock but rather to Boss. Further, the letter to Boss did not specify to Babcock that he should not operate or permit the operation of the vehicle. Further, accepting as the day from which notice would run the date on the letter, *i.e.,* June 11th, the ten-day period had not run at the time of the accident.

"Under a compulsory automobile insurance law, once an insurer issues a binder and certifies to the bureau of motor vehicles that the insured has obtained insurance, it is barred from asserting that the insurance coverage failed to attach on the date of issuance or that it failed to continue in force thereafter during the period in which the certificate of insurance remains uncancled, *[sic]* that is, until the insurer has given the statutory

[3] MCLA 500.3020; MSA 24.13020, being 1956 PA 218 as amended by 1967 PA 202, but prior to the effective date of amendatory language of 1971 PA 210. This case arose before the effective date of "no-fault" automobile insurance, 1972 PA 294; MCLA 500.3101 *et seq.;* MSA 24.13101 *et seq.*

notice required for cancellation." 7 Am Jur 2d, Automobile Insurance, § 3, p 296.

We find that: Babcock was issued a binder of insurance, based upon the apparent authority of the Boss Agency; the binder was subject to the terms and conditions of the policy expected to be received; one condition is that all relevant statutory provisions are read into the agreement; and, the statutory notice provisions had not been fulfilled, *i.e.,* ten days notice. Thus, we rule that Babcock was insured by Progressive Casualty at the time of the accident. This conclusion is the same as reached by the Tennessee Court of Appeals.

In *State Automobile Mutual Ins Co v Lloyd,* 54 Tenn App 587; 393 SW2d 17 (1965), cited with approval in *Harmon, supra,* p 148; 197 NW2d 309–310, it was asserted that State Automobile Mutual had issued a binder of insurance. State Automobile Mutual admitted that it had issued a verbal binder but that it had been cancelled upon receipt of a letter to the insurance agent advising that the binder was cancelled upon receipt of that letter. The trial court had held that 10 days written notice was necessary to cancel the binder and thus the binder was effective at the time of the accident giving rise to the case. The ten-day provision was provided by the insurance company in its standard policy. The Court of Appeals held that the ten-day written notice was necessary to cancel the binder and wrote at pp 606–607; 393 SW2d 25–26:

"On consideration of all the cases relied upon by the parties, and based upon our own research, it is our opinion that where there is nothing more said in an oral binder than that which leads the party to believe they are insured from the moment the binder is issued, whether it be oral or written, we hold that without

implied or expressed modifications showing that the parties did not so intend the binder bind the particular hazard insured against, in the absence of some statutory provision otherwise effective, in accord with the standard policy provisions which usually issued in event the bindee is protected by the issuance of a policy contract.

"We feel that this must be the correct conclusion because the cancellation right and requirement of notice of such cancellation is for the benefit of the insured to give insured time to obtain other insurance or protection. Appleman on Insurance, Vol 6, p 149, 1964 pocket parts, Section 4182. This is true of all of our cases in Tennessee that deal with the question for 'whose benefit' the right to cancel is authorized by the insurer."[4]

Moreover, our decision is correct in light of the public policy which requires that liability insurance must be written in conformity with statutory requirements and the fact that the Legislature intended that no automobile should be registered in this state unless specified requirements have been met, *viz.,* either a policy of liability insurance or payment of the uninsured motorists vehicle fee. *Allstate Ins Co v Motor State Ins Co,* 33 Mich App 469, 473; 190 NW2d 352, 354 (1971); *Celina Mutual Ins Co v Preferred Risk Mutual Ins Co,* 51 Mich App 99, 102; 214 NW2d 704, 705 (1974). To hold other than we have, would be to condone situations wherein motorists without liability insurance or without coverage from the uninsured motorists fund were on the streets and highways of this state; this conclusion would be incongruous as the vehicle here involved in the accident was, in the first instance, registered for use in this state on the basis that it was, in fact, insured as evidenced

[4] As to the purpose of notice requirement, *see, also, Raptis v Safeguard Ins Co,* 13 Mich App 193, 202; 163 NW2d 835, 839 (1968) (LEVIN, J., *dissenting)* and *Moore v Adams Electric Co, Inc,* 264 NC 667, 673; 142 SE2d 659, 664 (1965).

by a certificate of insurance. See MCLA 257.518; MSA 9.2218; MCLA 257.1104(3); MSA 9.2804(3).

Reversed and remanded for further proceedings based upon this opinion.

All concurred.

CRAMPTON v DEPARTMENT OF STATE

ADMINISTRATIVE LAW—LICENSE REVOCATION—IMPARTIAL HEARING—CONSTITUTIONAL LAW—STATUTES.

A statute which provides that the chief of police or a duly authorized police officer from an incorporated city or village in which the petitioner resides shall sit as a member of a licensing appeal board in driver's license revocation cases is not unconstitutional and will not be found violative of a driver's due process right to a fair hearing before an impartial tribunal where the record contains no proof of bias or unfairness on the part of the police department representative (MCLA 257.322).

Appeal from Ingham, Donald L. Reisig, J. Submitted Division 2 June 10, 1974, at Lansing. (Docket No. 17878.) Decided June 26, 1974. Leave to appeal granted, 392 Mich 791.

Complaint by Clyde B. Crampton against the Department of State for reinstatement of plaintiff's driver's license. Judgment for plaintiff. Defendant appeals. Reversed.

Church, Wyble, Kritselis & Tesseris (by *Thomas H. Hay),* for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Charles D. Hackney* and *John D. Pirich,* Assistants Attorney General, for defendant.

REFERENCES FOR POINTS IN HEADNOTE

1 Am Jur 2d, Administrative Law § 64.

51 Am Jur 2d, Licenses and Permits § 61.

Disqualification, for bias or interest, of member of occupation or profession sitting in license revocation proceeding. 97 ALR2d 1210.

Before: QUINN, P. J., and V. J. BRENNAN and CARLAND,* JJ.

QUINN, P. J. Plaintiff was arrested on a charge of driving an automobile under the influence of liquor, MCLA 257.625; MSA 9.2325. He refused to take a chemical test pursuant to the implied consent law, MCLA 257.625c; MSA 9.2325(3). The notice required by MCLA 257.625e; MSA 9.2325(5) was sent to plaintiff November 30, 1972, and plaintiff requested a hearing before the license appeal board, MCLA 257.625f; MSA 9.2325(6).

The hearing was conducted by appeal board representatives of the Secretary of State and the local police department as provided by MCLA 257.322; MSA 9.2022. The appeal board refused to restore plaintiff's driving privileges and he filed for judicial review, MCLA 257.625f(3); MSA 9.2325(6)(3).

Plaintiff is a resident of Lansing and he was arrested by an officer of the Lansing Police Department. One of plaintiff's contentions in the trial court was that the proceedings before the license appeal board were void because the makeup of that board violated his right to due process. The reasoning advanced in support of this position was that a fair hearing before an impartial administrative body was not possible when one member of that body was a member of the same police department as the arresting officer whose credibility might determine the outcome of the administrative hearing. Concisely, the police department member of the license appeal board could not be fair and impartial in a situation which required him to judge the credibility of a fellow officer.

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

No testimony was taken below. The cause was submitted on arguments and briefs. No specific acts or occurrences of bias on the part of the police department representative were shown. The trial court judgment held MCLA 257.322, requiring a police officer to sit in judgment upon a fellow police officer of the same community in hearing appeals under the provisions of MCLA 257.625f, *supra,* to be unconstitutional in violation of due process depriving plaintiff of a fair trial in a fair and impartial tribunal. The proceedings before the license appeal board were held void and plaintiff's operator's license was restored.

Defendant appeals. Plaintiff cross-appeals as to all issues raised below and denied or not decided by the trial court.

The record contains no proof of bias or unfairness on the part of the police department representative who sat on the license appeal board in this case. It does not appear that the arresting officer's credibility was even in issue. We are asked to assume the bias and unfairness relied on by the plaintiff and the trial court from the composition of the license appeal board and further to assume that the arresting officer's credibility was in issue and that that issue was resolved in favor of the arresting officer because of the bias of his fellow officer sitting on the license appeal board.

Is the presumption of statutory constitutional validity overcome by these assumptions that we are asked to make? We think not. As was stated in Clarence Twp v Dickinson, 151 Mich 270; 115 NW 57 (1908):

"I have no doubt cases may arise to which this law can have no constitutional application. Such a case will be presented if the proceedings before the drain commissioner violate constitutional rights. The fact that

such cases may arise is no reason for declaring the law unconstitutional. It is to be presumed that the legislature intended to enact a constitutional law and not an unconstitutional law (omitting citation), and it should be construed in accordance with this intent."

The issues raised by the cross-appeal have not been briefed and we consider them abandoned. The issue concerning the Attorney General, or his representative, sitting on the license appeal board is nonexistent in this case since neither the Attorney General nor his representative sat on the board in this case.

Reversed but without costs, a public question being involved.

All concurred.

WABEKE v CITY OF HOLLAND

OPINION OF THE COURT

1. APPEAL AND ERROR—EQUITY—REVIEW—DE NOVO REVIEW—FINDINGS OF FACT.

An appellate court will review *de novo* the record of a suit brought in equity, but in doing so will not ordinarily disturb findings of fact unless the court concludes that it would have arrived at a different result had it been in the position of the trial judge.

2. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—STREET IMPROVEMENTS—BENEFIT TO ADJOINING PROPERTY.

Municipal corporations may levy special assessments upon abutting property for the purpose of street improvement, based upon the theory that a special benefit is conferred upon such property over and above the general benefit conferred upon the municipality as a whole.

3. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—BENEFIT TO ADJOINING PROPERTY—JUDICIAL REVIEW.

The legislative body imposing a special assessment for street improvement purposes is in the best position to determine whether a benefit is conferred upon the property so assessed and the amount of such benefit; courts are reluctant to interfere in such legislative determination unless there is fraud, mistake, discrimination or where the absence of the benefits claimed appears with certainty.

4. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—BENEFIT TO ADJOINING PROPERTY—JUDICIAL REVIEW.

The concept that road improvements automatically result in special benefits to the abutting properties, even when so determined by the legislative body imposing assessments, may be overturned where the record as a whole stretches credulity or

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 822.

[2–8] 70 Am Jur 2d, Special or Local Assessments §§ 20, 22, 103, 107.

shows beyond fair dispute that an overall harm results to the property owners assessed.

5. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—BENEFIT TO ADJOINING PROPERTY.

A street-widening project purposely designed to maintain the essential residential character of the neighborhood, in which the street would remain two lanes, would only be widened from 22 to 25 feet plus a curb and gutter on each side, only three trees would be removed, and curves and grades would not be eliminated, confers a benefit upon the abutting property owners which would justify a special assessment, where the likelihood that the project would cause the neighborhood to lose its essential residential character is remote.

6. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—INJURY TO PROPERTY—PUBLIC BENEFIT.

Injury that might be suffered by owners of abutting property by reason of a street improvement program would be minimal and insufficient to justify enjoining a assessment of those owners where there would be a loss of shoulder parking, but little shoulder parking is in fact done, where a majority of the homes affected have either turn-around drives or use side-street exits and the others are to be accommodated by curb openings, and where the added width of the street could bring traffic only 1-1/2 feet closer to the residences.

7. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—BENEFIT TO ADJOINING PROPERTY—PUBLIC BENEFIT.

A special benefit to property owners, over and above the public benefit resulting from a street improvement, appears where the project will eliminate accumulated stormwater, stop the throwing of gravel onto front lawns, eliminate mud and dust, allow the city to sweep and to extend leaf pickup service to the street, and in most cases will actually increase the size of front lawns.

DISSENT BY T. M. BURNS, J.

8. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—STREET IMPROVEMENTS—BENEFIT TO ADJOINING PROPERTY.

A special assessment should not be levied because of a street improvement project where no special benefits will be conferred upon the residents bordering the street, the hazards of entering the street will be increased, at least two businesses will lose

parking space presently used by their customers, air and noise pollution will be increased and moved closer to the homes on the street, and traffic and the speed of traffic will tend to increase.

Appeal from Ottawa, Harold Van Domelen, J. Submitted Division 3 April 2, 1974, at Grand Rapids. (Docket No. 18076.) Decided June 27, 1974.

Complaint by Paul Wabeke, Cotter Tharin, James Van Putten, Samuel Loewy, and Helen Brockmeier against the City of Holland to enjoin the levy of a special assessment for purposes of street improvements. Injunction granted. Defendant appeals. Reversed.

James W. Bussard, for plaintiffs.

John R. Marquis, Deputy City Attorney, for defendant.

Before: ALLEN, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

ALLEN, P. J. Plaintiffs, the owners of certain residential lots which abut South Shore Drive in the City of Holland, have challenged the validity of special assessments levied upon them by the City of Holland to help pay for the widening, resurfacing, draining and curbing of South Shore Drive.

Circuit Judge Harold Van Domelen found that the plaintiffs would receive no special benefits from the proposed improvements to South Shore Drive over and above the benefit conferred on the community in general, and permanently enjoined the City of Holland from levying a special assess-

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

ment upon plaintiffs. From that decision, defendant has appealed.

South Shore Drive is a two-lane street commencing at the juncture of 16th and 17th Streets, and generally follows the shoreline of Lake Macatawa. The street surface is blacktop, and averages about 22 feet in width with gravel shoulders. The surface of the street is in generally poor condition, and is characterized by cracks, broken edges and holes. The city plans to install storm sewers, resurface the street to a width of 25 feet, and install curbing and gutter of 1-1/2 feet on each side for a total width of 28 feet, with the intersections flaring to 36 feet. The estimated cost of said project is $741,000, of which 23% is proposed to be specifically assessed against the property owners at about $10 a front foot. It is estimated that the residents on South Shore Drive generate about 25% to 28% of the traffic thereon. The character of the street is mainly residential, containing homes valued from $15,000 to $100,000. There are also a few small commercial establishments, such as a grocery store, small restaurant, and antique shop.

Plaintiffs argue that while the improvements would be a general benefit to the city and community as a whole, no special benefit would be conferred upon them. They in fact argue that they would suffer a detriment as far as increased traffic hazards, loss of parking space, increased air and noise pollution and a decrease in property values were concerned. Defendant maintained that the road needed the improvement, and that the residents would indeed enjoy special benefits, particularly in the form of better drainage, and asserts that the case falls within the rule of *Axtell v City of Portage,* 32 Mich App 491; 189 NW2d 99 (1971), *app dismissed,* 385 Mich 786 (1972).

Relying upon *Fluckey v City of Plymouth,* 358 Mich 447; 100 NW2d 486 (1960), and *Brill v Grand Rapids,* 383 Mich 216; 174 NW2d 832; 46 ALR 3d 121 (1970), the trial judge found in favor of plaintiffs. According to *Fluckey, supra,* the following rule is applicable to the instant case:

"The point here is more fundamental: where, viewed in its entirety, no benefit upon abutting property owners has been conferred by the improvement, but rather a detriment suffered, a special assessment based upon the enhancement of the value of the property is a fraud in law upon such property owners." 358 Mich 447, 454.

According to 46 ALR3d 127, 135–136, Anno: Widening Street—Special Assessment:

"[M]odern Michigan authority has firmly recognized that a street widening does not necessarily confer a benefit, and indeed may be found in appropriate circumstances to constitute a detriment rendering the collection of a special assessment invalid, especially, though apparently not necessarily, where residential properties are affected."

The issue before us is whether the proposed project is one of the "appropriate circumstances" which invalidates a special assessment. Does the proposed project fall within the rule of *Fluckey* and *Brill* or within *Axtell?* Before answering this question it will be helpful to set forth the standards upon which our decision is based. Recent street widening decisions in *Fluckey, Brill,* and *Axtell,* together with prior case law, offer a basis upon which these standards are formulated.

1. Where the suit is brought in equity the record is reviewed *de novo.* However, an appellate court reviewing *de novo* will not ordinarily disturb findings of fact unless the court concludes it would

have arrived at a different result had it been in the position of the trial judge. *In re Hartman Estate,* 51 Mich App 192, 203–204; 215 NW2d 202, 208 (1974).

2. The power to levy a special assessment for street improvement purposes rests upon the benefit which the assessment confers on the abutting property and which benefit is different from general benefit conferred upon the community at large. 14 McQuillin, Municipal Corporations (3d Ed), § 38.02, p 18. Municipal corporations may levy special assessments based upon the theory that a special benefit over and above the general benefit conferred upon the municipality as a whole, is conferred upon such property. *Axtell v City of Portage, supra.*

3. Whether there is no benefit at all, or the amount of benefit, is peculiarly a decision best made by the legislative body imposing the assessment. Courts are reluctant to interfere in this legislative determination unless there is fraud, mistake, discrimination or where the absence of the benefits claimed appears with certainty. *Frischkorn Investment Co v Detroit,* 257 Mich 546, 552; 241 NW 903 (1932).

4. The concept that road improvements, including street widening in particular, automatically result in special benefits even when so determined by the legislative body, may be overturned where the record as a whole "stretche[s] credulity" or "shows beyond fair dispute" an overall harm to the property owners assessed, *Brill v Grand Rapids,* 383 Mich 216, 220; 174 NW2d 832 (1970). Pavement widenings to double the width of what theretofore had been a quiet residential street and the purpose of which was to provide for fast and heavy motor traffic and where the whole character of the street

and neighborhood is changed are held as a matter of law to confer no special benefit. *Fluckey, supra; Brill, supra.*

Application of these standards leads this Court to conclude the trial court was in error in the present case. We do not agree that the present situation is governed by *Fluckey* and *Brill.* Both of those cases involved doubling the width of the street from two lanes to four lanes, from 22 feet to 44 and 48 feet. Both were connectors leading from a belt highway to the inner city. By contrast, South Shore Drive will remain two lanes, its paved portion to be widened only from its present 22 feet to 25 feet plus 1-1/2 feet curb and gutter on each side and, only indirectly, through 16th Street will connect with a belt highway. The belt highway connection already exists, is not part of the expanded program and lies more than two miles from South Shore Drive with the heart of the city located between. Under these circumstances we cannot conclude with certainty or beyond fair dispute that the modest widening program on South Shore Drive will significantly increase traffic. The scope of the work proposed in the instant case is far less ambitious than in *Axtell,* where in an essentially residential neighborhood a proposal to widen from two lanes to four lanes, regrade, eliminate trees, and install curb, gutter and sewer was found to confer special benefits.

In *Axtell,* a principal factor leading the court to conclude the special assessment was proper was the remote likelihood that the project would cause the neighborhood to lose its essential residential character.

"The Michigan Supreme Court has held that the widening of a residential street into a four-lane main artery would not confer the type of benefit which would

subject the abutting owners to a special assessment. *Brill v City of Grand Rapids,* 383 Mich 216; 174 NW2d 832; 46 ALR3d 121 (1970); *Fluckey v City of Plymouth,* 358 Mich 447; 100 NW2d 486 (1960). However, both of the Supreme Court cases cited dealt with the situation where a residential street was converted, more or less, into a highway. The whole character of the street and the neighborhoods had been changed as a result of the improvements, causing a great deal of deterioration in the quality of life experienced by abutting land owners." 32 Mich App 491, 495.

The South Shore Drive widening is purposely designed to maintain the esthetics and present character of the neighborhood. An earlier proposal to widen South Shore Drive to four lanes, eliminate its curves, remove 58 trees, and level dips and valleys in the roadway was rejected in 1969 by the mayor and council following a public hearing. A new and less ambitious program was then developed to maintain the essential character of the street, widen to two lanes, tear down three trees, and leave untouched the present curves and grade. Following public hearings it was approved by the city council and is the proposal in litigation before us. As to the change in policy brought about by the public hearings on the original proposal, we quote the testimony of the mayor:

"*Q.* Did the comments you heard at these hearings affect your judgment in that respect?

"*A.* I would say those are the only reasons I changed my opinion. This is, as I stated before, a feeder road and granted it serves South Shore Drive, it also serves the area north and south of South Shore Drive as well as the dead-end area at Lake Michigan, but *I felt this was a unique road and there are others in our community, and the people actually convinced me to keep that character.* We dropped from 58 trees down to 3 trees in the proposed project. We are going to keep the curves in the road. There is only a couple of bad safety spots

which we'll still have to cut down the tops for clear view areas, but *basically we are trying to keep the character, the intent of the present road."* (Emphasis supplied.)

The trial court further found that in certain respects plaintiffs would suffer injury by reason of the street program. Specifically, he cited 1) the elimination of shoulder parking; 2) the increased difficulty of backing out of a driveway; 3) the movement of traffic closer to homes; 4) added volume of traffic; 5) increased speed; 6) loss of parking spaces in front of certain commercial establishments. Based upon our review *de novo* of the record we cannot agree as to the first three findings. On the remaining three we agree with the facts but disagree as to the weight to be given thereto.

Car counts taken along the entire 1.7 mile stretch disclosed that during daylight there were from 1 to 3 cars parked. Nighttime counts found 1.05 to 2.94 cars parked. This count was not rebutted. We find it *de minimis* and insufficient to justify injunction. Likewise, a survey of residences abutting on South Shore Drive indicated that of some 134 to 149 homes, 94 either had turn-around drives or used a side street as an exit. 39 had no way to turn a car about. To accommodate these residents the approved plans called for a ten-foot curb and gutter opening at each driveway plus an additional ten feet on each side. This will allow 30 feet of uncurbed entrance which should permit continuance of the former practice of maneuvering a vehicle parallel to the street before exit. As to the finding that traffic was moved closer to residences we observe that it is but 1-1/2 feet of paved surface and is all within the existing city right of way. Further, the record discloses that of the five

residential owners who testified for plaintiffs, four would in fact receive an increase in front yard area. Installation of curb would prevent vehicles from driving on the shoulder with the result that for most residents the allowable traveled portion of the roadway will be further distant from the home than now.

Keeping in mind the standards of review mentioned earlier, does it appear with certainty or beyond fair dispute that there is not a special benefit accruing to the abutting property owners as distinguished from a general benefit to the community? Obviously there is a public benefit in the smoother surface, the wider two lanes and the addition of turn lanes at intersections. These are benefits which abutting property owners will share in common with other motorists. But we also find a special benefit over and above these benefits. The record is replete with testimony that stormwater and debris now collects along the road shoulder and runs onto private property, that many property owners complain about stones and gravel thrown onto their lawns, that the absence of curb makes it impossible to sweep the street as is done by the city in other residential areas, that homeowners are placed in danger by oncoming traffic which swerves onto the gravel shoulders, and that dust from the shoulders is a nuisance. Multiple photographs were introduced depicting frequent and unattractive pools of water, mud and mire along the roadbed and front yards. The proposed project will eliminate the accumulated stormwater, stop the throwing of gravel onto front lawns, eliminate mud and dust, and enable the city to sweep and extend leaf pickup service to the street. Importantly, for most homeowners, curb installa-

tion will actually increase the lawn size. The esthetics of the area will be improved and made consistent with other subdivisions in the city.

Abutting property owners are not charged for the entire cost of the proposed improvement but only for 23% thereof, with the balance to be spread against the city as a whole. This appears reasonable since the record shows that residents of South Shore Drive contribute from 25% to 28% of the traffic thereon. This Court is aware that the area involved in litigation contains some of the choicest site locations in the city. Rejection of the proposed special assessment will have the result of having other citizens in the community pay for the entire improvement. The property owners on South Shore Drive will receive without charge pavement, storm sewer, curb, and gutter for which residents in other parts of the city must pay either in full or the major cost thereof. In the past 20 years some 90 paving projects had been specially assessed by the city including 11 streets designated major.

Our decision in this case is not to be construed as holding that under no circumstances may a street widening of no more than two lanes be found to confer no special benefit or that the legislative body's determination of benefit in such instances shall remain inviolate. We conclude only that based on the extensive record in this case there is insufficient evidence to overturn the determination of special benefit made by the governing body of the city. The absence of benefits claimed does not appear with certainty. Overall harm to the property owner assessed is not shown beyond fair dispute.

Reversed. No costs allowed, a public question being involved.

R. L. SMITH, J., concurred.

T. M. BURNS, J. *(dissenting).* I cannot agree with the majority's view that the residents on South Shore Drive will receive special benefits from the proposed improvements over and above those conferred on the community in general.

In order to levy a valid special assessment for a public improvement, there must be a special benefit conferred upon the property assessed over and above that conferred upon the community itself. *Brill v City of Grand Rapids,* 383 Mich 216; 174 NW2d 832 (1970); *Fluckey v City of Plymouth,* 358 Mich 447; 100 NW2d 486 (1960).

In this case the trial court found that the amount of traffic on the street in question makes it practical for the residents to back out of their drives onto the shoulders in order to gain a safer entrance to a traffic lane. These shoulders are used for parking by adjacent residents. The purpose of improving the street is to facilitate the movement of traffic over it. However, while the widening, resurfacing and general improvement of the street will attract more use, the trial court found that such increased use will also increase the hazards in getting on and off the street for its residents. The installation of curbs and gutters will eliminate the present practice of backing out of drives onto the shoulders before entering a traffic lane, thus increasing the danger of entering the street. At least two businesses will be adversely affected by the elimination of presently used parking space for their customers. Furthermore air and noise pollution will be increased and moved closer to the homes on this street. The proposed improvements will tend to increase traffic and its speed which will not be beneficial to the abutting owners but more likely than not will be detrimental to residential property.

These are the factors upon which the trial court

based its conclusion that the residents on South Shore Drive will receive no special benefits from the proposed improvements.

In the recent case of *In re Hartman Estate,* 51 Mich App 192, 203–204; 215 NW2d 202 (1974), we explained our duty in regard to reviewing equity cases *de novo* when we quoted from our Supreme Court's decision in *Biske v City of Troy,* 381 Mich 611, 613–614; 166 NW2d 453, 455 (1969):

"'"We hear and consider chancery cases de novo on the record on appeal. *Johnson v Johnson,* 363 Mich 354; 109 NW2d 813 (1961); *Osten-Sacken v Steiner,* 356 Mich 468; 97 NW2d 37 (1959); *Futernick v Cutler,* 356 Mich 33; 95 NW2d 838 (1959); *A&C Engineering Co v Atherholt,* 355 Mich 677; 95 NW2d 871 (1959); *Straith v Straith,* 355 Mich 267; 93 NW2d 893 (1959); *Ball v Sweeney,* 354 Mich 616; 93 NW2d 298 (1958). This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases. This is primarily because the trial judge is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity. We do not ordinarily disturb the findings of the trial judge in an equity case unless, after such an examination of the entire record, we reach the conclusion we would have arrived at a different result had we been in the position of the trial judge."' *Christine Building Co v City of Troy,* 367 Mich 508, 517–518; 116 NW2d 816, 820 (1962)."

In considering this equity cause *de novo* according to the rule enunciated above, this writer agrees with the trial court's decision that the residents bordering on South Shore Drive will receive no special benefits from the proposed improvements to South Shore Drive over and above that conferred on the community in general.

Accordingly, I would affirm the trial court's judgment permanently enjoining the defendant from levying a special assessment.

APPEAL OF COBURN LEASING COMPANY

JERRY DAVIDSON, INC. v MICHIGAN NATIONAL BANK

1. COMPOSITIONS WITH CREDITORS—CORPORATIONS—RECEIVERSHIP—COMPROMISE ARRANGEMENT—DISCHARGE OF OBLIGATION—BANKRUPTCY—STATUTES.

Language in an order approving a compromise arrangement between a corporation in receivership and its creditors over the objections of one of the creditors is invalid where the practical effect of the language is to discharge the corporation's obligations to the objecting creditor; the trial court has no authority to make such an order because the Federal bankruptcy act has preempted the field (11 USCA 1 *et seq.;* CL 1948, 450.4[3]).

2. COMPOSITIONS WITH CREDITORS—CORPORATIONS—RECEIVERSHIP—COMPROMISE ARRANGEMENT—COURTS—STATUTES.

A creditor or a stockholder of a corporation in receivership may petition for a sanction by a court of a compromise arrangement between the corporation and its creditors, and it is unnecessary to consider the authority of the corporation to make such a petition when its corporate charter has been forfeited by operation of law where the petition is signed by one who is a creditor and stockholder of the corporation as well as its president (CL 1948, 450.4[3]).

3. COMPOSITIONS WITH CREDITORS—CORPORATIONS—RECEIVERSHIP—COMPROMISE ARRANGEMENT—OBJECTION.

A creditor which did not consent to a compromise arrangement between a corporation in receivership and itself and other creditors may not contest an order approving the arrangement, where the receiver failed to file an inventory, have an appraisal and audit and to list the claims of creditors, on the ground that the consents of creditors were ineffective because based on inadequate information.

Appeal from Genesee, Harry B. McAra, J. Sub-

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 19 Am Jur 2d, Corporations § 516.
66 Am Jur 2d, Receivers § 211.

mitted Division 2 June 11, 1974, at Lansing. (Docket No. 18258.) Decided June 27, 1974.

Complaint by Jerry Davidson, Inc., and Jerome A. Davidson against the Michigan National Bank to avoid a proxy and assignment of accounts receivable and for injunctive relief. Receiver appointed and compromise arrangement between Jerry Davidson, Inc., and its creditors approved. Monies received by Coburn Leasing Company, Inc., in a garnishment ordered deposited by escrow agent in a bank account with other monies. Coburn Leasing Company, Inc., appeals from approval of the compromise and the order concerning the escrow monies. Affirmed as modified.

R. G. Corace, P. C., for Coburn Leasing Company, Inc.

Before: QUINN, P. J., and V. J. BRENNAN and CARLAND,* JJ.

QUINN, P. J. In the course of litigation between Jerry Davidson, Inc. (hereinafter plaintiff) and Michigan National Bank (hereinafter defendant), a receiver was appointed for plaintiff on September 11, 1970. October 12, 1972, plaintiff filed a petition for sanction by the court of a compromise arrangement with its creditors. October 31, 1972, the trial court entered an order approving the compromise arrangement over the objections of Coburn Leasing Company, Inc. (hereinafter Coburn). November 20, 1972, Coburn moved for a rehearing on this order. No hearing having been held on this motion, on May 23, 1973, it was noticed for hearing

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

on June 4, 1973. The motion was denied by order of June 10, 1973. Coburn appeals.

In a separate action by Coburn against plaintiff, Coburn garnisheed General Motors and reached $54,625.22 owed by General Motors to plaintiff, and General Motors paid this sum into court. By consent order this sum was transferred to Burton Abstract & Title Company in escrow, Burton being the escrow agent for other funds being accumulated for consummation of the compromise arrangement. Without Coburn's consent and by order of March 23, 1973, the trial court authorized and instructed Burton to deposit the funds held in escrow in two interest-bearing accounts. The effect of this order was to commingle the money received from General Motors as the result of the garnishment with other monies. Coburn's motion to set aside the order of March 23, 1973 was denied by an order of June 10, 1973 and Coburn appeals.

Of the many questions involved in the litigation between these parties, the only questions before this Court on this appeal are the validity of the order of the trial court approving the compromise arrangement with creditors and the order directing the escrow agent to deposit the funds held in escrow in two interest-bearing accounts. Neither plaintiff nor defendant have filed briefs.

Plaintiff's articles of incorporation contain the provisions set forth in 1948 CL 450.4(3); MSA 21.4(3),[1] presently MCLA 450.1204–450.1205; MSA

[1] 3. The articles may also contain the following provision: Whenever a compromise or arrangement or any plan of reorganization of this corporation is proposed between this corporation and its creditors or any class of them and/or between this corporation and its shareholders or any class of them, any court of equity jurisdiction within the state of Michigan, may on the application of this corporation or of any creditor or any shareholder thereof, or on the application of any receiver or receivers appointed for this corporation, order a meeting of the creditors or class of creditors, and/or of the shareholders or class of shareholders, as the case may be, to be affected by the

21.200(204)–21.200(205). The petition for sanction by the court of a compromise arrangement with creditors and the order approving the compromise arrangement are authorized by this statute. However, the order approving the compromise arrangement in this case contained the following:

"9. That all creditors affected by the plan of arrangement and said compromise proposal as is set forth in the petition filed in this cause, together with their agents, attorneys and representatives shall be and they hereby are restrained and enjoined permanently from continuing or commencing any legal or other proceedings, or from taking any other steps or actions to enforce or obtain payment of their claims against Jerry Davidson, Inc. with respect to the indebtedness due them, under the penalty of this court."

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proposed compromise or arrangement or reorganization, to be summoned in such manner as said court directs. If a majority in number representing 3/4 in value of the creditors or class of creditors, and/or of the shareholders or class of shareholders, as the case may be, to be affected by the proposed compromise or arrangement or reorganization, agree to any compromise or arrangement or to any reorganization of this corporation as a consequence of such compromise or arrangement, said compromise or arrangement and said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the shareholders or class of shareholders, as the case may be, and also on this corporation.

Whenever the foregoing provision is included in the original articles of any corporation, all persons who become creditors and/or shareholders thereof, shall be deemed to have become creditors and/or shareholders subject in all respects to said provision, and the same shall be absolutely binding upon them; and whenever the said provision is inserted in the articles of any corporation, by an amendment of such articles, all persons who become creditors and/or shareholders of such corporation after such amendment becomes legally effective, shall be deemed to have become such creditors and/or shareholders, subject in all respects to the said provisions, and the same shall be absolutely binding upon them. Any court of equity jurisdiction within this state, shall have power to administer and enforce the said provision and to restrain, pendente lite, all actions and proceedings against any such corporation with respect to which the court so restraining shall have begun the administration and/or enforcement of said provision and to appoint a temporary receiver or receivers for such corporation and to grant to such receiver or receivers such powers as shall be deemed proper.

The practical effect of this language is to discharge plaintiff's obligations to Coburn. This the trial court was not authorized to do. The Federal bankruptcy act[2] has preempted the field, *International Shoe Company v Pinkus,* 278 US 261, 265; 49 S Ct 108, 110; 73 L Ed 318, 321 (1929). If the statute involved authorizes a trial court to make such an order, the order is not enforceable, *International Shoe, supra.* That language is stricken from the order approving the compromise arrangement.

Coburn questions the authority of plaintiff corporation to petition for sanction by the court of a compromise arrangement with creditors on the basis that the corporate charter had been forfeited by operation of law. It is not necessary to write to this point. Under 1948 CL 450.4(3), a creditor or a stockholder may petition for the sanction. The petition in this case was signed by Jerome A. Davidson as president of the corporation and as an individual. He is a creditor and stockholder of the corporation.

Coburn also contests the order appealed from because the receiver failed to file an inventory, have an appraisal and audit, and to list the claims of creditors. The argument here is that the consents of creditors were ineffective because they were based on inadequate information. A consenting creditor could advance this argument legitimately. Coburn cannot; it never consented.

The remaining issues raised as to the validity of the order approving the compromise arrangement do not merit discussion.

With respect to the order of March 23, 1973 directing the escrow agent to deposit the funds in two interest bearing accounts, we find that Co-

[2] 11 USCA 1 *et seq.*

burn's rights to the funds paid into court by General Motors are amply protected by the order dated February 8, 1973.

Paragraph No. 9 of the order of the trial court dated October 31, 1972 and approving the compromise arrangement with creditors is stricken from that order. Otherwise, the trial court is affirmed. Coburn may have costs.

All concurred.

KROL v CITY OF HAMTRAMCK

1. WORKMEN'S COMPENSATION—NOTICE OF CLAIM—APPEAL BOARD—FINDINGS OF FACT.

   The determination of whether an employer had notice of an injury entitling an employee to workmen's compensation benefits is a question of fact for the Workmen's Compensation Appeal Board.

2. WORKMEN'S COMPENSATION—APPEAL AND ERROR—APPEAL BOARD—EVIDENCE.

   A decision of the Workmen's Compensation Appeal Board that an employer had no notice of an injury entitling an employee to workmen's compensation benefits will be overturned only when it is contrary to law or not supported by competent, material, and substantial evidence on the whole record.

Appeal from Workmen's Compensation Appeal Board. Submitted Division 1 May 13, 1974, at Detroit. (Docket No. 18327.) Decided June 27, 1974.

Claim by Lottie Krol, widow of Bruno Krol, against the City of Hamtramck for workmen's compensation. Compensation denied. Plaintiff appeals. Affirmed.

Sam W. Thomas, P. C. (by *E. R. Whinham, Jr.,* of counsel), for plaintiff.

Edmund E. Torcellini, for defendant.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation §§ 463, 464.

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

R. B. BURNS, J. This case is before the Court for the second time. In *Krol v Hamtramck* (Docket No. 13789, decided May 29, 1973 [unreported]), this Court remanded the matter to the Workmen's Compensation Appeal Board "to allow a majority of the board to determine when the plaintiff should have reasonably known that decedent's disability was work related".

In its previous opinion the Court relied on MCLA 417.10; MSA 17.229, as construed in *Brown v Revere Copper & Brass Corp,* 42 Mich App 143; 201 NW2d 326 (1972), and *Tillotson v Penn-Dixie Cement Corp,* 47 Mich App 427; 209 NW2d 611 (1973). Section 10, as construed, holds that in occupational disease and death cases notice of the claim must be given to the employer within 120 days of the time the disability is discovered and when the claimant knows, or reasonably should know, that his disability is related to his employment.

On remand, the Workmen's Compensation Appeal Board stated that the only testimony regarding the time when plaintiff knew or should have known of the work-related nature of her husband's death was plaintiff's own testimony, wherein she stated that approximately two years after her husband's death she learned that it might have been work-related.

Defendant died November 14, 1960. Two years after that date would be November 14, 1962. No proofs were introduced from which the Workmen's Compensation Appeal Board could conclude that the employer received notice or had knowledge of the alleged cause of death before June 4, 1963. The appeal board unanimously found that plaintiff had not complied with the 120-day notice provision of the Workmen's Compensation Act, and death ben-

efits were accordingly denied. Leave was granted to appeal from that decision.

Plaintiff contends that this case is controlled by the decision in *Hayes v Revere Copper & Brass, Inc,* 43 Mich App 685; 204 NW2d 695 (1972). We disagree. The *Hayes* case dealt with an occupational injury. In the case at bar, it is undisputed that the decedent's death was the result of an occupational disease, not an injury. *Hayes, supra,* is therefore inapplicable to the case at bar, while *Tillotson* and *Brown, supra,* are dispositive of the present cause. MCLA 417.10; MSA 17.229 states that the notice provision for occupational disease or disability provides for 120 days notice.

The determination of whether an employer had notice of an injury entitling an employee to workmen's compensation benefits is a question of fact for the Workmen's Compensation Appeal Board. *Tillotson, supra.* In the instant case, no proofs were introduced from which the appeal board could conclude that the employer received notice or had knowledge of the alleged cause of death until the employer was served with the first application for hearing on June 4, 1963. The decision of the Workmen's Compensation Appeal Board will be overturned only when it is contrary to law or not supported by competent, material, and substantial evidence on the whole record. MCLA 413.12; MSA 17.186.

Applying these rules to the facts present in this case, we hold that the decision of the board was correct.

Affirmed.

All concurred.

RELIANCE INSURANCE COMPANY v HANEY

1. INSURANCE—AUTOMOBILES—UNINSURED MOTORIST COVERAGE—STATUTES.

   The language of a statute which required automobile liability insurance policies to protect the insured against uninsured motorists unless the named insured knowingly rejected such coverage was plain, unambiguous, and mandatory; the purpose of the statute was to place the victim of the uninsured motorist in the same position he would have occupied had the tortfeasor been insured (MCLA 500.3010).

2. PARENT AND CHILD—PARENTAL AUTHORITY—CLAIMS AGAINST CHILD.

   A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child.

3. PARENT AND CHILD—GUARDIAN AND WARD.

   The status of a parent is one of guardian by nature.

4. GUARDIAN AND WARD—POWERS OF GUARDIAN—BINDING WARD.

   A guardian is without power to bind the infant or his estate unless authorized by statute.

5. GUARDIAN AND WARD—AUTHORITY OF GUARDIAN—DETRIMENTAL ACTS.

   A guardian has no authority to do any act which is detrimental to his ward.

6. INSURANCE—AUTOMOBILES—UNINSURED MOTORIST COVERAGE—WAIVER—NOTICE—PARENT AND CHILD—STATUTES.

   A waiver of uninsured motorist coverage may have been invalid where the waiver was not made by the named insured as mandated by statute but rather by the named insured's father,

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REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 7 Am Jur 2d, Automobile Insurance § 136.

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

[2–5] 39 Am Jur 2d, Guardian and Ward §§ 5–10.

and where the statute concerning uninsured motorist protection was not complied with in that the specified notice regarding uninsured motorist coverage was not displayed prominently on the front page of the insurance policy; therefore, a determination that as a matter of law the waiver of uninsured motorist coverage was fully dispositive of a claim by the named insured against the insurer was erroneous (MCLA 500.3010).

Appeal from Saginaw, Joseph R. McDonald, J. Submitted Division 3 May 7, 1974, at Lansing. (Docket No. 18407.) Decided June 27, 1974.

Complaint by Reliance Insurance Company against Robert T. Haney and the American Arbitration Association for declaratory judgment that uninsured motorist coverage was not included in a policy of automobile insurance issued by plaintiff to defendant Haney. Judgment for plaintiff. Defendants appeal. Reversed and remanded with instructions.

Collison & Fordney, P. C. (by *John A. Chasnis),* for plaintiff.

van Benschoten & van Benschoten, P. C., for defendants.

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

HOLBROOK, J. On May 25, 1969, defendant-appellant Robert T. Haney was involved in a motor accident with an uninsured motorist. Subsequently, Haney filed notice demanding arbitration before the American Arbitration Association on the basis that he had a private policy of insurance with the Reliance Insurance Company which cov-

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

ered the loss occasioned by the accident. Plaintiff denied that such protection was afforded, due to what it asserted to be a properly executed waiver of coverage.

On June 28, 1972, an arbitrator was appointed and hearing set for July 18, 1972. At the hearing before the arbitrator, plaintiff requested the right to file a complaint for declaratory judgment in circuit court on the basis that no uninsured motorist coverage was provided to appellant. The complaint was filed in September and on February 7, 1973, the trial court granted an order restraining all parties from further proceedings before the arbitrator until a determination on the declaratory judgment complaint could be made. Two days later, defendants Haney and American Arbitration Association moved for accelerated judgment or, in the alternative, summary judgment on the grounds that defendants were entitled to judgment as a matter of law and that plaintiff had failed to state a cause of action. The court granted plaintiff's motion for declaratory judgment on July 12, without passing upon defendants' motions, and wrote:

"Upon the motion of RELIANCE INSURANCE COMPANY for a declaratory judgment pursuant to the Uninsured Motorist Statute (MCLA 500.3010; MSA 24.13010) and upon the finding of this court that the waiver of uninsured motorist coverage by J. B. HANEY [father of appellant Robert T. Haney] was in compliance with the aforementioned statute as a matter of law; and such waiver being fully dispositive of the controversy between RELIANCE INSURANCE COMPANY and ROBERT T. HANEY:

"IT IS THEREFORE ORDERED and adjudged that ROBERT T. HANEY be permanently enjoined from proceeding against RELIANCE INSURANCE COMPANY inasmuch as a valid rejection of the uninsured motorist coverage was executed as a matter of law."

Insurance had been sought for the then 19-year-old Robert T. Haney through the Bruce G. Kendall Insurance Agency.[1] An application for insurance dated June 16, 1968, was signed by J. B. Haney. By a separate form, appellant Haney's father signed a waiver for uninsured motorist coverage. Appellants contend that this waiver was not knowingly executed and was not in accordance with the statute. The statute then in effect read:

"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. *All such policies shall contain a notice, displayed prominently on the front page of the policy, in at least 8-point type that such protection coverage was explained to him and that he can reject such coverage by notice in writing.* Unless the named insured requests such coverage in writing, it need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a

[1] This cause of action arose before the effective date (January 1, 1972) of the so-called Age of Majority Act, MCLA 722.51 *et seq.;* MSA 25.244(51) *et seq.;* therefore, Robert was a minor at the time. See *Barbier v Barbier,* 45 Mich App 402, 404; 206 NW2d 464, 466 (1973).

policy previously issued to him by the same insurer."[2] (Emphasis supplied.) MCLA 500.3010; MSA 24.13010.

The language of the statute is plain, unambiguous, and is mandatory. *Blakeslee v Farm Bureau Mutual Insurance Co of Michigan,* 388 Mich 464, 473; 201 NW2d 786, 791 (1972); *Boettner v State Farm Mutual Insurance Co,* 388 Mich 482, 487; 201 NW2d 795, 798 (1972). See, also, *Collins v Motorists Mutual Insurance Co,* 36 Mich App 424, 431; 194 NW2d 148, 151–152 (1971). The purpose of the statute is "to place the victim of an uninsured motorist in the same position he would have occupied had the tortfeasor been insured". *Hopkins v Auto-Owners Insurance Co,* 41 Mich App 635, 638; 200 NW2d 784, 786 (1972). Moreover, the statute was remedial and the public policy of the state. *Winans v Hartford Accident Indemnity Co,* 25 Mich App 75, 83; 181 NW2d 17, 21 (1970).

The statute states that no policy shall issue without uninsured motorist coverage unless the *named insured* rejects the coverage in writing. In the present case, while defendant Robert T. Haney's father appears to have signed the application with the Kendall Agency for insurance for the son, the named insured was Robert. This is further evidenced by the fact that the policy as issued stated that the named insured was Robert and made no mention of Mr. J. B. Haney, who had signed the rejection statement. Taken literally, the statute's requirement was not met in that the named insured did not waive coverage.

Plaintiff, in its brief on appeal, states that J. B. Haney purchased the insurance for Robert and signed the waiver in his son's presence. While this may be true, there is no record to support the

[2] Added to 1956 PA 218 by 1965 PA 388, later amended by 1971 PA 210, repealed by 1972 PA 345, effective January 9, 1973.

assertion. We have no means of determining under what authority defendant Haney's father was acting, which is not unimportant in this regard. Questions of fact relating to this issue have not been answered, *inter alia:* what facts surrounded the purchase of insurance and waiver of uninsured motorist coverage; did Robert attempt to purchase insurance himself; did J. B. Haney have insurance on the vehicle (which was registered in his name) and, if so, was Robert covered as a secondary driver thereunder; was it understood that Robert was to be the sole driver of the automobile and was the insurance, thus, solely for his benefit; who was to pay the premiums; and, who, in fact, paid the premiums. These are questions which demand remand as a basic question remains, *viz.,* was the father empowered to effect a valid and knowing waiver on behalf of his son? See, for instance, 1 Restatement Agency, 2d, § 20, Comment c, p 91.

A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child. 67 CJS, Parent & Child, § 58, p 764; *Schofield v Spilker,* 37 Mich App 33; 194 NW2d 549 (1971). The status of a parent is one of guardian by nature. *Monaghan v Agricultural Fire Insurance Co,* 53 Mich 238, 244; 18 NW 797, 799 (1884); 39 CJS, Guardian & Ward, § 3, pp 10–12; 39 Am Jur 2d, Guardian & Ward, § 5, p 13. Unless authorized by statute, a guardian is without power to bind the infant or his estate. 39 Am Jur 2d, *supra,* § 99, p 84. The natural guardian may not consent to the surrender of life insurance which has been taken out for the benefit of the child. 39 Am Jur 2d, *supra,* § 9, p 16. As a general proposition, the guardian has no authority to do any act which is detrimental to his ward. 13 Michigan Law & Practice, Guardian & Ward, § 41,

p 156. 39 CJS, *supra,* § 73, p 114; *cf. Power v Harlow,* 57 Mich 107, 111; 23 NW 606 (1885); and *Anderson v Newport Mining Co,* 202 Mich 204; 168 NW 523 (1918). The very fact that Robert was injured by an uninsured motorist and the insurer denies coverage on the basis of the father's waiver for the son indicates a detrimental act.

In *Oatis v Dairyland Insurance Co,* 20 Mich App 367; 174 NW2d 35 (1969), the trial court had granted defendant insurance company's motion for summary judgment on the basis that plaintiff had no uninsured motorist coverage in effect on the date of the accident. Appeal was brought by the Secretary of State as custodian of the Motor Vehicle Accident Claims Fund. The rejection of the uninsured motorist coverage was contained in an area of the application for insurance which was separated from the body of the form by a heavy dark line. The rejection required a separate signature by the applicant. The policy issued on the basis of this application was renewed the next year. In the interim, MCLA 500.3010; MSA 24.13010 went into effect. Chief Judge LESINSKI, as concurred with by Judge QUINN and this author, wrote:

"The statute was clearly passed with the uninsured motorist fund in mind. Indeed, MCLA 500.3010; MSA 24.13010, which is 1965 PA 388, was passed the same day as 1965 PA 389, the latter containing several amendments to the Motor Vehicle Accident Claims Act. Moreover, in *Woods v Progressive Mutual Insurance Company,* 15 Mich App 335; 166 NW2d 613 (1968), this Court accepted the fact agreed to by both parties therein that this statute and the Motor Vehicle Accident Claims Act are *in pari materia.*

"With the statute the legislature has encouraged the purchase of uninsured motorist coverage by requiring specific notice and specific written rejection of the cov-

erage. *The required notices also serve to place to the burden of guaranteeing a knowledgable rejection on the insurance company.*

* * *

"It is hornbook law in Michigan that statutes must be read as a whole and that the duty of the courts is to implement legislative intent. As noted above, the policy of the legislature was to encourage the purchase of this coverage by requiring that it is only rejected after the insured is fully aware of what he is doing. To obtain this goal a specific procedure was set out in the statute, the following of which would greatly increase the chances that only knowledgeable rejections are made." (Emphasis supplied.) *Oatis v Dairyland Insurance Co,* 20 Mich App 367, 371–373; 174 NW2d 35, 37–38 (1969).

The Court held that the insurance contract provided uninsured motorist coverage and reversed the summary judgment entered in favor of the insurance company.

Plaintiff relies upon *Dues v Universal Underwriters Insurance Co,* 41 Mich App 631; 200 NW2d 487 (1972). In *Dues,* the plaintiff signed a statement which waived uninsured motorist protection. Subsequently, a policy issued which contained notice of explanation of uninsured motorist coverage to the named insured, and the option of rejection by notice in writing to the company. *Dues* is not applicable to the instant case because in the *Dues* insurance policy the required notice was present. In the instant case, the policy failed to contain the statutory notice.

The waiver here may not have been made knowingly because it was not made by the named insured, as mandated by the statute, and the question remains as to whether the father could properly waive the coverage for his son. Moreover, the statute was not properly complied with in that the specified notice was not "displayed promi-

nently on the front page of the policy". The claimed waiver may be invalid and therefore the judgment of the trial court was erroneous.

The trial court's grant of declaratory judgment as a matter of law is reversed and the case is remanded for further proceedings in accordance with this opinion. Costs to defendants.

All concurred.

PEOPLE v HARRIS

CRIMINAL LAW—CONSTITUTIONAL LAW—GUILTY PLEA—CONFRONTATION OF WITNESSES.

A defendant was sufficiently apprised of his constitutional right to confront his accusers, prior to the acceptance of his guilty plea, where the defendant was told in substance that he would be permitted through his counsel "to question each witness called by the prosecution".

Appeal from Recorder's Court of Detroit, Elvin L. Davenport, J. Submitted Division 1 April 4, 1974, at Detroit. (Docket No. 18658.) Decided June 27, 1974.

Marvin Harris 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 *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Theodore B. Sallen and *Carl Ziemba,* for defendant.

Before: BASHARA, P. J., and BRONSON and CARLAND,* JJ.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 484 *et seq.*

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

CARLAND, J. The defendant was charged with first-degree murder in the perpetration or attempt to perpetrate a robbery, MCLA 750.316; MSA 28.548. On December 27, 1972, defendant appeared with counsel and pled guilty to the lesser offense of murder in the second degree, MCLA 750.317; MSA 28.549.

The defendant admitted that on July 21, 1972, he attempted to rob a party store and that during the course of this attempt one Charles Cochran was killed. The plea of guilty was accepted and the defendant sentenced to a term of 15 to 25 years in prison.

On appeal, the only question raised by the defendant is the alleged failure of the trial court to advise him of his rights of confrontation prior to the acceptance of his plea.

Before accepting the defendant's plea, the trial judge advised the defendant as follows:

"Next, entitled, if the trial is tried, to Question each witness called by the Prosecution. This you would not do but assist your lawyer in that process.

* * *

"The Court would be required to subpoena witnesses in your behalf."

Was the defendant thereby informed of his constitutional right to confront his accusers? *Boykin v Alabama,* 395 US 238, 243; 89 S Ct 1709, 1712; 23 L Ed 2d 274 (1969).

In *People v D'Argis,* 44 Mich App 186; 205 NW2d 19 (1972), the defendant on appeal claimed the trial court had failed to apprise him of his constitutional right to confront his accusers. Prior to the acceptance of the plea, the court spoke to the defendant as follows:

"*The Court:* You could have this whole battery of

lawyers throughout that trial to advise you and question witnesses for you. They could call witnesses on your behalf and assist you in other ways. Do you understand that?

"*Mr. D'Argis:* Yes your Honor."

In testing this language against the requirements of *Boykin, supra,* the Court said on page 195:

"No mention is specifically made of defendant's right to examine adverse or complaining witnesses. Failure of compliance with the rule regarding warnings to be given the criminally accused has been held grounds to reverse the taking of a guilty plea. *People v Demers,* 2 Mich App 238; 139 NW2d 324 (1966)."

In the instant case the defendant, unlike the defendant in *D'Argis,* was told in substance that he would be permitted through his counsel to question "each witness called by the prosecution". It would seem that he was thereby advised of his right to face his accusers, since only the witnesses called by the prosecution could be classified as accusers. As stated in *People v Ward,* 391 Mich 71; 214 NW2d 831 (1974), we are being asked to substitute form for substance. This we do not propose to do.

People v Mathis, 52 Mich App 140; 216 NW2d 467 (1974), succinctly states our finding:

"We write to the simple proposition that substantial compliance with all the foregoing cases does not rest on phraseology but rather on the substance of the advice given."

We affirm.

All concurred.

HILLIKER v DOWELL

1. COURTS—JURISDICTION—TITLE—PERSONAL PROPERTY—PROCEEDS OF INSURANCE POLICY.

   A dispute over the proceeds of a life insurance policy was properly before the circuit court because the question is one of resolving title to personal property; the probate court has no jurisdiction to determine questions of title.

2. INSURANCE—LIFE INSURANCE—DIVORCE—CONTINGENT BENEFICIARIES.

   The proceeds of a life insurance policy were properly awarded to contingent beneficiaries, where the primary beneficiary, the decedent's former wife, was not entitled to the proceeds by reason of her divorce from the decedent and operation of statute, and where no provision of the policy required a different result (MCLA 552.101).

3. EVIDENCE—DEAD MAN'S STATUTE—CORROBORATING EVIDENCE.

   The testimony of a plaintiff and her brother to establish that they were the "children" referred to as the contingent beneficiaries of an insurance policy was not barred by the dead man's statute where they also offered photographs as demonstrative evidence of the relationship; such photographs were sufficient to satisfy the statutory requirement of corroborating evidence (MCLA 600.2166).

Appeal from Oakland, Farrell E. Roberts, J. Submitted Division 2 May 15, 1974, at Lansing. (Docket No. 18697.) Decided June 27, 1974.

REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur 2d, Courts §§ 27, 32.

[2] 44 Am Jur 2d, Insurance § 1740.

Divorce of insured and beneficiary as affecting the latter's right in life insurance. 175 ALR 1220.

[3] 58 Am Jur, Witnesses §§ 222, 337.

Complaint by Yvette M. Hilliker against Alice E. Dowell, personally and as administratrix of the estate of Nolan W. Dowell, for proceeds of a policy of life insurance. Judgment for plaintiff. Defendant appeals. Affirmed.

James Paterson, for plaintiff.

Donald Wm. Sargent, for defendant.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

CARLAND, J. From a judgment in favor of plaintiff entered February 28, 1973, the defendant appeals. The judgment awarded the proceeds of an insurance policy to plaintiff and her brother. The facts are not in dispute.

Charlie Mae Dowell, by a former marriage, is the mother of plaintiff Yvette Marie Hilliker and her brother Harry August Perrette. Charlie Mae married the decedent Nolan Walter Dowell sometime prior to the execution of the instrument here involved. For some 17 years following their mother's marriage, these two children, although never adopted by the deceased, were brought up in his home and not only treated as his children but during this time the decedent held himself out to be their father. Nolan Walter Dowell had no children of his own.

On December 22, 1958, the marriage of Charlie Mae and Nolan Walter Dowell was terminated by a judgment of divorce. Charlie Mae still survives. The defendant, mother of the decedent, was appointed administratrix of the estate and received the proceeds of the policy in dispute. Plaintiff

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

seeks to be determined to be the beneficiary entitled to the proceeds of the policy and defendant maintains that the estate is entitled thereto.

At issue is the legal effect of an instrument executed by the decedent on October 5, 1953 in which he named "Charlie Mae Dowell, wife" as primary beneficiary, and "children" without further description as contingent beneficiaries under the policy in the event of the death of the primary beneficiary. Following the divorce, the decedent failed to name a "primary beneficiary" to replace his divorced wife.

It is conceded both by reason of the judgment of divorce and the provisions of MCLA 552.101; MSA 25.131, that the divorced wife is not entitled to the proceeds of the policy despite the fact that she was named as primary beneficiary therein, *Starbuck v City Bank and Trust Co,* 384 Mich 295; 181 NW2d 904 (1970).

On appeal the appellant first challenges the subject matter jurisdiction of the circuit court, it being contended that the subject matter of this dispute lies solely within the jurisdiction of the probate court. MCLA 701.19; MSA 27.3178(19), provides in pertinent part as follows:

"Each judge of probate shall have jurisdiction:

"1. Of all matters relating to the settlement of the estates of all deceased persons, whether testate or intestate * * * .

"2. Of all trusts and trustees in the execution of wills and administration of estates of deceased persons * * * .

"The jurisdiction conferred by this section shall not be construed to deprive the circuit court in chancery in the proper county of concurrent jurisdiction as originally exercised over the same matter * * * ."

The claim that the instrument in question is

testamentary in character is without merit. It fails entirely to conform to the statute of wills. We hold that the dispute in question is one of resolving title to personal property. That being so, the probate court is without jurisdiction to determine questions of title. *Ashbaugh v Sinclair,* 300 Mich 673; 2 NW2d 810 (1942); *Laude v Cossins,* 334 Mich 622; 55 NW2d 123 (1952); *Nelson v Woodworth,* 363 Mich 244; 109 NW2d 861 (1961). We further hold the remedy available in the probate court under the circumstances here involved to be inadequate. The issuance of the injunction was necessary in order to preserve the property pending the disposition of the issues raised herein. The circuit court had jurisdiction and the case was tried in the proper forum.

It is further claimed that the trial court erred in awarding the proceeds of the policy to the plaintiff and her brother as the "contingent beneficiaries" named in the instrument in question. On the authority of *Starbuck v City Bank and Trust Co, supra,* we hold that since no provision of the policy requires a different result, upon the disqualification of the "primary beneficiary", the "contingent beneficiaries" are entitled to the proceeds of the policy.

Hence there arises the question of determining whether the plaintiff and her brother are the "children" named as contingent beneficiaries. We adopt the findings of fact of the trial judge and conclude that they are.

The final question to be decided is whether the foregoing findings of fact are based upon competent evidence. The evidence introduced to establish the relationship between the deceased and the children of his former wife is the testimony of plaintiff and her brother, plus certain photographs

offered as demonstrative evidence. The testimony of plaintiff and her brother was received over the objection of the defendant under the claim that the dead man's statute, MCLA 600.2166; MSA 27A.2166, barred their testimony as being equally within the knowledge of the deceased. The material portion of this statute provides as follows:

"(1) In any action by or against a person incapable of testifying, a party's own testimony shall not be admissible as to any matter which, if true, must have been equally within the knowledge of the person incapable of testifying, *unless some material portion of his testimony is supported by some other material evidence tending to corroborate his claim."* (Emphasis supplied.)

Based on the decision in *Braidwood v Harmon,* 31 Mich App 49; 187 NW2d 559 (1971), the trial judge found and we agree that "the pictures introduced as demonstrative evidence at trial are deemed sufficient to satisfy the requirement of corroborating evidence" and that therefore plaintiff and her brother were competent witnesses.

We affirm.

All concurred.

PEOPLE v TUNSTULL

1. CRIMINAL LAW—JURY SELECTION—EVIDENCE—SYSTEMATIC EXCLUSION—DISCRIMINATION.

   There is insufficient proof of systematic exclusion or purposeful discrimination to require a remand for an evidentiary hearing on the matter of jury selection where a defendant merely challenges the exclusive use of voter registration lists from which to select prospective jurors and makes comparisons of percentages of blacks and young people on the voter registration lists with the actual numbers of these groups on the jury panel.

2. CRIMINAL LAW—APPEAL AND ERROR—INSTRUCTIONS TO JURY—PRESERVING QUESTION.

   The issue of error in jury instructions was not preserved for appeal where allegedly prejudicial remarks were made by the prosecutor during his opening statement, the remarks were immediately objected to, the trial court instructed the jury to disregard the remarks, and defendant thereafter neither objected to the curative instructions nor requested any further instructions on the matter.

3. CRIMINAL LAW—SENTENCING—PRESENTENCE REPORTS.

   Denial of a defendant's request, made by appellate counsel, to examine the presentence report was not reversible error where, at the time of sentencing, no request for the presentence report had been made by defendant's trial counsel.

Appeal from Macomb, Hunter D. Stair, J. Submitted Division 2 May 15, 1974, at Lansing. (Docket No. 15227.) Decided June 27, 1974.

Sidney J. Tunstull was convicted of breaking

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur 2d, Jury §§ 189–194.
[2] 53 Am Jur, Trial § 824.
[3] 21 Am Jur 2d, Criminal Law § 303.

and entering with intent to commit larceny. 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 *Max J. Pitlosh,* Assistant Prosecuting Attorney, for the people.

James R. McMaster, for defendant on appeal.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

PER CURIAM. On May 3, 1972, defendant was tried before a jury and convicted of breaking and entering with intent to commit larceny. MCLA 750.110; MSA 28.305. On May 31, 1972, he was sentenced to 12 to 15 years in prison. On January 10, 1974, the trial court entered an order correcting defendant's sentence to 10 to 15 years in accordance with the guidelines announced in *People v Tanner,* 387 Mich 683; 199 NW2d 202 (1972).

Prior to trial, defense counsel moved to challenge the jury array, alleging discrimination against blacks and young people. After hearing testimony from the Macomb County Jury Clerk, the trial court denied the motion. This Court subsequently granted defendant's motion for a remand for an evidentiary hearing on the question of jury selection. However, in an order entered May 21, 1973, this Court, after reviewing the relevant portions of the trial transcript, revoked its prior order stating:

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

"We have reviewed that portion of the transcript and find that our prior order of remand was inappropriate."

Defendant is now before this Court again requesting that we remand this cause for an evidentiary hearing on the question of the systematic exclusion of blacks and young people from juries in Macomb County. Defendant claims that the exclusive use of voter registration lists in the selection of juries tends to exclude blacks and young people from the array of prospective jurors because these groups are registered in lesser numbers than other groups. Were we to remand this cause for an evidentiary hearing, presumably defendant would attempt to show systematic exclusion by comparing the percentage of blacks and young people registered to vote with the actual number of those groups on the jury panel. However in *People v Redwine,* 50 Mich App 593; 213 NW2d 841 (1973), and *People v Williams,* 50 Mich App 763; 213 NW2d 754 (1973), our Court has determined that such comparisons are insufficient proof of systematic exclusion or purposeful discrimination.

In *Redwine* the defendant claimed discrimination due to the fact that while 40% of the people in the community eligible to vote were under the age of 34, the percentage of jurors under 34 on the panel was only 1.33. The court rejected defendant's contention when it stated at p 596:

"[W]e refuse to recognize any particular age group as a cognizable class against which discrimination in jury selection can be practiced."

* * *

"[D]efendant Redwine makes no showing of a systematic and intentional exclusion of a particular group or class of persons from the list of eligible jurors, *People v Gray,* 45 Mich App 643; 207 NW2d 161 (1973)."

In *Williams,* the defendant alleged a systematic exclusion of blacks from jury service through the use of voter registration lists. The Court disagreed and determined that a jury array drawn by random selection from voter registration lists was no proof of "purposeful discrimination." The Court stated at p 767:

> "This Court has repeatedly held that the use of voter registration lists to select potential jurors is a constitutionally permissible means of proceeding."

As in *Redwine* and *Williams,* defendant in this case does not allege specific acts of purposeful discrimination, nor does he offer sufficient evidence of systematic exclusion. Therefore, we feel that our Court's May 21, 1973, order was proper and that a remand for an evidentiary hearing would be inappropriate.

Defendant also claims that certain remarks made by the prosecutor in his opening statement were so prejudicial as to entitle him to a new trial. Immediately after defense counsel's objection, the trial court instructed the jury to disregard the prosecutor's remarks. Defense counsel did not object to this instruction, nor did he request any further instructions on this matter.

Since defendant neither objected to the curative instruction given nor requested that it be supplemented, the error, if any, has not been preserved for appeal. *People v Smith,* 43 Mich App 562; 204 NW2d 555 (1972); *People v Ross,* 39 Mich App 697; 198 NW2d 439 (1972); *People v Wilson,* 40 Mich App 290; 198 NW2d 424 (1972). Furthermore, any error was corrected by the trial court's instruction. Since the record fails to support defendant's allegation of prejudice, the trial court's denial of his motion for mistrial is sustained.

Finally, defendant asserts three reasons why this cause should be remanded for sentencing. First, defendant claims that his sentence violated the guidelines of *People v Tanner, supra.* As we have already pointed out, the trial court corrected its error in sentencing by a subsequent order entered on January 10, 1974. Nothing further is required.

Second, defendant claims that the trial court's denial of his request to examine the presentence report was reversible error. However, the transcript of the sentencing proceeding reveals that no request for the presentence report was made by trial counsel. In view of this fact, we also do not find the trial court's denial of appellate counsel's motion to view the presentence report to be improper. We perceive no error. *People v Brown,* 45 Mich App 400; 206 NW2d 542 (1973). See also *People v Curry,* 48 Mich App 545; 210 NW2d 791 (1973).

Finally, with respect to the use of defendant's juvenile record at sentencing, this issue has already been decided adversely to defendant by a unanimous Supreme Court decision. See *People v McFarlin,* 389 Mich 557; 208 NW2d 504 (1973).

Affirmed.

PEOPLE v FINLEY

FORGERY—UTTERING AND PUBLISHING—DRAWING CHECK WITHOUT ACCOUNT—IMPROPER CHARGES.

A defendant was improperly charged with uttering and publishing a false, altered or counterfeited order for the payment of money where the defendant signed his own name to a check drawn on a bank in which he had no account and gave identification information to the payee; the charge that should have been placed against the defendant was under another statute concerning the drawing of checks without an account (MCLA 750.131a, 750.249).

Appeal from St. Clair, Halford I. Streeter, J. Submitted Division 2 May 8, 1974, at Lansing. (Docket No. 16061.) Decided June 27, 1974.

Charles J. Finley was convicted of uttering and publishing. Defendant appeals. Reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter E. Deegan,* Prosecuting Attorney, and *Peter R. George,* Chief Appellate Attorney, for the people.

Norris Thomas, Assistant State Appellate Defender, for defendant.

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

PER CURIAM. On September 19, 1972, defendant

REFERENCE FOR POINTS IN HEADNOTE

36 Am Jur 2d, Forgery § 48.

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

pled guilty to uttering and publishing a false, forged, altered, or counterfeited order for the payment of money, contrary to MCLA 750.249; MSA 28.446, in the Circuit Court of the County of St. Clair. On October 18, 1972, defendant was sentenced to a minimum of 5 and a maximum of 14 years in prison. The record reveals the defendant was in a tavern drinking all day. Defendant called McDonald's and told them to deliver an order of hamburgs and fries. When the person from the restaurant delivered the food, defendant gave a check signed by himself in payment for the purchase. On the back of the check appears the defendant's driver's license and social security numbers. Defendant did not have a checking account in the drawee bank. Defendant appeals as of right.

There is one issue to be considered on appeal, *i.e.,* was the charge placed against defendant a proper charge under the facts in this case? The pertinent statute, MCLA 750.249; MSA 28.446, reads as follows:

"Any person who shall utter and publish as true, any false, forged, altered or counterfeit record, deed, instrument or other writing mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud as aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 14 years."

As referred to in the said statute we go to the preceding section, MCLA 750.248; MSA 28.445, for further definition of the acts prohibited and the instruments defined and set forth in pertinent part as follows:

"Any person who shall falsely make, alter, forge or counterfeit any public record, * * * or any order, ac-

quittance of discharge for money * * * a bill of exchange, * * * ."

These statutes have to do with forging, altering, and counterfeiting of public records and other instruments. The key words in MCLA 750.248; MSA 28.445, are "falsely make, alter, forge or counterfeit". These acts pertain to public records and other instruments specifically mentioned.

The case of *People v Brown,* 178 Mich 155; 144 NW 477 (1913), is similar as to the facts herein. The defendant was charged with the offense of having uttered and published as true a certain false, forged, and counterfeit order for the payment of money, with intent to injure and defraud. He wrote a check on a bank and signed his own name, at least the name that he had been going under for a considerable length of time, and which was known to the payee. The defendant did not have an account in the bank and therefore the check was not paid. After the people's case was presented, the attorney for the defendant moved the court to discharge the respondent and to quash the information, because it appeared that the instrument was not forged. The Court ruled as follows: "It is obvious that the motion should have been granted; there being no testimony tending to prove that the check was a false, altered, forged, or counterfeit instrument".

We find further light on the issue in the case of *Greathouse v United States,* 170 F2d 512, 514 (CA 4, 1948), wherein it is stated:

"It is well established that forgery contemplates a writing which falsely purports to be the writing of another person than the actual maker. Hence it is not forgery for one, with intent to defraud, to issue a check in his own name on a bank in which he has no funds, and it is not a violation of the statute in question to

cause such a check to be transported in interstate commerce."

See, also, *People v Susalla,* 46 Mich App 473; 208 NW2d 221 (1973).

In the instant case, the defendant signed his own name and gave identification information to the payee. The charge placed against the defendant was improper.

Defendant asserts, and properly so, that there is a viable and proper charge that should have been placed against him, which is MCLA 750.131a; MSA 28.326(1), and reads in part as follows:

"Any person who with intention to defraud shall make or draw or utter any check, draft or order for the payment of money to apply on an account or otherwise upon any bank or other depository who at the time of making, drawing, uttering or delivering such check, draft or order has no account in or credit with such bank or other depository for the payment of such check, draft or order upon presentation shall be guilty of a felony punishable by imprisonment in the state prison for not more than 2 years or by a fine of not more than $500."

Reversed.

SIMM v CITY OF DEARBORN

WORKMEN'S COMPENSATION—JUDGMENT—SETOFF—PRESERVING QUESTION.

A circuit court must enter judgment on an award of workmen's compensation after a party presents a certified copy of the order of compensation and after seven days' notice to the opposite party unless proof of payment is made; therefore, a circuit court properly refused to consider a claim of setoff which a defendant waived by its failure to assert it in the prior workmen's compensation proceeding (MCLA 418.863).

Appeal from Wayne, Harry J. Dingeman, Jr., J. Submitted Division 1 April 4, 1974, at Detroit. (Docket No. 17488.) Decided June 27, 1974. Leave to appeal denied, 392 Mich 818.

Complaint by John Simm, Sr., against the City of Dearborn for entry of judgment pursuant to a workmen's compensation award. Judgment for plaintiff. Defendant appeals. Affirmed.

Lopatin, Miller, Bindes & Freedman (by *Michael A. Gantz),* for plaintiff.

Joseph Burtell and *Carl P. Garlow,* for defendant.

Before: BASHARA, P. J., and BRONSON and CARLAND,* JJ.

PER CURIAM. Plaintiff, an employee of the City of Dearborn, made a motion for entry of judgment

REFERENCE FOR POINTS IN HEADNOTE

58 Am Jur, Workmen's Compensation §§ 484, 515.

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

pursuant to a workmen's compensation award. The city defended, claiming setoff for pension benefits and salary paid to plaintiff. In a written opinion the circuit court granted plaintiff's motion for entry of judgment and denied defendant's defense of setoff. We perceive the dispositive issue to be:

Whether the party directed to pay workmen's compensation benefits may properly *raise the question of setoff for the first time when the beneficiary moves for entry of judgment on the award in the circuit court pursuant to § 863 of the Workmen's Compensation Act.*

Defendant city argues that the provision of its city charter[1] directing that workmen's compensation payments be offset, when read in conjunction with a portion of § 161 of the act,[2] requires the circuit court to consider newly raised claims for setoff. The pertinent excerpt of § 161 reads:

" * * * Nothing contained in this act shall be construed as limiting, changing or repealing any of the provisions of any charter of any municipality or village of this state relating to any benefits, compensation, pensions or retirement, independent of this act, provided for employees." MCLA 418.161(a); MSA 17.237(161)(a).

The defendant's argument misses the mark. The question of whether the city can claim a setoff is not in issue. What is at stake is when and where this claim must be raised.

MCLA 418.863; MSA 17.237(863) provides:

"Sec. 863. Any party may present a certified copy of an order of a hearing referee, the director or the board

[1] Dearborn City Charter, § 22.29(a) (1942).

[2] MCLA 418.161(a); MSA 17.237(161)(a).

in any compensation proceeding to the circuit court of the circuit in which the injury occurred, or to the circuit court of the county of Ingham if the injury was sustained outside this state. The court, after 7 days' notice to the opposite party or parties, shall render judgment in accordance therewith *unless proof of payment is made.* The judgment shall have the same effect as though rendered in an action tried and determined in the court and shall be entered and docketed with like effect." (Emphasis supplied.)

This provision leaves the trial court with no discretion absent proof of payment. Proof of payment was not offered by the defendant. Only a claim of setoff, which should have been raised in the workmen's compensation proceeding,[3] was made. The circuit court properly refused to consider the claim for setoff which the city waived by its failure to assert it in the prior proceeding. Compare *Willis v Michigan Standard Alloy Casting,* 367 Mich 140; 116 NW2d 222 (1962).

Affirmed. Costs to plaintiff.

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[3] MCLA 418.841; MSA 17.237(841) reads:

"Sec. 841. Any controversy concerning compensation shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau. The director shall be deemed to be an interested party in all workmen's compensation cases in questions of law."

VAN BUREN v B & J MOVING & STORAGE, INC.

1. LIMITATION OF ACTIONS—DEFENSES—AFFIRMATIVE DEFENSE—COURT RULES.

   The statute of limitations is an affirmative defense (GCR 1963, 111.7, 116.1[5]).

2. PLEADING—DEFENSES—AFFIDAVIT HEARING—JURY TRIAL—COURT RULES.

   Affidavit hearings and immediate trials concerning defenses are available in certain circumstances but this procedure is not available if jury trial was timely demanded (GCR 1963, 116.3).

3. PLEADING—COMPLAINT—CONCLUSORY TERMS—COURT RULES.

   A complaint must set forth "a statement of the facts without repetition upon which the pleader relies" and may not be phrased in conclusory terms (GCR 1963, 111.1[1]).

4. JUDGMENT—SUMMARY JUDGMENT—ACCELERATED JUDGMENT—LIMITATION OF ACTIONS—QUESTIONS OF FACT.

   Entry of summary or accelerated judgment was improper where a plaintiff raised the question of tolling the statute of limitations by the disability of insanity, because this raised questions of fact to be determined at trial.

Appeal from Ingham, Ray C. Hotchkiss, J. Submitted Division 2 May 9, 1974, at Lansing. (Docket No. 18066.) Decided June 27, 1974.

Complaint by Lorraine Van Buren against B & J Moving and Storage, Inc., and Earl Wentworth for damages resulting from her eviction from premises

REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur 2d, Limitation of Actions § 453.
[2] 47 Am Jur 2d, Jury §§ 57, 58.
[3] 61 Am Jur 2d, Pleading § 187 *et seq.*
[4] 73 Am Jur 2d, Summary Judgment § 26.

possessed by her. Summary judgment for defendant B & J Moving and Storage, Inc., and accelerated judgment for defendant Wentworth. Plaintiff appeals. Reversed and remanded with instructions.

Karl A. H. Bohnhoff, for plaintiff.

Spence & Martin, for defendant B & J Moving and Storage, Inc.

O'Connor, McNamara & O'Keeffe, for defendant Wentworth.

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

PER CURIAM. On January 5, 1970, plaintiff was evicted from her premises by defendant Earl Wentworth. Deputy Sheriff Wentworth had to use "reasonable force", acting under color of an order of the district court. Plaintiff's property was taken to defendant B & J Moving and Storage, Inc.

On January 9, 1973, two years and four days later, plaintiff filed a six-count complaint with jury demand alleging January 15, 1970 as the date of the eviction. Each defendant appeared specially and moved for accelerated and summary judgment (GCR 1963, 116 and 117) but did not answer. Plaintiff then amended the complaint of right,[1] including jury demand. The date of accrual was changed to January 5, 1970, and a claim of insanity which could toll the statute of limitations was

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

[1] GCR 1963, 118.1. The defendants, although contesting this below, have conceded in the briefs that the complaint was properly amended by right.

added to each count. MCLA 600.5851(1) and (2); MSA 27A.5851(1) and (2).[2]

Defendants again moved for summary relief under GCR 1963, 116, 117 or both. Accelerated judgment was granted defendant Wentworth and partial summary judgment was granted defendant B & J Moving and Storage. Plaintiff's motion to reconsider was denied and she appealed to this Court. The appeal was returned because the partial summary judgment was not a final order within the meaning of GCR 1963, 518.2. On August 17, 1973, the circuit court entered a final order of summary judgment and plaintiff appealed.

If plaintiff properly pleads and proves the alleged disability of insanity commencing simultaneously with the eviction, it will be dispositive of the statute of limitations question. A second question concerning the nature and timing of a demand and if it is necessary to the accrual of a cause of action for conversion will be discussed *infra.*

The statute of limitations is an affirmative defense. GCR 1963, 116.1(5) and GCR 1963, 111.7. While affidavit hearings and immediate trials concerning defenses are available in certain circumstances, GCR 1963, 116.3, this procedure is not available if jury trial was timely demanded. GCR 1963, 116.3 reads, *inter alia:*

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[2] The statute includes insanity and defines it. The relevant portions read:

"Sec. 5851. "(1) If the person first entitled to make an entry or bring any action is under 21 years of age, insane, or imprisoned at the time his claim accrues, he or those claiming under him shall have 1 year after his disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

"(2) The term insane as employed in this chapter means a condition of mental derangement such as to prevent the sufferer from comprehending rights he is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane."

"As to defenses and objections based upon subrule 116.1(5), the court may order immediate trial of any disputed questions of fact, and judgment may be rendered forthwith if the proof shows that the moving party is entitled to judgment on the facts as determined; or the court may postpone the hearing on the matter until the trial on the merits, and *shall* postpone the hearing if a jury trial has been demanded pursuant to right on or before the day of the hearing." (Emphasis added.)

Such is the instant case. We observe that plaintiff set forth the disability in conclusory terms. The complaint must set forth "a statement of the facts without repetition upon which the pleader relies * * * ". GCR 111.1(1). On remand the plaintiff should be allowed to correct the averment. See: *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973).

Entry of summary and/or accelerated judgment was improper. The plaintiff has raised the question of tolling the statute of limitations by the disability of insanity. Properly pleaded, this raises questions of fact to be determined at trial.[3]

Our determination of this issue renders the remaining issues raised by defendants moot.

Reversed and remanded for proceedings consistent with this opinion. Costs to plaintiff-appellant.

[3] *See: Davidson v Baker-Vander Veen Co,* 35 Mich App 293; 192 NW2d 312 (1971).

TRANS PLASTIC, INC. v CONSER CONSTRUCTION COMPANY

1. LIMITATION OF ACTIONS—CORPORATIONS—STATUTES—FILING OF CORPORATE REPORT—DEFAULT.

The two-year statute of limitations for filing an action against the officers of a corporation for liability on a contract entered into while the corporation was in default of filing its annual corporate report, contained in a former statute, did not begin to run until after the expiration of a grace period for filing the annual report (MCLA 450.87; 450.90).

2. JUDGMENT—ACCELERATED JUDGMENT—COURT RULES—QUESTIONS OF FACT.

The requirements for the granting of an accelerated judgment were not met where there was disagreement between the parties regarding the making of a contract and the date upon which the defendant's default in filing a corporate report was terminated; a court rule requires a hearing of any disputed questions of fact (GCR 1963, 116.3).

Appeal from Washtenaw, Patrick J. Conlin, J. Submitted Division 2 May 9, 1974, at Lansing. (Docket No. 18093.) Decided June 27, 1974. Leave to appeal denied, 392 Mich 798.

Complaint by Trans Plastic, Incorporated, an Ohio corporation, against Conser Construction Company, a Michigan corporation, Hugh P. Conser, Gerard Matuszak, and Maureen Conser, to enforce an Ohio judgment against Conser Construction Company, and to obtain personal judgments against the other defendants. The Ohio judgment against the corporate defendant was upheld, and accelerated judgment granted for the

REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur 2d, Limitation of Actions §§ 59, 154.

[2] 73 Am Jur 2d, Summary Judgment § 26.

individual defendants. Plaintiff appeals. Reversed and remanded.

Hooper, Hathaway, Fichera, Price & Davis, for plaintiff.

Gerard J. Matuszak, in propria persona.

Bilakos & Hanlon, for defendants Conser Construction Company and Hugh P. Conser.

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

PER CURIAM. Plaintiff, an Ohio corporation, brought suit in Michigan to enforce an Ohio judgment against the corporate defendant, Conser Construction Company. Plaintiff also sought to obtain personal judgments against the individual defendants as officers of the debtor corporation.[1] The obligation of the officers is asserted upon the authority of MCLA 450.87; MSA 21.87[2] holding officers personally liable for debts contracted during a period of default in the filing of an annual corporate report. The trial judge granted an accelerated judgment in favor of the individual defendants, granted full faith and credit to the Ohio judgment against the corporation, and dismissed plaintiff-appellant's complaint.

We direct our initial review to the defendants'

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

[1] The parties apparently agree that defendant Maureen B. Conser, a director but not an officer of the corporation, is not liable. *See: Adams v E M Burke Homes, Inc,* 14 Mich App 578, 583–584; 166 NW2d 34 (1968).

[2] This section is now found in two sections of the Business Corporation Act. MCLA 450.1921; MSA 21.200(921) and MCLA 450.1923; MSA 21.200(923). The provision making officers liable for debts was not incorporated in the new Business Corporation Act.

claim that the plaintiff's action is barred by the two-year limitation period found in MCLA 450.90; MSA 21.90.[3] This argument is without merit. The two-year limit begins after the period of grace for filing and this action was timely commenced within this two-year period. *See: Eberts Cadillac Co v Miller,* 372 Mich 172; 125 NW2d 306 (1963).

The remaining question is the liability of the corporate officers. Both parties have argued the merits of when and if a contract was made during the period of default. The parties also disagree on when the period of default was terminated.

This decision is here on appeal of an accelerated judgment, GCR 1963, 116. Section 3 of GCR 116 provides:

".3 Affidavit Hearing; Immediate Trial. Any defense or objection raised under this rule, whether in a responsive pleading or by motion, may be noticed for hearing by either party as if raised by motion. Affidavits or other evidence may be submitted by either party to support or oppose the grounds asserted in the pleading or motion, and in every case where the grounds asserted do not appear on the face of the pleading attacked, the demand shall be supported by affidavits or other evidence filed with the pleading or motion. As to defenses and objections based upon (1), (2), (3), or (4) in sub-rule 116.1, the court may order immediate trial of any disputed questions of fact, and judgment may be rendered forthwith if the proof shows that the moving party is entitled to judgment upon the facts as determined; or the court may postpone the hearing on the matter until the trial on the merits. As to defenses and objections based upon sub-rule 116.1(5), the court may order immediate trial of any disputed questions of fact, and judgment may be rendered forthwith if the proof shows that the moving party is entitled to judgment on the facts as determined; or the court may postpone the hearing on the matter until the trial on the merits, and

[3] This section is now found in MCLA 450.1923; MSA 21.200(923).

shall postpone the hearing if a jury trial has been demanded pursuant to right on or before the day of the hearing."

The requirements of this section were not met. There was no trial, only a brief five-page motion hearing and subsequent opinion by the trial judge. A trial is required. In *Lake States Engineering Corp v Lawrence Seaway Corp,* 15 Mich App 637, 642–643; 167 NW2d 320 (1969), Judge (now Justice) LEVIN stated:

"The question of when and where the parties became contractually bound depends on their intention as manifested by their verbal statements and conduct in the light of all the circumstances. * * * Furthermore, the question could not be decided without a trial hearing * * * ." [Footnotes omitted.] *Lake States, supra,* at 642–643.[4]

Defendants also attack the Ohio judgment. This question was raised for the first time on appeal. We note that in the trial court the judgment was assumed to be valid. We will not consider such unpreserved issues, especially where the resolution hinges on factual determinations from a record wherein no evidence on the issue has been presented.

Accordingly, the judgment of the trial court is vacated, the plaintiff-appellant's complaint is reinstated, and the matter is remanded for trial on the merits. To avoid any possible prejudice to the parties due to the premature finding of the trial

[4] *See, also:* MCLA 440.1201(3); MSA 19.1201(3) (agreement), MCLA 440.1201(11); MSA 19.1201(11) (contract), MCLA 440.1103; MSA 19.1103 (supplementary general principles of law applicable); MCLA 440.2102; MSA 19.2102 (scope), MCLA 440.2106(1); MSA 19.2106(1) (contract-agreement), MCLA 440.2204; MSA 19.2204 (formation). Because the question is not before us we express no opinion on the applicability of the Uniform Commercial Code *vis-a-vis* the common law of contracts.

court another circuit judge shall be appointed for the trial of this cause.

Reversed and remanded. Costs to plaintiff-appellant.

BRONSON, J., did not participate.

PEOPLE v TAYLOR

CRIMINAL LAW—PLEA OF GUILTY—NONJURY TRIAL—COURT RULES.

There was no requirement that a trial court must specifically inform a defendant that by pleading guilty he waives his right to be tried by a judge sitting without a jury prior to the adoption of a General Court Rule requiring that a defendant be so informed (GCR 1963, 785.7).

Appeal from Recorder's Court of Detroit, Samuel H. Olsen, J. Submitted Division 1 May 9, 1974, at Detroit. (Docket No. 18656.) Decided June 27, 1974.

John W. Taylor 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, *William L. Cahalan,* Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *John L. Thompson, Jr.,* Assistant Prosecuting Attorney, for the people.

Charles A. Haas, for defendant on appeal.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

PER CURIAM. Defendant pled guilty to a charge

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 484 *et seq.*

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

of assault with intent to do great bodily harm less than murder. MCLA 750.84; MSA 28.279. He appeals his conviction.

Defendant alleges that the trial judge erred during the plea-taking proceeding when he failed to advise defendant of a right to a nonjury trial. He was advised of his right to trial by jury. The record reveals that the plea was taken on November 6, 1972, after the release of *People v Jaworski,* 387 Mich 21; 194 NW2d 868 (1972), but before the promulgation of GCR 1963, 785.7.

Jaworski, supra, established that the defendant is entitled to be advised of his right to a jury trial, to confront his accusers, and of his privilege against self-incrimination. This Court in *People v Eagan,* 46 Mich App 377; 208 NW2d 219 (1973), interpreted *Jaworski, supra,* to mean that a defendant must be advised of both his right to jury trial and nonjury trial. While the new court rules under GCR 1963, 785.7 would require such advice, we are in disagreement with *Eagan, supra,* that *Jaworski, supra,* intended such a result. We prefer to adopt the reasoning of *People v Graham,* 39 Mich App 109, 111; 197 NW2d 312, 314 (1972), where the Court stated:

> "There is no requirement that a trial court must specifically inform a defendant that by pleading guilty he waives his right to be tried by a judge sitting without a jury. *People v Logan,* 35 Mich App 600; [192 NW2d 650] (1971). See *People v Robert A Smith,* 35 Mich App 349; [192 NW2d 626] (1971)."

Graham, supra, was reaffirmed in the case of *People v Piffer,* 40 Mich App 419; 198 NW2d 907 (1972). It is also buttressed by the recent opinion of *People v Kuchulan,* 390 Mich 701; 213 NW2d 95 (1973). That opinion has the clear impact of limit-

ing the advice on waiver to the specific rights enumerated in *Jaworski, supra,* prior to the adoption of GCR 1963, 785.7.

We find no merit in defendant's remaining assignment of error.

Affirmed.

ROCK ISLAND BANK & TRUST COMPANY v FORD MOTOR COMPANY

1. DISCOVERY—PURPOSE.

The purpose of discovery is to allow the parties to a lawsuit to have access to material which will assist them in preparing and trying their cases.

2. DISCOVERY—WITHHOLDING EVIDENCE—NEW TRIAL.

Failure of a defendant automobile manufacturer to obey a discovery order to produce certain crash-test films entitled the plaintiffs in a products-liability action to a new trial; the Court of Appeals need not say with certainty that if plaintiffs had access to the films the jury would have found for the plaintiffs, because the films in question may have made a difference in the way plaintiffs' counsel approached the case or prepared for trial, and therefore plaintiffs may well have been denied their right to a fair trial.

Appeal from Wayne, Charles Kaufman, J. Submitted Division 1 May 9, 1974, at Detroit. (Docket No. 14636.) Decided July 22, 1974.

Complaint by Rock Island Bank & Trust Company, as administrator of the estates of James A. Haskins and Odie Dowdy, and Clarence W. Kemp and Patsy Kemp against Ford Motor Company for damages resulting from an automobile accident. Judgment for defendant. Plaintiffs appeal. Reversed and remanded for new trial.

Goodman, Eden, Millender, Goodman & Bedrosian, for plaintiffs.

REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur 2d, Depositions and Discovery §§ 155–229.

[2] 23 Am Jur 2d, Depositions and Discovery §§ 308, 322, 324.

Alexander, Buchanan & Seavitt, for defendant.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

BASHARA, P. J. James Haskins and Odie Dowdy were killed and Clarence Wayne Kemp was injured in an automobile collision. Plaintiffs allege that injuries were primarily due to a rear-end collision which resulted in a fire in plaintiff Wayne Kemp's auto. Counts of negligence and breach of warranty were pled, averring that the fuel tank of the 1965 Ford was of inadequate construction and design, constituting a dangerous condition upon the occurrence of a rear-end collision.

The pretrial judge granted plaintiff's motion pursuant to GCR 1963, 310.1(1) for the production of test reports, movies, and photographs relating to 1965 Ford sedans. Defendant stated that no reports relative to crash barrier tests performed on 1965 Fords were made or available.

The trial court then ordered defendant to produce all motion picture films and still photographs taken of crash tests or crash-tested vehicles or components thereof on 1965, 1966, and 1967 Ford Custom Galaxies, 500s, and Galaxie 500 LTD vehicles made prior to December 3, 1967. Defendant produced ten films of crash tests involving 1966 and 1967 Fords. No records, films, or photos of 1965 Fords were produced.

The jury entered a verdict of no cause of action in favor of defendant. By mere happenstance, plaintiffs' counsel discovered, after the trial, that reports of crash tests on 1965 Ford autos were made and were still in the possession of the defendant. Plaintiff filed a motion for a new trial

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

contending that defendant improperly withheld test films on 1965 Fords, therefore not complying with court orders for discovery.

The films which defendant initially said did not exist were turned over to the trial judge subsequent to trial. The judge, after viewing the four films in question, denied the motion for new trial.

The sole issue is whether defendant's failure to comply with a court discovery order entitled plaintiffs to a new trial.

The purpose of discovery is to allow the parties to have access to material which will assist them in preparing and trying their cases. *Willard v Gaston,* 333 Mich 455; 53 NW2d 332 (1952). Defendant's counsel believed that the 1965 reports and films were not available. The fact is that they were. We must note that the basic purpose of discovery is to further the ends of justice. *Daniels v Allen Industries, Inc,* 391 Mich 398; 216 NW2d 762 (1974).

No Michigan cases have addressed the question presented. *Seaboldt v Pennsylvania R Co,* 290 F2d 296 (CA 3, 1961), however, decided a similar issue. There the Court held that failure of plaintiff's counsel to supply defendant with information concerning back treatment given plaintiff by a chiropractor prior to an accident, in violation of a pretrial order of district court directing lawyers to exchange all medical information and photographs, entitled defendant to a new trial.

In the instant case the trial judge was placed in the awkward position of having to make a determination that the jury would not have reached a different conclusion had they been able to view the after-acquired evidence. It is our opinion that if defendant had material in its possession, the subject of the order for discovery, then defendant was

not the one to determine that the material should not be submitted. GCR 1963, 306.2 clearly states:

> "Upon motion *seasonably made* by either party * * * and upon reasonable notice and for good cause shown, the *court in which the action is pending may make an order* that * * * certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, * * * or that secret processes, developments, or research need not be disclosed * * * ." (Emphasis supplied.)

If defendant believed that the 1965 tests were not relevant, or were not covered by the order of discovery because of the differences between the test vehicles and the vehicle involved in the accident, defendant should have filed a motion under GCR 1963, 306.2 asking the court to rule on the films.

It is not enough to determine that counsel for the defendant did not knowingly abuse the court's order. The fact of the matter is that defendant must be charged with knowledge of the court's order.

We cannot say with certainty that if plaintiffs had access to the 1965 Ford films the jury would have changed the case from a verdict for the defendant to one for the plaintiffs. However, the films in question may have made a difference in the way plaintiffs' counsel approached the case or prepared for trial.

In conclusion, the fact that plaintiffs did not receive the ordered information which could have been made available by defendant may well have precluded plaintiffs' right to a fair trial.

Reversed and remanded for a new trial.

All concurred.

PONTIAC POLICE OFFICERS ASSOCIATION v CITY OF PONTIAC (SUPPLEMENTAL OPINION)

LABOR RELATIONS—COLLECTIVE BARGAINING—MUNICIPAL CORPORATIONS—CITY CHARTERS—POLICE TRIAL BOARDS—CIVILIAN TRIAL BOARDS.

The question of a civilian trial board for policemen is a permissive, not a mandatory subject, of collective bargaining between a city and a police officers association when the city charter provides for a police trial board.

Appeal from Employment Relations Commission. Submitted Division 2 October 8, 1973, at Detroit. (Docket No. 14843.) Decided November 1, 1973, 50 Mich App 382; 213 NW2d 217. Leave to appeal granted, decisions vacated and remanded to the Court of Appeals for reconsideration, 391 Mich 814 (1974). Supplemental decision filed July 22, 1974. Leave to appeal granted, 392 Mich 812.

The Employment Relations Commission ordered the City of Pontiac to bargain in good faith with the Pontiac Police Officers Association with respect to certain labor issues. The city appealed by leave granted. Reversed. Upon remand for reconsideration, reversed.

Gregory, Van Lopik & Higle (by *J. Douglas Korney),* for plaintiff Pontiac Police Officers Association.

Tolleson, Burgess & Mead (by *J. Douglas Dahn),* for defendant City of Pontiac.

REFERENCE FOR POINTS IN HEADNOTE

48 Am Jur 2d, Labor and Labor Relations §§ 1191, 1192.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Francis W. Edwards,* Assistant Attorney General, for the Employment Relations Commission.

Before: LESINSKI, C. J., and R. B. BURNS and QUINN, JJ.

SUPPLEMENTAL OPINION

QUINN, J. An order of the Supreme Court in the above entitled cause dated April 18, 1974, and designated CR 12-98, provides:

"We grant leave to appeal and *sua sponte* vacate the decision of the Court of Appeals reported at 50 Mich App 382; 213 NW2d 217 (1973).

"On the authority of *Detroit Police Officers Association v City of Detroit,* 391 Mich 44; 214 NW2d 803 (1974), we hold that a residency requirement is a mandatory subject of collective bargaining.

"We remand to the Court of Appeals for reconsideration, in light of *D.P.O.A. v City of Detroit, supra,* of the question whether the continuation of a civilian trial board for policemen is a 'mandatory', 'permissive' or 'illegal' subject of collective bargaining."[1]

Pursuant thereto we have reconsidered our prior holding. Contrary to the language of the foregoing order, this case does not involve the question, "whether the continuation of a civilian trial board for policemen is a 'mandatory', 'permissive' or 'illegal' subject of collective bargaining".

The question originally before this Court was

"Is the question of a civilian trial board for policemen a mandatory subject for collective bargaining when the city charter provides for a police trial board?" *Police*

[1] 391 Mich 814 (1974).

Officers Association v Pontiac, 50 Mich App 382, 383; 213 NW2d 217 (1973).

For the reasons expressed in our prior opinion, we affirm our negative answer to this question. We do not read *Detroit Police Officers Association, supra,* as a refutation of that reasoning. The question of a civilian trial board on the facts of this case is a permissive subject of collective bargaining.

All concurred.

PEOPLE v HELZER

OPINION OF THE COURT

1. INDICTMENT AND INFORMATION—DATE OF OFFENSE—VARIANCE.

The people are entitled to some latitude in fixing the date of an offense, and variance between the proofs and the complaint is not fatal, provided the verdict is confined to the particular act within the scope of the complaint upon which the people introduce evidence for the purpose of procuring a conviction.

2. ASSAULT AND BATTERY—GROSS INDECENCY—DATE OF OFFENSE—INSTRUCTIONS TO JURY.

Instructing a jury that the offense of gross indecency with a child could be regarded as proven should the proofs show any date within the statute of limitations and that the date of the offense was not a material element of the offense was error where testimony at trial confined the offense alleged to the last half of a month, or possibly the entire month, and the defense was alibi (MCLA 750.338).

DISSENT BY V. J. BRENNAN, J.

3. ASSAULT AND BATTERY—GROSS INDECENCY—INFANTS—DATE OF OFFENSE—INSTRUCTIONS TO JURY.

Children who are witnesses in a prosecution for gross indecency usually cannot be examined and cross-examined and remember specific dates, therefore the only critical areas in such a prosecution are: Is this the person and what exactly was done?, i.e., *identity and credibility of witnesses (MCLA 750.338).*

Appeal from Presque Isle, Philip J. Glennie, J. Submitted Division 3 April 3, 1974, at Lansing. (Docket No. 15180.) Decided July 22, 1974. Leave to appeal granted, 392 Mich 818.

Richard L. Helzer was convicted of gross inde-

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur 2d, Indictments and Informations §§ 260-276.

[2, 3] 6 Am Jur 2d, Assault and Battery § 95.

cency. Defendant appeals. Reversed and remanded for new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Elmer Radka,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, by *Howard C. Marderosian,* of counsel), for the people.

Roger L. Wotila, Assistant State Appellate Defender, for defendant.

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

DANHOF, P. J. Defendant was convicted by a jury of gross indecency. MCLA 750.338; MSA 28.570. On July 7, 1972, he was sentenced to a term of one to five years in prison.

The information alleged that the offense occurred "on or about July 27, 1971". The complaining witness was nine years of age at the time of the alleged offense. He testified that defendant performed an act of fellatio upon him, but was unable to specify an exact date. He did testify that the incident took place on a weekday, between 3 p.m. and 6 p.m., one or two weeks before the Rogers City Centennial, which began on July 30, 1971. He further testified that the alleged act took place on the same day his parents drove a car for his father's part-time employer north across the Mackinac Bridge. Before leaving, the boy's parents gave him permission to go fishing with the defendant and the defendant's five-year-old stepson. The boy did not inform his parents of the alleged crime until approximately one month thereafter. Neither defendant's stepson, in whose presence the crime

was alleged to have been committed, nor the boy's parents testified at trial.

Defendant did not take the stand at trial, but presented an alibi defense through other witnesses. It was established with a fair degree of certainty that the boy's parents crossed the Mackinac Bridge on at least one occasion on July 20, 1971. A representative of defendant's employer in charge of business records testified that defendant had been paid as a member of the galley crew of the ore vessel S.S. "Munson" for working the hours of 7:30 a.m.–1 p.m.; 3:30 p.m.–6 p.m. from July 16, 1971 to July 31, 1971. On July 20, 1971, the "Munson" was in Buffington, Indiana. Upon cross-examination, the witness conceded that he could not state with certainty whether defendant actually worked the hours for which he was paid. Furthermore, he testified that on occasion men employed on the ore boats which are in their home port switch shifts with other men. The "Munson" was in defendant's home port of Rogers City on July 27, 1971.

On appeal, defendant raises a number of issues for our consideration. Our resolution of one necessitates reversal and remand for new trial.

The people proposed for the trial court's consideration the following instruction:

"I further charge you that this offense of gross indecency is one where the time or day that the offense was committed is not of the essence. In other words, in this case where the offense was alleged to have occurred on or about the 27th day of July, 1971, should the proof have shown any other possible date so long as it is within the statute of limitations, then the offense charged can be regarded as proven. If you find that the offense of gross indecency was, in fact, committed, the date that it was committed is not a material element of the offense."

This instruction was based on the following language from *People v Swift,* 172 Mich 473, 488; 138 NW 662, 668 (1912):

"Time was not of the essence of this offense. It could be stated in the information as one time, and the proof might show another; evidence could be given of such an act within the jurisdiction of the court and the statute of limitations, and the act indicated by the evidence could thenceforth be deemed the act charged."

Defense counsel vigorously objected to the above-quoted proposed instruction. He argued that he had never attempted, from the day of the preliminary examination to trial, to confine the people to a specific date for the alleged offense. However, he claimed that the boy himself had in his testimony given certain reference points which confined the offense alleged to the last half or possibly the entire month of July, 1971. He claimed that the proposed instruction would deprive defendant of his alibi defense. The trial court took the question under advisement, but thereafter instructed the jury in substantially the same form as proposed by the people. This was error.

The above-quoted language from *Swift, supra,* went to the issue of variance between the proofs and the complaint. The people are entitled to some latitude in fixing the date of the offense. Where, as here, the date is not alleged with particularity, variance is not fatal provided the verdict is confined to the particular act within the scope of the complaint upon which the people introduce evidence for the purpose of procuring a conviction. *People v Leneschmidt,* 260 Mich 671; 245 NW 544 (1932). *People v King,* 365 Mich 543; 114 NW2d 219 (1962). However, *Swift* does not sanction an instruction such as the one at issue here. This can be readily seen from the instructions as quoted

thereafter in *Swift* which confined that jury's deliberations to the 23rd of November, as had been alleged, or some date prior thereto during that same month of November, for which there was support in the record. In the instant case, the jury should have been similarly instructed to confine its deliberations to a time period supported by the record. *People v Brocato,* 17 Mich App 277, 286; 169 NW2d 483, 487 (1969).

Defendant also alleges error in the trial court's instruction on gross indecency. The jury's function in determining guilt or innocence upon a charge of gross indecency is set forth in *People v McCaleb,* 37 Mich App 502, 507; 195 NW2d 17, 19 (1972). See also *People v Ferguson,* 45 Mich App 697; 206 NW2d 812 (1973).

Reversed and remanded for new trial.

QUINN, J., concurred.

V. J. BRENNAN, J. *(dissenting).* I cannot concur with my colleagues.

There was no question here of mistaken identity. The defendant was known to the complainant, aged nine, for some time. He had the permission of the parents to take him fishing so the boy and the parents knew the defendant, thereby excluding any question of identification.

The complainant testified that the defendant took him and the defendant's stepson to a "secret place", unzipped their pants, and began fondling their private parts as well as performing acts of fellatio upon them.

Defendant claims the date fact is absolute in this case—negative. Our Supreme Court in *People v Swift,* 172 Mich 473, 488; 138 NW 662 (1912), said, and this has not been changed:

"Time was not of the essence of this offense. It could be stated in the information as one time, and the proof might show another; evidence could be given of such an act within the jurisdiction of the court and the statute of limitations, and the act indicated by the evidence could thenceforth be deemed the act charged."

The trial court based his instructions on the ruling of that case. My colleagues have said that the charge was erroneous in that the date for the jury to consider was not specified. I cannot agree with them. The prosecutor is not bound, in a case of this nature, to prove that the act was committed on a certain date. The reasoning of the Supreme Court is clear. It simply is that children usually cannot be examined and cross-examined and remember specific dates. Therefore, the only critical areas are: Is this the person and what exactly was done? After that, if the elements have been established, then the fact finders, that is the jury in this case, must determine whether those elements have been proven beyond a reasonable doubt. I feel in this case they have.

The defendant claims that the testimony of the minor child confined the date to a specific time and, therefore, the trial court could not instruct the jury that the date that the offense was committed is not a material element of the offense. Defendant's contentions are erroneous.

In gross indecency cases such as this involving minor children where dates and times are sometimes difficult to pinpoint, the only areas of concern of our courts have been identity and the credibility of the witnesses.

Here the jury chose to believe the child on the question of whether the defendant did or did not commit the acts charged.

I would affirm the conviction.

SCHIMMER v WOLVERINE INSURANCE COMPANY

1. LIMITATION OF ACTIONS—NEGLIGENCE.

   The statute of limitations for an action in tort begins to run at the time the claim accrues and therefore a claim of negligence on the part of an insurance agent in giving plaintiff bad advice in 1962 was barred in an action commenced in 1971 on the theory of tort (MCLA 600.5805).

2. LIMITATION OF ACTIONS—PRIOR JUDGMENT—PRINCIPAL AND AGENT.

   A plaintiff cannot maintain an action against an insurance company for the negligence of its agent where a judgment has been rendered in favor of the agent, which determined that the applicable statutes of limitations had run, and that judgment has not been appealed from; a plaintiff who has chosen to proceed against an agent for misconduct and has been defeated is barred from litigating the same cause of action against the principal.

3. LIMITATION OF ACTIONS—CONTRACTS.

   A plaintiff who brought an action alleging a breach of contract by a defendant insurance company's refusal to defend claims brought against the plaintiff could not maintain the action where it was commenced more than six years after the breach alleged (MCLA 600.5807).

4. JUDGMENT—ACCELERATED JUDGMENT—SUMMARY JUDGMENT.

   The Court of Appeals can give any judgment and make any order which should have been given or made in the trial court; therefore, a defendant's motion for accelerated judgment may be treated as one for summary judgment where the plaintiff failed to state a claim upon which relief could be granted and summary judgment was proper (GCR 1963, 116, 117, 820.1).

REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur 2d, Limitation of Actions § 59.
[2] 51 Am Jur 2d, Limitation of Actions § 301 *et seq.*
[3] 51 Am Jur 2d, Limitation of Actions §§ 1, 64, 65.
[4] 73 Am Jur 2d, Summary Judgment § 26.
[5] 61 Am Jur 2d, Pleading § 306.
[6] 43 Am Jur 2d, Insurance § 1575.

5. PLEADING—AMENDMENT—SUMMARY JUDGMENT—COURT RULES.

A plaintiff's motion to amend her pleadings, made after summary judgment was entered against her, to plead estoppel of defendant insurance companies to raise exclusionary coverage defenses was properly denied where the defendants were not asserting exclusionary clauses, but rather that no coverage existed (GCR 1963, 117.3, 118.1).

6. INSURANCE—DEFENSE OF INSURED—DUTY TO DEFEND—INSURED PREMISES.

An insurer had no duty to defend an insured in an action for damages resulting from the asphyxiation and injury of the occupants of a dwelling owned by the insured but not specifically covered by the policy where the insurer's duty to defend was stated in the policy to be in any suit against the insured alleging bodily injury or property damage and seeking damages payable under the terms of the policy.

Appeal from Saginaw, Joseph R. McDonald, J. Submitted Division 3 June 10, 1974, at Lansing. (Docket No. 15585.) Decided July 22, 1974.

Complaint by Freida Schimmer against the Wolverine Insurance Company and the Camden Fire Insurance Association seeking recovery of attorney fees and damages. Judgment for defendants. Plaintiff appeals. Affirmed.

Gilbert, Eaton & Leak, for plaintiff.

Isackson & Neering, P. C., for defendant Wolverine Insurance Company.

Ransom & Henneke, P. C., for defendant Camden Fire Insurance Association.

Before: QUINN, P. J. and V. J. BRENNAN and CARLAND,* JJ.

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

CARLAND, J. On October 30, 1959, C. A. Raymond, the operator of a general insurance agency in the City of Saginaw, insured plaintiff's residence at 1006 Brockway in such city under a standard owner's, landlord's and tenant's liability policy with the defendant Wolverine Insurance Company (hereinafter referred to as Wolverine). By an endorsement to this same policy, a rental property owned by the plaintiff and located at 1016 Brockway was also insured. Each renewal of this policy up to October 30, 1962 specifically covered both the residence and the rental property. On July 16, 1962, the rental property at 1016 Brockway was sold by plaintiff to Daniel and Joyclyn Cox on land contract. When this policy was renewed on October 30, 1962, 1016 Brockway was specifically deleted from the policy declarations, leaving only 1006 Brockway covered by the policy. It is plaintiff's contention that this deletion was made despite her specific request to Raymond that the coverage be continued, even though Raymond had advised that she no longer needed the coverage. The policy covering only 1006 Brockway was again renewed in October of 1963 and for several years thereafter.

On October 31, 1962, Camden Fire Insurance Association (hereinafter referred to as Camden) issued to plaintiff homeowner's insurance policy no. H68-17-41 containing along with other coverage comprehensive personal liability coverage under section II of its policy. This policy was for a term of three years and the only premises described therein were 1006 Brockway.

Plaintiff also had a homeowner's policy of insurance in effect with State Farm Fire & Casualty Company covering the 1016 Brockway property. The policy had been issued to Cox and wife, the

land contract purchasers, with plaintiff being named as an additional insured.

On November 6, 1963, Daniel F. Cox and his daughter were allegedly asphyxiated at 1016 Brockway and Joyclyn Cox was allegedly injured. Following this incident, a series of lawsuits was started against the plaintiff and others. Plaintiff was first served with process in connection with these actions on February 6, 1964. Subsequently thereto Wolverine, Camden and State Farm were requested by plaintiff to defend these actions under the terms of their policies. This they declined to do. Plaintiff eventually succeeded in having the action dismissed as to her.

On January 14, 1971, plaintiff instituted the present action against Wolverine, Camden, State Farm and C. A. Raymond seeking to recover the attorney fees incurred by her in defense of the actions against her and also seeking to recover special damages for mental and physical suffering arising as the result of the defendants' breach of contract. The action is no longer pending against Raymond or State Farm.

On May 1, 1972, the trial court granted an accelerated judgment in favor of Wolverine upon a finding that plaintiff had no coverage under her contract of insurance with Wolverine "with respect to the alleged accident or casualty at 1016 Brockway, and there was no obligation on the part of defendant insurance company to defend plaintiff under the terms of said policy. Plaintiff has failed to state a claim upon which relief can be granted."

Likewise, on May 1, 1972, summary judgment was rendered in favor of Camden under a finding by the trial court that "under the terms of the applicable insurance policy * * * no coverage was afforded to the plaintiff by her contract of insur-

ance with defendant Camden Fire Insurance Association with respect to the alleged accident or casualty at 1016 Brockway, and there was no obligation * * * to defend plaintiff under the terms of said policy". From these two judgments, plaintiff appeals.

It is first claimed by appellant that the trial court erred in granting Wolverine's motion for accelerated judgment. Plaintiff's claim that she was taken by surprise by the trial court's action in granting the defendant's motion on the basis that plaintiff had failed to state a cause of action is without merit. The record discloses that the motion was argued and briefed by the defendant both on the statute of limitation question and the issue of whether the insurance policy covered the casualty involved. Having disposed of the motion on the failure of plaintiff to state a cause of action, the trial court found no necessity to decide the statute of limitation question. Plaintiff was neither surprised nor prejudiced thereby.

The facts are not in dispute. When the policy came up for renewal in October 1962, 1016 Brockway which had previously been covered by the policy was specifically deleted therefrom. It was again renewed in 1963 without mention of the address at 1016. Plaintiff requested Wolverine to defend these actions started against her and by letter dated May 7, 1964, Wolverine refused the request and denied coverage under the policy. This action was commenced January 14, 1971.

Plaintiff sued Wolverine on both a tort and contract theory. Under either theory plaintiff's action is barred by the statute of limitations.

Plaintiff's theory on tort arises from the claimed negligence of Wolverine's agent, C. A. Raymond, in giving her bad advice at the time of renewal on

October 30, 1962. MCLA 600.5827; MSA 27A.5827 provides that the statute of limitations begins to run at the time the claim accrues.

"Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

Further, MCLA 600.5805; MSA 27A.5805 provides that the period of limitations is three years for injuries to persons or property.

There further appears to be a most cogent reason why plaintiff cannot prevail against Wolverine under the claim here made. By its order of May 1, 1972 granting an accelerated judgment in favor of C. A. Raymond, the alleged agent of Wolverine, the trial court determined that both the three-year and the six-year statute had run on any claim against the agent. This judgment has not been appealed from and still stands. It would indeed be strange if a principal could be held liable for the acts of its agent where, by judicial determination, the agent has been found not to be liable for these same acts. This determination would seem to estop the plaintiff from further action against Wolverine.

In *DePolo v Greig,* 338 Mich 703; 62 NW2d 441 (1954), the Supreme Court held on page 709 as follows:

"The present case is controlled by that of *Krolik v Curry* 148 Mich 214; 111 NW 761 (1907), where we said (page 222):

" 'Where a litigant has chosen to proceed against the agents of a corporation for misconduct on their part and has been defeated, he is thereby barred from liti-

gating the same cause of action against the principal. *Emma Silver Mining Co (Limited) v Emma Silver Mining Co of New York,* 7 F 401 (CA 2, 1880). It follows that a determination of the issue in a suit brought against the principal bars an action against the agents. *Emery v Fowler,* 39 Me 326; 63 Am Dec 627 (1855).' "

Further, the Court quoted with approval from page 128 of *Bigelow v Old Dominion Copper Mining & Smelting Co,* 225 US 111; 32 S Ct 641; 56 L Ed 1009 (1912), the following:

" 'The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee.' " 338 Mich 711; 62 NW2d 444.

Under the contract theory, plaintiff had, from the date of the breach, a period of six years in which to bring the action, MCLA 600.5807(8); MSA 27A.5807(8). Assuming the insurance to be in force, Wolverine's breach occurred on May 7, 1964 when it refused to defend the actions brought against plaintiff. The statute of limitations ran on May 7, 1970, some six months prior to the commencement of the case at bar. Therefore, even under plaintiff's contract theory, the action is barred.

The dispute between the parties raises the issue of whether the trial court could properly grant Wolverine's motion for accelerated judgment on summary judgment grounds. However, this issue need not be decided. Under GCR 1963, 820.1(7), the Court of Appeals can give any judgment and make

any order which ought to have been given or made in the trial court. Therefore, since plaintiff's action is barred by the statute of limitations, the court may properly grant Wolverine's motion for accelerated judgment based on the grounds that plaintiff's action is barred by the statute of limitations. Further, the court may treat Wolverine's motion for accelerated judgment as one for summary judgment according to *Sims v United Papermakers & Paperworkers AFL-CIO,* 26 Mich App 129; 182 NW2d 90 (1970). The terms of the insurance policy clearly show that at the time of the casualty 1016 Brockway had been deleted from the Wolverine policy. Therefore, plaintiff failed to state a claim upon which relief could be granted and a summary judgment is proper.

It is next argued by plaintiff that the trial court erred in refusing to permit plaintiff to amend her pleadings under GCR 1963, 117.3 to allege that defendants were estopped from raising exclusionary coverage defenses. Although we find this issue to be properly before this Court by reason of the resulting waiver by Camden following its failure to comply with GCR 1963, 804.2, we discern no merit in plaintiff's contention.

Plaintiff sought to amend her pleadings pursuant to GCR 1963, 117.3 which reads in part:

> "Each party shall be given opportunity to amend his pleadings as provided by Rule 118 unless the evidence then before the court shows amendment would not be justified."

Further, since plaintiff's motion to amend was made after summary judgment was entered against her, she could only amend her pleadings by leave of the court. 1 Honigman & Hawkins,

Michigan Court Rules Annotated (2d Ed), pp 413-414.

Plaintiff relies on only one Michigan case to support her claim of estoppel, *Meirthew v Last,* 376 Mich 33; 135 NW2d 353 (1965). In *Meirthew* the insurance company, acknowledging the existence of an insurance contract on the subject matter of the suit, undertook to defend the insured's lawsuit under a reservation of rights. The court held that the insurance company was estopped, after it lost the lawsuit, to assert exclusionary provisions of the insurance policy in order to disclaim liability. The court found that the insured was prejudiced by the failure of the insurance company to give reasonable notice of the exclusionary clause.

The doctrine of estoppel urged by plaintiff is not applicable to the situation presented in this case. This is not a case where the defendant insurance companies assert exclusionary clauses in the insurance contracts in order to disclaim liability. Rather, the insurance companies' position was that no policy coverage existed. Therefore, the court properly denied plaintiff's motion to amend her pleadings since the evidence before the court showed that the amendment would not be justified.

The final question raised by plaintiff is whether the trial court erred in granting Camden's motion for summary judgment. In deciding this question, we must bear in mind the policy here involved and that the policy was in force on the date of the occurrence of the casualty leading to the litigation. The policy provided for comprehensive personal liability insurance under section II.

The plaintiff maintains that the policy was in effect two policies. One policy insured against certain risks such as fire or windstorm occurring at or

in connection with 1006 Brockway. It is conceded by plaintiff that 1016 Brockway was not listed in the Camden policy as being insured premises. The other policy as claimed by plaintiff afforded to plaintiff the right to be defended by Camden in any personal action no matter where the casualty occurred.

Since it is conceded that 1016 Brockway is not an insured premise, the sole question remaining is whether Camden under the terms of the policy is bound to defend an action arising out of a casualty occurring at that address on November 6, 1963. Because of her concession as to the location of the premises described in the policy, plaintiff is here maintaining that the liability to defend attaches whether the casualty occurred at 1016 Brockway or elsewhere. She says that this liability attaches from the mere fact of the occurrence of a casualty for which she is sued.

Camden on the other hand maintains that its only obligation to defend arises when the casualty occurs at the insured premises.

The trial court in granting the motion based its decision on the terms of the policy. Although the plaintiff alleged the terms to be ambiguous, thus creating factual questions, the court found that there was no question of fact to be decided. We are thus faced with the necessity of deciding whether the trial court properly interpreted section II of the policy, which provision reads as follows:

"1. COVERAGE E—COMPREHENSIVE PERSONAL LIABILITY: (a) Liability: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, and the company shall defend any suit against the insured alleging such bodily injury or

property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient."

Both parties rely on *Zurich Insurance Co v Rombough,* 384 Mich 228; 180 NW2d 775 (1970), which simply held the policy in issue to be sufficiently ambiguous to require the company to defend. There the plaintiff was relying, as was the defendant in *City Poultry & Egg Company v Hawkeye Casualty Co,* 297 Mich 509; 298 NW 114 (1941), upon certain exclusionary clauses in the policy. The insurers were claiming in effect that, since they were not liable to pay the damages which might be assessed against their assured, no obligation to defend existed. In these cases, the policies provided that the insurer would defend any action against the insured seeking damages even if the action be groundless, false or fraudulent. In *Hawkeye, supra,* the Court found the obligation to defend to be clear and unequivocal, saying on page 512 as follows:

"The obligation to defend suits alleging injuries, sustained by persons, caused by accident and arising out of the use of the automobile, is clear and unequivocal. The insurance company could have limited its obligation to the defense of suits where, on the facts, the insurance company was liable to the insured in case of judgment. That, however, is not this case. Here, the undertaking to defend is absolute."

This language was quoted with approval in *Zurich, supra,* and the conclusion followed that any ambiguity must be construed against the insurer.

In the case at bar, Camden is not defending on some exclusionary clause but is maintaining that the policy itself does not require it to defend with

respect to any accident or casualty occurring at 1016 Brockway. Here Camden, unlike the insurers in *Zurich* or *Hawkeye,* limited its liability to defend through the use of the following language:

"and the company shall defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy."

We also note the following language on page 234 of *Zurich, supra:*

"Our decision does not extend the insurer's duty to defend without limits. The duty extends only to the defense of actions of the nature and kind covered by the policy."

In *State Mutual Cyclone Insurance Co v Abbott,* 52 Mich App 103; 216 NW2d 606 (1974), the Court in interpreting the precise language contained in the policy in the instant case concluded that by the use of such language the insurer did not have a duty to defend. With this we concur and find that Camden had only the obligation to defend in actions arising out of incidents occurring upon the insured premises located at 1006 Brockway.

The decision of the trial court is hereby affirmed on all issues raised by this appeal.

All concurred.

PEOPLE v JOHNSON

1. ASSAULT AND BATTERY—INTENT TO COMMIT MURDER—DISCHARGE OF FIREARMS—STATUTES.

The intentional discharge of a firearm at someone within range is an assault and the usual result and purpose of such an assault is death; the unjustified and unexcused intention to kill when committing an assault constitutes the crime of assault with intent to commit murder (MCLA 750.83).

2. CRIMINAL LAW—INTENT—INFERENCES—EVIDENCE.

A criminal's intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows.

3. ASSAULT AND BATTERY—MURDER—EVIDENCE—INTENT—INFERENCES—HOMICIDE—JURY—DISCHARGE OF FIREARMS.

A jury could properly infer the existence of intent to commit murder where the evidence adduced at trial was that the defendant leaned out a car window and fired a sawed-off shotgun at a uniformed policeman chasing him on foot; therefore a jury conviction of assault with intent to do great bodily harm less than murder was sustainable (MCLA 750.84).

Appeal from Recorder's Court of Detroit, George T. Ryan, J. Submitted Division 1 June 11, 1974, at Detroit. (Docket No. 16221.) Decided July 22, 1974. Leave to appeal denied, 392 Mich 800.

George Johnson, Jr., 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,*

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 40 Am Jur 2d, Homicide §§ 568–582.

[2] 21 Am Jur 2d, Criminal Law § 81.

Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *John L. Thompson, Jr.,* Assistant Prosecuting Attorney, for the people.

Carl Ziemba, for defendant on appeal.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ELLIOTT, J. As in a cops and robbers movie, a police car is hailed to follow robbers fleeing the wrong way on a one-way street. When the police car stalls, officers run after the robber's car. That vehicle collides with a parked car and bounces into a taxicab before defendant leans out a car window and fires a sawed-off shotgun at a uniformed policeman chasing him. Defendant is finally caught on a freeway with the gun and charged with assault with intent to commit murder, MCLA 750.83; MSA 28.278.

The intentional discharge of a firearm at someone within range is an assault. The usual result and purpose of such an assault is death. The unjustified and unexcused intention to kill when committing an assault constitutes the crime charged.

There would rarely be a conviction if a criminal's intent had to be confessed or proven directly by a witness. Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows.

From the evidence adduced at trial, the jury could have properly inferred the existence of intent to commit murder. Rather, the jury found the

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

included offense, assault with intent to do great bodily harm; and defendant received a moderate three-to-ten year sentence. The instruction permitting inference of intent was not error. No other error is claimed.

Affirmed.

All concurred.

PEOPLE v ELWELL

OPINION OF THE COURT

1. DRUGS AND NARCOTICS—CONTROLLED SUBSTANCES ACT—STATUTES—EFFECTIVE DATE.

The Controlled Substances Act of 1971 only reaches conduct which occurred subsequent to April 1, 1972, its effective date, and a defendant cannot be properly convicted under it of dispensing marijuana when the act for which he was prosecuted occurred on October 7, 1971 (MCLA 335.361[1], 335.361[5]).

2. DRUGS AND NARCOTICS—MARIJUANA—DEFINITIONS—CONSTITUTIONAL LAW.

The definition of narcotics in the former narcotic drug act, insofar as it included marijuana, was unconstitutional, and could not support a prosecution for dispensing marijuana under that act (MCLA 335.151, 335.152).

DISSENT BY BASHARA, J.

3. DRUGS AND NARCOTICS—MARIJUANA—DEFINITIONS—EQUAL PROTECTION.

The Supreme Court has previously considered and rejected the argument that equal protection of the laws was violated by the former narcotic drug act as it applied to the sale of marijuana (MCLA 335.152).

Appeal from Calhoun, Ronald M. Ryan, J. Submitted Division 3 March 7, 1974, at Grand Rapids. (Docket No. 16254.) Decided July 22, 1974.

Michael L. Elwell was convicted of dispensing

REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 34, 35 *et seq.*

[2, 3] 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 1–6.

marijuana. Defendant appeals. Reversed and defendant discharged.

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

Daudert & Barron, for defendant.

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

V. J. BRENNAN, J. Defendant, Michael L. Elwell, was arrested on October 7, 1971, and charged under the old narcotic drug act with dispensing marijuana contrary to the provisions of MCLA 335.152; MSA 18.1122 after he had supplied a Federal undercover narcotics officer with a quantity of marijuana. Trial was had before a judge sitting without a jury in the Calhoun County Circuit Court and defendant was found guilty. In his written statement, dated December 4, 1972, the trial judge stated that he found defendant guilty under the new Controlled Substances Act of dispensing marijuana contrary to the provisions of MCLA 335.341(1)(c); MSA 18.1070(41)(1)(c).

The provision under which the trial judge stated he found defendant guilty is part of the Controlled Substances Act of 1971, which took effect on April 1, 1972. The conduct for which defendant was tried, however, does not fall within the reach of that act. MCLA 335.361(5); MSA 18.1070(61)(5) provides:

"This act applies to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings and investigations which occur after its effective date."

This provision makes clear that the act only reaches conduct which occurred subsequent to April 1, 1972. The actions of defendant which constituted the offense for which he was tried, however, occurred on October 7, 1971, and he was tried in September of 1972, after *People v Sinclair,* 387 Mich 91; 194 NW2d 878 (1972), was decided.[1] It is, therefore, readily apparent that defendant could not properly be convicted under the new act.

We also hold, however, that defendant could not properly be convicted of violating MCLA 335.152; MSA 18.1122, the crime he was charged with committing. In *People v Sinclair, supra,* our Supreme Court held that the inclusion of marijuana within the definition of "narcotics" contained in MCLA 335.151; MSA 18.1121 was improper and contrary to the requirements of both the state and Federal Constitutions.[2] See *People v Griffin,* 39 Mich App 464; 198 NW2d 21 (1972). Although no single reason for such a conclusion commanded the support of a majority of the Court, it nevertheless was decided that the definition of narcotics, insofar as it included marijuana, was unconstitutional.[3] Since this same definition of narcotics is

[1] *People v Sinclair,* 387 Mich 91; 194 NW2d 878 (1972), was decided on March 9, 1972.

[2] Three Justices, T. M. KAVANAGH, C. J., and SWAINSON and WILLIAMS, JJ., found that the inclusion of marijuana within the statute's definition of narcotics constituted a violation of the equal protection clauses contained in Const 1963, art 1, § 2 and U.S. Const, Am XIV Justice T. G. KAVANAGH found that the statute violated the state and Federal Constitutions in that it constituted an impermissible intrusion on fundamental rights and an unwarranted interference with the right to possess and use private property.

[3] It has been suggested that *People v Sinclair, supra,* does not constitute binding precedent on this Court. Although the decisions of *People v Waxman,* 41 Mich App 277; 199 NW2d 884 (1972), and *People v Cannon,* 41 Mich App 85; 199 NW2d 657 (1972), tend to support such a claim, the summary reversal of *Waxman* by our Supreme Court (388 Mich 774) on the basis of *Sinclair* persuades us that reliance on this argument would be misplaced.

used in a prosecution under MCLA 335.152; MSA 18.1122 for dispensing marijuana, we can see no reason for arriving at a result different from that reached in *Sinclair*. The definition of narcotics essential to a prosecution for dispensing marijuana was found unconstitutional in *Sinclair*. Given the reasons advanced in *Sinclair* for such a determination, we fail to perceive how the inclusion of marijuana in the definition of narcotics could be constitutional for one crime and unconstitutional for another. *Sinclair* was not bottomed on any such distinction and the route taken by our Supreme Court in reaching its decision permits no such distinction. It has been suggested that our Supreme Court decided otherwise in *People v Lorentzen,* 387 Mich 167; 194 NW2d 827 (1972). We disagree. In *Lorentzen* our Supreme Court decided only that the minimum penalty provided for the sale of marijuana in MCLA 335.152; MSA 18.1122 violated the prohibition against cruel and unusual punishments contained in the Michigan and Federal constitutions.[4] The *Lorentzen* Court, for some unexplained reason, was unable to muster a majority to apply the reasoning of *Sinclair* to the facts of the case before it. This, however, in no way affects the central holding in *Sinclair*—that the inclusion of marijuana within the definition of narcotics contained in MCLA 335.151; MSA 18.1121 is unconstitutional.

We, therefore, reverse defendant's conviction and order him discharged since, for the two foregoing reasons, he cannot properly be proceeded against under either the old or new acts.

T. M. BURNS, P. J., concurred.

[4] Const 1963, art 1, § 16; US Const, Am VIII.

BASHARA, J. *(dissenting).* I would dissent on the basis that, contrary to the majority's conjecture, the Michigan Supreme Court has previously considered and rejected the same equal protection argument raised by defendant as it applies to the sale of marijuana. *People v Lorentzen,* 387 Mich 167, 171; 194 NW2d 827, 828 (1972).

DeMOTT v BATTLE CREEK GOODWILL INDUSTRIES
(SUPPLEMENTAL OPINION)

1. WORKMEN'S COMPENSATION—LOSS OF INDUSTRIAL USE—LEGS—EMPLOYMENT-RELATED INJURIES.

Permanent and total loss of industrial use of both legs exists where, *inter alia,* (1) an employment-related injury in one or both legs causes pain or other condition that prevents use of both legs in industry, or (2) the use of one or both legs, whether or not injured, triggers an employment-related injury or malady in any part of the body, including one or both legs, that causes pain or other condition that prevents use of both legs in industry.

2. WORKMEN'S COMPENSATION—AMPUTEES—LOSS OF INDUSTRIAL USE—LEGS—EMPLOYMENT-RELATED INJURIES—STATUTES.

A work-related injury which causes an amputee "leg-connected disabling pain associated primarily with the use of" the only leg she has, prevents the use of her "legs" in industry (MCLA 412.8a, 412.10[b][7]).

Appeal from Workmen's Compensation Appeal Board. Submitted Division 3 December 5, 1973, at Grand Rapids. (Docket No. 16413.) Decided July 22, 1974.

Claim by Vivian L. DeMott against Battle Creek Goodwill Industries, Wolverine Insurance Company, and the Second Injury Fund for workmen's compensation. Compensation for continuing disability awarded, but claim for total and permanent disability denied. Plaintiff appealed by leave granted. Remanded to Workmen's Compensation

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation § 288.

Appeal Board which found permanent and total loss of industrial use. Affirmed.

McCroskey, Libner, Van Leuven, Kortering, Cochrane & Brock, P. C. (by *James L. Waters),* for plaintiff.

Cholette, Perkins & Buchanan (by *Edward D. Wells),* for defendants.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *William J. Szykula* and *A. C. Stoddard,* Assistants Attorney General, for defendant Second Injury Fund.

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

SUPPLEMENTAL OPINION

HOLBROOK, J. We remanded the original determination of the Workmen's Compensation Appeal Board in this case for clarification of what legal standard the board applied in determining that plaintiff had not lost the industrial use of her legs. 51 Mich App 127, 132–133; 214 NW2d 554, 557 (1974). We retained jurisdiction.

Since our opinion was released, but prior to the board's opinion on remand, the case of *Burke v Ontonagon County Road Commission,* 391 Mich 103; 214 NW2d 797 (1974), was released, which set out a comprehensive standard for reviewing claims of loss of industrial use of legs. Additional time was granted the board in order that it might correlate the standard in *Burke* with the present case.

In the board's opinion on remand, two members

in a minority opinion concluded under *Burke* that plaintiff had not lost the industrial use of her legs.

The majority opinion concluded that:

"To the extent the Court of Appeals' remand order is directed to the minority decision previously entered we here cite the Supreme Court's history of the term 'industrial loss of use' set forth in the matter of *Miller v Sullivan Milk Products Co,* 385 Mich 659; 189 NW2d 304 (1971), with particular reference to Sections a, b and c, and the cases cited therein going as far back as 1918.

* * *

"The unrebutted factual proofs presented in this matter show that plaintiff herein had a left leg that was useful in industrial pursuits which enabled her to be gainfully employed until she suffered injury which arose out of and in the course of her employment on September 13, 1965. Unrebutted factual proofs show further that she had been totally disabled as a result of the injury she received to the lower left extremity from the date of the injury until the proofs were closed at the hearing nearly five years later. The prognosis of her recovery so that she could again be employed was almost nil. Plaintiff not only has established a presumption of industrial loss of use of the left leg for a period of 215 weeks, she has shown that such a fact did occur for a period greater than 215 weeks. How it can be said that she has not done so either in fact or law, defies logic. The liability of the employer should be limited to the specific loss of the left lower extremity, all as provided in Section 8a, Part 2, at the time injury occurred. Further, plaintiff should be awarded compensation beyond the period of 215 weeks pursuant to this same section and in accord with Section 9, Part 2 from the Second Injury Fund for a period not to exceed 800 weeks from the date of injury, and thereafter, as the facts may be at that time. Accounting between the fund and the employer to be accomplished by the parties in interest."

Our reading of *Burke, Miller,* and their predeces-

sors, cause us to conclude that the majority opinion on remand of the Workmen's Compensation Appeal Board applied the proper standard to this case. In *Burke, supra,* 391 Mich 114; 214 NW2d 802, Justice WILLIAMS wrote:

"There is permanent and total loss of industrial use of both legs where, *inter alia,*

"1. *An employment-related injury in one or both legs causes pain* or other condition that prevents use of both legs in industry.

"2. The *use of one or both legs,* whether or not injured, triggers an employment-related injury or malady in any part of the body, including one or both legs, that causes pain or other condition that prevents use of both legs in industry." (Emphasis supplied.)

In *Miller, supra,* 385 Mich 666; 189 NW2d 307, the Court wrote:

"In *Paulson v Muskegon Heights Tile Co,* 371 Mich 312; 123 NW2d 715 (1963), plaintiff suffered a punctured bladder and a fractured pelvis. The resulting tear in the urinary tract system permitted urine to escape into surrounding tissues. Due to constant urine drainage from the bladder through sinus tracts, a disability resulted from the presence of the fistulous sinus tract with pain resulting from any pressure being borne by either leg. This Court said (p 319; 123 NW2d 719):

" 'We construe the statute to mean that permanent and total loss of industrial use, insofar as the facts in this case are concerned, is that leg-connected disabling pain associated primarily with the use of the legs, which is so severe as to make use of the legs in industry practically impossible.' "

Defendant Goodwill Industries took plaintiff at the gate as they found her, *viz.,* an amputee. Due to a work-related injury she has "leg-connected disabling pain associated primarily with the use

of" the only leg she has. The employment-related injury has prevented the use of her "legs" in industry. The majority properly decided in accord with *Burke, Miller, Paulson,* MCLA 412.10(b)(7); MSA 17.160(b)(7), and MCLA 412.8a; MSA 17.158(1).

We affirm and retain no jurisdiction. Costs to plaintiff.

All concurred.

PEOPLE v GODSEY

OPINION OF THE COURT

1. HOMICIDE—DEFENSES—SELF-DEFENSE—RETREAT.

The general rule which requires retreat where practicable prior to utilization of deadly force in order to invoke a plea of self-defense to a charge of homicide is subject to the exception that deadly force may be utilized, with no retreat necessary, when one is assaulted in his dwelling.

2. HOMICIDE—DEFENSES—SELF-DEFENSE—RETREAT—INSTRUCTIONS TO JURY.

A defendant charged with homicide, who invoked the defense of self-defense, was not entitled to an instruction *sua sponte* from the trial court with respect to the rule that no retreat is necessary when the defendant is assaulted in his own dwelling where the homicide did not take place within the defendant's home but near the lot line separating the defendant's property from that of the deceased.

DISSENT BY R. L. SMITH, J.

3. HOMICIDE—DEFENSES—SELF-DEFENSE—RETREAT—INSTRUCTIONS TO JURY.

Failure to instruct the jury that no retreat was necessary where a defendant was assaulted in his dwelling in an instruction on self-defense in a trial for homicide was reversible error where the fatal blow was struck near the lot line dividing the property of the defendant from that of the deceased, and where the jury could have found from the evidence that the defendant was first assaulted on the front porch of his home.

REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur 2d, Homicide §§ 160, 162–169.
[2, 3] 40 Am Jur 2d, Homicide § 520.
[4] 40 Am Jur 2d, Homicide § 274.
[5] 58 Am Jur, Witnesses § 723.

4. HOMICIDE—EVIDENCE—PRIOR RELATIONS OF PARTIES—AGGRESSORS —INSTRUCTIONS TO JURY.

Evidence of a prior altercation between a defendant and the deceased, in a trial for homicide, was properly admitted, because a showing of the prior relations between the parties is permissible on the issue of who is the aggressor; a cautionary instruction would assist the jury in giving such evidence its proper perspective in relation to the circumstances.

5. CRIMINAL LAW—EVIDENCE—WITNESSES—IMPEACHMENT OF WITNESS —REBUTTAL WITNESSES—ATTEMPT TO INFLUENCE TESTIMONY.

Testimony by the mother of a witness that the defendant and his wife attempted to influence the testimony of the witness, which was offered in rebuttal to the wife's denial of such attempt, was properly admitted; the mother's testimony was not impeachment of a witness on a collateral issue because there was evidence of the defendant's direct involvement.

Appeal from Macomb, Frank E. Jeannette, J. Submitted Division 2 March 5, 1974, at Lansing. (Docket No. 16438.) Decided July 22, 1974.

Fred L. Godsey was convicted of manslaughter. 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 *Don L. Milbourn,* Assistant Prosecuting Attorney, for the people.

James R. McMaster, for defendant on appeal.

Before: MCGREGOR, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

MCGREGOR, P. J. In his dissenting opinion, Judge SMITH has accurately set forth the operative facts and, in our view, correctly resolved all issues raised by defendant save one. We will, therefore,

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

limit our discussion to the one point with respect to which our views differ from those expressed by Judge SMITH, to wit:

Whether the trial court erred in failing *sua sponte* to instruct the jury that the defendant was not obligated to retreat if in his own dwelling at the time of the fatal confrontation.

Viewing the facts most favorably to the defendant, the testimony adduced at trial indicates that defendant was in his home when he noticed the decedent was throwing rocks and pieces of concrete against his (defendant's) house and car; the defendant went to his front porch and was struck on the leg by a piece of concrete hurled by the decedent; that defendant came off the porch, grabbed a baseball bat and approached the decedent who was holding another piece of concrete at the time; and that defendant struck the decedent with the bat twice, whereupon the decedent fell to the ground. Although the decedent's body was found on his property, there was conflicting testimony presented regarding on which side of the lot line the fatal confrontation occurred.

The plea of self-defense is based on necessity; the law will condone a defendant's act of killing only where that act was, under the particular circumstances, the only available avenue by which the defendant could escape from a reasonably perceived threat of death or great bodily harm. As Justice Campbell noted in a leading case of *Pond v People,* 8 Mich 150, 173 (1860):

> "Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion."

The general rule requiring retreat where practicable prior to utilization of deadly force is thus

simply one facet of this overriding premise, that necessity is the basis of any plea of self-defense.

To this retreat requirement there has been engrafted a well established exception—which is beyond our power as an intermediate level appellate court to disturb—that a "man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life". *Pond v People, supra,* 177.

The justification for this exception to the general rule is difficult to pinpoint. Justice Cardozo, in *People v Tomlins,* 213 NY 240, 243; 107 NE 496, 497 (1914), observed:

> "It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home." See *People v McGrandy,* 9 Mich App 187; 156 NW2d 48; 26 ALR3d 1292 (1967).

Dean Prosser has suggested that the no retreat rule is based on " 'an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.' " Prosser, Torts (4th ed), § 19, p 111, quoting from Restatement of Torts, Tentative Draft, Commentary to § 84.

On a more pragmatic level it can be argued that one's own dwelling is presumptively the safest haven from attack and retreat therefrom would correspondingly increase the risk of harm and thus be impractical and unnecessary.

Whatever may be the present-day validity of these suggested justifications for the "no retreat in

dwelling" rule, the rule itself is well established in Michigan. Our only legitimate function, therefore, is to consider its applicability here in light of the facts outlined above.

Was the defendant in his dwelling at the time of the fatal assault? If so, the trial court was obliged to *sua sponte* instruct the jury with respect to the no retreat rule. *People v Paxton,* 47 Mich App 144; 209 NW2d 251 (1973). If not, the trial court's failure to so instruct was, of course, not reversible error.

Michigan case law provides no precise definition of "dwelling" for purposes of the no retreat rule. *Pond, supra,* is frequently cited for the proposition that the term "dwelling" embraces the curtilage of a house and correspondingly extends the area within which one is not obliged to retreat beyond the mere physical structure utilized as an abode. See, for example, 52 ALR2d 1458, Annotation, *Homicide: Extent of Premises Which May Be Defended Without Retreat Under Right of Self-Defense,* § 2, and 40 Am Jur 2d, *Homicide,* § 168, p 455, footnote 4. In our judgment, however, such a reading of Pond is unjustifiably expansive. In that case the killing took place in a net house, located on defendant's property, but approximately 36 feet from his actual home. The court noted:

> "A question was raised whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. It was near the other building, and was used not only for preserving the nets which were used in the ordinary occupation of Pond, as a fisherman, *but also as a permanent dormitory for his servants."* (Emphasis added.) 8 Mich 150, 181.

The fact that the net house was utilized "as a permanent dormitory for [the defendant's] servants," serves to undermine the argument that

Pond extends the right of self defense without retreat to any portion of the curtilage of a defendant's home. We read Pond as extending that right only to inhabited outbuildings located within the curtilage of the home. Indeed, in this day of small city and suburban residential lots, the contrary rule—that a man may utilize deadly force without retreat whenever attacked in the curtilage of his home—would effectively limit the applicability of the prevailing retreat requirement to situations in which the defendant was on another's property. Such a result, to us, is both an unwarranted extension of Michigan law and inconsistent with the high value placed on human life by any enlightened society.

In this case, all the testimony adduced at trial indicated that the fatal blows were inflicted by the defendant on or near the lot line separating his property from that of the deceased. Further, the police officer investigating the homicide testified that the decedent's body was found one foot on his side of the lot line. In these circumstances and in light of our discussion above, we are of the opinion that the defendant was not, as a matter of law, in his dwelling at the time of the killing and, therefore, the trial court did not err in failing to instruct the jury with respect to the "no retreat in dwelling" rule.

Affirmed.

R. B. BURNS, J., concurred.

SMITH, J. *(dissenting)* Fred L. Godsey was convicted by a jury of manslaughter having been charged with the offense of second-degree murder. On December 1, 1971, defendant was sentenced to a 5 to 15 year term in the state prison, pursuant to MCLA 750.321; MSA 28.553. A motion for a

new trial was denied and defendant appeals. I would reverse and remand for a new trial.

William Duncan and defendant were next door neighbors. They were not friendly neighbors, there having been previous arguments over the Godsey dog, their children, and about throwing stones from one lawn to the other. Testimony was given that about a year previous to the altercation leading to the death of Mr. Duncan, defendant had pulled a switch-blade knife from his pocket and offered to fight the deceased.

On July 12, 1970, an altercation arose between deceased and defendant. While many facts were in dispute we recite only those facts which bear upon the disputed issues.

Shortly before 7 o'clock on the evening in question deceased was clearing his lawn of debris which had been left there the day before when defendant had a new driveway installed between their two houses. One version was that deceased was putting the debris in a trash can in his garage. Another version was that deceased was throwing the debris against defendant's car and house.

In any event defendant, who had been inside his house, appeared on his front porch where he claims he was struck on the leg by a piece of cement. At this point defendant left his front porch and with a baseball bat in hand approached deceased. Defendant claims deceased was holding a large piece of cement in his hand. Defendant struck deceased on the shoulder and when deceased did not release the cement he struck the deceased on the head. The latter blow resulted in death four days later.

In his opening statement defendant informed the jury that the blow was delivered in self-de-

fense. The court charged the jury in the following manner:

"It must also appear that * * * there was no way open for him to retreat to a place of safety and his only safety lay in striking the alleged aggressor to repel the attack."

and,

"Before a man can avail himself of this defense you, ladies and gentlemen of the jury, must be satisfied that he did all he could do to avoid the conflict."

The jury requested additional instructions and the trial court responded:

"It must also appear from the circumstances that were apparent to him at the time that he was in imminent danger of loosing (sic) his life or suffering some grievous bodily injury and there was no way open for him to retreat to a place of safety, and his only safety lay in striking the aggressor to repel the attack."

No objections were made by defendant to these instructions. Defendant now contends that the court should have instructed the jury that defendant was not obliged to retreat if assaulted in his own home.

In dealing with this issue I would follow the holding in *People v Paxton,* 47 Mich App 144; 209 NW2d 251 (1973), wherein the court held that a trial court erred in failing, *sua sponte,* to instruct the jury that a defendant had no duty to retreat within his own home, in order to establish the defense of self-defense to a charge of manslaughter.

I do not fail to note the case of *People v Broom,* 50 Mich App 337; 213 NW2d 247 (1973), wherein the majority held that there was no miscarriage of

justice in the court's instructions when read as a whole. The trial court in *Broom* instructed the jury:

" 'The other man was not a trespasser though; the deceased; he had been given permission to be there.' "

I agree with the dissenting opinion in *Broom* that *People v McGrandy,* 9 Mich App 187, 190; 156 NW2d 48, 49 (1967), establishes that:

" 'A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.' "

In *McGrandy* the altercation was between husband and wife

In most cases the failure to give an instruction, even an important instruction, will not be considered reversible error if such an instruction has not been requested. There are a few exceptions to this general rule. For example it is necessary to instruct on all elements of an offense. *People v Miller,* 35 Mich App 627; 192 NW2d 517 (1971), *People v Crook,* 28 Mich App 490; 184 NW2d 459 (1970). I find the situation in this case to be much akin to the situation where an element of an offense has been omitted from the instructions. In this case the defendant's assertion of innocence rested solely on a claim of self-defense, and the trial court's instructions effectively foreclosed the consideration of that defense. Judge Cardozo considered a similar case in *People v Tomlins,* 213 NY 240, 245–246; 107 NE 496, 498 (1914), saying:

"The charge that it was his duty to escape, if he could, was, therefore, equivalent to an instruction to the jury that the defendant had failed to justify the

homicide on the ground of self-defense. It was thus a direction to find the defendant guilty, at least of some degree of crime. *(People v Walker,* 198 NY 329, 334; 91 NE 806 [1910].) The situation is the same in effect as if the issue of self-defense had not been submitted to the jury at all. It was submitted in form, but not in substance, for the submission was coupled with instructions that predetermined the answer. It is the defendant's right to have the question of his guilt determined by the verdict of a jury rather than by the judgment of this court; and whatever our own opinion of his guilt may be, we cannot say, until it has been passed upon by a jury, that justice has been done."

I note that the jury could have found from the evidence that the first assault on defendant was on his front porch as he was emerging from his home. In *People v Lilly,* 38 Mich 270, 276 (1878), the Court reversed a manslaughter conviction where defendant was defending himself in his yard and at his own front door. There the Court held:

"The jury should have been instructed in effect that if they were satisfied that Lilly being *at his own house* had reason to believe and did believe from Kreiger's previous and present language, manner and actions, and what had already taken place, that it was necessary to inflict the wounds he did inflict upon Kreiger to save his own life or to protect himself from danger of great bodily harm, he was excused." (Emphasis supplied)

I would find reversible error in the failure of the court to instruct on the no retreat element in the self-defense instruction as it applied to the disputed facts in the case before us.

Defendant contends that it was error to allow evidence to be produced for jury consideration of a prior altercation between defendant and deceased. I note that the altercation referred to was alleged to have occurred the previous spring. That would

put it about nine months previous to the fatal altercation of July 12, 1970. The wife of the deceased testified that on a Sunday, the previous spring, defendant, in her presence, asked deceased to come out of his garage and fight him. At this occasion the witness claimed defendant took a switch-blade knife from his pocket and showed it to deceased. When deceased closed the garage door there were no further developments.

On the issue of who is the aggressor the law clearly makes it permissible to show the prior relations between the parties. In 3 Gillespie, Michigan Criminal Law and Procedure, (2d ed), § 1707, p 2069, it is stated:

> "The previous relations of the defendant and the deceased may be shown at the trial, and it is not error to admit testimony of ill-feelings between the accused and his victim, extending back two years before his death, although the showing might be remote."

A cautionary instruction will assist the jury in giving such evidence its proper perspective in relation to the circumstances. I find no error here.

Finally I find no error in the admission of testimony that defendant's wife had attempted to influence the testimony of witness Rodney Kozyra. Defendant's wife took Rodney to visit defendant while the latter was in jail. Rodney testified that on this occasion the defendant told him he would pay him if he testified for him at his trial. When defendant's wife was asked whether she and defendant had offered to pay $35 for Rodney's testimony she denied it. Mrs. Kozyra, Rodney's mother, called in rebuttal of this testimony, stated that defendant's wife had made such an offer in her presence.

Under these circumstances the testimony offered

in rebuttal was not impeachment of a witness on a collateral matter. There was evidence of defendant's direct involvement. It would appear that the cautionary instructions given by the court to the effect that this impeachment testimony only went to the credibility of the witness (defendant's wife) was more favorable than defendant was entitled to.

I would reverse and remand for a new trial.

TALLY v CITY OF DETROIT

1. MUNICIPAL CORPORATIONS—INTOXICATING LIQUORS—REGULATIONS—HOME-RULE CITIES—POLICE POWER—LIQUOR CONTROL COMMISSION.

A home-rule city has the power to regulate traffic in the liquor business within its own bounds through the exercise of its police powers subject to the authority of the Liquor Control Commission only when a conflict arises (MCLA 117.4j).

2. CONSTITUTIONAL LAW—POLICE POWER—PUBLIC WELFARE.

The legitimacy of any exercise of police power depends upon the existence of a real and substantial relationship between the exercise of those powers in a particular manner in a given case and the public health, safety, morals, or the general welfare.

3. MUNICIPAL CORPORATIONS—ORDINANCES—PRESUMPTIONS—CONSTITUTIONAL LAW—BURDEN OF PROOF.

A municipal ordinance is presumed to be constitutionally valid and the party claiming that an ordinance is unreasonable has the burden of so proving.

REFERENCES FOR POINTS IN HEADNOTES

[1] 45 Am Jur 2d, Intoxicating Liquors §§ 23, 24, 102.
Operation and effect, in dry territory, of general state statute making sale or possession for sale of intoxicating liquor, without a license, an offense. 8 ALR2d 750.
Transportation of liquor within state some countries or districts of which are "wet" and others "dry". 134 ALR 424.

[2] 16 Am Jur 2d, Constitutional Law §§ 268, 269, 287, 305–308.

[3] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 355, 381–385.

[4, 7, 10, 11] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 362–366, 381, 382.

[5, 8] 16 Am Jur 2d, Constitutional Law §§ 306, 310.
56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 222.

[6, 8] 16 Am Jur 2d, Constitutional Law §§ 309, 314, 321, 324.

[9, 12] 16 Am Jur 2d, Constitutional Law §§ 316, 323.
56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 367, 368.

4. MUNICIPAL CORPORATIONS—POLICE POWER—ORDINANCES—REASONABLENESS.

   Exercise of police power through the enactment of a municipal ordinance must be reasonable in two respects: first, it must be for the public welfare, and, second, the measures adopted must have relation to the purpose sought to be accomplished.

5. MUNICIPAL CORPORATIONS—POLICE POWER—ILLEGAL ACTIVITIES—STRICT REGULATION.

   The protection of the public from illegal activity is a proper purpose for the exercise of police power and a business which is susceptible to the opportunity of criminal activity is a fit subject for strict regulation.

6. MUNICIPAL CORPORATIONS—TOPLESS GO-GO BARS—POLICE POWER—PUBLIC WELFARE.

   The operation of a topless go-go bar is a business so far affecting the public health, morals, and welfare as to authorize its regulation and licensing by a city (Detroit Municipal Code, ch 5, art 4).

7. MUNICIPAL CORPORATIONS—POLICE POWER—REASONABLENESS—TOPLESS GO-GO BARS—APPEAL AND ERROR.

   A requirement that persons desiring to operate a cabaret must first obtain a license and that employees of such establishments who desire to dance topless must first obtain an identification card from the city police was found by a city's legislative body to be reasonably suited to the accomplishment of an objective within the city's police power, and such a determination should not easily be disturbed (Detroit Municipal Code, ch 5, art 4).

8. MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—TOPLESS GO-GO BARS—FREEDOM OF SPEECH—PUBLIC WELFARE.

   A municipal ordinance which regulates topless go-go dancers does not violate the First Amendment rights of such performers or their employers because a city, as agent of the state, has, under the Twenty-First Amendment, broad authority over public health, welfare, and morals, and because forms of expression which are in fact public acts are susceptible of greater regulation than traditional speech and writings (Detroit Municipal Code, ch 5, art 4).

9. MUNICIPAL CORPORATIONS—ORDINANCES—CABARETS—LICENSES—CONSTITUTIONAL LAW—VAGUENESS—DISCRETION.

   A municipal ordinance which allows the mayor to deny an applicant a license to operate a cabaret upon proof of an arrest and conviction is not unconstitutionally vague or overbroad and

does not allow the exercise of unlimited discretion (Detroit Municipal Code, ch 5, art 4).

10. MUNICIPAL CORPORATIONS—ORDINANCES—CONSTITUTIONAL LAW—EQUAL PROTECTION—RATIONAL BASIS.

A classification established by ordinance which has a rational basis in fact does not amount to discrimination or arbitrary classification such as to invalidate the ordinance or constitute it class legislation.

11. MUNICIPAL CORPORATIONS—ORDINANCES—CONSTITUTIONAL LAW—EQUAL PROTECTION—TOPLESS GO-GO BARS.

Legislation is not unconstitutional because it is legislation of a particular kind or character so long as the law operates equally upon those within the particular class; therefore a municipal ordinance which requires all female entertainers who desire to dance topless to obtain an identification card, and which prohibits them from acting as waitresses, is not arbitrary or unreasonable or in violation of the equal protection clause (Detroit Municipal Code, ch 5, art 4).

12. MUNICIPAL CORPORATIONS—ORDINANCES—LICENSES—CONSTITUTIONAL LAW—STANDARDS.

A municipal ordinance which permitted the mayor to refuse to issue a cabaret license for what the mayor might determine to be "good, and satisfactory" evidence that the applicant had violated an ordinance or statute was properly modified by a trial court which allowed the mayor to deny a license only upon proof of arrest and conviction because a more definite standard was required to uphold the ordinance as constitutional (Detroit Municipal Code, ch 5, art 4).

Appeal from Wayne, James N. Canham, J. Submitted Division 1 May 7, 1974, at Detroit. (Docket No. 16490.) Decided July 22, 1974. Leave to appeal applied for.

Complaint by Carol Tally and Jads, Inc., against the City of Detroit, John F. Nichols, Commissioner of the Detroit Police Department, and Michael M. Glusac, Corporation Counsel of the City of Detroit, to have certain amendments of the Detroit City Code pertaining to the regulation of topless go-go dancers declared unconstitutional. The trial court

modified the ordinance, and upheld its constitutionality. Plaintiffs appeal; defendants cross appeal. Affirmed.

Hampton, Snavely & Ranno, for plaintiffs.

Michael M. Glusac, Corporation Counsel, and *Maureen P. Reilly and John E. Cross,* Assistants Corporation Counsel, for defendants.

Before: BASHARA, P. J., and McGREGOR and VAN VALKENBURG,* JJ.

McGREGOR, J. Before us are topless go-go dancers and a city ordinance attempting to regulate them and their employers. *Jads, Inc v Detroit,* 41 Mich App 693, 699; 200 NW2d 715; decided July 3, 1972, involved the same institutions. At that time Judge (now Justice) LEVIN opined that:

"On remand a declaratory judgment shall be entered granting Jads a judgment declaring that the ordinances in question do not prohibit topless go-go dancing."

In the instant case, the plaintiffs brought an action to have certain amendments of the Detroit City Code pertaining to the regulation of topless go-go dancers declared unconstitutional. The trial court heard the evidence and entered a written opinion in which he upheld the ordinance provisions in question, with one alteration. Following entry of judgment consistent with the opinion, this appeal was taken.

On November 2, 1972, the defendant City of Detroit amended chapter 5, art 4 of the Municipal Code of the City of Detroit. This amended ordinance redefined the term "cabaret" and required

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

such establishments to obtain a license which could be denied or revoked by the mayor for violation of certain ordinances. The amendments further prevented entertainers from performing a secondary activity, such as waiting tables, and required all such entertainers to obtain an identification card from the Detroit Police Department.

Plaintiffs, Jads, Inc., operators of an establishment which came under the amended ordinance, and Carol Tally, an entertainer at this establishment, brought an action seeking declaratory relief under GCR 1963, 521[1] to have the amended sections declared unconstitutional on a number of grounds, primarily as a violation of the First and Fourteenth Amendments. The trial court determined that a violation of an ordinance which would justify denial or revocation of a license must be evidenced by an arrest and conviction. On February 6, 1973, judgment was entered. Plaintiffs filed an appeal, and the defendant municipality filed a cross appeal based upon the trial court's modification of the involved ordinance.

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[1] GCR 1963, 521. Declaratory Judgments.

".1 Power to Make. In a case of actual controversy within its jurisdiction, any circuit court of this state may declare the rights and other legal relations of any interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

".2 Procedure. The procedure for obtaining declaratory relief pursuant to this rule shall be in accordance with these rules and the right to trial by jury may be demanded under the circumstances and in the manner provided in the constitution, statutes, and court rules of the State of Michigan.

".3 Other Adequate Remedy. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

".4 Hearing. The court may order a speedy hearing of an action for declaratory relief and may advance it on the calendar.

".5 Effect; Review. Declaratory judgments shall have the force and effect of final judgments and shall be reviewable as final judgments.

".6 Other Relief. Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by the declaratory judgment."

This Court is asked to determine whether the City of Detroit had the authority to enact certain amendments of chapter 5, art 4 of its municipal code pertaining to the regulation of topless go-go dancers, and whether these amendments are in conflict with state law.

In a written opinion, the trial court found that the Michigan Liquor Control Commission, through its administrative rules, particularly 1954 AACS, R 436.14, has delegated to the City of Detroit the authority to pass upon licensees.

The City of Detroit was not exercising any power delegated to it through the Michigan Liquor Control Commission; rather, it was operating under the authority conferred upon it through the home rule act. The ordinance in question was enacted pursuant to the charter provisions authorized by MCLA 117.4j; MSA 5.2083. In addition, we note that home rule cities may provide "[f]or the regulation of trades, occupations and amusements within its boundaries, not inconsistent with state and Federal laws, and for the prohibition of such trades, occupations and amusements as are detrimental to the health, morals or welfare of its inhabitants". MCLA 117.4i; MSA 5.2082. The City of Detroit exercised its authority by an appropriate charter provision: Title 3, ch 1, § 12(n).

In view of these provisions, it is not necessary for the city to rely upon any authority delegated to it through the Michigan Liquor Control Commission.

"The point here made is that under our constitution and our home-rule cities act, cities may exercise substantially greater powers essential to local self-government than they previously were allowed to exercise." *Dooley v Detroit,* 370 Mich 194, 210; 121 NW2d 724 (1963).

Under the act, cities derive their power from the state and when they exercise state power they are acting as agents of the state. *Hudson Motor Car Co v Detroit,* 282 Mich 69, 78; 275 NW 770 (1937). The city is given a general grant of rights and power subject to certain restrictions. *City of Pontiac v Ducharme,* 278 Mich 474, 480; 270 NW 754 (1936).

Under the provisions of the home rule act, the City of Detroit acted under its general police power, which includes authority from the state to regulate liquor. "Except as limited by the constitution or by statute, the police power of Detroit as a home rule city is of the same general scope and nature as that of the state." *People v Sell,* 310 Mich 305, 315; 17 NW2d 193 (1945). Due to the nature of the liquor business, the City of Detroit has the power to regulate the traffic within its own bounds through the exercise of its police powers, subject to the authority of the Liquor Control Commission only when a conflict arises. *Johnson v Liquor Control Commission,* 266 Mich 682; 254 NW 557 (1934).

Next, plaintiffs argue that the trial court erred in finding that the facility operated by the plaintiff corporation is a cabaret within the definition of § 5-4-1 and, therefore, subject to the licensing provisions set forth in chapter 5, art 4 of the Detroit City Code.

The trial court found that the establishment operated by the plaintiff corporation was a cabaret within the meaning of the definition of the Detroit City Ordinance, to wit: "any place wherein food" and alcoholic beverages by the glass are sold, and which provides entertainment. The manager of the plaintiff establishment testified that food was sold in the lounge and that it was licensed to serve food as well as alcoholic beverages. The trial court's holding in this regard is correct.

Plaintiffs next question whether the provisions of the recent amendments of the Detroit City Code pertaining to the regulation of topless go-go dancers bear a reasonable relationship to the public health, safety, or welfare, thereby constituting a valid exercise of the police power.

The trial court found that this ordinance was meant to control the manner and circumstances under which alcoholic beverages were dispensed and, as such, was reasonably related to the public health, welfare, and morals so as to constitute a valid exercise of the general police power. The court determined that the license and identification card requirements were reasonably related to a valid governmental purpose—protection of the public from illegal activity.

The legitimacy of any exercise of police power depends upon "the existence of a real and substantial relationship between the exercise of those powers in a particular manner in a given case and the public health, safety, morals, or the general welfare". *Grocers Dairy Co v Dept of Agriculture Director,* 377 Mich 71, 76; 138 NW2d 767 (1966). An ordinance will be presumed to be constitutionally valid. *Watnick v Detroit,* 365 Mich 600, 606; 113 NW2d 876 (1962). The party claiming that an ordinance is unreasonable has the burden of so proving. *Michigan Towing Association, Inc v Detroit,* 370 Mich 440, 455; 122 NW2d 709 (1963).

Exercise of police power through the enactment of a municipal ordinance must be reasonable in two respects:

> "There are two very important essentials to a reasonable and proper exercise of police power. They are *first,* that it must be for the public welfare, and *second,* that the measures adopted must have relation to the purpose sought to be accomplished." *Parkes v Judge of*

Recorder's Court, 236 Mich 460, 466–467; 210 NW 492 (1926).

It cannot be doubted that the protection of the public from illegal activity is a proper purpose for the exercise of police power. A business which is susceptible to the opportunity for criminal activity "is a fit subject for strict regulation". *Rassner v Federal Collateral Society, Inc,* 299 Mich 206, 224; 300 NW 45 (1941). The operation of a topless go-go bar is "a business so far affecting the public interest as to authorize the regulation and the licensing of the same * * * on the ground that the business so far affects the public health, morals and welfare as to warrant it". *People v Harley,* 230 Mich 676, 681; 203 NW 531 (1925).

Since this type of business activity directly affects the public welfare, the City of Detroit has the authority to regulate it.

"Having the power to regulate, the only question which remains to be determined is whether the regulation in this ordinance is reasonable." *Knack v Velick Scrap Iron & Machinery Co,* 219 Mich 573, 575; 189 NW 54 (1922).

The propriety of the relationship between the character of the remedy and the public need should be determined by the legislative body, and that determination should not easily be disturbed. *Carolene Products Co v Thomson,* 276 Mich 172, 178; 267 NW 608 (1936). The ordinance in question, which requires that persons desiring to operate a cabaret must first obtain a license and that employees of such establishment who desire to dance topless must first obtain an identification card has been found by the legislative body of the City of Detroit to be reasonably suited to the accomplishment of an objective within the city's

police power. A requirement that private employment agencies be licensed was held to be a proper exercise of the police power in *Brazee v Michigan,* 241 US 340; 36 S Ct 561; 60 L Ed 1034 (1916). A Detroit ordinance requiring the licensing of television service dealers was upheld in *People v Murphy,* 364 Mich 363; 110 NW2d 805 (1961).

Plaintiffs next contend that the trial court erred by ruling that the provisions of the recent amendments of the Detroit City Code pertaining to the regulation of topless go-go dancers do not violate the First Amendment rights of such performers or their employers.

The trial court found that the regulations fell within the broad purview of the Twenty-First Amendment, as interpreted by the Supreme Court in *California v LaRue,* 409 US 109; 93 S Ct 390; 34 L Ed 2d 342 (1972), and held that the corporate plaintiff "did not produce or promote an activity protected by the First Amendment". This decision was followed in *Paladino v City of Omaha,* 471 F2d 812, 814 (CA 8, 1972).

> "We understand the rule in *LaRue* to be that under the twenty-first amendment, the state (or city) may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licensed to sell liquor by the drink."

In support of their argument that the First Amendment precludes regulation of topless dancing, the plaintiffs have cited no Michigan cases, relying almost exclusively on a California case, *Perrine v Los Angeles Municipal Court,* 5 Cal 3d 656; 97 Cal Rptr 320; 488 P2d 648 (1971). This case is not in point, as it involved a license to operate a book store.

The United States Supreme Court's opinion in

LaRue, supra, has been quoted extensively by the trial court. It should be noted that the facts in *LaRue* are very similar to those in the instant case. The California Department of Alcoholic Beverage Control promulgated rules regulating the type of entertainment which could be presented in establishments that it licensed. A three-judge district court panel held that these regulations were invalid. The Supreme Court reversed, pointing out that the Twenty-First Amendment conferred upon the states broad authority over public health, welfare, and morals. The Court also noted that forms of expression which are in fact public acts are susceptible of greater state regulation than traditional speech or writings. Justice Rehnquist, author of the majority opinion, stated:

"The department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-First Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution."

In view of this decision, it cannot be said that the ordinance in question is invalid as in violation of the plaintiffs' constitutional rights.

Another contention of plaintiffs is that the trial court erred in ruling that the provisions of the recent amendments of the Detroit City Code which pertain to the regulation of topless go-go dancers include reasonably definite standards, so as not to be vague or overbroad, and not requiring the exercise of unlimited discretion for their enforcement.

Plaintiffs' argument is concerned with the

vagueness and overbreadth of the ordinance insofar as it permits the licensing authority to exercise unlimited discretion. Under this ordinance, the mayor is not allowed to deny an applicant a license unless proof is submitted to him that the applicant violated either an ordinance or a statute. The trial court modified this provision to allow the mayor to deny a license only upon proof of an arrest and conviction. Instances in which licensing provisions have been struck down as unconstitutional because they lend themselves to the exercise of unlimited discretion in the absence of sufficient standards appear to be limited to cases in which no attempt has been made objectively to establish ascertainable standards. The ordinance is not unconstitutionally vague or overbroad and it does not allow the exercise of unlimited discretion. *Johnson v Commissioner of Agriculture,* 314 Mich 548, 564–565; 22 NW2d 893 (1946); *People v Riksen,* 284 Mich 284; 279 NW 513 (1938); *Prawdzik v Grand Rapids,* 313 Mich 376; 21 NW2d 168 (1946).

Plaintiffs also argue that the provisions of recent amendments of the Detroit City Code pertaining to the regulation of topless go-go dancers are unreasonable so as to deny equal protection of the law.

Michigan cases have long recognized a principle that a classification established by ordinance which has a rational basis in fact "does not amount to discrimination or arbitrary classification such as to invalidate the ordinance or constitute it class legislation". *Ritter v City of Pontiac,* 276 Mich 416, 422; 267 NW 641 (1936). The basis for the classification will be presumed to be reasonable in the absence of clear evidence to the contrary. In the instant case, not only is evidence to the contrary lacking, but there is clear evidence supporting the rationality of the classification.

People's Appliance, Inc v City of Flint, 358 Mich 34; 99 NW2d 522 (1959), quoting from *People v DeRose,* 230 Mich 180, 184; 203 NW 95 (1925). The special treatment afforded topless go-go dancers is designed to minimize opportunity for violation of other penal statutes and ordinances.

"It is not in our view that kind of classification which does not bear a reasonable relationship to the object of the legislation." *Alexander v Detroit,* 45 Mich App 7, 14; 205 NW2d 819 (1973), and Appendix.

In the instant case, the ordinance operates equally upon all those within the particular class. All female entertainers who desire to dance topless are required to obtain an identification card, and they are prohibited from activities as waitresses. "This Court has many times held that legislation is not unconstitutional because it is legislation of a particular kind or character * * * so long as the law operates equally upon those within the particular class. * * * This amendment includes all within the respective classes; consequently, it is not arbitrary or unreasonable." *Burgess v Detroit,* 359 Mich 269, 280; 102 NW2d 483 (1960).

The evidence presented in this case was not sufficient to establish that the ordinance in question was unconstitutional as a violation of the equal protection clause. "In the presence of the presumption of constitutionality and in the absence of contrary proof, we cannot say from this record that the classification was so patently unreasonable and arbitrary as to be unconstitutional and void." *Patchak v Lansing Twp,* 361 Mich 489, 498; 105 NW2d 406 (1960).

Plaintiffs further contend that the trial court erred in ruling that a provision of the recent amendments to the Detroit City Code pertaining to the regulation of topless go-go dancers and their employers which allows the mayor to refuse to issue or to revoke a license upon a showing of a "violation" of certain related statutes or ordinances constitutes an invalid exercise of the police power, and that the section must be modified to require a showing of an arrest and conviction.

The trial court found that this section of the ordinance (as originally written, it refers merely to a "violation") was not a reasonable exercise of the police power because this standard was too vague.

In *Eastwood Park Amusement Co v Mayor of East Detroit,* 325 Mich 60; 38 NW2d 77 (1949), the court below held that part of the ordinance allowing the mayor to revoke an amusement park license "for good satisfactory reasons" was unconstitutional. However, the balance of the ordinance was sustained. Our Supreme Court affirmed this determination because the section in question allowed the revocation of a license without a sufficient showing of satisfactory reasons for the action and thereby failed to establish proper standards.

In the instant case, the degree of evidence of a violation rests with the mayor's determination of what is "good and satisfactory." The trial court properly ruled that a more definite standard was required in order to uphold the ordinance. His determination should not be disturbed.

Other issues raised by the parties have been considered and are not material to the results.

Judgment affirmed. No costs to either party, a public question being involved.

All concurred.

PEOPLE v WHITE

1. SEARCHES AND SEIZURES—REASONABLE SEARCH.

A search by police of defendant's premises conducted without a search warrant was reasonable in light of the circumstances where the police had been fired upon from the apartment, the defendant had surrendered after a lengthy siege and was arrested outside the apartment, the search was simultaneous with the arrest, the police were unsure whether there were other assailants in the apartment, and they wished to preserve evidence and search for weapons.

2. SEARCHES AND SEIZURES—EVIDENCE—PLAIN VIEW.

Police officers conducting a lawful search had the right to seize objects coming into plain view; thus a rifle which was found in a defendant's apartment, concededly belonging to the defendant and used in a shooting, was properly admitted into evidence, as were cartridges from the rifle found at the site of an earlier shooting.

3. CRIMINAL LAW—APPEAL AND ERROR—PRESERVING QUESTION—PROSECUTOR'S STATEMENTS.

Inflammatory and prejudicial remarks made by the prosecutor in his closing statement do not require reversal where any error involved could have been cured by objection or by instructions

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REFERENCES FOR POINTS IN HEADNOTES

[1] 68 Am Jur 2d, Searches and Seizures §§ 37, 92–98.

Modern status of rule as to validity of nonconsensual 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.

Constitutionality of searching premises without search warrant as incident to valid arrest—Supreme Court cases. 23 L Ed 2d 966.

[2] 68 Am Jur 2d, Searches and Seizures §§ 23, 88, 94.

Search and seizure: Observation of objects in "plain view"—Supreme Court cases. 29 L Ed 2d 1067.

[3] 5 Am Jur 2d, Appeal and Error § 545 *et seq.*

[4] 53 Am Jur, Trial §§ 797, 800, 802.

[5] 53 Am Jur, Trial § 647.

[6–8] 21 Am Jur 2d, Criminal Law §§ 241, 242, 245–248.

from the court and no objections nor requests for precautionary instructions were made.

4. CRIMINAL LAW—INSTRUCTIONS TO JURY—LESSER OFFENSES—INCLUDED OFFENSES.

Failure to instruct a jury on lesser and included offenses was not reversible error where such an instruction was suggested by the court and defendant's attorney requested that it not be given.

5. CRIMINAL LAW—INSTRUCTIONS TO JURY—AIDING AND ABETTING.

An instruction that a defendant could be convicted of aiding and abetting a shooting was proper where the defendant's gun was used in the shooting, the shots were fired from his apartment, and he remained in the apartment after the surrender of a codefendant, and thus there was sufficient circumstantial evidence to raise a jury question of his guilt as an accomplice of the codefendant.

6. CRIMINAL LAW—CONSTITUTIONAL LAW—SPEEDY TRIAL.

Factors to be weighed in a test of the constitutionality of a trial held after a long delay include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) any prejudice to the defendant.

7. CRIMINAL LAW—SPEEDY TRIAL.

The right to a speedy trial was designed to (1) prevent oppressive pretrial incarceration; (2) minimize the anxiety and concern of the accused; and (3) limit the possibility that the defense will be impaired.

8. CRIMINAL LAW—SPEEDY TRIAL—PREJUDICE.

A defendant was not prejudiced by a delay of 13 months between arrest and trial where for much of the time he was without an attorney because of the court's difficulty in obtaining and retaining an attorney for him, much time was consumed by motions and pretrial procedures both by defendant and by the people, the people were prepared for trial at all times with the exception of one conflict with another case in which both prosecutor and defense counsel were involved, and there was no indication that the defense was in any way impaired by the delay.

Appeal from Recorder's Court of Detroit, John R. Murphy, J. Submitted Division 1 January 15,

1974, at Detroit. (Docket Nos. 16589–16591.) Decided July 22, 1974.

Lawrence White, Jr., was convicted of assault with intent to commit 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.

Dennis H. Benson, Assistant State Appellate Defender, for defendant.

Before: V. J. BRENNAN, P. J., and BRONSON and CARLAND,* JJ.

V. J. BRENNAN, P. J. Defendant Lawrence White, Jr., and Michael Anderson were charged with three counts of assault with intent to murder, MCLA 750.83; MSA 28.278. Anderson pled guilty to all three counts. Defendant was tried and convicted by a jury likewise on all three counts. On November 22, 1971, he was sentenced to life imprisonment. From verdict and sentence defendant appeals as of right.

At 12:05 a.m. on the morning of June 28, 1970, Detroit policemen Sieloff and Gordon were fired on by unknown assailants in the vicinity of Harper and McClellan Streets. The nature of the gunfire indicated the use of two distinct weapons. The officers were hit by bullet fragments. Neither offi-

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

cer could say who fired the shots nor did they see the defendant in the area that night.

Inspectors Bowyer and Bertoni, while in an unmarked police car and while responding to a call for help at Harper and McClellan, were fired upon and hit by flying glass. Bowyer saw two assailants and testified that the silhouette of one resembled the defendant. Bertoni concluded that two persons were involved since he saw one man as a shot was fired from another direction.

After receiving radio information that the responsible party or parties might be at 6162 Rohns Street, the police entered and searched the residence at this location but discovered no one. The police were then directed to 6154 Rohns Street and there ascended the stairs. As some of the police reached the top of the stairs they were met by a volley of gunfire. As they scrambled downstairs a protective shot was fired which was followed by a second volley from above.

Following the officers' retreat, tear gas was fired into the house. At about 1 a.m., Anderson surrendered, throwing down a .30-caliber rifle from an upstairs window to which was attached a white flag. About 4 a.m., the defendant, after several consultations with his father, surrendered. Thereafter the police entered the premises and seized certain evidence including a .30-06 Browning rifle, various ammunition, weaponry devices and armor-piercing bullets. Searches were continued without a search warrant and, on motion to suppress, all evidence seized after 9 a.m. of June 28, 1970, was suppressed.

Fragments of spent bullets and shell casings were found at the scenes of the shootings and identified as having been fired by the guns here involved. Also was found a blue blanket belonging

to the defendant in which it is claimed the guns of the assailants were wrapped as observed earlier in the evening.

Among the issues raised by the appellant is the claim that the search of defendant's premises following his arrest without a search warrant was unreasonable and that therefore all the evidence seized should have been suppressed. In assessing this claim it is necessary to review the facts known by the officers at the time they conducted the search.

When defendant was arrested, the police knew that at about 12:05 a.m. two officers had been fired upon and hit by bullet fragments by more than one assailant in the area of Harper and McClellan; that in responding to a radio call for help at this location, two other officers were fired upon and hit by fragments of glass; Officer Joseph Brooks saw two men walking north on Rohns toward the freeway and had observed that one of the men was carrying a three-foot-long object wrapped in blue material; four minutes later he heard gunfire and he identified one of the men involved as the defendant. After the police arrived at Rohns Street they were advised by a neighbor that she had seen the resident at 6154 Rohns run into the flat carrying a rifle. They knew that as the officers ascended the stairs they were met by a volley of gunfire which was followed by a second volley as they retreated. The defendant's wife had refused to advise them as to who was upstairs, as had Anderson at the time of his surrender, and therefore they were uninformed as to how many people might be in the upstairs apartment.

Based upon this information, they entered without a warrant to ascertain whether other assailants were present, to preserve evidence which, as

they testified, might have been booby-trapped, and to search for weapons. Was such a search reasonable in the light of all the circumstances existing at the time of defendant's arrest? Our answer to this question must be in the affirmative.

The search in this case occurred almost immediately after the defendant surrendered at 4 a.m. and was therefore simultaneous with the arrest that followed. No one challenges the legality of the arrest since the crime had been committed in the presence of the officers. The fact that the arrest was outside the flat occupied by the defendant should have no bearing on the outcome of this case, as the police were unsure of whether other individuals were present in the house at this time.

In light of these facts, and despite the fact that the search revealed no other person in the house, we feel that the officers' right to make this search is sustained by *Warden v Hayden,* 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967).

Having concluded the initial search to have been lawful, it follows that the officers had the right to seize objects coming in plain view, including the .30-06 rifle which it is conceded belonged to the defendant and was used in the shootings. Since it is conceded that the .30-06 rifle was used in all of these shootings, although it is denied that it was used by the defendant during the McClellan and overpass incidents, it is difficult to see the relevancy of the other items seized on Rohn and introduced into evidence. Since the gun was properly received in evidence, the cartridges found at the McClellan Street site were properly received. The casing found at defendant's apartment would indicate only that the .30-06 had been fired at Rohns Street, a fact conceded by defense counsel. If there was error in the admission into evidence

of these items seized in the apartment, it was harmless error only.

The defendant next condemns the conduct and arguments of the prosecuting attorney in his closing statement and contends that inflammatory and prejudicial statements were made which require reversal. With these contentions we do not agree. No objections were made by defense counsel nor were requests made for precautionary instructions. We conclude that any error here involved could have been cured by objection or by instructions from the court had they been brought to his attention.

In the recent case of *People v Plozai,* 50 Mich App 131; 212 NW2d 721 (1973), decided by another panel of this Court and released on October 31, 1973, the Court spoke as follows:

"We note, however, that in a number of more recent cases this Court has found no reversible error in prosecutorial remarks of similar character that were not objected to at trial. *People v Evans,* 36 Mich App 238, 241; 193 NW2d 387, 389 (1971); *People v David Smith,* 16 Mich App 198, 201; 167 NW2d 832, 834 (1969); *People v Russell,* 27 Mich App 654, 663; 183 NW2d 845, 850 (1970); *People v Rowls,* 28 Mich App 190, 195; 184 NW2d 332, 334–335 (1970). Moreover, in *Ignofo* [315 Mich 626; 24 NW2d 514 (1946)] only two Justices thought the statement by the prosecutor that 'Joe Neuff [the defendant] killed that man' constituted reversible error despite the absence of an objection, while three Justices, concurring in the result, were unwilling to hold that the statement could not have been cured by appropriate court instruction, and the remaining two Justices concurred in the result without opinion. We believe the prejudice resulting from the prosecutor's remark here could have been cured by instruction had defendant objected to the remark below and therefore we decline to reverse on this issue." 50 Mich App 133–134; 212 NW2d 722–723.

It is next claimed by the defendant that the failure of the trial court to instruct on lesser and included offenses constituted reversible error. Prior to the giving of instructions the court suggested including therein a charge as to lesser and included offenses and defense counsel requested that it not be given. In omitting to give such instructions the court did not affirmatively exclude lesser and included offenses. *People v Lemmons,* 384 Mich 1; 178 NW2d 496 (1970). Defendant relies on *People v Herbert Van Smith, Jr.,* 388 Mich 457; 203 NW2d 94 (1972), but in that case the Court based its opinion on the fact that the defendant had requested a charge on lesser and included offenses. In *People v Carroll,* 49 Mich App 44, 51; 211 NW2d 233 (1973), the Court speaks as follows:

"The fifth claim made on appeal is that the trial court erred in failing to instruct on lesser included offenses. However, no request was ever made for such instructions. The opinion of two Justices in *People v Herbert Van Smith, Jr,* 388 Mich 457; 203 NW2d 94 (1972), to the contrary notwithstanding, the law still remains that requests for such instructions must be made. MCLA 768.29; MSA 28.1052; GCR 1963, 516; *People v Burton,* 46 Mich App 20; 207 NW2d 415 (1973). See also, *People v Macklin,* 46 Mich App 297, 309; 208 NW2d 62, 69 (1973)."

We find no merit in the defendant's contention in this regard.

The next question raised by the defendant is whether the trial court erred in instructing the jury that the defendant could be convicted of aiding and abetting the commission of the Rohns Street shooting.

While there is no direct evidence that the defendant himself shot at the officers on Rohns Street (although defendant's counsel seems to con-

cede as much) there is indeed circumstantial evidence that if he was not a principal, he may have been involved as an aider and abettor. His gun was used on Rohns Street and the shots came from the apartment which he occupied. White remained in the apartment after Anderson surrendered negating the possibility that his presence at the scene was involuntary or occasioned by duress. Under the decisions in *People v Ford,* 19 Mich App 519; 173 NW2d 3 (1969), and *People v Fuller,* 44 Mich App 297; 205 NW2d 287 (1973), the circumstantial evidence in the case at bar is sufficient to raise a jury question as to defendant's guilt as an accomplice to Anderson in the Rohns Street shooting.

Defendant further claims that he was denied his Sixth Amendment right to a speedy trial.

Defendant was arrested on June 29, 1970, and remained incarcerated for about 13 months before being first brought to trial (trial resulted in a mistrial as a result of a hung jury). His examination was held in July of 1970. Following examination, a trial date was set for December 28, 1970. Mr. Milton Henry, appointed counsel, filed a motion November 23, 1970, seeking permission to withdraw as counsel and the motion was granted December 7, 1970. On this same date Mr. George Lee was appointed to represent both defendants. Prior to trial, Mr. Lee requested leave to withdraw, which leave was apparently granted. Mr. Elliot Hall was then appointed counsel for the defendant on December 28, 1970, and the trial was set for March 22, 1971. As this trial date approached, the case was adjourned by stipulation of counsel because of another pending trial in which both were involved. White was not consulted in regard to this adjournment and so did not consent thereto. Mr. Hall subsequently was relieved by Mr.

Wilfred Rice who in turn was relieved by Mr. Gerald Schwartzbach on May 25, 1971. Trial was again set for June 21, 1971. Various preliminary motions both by the defense and the people prevented the trial from being held on that date. However, trial did commence on August 3, 1971, and concluded August 24, 1971. Following the mistrial, the case was promptly reset and trial commenced on October 28, 1971. The people maintain that they were at all times ready for trial and the record seems to bear out this contention. It also appears that the withdrawal of certain attorneys was actuated by the threats of violence which might occur at the trial.

The factors to be weighed in a test of the constitutionality of a trial held after long delay include: (1) length of delay; (2) the reason for delay; (3) defendant's assertion of his rights; (4) prejudice to the defendant. *Barker v Wingo,* 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). The rule of *Wingo* has been adopted by our Supreme Court in *People v Grimmett,* 388 Mich 590; 202 NW2d 278 (1972).

The speedy trial right, insofar as the fourth factor, prejudice to the defendant, was discussed in *Grimmett, supra.* As to this aspect the Court concluded that the speedy trial right was designed to protect three interests of the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; (3) limitation of the possibility that the defense will be impaired. See *People v Boyd,* 49 Mich App 388; 212 NW2d 333 (1973).

In the case at bar, the delay was some 13 months before the first trial. The reasons for the delay seem to have been the difficulty that the court experienced in obtaining and retaining an attorney for the defendant; the atmosphere of

threats which pervaded the community at this time; from May until date of trial much of the time was taken up by motions and pretrial procedures both by the defendant and by the people. Again it should be noted that the people were prepared for trial at all times except as to one conflict with another case in which both the prosecutor and defense counsel were involved. Any delay in the assertion of right by the defendant certainly arose through no fault of his own because much of the time he was without an attorney. We are unable to discern that defendant's defense was in any way impaired by this delay. As to the length of incarceration and the concern and anxiety of the defendant, while they are to be regretted, they appear to have been unavoidable.

We conclude that the defendant was not denied his right to speedy trial and that no prejudice from the delay resulted.

Lastly, we have considered defendant's claim that he is entitled to be resentenced because the trial judge improperly considered certain factors in imposing sentence and find it to be without merit.

We affirm defendant's conviction.

All concurred.

PEOPLE v HARDEN

PEOPLE v RITTENBERRY

1. SEARCHES AND SEIZURES—WITHOUT WARRANT—PLAIN VIEW.

A police officer, in order to apply the plain view doctrine to justify a warrantless seizure of evidence, must be rightfully in a position where the evidence is plainly visible, must have prior justification for his intrusion, and must discover the evidence inadvertently.

2. SEARCHES AND SEIZURES—WITHOUT WARRANT—PLAIN VIEW—JUSTIFIABLE INTRUSION.

Police officers' initial intrusion into a residence was limited and justifiable and provided a basis for a later seizing of evidence without a warrant under the plain view doctrine where a next door neighbor who had been given a key, told to watch the house by the owners, and told that no one was to be inside, had called the police to investigate activity at the residence, and where, in response to a knock on the door and questioning, the police had been admitted to the foyer.

3. SEARCHES AND SEIZURES—WITHOUT WARRANT—PLAIN VIEW—JUSTIFIABLE INTRUSION.

Police intrusion into the kitchen of a private residence without a warrant was reasonable and justifiable following a justifiable entry into the foyer of the home where: first, testimony indicated that the police had been told that no one was supposed to be in the home because the owners were on vacation, second, when a son of the owners had met with the police in the foyer his hand was bleeding profusely, and, third, the officers had been led to believe that three persons they had seen from the foyer were the only persons in the house, and yet, after hearing noises, two other persons were found in a bedroom; under these circumstances, entry into the kitchen in quest of an explana-

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 68 Am Jur 2d, Searches and Seizures §§ 23, 88, 94.

Search and seizure: Observation of objects in "plain view"—Supreme Court cases. 29 L Ed 2d 1067.

[4] 68 Am Jur 2d, Searches and Seizures § 96.

tion from defendants of the presence of the two strangers cannot be characterized as unreasonable, and evidence of a breaking and entering discovered inadvertently by the police in the kitchen was admissible under the plain view doctrine.

4. SEARCHES AND SEIZURES—WITHOUT WARRANT—REASONABLENESS—HOMES—MOVING VEHICLES.

Greater foundational facts are necessary to support a finding that a police intrusion was constitutionally reasonable when a house or a home is involved than if a moving vehicle were involved.

Appeal from Oakland, Arthur E. Moore, J. Submitted Division 2 May 13, 1974, at Lansing. (Docket Nos. 16737, 16738.) Decided July 22, 1974.

Ronald D. Harden and Jackie Rittenberry were convicted of breaking and entering with intent to commit larceny. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, and *T. S. Givens,* Assistant Appellate Counsel, for the people.

Kennedy, Carson, Fischer & Potts (by *David William Potts* and *David P. Philips),* for defendants.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

DANHOF, P. J. Defendants were found guilty by a jury of breaking and entering with intent to commit larceny. MCLA 750.110; MSA 28.305. On January 25, 1973, each defendant was sentenced to a term of five to ten years in prison. They appeal. We affirm.

James Fiss, a neighbor of defendant Harden's

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

parents, testified that at about 5 a.m. on October 14, 1972 he was awakened in his home by a loud noise. He got up in time to see a car roll into his driveway. Two people jumped out of the car and disappeared into the darkness. This incident drew his attention to the nearby Harden residence because he knew that the owners were away. The vacationing Hardens had given Mr. Fiss a key to the residence and had told him that no one was supposed to be inside. Fiss then noted that the lights in the house were on and that a second strange car was in the Harden driveway. Fiss called the sheriff's department. The responding officer, Deputy Brown, was informed of the circumstances by Mr. Fiss.

Brown walked toward the Harden house to conduct a further investigation. On his way, he noticed that the lights had been turned out. Drawing his gun, Brown knocked on the Hardens' door. Defendant Rittenberry answered and identified himself as a guest of the owner's son. When questioned further as to defendant Harden, Rittenberry said, "Come on, I will get him". The deputy reholstered his gun and stepped inside. He remained in the foyer while Rittenberry went into the back of the house. While waiting for Rittenberry, Brown saw a third person—later identified as one Gary Wyman—apparently sleeping on a rollaway bed in the living room.

Rittenberry returned with Harden, and Mr. Fiss identified him as the owner's son. The deputy contemporaneously noticed that Harden's right hand had been severely cut. When asked about his hand, Harden responded somewhat vaguely that he had been hurt in a fight considerably earlier in the evening. The deputy noticed, however, that the untreated wound was bleeding profusely. Deputy

Brown asked whether Harden, Rittenberry, and Wyman were the only ones in the house and apparently received an affirmative answer.

While this conversation was taking place, a backup officer, Deputy Eno, arrived on the scene. As the two officers conversed in the foyer, they heard a "thud" or a series of "thuds" from the back portion of the house. They investigated these noises and in the back bedroom discovered a fourth male subject lying in a bed apparently sleeping and a young female slumped in a closet apparently passed out. Eno returned from the back bedroom and went into the kitchen where defendants apparently were at the time. Eno called out to Brown, and he too entered the kitchen. The kitchen was in disarray. On top of a dryer near the kitchen table, Brown saw an electric scalpel with a good deal of blood on it. On top of the kitchen table, he observed a pile of glass tubes filled with a clear liquid and labeled in medical terms.

Brown then placed a call to his command deputy. Area cars were alerted to a possible B & E at a doctor's office. A third officer, Deputy Theunick, received the alert while on his way to the Fiss residence. He remembered that there was a dentist's office near the Fiss address. Upon arrival at the dentist's office, he discovered that it had been broken and entered. All five subjects were placed under arrest. In the Oakland County Jail, defendants' shoes were seized. An examination of the shoes revealed what appeared to be particles of glass embedded in the soles. At trial, the shoes were admitted as evidence.

The sole issue raised on appeal is whether defendants' arrest and booking was irreparably tainted by the initial discovery of the stolen goods

in the Harden kitchen. Defendants contend that their arrest was a product of an illegal search and seizure in violation of US Const, Amendment IV and Const 1963, art 1, § 11.

For purposes of this opinion, we will assume, without deciding, the following: That defendants did not consent to the challenged police conduct and that Mr. Fiss did not or could not consent thereto; That defendants have standing to raise the issue of illegal search;[1] That there is a proper relationship between the issue raised on appeal and defendants' motion to suppress.[2]

In *People v Whalen,* 390 Mich 672, 677; 213 NW2d 116, 119 (1973), our Supreme Court distinguished between seizure which is the product of a search and seizure of items in plain view:

"As stated by the United States Supreme Court in *Coolidge v New Hampshire,* 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971) the basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment —subject only to a few specifically established and well delineated exceptions.

"However, before the above rule can be applied, and the exceptions to it come into play, it first must be established from the facts before the court, that a search did in fact take place for Fourth Amendment purposes.

[1] The trial record contains no indication that defendant Harden resided in his parents' home, nor that the owners knew of or approved of the single night's usage. Furthermore, defendant Rittenberry testified that prior to the arrival of the police, defendant Harden was destroying parts of the house's interior with an electric hand saw.

[2] There was no pretrial motion to suppress evidence. During trial, defendants requested and were granted an evidentiary hearing relating to the admissibility of defendants' shoes which were seized following arrest as part of the booking procedure at the Oakland County Jail. The scalpel seized at the Harden residence and photographs of the medical supplies were received into evidence without objection.

"From *Katz v United States,* 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967) there has evolved a test, applied by the courts, to determine whether or not a search, by Fourth Amendment standards, has indeed taken place. Simply put, if an individual has a reasonable expectation of privacy in the area searched, or the materials seized, a search has been conducted. 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' *Katz, supra,* 351.

"Thus seizure of objects within the plain view of an officer, lawfully in a place where he had a right to be, are not proscribed by the Constitution. *United States v Lee,* 274 US 559; 47 S Ct 746; 71 L Ed 1202 (1927)."

For the plain view doctrine to apply, the officer must be rightfully in a position where the evidence is plainly visible. There must be a prior justification for his intrusion and discovery of the evidence must be inadvertent:

"What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge v New Hampshire,* 403 US 443, 466; 91 S Ct 2022, 2038; 29 L Ed 2d 564, 583 (1971).

On the facts of this case, we hold that the initial intrusion into the Harden residence was limited

and justifiable. Deputy Brown had been directed to the house by the next door neighbor who had been given a key, told to watch the house by the owners, and told that no one was to be inside. In response to Brown's query about Rittenberry's presence in the house, the latter answered, "Come on, I will get him [Harden]". Brown entered, but remained in the foyer. Soon thereafter Deputy Eno arrived and entered, but also remained in the foyer.

Defendants argue that once Mr. Fiss identified defendant Harden, the justification for police intrusion ceased to exist. This contention ignores the following facts: First, the testimony is clear that Brown had been told that no one was supposed to be in the house. Second, when Harden did come forward, his hand was bleeding profusely. Third, the officers were led to understand that Harden, Rittenberry, and Wyman were the only persons in the house. It was only after the occurrence of the "thud" or "thuds" that the officers went further into the house to investigate.

There was, therefore, a prior justification for the intrusion. It is also clear that the evidence seized was in plain view and that its discovery was inadvertent. The tubes labeled in medical terms were on top of a dryer in the kitchen. The electric scalpel was on top of the kitchen table. The record indicates that Deputy Eno entered the kitchen only after the discovery of the two strangers in the bedroom, one a young female slumped in the closet. Under the circumstances, entry into the kitchen in quest of an explanation from defendants of the presence of the two strangers cannot be characterized as unreasonable. Finally, the discovery of the evidence in the kitchen, combined with Deputy Theunick's knowledge of the burglary of

the dentist's office, constituted probable cause for the ultimate arrest and booking.

The subject of police intrusion in this case was a private residence. This Court is aware of its consequential seriousness:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v United States,* 365 US 505, 511; 81 S Ct 679, 683; 5 L Ed 2d 734, 739 (1961).

Greater foundational facts are necessary to support a finding that the intrusion was constitutionally reasonable when a house or a home is involved than if a moving vehicle were involved.[3] After close scrutiny of all of the attendant facts, we hold that the challenged police conduct in this case was reasonable. The existing circumstances were such as to create a reasonable and honest belief in the minds of the investigating officers that the law was being violated. The fact that the initial intrusion was limited and then extended only after further unexplained occurrences argues against a finding that this was a general exploratory search. Discovery of the evidence in the kitchen was not anticipated and the officers were legitimately in a position which brought the evidence into plain view.

Affirmed.

All concurred.

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[3] "Fewer foundation facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved." *People v Whalen, supra,* 682.

PREMINGER v UNION BANK & TRUST COMPANY, N.A.

1. TRUSTS—SPENDTHRIFT TRUSTS—VALIDITY.

A valid spendthrift trust complies with certain prerequisites: (1) the gift is only of income, the beneficiary takes no estate whatever and has nothing to alienate, he has no right to possession and no beneficial interest but only a qualified right to support and an equitable interest only in the income; (2) the legal title must be vested in a trustee; (3) the trust must be an active one.

2. TRUSTS—SPENDTHRIFT TRUSTS—INCOME BENEFICIARIES—QUALIFIED RIGHTS.

A spendthrift trust which gives the trustees the right to make payments to the beneficiaries when in the discretion of the trustees a need exists and after their determination that the beneficiaries cannot help themselves vests only a qualified right in the beneficiaries to receive any part of the corpus within the discretion of the trustees, and such an estate is not one which the beneficiaries could control, dispose of, or compel the trustees to deliver so as to render the trust not a spendthrift trust.

3. TRUSTS—SPENDTHRIFT TRUSTS—VALIDITY.

A trust which gave to the beneficiaries only the income of the trust assets during their lifetimes, provided for distribution of the trust assets to remaindermen upon the death of the last income beneficiary, gave to the trustees the power to invade principal for an income beneficiary when, in the discretion of the trustees, a need existed but only after a determination that the beneficiary could not help himself, and provided that neither principal nor income would be liable for the debts of a

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 54 Am Jur, Trusts § 152.

[1–4] Validity of spendthrift trusts. 119 ALR 28, s. 138 ALR 1321.

[2, 3] 54 Am Jur, Trusts §§ 156, 179.

Conditions, amount, and character of support contemplated by will, trust instrument, or contract providing for support of person. 101 ALR 1461.

[4, 5] 54 Am Jur, Trusts §§ 151, 159, 160.

[6, 7] 54 Am Jur, Trusts §§ 150, 169 *et seq.*

beneficiary and that no beneficiary could alienate his interest in principal or income, was a valid spendthrift trust.

4. TRUSTS—SPENDTHRIFT TRUSTS—ALIENATION OF CORPUS.

Voluntary or involuntary alienation of the principal of a trust fund during the life interest of income beneficiaries may be validly restricted by the settlor, provided that the right to principal does not vest in the income beneficiary.

5. TRUSTS—SPENDTHRIFT TRUSTS—REMAINDERMEN—CONVEYANCE OF INTEREST.

Conveyances by remaindermen of their future interests in the corpus of a spendthrift trust before the termination of the trust, in violation of restrictions on such alienation in the trust instrument, are void.

6. TRUSTS—SPENDTHRIFT TRUSTS—INCOME BENEFICIARIES—ASSIGNMENT.

An attempted assignment by an income beneficiary of his life interest in a spendthrift trust will not be sanctioned where it was contrary to the provisions of the trust and the settlor's clear intent.

7. TRUSTS—SPENDTHRIFT TRUSTS—INCOME BENEFICIARIES—ASSIGNMENT—DISCLAIMER—STATUTES.

An assignment by one life beneficiary of a spendthrift trust to another life beneficiary was invalid because it was contrary to the provisions of the trust instrument, and could not operate as a disclaimer where it failed to conform to the requirements of the right of disclaimer act (MCLA 554.511).

Appeal from Kent, John H. Vander Wal, J. Submitted Division 3 March 7, 1974, at Grand Rapids. (Docket No. 16834.) Decided July 22, 1974.

Complaint by Mary G. Preminger against Union Bank and Trust Company and Ford C. Perne, co-trustees of the Cornella N. Gilbert Trust II, for a declaratory judgment terminating the trust and distributing the trust assets. Complaint dismissed. Plaintiff appeals. Affirmed.

Rhoades, McKee & Boer, for plaintiff.

John C. Cary, for defendant Ford C. Perne.

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

BASHARA, J. On October 18, 1972, plaintiff filed a complaint for declaratory judgment requesting the termination of a trust of which she was a beneficiary and the distribution to her of the trust assets. Defendants answered contending the trust to be a spendthrift trust and therefore not subject to termination while the duties of the trustee remained unfulfilled. The circuit court, after hearing plaintiff's motion for summary judgment, denied the requested judgment and dismissed the complaint. Plaintiff appeals from both circuit court orders.

On September 7, 1966, Cornella N. Gilbert established an inter vivos trust for her two daughters, Mary Preminger and Nancy Howland, and also for Gilbert Gardner, Mary's son. The trust was initially funded with several thousand dollars, but under the settlor's will the bulk of her estate was to be placed equally into the individual trust accounts of the two daughters.

The trust provided that the beneficiaries receive only the income of the trust during their lifetime. If either of the daughters died, the assets of that daughter's account would be placed in the account of the surviving daughter. If Gilbert Gardner survived both the daughters (his mother and aunt), the remainder of the account of the surviving daughter would be paid over into his account. Upon the death of Gilbert or the last daughter, if he predeceased her, the trust assets would be distributed among the children of Cornella Gilbert's brother. Thus, the interest of the three beneficiaries was limited, with one exception, to the income of the trust assets during their life-

times. The exception was contained in the following language of one clause:

" * * * [A]nd the Trustees shall have the right to make payments of principal to the respective beneficiaries when, in their discretion, a need exists but only after a determination that the beneficiary cannot help herself or himself."

Finally, the controverted classification of this trust as spendthrift comes from the following provision:

"11. Neither the principal nor the income of this trust shall be liable for the debts of any beneficiary of this trust nor shall the funds or properties of this trust be subject to seizure by the creditors of any beneficiary of this trust in any proceeding whatsoever, and no beneficiary of this trust shall have power to sell, transfer, encumber, hypothecate, dispose of or anticipate his or her interest in any such trust whether it be principal or income thereof."

Subsequent to the death of Cornella Gilbert, plaintiff filed numerous objections to the allowance of the will upon the grounds of mental incompetency and undue influence. A will contest settlement agreement was signed by all interested parties and provided, *inter alia,* for the release and conveyance of the future interests of all remainder beneficiaries in the trust to Gilbert Gardner.

Shortly after the death of Nancy Howland in June, 1972, the assets in her trust account were transferred to plaintiff's account pursuant to the terms of the trust. On September 20, 1972, Gilbert Gardner executed a document entitled "ASSIGNMENT OF BENEFICIARY" wherein he assigned all his rights in the trust to plaintiff, making her sole beneficiary. She then filed her demand for

dissolution of the trust which was denied, the propriety of which order is now before us on appeal.

The paramount issue is whether the testamentary language constitutes a spendthrift trust. The first case in Michigan to define a spendthrift trust was *Rose v Southern Michigan National Bank,* 255 Mich 275; 238 NW 284 (1931). The Court quoted the following definitional language of *Kessner v Phillips,* 189 Mo 515; 88 SW 66 (1905), with approval:

> "In order to create a spendthrift trust certain prerequisites must be observed, to-wit: first, the gift to the donee[1] must be only of the income. He must take no estate whatever, have nothing to alienate, have no right to possession, have no beneficial interest in the land, but only a qualified right to support, and an equitable interest only in the income; second, the legal title must be vested in a trustee; third, the trust must be an active one." 255 Mich 275, 281.

Plaintiff contends that the trust established here cannot qualify as a spendthrift trust because the beneficiaries had more than a gift "only of income". It is asserted that they had a right to invade corpus because of the language in clause 2 permitting payment to them if they could not financially help themselves. The qualified right the beneficiary has in the corpus of this trust does not fail the "income only" test of *Rose, supra.* The right of the beneficiary to receive any part of the corpus is within the discretion of the trustee and such interest is not an estate which the beneficiary could control, dispose of, leave by will, or compel the trustee to deliver until the narrow requirements stated in the trust were met. We find that

[1] The language in *Kessner, supra,* refers to "donee" apparently due to the fact that the intended trust was created by a deed to land.

the trial court was correct in its determination that the settlor created a valid spendthrift trust.

The next issue we consider is whether a beneficiary of this trust could alienate his interest by assignment before the time for payment had arrived. The resolution of this question will depend primarily on whether Michigan permits restraints on the alienation of principal as well as income in spendthrift trusts. Although a restraint on income was approved in *Rose, supra,* the validity of a restraint on a beneficiary of corpus alone has not been tested in this state.[2]

While the question of restraint on principal alone is novel to the courts of this state, our research discloses that the Restatement of Trusts, 2d, now recognizes that certain restraints on the alienation of principal are valid, as do the majority of the modern decisions.[3] The recent decision of *In Re Estate of Vought,* 25 NY2d 163; 250 NE2d 343; 303 NYS2d 61 (1969), reflects the current attitude of the courts on the subject of restraints on alienation:

"The precise question of whether a settlor has the power to make inalienable a principal remainder limited on an entrusted life estate is one of first impression. In this State, although there are many precedents which offer close analogies, they yield no conclusive or authoritative holding or doctrine. It is evident, however,

[2] The Supreme Court in the case of *In re Ford's Estate,* 331 Mich 220; 49 NW2d 154 (1951), did address itself to the question of whether a spendthrift trust was created when a settlor gave a beneficiary the right to income as well as the right to corpus beginning at age 35. The Court held that under the *Rose* test a spendthrift trust could not be established because the donee received more than a gift of income. We can only speculate that had the right of corpus been given to another individual the result may have been different and a valid spendthrift trust recognized.

[3] 1 Restatement 2d, Trusts, § 153, p 318; Bogert, Law of Trusts and Trustees (2d ed), § 222, p 639; 34 ALR2d 1335, § 4, p 1341; 2 Scott, Law of Trusts (3d ed), § 153, p 1170.

that the prevailing weight of decisional authority in the Nation, based more or less on common-law principles, would sustain the restraint on alienation of a remainder limited on an equitable life interest, if so provided by the creator of the trust. Moreover, in policy, there are no persuasive modern reasons, and aside from conceptual and historical grounds for nullifying attempts at restraining alienation on transfers in fee absolute, no compelling legal ground why the creator's wishes must be ignored during the measured period involved." 25 NY2d at 168–169.

The Court in *Vought, supra,* held that the assignment of a vested remainder by a beneficiary who had no other interest in the trust was void as being contrary to the inalienability provisions imposed by the settlor. The rationale was expressed in the following language:

"[A]nd according substantial weight to modern policy considerations and the purpose of permitting owners enlarged freedom to dispose of their property as they will unless there is injury to the public, the law of this State should conform to the prevailing weight of authority. In this way, the intended beneficiaries of the remainders of principal will be protected as the settlors intend * * * . Interests in property are not restrained of alienation or transfer for any greater time than the permissible life interests and the legal title of the particular assets, as earlier noted, is always capable of being transferred." 25 NY2d at 174.

It is this Court's view that for the foregoing reasons Michigan should join with the majority of states in permitting certain restraints on alienation of principal. Accordingly, we hold that a settlor can validly restrict the voluntary or involuntary alienation of principal during the life interest of the income beneficiary, provided that the right to principal does not vest in the income beneficiary. The decisions in *Rose, supra,* and

Ford, supra, appear to prevent an income beneficiary from having a right to principal as well as income. The conveyances made by the remaindermen are therefore void and may not be recognized by the trustee or the court. To give approval to such an assignment would be in direct conflict with the intentions of the settlor in creating the spendthrift trust. *Rose, supra.*

Plaintiff next contends that if Gilbert Gardner's transfer of his entire interest to her is invalid as an assignment then it should constitute a disclaimer under the right of disclaimer act, MCLA 554.511; MSA 26.1236(11). The document entitled "ASSIGNMENT BY BENEFICIARY" was signed September 20, 1972, and contains the following pertinent language:

"WHEREAS Gilbert Gardner no longer wishes to retain his said interests therein, the undersigned, Gilbert Gardner, sole remainder beneficiary of the Cornella N. Gilbert Trust II, dated September 7, 1966, as amended by a Will Contest Settlement Agreement dated July 22, 1970, with Ford C. Perne and the Union Bank and Trust Company as co-trustees, does hereby for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, assign and transfer all of his right, title, interest, and benefit in and under said Trusts and all interests therein to Mary G. Preminger and authorize her irrevocably as his attorney in fact to accept and receive all income profits and benefits payable to him, out of said Trust property."

Although the act does not require specific language in a document to qualify it as a disclaimer, any ambiguity in its intended effect will have to be determined by looking at the intent of the parties in signing it. See 93 ALR2d 8, § 31, pp 62–63. From the document's title, the receipt of consider-

ation, the direction that the assets be passed to plaintiff, and the use of words "assign and transfer", we conclude Gilbert Gardner intended to assign his interest, not disclaim it. We have previously noted that this assignment would be invalid under the terms of the spendthrift trust.

In summary, we find that Cornella Gilbert created a valid spendthrift trust to provide income of her two daughters and grandson during their lifetimes. The attempted assignments by the beneficiaries were invalid as being contrary to the provisions set forth in the trust. The settlor's intent was clear and will not be changed by sanctioning the acts of these beneficiaries.

Affirmed, costs to appellees.

All concurred.

WHITE v EXTRA LABOR POWER OF AMERICA

1. MASTER AND SERVANT—EXISTENCE OF RELATIONSHIP—ECONOMIC REALITY.

   The "economic reality" test for the existence of an employer-employee relationship includes as factors to be considered control over a worker's duties, payment of wages, the right to hire and the right to fire, and the right to discipline.

2. WORKMEN'S COMPENSATION—COMPUTATION OF BENEFITS—LABOR BROKERS—WAGE DIFFERENTIAL.

   The difference between the amount paid to a worker for his services by his employer, a labor broker, and the amount paid to the labor broker by the employer for whom the worker performed his services is not included in computing workmen's compensation benefits because the wage differential never accrued to the economic advantage of the worker but arose as a result of an agreement between the labor broker and the employer.

3. WORKMEN'S COMPENSATION—DUAL EMPLOYERS—LIABILITY FOR BENEFITS—QUESTION OF FACT—APPEAL AND ERROR.

   A determination of which of two employers is liable to pay workmen's compensation benefits is a question of fact, and where there is support in the record for the factual findings, that finding is conclusive and binding upon the Court of Appeals.

4. WORKMEN'S COMPENSATION—DUAL EMPLOYERS—LIABILITY FOR BENEFITS—LABOR BROKERS.

   A labor broker was exclusively liable for the payment of workmen's compensation benefits to an employee who was injured while on the premises of another employer even though the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur 2d, Master and Servant § 2.
[2, 5] 58 Am Jur, Workmen's Compensation § 308 et seq.
[3, 4] 58 Am Jur, Workmen's Compensation § 89.
[6] 58 Am Jur, Workmen's Compensation § 549.

employee was subject to direction and control of the latter employer's supervisory personnel where only the labor broker paid the injured worker's wages, and had the right to fire and to refuse to hire him.

5. WORKMEN'S COMPENSATION—COMPUTATION OF BENEFITS—AVERAGE WEEKLY WAGE—FACTUAL SUPPORT—REMAND.

Lack of factual support in the record for a workmen's compensation hearing referee's finding of an injured worker's average weekly wage requires a remand in order that the determination be made upon an established record.

6. WORKMEN'S COMPENSATION—DELINQUENT PAYMENTS—INTEREST.

Interest is allowable at the rate of five percent per annum on all delinquent workmen's compensation benefit payments from the date compensation would have been due had it been paid voluntarily (MCLA 438.7, 438.31).

Appeal from Workmen's Compensation Appeal Board. Submitted Division 2 April 3, 1974, at Detroit. (Docket Nos. 17017, 17070.) Decided July 23, 1974. Leave to appeal applied for.

Claim by Robert White against Extra Labor Power of America and Estan Manufacturing Company for workmen's compensation. Benefits granted. Plaintiff appeals the amount of compensation awarded; defendant Extra Labor Power of America appeals seeking apportionment. Affirmed and remanded for further proceedings.

Kelman, Loria, Downing & Schneider, for plaintiff.

Charfoos & Charfoos (by *David F. Dickinson),* for defendant Extra Labor Power of America.

Conklin, Benham, McLeod, Ducey & Ottaway, P. C. (by *Thomas P. Chuhran),* for defendant Estan Manufacturing Company.

Before: BASHARA, P. J., and BRONSON and CARLAND,* JJ.

CARLAND, J. On March 26, 1973, plaintiff Robert White was awarded compensation by the Workmen's Compensation Appeal Board on his claim against Extra Labor Power of America (hereinafter referred to as Extra Labor) for the loss of four fingers on his left hand arising through the operation of a punch press on the premises of Estan Manufacturing Company (hereinafter referred to as Estan). At the same time the appeal board affirmed the decision of the referee denying plaintiff recovery of compensation benefits against Estan. It is from this latter decision that appellants appeal.

The accident occurred on December 21, 1965. Plaintiff had been working at Estan since October 4, 1965 on assignment from Extra Labor, a labor broker licensed by the State of Michigan.

The plaintiff reported each morning to Extra Labor after his initial hiring on October 4, 1965. He there received a time sheet and was transported by Extra Labor to Estan where he performed his day's work. At the conclusion of each day, the hours worked would be noted by Estan on the time sheet. This time sheet was then presented to Extra Labor and plaintiff was immediately paid for that day's work. Although plaintiff was never on the payroll of Estan, he was while working on its premises subject to direction and control of its supervisory personnel.

Periodically, Extra Labor billed Estan for the hours worked by its employees such as plaintiff at an estimated rate of $1.95 per hour. All of the

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

hours which plaintiff worked in excess of 40 hours per week were paid on the basis of time and one-half.

Extra Labor paid plaintiff $1.25 per hour for his work at Estan. The difference between the $1.95 per hour wage rate paid to Extra Labor and the $1.25 wage rate paid by Extra Labor to plaintiff was retained by Extra Labor to cover the cost of its operation, including social security and workmen's compensation.

Plaintiff testified that during the first six weeks of employment he worked ten hours per day, six days per week, and that during the final five weeks, he worked eight hours per day and six days per week. This testimony is not borne out by the records of Extra Labor. Plaintiff further testified that he was paid $1.30 per hour for the afternoon shift and $1.25 per hour for the morning shift.

The referee found plaintiff's average weekly wage to be $60 computed at the rate of $1.25 per hour and therefore fixed his compensation at $40 per week. Since Extra Labor's insurer had been paying at the rate of $33 per week, a deficiency was determined to be due and interest was assessed thereon at the rate of five percent per annum.

It is beyond dispute that on December 21, 1965, the date of the accident, both Extra Labor and Estan were employers of plaintiff, *Renfroe v Higgins Rack Coating & Manufacturing Co, Inc,* 17 Mich App 259; 169 NW2d 326 (1969). Plaintiff now claims that the wage differential should be included in computing his benefits. Plaintiff, having filed a claim asserting Extra Labor to be his employer, now seems to assert that this employer-employee relationship ceased each day at the time he began his work at Estan. No such claim was

asserted below. Plaintiff in effect now says that he engaged Extra Labor to act as his agent in finding him employment. This claim against Estan based on a theoretical principal-agent relationship with Extra Labor is inconsistent with the "economic reality" test which determines the existence of the employer-employee relationship, *Goodchild v Erickson,* 375 Mich 289, 293; 134 NW2d 191 (1965). Although Estan had a certain right of control while plaintiff was on its premises, it is not determinative of the issue here involved.

In the "economic reality" test, control of the worker's duties is only one factor among four to be considered in a determination of whether an employer-employee relationship exists. The other factors are payment of wages, the right to hire and fire, and the right to discipline, *Cronk v Chevrolet Local 659,* 32 Mich App 394, 399; 189 NW2d 16 (1971).

In the instant case, only Extra Labor paid plaintiff's wages. Moreover, Extra Labor had the right to fire and to refuse to hire plaintiff. Perhaps Estan could, in effect, fire plaintiff by refusing to permit him to work in the future, but only Extra Labor could decide whether plaintiff would in fact be hired. The claims by plaintiff of the existence of the principal-agent relationship and that the wage differential was in reality compensation for services rendered by the agent clash with economic reality. This differential was paid by Estan in order that it might avoid the expense of maintaining certain employment records concerning plaintiff, such as withholding and social security payments. The differential arose as the result of an agreement between Extra Labor and Estan in which plaintiff was not involved.

The wage differential never accrued to the eco-

nomic advantage of plaintiff and therefore should not be included in computing his workmen's compensation benefits, *Hite v Evart Products Co,* 34 Mich App 247; 191 NW2d 136 (1971).

It would seem that Extra Labor could reasonably be considered to be plaintiff's primary employer at all times. Extra Labor contends, however, that despite this fact, and since both it and Estan were employers of plaintiff, they should be jointly liable for the workmen's compensation to which plaintiff is entitled. In *Wing v Clark Equipment Co,* 286 Mich 343; 282 NW 170 (1938), it was held that joint liability does not necessarily follow from a dual employer situation. There, the Court said that since both paid wages, separate awards should issue. Here only Extra Labor paid wages and hence there was no basis upon which an award could be levied against Estan.

Moreover, in *Allen v Kendall Hardware Mill Supply Co,* 305 Mich 163; 9 NW2d 45 (1943), the Court held that the determination of which employer should be liable to pay benefits was a question of fact. This result was reached by a finding of who was in control of the employee at the time of the injury. It would likewise be a question of fact when the "economic reality" test is used. Since there is support in the record for the factual finding that Extra Labor should be exclusively liable for the payment of benefits, that finding is conclusive and binding upon this Court, *Coates v Continental Motors Corp,* 373 Mich 461; 130 NW2d 34 (1964).

An examination of the record discloses there to be no factual support for the referee's finding of fact that plaintiff's average weekly wage amounted to $60. Although plaintiff testified that during the 11 weeks of employment he worked a total of 600

hours and earned $867, he later admitted that during the first week he earned only $20. Although Extra Labor's records were available showing plaintiff's earnings, they were not in fact made a part of the record to establish his average weekly wage. This despite the fact that plaintiff at one time conceded the correctness of these records, which concession he later withdrew. There appears to be no basis for the determination of wages made by the referee. A remand is therefore necessary in order that the determination be made upon an established record.

The award being in the sum of $40 per week, and since plaintiff had only been receiving $33 per week, interest at five percent was allowed on the $7 difference. The plaintiff now maintains that interest at six percent should have been assessed. This claim is without merit.

Wilson v Doehler-Jarvis Division of National Lead Co, 358 Mich 510; 100 NW2d 226 (1964), held that while there was no express statute for the allowance of interest on a workmen's compensation award, there was no statute which forbade its allowance; that, therefore, the circuit court should include interest in any judgment entered based upon an award. This ruling was justified upon the finding that the right to an award arose because of the contractual relationship between employers and employees; that having determined the proceeding to be one based upon contract, MCLA 438.7; MSA 19.4 became applicable.

Following this determination, the Court held that such interest was payable "from the date compensation would have been due had it been paid voluntarily". Interest in the instant case became payable on all delinquent payments from the date of the accident, December 21, 1965. Since

interest is allowable, the rate is fixed at five percent in the case at bar by virtue of the provisions of MCLA 438.51; MSA 19.11, now MCLA 438.31; MSA 19.15(1).

We find MCLA 600.6013; MSA 27A.6013 to have no application in the case at bar since it applies only to judgments and no judgment has been entered here. Further it should be noted that the amendment to this statute raising the rate from five percent to six percent did not become effective until March 30, 1973, and can have no retroactive effect on rights already determined.

We affirm and remand for a factual determination of plaintiff's average weekly earnings.

All concurred.

LILJE v ALLSTATE INSURANCE COMPANY

1. INSURANCE—AUTOMOBILES—PURCHASER—EXCLUSION—STATUTES.

A section of a garageowner's liability insurance policy which excluded coverage of the purchaser of an automobile who had taken possession pursuant to an agreement of sale is invalid because it is contrary to the statute requiring that coverage extend to any permissive user of an insured vehicle (MCLA 257.520[b] [2]).

2. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVITS—COURT RULE.

Supporting affidavits are required of a party making a motion for summary judgment on the ground that except as to damages there is no genuine issue as to any material fact (GCR 1963, 117.2[3]).

Appeal from Wayne, James L. Ryan, J. Submitted Division 1 May 7, 1974, at Detroit. (Docket No. 17149.) Decided July 23, 1974. Leave to appeal applied for.

Complaint by Ray Allen Lilje against the Allstate Insurance Company and Universal Underwriters Insurance Company for a declaratory judgment. Michigan Bank intervened as a party plaintiff against the original defendants, and cross-complained against plaintiff Lilje for indemnification. Judgment for defendant Universal Underwriters Insurance Company. Defendant Allstate Insurance Company appeals. Reversed and remanded.

Ray Allen Lilje, *in propria persona.*

REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Automobile Insurance §§ 96, 97.

[2] 73 Am Jur 2d, Summary Judgment § 18.

Sullivan, Sullivan, Ranger & Ward, for plaintiff Michigan Bank.

Garan, Lucow, Miller, Lehman, Seward & Cooper (by *Ronald C. Winiemko),* for defendant Allstate Insurance Company.

Sommers, Schwartz, Silver, Schwartz, Tyler & Gordon, P. C., for defendant Universal Underwriters Insurance Company.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

BASHARA, P. J. Allstate Insurance Co. appeals an order of summary judgment declaring that plaintiff, Ray Allen Lilje, was not insured under a policy issued by Universal Underwriters Insurance Co. to Bart Lincoln-Mercury (hereinafter referred to as "Bart").

Plaintiff sold his 1967 Cadillac to Bart and, at a later date, took possession of the 1969 Lincoln he had ordered, but not yet paid for. The accident occurred on December 12, 1968, when title to the 1969 Lincoln was still in Bart's name. Universal insured Bart against automobile hazards under a garage liability insurance policy. Automobile hazard is defined in part by the policy as:

" * * * (3) *the ownership,* maintenance or *use* of any automobile owned by named insured *while furnished for the use of any person."* (Emphasis added.)

Following this language are definitions of persons who are uninsured:

"None of the following is an insured:

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

"(iii) any person or organization, other than the named insured, with respect to any automobile

(a) owned by such person or organization or by a member (other than the named insured) of the same household, or

(b) possession of which has been transferred to another by the named insured pursuant to an agreement of sale; * * * ."

At the time of the accident, plaintiff was insured under a policy issued to him by Allstate.

The question presented on appeal is whether the trial court erred in holding that Universal did not provide liability insurance to plaintiff.

MCLA 257.520(b)(2); MSA 9.2220(b)(2), provided, in pertinent part, that a policy of 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 * * * ." (Emphasis supplied.)

It was, therefore, incumbent upon Universal that the policy issued to Bart conform with the above statutory provision.

The recent case of *Celina Mutual Insurance Co v Preferred Risk Mutual Insurance Co,* 51 Mich App 99; 214 NW2d 704 (1974), decided a similar question on similar facts. That case in construing the above statute stated:

"The statute clearly required that coverage under the policy extend to *any person, as insured,* using the automobile with the express or implied permission of the named insured (Barber). Since the statute did not provide for the type of exclusionary clause in issue, that clause is invalid and of no effect. It follows that, if David Wells was driving with Barber's express or implied permission at the time of the accident, then David

Wells was insured under plaintiff's policy." 51 Mich App 103–104.

In the instant case, the definitional section "None of the following is an insured" is the same as the exclusionary clause in *Celina, supra.* That Court used as its rationale the following:

"If the exclusion in plaintiff's policy issued to Barber is valid, then it is clear that it permits an automobile, between the time of transfer of possession and the time when application is made for transfer of title, to be an uninsured motor vehicle. By its terms, the clause excludes as insured 'any person * * * with respect to any automobile * * * possession of which has been transferred * * * pursuant to an agreement of sale' whether or not that person has any insurance at all. The result in this case should therefore not turn on the fortuity that the purchaser was insured when he could easily not so have been." 51 Mich App 102.

Since the definition of who is uninsured is invalid under MCLA 257.520(b)(2); MSA 9.2220(b)(2), it has no effect. We, therefore, hold that Universal provided liability insurance to plaintiff.

The remaining question is whether a motion for summary judgment based on GCR 1963, 117.2(3) may be granted where the moving party did not file supporting affidavits. Although the trial court did not reach this procedural question, the answer had been provided in *DeMare Brothers Construction Co, Inc v Teska,* 49 Mich App 642; 212 NW2d 602 (1973), where it was held that the filing of supporting affidavits is mandatory. Accordingly, in the event that a motion for summary judgment is proferred based on GCR 1963, 117.2(3), supporting affidavits will be required.

Reversed and remanded for proceedings not inconsistent with this opinion.

All concurred.

MURRAY v BUIKEMA

1. BOUNDARIES—CONVEYANCES—CONFLICTING DESCRIPTIONS—INTENT.

The primary rule in construing and interpreting a conveyance where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls which cannot be explained by any competent evidence is that the intention of the parties controls and is to be followed.

2. BOUNDARIES—CONVEYANCES—TERMS OF DESCRIPTION—IDENTIFIABLE DESCRIPTION.

Terms of description in a conveyance repugnant to the identifiable description may be rejected.

3. BOUNDARIES—CONVEYANCES—MONUMENTS—COURSES AND DISTANCES.

Monuments control courses and distances in descriptions of real property and when monuments and measurements vary, the monuments always control.

4. BOUNDARIES—PLATS—CONFLICTING DESCRIPTIONS—MONUMENTS—SECTION LINES.

A plattor intended that a plat's boundaries coincide with monuments used as calls in the legal description where otherwise monuments referred to as being on a section line also used as calls would have been omitted from the description; therefore, the monuments controlled in a boundary dispute which arose upon discovery that the section line was more than 200 feet from where the plattor had thought it was.

5. BOUNDARIES—CONVEYANCES—DESCRIPTIONS—MONUMENTS—SECTION LINES.

A monument used in describing land is any physical object on the ground which helps establish the location of the line called for, and the term "monument" when used with reference to bound-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 12 Am Jur 2d, Boundaries §§ 2, 77.
[3] 12 Am Jur 2d, Boundaries § 10.
[4, 5] 12 Am Jur 2d, Boundaries § 67.
[6] 12 Am Jur 2d, Boundaries § 76.

aries indicates a permanent object which may be either a natural or an artificial one; therefore, a section line is not a monument.

6. BOUNDARIES—MARKETABLE RECORD TITLE ACT—CHAIN OF TITLE—PLATS.

The marketable record title act did not afford support to defendants in a boundary dispute where the unbroken chain of title under which defendants claimed the disputed parcel began with a deed which gave notice that all lands within a certain subdivision were excepted from the conveyance, and where the recorded plat of that subdivision, when examined in light of rules of construction applied when a legal description contains conflicting calls, showed that the subdivision obviously extended into the parcel claimed by defendants (MCLA 565.102).

Appeal from Cheboygan, Edward H. Fenlon, J. Submitted Division 3 April 4, 1974, at Grand Rapids. (Docket No. 17364.) Decided July 23, 1974.

Complaint by Donald A. Murray and others against Edward C. Buikema and Dorcas J. Buikema to quiet title. Judgment for plaintiffs. Defendants appeal. Affirmed.

Francis E. Lindsay (Edward B. Emery, of counsel), for plaintiffs.

Hillman, Baxter & Hammond, for defendants.

Before: ALLEN, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. This is an appeal from the judgment determining the boundary dispute in favor of plaintiffs. The facts are not in dispute.

One E. R. Smith was the common grantor of all parties in this case and was also the plattor of Waubun Beach plat. In 1910 Smith conveyed lots 1

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

through 6 to plaintiffs' predecessors in title. The descriptions were by courses and distances and made no references to section lines but each description contained the following:

"being a part of Lot 1, Sec. 2, T.35 N.R.3 W."

These deeds were recorded in 1910 and 1911.

In 1915 Smith filed the Waubun Beach plat for record. The description of the property composing the plat, as set forth in plaintiffs' Exhibit 3, is as follows:

"commencing at point 15' East from the Meander Post set on the shore of Burt Lake on the S. 1/8th line of Section 2 Township of Tuscarora County of Cheyboygan State of Michigan, a gas pipe 3' long B.T. Pine 22" S 78° 30' E 55' thence East 473' to Section Line no B.T. thence South on Section Line 369' B.T. White Oak 16" N 7° E 28' thence S 38° W 2832' B.T. Red Oak 12" S 78° 30' E 13' B.T. Red Oak 7" N 12° E 33' thence S 89° W 745' B.T. Pine 4" N 58° 30' E 8' 6" B.T. Aspen 7" N 24° W 6' thence N 38° E 3289' Meandered along shore of Burt Lake to place of beginning all dimentions *[sic]* are given in feet and inches"

Comparing the plat with the descriptions covering plaintiffs' property it is noted that these descriptions correspond to Lots 1 through 6 of the Waubun Beach plat. Some variation in the description of Lot 1 was not considered of decisional importance by these parties.

Defendants claim under a chain of title, uncontroverted by plaintiffs, beginning with the deed from E. R. Smith to one J. A. Pollard made on October 24, 1916, and describing the land as follows:

"1. The southwest quarter of the southwest quarter of

section one, of township thirty-five, north of range three, west of the meridian of Michigan.

"2. That portion of section two of said township thirty-five north of range three west of the meridian of Michigan which lies south of the east and west one-eighth line (being the southeast quarter of the southeast fractional quarter of said section), and lots one and two of section eleven of said township thirty-five north of range three west of the meridian of Michigan (being north half of northeast quarter of said section, EXCEPTING and RESERVING however, from the descriptions above on said sections two and eleven, so much thereof as is included in the recorded plat of 'WAUBUN BEACH'.

"3. The northwest quarter of the northwest quarter of section twelve of said township thirty-five north of range three west of the meridian of Michigan.

"4. Lots fifty-two, fifty-three and fifty-four according to the recorded plat of 'Waubun Beach, Township of Tuscarora, Cheboygan County, Michigan'."

The deed further included the following notice of intent:

"The intent of this conveyance being to convey all of the land included in the deed from the Embury Martin Lumber Company to Edwin R. Smith, trustee, recorded in Liber 49 of Deeds, page 340, and all of the land included in the deed from George E. Patterson and wife to Edwin R. Smith, trustee, recorded in Liber 49, page 60. (both Cheboygan County Records), except so much thereof as has been heretofore platted as 'Waubun Beach', and also to convey lots fifty-two, fifty-three and fifty-four of said plat."

Defendants claim ownership of the southwest quarter of the southwest quarter of section 1, township 35 north, range 3 west, by virtue of a warranty deed dated September 16, 1967. The present dispute arose out of a survey conducted in 1968. In this survey the section line separating sections 1 and 2 was found to be some 207 feet

west of where it was originally thought to be; that is, the section line was found to be some 207 feet west of the east boundary of Waubun Beach. Claiming to own all of the property east of the 1968 survey line in section 1, defendants placed some barricades across trails on the easterly portion of plaintiffs' land, precipitating this lawsuit.

Plaintiffs do not dispute the 1968 survey. All parties acknowledge that the common grantor E. R. Smith mistakenly believed the section line between sections 1 and 2 was approximately 207 feet east of the true section line. The first issue for discussion is: What was the common grantor's intent? In 12 Am Jur 2d, Boundaries, § 2, p 548, we find:

> "The primary rule which the courts apply in construing and interpreting a conveyance where the location of the boundary lines of the land is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance which cannot be explained by any competent evidence, is that the intention of the parties controls and is to be followed."

See also 11 CJS, Boundaries, § 3, p 538.

It is clear that plaintiffs' property is identifiable without the use of the phrase "part of Lot 1, Sec 2". Their courses and distances as described coincide with Lots 1 through 6 in the plat of Waubun Beach. Terms of description repugnant to the identifiable description may be rejected. *Ives v Kimball,* 1 Mich 308 (1849); *Burton Twp v Genesee County,* 369 Mich 180; 119 NW2d 548 (1963).

It is evident from the description found in the plat of Waubun Beach that the plattor, E. R. Smith, intended that the lots in the plat be 600 feet long. This intent is also clear from the deeds. The description of the plat used as calls such

monuments as Burt Lake, Pipe, White Oak, Red Oak, Aspen, Pine, and Post. All these monuments have been found to exist at the present time. It is not disputed that these monuments were placed or determined as of the time of the original survey of the Waubun Beach plat. "It is a well-settled law in this state that monuments control courses and distances, and that, when monuments and measurements vary, the monuments always control." *Woodbury v Venia,* 114 Mich 251; 72 NW 189 (1897); see also *Brown v Milliman,* 119 Mich 606; 78 NW 785 (1889). Applying this rule to the facts of this case it is plain that the grantor intended the plat boundaries to coincide with the monuments since otherwise the monuments referred to as being on the section line would have been omitted from the description.

A positive indication of the common grantor's intent is found in the deed to defendants' predecessor in title, J. A. Pollard, wherein the grantor stated:

> "The intent of this conveyance being to convey * * * except so much thereof as has been heretofore platted as 'Waubun Beach', and also to convey lots fifty-two, fifty-three and fifty-four of said plat."

Defendants' contention that a section line is a monument is without merit. A monument when used in describing land has been defined as any physical object on the ground which helps establish the location of the line called for, and the term "monument" when used with reference to boundaries indicates a permanent object which may be either a natural or an artificial one. 12 Am Jur 2d, Boundaries, § 4, p 549; Black's Law Dictionary (4th ed), p 1159; *Stolte v Krentel,* 271 Mich 98; 260 NW 127 (1935). Even assuming that a

section line is a monument it would yield to the other monuments selected by the grantor to indicate his intention in setting the boundaries of the plat.

From the evidence the trial judge concluded that it was the intent of the common grantor to convey the lands described by the course and distance description to plaintiffs' predecessors in title and to describe the plat of Waubun Beach by reference to various physical monuments therein described. The court also found that the grantor intended to deed to defendants' predecessor in title the lands described except such lands that were included in the Waubun Beach plat. We agree with this finding of intent.

Defendants further contend that plaintiffs' claims to ownership are defeated by the marketable record title act, MCLA 565.101 *et seq.;* MSA 26.1271 *et seq.* Section 2 of the marketable record title act reads in part:

> "A person shall be deemed to have the unbroken chain of title to an interest in land as such terms are used in the preceding section when the official public records disclose * * *
>
> "(b) A conveyance or other title transaction not less than 40 years in the past, which said conveyance or other title transaction purports to create such interest in some other person and other conveyances or title transactions of record by which such purported interest has become vested in the person first referred to in this section, with nothing appearing of record purporting to divest the person first referred to in this section of such purported interest."

The deed to Pollard relied on by defendants at the beginning of their unbroken chain of title contains notice that all lands within Waubun Beach plat except Lots 52, 53, and 54 are excepted.

When the description of the Waubun Beach plat is examined in light of the rules of construction above mentioned it would be obvious that a portion of that plat would extend into section 1. We conclude, therefore, that there was something of record purporting to divest defendants of any interest in lands in Waubun Beach other than that specifically mentioned. Defendants had notice that the plat of Waubun Beach extended into section 1. The marketable title act affords defendants no support.

Affirmed. Costs to the plaintiffs.

All concurred.

NORTHRUP v HYATT

RELEASE—TORTS—TORTFEASORS—NEGLIGENCE—DRAMSHOP ACT.

The release of one tortfeasor does not apply to another tortfeasor, where the released tortfeasor's liability is grounded on negligence and the other tortfeasor's liability is grounded on violation of the dramshop act (MCLA 436.22).

Appeal from Ingham, Marvin J. Salmon, J. Submitted Division 2 June 14, 1974, at Lansing. (Docket No. 17410.) Decided July 23, 1974.

Complaint by Robert D. Northrup, for himself and as next friend of Robert S. Northrup, a minor, and by Evelyn Northrup against James L. Hyatt and against James Coscarelli and Pat DeLuca, doing business as the Willow Bar, for damages for injuries received in an automobile accident. Action against defendant Hyatt dismissed by stipulations. Accelerated judgment for defendants Coscarelli and DeLuca. Plaintiffs appeal. Reversed and remanded.

W. Charles Kingsley, for plaintiffs.

James A. Timmer, for defendants Coscarelli and Deluca.

Before: QUINN, P. J., and V. J. BRENNAN and CARLAND,* JJ.

REFERENCE FOR POINTS IN HEADNOTE

74 Am Jur 2d, Torts § 69.

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

QUINN, P. J. The trial court granted an accelerated judgment to defendants Coscarelli and DeLuca, d/b/a Willow Bar (hereinafter defendants) and against plaintiffs. Plaintiffs appeal and we reverse.

December 12, 1969, a collision occurred between automobiles driven by James Hyatt and Robert D. Northrup. Robert D. Northrup's 15-year-old son, Robert S. Northrup, was a passenger in the father's car. This action for damages was filed against Hyatt and defendants. The claim against defendants was an alleged violation of the dramshop act, MCLA 436.22; MSA 18.993.

The action against Hyatt was settled and plaintiffs executed releases to him. Additionally, stipulations for dismissal of the action against Hyatt were executed by plaintiffs' counsel and by Robert D. Northrup as guardian ad litem for Robert S. Northrup. On the basis of these stipulations, orders of dismissal as to Hyatt entered October 6, 1972.

January 25, 1973, the date for trial of plaintiffs' action against defendants, the latter moved for accelerated judgment on the basis that plaintiffs' release of Hyatt also released defendants. The theory behind this reasoning is found in *Geib v Slater,* 320 Mich 316; 31 NW2d 65 (1948). That theory is that a party who releases a tortfeasor who acted independently and concurrently with another to cause a single, indivisible injury releases all such tortfeasors.

We find the *Geib* theory inapplicable to the case before us; *Geib* involved two tortfeasors based on their alleged negligence. Defendants' alleged liability is not grounded on any theory of negligence but arises because of an alleged violation of the statute, *Virgilio v Hartfield,* 4 Mich App 582; 145

NW2d 367 (1966). The release of Hyatt did not release defendants.

Additionally, the record before us establishes beyond question that the release from plaintiffs to Hyatt was intended to release Hyatt and no one else.

These conclusions obviate discussion of the other issues raised on appeal.

Reversed and remanded with costs to plaintiffs.

All concurred.

PEOPLE v HARMON

CRIMINAL LAW—INSTRUCTIONS TO JURY—LESSER INCLUDED OFFENSES.

An instruction to a jury that it could not consider lesser included offenses until it found the defendant not guilty of the primary charge was reversibly erroneous because of the possibility that jurors opposed to conviction on the primary charge may have been coerced into voting for conviction of the higher charge by the prospect that the lesser included offenses would not even be considered unless agreement could be reached on acquittal of the higher charge.

Appeal from Eaton, Willard L. Mikesell, J. Submitted Division 3 June 3, 1974, at Lansing. (Docket No. 17581.) Decided July 23, 1974.

Jack Harmon was convicted of assault with intent to commit rape. Defendant appeals. Reversed and remanded for new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *David L. Smith,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Edward R. Wilson, III,* Director, by *William P. Weiner,* Special Assistant Attorney General), for the people.

Francis L. Zebot, Assistant State Appellate Defender, for defendant.

Before: MCGREGOR, P. J., and R. B. BURNS and O'HARA,* JJ.

REFERENCE FOR POINTS IN HEADNOTE

53 Am Jur, Trial §§ 286, 796–802.

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

McGREGOR, P. J. Following a jury trial, on a charge of rape, MCLA 750.520; MSA 28.788, defendant was convicted of the lesser included offense of assault with intent to rape, MCLA 750.85; MSA 28.280. On March 15, 1973, defendant was sentenced to a term of 3-1/2 to 10 years in prison, with credit granted for 196 days already spent in jail. Defendant appeals this conviction and sentence as of right.

The dispositive issue before us is whether the trial court's supplementary instructions on the order in which the jury was to consider the charge and lesser offenses were coercive and reversibly erroneous.

In a supplemental charge to the jury, the trial court instructed that:

"If you find that he did commit the act upon—of rape upon Susan Metzmaker beyond a reasonable doubt, that is, that he did penetrate her vagina with his penis or if he held or assisted against her will so that someone else could have intercourse with her, if you find this beyond a reasonable doubt, then, he is guilty of the crime charged. *Before you can go or consider the lesser included offenses, you must first then determine that he did not commit that crime. If you consider that and find and are satisfied from your deliberations that he did not commit the crime as charged, then you can consider the lesser included offenses and only then.* That would be the assault with intent to commit rape, assault and battery, or simple assault. If you are not satisfied beyond a reasonable doubt that he committed any of those acts, then, the verdict would be not guilty." (Emphasis added.)

Defendant asserts that the foregoing instruction is reversibly erroneous in light of this Court's recent decision in *People v Ray,* 43 Mich App 45; 204 NW2d 38 (1972).

In *Ray,* the defendant was charged with and

convicted of assault with intent to rob being armed. During the course of its deliberations the jury sought supplemental instructions with respect to the manner in which voting was to take place on the primary charge and the lesser included offenses. In pertinent part, the court instructed the jury:

> "If you find the defendant not guilty of the first charge, then go to the second charge. You don't have to vote on all of them. If you find him guilty of the first charge, there is no need to go to the other charges.
>
> * * *
>
> "*The Court:* Well you have to either keep voting on the first charge until you either all find him not guilty, or all find him guilty." 43 Mich App 48; 204 NW2d 40.

Although defense counsel in *Ray,* as in this case, neither objected to the instruction nor moved for a new trial, as contemplated by GCR 1963, 516.4, this Court held that the instruction was "coercive, unduly restrictive and reversible".

Tacitly conceding that the instruction given in this case is basically identical to that given in *Ray,* the people argue that *Ray* is distinguishable, in that defendant *Ray* was convicted of the principal charge, whereas defendant Harmon was convicted of an included offense. Perceiving the *Ray* decision as an attempt to insure that compromise verdicts are not rendered impossible by unwarranted judicial interference with the method of jury deliberation, the people assert that *Ray* is not applicable here because the defendant was convicted of a lesser included offense, possibly as the result of a compromise verdict. Thus, say the people, defendant can make no claim that he was prejudiced by the court's supplemental instruction.

The rationale of the *Ray* decision is, however,

somewhat broader than that suggested by the parties. *Ray* seeks to prevent those jurors opposed to a defendant's conviction on a higher charge from being coerced into voting for conviction by an instruction requiring acquittal of that higher charge before lesser offenses can even be considered. For example, if the jury is considering the charge of assault with intent to commit rape, and juror A is opposed to conviction, he may be coerced into changing his vote to guilty by the prospect that the lesser included offenses of assault and battery and simple assault will not even be considered unless all the remaining 11 jurors agree to acquit the defendant of assault with intent to commit rape.

As Justice Gray, dissenting in the case of *Ballinger v State,* 437 P2d 305, 311 (Wyo, 1968), stated:

> "Its effect was simply to direct the jury either to convict or acquit the defendant of the primary charge when obviously the members were in serious disagreement on that charge. It is no more reasonable to say that those members voting against conviction on such charge were finally persuaded by the wisdom and convincing arguments of those for conviction, which resulted in the verdict rendered [guilty of the primary charge], than to say that those unpersuaded of the defendant's guilt in that respect might not have likewise prevailed upon the others to accept their views had not the trial court circumscribed the jury's discretionary power to deliberate upon the lesser included offenses."

Although in this case defendant Harmon was indeed convicted of a lesser included offense, there remained yet lesser offenses which members of the jury may have been precluded from considering by the trial court's supplemental instruction with respect to their method of deliberation. In these

circumstances, we cannot say that the trial court's instruction was not prejudicial and, hence, reversibly erroneous under *Ray, supra.*

Because we find that defendant's claim of instructional error mandates reversal, we refrain from generating dicta by discussing why his other allegations of error do not.

Conviction reversed. Case is remanded for a new trial on a charge of assault with intent to commit rape or some lesser included offense.

All concurred.

DUNLAP v CITY OF SOUTHFIELD

1. JUDGMENT—CONSENT JUDGMENT—COLLATERAL ATTACK.

The principle that a judgment of a court of competent jurisdiction cannot be collaterally attacked applies to all judgments, whether they are consent judgments or the result of contentious litigation.

2. JUDGMENT—ACCELERATED JUDGMENT—PRIOR JUDGMENT.

An accelerated judgment was properly granted on the ground that a plaintiff's claims were barred by a prior judgment where the prior judgment was obtained in a court which had proper jurisdiction and the subject matter of the two actions was identical.

3. COURTS—SUPERINTENDING CONTROL.

Superintending control will not be granted where no action has been taken by the inferior tribunal and there is accordingly no record to review (GCR 1963, 711.1).

4. INJUNCTION—ZONING—SPECULATIVE INJURY.

A group of homeowners cannot enjoin a city from consideration of a site plan for construction of high-rise condominium housing units which allegedly violate city zoning ordinances and threaten harm to the surrounding homeowners because it is within the realm of the city to consider such a plan and until the city has taken action on it any threatened injury or violation of the ordinances is merely speculative and conjectural.

Appeal from Oakland, Robert L. Templin, J. Submitted Division 2 February 12, 1974, at Lansing. (Docket No. 17649.) Decided July 23, 1974. Leave to appeal applied for.

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur 2d, Judgments §§ 1056, 1075, 1097, 1150, 1213.
[2] 46 Am Jur 2d, Judgments §§ 498–517.
[3] 20 Am Jur 2d, Courts §§ 39, 54.
[4] 58 Am Jur, Zoning § 188 *et seq.*

Complaint by Kinloch Dunlap and others against the City of Southfield, Realty Ventures, Inc., and Rembrandt Enterprises, Inc., for an order of superintending control. Judgment for defendants. Plaintiffs appeal. Affirmed.

Paul J. Lay and *Riseman, Lemke & Piotroski,* for plaintiffs.

Sigmund A. Beras, for defendant City of Southfield.

Hartman, Beier, Howlett, McConnell & Googasian, for defendant Rembrandt Enterprises, Incorporated.

Dykema, Gossett, Spencer, Goodnow & Trigg (by *Laurence D. Connor),* for defendant Realty Ventures, Incorporated.

Before: J. H. GILLIS, P. J., and HOLBROOK and DENEWETH,* JJ.

DENEWETH, J. The plaintiffs are Southfield property owners representing a class of residents living in the area of a condominium development proposed by the defendants Realty Ventures and Rembrandt Enterprises (hereinafter referred to as the developers). Plaintiffs' complaint for an order of superintending control against the City of Southfield consisted of five counts. The defendant developers moved for accelerated and summary judgment. The trial court granted the motion, and the plaintiffs appeal.

The asserted grounds on the combined motion for accelerated and summary judgment were that the issues raised in the complaint were barred by

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

a prior judgment, a proper ground for accelerated judgment; and that the complaint failed to state a claim upon which relief could be granted, or to present a genuine issue of material fact, proper grounds for summary judgment. GCR 1963, 116.1(5); 117.2(1), (3). The trial court granted the motion for accelerated judgment, specifying in its order that the plaintiffs' claims were barred by a prior judgment of the court in *Harvey Smith v City of Southfield,* Oakland County Circuit No. 16937 (1966).

We affirm the decision of the trial court to dismiss the action, but we must broaden the grounds for dismissal. While some of the plaintiffs' claims were barred by the *Smith* decision, the remaining allegations failed to state a claim upon which relief could be granted. This latter ground was properly pled by the defendant developers, and along with the prior judgment, effectively places the plaintiffs out of court.

The plaintiffs' complaint asked for entry of an order of superintending control and presented five counts which in substance alleged the following:

I. The development of the defendants' property according to their proposed site plan will cause harm to the plaintiffs from traffic congestion, invasion of privacy, and overall detrimental effect; and since the plaintiffs have learned that the City Council will approve the site plan due to threats against council members by the defendant developers, such approval will be arbitrary, capricious, and in abuse of the city's powers.

II. The consent judgment in *Smith, supra,* which allowed the previous owner of the property now owned by the defendants to build high-rise structures, was void on its face due to lack of jurisdiction over the subject matter and further was a denial of due process.

III. The defendant developers, since they are not qualified to do business in Michigan, are not "persons"

within the meaning of the Southfield Zoning Ordinance, and thus have no standing to develop the project or to file a petition for site plan review.

IV. The proposed site plan contains several violations of the Southfield Zoning Ordinance.

V. The consent judgment in *Smith, supra,* and its allowance of the previous owner to build high-rise structures, does not enure to the benefit of the defendants because of the laches of the previous owner by failing to seasonably develop the property, because it does not run with the land, and because of a subsequent amendment in the zoning ordinance.

Counts II and V represent a collateral attack on the judgment entered in the *Smith* decision, *supra.* The general rule summarized in 6 Callaghan's Michigan Pleading & Practice (2d ed), § 42.94, pp 527, 528, supported with citation to Michigan cases, is controlling of the claims asserted in counts II and V:

> "It is a well settled rule that a judgment of a court of competent jurisdiction cannot be 'collaterally' attacked. If the court had jurisdiction both of the subject matter adjudicated and of those against whom the judgment runs, no one can question its force and effect as terminating the particular litigation and doing so, with finality, as therein stated * * * . It is immaterial that the adjudication was unjust, * * * mistaken, or excessive." (Footnotes omitted.)

This principle applies with as much force to all judgments, irrespective of whether they be consent judgments or those entered after any amount of contentious litigation. *Tudryck v Mutch (Appeal of Smyl),* 320 Mich 99; 30 NW2d 518 (1948).

The plaintiffs' further claim that the court had no jurisdiction of the subject matter it purportedly litigated by the prior judgment in *Smith* is totally without merit. This claim is based upon MCLA

125.590; MSA 5.2940. The cited statutory provision applies only to appeal of a decision of a municipal authority with regard to a nonconforming use. The defendant developers have properly pointed out that this provision had no application in *Smith,* which did not invoke any question of a nonconforming use or structure but rather was a direct attack on the constitutionality of ordinance provisions as applied to the subject property.

Any different decision in this case would be extremely unfair in view of all of the circumstances herein existing. Not only has the judgment stood uncontested for seven years, but the surrounding residents of the community, upon whose behalf this action was supposedly brought, have enjoyed the benefits of a seven-acre park obtained from the defendants' predecessors pursuant to the terms of the consent judgment.

It is this Court's opinion that the trial judge's action in granting defendants' motion for an accelerated judgment on the ground that plaintiffs' claims were barred by prior judgment was proper and is affirmed.

Plaintiffs' counts I, III, and IV completely fail to present any claim upon which relief can be granted. All of said counts seek relief in the nature of superintending control. Under GCR 1963, 711.1, an order of superintending control expressly applies to supervisory control over "inferior tribunals". The statutory grant of superintending control to circuit courts gives power over "all inferior courts and tribunals". MCLA 600.615; MSA 27A.615. The inferior tribunals referred to include "administrative agencies which act in judicial or quasi-judicial proceedings". *Parshay v Marquette Prison Warden,* 30 Mich App 556, 559; 186 NW2d 859, 860 (1971).

Without deciding that a complaint for superin-

tending control was proper in this case, it is obvious that the relief sought by the plaintiffs was the issuance of an injunction prohibiting the city from taking action regarding the proposed site plan. A court will not grant superintending control where no action is taken and there is accordingly no record to review. See *Drouillard v City of Roseville,* 9 Mich App 239, 243; 156 NW2d 628, 631 (1967). Furthermore, it is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural. Since the City Council had taken no action on the site plan, any threatened injury or harm due to traffic or invasion of privacy, etc., at that point in time was sheer speculation and conjecture. No decision having been made, the complaint that the site plan violated city zoning ordinances was equally premature. It is not the Court's business to enjoin a city from considering the merits of a proposed site plan, a function squarely within their realm. For these reasons, the counts in question failed to state a claim upon which the injunctive relief pursuant to superintending control could be granted.

The other issues raised on this appeal are without merit. It is also to be noted that the consent judgment by its express terms specifically provides that any future high-rise development must comply with all the applicable provisions of all Southfield ordinances. If in fact upon proper hearing, it becomes apparent that the proposed site plan is in conflict with applicable city ordinances, the City Council is free to deny the proposed site plan or to force the developers to modify it to comply with any such ordinances relating to high-rise development. The *Smith* judgment, rather than restricting this possibility, mandates ordinance compliance.

Affirmed. No costs, a public question.

All concurred.

LEGUT v DETROIT WINDOW CLEANING COMPANY

1. WORKMEN'S COMPENSATION—TOTAL AND PERMANENT DISABILITY—IMBECILITY—EVIDENCE—INTELLIGENCE TESTS.

The Stanford-Binet intelligence test has not been designated by the Legislature or the courts as the exclusive test to be used in determining imbecility; therefore, a finding by the Workmen's Compensation Appeal Board that a claimant seeking total and permanent disability benefits for imbecility failed to meet his burden of proof because of his inability to translate other test results into the Stanford-Binet scale was prejudicial error (MCLA 418.361[2] [f]).

2. WORKMEN'S COMPENSATION—TOTAL AND PERMANENT DISABILITY—INCURABLE INSANITY.

An employee is incurably insane under the Workmen's Compensation Act if the occupationally related mental or emotional illness which impairs the employee's mental processes is of totally disabling proportions and is likely to be of long and indefinite duration, thus making gainful employment impossible (MCLA 418.361[2] [f]).

Appeal from Workmen's Compensation Appeal Board. Submitted Division 1 April 3, 1974, at Detroit. (Docket No. 17707.) Decided July 23, 1974. Leave to appeal granted, 393 Mich —.

Claim by Walter L. Legut against Detroit Window Cleaning Company, the State Accident Fund, and the Second Injury Fund for workmen's compensation. Benefits denied. Plaintiff appeals by leave granted. Reversed and remanded for further proceedings.

Kelman, Loria, Downing & Schneider, for plaintiff.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur 2d, Workmen's Compensation § 283.

Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P. C. (by *James A. Sullivan),* for defendants Detroit Window Cleaning Company and the State Accident Fund.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Philip C. Dean* and *A. C. Stoddard,* Assistants Attorney General, for defendant Second Injury Fund.

Before: BASHARA, P. J., and BRONSON and CARLAND,* JJ.

BASHARA, P. J. On March 6, 1964, plaintiff was employed as a window cleaner when he fell and injured himself in a work-related accident. He was paid benefits until May 2, 1964, at which time he petitioned for further benefits alleging that he was permanently disabled as being incurably insane and imbecilic.[1] The hearing referee found that plaintiff was not totally and permanently disabled under the Workmen's Compensation Act and denied the petition. The Workmen's Compensation Appeal Board affirmed this finding, and plaintiff appeals by leave granted.

Plaintiff first asserts error by the referee and board in finding that he was not an imbecile for purposes of total and permanent disability. Although the Workmen's Compensation Act does not define imbecility, it would appear that the referee and board relied solely on the scores of the Stanford-Binet Intelligence Test in determining its definition. The board stated in its opinion:

"Rarely does this Board see a more deserving plaintiff

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

[1] MCLA 418.361(2)(f); MSA 17.237(361)(2)(f), formerly MCLA 412.10(b)(6); MSA 17.160(b)(6).

before it seeking the benefits of the Act—yet the undersigned regretfully submit the present state of law is such that the referee was correct in his denial of benefits.

* * *

"But this plaintiff is not entitled to the designation of a permanently and totally disabled employee as defined in Part II, Section 10(b)(6), of the Compensation Act. To be so entitled, he must be an imbecile or insane. The prior opinion gives the relevant testimony on imbecility. While the term may be outmoded or behind "the constantly changing nomenclature used by the practitioner of the medical arts, it *is* the term used in the Act. *The testimony of this record reveals it to be a term based on measurement in the Stanford-Binet intelligence test for persons testing between 20–50. This plaintiff was tested at 73 on the Wechsler test, which Doctor Jean S. Braun could not translate into Stanford-Binet scores. Imbecility is not proven—a burden not met by plaintiff."* (Emphasis added.)

Plaintiff correctly states that the Stanford-Binet test has not been designated by the Legislature or the courts as the exclusive test to be used in determining imbecility. The Stanford-Binet is, of course, one available indicator, but other recognized tests are being used which should be considered, when offered, by referees and the Workmen's Compensation Appeal Board. Plaintiff's experts employed the Rorschach, Bender-Gestalt, and Wechsler tests to evaluate plaintiff's intelligence. The results of these tests and the testimony of plaintiff's experts showed that plaintiff was rated either an imbecile or was in a category very close to being one. The opinion of the board that plaintiff's inability to translate the test results into the Stanford-Binet scale, with the subsequent finding that he failed to meet his burden of proof, was prejudicial error. This Court is unable to say that a different finding would have been made had the

board considered the plaintiff's proferred tests. However, the fact that the board makes it clear that it would only consider the Stanford-Binet test requires a reversal by this Court and a new finding on the question of imbecility. The determination will be a factual question for the board to decide after reviewing all the evidence and scrutinizing intelligence tests offered by the parties involved.

Plaintiff next contends that the phrase "incurable insanity" as used in MCLA 418.361(2)(f); MSA 17.237(361)(2)(f), should not be defined to exclude those employees who are gainfully employed after their injury. Judge BRONSON, writing for the Court in *Sprute v Herlihy Mid-Continent Co,* 32 Mich App 574; 189 NW2d 89 (1971), defined incurable insanity as follows:

> "An employee is incurably insane under MCLA § 412.10(b)(6) (Stat Ann 1968 Rev § 17.160 [b] [6]) if the occupationally-related mental or emotional illness which impairs the employee's mental processes is of totally disabling proportions and is likely to be of long and indefinite duration, thus making gainful employment impossible."

In the instant case the board found that plaintiff was gainfully employed as a conveyer-belt loader at the time of the hearings and therefore denied him benefits under the above test. It also found that his wage scale was approximately that which he was earning prior to his injury.

We have carefully reviewed the statutes involved here and the *Sprute, supra,* decision in searching for a definition of incurable insanity. It is difficult to provide a meaning to this phrase that will provide benefits to each plaintiff who was contemplated by the Legislature to be entitled to compensation. The Court in *Sprute, supra,* set

forth a test which it believed would provide the broadest definition of "incurably insane" within the meaning of the Workmen's Compensation Act. This Court is not persuaded that the test should be modified and we note, as in *Pastaleniec v The Great A & P Tea Co, Inc,* 49 Mich App 702; 212 NW2d 734 (1973), that leave to appeal in *Sprute, supra,* was denied by the Michigan Supreme Court at 385 Mich 784 (1971).

Reversed and remanded for proceedings consistent with this opinion.

All concurred.

HENRY v J. B. PUBLISHING COMPANY

1. MASTER AND SERVANT—CORPORATIONS—EMPLOYEE COMPENSATION—PROFIT-BASED BONUS—PURPOSE.

   The purpose of profit-based bonus agreements between corporations and their employees is to encourage greater efforts in behalf of the corporation on the part of employees participating in such a plan.

2. CONTRACTS—DISPUTES—DUTY OF COURT—INTENT OF PARTIES.

   The primary role of a court in deciding a case involving a contract dispute is to ascertain the intent of the parties, and this must be done from an examination of the terms of the contract itself where at all possible.

3. CONTRACTS—AMBIGUITY—ADDITIONAL EVIDENCE.

   If a contract term is ambiguous or rendered indefinite or uncertain when applied to the facts of a particular situation, then additional evidence should be considered to determine what the parties intended.

4. MASTER AND SERVANT—CORPORATIONS—EMPLOYEE COMPENSATION—PROFIT-BASED BONUS—NET PROFITS—INSURANCE PROCEEDS.

   Life insurance proceeds paid to a corporation upon the death of its president were not includible in the net profits of the corporation for the purpose of determining the amount of a bonus due to an employee of the corporation where the amount of the bonus was based on the net profits of the corporation, because inclusion of the life insurance proceeds in the net profits of the corporation would serve as a windfall to the employee, and would not further the generally understood purpose of such bonus agreements.

REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 5] 53 Am Jur 2d, Master and Servant §§ 74, 84.

[2] 20 Am Jur 2d, Courts §§ 139–141.

Validity of contractual provision limiting place or court in which action may be brought. 56 ALR2d 300.

[3] 17 Am Jur 2d, Contracts §§ 75–84.

5. MASTER AND SERVANT—CORPORATIONS—EMPLOYEE COMPENSATION—PROFIT-BASED BONUS—NET PROFITS—INSURANCE PROCEEDS.

The fact that a corporation's payment of premiums for its president's life insurance policy naming the corporation as beneficiary out of its profits may have acted to reduce an employee's profit-based bonus does not require the inclusion of the life insurance proceeds in the corporation's net profits for the purpose of determining the amount of the employee's bonus; maintenance of such a policy on the life of the corporation's president was a legitimate expenditure and served a valid corporate purpose.

Appeal from Manistee, Charles A. Wickens, J. Submitted Division 3 March 7, 1974, at Grand Rapids. (Docket No. 17767.) Decided July 23, 1974.

Complaint by William J. Henry against the J. B. Publishing Company for monies due under an employment contract. Judgment for plaintiff. Defendant appeals. Reversed and remanded for further proceedings.

John E. Hart, for plaintiff.

Murchie, Calcutt & Sondee, for defendant.

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

V. J. BRENNAN, J. Defendant, the J. B. Publishing Company, appeals from a judgment of the Manistee Circuit Court entered in favor of plaintiff, William J. Henry, for $42,687.96.

Plaintiff was employed by defendant as general manager of the Manistee News Advocate, a newspaper published by defendant corporation. Plaintiff was employed by defendant in this capacity from March 1, 1964 until December 3, 1970, when he was relieved of his responsibilities as general manager. He continued in the employ of defendant in

other capacities, though, until he quit on March 17, 1971.

In August of 1971, plaintiff brought this action against defendant corporation seeking to recover an amount of money which, he alleged, defendant owed him under a profit-based bonus agreement he entered into with defendant's president, Mr. John Batdorff. Defendant answered plaintiff's complaint denying the existence of any formal bonus arrangement. Defendant also filed a counterclaim against plaintiff seeking to recover certain overpayments which were alleged to have been made to plaintiff. A nonjury trial was held on June 7, 1972, before Judge Charles A. Wickens who, by a written opinion dated September 20, 1972, found in favor of plaintiff. A supplemental opinion confirming the earlier decision was filed on January 10, 1973, and defendant's motion for a new trial was denied.

In the proceedings below plaintiff testified that he was employed by defendant as general manager at a yearly salary of $10,400. He further testified that in the years 1968 through 1970 he received, in addition to his yearly salary, a bonus based on the "net profits" of the company. The alleged bonus agreement provided that the first $15,000 of net profits was to be retained by the J. B. Publishing Company with the next $5,000 of net profits belonging to plaintiff. If the net profits exceeded $20,000, the excess was to be divided evenly between plaintiff and the defendant corporation. Plaintiff testified that in late May or early June of 1970, a similar arrangement was agreed to by Mr. Batdorff for the period beginning May 1, 1970 and ending April 30, 1971, this being defendant corporation's fiscal year. This bonus agreement, like the others, however, was never reduced to writing.

On October 30, 1970, Mr. Batdorff died. A term insurance policy in the sum of $100,000 had been taken out on Mr. Batdorff's life in 1968 with defendant corporation named as beneficiary. The premium payments for this policy were paid out of the regular funds of the business and amounted to over $2,000 a year. Upon Mr. Batdorff's death, the $100,000 was paid to defendant corporation. It was plaintiff's contention in the court below, and the trial court expressly found, that the proceeds defendant corporation received from the life insurance policy on Mr. Batdorff's life should have been included in the "net profits" of the corporation for the purpose of determining plaintiff's bonus. It is from this determination that defendant now appeals.

Defendant argues that the lower court erred in holding that the proceeds the corporation received from the insurance on Mr. Batdorff's life were properly includible in the net profits of the corporation for the purpose of determining plaintiff's bonus under the profit-based bonus agreement. Defendant contends, and correctly we feel, that such a conclusion ignores the basic purpose behind such bonus agreements—to encourage greater efforts in behalf of the corporation on the part of employees participating in such a plan. 5 Fletcher Cyclopedia of Corporations, § 2143. Consideration of the generally understood purpose of profit-based bonus agreements is essential in a contract dispute involving the meaning to be given a certain term where, as here, the central determination required for a proper resolution of the case turns upon what the parties intended.

In deciding a case involving a contract dispute the primary role of a court is to ascertain the intent of the parties. *McIntosh v Groomes,* 227

Mich 215; 198 NW 954 (1924). This, of course, must be done from an examination of the terms of the contract itself where this is at all possible. *Montgomery v Taylor & Gaskin, Inc,* 47 Mich App 269; 209 NW2d 472 (1973). If, however, a contract term is ambiguous or rendered indefinite or uncertain when applied to the facts of a particular situation then additional evidence should be considered to determine what the parties intended. *Keller v Paulos Land Co,* 381 Mich 355; 161 NW2d 569 (1968); *McIntosh v Groomes, supra.* In applying the above rules to the facts of the case before us we are guided by the following language from *Fox v Detroit Trust Co,* 285 Mich 669, 677; 281 NW 399, 401 (1938):

> "We are well aware of the settled rules of law, so well established that citation of authority therefor is unnecessary, that it is not the province of the court by construction or by the addition of words or punctuation to remake the contract of the parties or to find a meaning not intended. Where ambiguity exists, however, it is the duty of the court to determine, if possible, the true intent of the parties by construction of the instrument."

In the case at bar the bonus agreement was based on the "net profits" of the corporation. No precise definition of that term constituted a part of the agreement between plaintiff and defendant and the conflicting testimony of plaintiff's and defendant's expert witnesses illustrated the uncertainty of the term when an unusual item was sought to be included therein. As stated earlier, what we are essentially concerned with in a case like this is resolving the contractual dispute by seeking to effectuate the intention of the parties. This should be the primary consideration in disputes such as this and it is in furtherance of this

effort that the testimony of expert witnesses becomes helpful. Through such testimony an accepted procedure or common practice in the profession with respect to the treatment of such items can be shown. This, of course, would all have a bearing on what the parties intended when they entered into their agreement. But where, as here, the testimony of the experts as to the proper handling of such items is in hopeless conflict the central inquiry should revolve around the parties' intent—not the choosing of one accounting practice over another. It is at this point that the consideration of the purposes behind such bonus agreements has its most beneficial effect. It helps to place in proper perspective the overall intention of the parties as to the manner in which the bonus was to be computed—from the operating profits of the defendant corporation. The inclusion of the life insurance proceeds in the "net profits" of the defendant corporation would serve as a windfall to plaintiff under the circumstances here presented. These proceeds were not realized because of plaintiff's efforts on behalf of the corporation and their inclusion in the net profits would not further the generally understood purpose of such bonus agreements. The fact that the premium payments may have acted to reduce plaintiff's bonus in previous years is of no consequence. The maintenance of such a policy on the life of the corporation's president was a legitimate expenditure and served a valid corporate purpose.

Under the circumstances here presented we find that the trial judge erroneously concluded that the life insurance proceeds were properly includible in the net profits of the corporation for the purpose of determining plaintiff's bonus. Therefore, the decision of the trial judge is reversed and the case

remanded for proceedings consistent with this opinion.

All concurred.

SORENSON v SAWYER

1. JUDGMENT—RES JUDICATA—AUTOMOBILES—NEGLIGENCE—INSURANCE—SUBROGATION.

A plaintiff in an automobile negligence action has the same rights against the defendant as the plaintiff's insurer had in a prior action by the insurer, as subrogee of the plaintiff, against the defendant, because the factors establishing defendant's liability to the plaintiff's insurer and the plaintiff are the same; therefore, where the defendant obtained a judgment of no cause of action in the prior suit by plaintiff's insurer as subrogee, the defendant was entitled to accelerated judgment in a subsequent action instituted by the plaintiff.

2. JUDGMENT—RES JUDICATA.

A legal action must fail where issues of fact or law which are essential to the maintenance of that action have been finally decided by a court of competent jurisdiction in another legal action.

Appeal from Bay, Leon R. Dardas, J. Submitted Division 3 June 11, 1974, at Lansing. (Docket No. 17770.) Decided July 23, 1974. Leave to appeal applied for.

Complaint by Walter Sorenson against Robert J. Sawyer, Sr., for damages resulting from an automobile accident. Defendant's motion for accelerated judgment denied. Defendant appeals. Reversed and remanded with instructions.

John M. Patterson, P. C., for plaintiff.

REFERENCES FOR POINTS IN HEADNOTES

[1] 8 Am Jur 2d, Automobiles and Highway Traffic § 598.

Liability of owner of automobile for negligence while it is being operated by another with his consent as affected by immunity of the operator (or his employer) from liability or action. 152 ALR 1058.

[2] 46 Am Jur 2d, Judgments §§ 416, 440, 441.

Isackson & Neering, P. C. (by *Stanley Zimostrad),* for defendant.

Before: QUINN, P. J., and V. J. BRENNAN and CARLAND,* JJ.

QUINN, P. J. Defendant appeals from the trial court's denial of his motion for accelerated judgment. The motion was based on a claim of res judicata.

The automobiles of plaintiff and defendant collided at the intersection of Grant and Fourth Streets, Bay City, on March 7, 1966. At the time, plaintiff was insured by USF&G and the insurance policy provided for medical payments. Plaintiff made claim against his insurance company and was paid approximately $1,000 for which he executed a subrogation receipt for $1,000 to USF&G.

April 19, 1968, USF&G filed suit on its subrogated claim against defendant in Bay City municipal court for the subrogated amount of $1,000. This case was tried before a jury August 20, 1968. Plaintiff appeared as a witness for USF&G in this action. The jury verdict was no cause of action and judgment entered thereon. No appeal was taken.

March 4, 1969, plaintiff filed the present action in circuit court. Defendant appeared specially and moved for accelerated judgment on the basis of res judicata. The motion was argued May 19, 1969 and it was denied by order entered June 4, 1973.

Plaintiff's rights against defendant are the same as the rights of USF&G against defendant, *Indemnity Insurance Co of North America v Otis Elevator Co,* 315 Mich 393; 24 NW2d 104 (1946). The factors establishing defendant's liability to USF&G and to plaintiff are the same, *Jones v Chambers,*

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

353 Mich 674; 91 NW2d 889 (1958). A statement in the latter case at page 680 is applicable:

> "Where issues of fact or law have been finally decided by a court of competent jurisdiction in one legal action which are essential to the maintenance of another legal action, it is universally held that the second action must fail."

Unlike *Chunko v LeMaitre,* 10 Mich App 490; 159 NW2d 876 (1968), this defendant asserted his claim of res judicata at the first opportunity. While the result of foreclosing plaintiff from trying this action may appear harsh, it is equally harsh to require defendant to defend this action twice. Plaintiff could have prevented the result by timely action in municipal court.

Reversed and remanded for entry of an order granting defendant's motion for accelerated judgment with costs to defendant.

All concurred.

PEOPLE v GILLESPIE

1. CRIMINAL LAW—VERDICTS—INSTRUCTIONS TO JURY.

A jury may not be charged affirmatively irrespective of the quantum of proof of guilt, that upon uncontradicted proof of the essential elements of the offense charged or the essential elements of one or more of the lesser included offenses under the principal offense it must return a verdict of guilty of the principal charge or one of the lesser included offenses and that it may not return a verdict of not guilty.

2. CRIMINAL LAW—VERDICTS—INSTRUCTIONS TO JURY.

An instruction to the jury that "I am directed by Michigan law to instruct that you must find * * * the defendant * * * [guilty] * * * you have no discretion to reach a contrary decision" is reversible error.

Appeal from Washtenaw, Edward D. Deake, J. Submitted Division 2 May 7, 1974, at Lansing. (Docket No. 17861.) Decided July 23, 1974.

Tommie Gillespie was convicted in district court of driving under the influence of intoxicating liquor. Defendant appealed to circuit court. Affirmed. Defendant appeals by leave granted. Reversed and remanded.

Edwin L. Pear, Ann Arbor City Attorney, and *John K. Van Loon,* Assistant City Attorney, for the people.

Richard B. Ginsberg, Washtenaw County Legal Aid Society, for defendant on appeal.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial §§ 412, 413.

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

O'HARA, J. Defendant appeals his conviction of what has come to be known generally as DUIL. MCLA 257.625; MSA 9.2325.[1]

The case presents a clear-cut legal issue.

The question is: May a trial judge affirmatively charge that upon uncontradicted proof of the essential elements of the offense charged or the essential elements of one or more of the lesser included offenses under the principal offense that the jury must return a verdict of guilty of the principal charge or one of the lesser included offenses?

In this case the trial judge charged the jury:

"Now neither the prosecution nor the defendant has offered any evidence which would indicate defendant was not affected by the alcohol in his bloodstream in the same way as most persons. Thus if you believe that the test was properly administered, and that the defendant's blood alcohol was, in fact, .17% and .16% on the second, I am directed by Michigan law to instruct you that you must find that the defendant was driving under the influence of intoxicating liquor and his ability to operate the automobile was impaired due to the consumption of alcohol. *The issue is thereby determined as a matter of law and you have no discretion to reach a contrary decision.*" (Emphasis supplied.)

The test for alcoholic content was properly administered. The accuracy of the results was not challenged.

Thus by the charge the trial judge instructed the jury that as a matter of law they could not return a verdict of not guilty.

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

[1] The defendant was actually charged with violation of the Ann Arbor ordinance corresponding to the statute cited.

As we understand Michigan law such a charge is impermissible and constitutes reversible error.

In this state a jury may disbelieve any fact testimony or reject any factual results, uncontradicted or not.

We are unable to distinguish the instruction in this case from that which was disapproved as lately as *People v Gibbs,* 50 Mich App 517, 518–519; 213 NW2d 586 (1973).[2]

" 'Now in most cases, there is a third verdict, of course, the verdict of not guilty. I would say, in this regard, that you have heard the defendant testify in this case. There is no question here, no way that you could find that he did not kill his wife. He stated to you that he did. This killing was unlawful and felonious. There has been no excuse offered, which is excusable or justifiable under the law, so that your main duty here will really be to determine whether or not this is murder in the second degree or manslaughter.' "

The *Gibbs* case held:

"The quoted excerpt is fatally infirm. The plea of not guilty itself put the question of guilt or innocence of *any* offense in issue." (Emphasis supplied.) 50 Mich App at 519; 213 NW2d at 587.

Thus the question remains purely and simply, can a trial judge irrespective of the quantum of proof of guilt instruct a jury that it may not return a verdict of *not guilty?*

In *People v Lathers,* 223 Mich 92, 96; 193 NW 903, 904 (1923), the Supreme Court noted the trial judge charged the jury that they:

"should retire 'notwithstanding the court had di-

[2] Leave denied by the Supreme Court at 391 Mich 783 (1974).

rected a verdict,' but ordered that when they returned into court and were asked if they had agreed upon a verdict, their foreman should answer that their verdict was guilty as charged, concluding: 'In other words your verdict in form in this case will be, "We find the respondent guilty as charged." ' "

The Supreme Court then went on to say:

"Under such unqualified command of the court, retirement of the jury served no purpose and was but an idle ceremony. Instead of telling the jury what it was their duty to decide as a matter of law, the court told them it was his duty to order a verdict of guilty, and so commanded." 223 Mich at 96–97; 193 NW at 904.

This holding would not be difficult to understand, nor for the trial bench and this Court to follow, had not the Supreme Court added on the same page:

" 'The trial judge may, with perfect propriety, state to the jury that the law applied to the facts, which are undisputed, shows the defendant to be guilty of the offense charged, and that it is their duty to so find under the *facts* and the law.' " (Emphasis supplied.) 223 Mich at 97; 193 NW at 904–905.

The foregoing quotations seem to us to be sufficiently equivocal to permit us to write to them interpretively.

Since the trial judge must solemnly tell the jury that they are the sole trier of the facts and at the same time tell them "with perfect propriety * * * that the law applied to the facts, which are undisputed, shows the defendant to be guilty" the right of determination of guilt by a jury becomes as Porgy said of Bess, "a sometime thing".

We hold under the authority of *Gibbs, supra,* and *Lathers, supra,* that the charge "I am directed

by Michigan law to instruct that you must find * * * the defendant * * * [guilty] * * * you have no discretion to reach a contrary decision" was reversibly erroneous.

Reversed and remanded.

All concurred.

PEOPLE v GROENEVELD

1. CRIMINAL LAW—COMPETENCY TO STAND TRIAL—DUTY OF JUDGE—BONA FIDE DOUBT—DISCRETION.

A trial judge has a duty to raise the issue of competency, if facts are brought to his attention which raise a bona fide doubt as to a criminal defendant's capacity to stand trial; however, the question whether a bona fide doubt exists is within the discretion of the trial court, and that decision will be reversed only for an abuse of discretion (MCLA 767.27a).

2. CRIMINAL LAW—COMPETENCY TO STAND TRIAL—DUTY OF JUDGE.

Failure of a trial judge to raise *sua sponte* the issue of a defendant's competence to stand trial was not error, despite the fact that less than three months prior to defendant's arraignment for felonious assault the trial judge had ordered the defendant transferred to a state hospital, where the judge also knew that defendant had been released from the state hospital, and where the judge had access to a letter from two physicians on the hospital staff which said that defendant was not suffering from any mental disease; the trial judge could have reasonably concluded that there was no question of defendant's competence to stand trial.

3. CRIMINAL LAW—SENTENCES—CREDIT FOR TIME SERVED—STATUTES.

The statute requiring credit for time spent in jail before sentencing is remedial and should be liberally construed to effectuate the salutary purpose sought to be achieved by the Legislature in its enactment (MCLA 769.11b).

4. CRIMINAL LAW—SENTENCES—CREDIT FOR TIME SERVED—MENTAL HOSPITALS—COMMITMENT.

A defendant's commitment to a state mental hospital as the result of a civil proceeding bore no relationship to his subsequent conviction for felonious assault; therefore, the defendant was not entitled to credit against his sentence for time spent in the state hospital (MCLA 330.21, 769.11b).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial §§ 47–52.

[3, 4] 21 Am Jur 2d, Criminal Law § 533 *et seq.*

Appeal from Midland, James R. Rood, J. Submitted Division 3 May 7, 1974, at Grand Rapids. (Docket No. 17918.) Decided July 24, 1974.

Danny Lee Groeneveld was convicted, on his plea of guilty, of felonious assault. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward G. Durance,* Prosecuting Attorney, and *Gerald L. White,* Assistant Prosecuting Attorney, for the people.

Marshall S. Redman, Assistant State Appellate Defender, for defendant.

Before: ALLEN, P. J., and J. H. GILLIS and QUINN, JJ.

J. H. GILLIS, J. Defendant was arrested December 22, 1972 on a charge of felonious assault. MCLA 750.82; MSA 28.277. While he was incarcerated in the Midland County jail awaiting arraignment, his wife, on January 5, 1973, petitioned the Midland County Probate Court to have defendant committed to a state mental institution. On January 9, the court adjudged defendant mentally ill and ordered him committed to Traverse City State Hospital. On January 24, Midland County Circuit Judge Rood ordered that defendant be released from the county jail and transported immediately to the state hospital. Following his March 23, 1973 discharge from the hospital, defendant was arraigned before Judge Rood on April 11. The judge accepted defendant's plea of guilty to felonious assault, and sentenced him to two years, eight months to four years imprisonment. Defendant appeals.

Defendant argues that it was error for the trial

judge not to raise, *sua sponte,* the issue of defendant's competence to stand trial, since he was the same judge who, less than three months prior to arraignment, ordered defendant transferred to a state hospital. It's true that if facts are brought to the attention of the trial court which raise a "bona fide doubt" as to defendant's capacity to stand trial, the trial judge has a duty to raise the issue of competency. *Pate v Robinson,* 383 US 375; 86 S Ct 836; 15 L Ed 2d 815 (1966); *People v Russell,* 20 Mich App 47; 173 NW2d 816 (1969); see MCLA 767.27a; MSA 28.966(11). However, the question of whether a "bona fide doubt" exists is within the discretion of the trial court,[1] and that decision will be reversed only for an abuse of discretion. We find no abuse of discretion here.

The trial judge was informed of defendant's recent history of supposed mental illness. However, the judge obviously also knew that defendant had been released from the state hospital. Moreover, in the lower court file there is a letter from two physicians of the Traverse City State Hospital staff addressed to the probate judge who ordered defendant's commitment. The letter says, "This patient [defendant] is not suffering from any mental disease. His problems are mainly behavioral in nature and not the product of mental disease." Surely, the trial judge had access to this letter. From this information he could have reasonably concluded that there was no question of defendant's competency to stand trial.

Next, defendant argues that his guilty plea must

[1] MCLA 767.27a; MSA 28.966(11), provides in pertinent part: "The issue of competence to stand trial *may be raised* by the prosecuting attorney, defense counsel, by any interested person on leave of the court, or *by the court on its own motion.* The time and form of the procedure incident to raising the issue of competence shall be provided by court rule." (Emphasis supplied.)

be reversed because the trial judge did not inform him of his right to be tried without a jury. This contention is without merit. On the date of the guilty plea in this case the trial judge was not required to inform a criminal defendant of this statutory right. *People v Smith,* 52 Mich App 731; 218 NW2d 151 (1974).[2]

Next, defendant contends he is entitled to credit against his sentence for the 57 days he was involuntarily confined in a state hospital.[3] He says this credit is required by MCLA 769.11b; MSA 28.1083(2), which provides:

> "Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing."

Defendant argues that a jail is any place of confinement, and that in this case Traverse City State Hospital was such a place.

The statute requiring credit for time spent in jail before sentencing is remedial and should be liberally construed to effectuate the salutary purpose sought to be achieved by the Legislature in its enactment. *People v Cohen,* 35 Mich App 706; 192 NW2d 652 (1971); *People v Gravlin,* 52 Mich App 467; 217 NW2d 404 (1974). Even so, we do not think the statute is applicable here.

To be entitled to credit, the time spent in confinement must "bear an intimate and substantial relationship to the crime for which such person is

[2] *But see* GCR 1963, 785.7(1)(d)(i), effective as to guilty pleas accepted on and after June 1, 1973.

[3] Defendant was given credit for the 35 days he spent in the county jail prior to his hospital commitment.

subsequently convicted". *Bernoff v Amoroso,* 188 Misc 845, 847; 65 NYS2d 810, 813 (1946). See *People v Noble,* 26 Misc 2d 903; 207 NYS2d 467 (1960); *People v Nagler,* 21 AD2d 490; 251 NYS2d 107 (1964); *Commonwealth v Rundle,* 207 Pa Super 443; 217 A2d 772 (1966). There must be a "nexus" between a defendant's confinement and his criminal activity. *People v Rosen,* 45 Misc 2d 789; 257 NYS2d 626 (1965). There is no such nexus in the instant case. Defendant's confinement to Traverse City State Hospital was the result of a civil proceeding under MCLA 330.21; MSA 14.811; defendant was ordered committed to the institution by the probate court on a petition filed by his wife. Therefore, Groeneveld's commitment to the state hospital bears no relationship to his subsequent conviction for felonious assault. He is not entitled to credit for the time he spent there.

We have reviewed defendant's other assignments of error and find them to be without merit.

Affirmed.

All concurred.

MILTON v OAKLAND COUNTY BOARD OF AUDITORS

1. WORKMEN'S COMPENSATION—APPEAL BOARD—QUESTION OF FACT.
Findings of fact of the Workmen's Compensation Appeal Board which are supported by the evidence are conclusive and binding.

2. WORKMEN'S COMPENSATION—DISABILITIES—COMPENSABLE DISABILITIES—EMOTIONAL DISTURBANCES.
An employee's inability to work which was caused not by his working conditions but by his own emotional difficulties preceding his employment with the defendant and his failure to attain self-imposed goals is not a work-related disability.

Appeal from Workmen's Compensation Appeal Board. Submitted Division 1 February 11, 1974, at Detroit. (Docket No. 17975.) Decided July 24, 1974. Leave to appeal applied for.

Claim by Rodney H. Milton against the Oakland County Board of Auditors and Allstate Insurance Company for workmen's compensation. Compensation denied. Plaintiff appeals by leave granted. Affirmed.

Levine & Benjamin, P. C., for plaintiff.

Franklin, Petrulis & Lichty, for defendants.

Before: BASHARA, P. J., and DANHOF and R. L. SMITH,* JJ.

R. L. SMITH, J. This is an appeal from the Work-

REFERENCES FOR POINTS IN HEADNOTES
[1] 58 Am Jur, Workmen's Compensation §§ 530, 532.
[2] 58 Am Jur, Workmen's Compensation §§ 198, 209 *et seq.*

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

men's Compensation Appeal Board. The board denied compensation and we affirm.

In 1967, plaintiff went to work for defendant as a landscape foreman at a salary of $8,200. In 1968 he was promoted to landscape supervisor and his salary raised to $9,000. In 1969, plaintiff was given supervision of the grounds division of the Parks & Recreation Division at a salary of $10,500.

Having proven himself to be a diligent employee and highly skilled in his profession as a horticulturist, plaintiff discussed with Joseph Joachim, director of facilities and operation for Oakland County, his desire for a promotion to a superintendency. Joachim took this matter up with the Board of Auditors and was able to obtain a raise for plaintiff to a salary of $13,500, but without a change in status from supervisor to superintendent. This matter was again pursued by Joachim on behalf of the plaintiff in 1971 and he finally obtained the promotion to superintendent, with a salary of $15,000.

When advised of this promotion and salary plaintiff confronted Joachim on February 17, 1971, with the ultimatum that his salary should be $19,000 or nothing. When he was told that this was impossible the plaintiff left his work, started psychiatric treatment, was hospitalized, and ultimately his employment was terminated by the defendant.

It is conceded that the plaintiff is totally disabled from working at the present time. His condition is described as paranoid schizophrenia, pseudoneurotic schizophrenia, and psychotic. There can be little doubt but that the plaintiff's emotional and mental condition is of long standing, preceding his employment by the defendant. Plaintiff

contends that his work environment caused him to have a feeling of harassment, that he felt his superiors and employer did not sufficiently appreciate his abilities, and that his responsibilities were insufficiently compensated. Plaintiff further contends that the pressure that built up within him because of these frustrations was touched off when he finally was offered the title he wanted but at a salary less than that of other superintendents in the defendant's employ.

The defendants contend that there was a question of fact for resolution by the Appeal Board and that the board's findings are supported by credible evidence. The defendants claim that plaintiff's work environment was normal and reasonable, that his promotions and salary increases indicated that his work was appreciated, and that plaintiff's emotional problems were caused by his failure to reach the goals and attainments he set for himself.

Psychiatric testimony described the plaintiff as a person who was proud of his work but frustrated, depressed, crushed, and disappointed that he was not appreciated to the extent he believed he was entitled. The testimony further indicated that his emotional makeup set the stage for his emotional difficulties. The testimony indicates that he is the author of his own difficulties and is completely unable to see that this is the case. He cannot distinguish persecution from reality and he was thinking psychotically.

The plaintiff makes his position clear when he contends that it is not a question of what his working environment actually was but what he thought it was. We cannot accept this argument, nor do we regard *Carter v General Motors Corp,* 361 Mich 577; 106 NW2d 105 (1960), as authority for plaintiff's claim. We do not equate the pres-

sures of assembly line production with the failure to attain self-imposed goals.

The Appeal Board concludes its lengthy opinion in the following manner:

> "Our analysis of the work history, contained herein, finds that rather than a work environment perceived by plaintiff as demeaning and injurious his abilities had in fact been recognized, he had enjoyed advances in job status and substantial increases in remuneration in his less than four years of employment with defendant."

It is evident that the above finding, which is supported by the evidence, is a determination by the Appeal Board that the plaintiff's disability is not work related. Findings of fact by the Appeal Board which are supported by the evidence are conclusive in the absence of fraud. *Dean v Arrowhead Steel Products Co, Inc,* 5 Mich App 691; 147 NW2d 751 (1967). This Court is bound by such findings. The plaintiff is in an even less favorable position than the plaintiff in *MacKenzie v Fisher Body Division, General Motors Corp,* 48 Mich App 175; 210 NW2d 357 (1973).

Affirmed. Costs to the defendant.

All concurred.

ARTIBEE v CHEBOYGAN CIRCUIT JUDGE

1. BASTARDS—PATERNITY ACT—PURPOSE OF STATUTE.

   The purpose of the Paternity Act is not to punish the putative father but rather to secure support for the child (MCLA 722.711 *et seq.*).

2. BASTARDS—PATERNITY ACT—ORDER OF FILIATION—CONFINEMENT OF FATHER—CONTEMPT.

   Confinement of a father is not the objective or result of a paternity proceeding, but rather is one possible result of a contempt of court proceeding; the only result of a paternity proceeding is an order of filiation establishing the father-child relationship and specifying the sum the father is required to pay for his child's support and education (MCLA 722.717, 722.719, 722.727).

3. CONSTITUTIONAL LAW—RIGHT TO COUNSEL—BASTARDS—PATERNITY ACT.

   There is no constitutional right to counsel for defendants in paternity proceedings because the purposes and objectives of paternity proceedings are such that the direct result of these actions is *never* a deprivation or restriction of liberty (MCLA 722.711 *et seq.*).

Original action in the Court of Appeals. Submitted Division 3 May 8, 1974, at Grand Rapids. (Docket No. 18077.) Decided July 24, 1974. Leave to appeal applied for.

Complaint by Kenneth Artibee against Cheboygan Circuit Judge Joseph P. Swallow for superintending control to require the defendant to acknowledge plaintiff's right to appointed counsel in a paternity suit. Relief denied.

REFERENCES FOR POINTS IN HEADNOTES

[1] 10 Am Jur 2d, Bastards § 75.
[2] 10 Am Jur 2d, Bastards § 129.
[3] 10 Am Jur 2d, Bastards § 80.

Jerry L. Sumpter, for plaintiff.

Boyce, Yahne & Wenzel, for defendant.

Amicus Curiae: Legal Services of Eastern Michigan (by *Dolores Coulter).*

Before: ALLEN, P. J., and J. H. GILLIS and QUINN, JJ.

J. H. GILLIS, J. On December 22, 1971 a child was born to Brenda Joyce Valley. Miss Valley subsequently applied to Cheboygan County Department of Social Services for aid to dependent children benefits. Thereafter, based on information furnished by Miss Valley, the Cheboygan County Prosecutor commenced an action in circuit court against Kenneth Artibee pursuant to the Paternity Act, MCLA 722.711 *et seq.;* MSA 25.491 *et seq.,* alleging that Artibee was the child's father. At his August 15, 1973 arraignment Artibee moved that the court appoint counsel at public expense to represent him. His motion was denied. Artibee then filed a complaint for superintending control in this Court requesting an order requiring the Cheboygan Circuit Judge to acknowledge his right to appointed counsel if he were to establish his indigency. On October 15, 1973, this Court ordered the circuit judge to show cause why Artibee should not be granted the relief requested. The precise question presented here for our determination is: Do defendants in paternity suits have a right to counsel under either the United States Constitution or the Constitution of the State of Michigan, thereby requiring the appointment of counsel for an indigent defendant?

I

The basic argument of the circuit judge is that a paternity suit is not a criminal prosecution, and that there is a right to counsel only if an action is criminal. He argues first that the Sixth Amendment to the United States Constitution[1] and art 1, § 20 of the Michigan Constitution[2] both provide specifically that an accused shall have a right to counsel in all *criminal* prosecutions. He also relies heavily on the recent interpretation of the Sixth Amendment by the United States Supreme Court in *Argersinger v Hamlin,* 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972),[3] where the Court held that:

"[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.

"That is the view of the Supreme Court of Oregon, with which we agree. It said in *Stevenson v Holzman,* 254 Or 94, 102; 458 P2d 414, 418 [1969]:

" 'We hold that no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is

[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

[2] "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; to have an appeal as a matter of right; and in courts of record, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal."

[3] *See People v Studaker,* 387 Mich 698; 199 NW2d 177 (1972).

applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of assistance of counsel will preclude the imposition of a jail sentence.' " 407 US 25, 37–38; 92 S Ct 2006, 2012–2013; 32 L Ed 2d 530, 538–539.

The circuit judge says that *Argersinger* stands for the proposition that there is a constitutional right to counsel *only where* 1) punitive imprisonment results 2) from a criminal prosecution. He contends that paternity proceedings fail to meet both of these conditions. In addition to arguing that paternity suits are civil in nature, the circuit judge, relying on *In re Kaminsky,* 70 Mich 653; 38 NW 659 (1888), says that any confinement under the Paternity Act is not punitive imprisonment.[4]

We find three serious fallacies in the circuit judge's position. First, while *Argersinger* does stand for the proposition that counsel is required whenever a person is to be imprisoned for any criminal offense, it does not say that this is the *only* situation requiring counsel. Second, the circuit judge ignores other constitutional provisions which could arguably support a claim of right to counsel in paternity suits. Specifically we refer to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and art 1, § 17 of the Michigan Constitution, both of which provide that no person shall be deprived of "life, liberty, or property, without due process of law". Third, by arguing that counsel is required only in criminal actions, and that paternity proceedings are essentially "noncriminal or civil in nature",

[4] In *In re Kaminsky,* 70 Mich 653; 38 NW 659 (1888), it was held that a father, confined for failure to pay the required bond to secure his child's support, could not be confined in the Detroit House of Correction because it was a prison solely for persons convicted of offenses.

the circuit judge is saying that labels should determine the disposition of this issue. We disagree.

Courts have felt compelled to attempt to classify paternity suits. In Michigan paternity actions have been denominated "noncriminal"[5] or "quasi-criminal".[6] Of course, as this Court pointed out in *Romain v Peters,* 9 Mich App 60; 155 NW2d 700 (1967), any action which is "quasi-criminal" must also be "quasi-civil". Almost every state has ruled that these actions are basically civil in nature.[7] However, whether a proceeding is labeled civil or criminal should not be the focus of an important constitutional inquiry. The Supreme Court refused to base its decision in *Argersinger* on any "petty offense—serious offense" distinction. Likewise, we will not let semantics control our decision here.

The fallaciousness of the circuit judge's argument can best be seen by a brief examination of the juvenile court system. Juvenile court proceedings are generally considered noncriminal. Such is the case in Michigan. MCLA 712A.1; MSA

[5] *Semon v People,* 42 Mich 141; 3 NW 304 (1879); *In re Cannon,* 47 Mich 481; 11 NW 280 (1882); *People v Harty,* 49 Mich 490; 13 NW 829 (1882).

[6] *People v Phalen,* 49 Mich 492; 13 NW 830 (1882); *People v Smith,* 65 Mich 1; 31 NW 599 (1887); *People v Martin,* 256 Mich 33; 239 NW 341 (1931); *People v McFadden,* 347 Mich 357; 79 NW2d 869 (1956).

[7] *See, for example, Pelak v Karpa,* 146 Conn 370; 151 A2d 333 (1959); *Perry v District of Columbia,* 212 A2d 339 (DC App, 1965); *State v Stevens,* 279 Minn 390; 157 NW2d 52 (1968); *State v Clark,* 58 NJ 72; 275 A2d 137 (1971); *ABC v XYZ,* 50 Misc 2d 792; 271 NYS2d 781 (1966); *People ex rel Harris v Williams,* 8 Ill App 3d 821; 291 NE2d 323 (1972); *Leach v State ex rel Cooper,* 398 P2d 848 (Okla, 1965); *Oliveira v Santosuosso,* 102 RI 362; 230 A2d 864 (1967); *Frazier v McFerren,* 55 Tenn App 431; 402 SW2d 467 (1964); *State v Judd,* 27 Utah 2d 79; 493 P2d 604 (1972); *Bielawski v Burke,* 121 Vt 62; 147 A2d 674 (1959); *State ex rel Crouser v Mercer,* 141 W Va 691; 92 SE2d 745 (1956); *State ex rel Sowle v Brittich,* 7 Wis 2d 353; 96 NW2d 337 (1959).

Maryland is the only state we found that treated paternity suits as criminal proceedings. *See Lank v State,* 219 Md 433; 149 A2d 367 (1959).

27.3178(598.1). While juvenile delinquents may be confined in state institutions, they are not imprisoned with criminals. See MCLA 712A.16; MSA 27.3178(598.16). Thus, neither of the *Argersinger* conditions which mandate the appointment of counsel are present in juvenile proceedings. Nonetheless the United States Supreme Court in *In re Gault,* 387 US 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967), held that the Due Process Clause of the Fourteenth Amendment requires that in proceedings:

> "[T]o determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." 387 US 1, 41; 87 S Ct 1428, 1451; 18 L Ed 2d 527, 554.

On the question of semantics Mr. Justice Harlan, concurring in part and dissenting in part, said:

> "It must at the outset be emphasized that the protections necessary here cannot be determined by resort to any classification of juvenile proceedings either as criminal or as civil, whether made by the State or by this Court. Both formulae are simply too imprecise to permit reasoned analysis of these difficult constitutional issues. The Court should instead measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created." 387 US 1, 68; 87 S Ct 1428, 1465; 18 L Ed 2d 527, 569.

II

Our rejection of the premises of the circuit judge's argument does not mean that we have

rejected his conclusion, *i.e.,* that appointment of counsel is not constitutionally required in paternity suits. Our rejection simply means that we think the important question raised in this case demands a different approach.

Presently, there is a constitutional right to counsel for defendants in 1) criminal prosecutions and 2) juvenile proceedings. We are urged here to extend this right to a third type of action—paternity. To determine whether this extension is constitutionally mandated we must examine and compare the purposes, objectives, and results of criminal and juvenile actions, with the purposes, objectives, and results of paternity proceedings.

A. *Criminal Proceedings*

Perkins says "[c]rime is any social harm defined and made punishable by law".[8] And, according to Wharton:

> "A crime is the commission or omission by a person having capacity, of any act which is either prohibited or compelled by law, and the commission or omission of which is punishable by a proceeding brought in the name of the government whose law has been violated."[9]

The common element of these definitions is that a crime is something "punishable". However, both Perkins and Miller think it erroneous to speak of punishment as the objective of criminal law.[10] Perkins contends that "[t]he purpose of criminal law is to define socially intolerable conduct, and to hold conduct within limits which are reasonably acceptable from the social point of view"—that

[8] Perkins, Criminal Law (2d ed), p 9.

[9] 1 Wharton, Criminal Law and Procedure, § 10, pp 11–12. *See* Miller, Criminal Law, § 2, pp 16, 17; *People v Veenstra,* 337 Mich 427; 60 NW2d 309 (1953).

[10] Perkins, p 4; Miller, § 3, pp 18, 19.

punishment is simply the means of carrying out this underlying purpose.[11]

When we examine punishment, we see that it has various objectives: retribution, deterrence, prevention, and rehabilitation.[12] All of these goals of punishment would tend to achieve the purpose of criminal law as espoused by Perkins, *i.e.,* to hold conduct within socially tolerable limits. However, there are differing views on which of these goals is of primary importance. *Sauer v United States,* 241 F2d 640, 648 (CA 9, 1957), opined that the "ultimate goal" of criminal law is deterrence, and "[i]n attempting to achieve this end we employ means which secondarily satisfy the retributive feelings of society". See *State v Rinehart,* 255 Iowa 1132; 125 NW2d 242 (1963). And Mr. Justice Black, writing for the United States Supreme Court in *Williams v New York,* 337 US 241, 248; 69 S Ct 1079, 1084; 93 L Ed 1337, 1343 (1949), said:

> "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

Some courts have gone a step further and intimated that rehabilitation is the primary goal of punishment.[13]

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[11] *Id.* In *Sauer v United States,* 241 F2d 640, 648 (CA 9, 1957), the Court said that: "At least one purpose of the penal law is to express a formal social condemnation of forbidden conduct, and buttress that condemnation by sanctions calculated to prevent that which is forbidden".

[12] *See* 1 Wharton, Criminal Law and Procedure, ch 1, pp 1–10; *Pennsylvania ex rel Sullivan v Ashe,* 302 US 51; 58 S Ct 59; 82 L Ed 43 (1937); *United States v Brown,* 381 US 437; 85 S Ct 1707; 14 L Ed 2d 484 (1965); *People v McFarlin,* 389 Mich 557; 208 NW2d 504 (1973).

[13] *Benson v United States,* 332 F2d 288 (CA 5, 1964); *State ex rel Ronan v Stevens,* 93 Ariz 375; 381 P2d 100 (1963); *People v Brown,* 60 Ill App 2d 447; 208 NE2d 629 (1965).

Punishment may take the form of 1) imprisonment, 2) probation, or 3) a fine. The first two affect the convicted person's liberty; imprisonment deprives him of it, while probation simply restricts it. Therefore, the direct result of our attempts to achieve the objectives of criminal law usually is a deprivation or restriction of liberty.

B. *Juvenile Proceedings*

The objective of the founders of the juvenile court system was the rehabilitation of youthful offenders.

"The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." *In re Gault,* 387 US 1, 15–16; 87 S Ct 1428, 1437; 18 L Ed 2d 527, 539 (1967).

Thus, there was no intention to deter or restrain or to find a child "guilty". Rather the intention was to cure. This continues as the overriding

purpose of our juvenile courts.[14]

While juveniles are not imprisoned as criminals, a youth who is found to have committed the act charged may be either 1) confined or 2) put on probation. For example, the Michigan statute, MCLA 712A.18; MSA 27.3178(598.18), provides for the following possible dispositions:

"(a) Warn the child or the parents, guardian, or custodian and dismiss the petition.

"(b) Place the child on probation, or under supervision in his own home, upon such terms and conditions, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, designed for the physical, mental or moral well-being and behavior of the child, as the court shall determine.

"(c) Place the child, in a suitable boarding home, which if a home of persons not related to the child, shall be licensed as provided by law.

"(d) Place the child in or commit the child to a private institution or agency incorporated under the laws of this state and approved or licensed by the state department of social welfare for the care of children of similar age, sex and characteristics.

"(e) Commit the child to a public institution or county facility or institution operated as an agency of the court or county or agency authorized by law to receive children of similar age, sex and characteristics."

Thus, the direct consequences to a person "convicted" under a juvenile court act and to a person

[14] "The objectives [of juvenile courts] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." *Kent v United States,* 383 US 541, 554; 86 S Ct 1045, 1054; 16 L Ed 2d 84, 94 (1966). *See United States v King,* 482 F2d 454 (CA 6, 1973); *In re Johnson,* 178 F Supp 155 (D NJ, 1957); *People v Dotson,* 46 Cal 2d 891; 299 P2d 875 (1956); *In re Walker,* 282 NC 28; 191 SE2d 702 (1972); *In re Poulin,* 100 NH 458; 129 A2d 672 (1957). *See, also,* Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 Col L Rev 281 (1967); Ketcham, *Legal Renaissance in the Juvenile Court,* 60 NWU L Rev 585 (1965).

convicted of a crime are essentially the same—a deprivation or restriction of his liberty.

C. *Paternity Proceedings*

First, we must examine relevant portions of the Michigan Paternity Act. MCLA 722.711 *et seq.;* MSA 25.491 *et seq.*

"(c) The complaint shall be made to, and for the purpose of this act jurisdiction is conferred upon the circuit court; it shall be reduced to writing and the proceedings shall be conducted by an attorney employed by the complainant. If the department of social services of the county wherein the complainant resides first determines her to be eligible for public assistance or to be without means to employ an attorney or if the department of social services is the complainant, then the prosecuting attorney or an attorney employed by the county pursuant to section 1 of Act No. 15 of the Public Acts of 1941, as amended, being section 49.71 of the Compiled Laws of 1948, shall represent the complainant in initiating and conducting the proceedings under this act. The complaint shall be verified by oath or affirmation of complainant. * * *

"(d) The complainant shall charge the person named as defendant with being the father of the child and state the time and place, as near as possible, where the complainant was begotten with child. If the department of social services is the complainant, the person named as defendant shall be charged upon information and belief.

"(e) Upon the filing of the complaint the court shall issue a warrant against the alleged father directed to any peace officer in the state which may be executed in any part of this state. Upon the alleged father being brought before the court by virtue of the warrant, the court thereupon, or as soon thereafter as may be, shall proceed with the trial of the case." MCLA 722.714; MSA 25.494.

"(a) If the finding of the court or verdict be against the defendant, or if the defendant acknowledges paternity orally to the court or by the filing in the case of his written acknowledgment of paternity, or if he is served

with summons or a warrant and a default is duly taken against him, the court shall make an order of filiation declaring paternity and for the support and education of the child.

"(b) The order of filiation shall specify the sum to be paid weekly or otherwise, until the child reaches the age of 18. In addition to providing for the support and education, the order shall also provide for the payment of the necessary expenses incurred by or for the mother in connection with her confinement; for the funeral expenses if the child has died; for the support of the child prior to the making of the order of filiation; and such expenses in connection with the pregnancy of the mother or of the proceedings as the court deems proper.

"(c) When an order of filiation has been made, the clerk of the court shall forthwith transmit to the state commissioner of health on a form prescribed by him a written notification as to the order, together with such other facts as may assist in identifying the birth record of the person whose paternity was in issue. If the order is abrogated by a later judgment or order of the same or a higher court, that fact shall be immediately communicated in writing to the state commissioner of health on a form prescribed by him by the clerk of the court which entered the order." MCLA 722.717; MSA 25.497.

"(c) The judge, in case of default in the payment, when due, of any installment or any part thereof or in the condition of the bond, may adjudge the reputed father guilty of contempt of court, by reason of the default, and may order him committed to the county jail or other penal institutions in the state of Michigan, where his earnings or a portion thereof, shall be applied to the support of the child, or confinement expenses, but for a period not exceeding 1 year or until the amount of the installment so due, shall be fully paid, but the commitment of the reputed father shall not operate to stay or defeat the obtaining of judgment and the collection thereof by execution. The rendition and the enforcement of decree or judgment shall not be construed to bar or hinder the taking of similar proceedings for subsequent defaults." MCLA 722.719; MSA 25.499.

In *Romain v Peters,* 9 Mich App 60; 155 NW2d 700 (1967), this Court said that the purpose of our Paternity Act is "not to punish the putative father", but is rather to secure "support of the child". Other jurisdictions are generally in accord.[15] Some courts have noted that a secondary objective of these laws is to relieve the public of the support obligation.[16]

The direct result of a paternity proceeding is an order of filiation (MCLA 722.717; MSA 25.497), establishing the father-child relationship and specifying the sum the father is required to pay for his child's support and education. This is the only result of a paternity proceeding and it is wholly consistent with the proceeding's objectives. Confinement may occur if the father fails to comply with the order, but such confinement is not the objective or result of the paternity proceeding, but rather is one possible result of a contempt of court proceeding. MCLA 722.719, 723; MSA 25.499, 503.

III

We have seen that the purposes and objectives of criminal and juvenile proceedings are such that the usual and direct result of these actions is a deprivation or restriction of liberty. We have also seen that the purposes and objectives of paternity proceedings are such that the direct result of these actions is *never* a deprivation or restriction of liberty. For this reason we hold that there is no constitutional right to counsel for defendants in paternity proceedings.

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[15] *See Perry v District of Columbia, supra; People v Williams, supra; ABC v XYZ, supra; Oliveira v Santosuosso, supra; Frazier v McFerren, supra; State v Judd, supra; Bielawski v Burke, supra; State v Bowen, supra; State v Brittich, supra.*

[16] *See, for example, Pelak v Karpa, supra; State v Clark, supra; State v Mercer, supra.*

The requirements of procedural due process are flexible and may be adapted to the demands of a variety of contexts. *McNeill v Butz,* 480 F2d 314 (CA 4, 1973).

"[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the *government function* involved as well as of the *private interest* that has been affected by governmental action." (Emphasis supplied.) *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v McElroy,* 367 US 886, 895; 81 S Ct 1743, 1748–1749; 6 L Ed 2d 1230, 1236 (1961); *see Goldberg v Kelly,* 397 US 254, 263; 90 S Ct 1011, 1018; 25 L Ed 2d 287, 296 (1970); *Morrissey v Brewer,* 408 US 471, 481; 92 S Ct 2593, 2600; 33 L Ed 2d 484, 494 (1972).

The government's function in a paternity suit is not to deprive the putative father of his liberty. Freedom is not the private interest primarily affected by these proceedings.

Admittedly, confinement is a collateral possibility via a contempt of court proceeding. However, confinement for contempt of court may also result if a party to a divorce or separate maintenance proceeding has been ordered to pay money for the support of his minor children and fails to do so. MCLA 552.201; MSA 25.161. Moreover, any judgment debtor is subject to civil arrest and imprisonment if under certain circumstances he fails to pay the judgment secured against him. MCLA 600.6075; MSA 27A.6075. Therefore, were we to hold that procedural due process mandated a right to counsel in paternity proceedings, logic would mandate a right to counsel in virtually all civil proceedings. We don't think the flexible concept of due process demands such a result.

Since the Cheboygan Circuit Judge has shown

cause why the relief sought in plaintiff Artibee's complaint should not be granted, we order that the relief be denied. No costs, a public question being involved.

All concurred.

PEOPLE v WILLIAMS

CRIMINAL LAW—CONTROLLED SUBSTANCES—DEFENSES—PROCURING AGENT—STATUTES.

The procuring agent defense is not available to a defendant charged with delivery of a controlled substance because under the Controlled Substances Act if there is an actual, constructive or attempted delivery a crime has been committed regardless of any agency relationship, whether it be between the defendant and a narcotics agent or between the defendant and the suppliers (MCLA 335.304[1]).

Appeal from Midland, James R. Rood, J. Submitted Division 3 June 7, 1974, at Lansing. (Docket No. 18237.) Decided July 24, 1974. Leave to appeal applied for.

Dale E. Williams was convicted of delivery of marijuana. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward G. Durance,* Prosecuting Attorney, and *Gerald L. White,* Assistant Prosecuting Attorney, for the people.

Whittaker & Rowland, for defendant.

Before: MCGREGOR, P. J., and R. B. BURNS and O'HARA,* JJ.

R. B. BURNS, J. Defendant was convicted by a

REFERENCES FOR POINTS IN HEADNOTE

25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 38, 43, 46, 47.

Entrapment to commit offense with respect to narcotics law. 33 ALR2d 883.

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

jury of delivering a controlled substance (marijuana). MCLA 335.341(1)(c); MSA 18.1070(41)(1)(c).

Narcotics agents let it be known that they were in the market for marijuana. Upon inquiry a young lady introduced them to Rick Jones who called defendant and was informed that he would see what he could do. They drove to defendant's residence. Defendant stated that he was unable to contact anybody but they should come back later.

Officer Huston returned to defendant's house. Defendant said he had made a contact and that the man would be at his house in about one-half hour. Huston left and later returned. He was introduced to two men. Huston inquired if they had the stuff and was told it was on the bed.

Officer Huston testified that defendant took the two bags off the bed and handed them to him. He paid defendant $20.

Defendant testified that he might have handed the bags to him, he couldn't remember, but he was positive Huston picked up the bags. He accepted the money and handed it to a fellow named Joe.

Has the procuring agent defense announced in *People v Turner,* 38 Mich App 479; 196 NW2d 799 (1972), been abrogated by the new Controlled Substances Act?

Defendant contends that the court erred in refusing to give the *Turner* procuring agent defense to the jury. *Turner* was based upon the Uniform Narcotic Drug Act, MCLA 335.152; MSA 18.1122. This statute was repealed by the Controlled Substances Act prior to the commencement of the defendant's trial. The new act controls; it provides:

" 'Deliver' or 'delivery' means the actual, constructive or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCLA 335.304(1); MSA 18.1070(4)(1).

In this case the narcotics officer was invited to defendant's home where the sale and delivery took place. The money was handed to the defendant. We conclude, as did the jury, that there was a delivery.

Delivery is the key word. We interpret the Controlled Substance statute to mean that if there is an actual, constructive or attempted delivery, a crime has been committed regardless of any agency relationship whether it be between defendant and narcotics agent or with the suppliers.

This abrogates the procuring agent defense raised, discussed and decided in *Turner*. The *Turner* precedent no longer applies. Criminal liability attaches when the seller or procurer, whether agent or not, hands the contraband package to the purchasing officer.

Refusal by the trial court to give the *Turner* procuring agent instruction to the jury was proper and no error was committed.

Affirmed.

All concurred.

HAKKINEN v LAKE SUPERIOR DISTRICT POWER COMPANY

OPINION OF THE COURT

1. WORKMEN'S COMPENSATION—THIRD-PARTY ACTION—SETTLEMENT—APPORTIONMENT OF EXPENSES—CREDITS.

Credit to which a workmen's compensation insurer is entitled for benefits paid to an injured employee, in a settlement of the employee's claim against a third-party tortfeasor, is for the Bureau of Workmen's Compensation to determine, and a trial court which apportioned the expenses of litigation between the employee and the insurer committed error when it also fixed the credit for benefits paid.

DISSENT BY J. H. GILLIS, J.

2. WORKMEN'S COMPENSATION—COMPROMISE AND SETTLEMENT—THIRD-PARTY TORTFEASOR—DAMAGES—STATUTES.

An injured employee has the right to settle his claim against a third-party tortfeasor for damages independent of workmen's compensation and the Workmen's Compensation Act does not prohibit such a settlement; the statute preserves the employee's common-law rights aside from his rights under the Workmen's Compensation Act, and where a compensation insurance carrier was a protected intervening plaintiff and knew of the settlement but failed to exercise any rights respecting it, such a good-faith settlement should be upheld (MCLA 413.15).

Appeal from Gogebic, Donald L. Munro, J. Sub-

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation §§ 63, 358 *et seq.*

Right as between employer primarily responsible under workmen's compensation act and employer secondarily liable under that act (or their insurers) where injury was due to latter's negligence. 117 ALR 571.

[1, 2] 58 Am Jur, Workmen's Compensation §§ 60, 66.

Workmen's Compensation: rights and remedies where employee was injured by a third person's negligence. 106 ALR 1040.

mitted Division 3 May 10, 1974, at Marquette. (Docket Nos. 18261, 18262.) Decided July 24, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Waino Hakkinen against Lake Superior District Power Company, Roy Hopkins, David Bulinski, and Harry Collis for negligence resulting in personal injuries when he came in contact with an electric wire while at work. Employers Mutual Liability Insurance Company of Wisconsin, the workmen's compensation insurer of Northern Advertising Company, plaintiff's employer, intervened as a plaintiff. Claim against the defendants settled, and the court made an order apportioning the costs of recovery and the amount of settlement between the plaintiff and the insurance carrier. The insurance carrier appeals. Affirmed as to apportionment of expenses of litigation. Reversed as to amount of credit to the workmen's compensation insurer.

William G. Cloon, for Waino Hakkinen and Sylvia A. Hakkinen.

Humphrey & Weis, for Lake Superior District Power Company.

Strom, Hoehn, Butch, Quinn & Rosemurgy, for Northern Advertising Company and Employers Mutual Liability Insurance Company.

Before: ALLEN, P. J., and J. H. GILLIS and QUINN, JJ.

QUINN, J. The basic facts involved in this litigation are found in *Hakkinen v Northern Advertising Co,* 38 Mich App 506; 196 NW2d 863 (1972). The concluding paragraph of that opinion reads:

"The case is remanded to the Bureau of Workmen's

Compensation for action in accordance with this opinion, after final determination of the third-party action now pending in circuit court."

In context with the full opinion in *Hakkinen, supra,* this language required two things to be done:

1. Apportionment by the trial court of the expenses in the litigation which resulted in the settlement of Hakkinen's claim against the third-party tortfeasor between Hakkinen and Employers Mutual Liability Insurance Company.

2. After this determination, the Bureau of Workmen's Compensation was required to credit Employers Mutual's liability for workmen's compensation benefits with a corrected amount which reflected the apportionment of those expenses.

The present appeal is before us because the trial court did more than it was required to do under *Hakkinen, supra.* In addition to apportioning $2,665.06 of the expenses to Employers Mutual, the trial court fixed the amount of credit to which Employers Mutual was entitled against workmen's compensation benefits paid and to be paid to Hakkinen. This was error. The credit to which Employers Mutual was entitled was for the Bureau of Workmen's Compensation to determine.

The trial court is reversed except as to its determination that Employers Mutual's share of expenses in the third-party litigation was $2,665.06. That determination is affirmed and the cause is remanded to the Workmen's Compensation Bureau for correction of the credit heretofore allowed Employers Mutual on its liability for payment of workmen's compensation benefits to Hakkinen. No costs are allowed.

ALLEN, P. J., concurred.

J. H. GILLIS, J. *(dissenting).* I would affirm the trial court's judgment for plaintiffs (not its alternative findings). After exploring numerous cases, many substantively aligned with the majority, I nevertheless conclude that the trial judge's application of equitable principles to bar reimbursement in this case was appropriate and proper. Further, *Hix v Besser Co,* 386 Mich 499; 194 NW2d 333 (1972), decided just after *Hakkinen #1,*[1] which applied the waiver doctrine to this area, modified preexisting law. Application of "res judicata" or its offshoots is improper in this context, especially absent a final judgment.

The issue was well framed by the trial judge: May an employee and his spouse settle their claims against a third-party tortfeasor for damages independent of workmen's compensation or do *subsequently* interpreted provisions of MCLA 413.15; MSA 17.189[2] prohibit that settlement? The issue is further, and to my mind, conclusively modified because the insurance carrier, a protected intervening plaintiff, knew of that settlement but failed to exercise any rights respecting it despite its intervening status. I believe the employee has the right to settle for his independent damages. The statute does not prohibit that result. I agree with the trial judge; both *Transamerican Freight Lines v Quimby,* 381 Mich 149; 160 NW2d 865 (1968), and *Gamble v American Asbestos Products Co,* 381 Mich 105; 159 NW2d 839 (1968), are distinguishable because of the employer's intervenor status. Settlement between the injured employee and third-party tortfeasor was effected on December 29, 1967. The insurance carrier first filed objections and requested apportionment in 1972, after

[1] *Hakkinen v Northern Advertising Co,* 38 Mich App 506; 196 NW2d 863 (1972).

[2] Now MCLA 418.827; MSA 17.237(827).

Hakkinen #1 was decided, despite the right granted the insurer to appeal the dismissal of the employee's action by the order of intervention. In fact, after the settlement the insurer filed its own complaint against the third-party tortfeasor!

MCLA 413.15; MSA 17.189, inartfully attempts to achieve several goals: to preclude the employee from double recovery, to prevent ouster of the insurer's right to recover, but to preserve nonetheless the employee's common-law rights aside from his rights under the Workmen's Compensation Act. The prior statute required an election of remedies but was amended to protect common-law rights and avoid that effect. Legislative redefinition is indicated when the assertedly "remedial" legislation casts the employee as a collection agent for the insurer. But if that is the Legislature's intent, the unwitting employee at least deserves to be apprised of the fact! To cast him in that role some four years after good-faith settlement of his claim violates fundamental principles of our jurisprudence. To this injustice, laches and constructive fraud should apply. I dissent from my Brothers' treatment of this case.

PEOPLE v GOINS

1. CRIMINAL LAW—PLEA OF GUILTY—HIGHER OFFENSE—SAME TRANSACTION.

A defendant who was charged with sale of marijuana, carrying a concealed weapon, and possession of marijuana, and who pled guilty to the concealed weapon and possession charges, whereupon the sale charge was quashed, cannot again be charged with sale of marijuana when the convictions on the other two charges are vacated; upon the acceptance of a plea of guilty, the state, as a matter of policy, may not thereafter charge a higher offense arising out of the same transaction (MCLA 335.152, 335.153, 750.227).

2. CRIMINAL LAW—PLEA OF GUILTY—HIGHER OFFENSE—IMPROPER CHARGE—VOLUNTARINESS OF PLEA.

A defendant who pled guilty to a charge of carrying a concealed weapon, where he had also been improperly charged in a supplemental information with the sale of marijuana as a second felony offense and therefore subject to an increased sentence, is entitled to a new trial upon the concealed weapon charge because there is a question whether his guilty plea was voluntarily given or was coerced as the only way he could extricate himself from the threat of the improper charge of sale of marijuana.

3. CRIMINAL LAW—PLEA OF GUILTY—GREATER OFFENSE—VOLUNTARINESS OF PLEA—IMPROPER CHARGE—UNRELATED OFFENSE.

A series of cases which held that even where a plea of guilty of a

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 185–187, 189, 212.
Conviction of lesser offense or bar to prosecution for greater on new trial. 61 ALR2d 1141.

[2, 3] 21 Am Jur 2d, Criminal Law §§ 485–487, 505.
Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he's advised thereof. 97 ALR2d 549.

[3] 21 Am Jur 2d, Criminal Law § 226.
Conviction of criminal offense without evidence as denial of due process of law. 80 ALR2d 1362.

lesser included offense is induced by a desire to avoid the possibility of conviction on a greater offense properly charged, that is not a ground for vacating the plea on the ground of involuntariness, does not apply to a case in which a defendant was improperly charged with a greater offense and pled guilty not to a lesser included offense but to an offense totally unrelated to the greater offense charged.

Appeal from Van Buren, David Anderson, Jr., J. Submitted Division 3 April 3, 1974, at Grand Rapids. (Docket No. 18269.) Decided July 24, 1974.

Eugene Goins was convicted, on his plea of guilty, of carrying a concealed weapon. Defendant appeals. Reversed and remanded.

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

Francis Zebot, Assistant State Appellate Defender, for defendant.

Before: ALLEN, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. An understanding of the chronology of events in the instant case is necessary for a proper consideration of defendant's questions on appeal.

On May 17, 1971, defendant Eugene Goins was arraigned on a two-count information charging him with sale of marijuana, MCLA 335.152; MSA 18.1122, and carrying a concealed weapon without a license, MCLA 750.227; MSA 28.424. He stood mute, and the court entered a plea of not guilty on his behalf.

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

On July 1, 1971, the information was amended to add a third count, possession of marijuana, MCLA 335.153; MSA 18.1123. On July 6, 1971, defendant's plea of guilty was accepted on counts II and III of the amended information. He pled not guilty to count I (sale), and that count was subsequently quashed.

On August 30, 1971, defendant was sentenced to 2-1/2 to 5 years on count II (carrying a concealed weapon and 2-1/2 to 10 years on count III (possession).

On April 26, 1972, the trial court vacated defendant's conviction and sentence for possession of marijuana (count III) pursuant to *People v Sinclair,* 387 Mich 91; 194 NW2d 878 (1972). On May 5, 1972, the trial court vacated defendant's plea-based conviction and sentence for carrying a concealed weapon (count II) on the basis of a violation of *People v Jaworski,* 387 Mich 21; 194 NW2d 868 (1972). At the same time the court granted the prosecutor's motion to reinstate count I (sale).

On July 13, 1972, the prosecution filed a supplemental information pursuant to MCLA 769.10; MSA 28.1082 and MCLA 769.13; MSA 28.1085, charging sale of marijuana and carrying a concealed weapon as "second felonies", thereby increasing the possible maximum sentences on those charges by fifty percent.

On July 19, 1972, defendant was arraigned on counts I and II and the supplemental information and he pled not guilty to count I (sale) and the supplemental information on that charge, and guilty to count II (carrying concealed weapon) and the supplemental information on that charge, acknowledging the existence of a 1956 conviction for breaking and entering. Count I (sale) and its appended supplemental information were quashed.

On September 5, 1972, defendant was sentenced to 2-1/2 to 7-1/2 years in Jackson prison. On June 22, 1973, the prosecution moved to strike the conviction on the supplemental information as a result of the decision in *People v McMiller,* 389 Mich 425; 208 NW2d 451 (1973), and on July 12, 1973, the trial court entered an order amending defendant's sentence to 2-1/2 to 5 years in prison.

Defendant first contends that after his plea of guilty to possession of marijuana was set aside, the prosecutor's reinstatement of the sale charge was improper because such action contravenes the policy expressed in *People v McMiller, supra.*

In *McMiller,* our Supreme Court held that upon the acceptance of a plea of guilty, as a matter of policy, the state may not thereafter charge a higher offense arising out of the same transaction. The Court enumerated two overriding policy considerations when it stated at p 432:

> "Allowing trial on a higher charge following reversal of a plea-based conviction of a lesser offense would (1) discourage exercise of the defendant's right to appeal a conviction claimed to be based on an improperly accepted plea, and (2) tend to insulate from appellate scrutiny non-compliance with the guilty plea procedure established by the statute and the court rule."

Applying these considerations to the case at bar, we are of the opinion that the trial court erred in allowing the prosecutor to reinstate the sale charge after defendant's guilty plea to possession had been set aside.

We are aware that in *People v McGreevy,* 52 Mich App 52; 216 NW2d 623 (1973), the Court declined to apply *McMiller* retroactively. However, *McGreevy* is distinguishable on its facts, since there a guilty plea to a lesser offense had been set

aside, the defendant had been recharged with the greater offense and had again pled guilty to the lesser offense. In this case defendant did not again plead guilty to the lesser offense, but instead pled guilty to an unrelated offense. Therefore, *McGreevy* is not controlling and we conclude that the holding in *McMiller* applies to defendant's case, thereby precluding his retrial on the sale charge.

Since we hold that it was improper to reinstate the sale charge against the defendant, we find it unnecessary to consider defendant's equal protection challenge to the statute under which the sale charge was reinstated.

Defendant next claims that his plea of guilty to carrying a concealed weapon and the supplemental information on that charge was coerced by the improper reinstatement of the sale charge. Defendant argues that his plea was involuntary because he had no choice. He either had to plead guilty to the charge of carrying a concealed weapon or be faced with further prosecution and an increase in sentence via the supplemental information for sale of marijuana charged in contravention of the policy of *McMiller.* Defendant thus asserts that the only way he could extricate himself from the threat of the improper sale charge was to plead guilty to the concealed weapon charge. We agree.

Defendant requested an evidentiary hearing before the trial court to determine whether his plea of guilty to carrying a concealed weapon and the supplemental information was coerced by the reinstated charge of sale of marijuana. Although this motion is still pending in the Van Buren Circuit Court, since such a hearing has not been held, we assume for our purposes that the motion has been denied. The motion should have been granted for if such hearing had been held, we would then have

before us a proper record from which we could determine the question of the involuntariness of defendant's plea.

However, due to the circumstances of this case, we find remand for an evidentiary hearing unnecessary, since we are of the opinion that defendant's guilty plea should be vacated and that he should be granted a new trial on the charge of carrying a concealed weapon. We do so because we feel that with the improper sale charge now eliminated, an evidentiary hearing into the question of the involuntariness of defendant's plea would serve no useful purpose. Instead defendant is entitled to a new trial where the possibility of coercion would be nonexistent.

We are aware that the *Kindell*[1] line of cases hold that even where a plea is induced by a desire to avoid the possibility of conviction on the greater offense, that is not a ground for vacating the plea on the ground of involuntariness. However, *Kindell* and its progeny are distinguishable on two grounds. First, in those cases the defendants were *properly charged* as to the greater offense, and thus their assertions that they were thereby coerced to pleading to the lesser offense were held to be meritless. But in the instant case, as we have already stated, defendant was *improperly charged* with a greater offense and we believe his claim of coercion to have merit. Second, in *Kindell* and its progeny, the defendants pled guilty to a charge which was a lesser included offense of the greater crime charged. Here the defendant's plea was to an offense totally unrelated to the greater sale of

[1] *People v Kindell,* 17 Mich App 22; 168 NW2d 909 (1969); *People v Jackson,* 20 Mich App 414; 174 NW2d 9 (1969); *People v Sumlin,* 32 Mich App 1; 188 NW2d 144 (1971); *People v Grades,* 35 Mich App 383; 192 NW2d 655 (1971).

marijuana charge. Therefore, the *Kindell* line of cases is not controlling.

Since our previous discussion effectively disposes of this case, we find it unnecessary to deal with defendant's remaining allegations of error. A careful review of the record in regard to those issues discloses no prejudicial error.

Reversed and remanded for a new trial on the charge of carrying a concealed weapon.

All concurred.

PEOPLE v HENLEY

1. CRIMINAL LAW—DEFENSES—ENTRAPMENT—OBJECTIVE TEST—CONDUCT OF POLICE.

The objective test of entrapment is applied by looking to the conduct of the police; if the crime was manufactured by the law enforcement officers, the defendant was entrapped.

2. CRIMINAL LAW—ENTRAPMENT—WILLINGNESS TO COMMIT CRIME—DELIVERY OF HEROIN.

A defendant convicted of delivery of heroin was not entrapped where the facts demonstrate that he was ready and willing to commit the crime whenever the opportunity to do so arose and on each of several occasions, when requested by a police undercover agent to furnish drugs, the defendant left his premises and obtained the heroin without delay from sources apparently well known to him.

3. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESSES.

A police undercover agent was not a res gestae witness where the agent had arranged delivery of drugs on occasions previous to the occurrence for which the defendant was charged, but was not present during the events leading up to or at the time of the delivery in question.

Appeal from Genesee, Thomas C. Yeotis, J. Submitted Division 2 June 10, 1974, at Lansing. (Docket No. 18319.) Decided July 24, 1974.

Theodore W. Henley was convicted of unlawful delivery of heroin. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 143–145.

[2] 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 38, 43, 46, 47.

Entrapment to commit offense with respect to narcotics law. 33 ALR2d 883.

[3] 29 Am Jur 2d, Evidence §§ 708, 713.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people.

Shaheen & Shaheen, for defendant on appeal.

Before: QUINN, P. J., and V. J. BRENNAN and CARLAND,* JJ.

CARLAND, J. The defendant was charged and convicted in a nonjury trial of the unlawful delivery of heroin in violation of the provisions of MCLA 335.341; MSA 18.1070 (41) (controlled substances act of 1971). The defendant appeals as a matter of right.

The charged offense occurred on June 12, 1972 and while admitting the delivery of heroin on that date, the defendant raises the defense of entrapment. Because of this admission, there is little dispute, if any, concerning the essential facts in this case, but since our determination of this issue must rest upon the particular facts attendant hereto, these facts must be stated. The facts are largely gleaned from the defendant's own testimony.

For some time prior to the date in question, a Michigan State Police narcotics unit had been conducting an investigation into the drug traffic being carried on in the City of Flint. During the course of this investigation, the state police availed themselves of the services of an undercover agent known to the record as "IL 367" and "Bob" as he is hereinafter referred to. Such agent while employed at a General Motors plant became acquainted with a fellow employee, one Michael

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

Johnson. Mike, as he is referred to throughout the record, is a cousin of the defendant. Apparently Bob was able to convince Mike that he was a user of narcotics and was anxious to learn of sources from which his needs might be supplied. Mike steadfastly maintained that he had no knowledge of such sources.

Eventually, however, Bob was introduced to the defendant by Michael Johnson. At this first meeting drugs were discussed and the defendant was asked by Bob to purchase some drugs for him. The defendant at that time asserted that he couldn't get any. At a second meeting a few days later, the request was repeated and heroin was promptly furnished by the defendant.

The defendant testified that his next contact with Bob occurred on May 23, 1972 when the agent drove up in a truck accompanied by another person, "Terry", who was introduced to him as Bob's brother. Mike was also present on this occasion and advised the defendant that Bob wanted him to get something for him. The defendant approached the truck and was again requested to furnish drugs to Bob. In response to this request, the defendant testified as follows:

"*Q.* Okay, did you speak with Bob at that time?

"*A.* Yes, I approached the truck. It was a white tow truck. I approached the truck and I had a conversation with Bob and he told me what he wanted you know. He explained to me that he wanted me to get him some more drugs.

"*Q.* Okay, and what did you do then?

"*A.* Well, I didn't argue the point with him. I told him to give me the money and I went and got them for him."

Again on May 31st, two cars were driven to the vicinity of the defendant's home. Mike got out of

one car and asked the defendant if he could get some "stuff" for Bob. The defendant then looked into the other car and observed Bob and his brother Terry and a third person with whom he was not acquainted. This third person was later identified as Police Officer Dolan. Bob repeated the request for drugs. The defendant left and came back with "stuff" which he delivered to Dolan. Arrangements were then made whereby Dolan might procure drugs from the defendant in the future.

The events upon which the present charge is based arose on June 12, 1972. A request at that time was made by Dolan that the defendant get him something. The following testimony of the defendant discloses a lack of pressure by the police and a willingness on the part of the defendant to furnish narcotics:

"I went to the door. It was Dolan. He said 'Hi, Teddy, remember me?'

"At first I didn't remember him until I noticed the car setting in front of the house. This was what made me remember him.

"And I said, 'Oh, yeah. What's happening, do you know?'

"And he said, 'Do you think you can get me something?'

"And I said, 'I don't know, man, but we can go see.'

"And then I—he said, 'Okay.'

"And I told my mother I'd be right back, and we left and went and got in the car.

"I then stated to Dolan they should drive down to Church Street and make a right and stop at the corner of Ninth and Church. He does like I asked.

"And he then asked me, he said, 'How much is it here, man?'

"I said, '$10.00.' And he gave me the money and I got out the car, went down to the house where I was

supposed to make the buy at but the guy didn't have anything.

"So I came back to the car and I told Dolan this and he didn't say, well, he said, 'The guy didn't have anything?'

"I said, 'No, but I might be able to get something else for you on the north side if you want to go over there.'

"He said, 'Yeah, okay. How do we get there?'

"And then I directed him to the house on Oren and Harriet and we parked on the corner. I say, 'Well I don't know how much it is here, man, I think it's twenty-five or thirty dollars.'

"Dolan said, 'Yes, twenty-five or thirty dollars.'

"And I said, 'Yes, if it's only twenty-five I'll bring you five dollars back.' He then gave me $30.00.

"I went into the house, made the buy, came back to the car and gave him the stuff."

It should be further noted that on none of the occasions the defendant had drugs in his possession at the time he was requested to furnish them. In every instance, the defendant left his premises and obtained the drugs without delay from sources apparently well known to him. Heroin was furnished on each occasion.

In *People v Turner,* 390 Mich 7; 210 NW3d 336 (1973), our Supreme Court, in deciding the issue of entrapment there raised, adopted the objective test enunciated by Mr. Justice Stewart in his minority opinion in *United States v Russell,* 411 US 423; 93 S Ct 1637; 36 L Ed 2d 366 (1973). In applying this objective test, it is held that the court must look to the conduct of the police officers before a determination can be made as to whether the defendant was entrapped. He was entrapped if the crime was manufactured by the enforcement officers. On page 439 of *Russell,* the Justice speaks as follows:

"It is common ground that 'the conduct with which the defense of entrapment is concerned is the *manufac-*

turing of crime by law enforcement officials and their agents.' *Lopez v United States,* 373 US 427, 434; 83 S Ct 1381, 1385; 10 L Ed 2d 462, 468 (1963). For the government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. *Sherman v United States,* 356 US 369, 372; 78 S Ct 819, 821; 2 L Ed 2d 848, 851 (1958). As Mr. Justice Brandeis put it, the government 'may not provoke or create a crime and then punish the criminal, its creature'. *Casey v United States,* 276 US 413, 423; 48 S Ct 373, 376; 72 L Ed 632, 636 (1928)."

Again on pages 444–445 of *Russell, supra,* we find the following:

"In my view, a person's alleged 'predisposition' to crime should not expose him to government participation in the criminal transaction that would be otherwise unlawful."

"This does not mean, of course, that the government's use of undercover activity, strategy, or deception is necessarily unlawful. *Lewis v United States,* 385 US 206, 208–209; 87 S Ct 424, 426; 17 L Ed 2d 312, 315 (1966). Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. *Osborn v United States,* 385 US 323, 331–332; 87 S Ct 429, 434; 17 L Ed 2d 394, 400 (1966). See also *Sherman v United States, supra,* at 383–384; 78 S Ct at 826; 2 L Ed 2d at 857 (Frankfurter, J., concurring).

"But when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the

institutional integrity of the system of federal criminal justice."

Applying the so-called objective test in *People v Turner,* the court's dismissal of the charges against the defendant was based upon a finding of entrapment. *A fortiori* the court must have found the defendant to have been one not ready and willing to commit the crime and that, therefore, the officers had engaged in the manufacture of the offense.

Applying the same test to the facts in the case at bar, we find that the investigation being conducted by the state police involving the drug traffic in the City of Flint to have been legitimate and proper in every respect. The use of undercover agents and the establishment of the confidential relationship with suspected drug peddlers are perhaps the only weapons by which society can combat the traffic which exacts such a devastating toll of its victims and society in general. It is a rare instance in which drugs are sold to strangers. The facts clearly demonstrate the defendant to have been ready and willing to commit the crime whenever the opportunity to do so arose. The crime was not manufactured by the police and thus the defendant was not entrapped.

During the course of the trial, the defendant moved to force the endorsement on the information of the name of the undercover agent IL 367, it being claimed that he was a res gestae witness. The trial court was correct in his denial of this motion. The record discloses that on the night of June 12, 1972 the agent was at no time present during the happening of the events leading up to or at the time of the delivery of the heroin to Officer Dolan by the defendant. This is the offense with which the defendant stands charged and any

prior delivery of drugs by the defendant either to the agent or at times when the agent was present are not relevant to this prosecution.

We affirm.

All concurred.

PEOPLE v LACY

1. CRIMINAL LAW—CONSTITUTIONAL LAW—DOUBLE JEOPARDY.

A defendant may not be reprosecuted in order to impose upon him another sentence for the same offense (US Const, Am V; Const 1963, art 1, § 15).

2. CRIMINAL LAW—CONSTITUTIONAL LAW—DOUBLE JEOPARDY—SENTENCES—CREDIT FOR TIME SERVED—PROBATION.

Failure to grant a defendant credit for time spent on probation against a prison sentence imposed after the revocation of that probation does not place the defendant in double jeopardy.

3. CRIMINAL LAW—CONSTITUTIONAL LAW—EQUAL PROTECTION—SENTENCES—CREDIT FOR TIME SERVED—PROBATION—PAROLE—STATUTES.

Applying credit for time spent on parole against a prison sentence while failing to give credit for time spent on probation is not a violation of the constitutional guarantee of equal protection of the laws because the treatment afforded probationers as distinguished from the treatment of parolees is necessary for the achievement of a compelling state interest; the effectiveness of probation revocation as a tool for securing compliance with the terms of probation would be vitiated if credit were granted for time previously spent thereon, and trial courts could well be discouraged in the important and necessary exercise of discretion in sentencing defendants in a manner relevant to their characteristics and to the crime involved (MCLA 791.238).

Appeal from Allegan, Wendell A. Miles, J. Submitted Division 3 June 13, 1974, at Detroit. (Docket No. 18450.) Decided July 24, 1974.

Earl Lacy, Jr., was convicted, on his plea of guilty, of larceny in a building and was placed on

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 182.

[2, 3] 21 Am Jur 2d, Criminal Law §§ 533, 545.

probation. Probation was revoked and defendant appeals the computation of credit for time served. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Gary Stewart,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Edward R. Wilson,* Director, by *William P. Weiner,* of counsel), for the people.

Marshall S. Redman, Assistant State Appellate Defender, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ALLEN, J. The single issue presented in this appeal is whether good time spent on probation must be deducted from a sentence of two to four years in prison imposed following a probation revocation hearing. Detailed facts follow.

On December 6, 1971, defendant pled guilty to the charge of larceny in a building. MCLA 750.360; MSA 28.592. January 3, 1972, he received a sentence of two years probation and was ordered to pay restitution. Defendant violated the terms of his probation by being convicted on March 21, 1972, of driving a vehicle without an operator's license. He was also convicted of being a disorderly person on April 5, 1972. MCLA 750.167; MSA 28.364. A probation revocation hearing was held April 21, 1972, and on May 1, 1972, defendant was committed to the Allegan County jail for 120 days with credit applied to that sentence for 32 days previously served. After such sentence, defendant's probation remained in effect.

Subsequent to his release, defendant was con-

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

victed on December 27, 1972, of receiving or concealing stolen property under $100. MCLA 750.535; MSA 28.803. A probation revocation hearing was held January 15, 1973, and on February 5, 1973, defendant received a sentence of two to four years in prison. Defendant received credit for 32 days previously spent in jail pursuant to his first arrest, the 120 days served in jail after his 1972 revocation hearing, and 12 days spent in jail between the 1973 revocation hearing and the time defendant was able to obtain bond before being sentenced. Defendant has appealed, and argues that he is entitled to credit for all the time that he was on probation.

Defendant's initial contention is that because he was not given credit for time served on probation, he has been punished twice, and that this violates the constitutional provisions against double jeopardy. US Const, Am V, and Const 1963, art 1, § 15. It has been said that "[t]he prohibition [against double jeopardy] is not against being twice punished, but against being twice put in jeopardy". *United States v Ball,* 163 US 662, 669; 16 S Ct 1192, 1194; 41 L Ed 300, 302 (1896). *People v Fick,* 45 Mich App 435, 437; 206 NW2d 739 (1971), stated that one of the tenets of the prohibition against double jeopardy is that one "may not be reprosecuted in order to impose upon him another sentence for the same offense". Was defendant "reprosecuted" and "twice put in jeopardy" when the trial court failed to grant defendant credit for time spent on probation against a prison sentence imposed after the revocation of that probation?

Our own Court and other jurisdictions, both state and Federal, have uniformly answered this question "no". In *People v Westman,* 53 Mich App 662; 220 NW2d 169 (1974), this Court held the trial

court did not err in failing to credit a jail sentence with time spent on probation. See also *People v Jaynes,* 23 Mich App 360; 178 NW2d 558 (1970). *State v Tritle,* 15 Ariz App 325, 326; 488 P2d 681, 682 (1971), said that the time spent on probation is not punishment to be credited against one's sentence upon revocation of that probation. *United States v Fultz,* 482 F2d 1, 4 (CA 8, 1973) first noted that despite the language in *Korematsu v United States,* 319 US 432; 63 S Ct 1124, 87 L Ed 1497 (1943), that probation is "an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline", a defendant is not placed in double jeopardy by failure to credit good time spent on probation. *Thomas v United States,* 327 F2d 795, 797 (CA 10, 1964), referring to other Federal cases, held that the sentencing upon revocation of probation, without giving defendant credit for the time he spent on probation, "does not place the defendant in double jeopardy".

Defendant next argues that applying credit for time spent on parole while failing to give credit for the time spent on probation is a violation of the constitutional guarantee of equal protection of the laws. US Const, Am XIV, and Const 1963, art 1 § 2.[1] In support of this contention, defendant relies on *Gagnon v Scarpelli,* 411 US 778, 782; 93 S Ct 1756, 1760; 36 L Ed 2d 656, 662 (1973), and *Warren v Parole Board,* 23 Mich App 754, 766–767, fn 22; 179 NW2d 664 (1970), *app dismissed,* 383 Mich 817 (1971). *Gagnon* observed that the revocation of probation, like the revocation of parole, resulted in

[1] MCLA 791.238; MSA 28.2308 provides that a parolee "shall be deemed to be still serving out the sentence imposed upon him by the court, and shall be entitled to good time the same as if he were confined in prison". No similar statute exists allowing credit for good time on probation.

a loss of liberty and held "that a probationer, like a parolee, is entitled to a preliminary and final revocation hearing". *Warren* noted that while there are technical differences between a paroled prisoner and a probationer, both are concerned, once accused of violating their respective conditional status, with "the impending loss of their liberty" and held it would be unreasonable not to afford both persons similar procedural safeguards "in the face of this common threat to a constitutionally protected interest—liberty".

Because a fundamental interest is involved, we must determine whether or not the treatment afforded probationers, as far as the denial of credit against one's sentence is concerned, as distinguished from the treatment afforded parolees is "necessary for the achievement of a 'compelling state interest' ". *Governor v State Treasurer,* 389 Mich 1, 25; 203 NW2d 457 (1972). We find defendant's reliance upon *Gagnon v Scarpelli, supra,* unpersuasive. Although similar in nature, parole and probation are indeed different in a real sense. As indicated previously, one is placed on probation if the trial court determines "that the public good does not require that the defendant shall suffer the penalty imposed by law". MCLA 771.1; MSA 28.1131. On the other hand, a prisoner is not granted parole "until he has served the minimum term imposed by the court" minus any statutory provisions for good or special good time. MCLA 791.233(b); MSA 28.2303(b). A person placed on probation is able to avoid the pain of incarceration upon compliance with the lawful conditions of probation. MCLA 771.3; MSA 28.1133. Upon violation of those conditions, probation may be revoked and defendant will be subject to the penalty of incarceration. MCLA 771.4; MSA 28.1134.

A person placed on probation has an obvious interest in avoiding incarceration. If credit were granted in a situation such as the instant one, trial courts might be reluctant to grant probation. The effectiveness of the tool for securing compliance with the terms of probation would be vitiated if credit were granted for time previously spent thereon. Were defendant to prevail, it would be a victory for defendant but a Pyrrhic victory for future defendants. A trial court could well be discouraged in the important and necessary exercise of discretion in sentencing defendants in a manner relevant to their respective characteristics and to the crime involved.[2] The state also has an interest in avoiding the expenses attendant to incarceration, and in seeking the effective rehabilitation and continued usefulness of its citizens outside of prison walls. The above have led this Court to conclude that a "compelling state interest" justified the withholding of credit for time spent on probation, and we find that the trial court did not err in crediting defendant only with time he had previously spent in jail.

Affirmed.

All concurred.

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[2] Frequently, the period of probation exceeds the maximum penalty of time in jail. This is particularly true in misdemeanor offenses. If credit is allowed for good time on probation, nothing will prevent defendants from ignoring probation once the time on probation equals the maximum allowable jail sentence.

PEOPLE v LEVELSTON

1. CRIMINAL LAW—EVIDENCE—POLYGRAPH EXAMINATIONS.
The results of a polygraph examination are not admissible in evidence in a criminal case.

2. CRIMINAL LAW—EVIDENCE—POLYGRAPH EXAMINATIONS.
A large body of state and Federal case authority retains the traditional view that polygraph examination results are not admissible in evidence, and rulings which have held to the contrary have not been followed.

Appeal from Muskegon, James F. Schoener, J. Submitted Division 3 June 5, 1974, at Grand Rapids. (Docket No. 18532.) Decided July 24, 1974.

Rodell Levelston was charged with first-degree murder. Upon motion by defendant, the court ordered the admission of results of a polygraph examination of defendant. The people appeal the interlocutory order by leave granted. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Richard J. Pasarela,* Prosecuting Attorney, and *Neil G. Mullally,* Assistant Prosecuting Attorney, for the people.

Marcus, Halbower, Ruck & Flynn, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 29 Am Jur 2d, Evidence § 831.

Physiological or psychological truth and deception tests. 23 ALR2d 1306.

* Former circuit judge, sitting on the Court of Appeals by Assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

HOLBROOK, P. J. The defendant was arrested and charged with first-degree murder, arising out of a homicide which occurred in Muskegon County on July 14, 1973. On October 5, 1973, the defendant's attorney filed a motion for the admission at trial of evidence concerning a polygraph examination of the defendant and a res gestae witness. At the hearing the trial court heard the testimony of one witness who testified as to the general operation and reliability of polygraph tests. The operator who conducted the examinations did not testify. The people opposed the motion.

On October 15, 1973, the trial court ruled that the results of the polygraph examination of the defendant would be admissible at trial, but that the examination of the witness would not be admissible. An order in accord with that ruling was filed on October 16, 1973. The people have by leave of this Court appealed that interlocutory order.

We are now presented with a single question raised by appellant: Are the results of a polygraph or lie-detector examination admissible in evidence in a criminal case?

At the present time polygraph tests are inadmissible in Michigan. *People v Davis,* 343 Mich 348; 72 NW2d 269 (1955). This holding has been restated by and reaffirmed in numerous cases both in this Court and in the Supreme Court. The ruling in the case of *People v Becker,* 300 Mich 562; 2 NW2d 503 (1942), left the door open for further evaluations of its holding. The Court indicated that such evidence might be admissible when it can be demonstrated that such tests are accurate and have obtained general scientific acceptance and standardization. Such demonstra-

tions must establish that "reasonable certainty follows from such tests".

In some states such evidence is admissible on stipulation of counsel. *(People v Parisie,* 5 Ill App 3d 1009; 287 NE2d 310 [1972]; and *State v Ross,* 7 Wash App 62; 497 P2d 1343 [1972].) However, in Michigan "whether by voluntary agreement, court direction, or coercion, the results of such tests do not attain the stature of competent evidence". *Stone v Earp,* 331 Mich 606, 611; 50 NW2d 172, 174 (1951). The most recent statement of the Michigan Supreme Court on the subject is found in the case of *People v Frechette,* 380 Mich 64, 68; 155 NW2d 830, 832 (1968), wherein it is stated: "There can be no doubt at present that in this jurisdiction the results of lie-detector tests are inadmissible". See, also, *People v Tyrer,* 385 Mich 484; 189 NW2d 226 (1971).

Recent 1972 cases from other jurisdictions indicate that such evidence is not admissible in any jurisdiction. Such evidence was rejected in a leading Federal Court opinion in the case of *Frye v United States,* 54 US App DC 46; 293 F 1013 (1923), which has been followed by other Federal Courts to the present time.

Appellant points out that in theory, evaluation of polygraph examinations is subjective, and is affected by many factors—physical and psychological. The expert in this case testified that "even at the highest level of proficiency, polygraph examinations have a ten percent error factor". For further enlightenment on the subject see Radek, *The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo,* 3 Loyola Univ of Chicago L J 289 (1972).

Appellee does not quarrel with the cases cited by appellant, but asserts that the time has come

when polygraph tests are sufficiently accurate to be received in evidence. In support of this conclusion appellee relies on the opinion of a text writer, Professor Fred Inbau, who says in his book printed in 1966[1] that polygraph examinations have obtained enough scientific acceptability to be admissible. Although we accord Professor Inbau utmost sincerity and belief in his conclusion, we cannot accept his position when we weigh it against the rejection of his premise by the overwhelming opinions of courts which have treated this question since 1966 when his book was printed.

Appellee also relies on two recently decided cases by lower Federal Courts. These are *United States v Ridling,* 350 F Supp 90 (ED Mich, 1972) and *United States v Zeiger,* 350 F Supp 685 (D DC, 1972). On the basis of these opinions appellee asserts that polygraph examinations now have general acceptance. These two isolated trial decisions are at odds with the large body of Federal case authority within the Federal Court system. *Zeiger* was reversed by peremptory order by the U. S. Court of Appeals, District of Columbia, 155 US App DC 11; 475 F2d 1280 (1972). *Ridling* apparently was not appealed. However, in the case of *United States v Frogge,* 476 F2d 969, 970 (CA 5, 1973), on April 11, 1973, it was stated as follows:

"We are similarly unconvinced by the argument that the trial court erred when it refused to authorize the polygraph examinations requested by the appellants. Though a trend may be emerging towards loosening the restrictions on polygraph evidence, see *e.g., People v Houser,* 85 Cal App 2d 686; 193 P2d 737 (1948), the rule is well established in federal criminal cases that the results of lie detector tests are inadmissible. *United*

[1] Reid and Inbau, *Truth and Deception* (Williams & Wilkins, 1966), p 257.

States v Rodgers, 419 F2d 1315, 1319 (CA 10, 1969); *Frye v United States,* 54 App DC 46; 293 F 1013 (1923). Nothing in *United States v Ridling,* 350 F Supp 90 (ED Mich, 1972), heavily relied upon by the appellants, persuades us to abandon the traditional view."

Other recent cases retain the traditional view. *State v McDavitt,* 62 NJ 36; 297 A2d 849 (1972) (which relies on *Ridling* and concludes that results may be admitted on stipulation only); *In re Buckley,* 107 Cal Rptr 639 (Cal App, 1973) (evidence admissible at extradition hearing on stipulation); *Romero v State,* 493 SW2d 206 (Tex Crim App, 1973); *United States v Urquidez,* 356 F Supp 1363 (DC Cal 1973); *United States v Sockel,* 478 F2d 1134 (CA 8, 1973); *State v Curtis,* 281 So 2d 514 (Fla App, 1973); *State v Jones,* 281 So 2d 220 (Fla App, 1973); *People v McCain,* 42 AD2d 866; 347 NYS2d 72 (1973); *United States v Wilson,* 361 F Supp 510 (D Md, 1973); and *State v Towns,* 35 Ohio App 2d 237; 301 NE2d 700 (1973). See, also, *Sponick v Detroit Police Dept,* 49 Mich App 162; 211 NW2d 674 (1973); *People v Allen,* 49 Mich App 148; 211 NW2d 533 (1973); and *People v Lawson,* 48 Mich App 662; 211 NW2d 96 (1973). All available authorities with the single exception of *Ridling* assert that admission of results of polygraph tests is a theory whose time has not yet come.

Reversed and remanded for further proceedings not inconsistent with this opinion.

All concurred.

ARRIGO'S FLEET SERVICE, INC. v AETNA LIFE & CASUALTY COMPANY

1. INSURANCE—CONTRACTS—CONSTRUCTION.

The purpose of insurance is to insure; therefore a policy should not be construed to defeat that objective unless its language requires it.

2. INSURANCE—CONTRACTS—CONSTRUCTION.

Any doubts in the meaning of the terms of an insurance contract are to be resolved against the insurer and in favor of the insured.

3. INSURANCE—CONTRACTS—CONSTRUCTION.

The standard by which any contract of insurance is to be viewed is the understanding of an ordinary person.

4. INSURANCE—CONTRACT—EXCLUSIONARY CLAUSES—CONSTRUCTION.

Exclusionary clauses in insurance policies are to be strictly construed against the insurer.

5. INSURANCE—CONTRACTS—EXCLUSIONARY CLAUSES—AMBIGUOUS PROVISIONS.

A clause in a garageowner's liability insurance policy which excludes coverage of "property in the care, custody or control" of the insured is ambiguous, and is to be strictly construed against the insurer.

6. INSURANCE—CONTRACTS—AMBIGUOUS PROVISIONS—QUESTIONS OF FACT.

Ambiguous language in a contract gives rise to a question of fact wherein the jury must determine the intent of the parties;

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 17 Am Jur 2d, Contracts § 276.
43 Am Jur 2d, Insurance §§ 258, 271 *et seq.*
[3] 43 Am Jur 2d, Insurance §§ 261, 264.
[4, 5] 44 Am Jur 2d, Insurance §§ 271–279.
[5, 7] 44 Am Jur 2d, Insurance §§ 1422, 1423.
Scope of clause excluding from contractor's or similar liability policy damage to property in care, custody, or control of insured. 62 ALR2d 1242.
[6] 17 Am Jur 2d, Contracts §§ 244, 245.
43 Am Jur 2d, Insurance §§ 260, 264.

thus, whether the contents of a trailer, damaged during repair of the trailer, were excluded from coverage by a garageowner's liability insurance policy was a question for the jury where the language of the policy's exclusionary clause was ambiguous.

7. INSURANCE—CONTRACTS—EXCLUSIONARY PROVISIONS—CONSTRUCTION.

The most valuable criterion for determining whether a policy of insurance on the liability of contractors, which excludes coverage of property "in the care, custody or control" of the insured, should include liability for such property if damaged, is to distinguish whether the damaged property is necessary to the insured's work or merely incidental to it; if the property is essential to the work being performed, it is within the "care, custody or control" of the insured and excluded, but if the property is not essential to the work it is not within the exclusion.

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 June 7, 1974, at Grand Rapids. (Docket No. 18549.) Decided July 24, 1974. Leave to appeal denied, 392 Mich 812.

Complaint by Arrigo's Fleet Service, Inc. against Aetna Life & Casualty Company seeking payment under a policy of insurance. Judgment for defendant. Plaintiff appeals. Reversed and remanded for further proceedings.

Garlington & Smiley, for plaintiff.

Cholette, Perkins & Buchanan (by *Grant J. Gruel),* for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

HOLBROOK, P. J. Plaintiff is in the business of repairing trailers of large cargo trucks. On April 1, 1971, such a unit, owned by North American Van Lines, was brought to plaintiff's place of business.

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

On the day before, the unit had been repaired for a broken hanger assembly connecting the axle to the body of the trailer, in Chicago, Illinois. The trailer was locked and the keys were in the possession of the driver. There were three locks on the trailer. An employee of the plaintiff began welding. Shortly thereafter, the driver left plaintiff's premises for coffee. Employees of plaintiff discovered smoke coming from the trailer. After trying to get into the trailer, but being unable to do so because of the fact that it was locked, they took a cutting torch and cut off a lock. After the first lock was cut out, they noticed that there were straps behind and were unable to gain access at that point. Therefore, they were forced to use a cutting torch on the rear doors of the trailer. As a result of this fire, the merchandise in the trailer was damaged. An action (Kent County Circuit Court #13813) was instituted by North American Van Lines, as subrogee of Ted and Virginia Zyck, against plaintiff in this action. North American prayed for judgment in the amount of $14,000 plus interest and costs. Plaintiff then filed the present action seeking a declaratory judgment that the defendant should defend in the action instituted by North American and that the defendant should be liable for any judgment which might be rendered against plaintiff.[1]

Plaintiff had purchased a policy of garage insurance from defendant which stated:

"The *company* will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of

[1] At the outset, we note that it is unclear as to whether, even if the insurance company is not liable for a judgment on the basis of the exclusion, there is a duty to defend. The policy states only that "[t]his *insurance* does not apply * * * " (emphasis supplied), and does not delineate the exclusion in reference to the duty to defend.

"*bodily injury* or

"*property damage* to which this insurance applies, caused by an *occurrence* and arising out of *garage operations,* including only the *automobile hazard* for which insurance is afforded as indicated in the declarations, and the *company* shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* or *property damage,* even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the *company* shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the *company's* liability has been exhausted by payment of judgments or settlements."

Thereinafter, a number of exclusions were set out. Exclusion (g) provided that: [the insurance did not apply]

"to *property damage* to * * *

"(2) property in the care, custody or control of or being transported by the *insured* or property as to which the *insured* is for any purpose exercising physical control; * * * "[2]

Defendant denies coverage on the basis of this exclusion.

Plaintiff had demanded a jury trial. It contended that the only care, custody and control that they had was over the trailer itself, *i.e.,* not the contents within.[3] Defendant maintained that coverage

[2] The clause is commonly found in garage liability policies and contractor's liability policies. *See,* for instance, *Leiter Electric Co v Bituminous Casualty Corp,* 99 Ill App 2d 386, 388; 241 NE2d 325, 327 (1968); and *Bituminous Casualty Corp v Chicago, RI & P R Co,* 8 Ill App 3d 172, 174; 289 NE2d 464, 466 (1972). *Generally, see* Anno: *Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like,* 93 ALR2d 1047, 1072.

[3] Any damage which may have occurred to the trailer per se was paid by the insurance company on the basis of a separate clause in the policy which provided for fire and explosion coverage for the loss of an automobile, other than explosion of tires.

was excluded in that the contents were under the physical control of the plaintiff. Defendant moved for summary judgment. The trial court granted a directed verdict (summary judgment). The court ruled that the issue was one for the court's decision and not for the jury, as there were no disputed facts and it found no ambiguity. The court relied upon the case of *Appicelli Sales & Service, Inc v Citizens Mut Ins Co,* 40 Mich App 287; 199 NW2d 242 (1972), *lv den* 388 Mich 769 (1972). The court further stated that its determination would allow plaintiff to come to this Court for a ruling on the issue. Thus, we are faced with the determination of whether, as a matter of law, it can be said that on the basis of the exclusion defendant has no duty to defend on plaintiff's behalf or liability for any judgment rendered against plaintiff.

It is axiomatic that the purpose of insurance is to insure. See, for instance, *Goswick v Employer's Casualty Co,* 440 SW2d 287, 289 (Tex, 1969), wherein the Court stated: "[W]e must presume that the objective of the insurance contract is to insure, and we should not construe the policy to defeat that objective unless the language requires it". We are mindful that insurance is vitally affected with the public interest. *Ferguson v Phoenix Assurance Co of New York,* 189 Kan 459, 470; 370 P2d 379, 387; 99 ALR2d 118, 128 (1962).

In *Huron Bowl, Inc v Security Ins Co of New Haven,* 14 Mich App 62, 65; 165 NW2d 265, 266–267 (1968), Judge J. H. GILLIS wrote:

> " 'Care and custody' connotes dominion over the property which need not attain actual possession. *Birgbauer v Aetna Casualty & Surety Co,* 251 Mich 614; 232 NW 403 (1930). It does imply, however, some temporary right of dominion over, or charge of the property albeit

under the direction of another. See *Bierman-Danzi Corp v Fireman's Fund Insurance Co,* 115 NYS2d 706 (NY Mun Ct, 1952); *Fox West Coast Theatres, Inc v Union Indemnity Company,* 167 Wash 319; 9 P2d 78 (1932)."[4]

In *Zurich Ins Co v Rombough,* 384 Mich 228, 232–233; 180 NW2d 775, 777 (1970), the Supreme Court quoted with approval language of Justice Tobriner from *Gray v Zurich Ins Co,* 65 Cal 2d 263; 54 Cal Rptr 104; 419 P2d 168 (1966), stating that the principles of interpretation of insurance contracts are contemporarily inherently involved in the doctrine of contracts of adhesion. On such a basis any doubts in the meaning of the terms of an insurance contract are to be resolved against the insurer and in favor of the insured.[5] The standard by which any contract of insurance is to be viewed

[4] It is generally recognized that the clause in question refers to possessory handling of property as distinguished from proprietary control. 44 Am Jur 2d, Insurance, § 1423, p 279; *see, also, Condenser Service & Engineering Co v American Mutual Liability Ins Co,* 58 NJ Super 179, 184; 155 A2d 789, 792 (1959); *Sanco Co v Employers Mutual Liability Ins Co of Wisconsin,* 102 NH 253; 154 A2d 454 (1959); *Maryland Casualty Co v Holmsgaard,* 10 Ill App 2d 1, 9; 133 NE2d 910, 914 (1956); and *Crist v Potomac Ins Co,* 243 Or 254, 261; 413 P2d 407, 411 (1966), wherein the Court held that control refers only to the physical fact of possession and does not contemplate proprietary control or ownership and that for the insured to be "in charge of" the property damaged requires more than mere physical possession in that the placing of responsibility is connoted.

[5] It is the general rule that if an insurance policy calls for construction, it is to be construed liberally in favor of the insured and strictly against the insurer. Authority for this is far too numerous for complete recitation; the following is demonstrative: *Francis v Scheper,* 326 Mich 441, 448; 40 NW2d 214, 217 (1949); *Leski v State Farm Mutual Automobile Ins Co,* 367 Mich 560, 567; 116 NW2d 718, 721 (1962); *Hawkeye Security Ins Co v Shields,* 31 Mich App 649, 654; 187 NW2d 894, 898 (1971); *Mayer v Credit Life Ins Co,* 42 Mich App 648, 650; 202 NW2d 521, 523 (1972); *Wolverine Ins Co v State Automobile Mutual Ins Co of Columbus, Ohio,* 415 F2d 1182, 1184 (CA 6, 1969); *Michigan Mutual Liability Co v Mattox,* 173 So 2d 754, 756 (Fla App, 1965). *See, also,* 14 Michigan Law & Practice, Insurance, § 93, p 71; 3 Williston on Contracts (Rev ed, 1936) § 621, pp 1788–1789; 1 Restatement Contracts, § 236(d), p 328; *cf. Suwyn v Auto-Owners Ins Co,* 15 Mich App 279; 166 NW2d 549 (1968).

is the understanding of an ordinary person.[6] *Michigan Mutual Liability Co v Mesner,* 2 Mich App 350, 353; 139 NW2d 913, 915 (1966). Exclusionary clauses in insurance policies are to be strictly construed against the insurer. *Weaver v Michigan Mutual Liability Co,* 32 Mich App 605, 609; 189 NW2d 116, 118 (1971).

It has been said that the purposes of clauses of this type are to 1) avoid greater moral hazard as far as the insurance company is concerned, and 2) to eliminate the possibility that the insurance company may become the guarantor of the insured's workmanship. *Elcar Mobile Homes, Inc v D K Baxter, Inc,* 66 NJ Super 478, 484; 169 A2d 509, 512 (1961); *Royal Indemnity Co v T B Smith,* 121 Ga App 272, 275; 173 SE2d 738, 740 (1970). We point out that these purposes are well serviced by the language of the clause in that, read literally, it is broad enough and vague enough to be interpreted to exclude almost all instances which the average purchaser of this type of insurance might well expect to be covered.[7]

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[6] In no small part, this must be derived from the requirement that insurance companies make use of language that is clear and understandable to laymen. *See Century Indemnity Co v Schmick,* 351 Mich 622, 627; 88 NW2d 622, 625 (1958).

[7] Were it not that so many courts, including this Court, notwithstanding their determinations as to the applicability of the clause to the factual contexts of the particular cases, have impliedly assumed the validity of the clause, we would be inclined to find this clause void on the basis of public policy. We would find it to be in disfavor. Further, we note that the burden should be on insurance agents and companies to explain, with specific examples, the import of the clause, *i.e.,* what is covered and what is not covered. While not brought up by this case, we feel that the lack of complete explanation, leaving the implication of full coverage could be found to be against the spirit of MCLA 500.2005; MSA 24.12005. *Cf.* Davis, *Pretrial Discovery of Insurance Coverage,* 16 Wayne L Rev 1047, 1061 (1970), wherein it is asserted:

"A defendant who thinks he has 'full coverage' but learns after an accident that his agent procured only the statutory minimum need not wait for a judgment in excess of the policy limits; he could pursue the agent (generally an employee of the automobile liability insurer

This issue has only been twice previously before this Court. *Anderson v Brown,* 21 Mich App 699; 176 NW2d 457 (1970), involved the construance of the same clause here in question. Plaintiff Anderson was a housing contractor. He had obtained an insurance policy from the Travelers Indemnity Insurance Company for comprehensive general liability protection. While working on the construction of a home, work upon which was being done by the individuals for whom the house was to be constructed, a fire occurred which destroyed the house. The insurance company denied coverage on the grounds that the property was within the care, custody or control of the insured and was property which the insured was exercising physical control over. Litigation by the owners of the home concluded in judgment against plaintiff Anderson. Thereafter, Anderson commenced an action for declaratory judgment which was tried before a jury. Before the close of proofs, however, the trial court granted defendant's motion for a directed verdict, ruling that the language of the policy was clear and unambiguous and excluded coverage. This Court reversed, remanded and wrote:

"Words that are clear in their meaning when standing alone in a contract often give rise to ambiguity when they are applied to a given set of facts, and this ambiguity in turn gives rise to a question of fact. Michigan courts recognize the following rule in regard to ambiguity, 53 Am Jur, Trial, § 269, p 228:

" 'while it is true as a general rule that the construction of written contracts belongs to the court and not the jury, there are nevertheless cases in which the ambiguous nature of the words used or an obscure reference to unexplained circumstances requires that

nowadays) in a separate or third-party action immediately." (fn omitted.)

the interpretation of the language be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. It is for the jury to determine what is the agreement of the parties, where there is uncertainty in a written contract because of ambiguity or incompleteness, or technical words or terms of art. Likewise, where the nature of a contract is not clear, its interpretation may become a mixed question of law and fact, based upon the acts of the parties thereunder; and where a written contract has been modified by the practice under it, the question should be submitted to the jury under proper instructions,' "and leave the interpretation of an insurance contract and its applicability to the facts to the jury. *Clark v Hacker,* 345 Mich 751; 76 NW2d 806 (1956); *Barker v Citizens' Mutual Fire-Insurance Co,* 136 Mich 626; 99 NW 866 (1904).

* * *

"[T]he jury could have reasonably concluded, after determining the meaning of the words 'care, custody or control,' that the house was not in the 'care, custody or control' of Anderson at the time of the fire. The meaning of these words gives rise to a question of fact, and that question *should have been submitted to the jury."* (Emphasis supplied.) *Anderson v Brown, supra,* 21 Mich App 703–704; 176 NW2d 459–460.

The other case is *Appicelli Sales, supra,* which was a declaratory judgment action. There, the defendant insurance company denied coverage and the duty to defend in a pending action. Plaintiff had been hired by a third party to unload a mechanical cherry picker from a flatbed trailer. Employees of both plaintiff and the third party were involved in the operation. The third party's employees directed the operation and rendered some physical assistance. The Court there wrote:

"The defendant bases its failure to defend on an exclusionary clause which excludes coverage for 'property in the care, custody or control of or being trans-

ported by the insured *or property as to which the insured is for any purpose exercising physical control'.* The general rule governing this type of clause is stated in Anno: *Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like,* 93 ALR2d 1047, 1072:

" 'Most garage liability policies contain clauses which exclude specifically or qualify the liability coverage provided for certain types of causes or losses. In passing upon these exclusion clauses, the courts have generally applied the rule that if such limitations are not expressed plainly and without ambiguity they will be construed strictly against the insurer and liberally in favor of the insured, in order that the purpose of the insurance will not be defeated. However, if the limitations are plainly expressed, the insurers are entitled to have such limitations construed and enforced as expressed, assuming they are not contrary to law or public policy.'

"After examination of the record we can only conclude that this case falls within the exclusion." (Emphasis in original.) *Appicelli Sales, supra,* 40 Mich App 288–289; 199 NW2d 243.

Without further comment, the majority reversed and remanded the trial court's judgment in favor of plaintiff.[8] While at first blush these two cases may seem inconsistent, one overriding point is manifest, *viz,* that the cases are decided upon the facts, rather than law.[9]

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[8] In a short opinion, Judge T. M. BURNS dissented in this case, saying:

"In my opinion *physical control* over the machine was being exercised by the owners during the operation since they were at all times directing the unloading. The fact that plaintiff's wrecker was being used does not constitute the *type of control* over the machine which would make the policy's exclusionary clause applicable." (Emphasis supplied.) *Appicelli Sales,* 40 Mich App 289; 199 NW2d 243.

[9] In reviewing numerous cases from other jurisdictions, this may be the only consistency. While many different theories are applied, often to opposite conclusions, a reading of the cases does reveal that all are primarily decided upon each court's determination of the facts. One of the few relatively comprehensive discussions of this clause and its applications is to be found in Anno: *Scope of clause excluding from*

A number of courts have found this clause to be inherently ambiguous. *Boswell v Traveler's Indemnity Co,* 38 NJ Super 599, 607; 120 A2d 250, 254 (1956), wherein the Court said that the words care, custody or control are "words of art"; *Elcar Mobile Homes, supra,* 66 NJ Super 487; 169 A2d 511; *Falls Sheet Metal Works, Inc v US Fidelity & Guaranty Co,* 17 Ohio App 2d 209, 211; 245 NE2d 733, 735 (1969). We agree that the clause is ambiguous. In support, we point out that many different courts, in interpreting this clause, have applied many different tests and come to many different conclusions, and have seemingly always based their determinations on an interpretation of the facts of the particular case.

As the clause is ambiguous, it is to be strictly construed against the insurer.[10] Moreover, ambiguities in insurance policies are to be resolved in favor of coverage. *Connecticut Indemnity Co v Nestor,* 4 Mich App 578, 581; 145 NW2d 399, 401 (1966). Thus, as we have concluded that the question of whether a particular instance is excluded from coverage under this clause is a question of fact, for jury determination, the trial court's decision was improper.

As we find that the law in this area is in a state of uncertainty, we feel it proper to set out certain

contractor's or similar liability policy damage to property in care, custody, or control of insured, 62 ALR2d 1242, 1244, wherein it is stated:

"Generally speaking, no rule of general application can be deduced from the cases, aside from the rather obvious statement that the general principle that insurance policies, having been prepared by the insurer, must be construed most strongly against it and in favor of the insured, fully applies to the kind of exclusion clause discussed here. It is interesting to note that there is authority to the effect that the exclusion clause is inherently ambiguous and, on the other hand, that the clause is clear and unambiguous." *Cf.* 44 Am Jur 2d, Insurance, § 1423, p 279, fn 14.

[10] *See* fn 5, *supra.*

guidelines by which these cases may be judged in the future.

Certain general principles are set out in the annotation in 62 ALR2d 1242, 1247–1248, which are useful.[11] These principles are:

"(1) Where the *property damaged is merely incidental* to the property upon which the work is being performed by the insured, the damaged property is not considered as in the possessory control of the insured, and a clause excluding from liability damage to property 'in the care, custody, or control of the insured' will not operate to exclude the insurer from liability under the policy.

"(2) Where, however, the *property damaged is under the immediate supervision of the insured and is a necessary element of the work involved,* the damaged property is considered as in the possessory control of the insured, and the exclusionary clause will effectively operate to exclude the insurer from liability under the policy.

"(3) A third principle seems a permissible conclusion from the two other rules: Where the property damaged is in the proprietary[12] control of the insured, whether a necessary element of the work involved or merely incidental thereto, the exclusionary clause will operate to exclude the insurer from liability under the policy."

[11] The annotation points out that a review of the various opinions on this problem did not disclose whether the principles "were consciously applied." 62 ALR2d 1242, 1247.

[12] Black's Law Dictionary (4th ed) defines proprietary as an adjective as: "Belonging to ownership; belonging or pertaining to a proprietor; relating to a certain owner or proprietor."

Webster's Third International Dictionary says:

"1 a: held as the property of a private owner ([proprietary] right of manufacture): relating or belonging to a proprietor ([proprietary] control of mineral resources) ([proprietary] government) b: characteristic of or appropriate to an owner (the lawyers' * * * normal [proprietary] feeling about the law courts—Walter Goodman) 2: made and marketed by a person or persons having the exclusive right to manufacture and sell ([proprietary] baby food) ([proprietary] medicine) 3: privately owned and managed usually without public control or supervision (in the 19th century there were many [proprietary] medical schools in America) ([proprietary] hospital)."

(Footnotes omitted.) (Emphasis supplied.) 62 ALR2d 1242, 1247–1248.

We feel that distinguishing whether the damaged property is necessary to the insured's work or merely incidental thereto is the most valuable criterion.[13] This approach has been used in *Maryland Casualty Co v Hopper,* 237 SW2d 411 (Tex Civ App, 1950); *Condenser Service & Engineering Co v American Mutual Liability Ins Co,* 58 NJ Super 179; 155 A2d 789 (1959); *Goswick, supra.* In *Meiser v Aetna Casualty & Surety Co,* 8 Wis 2d 233, 240; 98 NW2d 919, 923 (1959), the Supreme Court of Wisconsin said that: "[t]he policy exclusion is meant to apply to the essential work being done by the insured * * * ". See also 44 Am Jur 2d, Insurance, § 1423, p 280; and *Thomas W Hooley & Sons v Zurich General Accident & Liability Ins Co, Ltd,* 235 La 289, 295; 103 So 2d 449, 450–451; 67 ALR2d 1078, 1082 (1958). In the case at bar, it is obvious that the contents of the van (which were inaccessible to the insured without destruction of property) were irrelevant to the work the insured was doing.

In *P & M Stone Co, Inc v Hartford Accident & Indemnity Co,* 251 Iowa 243, 249; 100 NW2d 28, 31 (1959), the Court wrote:

"The term 'physical control' is more difficult to define than to understand. An applicable definition of the word physical is 'bodily as contrasted with mental'. One definition of the verb 'control' given by Webster's International Dictionary is: 'To exercise restraining or di-

[13] In *Royal Indemnity Co, supra,* 121 Ga App 275; 173 SE2d 740, the Georgia Appellate Court concluded that the better approach is to examine the purposes of the exclusion and to determine if the case at bar is the type of risk against which the insurance company had not calculated its premium. This may indeed be one valuable criterion. It would be well to have the insurance company present testimony on this point.

recting influence over.' The noun 'control' is defined as: 'The act or fact of controlling.' "[14]

In *Falls Sheet Metal Works, supra,* 17 Ohio App 2d 212; 245 NE2d 736, the Court found that the concept of physical control relates to bodily contact with the damaged property. In *Crist v Potomac Insurance Co,* 243 Or 254, 261; 413 P2d 407, 411 (1966), there is the implication that the concept of control requires something more than mere physical possession in that some degree of responsibility must appear.[15] In the present case, it is debatable whether the insured was actually exercising physical control over the contents of the van.

Reversed and remanded for further proceedings. Costs to plaintiff.

All concurred.

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[14] The ambiguity in the use of "control" in application appears in contrasting various cases. In *S Birch & Sons Construction Co v United Pacific Ins Co,* 52 Wash 2d 350, 352; 324 P2d 1073, 1074 (1958), it appears that the decision is based upon the concept of control and in no small part upon the fact that to have not found that the damaged property was within the plaintiff's control would have left a void in which no one was responsible. However, in *Home Indemnity Co v Fuller,* 427 SW2d 97 (Tex Civ App, 1968), the Court found that at the time of the incident which damaged the property, no one was actually exercising physical control over the property.

[15] *See, also,* fns 4 and 8, *supra.*

ANDERSON v CITY OF DETROIT

1. CONSTITUTIONAL LAW—STATUTES—CLASSIFICATION—EQUAL PROTECTION.

The "rational basis" test of statutory classification applies when a law allegedly infringing equal protection creates no fundamental rights, and if a reasonable relation exists between the classification and some legitimate state interest, no denial of equal protection results.

2. CONSTITUTIONAL LAW—GOVERNMENTAL IMMUNITY—STATUTES—EQUAL PROTECTION—GOVERNMENTAL TORTFEASORS.

Withholding a legal remedy from persons injured by the state, while granting one to persons injured by nongovernmental tortfeasors, does not offend the equal protection clause.

3. STATUTES—GOVERNMENTAL IMMUNITY—CLASSIFICATION—FUNDAMENTAL INTEREST—RATIONAL BASIS—BURDEN OF PROOF.

The governmental immunity statute, in the absence of a suspect classification or the involvement of a fundamental interest, needs only a rational basis to be sustained and the litigant attacking the statute must carry the burden of showing it does not rest upon a rational basis (MCLA 691.1407).

4. STATUTES—GOVERNMENTAL IMMUNITY—CLASSIFICATION—FUNDAMENTAL INTEREST—RATIONAL BASIS—ARMED POLICEMEN.

Armed police officers are not inherently a menace to society, their presence is not to harm but to protect, and their mere presence on the streets exposes no one to risk of serious bodily injury or death; therefore, there is a rational basis upon which the governmental immunity statute may apply to them (MCLA 691.1407).

5. CONSTITUTIONAL LAW—DUE PROCESS—ACCESS TO COURTS—LEGISLATURE—ABROGATION OF RIGHTS.

Substantive due process, state or Federal, does not offer a total

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4] 16 Am Jur 2d, Constitutional Law § 494 *et seq.*

[2] 16 Am Jur 2d, Constitutional Law §§ 468, 469.

[5] 16 Am Jur 2d, Constitutional Law §§ 550–553.

right of access to the courts for civil litigants, and the right to sue for a future tortious injury is not property and may be abrogated by the Legislature (MCLA 691.1407).

Appeal from Wayne, Charles S. Farmer, J. Submitted Division 1 June 12, 1974, at Detroit. (Docket No. 18558.) Decided July 25, 1974. Leave to appeal applied for.

Complaint by Robert Anderson, for himself and as administrator of the estate of Robert Anderson, Jr., deceased, and by Aretter Anderson against the City of Detroit and William Roach and John Rein of the Detroit Police Department for wrongful death. Summary judgment for the City of Detroit. Plaintiffs appeal. Affirmed.

Harry D. Hirsch, Jr., for plaintiffs.

Robert Reese, Acting Corporation Counsel, and *Thomas H. Gallagher, William P. Doran,* and *Peter A. Letzmann,* Assistants Corporation Counsel, for defendants.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ALLEN, J. This is an action for wrongful death. Plaintiffs' complaint alleges that on the afternoon of June 25, 1971, defendant police officers, while in the course of duty, without provocation, intentionally shot deceased. Damages of $1,500,000 are sought. Defendant City of Detroit appeared, and moved for summary judgment on the grounds of sovereign immunity provided in MCLA 691.1407; MSA 3.996(107). The motion was granted and the City of Detroit dismissed as a defendant, with proceedings against the remaining defendants stayed pending appeal. Plaintiffs appeal.

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

Plaintiffs concede that the doctrine of governmental immunity as set forth in the Michigan sovereign immunity statute, MCLA 691.1407; MSA 3.996(107), is well established but alleges the statute is unconstitutional. Plaintiffs contend the statute is a denial of the equal protection of the laws, both under the state and Federal constitutions, because it allows suits for wrongful death resulting from the negligent operation of city vehicles or the maintenance of city buildings, yet denies the right to sue for negligent homicide committed by police officers. Plaintiffs aver this is an arbitrary distinction serving no legitimate governmental purpose.

Similar constitutional challenges to MCLA 691.1407; MSA 3.996(107) were made in *Kriger v South Oakland County Mutual Aid Pact,* 49 Mich App 7; 211 NW2d 228 (1973); and *McCann v Michigan,* 47 Mich App 326, 332; 209 NW2d 456 (1973). In each case the statute was assailed as a denial of the equal protection of the laws because it permitted suits against private tort-feasors but prohibited suits for similar torts against state and local units of government. The Court sustained the constitutionality of the statute, stating that:

"The 'rational basis' test applies when the law allegedly infringing equal protections creates no fundamental rights. The right claimed by plaintiff clearly falls within that class. If a reasonable relation exists between the classification and some legitimate state interest, no denial of equal protection results. *Wilkins v Ann Arbor City Clerk,* 385 Mich 670; 189 NW2d 423 (1971), citing *Naudzius v Lahr,* 253 Mich 216; 234 NW 581; 74 ALR 1189 (1931). Withholding legal remedy from persons injured by the state, while granting one to persons injured by nongovernmental tort-feasors does not offend the equal protection clause." *Kriger v South Oakland County Mutual Aid Pact, supra,* p 11.

In the absence of a suspect classification or the involvement of a fundamental interest—neither of which are involved in the instant case[1]—the statute needs only a rational basis to be sustained and the litigant attacking the statute must carry the burden of showing it does not rest upon a rational basis. *Freissler v State Highway Commission,* 53 Mich App 530; 220 NW2d 141 (1974).

The central issue in the instant case is whether there is a rational basis upon which the statute permits compensation for some persons offended by governmental action. We find that there is. Motor vehicles are inherently dangerous instrumentalities, whether driven by private persons or government employees. Public roads and buildings must be used by the public. In each case, failure to make a governmental agency responsible would expose the public to unreasonable risks. On the other hand, armed police officers are not inherently a menace to society. Their presence is not to harm but to protect. Unlike automobiles, their mere presence on the streets exposes no one to risk of serious bodily injury or death.[2]

Plaintiffs further contend the immunity statute

[1] Suspect classifications are those based upon race, alienage, national origin and sex. *See Frontiero v Richardson,* 411 US 677, 682; 93 S Ct 1764, 1768; 36 L Ed 2d 583, 589 (1973), and cases cited therein. Fundamental interests include the right to vote and travel, *Wilkins v Ann Arbor City Clerk,* 385 Mich 670, 680; 189 NW2d 423, 427 (1971), and cases cited therein; privacy, *Roe v Wade,* 410 US 113, 152–153; 93 S Ct 705, 726; 35 L Ed 2d 147, 176–177 (1973); due process in criminal matters, *Griffin v Illinois,* 351 US 12, 16–18; 76 S Ct 585, 589–590; 100 L Ed 891, 897–898 (1956); and specific guarantees in the Bill of Rights. *E.g., Wisconsin v Yoder,* 406 US 205, 214–215; 92 S Ct 1526, 1532–1533; 32 L Ed 2d 15, 24–25 (1972) (freedom of religion).

[2] *See* Cooperrider, Luke K., *The Court, the Legislature, and Governmental Tort Liability in Michigan,* 72 Mich L Rev 187, 283–284 (1973): "That principle argues most strongly for liability in situations where harm is caused by the affirmative actions of government officers and employees. Such liability *exists* where the act in question is the operation of a government vehicle, a 'direct trespass,' part of a proprietary enterprise, or when it creates a dangerous and injurious

is unconstitutional because it allows the taking of property without just compensation and is a violation of substantive due process of law. Substantive due process, state or Federal, has never been held to offer a total right of access to the courts for civil litigants. *United States v Kras,* 409 US 434; 93 S Ct 631; 34 L Ed 2d 626 (1973). Further, the right to sue for a future tortious injury is not property and may be abrogated by the Legislature. *Naudzius v Lahr,* 253 Mich 216, 221; 234 NW 581 (1931). *Miller v Huizinga,* 23 Mich App 363, 367; 178 NW2d 542 (1970).

Affirmed. No costs, a public question being involved.

All concurred.

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condition in a public way or building. On the other hand, the governmental-function defense negates liability for harms caused by law enforcement and by protective actions of employees such as policemen, firemen, inspectors, and custodial employees, who are by law compelled to act directly upon persons and property, overcoming resistance if necessary. Mistakes are an inevitable consequence of such activity, and it may be that resultant losses should, to some extent, be absorbed by the community, but the problems of separating instances where compensation would be appropriate from those in which it would not is complex, and it is difficult to see how, with any fidelity to language, it could be held that these employments are anything but governmental. I would suppose, therefore, that if there is to be liability in this area it should come through legislation, wherein the criteria and the limits can be specified, and the basic policy questions resolved in the appropriate forum."

PEOPLE v CURETON

CRIMINAL LAW—PLEA OF GUILTY—ADVICE OF RIGHTS—PRESUMPTION OF INNOCENCE—COURT RULES.

Explaining to a defendant, prior to accepting a plea of guilty, the meaning of the presumption of innocence and that a jury could not find him guilty unless its members were "completely convinced" that defendant had participated in each element of the charged offense substantially complied with the court rule requiring a trial court to inform the defendant of the "right to be presumed innocent until proven guilty beyond a reasonable doubt" (MCLA 769.26; GCR 1963, 529.1, 785.7[1][d][ii]).

Appeal from Recorder's Court of Detroit, John R. Murphy, J. Submitted Division 1 June 10, 1974, at Detroit. (Docket No. 18570.) Decided July 25, 1974.

Johnny Cureton was convicted, on his plea of guilty, of unarmed 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 *Michael R. Mueller,* Assistant Prosecuting Attorney, for the people.

Daniel R. Siefer, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 486-491, 505.

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

PER CURIAM. On June 20, 1973, defendant pled guilty to the crime of unarmed robbery. MCLA 750.530; MSA 28.798. He received a sentence of 6 to 15 years in prison, and on appeal asserts that the trial court failed to comply with the provisions of GCR 1963, 785.7(1)(d)(ii).

Before accepting a plea of guilty, the trial court must inform a defendant of, among other things, his "right to be presumed innocent until proven guilty beyond a reasonable doubt". GCR 1963, 785.7(1)(d)(ii). In the instant case, the trial court explained to defendant the meaning of the presumption of innocence, and told defendant that the jury could not find him guilty unless its members were "completely convinced" that defendant had participated in each element of the charged offense. We find that the trial court substantially complied with the above rule, and that defendant's conviction should not be reversed merely because the trial court failed to utter the phrase "beyond a reasonable doubt". MCLA 769.26; MSA 28.1096, GCR 1963, 529.1.

Affirmed.

PEOPLE v KOZAR

1. STATUTES—CONSTRUCTION—LEGISLATIVE INTENT.

Legislative intent is to be gathered not from a particular provision of a statute, but from the act as a whole, giving meaning to all sections of the act.

2. STATUTES—CONSTRUCTION—AMBIGUITY—LEGISLATIVE INTENT—REASONABLENESS.

When interpreting an act that is ambiguous the courts seek a reasonable construction in light of the purpose sought to be accomplished, and the intention is to be taken or presumed according to what is consonant to reason and good discretion.

3. AUTOMOBILES—IMPLIED CONSENT STATUTE—PURPOSE OF ACT.

The immediate purpose of the implied consent law is to obtain the best evidence of blood alcohol content at the time of the arrest of a person reasonably believed to be driving while intoxicated (MCLA 257.625).

4. AUTOMOBILES—IMPLIED CONSENT STATUTE—BLOOD ALCOHOL CONTENT—TIME OF OFFENSE—TIME OF TEST—LEGISLATIVE INTENT.

It was the Legislature's intent that, for the purpose of the implied consent statute, a defendant's blood alcohol content at the time of the offense should be regarded as equivalent to his blood alcohol content as determined by a subsequent chemical test provided such test was administered within a reasonable time after the defendant's arrest (MCLA 257.625a).

5. AUTOMOBILES—IMPLIED CONSENT STATUTE—BLOOD ALCOHOL CONTENT—EVIDENCE—TIME OF OFFENSE—TIME OF TEST—EXPERT TESTIMONY.

In a prosecution for driving a vehicle while under the influence of intoxicating liquor, the prosecutor is not required to introduce expert testimony to interpret and relate the results of chemical tests back to the time of the alleged offense, and such test results are admissible into evidence without such testimony

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 73 Am Jur 2d, Statutes §§ 142–341.

[3–5] 7 Am Jur 2d, Automobiles and Highway Traffic § 259.

provided the other prerequisites to admissibility have been met (MCLA 257.625a).

Appeal from Allegan, James E. Townsend, J. Submitted Division 3 April 4, 1974, at Grand Rapids. (Docket No. 18691.) Decided July 25, 1974. Leave to appeal denied, 392 Mich 819.

Michael J. Kozar was convicted, in district court, of driving under the influence of intoxicating liquor. Defendant appealed to circuit court. The district court jury verdict was vacated, and the case was remanded for a new trial. The people appeal by leave granted. Reversed and remanded for reinstatement of the district court jury verdict.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Gary Stewart,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Howard C. Marderosian,* Acting Director, by *William P. Weiner,* of counsel), for the people.

Leo W. Hoffman and *Stephen M. Kantz,* for defendant.

Before: ALLEN, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. At approximately 7:30 p.m. on the night of December 9, 1972, defendant, while driving in the City of Otsego, Michigan was stopped by an Otsego police officer for a traffic violation. During the course of this investigation, it became apparent to the officer that defendant was visibly intoxicated, and defendant was consequently taken into custody.

On February 16, 1973, defendant was tried be-

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

fore a jury in the 57th Judicial District Court, Allegan County, Michigan, on three charges, only one of which, driving while under the influence of intoxicating liquor contrary to MCLA 257.625; MSA 9.2325, is relevant to this appeal.

Otsego Police Officer Donald Morris testified in depth regarding two Breathalyzer tests which he administered to the defendant, relating that the first test was administered at 8:35 p.m. on December 9, the second test was given at 8:45 p.m. on the same date, and that both tests indicated the presence of 0.18 percent alcohol (by weight) in defendant's blood. A copy of the written results of these tests was admitted into evidence at trial.

Defendant was convicted of all three charges and subsequently appealed to the Allegan Circuit Court, alleging that under MCLA 257.625a; MSA 9.2325(1) plaintiff was obligated to introduce expert testimony which would relate the Breathalyzer test results back to the time of the alleged offense. The circuit court agreed with defendant's contention and on November 6, 1973, issued an order vacating the district court jury verdict and remanding the case for a new trial. Plaintiff appeals, by leave granted, from that order.

The sole issue raised on appeal is whether in a criminal prosecution for driving a vehicle while under the influence of intoxicating liquor, the prosecution is required to offer competent expert testimony to interpret and relate the results of Breathalyzer tests back to the time of the alleged offense before such test results can be admitted into evidence.

MCLA 257.625a; MSA 9.2325(1) provides in pertinent part as follows:

"(1) In any criminal prosecution for driving a vehicle while under the influence of intoxicating liquor, the

amount of alcohol in such person's blood *at the time alleged as shown by chemical analysis of the person's * * * breath * * * shall be admissible into evidence* and shall give rise to the following presumptions * * * ." (Emphasis supplied.)

Plaintiff contends that a proper construction of the above-quoted provision is that the Legislature, via this statutory enactment, has determined that the alcoholic content of a defendant's blood at the time a chemical test is administered is admissible as sufficient evidence that the defendant was intoxicated at the time of the offense. It is, therefore, plaintiff's view that it is not necessary to produce expert testimony relating the test data backward to achieve an alcoholic content figure presumably applicable to defendant at the time of the offense.

On the other hand, defendant argues that a proper construction of the provision in question compels the conclusion that our Legislature intended a defendant to be penalized only according to the degree of his intoxication at the time the offense was committed, and not as a result of his blood alcohol content at some subsequent time when a chemical analysis is performed. Defendant thus maintains that in the absence of the requisite relation back via expert testimony, the results of subsequent chemical tests are intrinsically meaningless and hence inadmissible.

So far as we are able to determine from the briefs submitted and our independent research, this is a case of first impression in this state. The statute does not expressly state that expert testimony is necessary to relate test results back to the time of the alleged offense and, indeed, it is ambiguous on this point. In this type of situation, the legislative intent is to be gathered not from a particular provision but from the act as a whole,

giving meaning to all sections of the act. *Collins v Secretary of State,* 384 Mich 656; 187 NW2d 423 (1971); *Smith v City Commission of Grand Rapids,* 281 Mich 235; 274 NW 776 (1937); *Sibley v Smith,* 2 Mich 486 (1855). And, when interpreting an act that is ambiguous, "we seek a reasonable construction of statutes in the light of the purpose sought to be accomplished *[Benjamin v Huntington Woods,* 349 Mich 545, 555; 84 NW2d 789 (1957)]" and "the intention is to be taken or presumed, according to what is consonant to reason and good discretion". *Sibley v Smith, supra,* p 492.

> "The intent of the 'implied consent law' has been said to be 'to obtain the best evidence of blood alcohol content at the time of the arrest of a person reasonably believed to be driving while intoxicated' and ultimately 'to prevent intoxicated persons from driving on the highways'. *Collins v Secretary of State,* 384 Mich 656, 668; 187 NW2d 423 (1971). Pursuant to this intent the Legislature has provided that certain specified chemical tests of blood alcohol content shall be admissible in evidence in criminal prosecutions for driving a vehicle while under the influence of intoxicating liquor, and has defined the effect to be given certain results." *People ex rel Ingham Prosecutor v 54th District Judge,* 47 Mich App 517, 520; 209 NW2d 689 (1973).

Looking at the act as a whole, we are unable to find support for defendant's claim that the prosecuting attorney must, by expert testimony, relate test results back to the time of the alleged offense as a condition precedent to admissibility. To so hold would be to frustrate the immediate purpose of the "implied consent law", which, as we have already stated, is to obtain the best evidence of blood alcohol content at the time of the arrest of a person reasonably believed to be driving while intoxicated. We believe that the best evidence of blood alcohol content is the results of the specified

chemical tests enumerated in the statute by our Legislature, and that it was the Legislature's intent that for purposes of this statute, a defendant's blood alcohol content at the time of the offense should be regarded as equivalent to his blood alcohol content as determined by a subsequent chemical test provided such test was administered within a reasonable time after the defendant's arrest.

We believe this interpretation of our statute to be in accordance with the modern and majority view on this subject. At 7 Am Jur 2d, Automobiles and Highway Traffic, § 332, pp 875–876, it is stated:

"In a prosecution for driving while intoxicated or under the influence of intoxicating liquor, the results of an alcohol breath test, such as the test using the 'Harger drunkometer', the 'Forrester intoximeter', or the 'breathalyzer', are admissible in evidence. It has been held that the drunkometer is sufficiently established as scientifically reliable and accurate for determining the alcoholic content of blood to admit testimony of the reading obtained upon a properly conducted test *without antecedent expert testimony* that the reading is a trustworthy index of alcohol in the blood, or as to why it is." (Emphasis supplied.)

It should be pointed out that many other states considering this problem have held that expert testimony is not necessary to relate back blood tests to the time of the alleged driving.[1] We agree with the reasoning of these decisions.

In the absence of clear statutory language re-

[1] *State v Parrott,* 187 Neb 213; 188 NW2d 694 (1971); *State v Quinn,* 289 Minn 184; 182 NW2d 843 (1971); *State v Miller,* 146 NW2d 159 (ND, 1966); *State v Becker,* 429 SW2d 290 (Mo App, 1968); *See also State v King,* 6 NC App 702; 171 SE2d 33 (1969); *State v Johnson,* 42 NJ 146; 199 A2d 809 (1964); *People v Morris,* 63 Misc 2d 124; 311 NYS2d 53 (1970).

quiring the need for expert testimony to interpret test results, we conclude that expert testimony is not necessary to relate test results back to the time of the alleged offense. We, therefore, hold that in a prosecution for driving a vehicle while under the influence of intoxicating liquor, the prosecutor is not required to introduce expert testimony to interpret and relate the results of chemical tests such as the Breathalyzer test back to the time of the alleged offense, and that such test results are admissible into evidence without such testimony provided the other prerequisites to admissibility have been met.[2] By this holding, we are not precluding the introduction and use of such testimony at a trial for driving while under the influence of intoxicating liquor. Interpretation of the results of the Breathalyzer test as it relates to the time of arrest would be permissible by way of cross-examination or introduction of expert evidence by defendant.

In light of this holding, we conclude that the circuit court erred in setting aside the district court jury verdict.

The judgment of the circuit court is reversed and remanded for reinstatement of the district court jury verdict.

All concurred.

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[2] These prerequisites, not at issue in the case at bar, include establishing the qualifications of the operator administering the test, the method or procedure followed in administering the test, that the test was performed within a reasonable time after the arrest, and the reliability of the testing device. Foundation testimony concerning these prerequisites must be introduced before the test results may be admitted into evidence.

MONTIY v CIVIL SERVICE BOARD OF THE CITY OF EAST DETROIT

1. APPEAL AND ERROR—ADMINISTRATIVE AGENCIES—EVIDENCE—ISSUES OF FACT—CONSTITUTIONAL LAW.

   A court reviewing an administrative tribunal decision reviews the original record to determine if the decision is supported by competent, material and substantial evidence, and will overturn a decision only when such decision is contrary to law, or is not supported by the necessary competent, material and substantial evidence; the court is without power to determine issues of fact that are disputed (Const 1963, art 6, § 28).

2. COURTS—STATUTES—ORDINANCES—INTERPRETATION—LEGISLATIVE INTENT.

   A court, in interpreting a statute or ordinance, must determine legislative intent from a consideration of all of the provisions of the enactment, and the purpose sought to be accomplished by it, and seeks to find a meaning which is reasonable and which gives effect to all parts of it; to effect this purpose, every clause and every word of the enactment is presumed to have some force and meaning, one part of a statute must not be so construed as to render another part nugatory or ineffective, and if there is any proper way in which claimed inconsistencies may be reconciled, the court will do so.

3. MUNICIPAL CORPORATIONS—CIVIL SERVICE COMMISSION—SUSPENSION OF EMPLOYEE—NOTICE—DUE PROCESS—ADMINISTRATIVE LAW.

   The notice provision of a city's civil service rules, which requires a department head to give a suspended employee a written statement of the reasons for his suspension within 24 hours after it takes effect and file a copy thereof with the Civil Service Board, is designed to see that the suspended employee

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REFERENCES FOR POINTS IN HEADNOTES

[1] 2 Am Jur 2d, Administrative Law §§ 618, 619, 697–705.
[2] 73 Am Jur 2d, Statutes §§ 145, 146, 271–276.
[3] 15 Am Jur 2d, Civil Service §§ 28, 33, 34.
[4] 1 Am Jur 2d, Administrative Law §§ 21, 676.

is accorded procedural due process; the civil service commission's actions in ruling that an employee's suspension was not effective until written notice was served did not prejudice an employee who received his notice more than 24 hours after his suspension because the ruling secured to the employee the full benefits of his position while maintaining all procedural safeguards (East Detroit Civil Service Rule 7.4).

4. ADMINISTRATIVE LAW—SUPERINTENDING CONTROL—ADMINISTRATIVE AGENCIES—MATERIAL PREJUDICE—STATUTES.

An order of superintending control in regard to procedural irregularities of an administrative tribunal should issue only if the plaintiff shows that unlawful procedure resulted in "material prejudice" to him (MCLA 24.306).

Appeal from Macomb, Hunter D. Stair, J. Submitted Division 2 June 7, 1974, at Detroit. (Docket No. 18775.) Decided July 25, 1974.

Complaint by Donald Montiy, Jr., and Brian Kozlowski for an order of superintending control against the Civil Service Board of the City of East Detroit to revoke their suspension from work. Complaint dismissed. Plaintiffs appeal. Affirmed.

Harris & Blank, for plaintiffs.

Carl B. Weymouth, City Attorney, and *Robert J. Hribar,* Assistant City Attorney, for defendant.

Before: BRONSON, P. J., and BASHARA and VAN VALKENBURG,* JJ.

BASHARA, J. This case resulted from the suspension of plaintiffs Donald Montiy, Jr., and Brian Kozlowski as police officers by the City of East Detroit for alleged insubordination. At a hearing held by defendant Civil Service Board of East Detroit, their suspensions were ostensibly upheld.

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

Plaintiffs thereafter brought this action for superintending control in the Macomb County Circuit Court pursuant to GCR 1963, 711. From an order denying their request for an order of superintending control and dismissing their complaint, plaintiffs appeal as of right.

Plaintiffs were suspended on July 7, 1973 at approximately 8:30 p.m. pursuant to rule 7.4 of the civil service rules of the City of East Detroit. This section provides:

"A department head may, for disciplinary purposes, suspend a classified employee without pay for a period not to exceed 15 days at any one time. In every such case the department head shall, within 24 hours after the suspension takes effect, give the employee a written statement of the reasons for such action and shall, on the same date, file a copy thereof with the civil service board."

Plaintiffs Montiy and Kozlowski were served with written notice under rule 7.4 on July 9, 1973 at 2:20 p.m. and 1:15 p.m. respectively. Plaintiffs contend that the notice served by the City of East Detroit to plaintiff Montiy was 18 hours late and to plaintiff Kozlowski 16 hours and 45 minutes late under rule 7.4 and consequently the 24-hour requirement was not met by the City of East Detroit.

Following a full hearing defendant held the suspension of plaintiffs valid, but only from the time that written notice was actually served.

"It is the decision of the civil service board that Patrolman Brian Kozlowski be reimbursed for time lost prior to 1:15 p.m., July 9, 1973, when a written notice was given to him by Sergeant Morrissett. Time lost after 1:15 p.m., July 9, 1973, is not to be reimbursed. This is not to be construed as a decision on the merits

which gave rise to the suspension. It is also the decision of the civil service board that Patrolman Donald Montiy, Jr. be reimbursed for time lost prior to 2:20 p.m., July 9, 1973, when a written notice was given to him by Sergeant Morrissett. Time lost after July 9, 1973, is not to be reimbursed. This is not to be construed as a decision on the merits which gave rise to the suspension."

The circuit court held that there was sufficient evidence in the record to sustain the decision of the defendant and therefore ordered the complaint for an order of superintending control dismissed.

We note at the outset that the administrative review by way of superintending control is limited in nature. In *Detroit v General Foods Corp,* 39 Mich App 180, 190; 197 NW2d 315, 321 (1972), this Court summarized the standards for judicial review of an administrative tribunal as follows:

"When a court reviews an administrative tribunal decision, it reviews the original record to determine if the decision is supported by competent, material and substantial evidence, and will overturn a decision only when such decision is *contrary to law,* or *is not supported by the necessary competent, material* and *substantial* evidence. Const 1963, art 6, § 28. We point out that under certiorari we are without power to determine issues of fact that are disputed. In the instant case the facts are undisputed. The question presented is one of law."[1]

In *O'Dell v Flint Civil Service Comm,* 328 Mich 631, 637; 44 NW2d 157, 160 (1950), the Michigan Supreme Court reiterated its earlier pronouncement on administrative review as stated in *Carroll v City Comm of Grand Rapids,* 266 Mich 123; 253 NW 240 (1934), where the Court stated:

[1] GCR 1963, 711.3 has provided that the writ of certiorari is now superseded by an order of superintending control.

" 'The office of a certiorari is not however to review questions of fact, but questions of law. And in examining into the evidence the appellate court does so not to determine whether the probabilities preponderate one way or the other but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal.' *Jackson v People,* 9 Mich 111 (77 Am Dec 491) [1860]."

In the case at bar we are squarely faced with the question of statutory interpretation of rule 7.4 of the civil service commission of East Detroit. Specifically, the issue is whether the failure to give written notice within 24 hours voided the suspension or simply delayed its effectiveness until proper notice was given. It is to be remembered that plaintiffs do not dispute the fact that their hearing was in accordance with procedural due process, nor were they prejudiced by the 16 and 18 hour delays in written notice since their suspensions were modified accordingly.

In reviewing an interpretation of a statute or ordinance this Court stated in *Detroit v General Foods Corp, supra,* page 192:

" 'As the well established rule has been otherwise stated, legislative intent must be determined from a consideration of all of the provisions of the enactment, and the purpose sought to be accomplished by it, and the courts seek to find a meaning which is reasonable and which gives effect to all parts thereof. To effect this purpose, every clause and every word of the enactment is presumed to have some force and meaning, and one part of a statute must not be so construed as to render another part nugatory or ineffective. If there is any proper way in which claimed inconsistencies may be reconciled, the court will do so.' 21 Michigan Law & Practice, Statutes, § 95, p 101."

In examining the purpose of the notice provision of rule 7.4, we believe that it was designed to see that suspended patrolmen were accorded procedural due process. In this regard we believe that the 24-hour requirement was intended to alleviate the fear of a perpetual state of limbo in which a suspended patrolman might exist, without pay and without a hearing. The actions of the civil service commission in ruling that the suspensions were not effective until written notice was served, secured to plaintiffs the full benefits of their position while maintaining all procedural safeguards. Plaintiffs were provided with adequate time to prepare with a full written notice in conformity with rule 7.4 and were given a full and fair hearing before defendant. The decision of the civil service board was clearly in conformity with any purpose the rule was designed to serve. Plaintiffs have in fact never disputed the fairness or procedural propriety of their hearing.

Finally, while the actions of a city civil service commission do not come within the scope of the Administrative Procedures Act, MCLA 24.201, *et seq.;* MSA 3.560(101), *et seq.;* we nevertheless believe that an examination of that act's provisions indicates the legislative intent in regard to the effect of procedural errors in administrative actions.

MCLA 24.306; MSA 3.560(206) provides:

"(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

* * *

"(c) Made upon unlawful procedure resulting in *material prejudice* to a party." (Emphasis supplied.)

The key to this section is the phrase "material prejudice". We believe that such a showing is embodied within and crucial to the issuance of any order of superintending control in regard to procedural irregularities of an administrative tribunal. Admittedly there was no material prejudice in this case. Consequently we believe that the order of superintending control was properly denied.

Affirmed. No costs, a public question being involved.

All concurred.

DETROIT & NORTHERN SAVINGS & LOAN ASSOCIATION v WOODWORTH

1. COURTS—SUPREME COURT—ADMINISTRATIVE ORDERS—COURT OF APPEALS.

   The Court of Appeals is bound by administrative orders of the Supreme Court and must interpret the orders to the best of its ability.

2. REPLEVIN—SALES—CONTRACTS—INSTALLMENT SALES CONTRACTS—DEFENSES—BREACH OF WARRANTY—SHOW CAUSE HEARING—ADMINISTRATIVE ORDERS.

   An administrative order of the Supreme Court allows the defendant in an action to recover the possession of personal property to introduce, at a show-cause hearing, evidence of a meritorious defense including the defense of breach of warranty; therefore, a trial court erred by limiting a show-cause hearing involving repossession of a mobile home sold under an installment sales contract to the questions of whether there was a contract, whether there was a default, and whether there was impairment of the collateral (Administrative order 1973-3).

Appeal from St. Joseph, Robert E. A. Boyle, J. Submitted Division 3 April 5, 1974, at Grand Rapids. (Docket No. 18890.) Decided July 25, 1974.

Complaint by Detroit & Northern Savings & Loan Association against Richard E. Woodworth, Sr., and Dorothy Woodworth to repossess a mobile home sold under an installment sales contract. After a show-cause hearing judgment was entered for plaintiff. Defendants appeal. Reversed and remanded for further proceedings.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 20 Am Jur 2d, Courts § 183 *et seq.*

Parmenter, Forsythe & Rude (by *Eric J. Fauri),* for plaintiff.

Richard E. Woodworth, Sr., *in propria persona.*

Before: ALLEN, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

ALLEN, P. J. On July 24, 1972, defendants purchased from Gray Mobile Home Sales, Inc., of Muskegon, Michigan, a new 1972 Statesman mobile home for $12,669.12, paying $3,031.12 down with the balance due in 120 monthly installments of $167.82 each. Purchase was by a retail sales contract and security agreement which, on the same day, were assigned to plaintiff. Defendants located the unit at Mendon, Michigan, living in it with their six children.

When defendants fell eight installments behind on the monthly payments, plaintiff filed a complaint praying for an order directing defendants to show cause why an order for claim and delivery should not issue. The order to show cause was issued, and on November 26, 1973 a hearing was held thereon. At the hearing, plaintiff introduced in evidence the installment sales contract and security agreement, evidence that defendants had made no payments since February 5, 1973, and evidence indicating defendants were badly abusing the security. Defendant Richard Woodworth, Sr., appearing *in propria persona,* denied abusing the mobile unit and admitted he was in arrears. When defendant Richard Woodworth sought to explain the arrearage by claiming a breach of warranty and that plaintiff was not a holder in due course,

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

the trial court disallowed such testimony. The trial court explained that in the show cause hearing the only questions to be considered were 1) whether there was a contract, 2) whether there was a default, and 3) whether there was impairment of the collateral. The court explained that the defense sought to be raised by Richard Woodworth, Sr., would be raised subsequently in a trial on the merits. At the conclusion of the show cause hearing, the trial court ruled that plaintiff was entitled to take possession of the trailer and gave defendants 20 days to vacate.

The present appeal squarely presents the issue of the extent to which a judge at a show cause hearing to determine possession of collateral under administrative order 1973-3, 389 Mich xliv, must consider various meritorious defenses of the underlying debt as defenses to repossession. Administrative order 1973-3 was issued by the Michigan Supreme Court February 2, 1973 in response to the decision in *Fuentes v Shevin,* 407 US 67; 92 S Ct 1983; 32 L Ed 2d 556 (1972), which declared unconstitutional replevin statutes allowing seizure of property without a prior hearing, including the opportunity for the possessor of the property to be heard on the right to continued possession.[1] The rationale of *Fuentes* has been followed by this Court. *Inter City Motor Sales v Judge of the Common Pleas Court,* 42 Mich App 112; 201 NW2d 378 (1972); *Gates Radio Co v WJAN, Inc,* 50 Mich App 453, 457–458; 213 NW2d 583 (1973). Unfortunately, neither *Fuentes* nor the two Michigan decisions have defined the scope of the show cause hearing mandated under administrative order 1973-3. Legal scholars disagree on the scope of the

[1] Honigman & Hawkins, Michigan Court Rules Annotated, 1974 Supp, p 17.

preliminary hearing required under *Fuentes*.[2] Further complicating the problem is the recent decision by the United States Supreme Court in *Mitchell v W T Grant Co*, 416 US 600; 94 S Ct 1895; 40 L Ed 2d 406 (1974), which effectively overruled *Fuentes*. In a 5–4 opinion, Mr. Justice White, speaking for the majority, held that the issues involved in the possessory action in Louisiana sequestration procedures were narrow and were limited to the following: 1) debtor's default, 2) existence of the creditor's lien, and 3) the possession of the debtor. Mitchell's argument that he was entitled to possession until all of the issues were judicially determined after the full adversary proceeding was rejected. Conceivably, *Mitchell* will lead to a modification of administrative order 1973-3. Possibly *Mitchell* may be distinguished from the present case on the ground that seizure of a home as distinguished from seizure of household goods will place defendants in a "brutal need" situation.[3] But until administrative order 1973-3 is changed or modified by the Supreme Court this Court is bound thereby and must interpret it to the best of this Court's ability. Paragraph 7 of said order provides as follows:

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[2] Hayes, *Civil Procedure*, 19 Wayne L Rev 353, 371 (1973); Martin, *Secured Transactions*, 19 Wayne L Rev 593, 635 (1973); Martin, *Commercial Transactions*, 20 Wayne L Rev 305 (1974); Clark & Landers, *Sniadach, Fuentes & Beyond: The Creditor Meets the Constitution*, 59 Va L Rev 355, 407 (1973).

[3] *See* Mr. Justice Powell's concurring opinion in *Mitchell* where he said "Against this concern must be balanced the debtor's real interest in uninterrupted possession of the goods, especially if the sequestration proves to be unjustified. To be sure, repossession of certain items of personal property, even for a brief period, may cause significant inconvenience. But it can hardly be said that temporary deprivation of such property would necessarily place a debtor in a 'brutal need' situation. *Goldberg v Kelly*, [397 US 254, 263–266; 90 S Ct 1011, 1018–1020; 25 L Ed 2d 287, 296–298 (1970)]; *Arnett v Kennedy*, [416 US 134; 94 S Ct 1633; 40 L Ed 2d 15 (1974)]." 416 US 625; 94 S Ct 1909; 40 L Ed 2d 424.

"'.7 *Hearing on Order to Show Cause.* If the defendant appears in response to the order to show cause the court shall thereupon hear the same as a motion. If the court determines that the defendant *has no meritorious defense* to the action the court is empowered to enter an order for delivery of any or all of the property claimed in the complaint to the plaintiff in conformity with GCR 1963, 752.2–757.8. If the court determines that *there may be a* meritorious defense to the action the case shall thereupon be set for trial in conformity with the rules of the court in which the action is pending." (Emphasis supplied.)

At 5 Honigman & Hawkins, Michigan Court Rules Annotated, 1974 Supp, p 17, the authors discuss the new administrative order and the *Fuentes* decision. Noting that the Arizona Supreme Court refused to follow *Fuentes* on the ground that the addition of Justices Powell and Rehnquist would lead to *Fuentes* being overruled (a correct forecast), they said:

"Even if the *Fuentes* decision is as tenuous as the Arizona court thinks—and it may be—the new Michigan procedure will remain a valid exercise of the rule-making power since a *Fuentes* overruling would hardly *forbid* the extra hearing now required in Michigan. (Emphasis in original.)

* * *

"Since the time allowed to the defendant is rather short, he should not be required to marshall all of the evidence he would present at a plenary hearing of the case; any substantial indication on his part that he has evidence to show—for example, that he has not defaulted in payments on the property in question, *or that the property was defective, contrary to a warranty, and he has exercised his statutory right under UCC 2-717*—should constitute an acceptable showing that there 'may be' a meritorious defense." (Emphasis supplied.) 5 Honigman & Hawkins, Michigan Court Rules Annotated, 1974 Supp, p 19.

A reading of the transcript reveals that this is precisely what defendant was trying to do at the hearing. He asserted that there were defects or a breach on the part of the seller, namely, some furniture had not been delivered and that the family had no place to store its clothing. He indicated that he and his wife had to do a lot of "warranty work" and has indicated in his brief that the "floor joists" were insufficient. He asserted that his reasons for not paying his monthly payments went "to the merits of the case" and that he could not be in arrears "if the warranty was breached". He stated that he contacted plaintiff in September, shortly after delivery of the trailer, in October–December of 1972, and in January–February 1973. It seems that defendant was trying to indicate the property was defective, that seller had breached the warranty, and that he (defendant) had in fact tried to comply with section 2-717 of the Uniform Commercial Code which provides:

"The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." MCLA 440.2717; MSA 19.2717.

The "official uniform commercial code comment" attached to that section indicates that while the buyer may withhold all or part of the price pursuant to a breach on the seller's part,

"[t]he buyer, however, must give notice of his intention to withhold all or part of the price if he wishes to avoid a default within the meaning of the section on insecurity and right to assurances. In conformity with the general policies of this article, no formality of notice is required and any language which reasonably

indicates the buyer's reason for holding up his payment is sufficient."

In our opinion, the clear wording of administrative order 1973-3 allows a defendant to introduce evidence of a meritorious defense including the defense of breach of warranty. Admittedly, the administrative order goes considerably further in protecting a defendant than the requirements of *Fuentes* or its enfeebled offshoot, *Mitchell.* Admittedly, the administrative order contains no standard by which a trial court is to determine "there may be a meritorious defense to the action". But the fact remains that in the instant case, defendants were not permitted to fully present the defenses the administrative order allows. The trial court mistakenly foreclosed inquiry which the administrative order permits.

Accordingly, the order of the trial court is set aside and the case remanded for a show cause hearing at which defendants will be permitted to introduce testimony of meritorious defenses. At the conclusion of such hearing the court may still determine that defendants have failed to show they may have a meritorious defense and enter an order for delivery of the mobile home unit, or may determine there may be a meritorious defense and set the case for trial.

Reversed and remanded for proceedings in accordance with this opinion. Costs to defendants.

All concurred.

PEOPLE v GIBBONS

1. CRIMINAL LAW—PLEA OF GUILTY—RIGHT TO TRIAL—RIGHT TO COMPULSORY PROCESS—WITNESSES—COURT RULES.

   There was no requirement prior to the effective date of an amendment to the court rules that before a defendant's guilty plea could be taken he had to be informed that at trial his guilt would have to be proved beyond a reasonable doubt and that he would have the right to compulsory process for obtaining witnesses in his favor (GCR 1963, 785.7).

2. CRIMINAL LAW—PLEA OF GUILTY—STATEMENT BY COURT—RIGHT TO TRIAL—JURY TRIAL—NONJURY TRIAL—SUFFICIENCY.

   A defendant must be informed at his guilty-plea proceedings that he has a right to trial by jury or by the court without a jury; a statement of the court that "you stay innocent until and unless a judge or a jury after they have weighed the evidence presented by the prosecution, decided after hearing that evidence, that you were guilty" was sufficient to inform defendant of his right.

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted Division 1 June 5, 1974, at Detroit. (Docket No. 16995.) Decided July 25, 1974.

Dwayne Gibbons was convicted, on his plea of guilty, 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,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 34 *et seq.*

[2] 21 Am Jur 2d, Criminal Law §§ 486–491, 505.

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.

Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Joel H. Schavrien, for defendant on appeal.

Before: LESINSKI, C. J., and BRONSON and VAN VALKENBURG,* JJ.

PER CURIAM. Defendant Dwayne Gibbons was convicted upon a plea of guilty to assault with intent to rob while being armed, MCLA 750.89; MSA 28.284. He appeals as of right.

Defendant first challenges the validity of his guilty plea on the basis that he was not informed that at trial his guilt would have to be proved beyond a reasonable doubt and that he would have the right to compulsory process to obtain witnesses in his favor. We find such claim to be without foundation. Defendant's guilty plea occurred on December 11, 1972, which was prior to the June 1, 1973 effective date of GCR 1963, 785.7. At such time it was not error for the trial court to fail to advise a defendant that if he did not plead guilty his guilt at trial must be proved beyond a reasonable doubt. *People v McCulloch,* 8 Mich App 481; 154 NW2d 664 (1967). Similarly, there was no requirement prior to the adoption of GCR 1963, 785.7 that a defendant be specifically informed that by pleading guilty he waives the right to compulsory process for obtaining witnesses in his favor at trial, since this was not one of the specifically enumerated rights required by *People v Jaworski,* 387 Mich 21; 194 NW2d 868 (1972), for the taking of an informed plea.

Defendant's final contention is that the trial

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

court erred in accepting his plea of guilty without first advising him of his right to trial without a jury.

In *People v Eagan,* 46 Mich App 377; 208 NW2d 219 (1973), this Court held that it was error to simply advise a defendant at a guilty plea that he had a right to trial, without informing him that such a trial would be by jury or the court without a jury. In the case at bar the trial court stated:

> "Now, I want you all to understand you're considered innocent of the offense and you stay innocent until and unless a judge or a jury after they have weighed the evidence presented by the prosecution, decided after hearing that evidence, that you were guilty."

We believe that this statement by the trial court was sufficient to inform defendant of his right to trial by judge or jury as required by *Eagan, supra.*

Affirmed.

PEOPLE v WEST

1. CRIMINAL LAW—DOUBLE JEOPARDY—SAME TRANSACTION.

A defendant who pleaded nolo contendere to a disorderly person charge under a city ordinance cannot later be tried on the charge of resisting arrest where both charges resulted from the same transaction; to do so would place the defendant in jeopardy twice for the same act.

2. CRIMINAL LAW—SAME TRANSACTION—CONTINUOUS TIME SEQUENCE —UNITY OF INTENT.

Two crimes with which a defendant was charged arose from the same transaction where a defendant directed profane language at a police officer who was questioning him in regard to a traffic accident, and then when the officer arrested him for disorderly conduct in violation of a city ordinance, he refused to submit peacefully and was later charged with resisting and obstructing an officer in discharge of his duty; the crimes charged were committed in a continuous time sequence and there was unity of intent in the defendant's refusal to submit to the police officer's authority.

3. CRIMINAL LAW—DOUBLE JEOPARDY—SAME TRANSACTION—JURISDICTION—PROSECUTOR'S ELECTION.

The allocation of jurisdiction among separate courts cannot defeat a defendant's right against double jeopardy; thus in a case where a defendant is charged with two crimes arising from the same transaction, one of which must be tried in the district court and the other in the circuit court, the prosecutor must elect which charge to pursue.

Appeal from Oakland, Richard D. Kuhn, J. Submitted Division 2 May 13, 1974, at Lansing. (Docket No. 17069.) Decided July 25, 1974.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 21 Am Jur 2d, Criminal Law §§ 183–187, 189, 212.
Conviction of lesser offense as bar to prosecution for greater or new trial. 61 ALR2d 1141.

[2] 21 Am Jur 2d, Criminal Law § 183.

James West was charged with resisting arrest. Motion to quash the information denied. Defendant appeals by leave granted. Defendant ordered discharged.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, and *Robert C. Williams,* Chief Appellate Counsel, for the people.

Campbell, Lee, Kurzman & Leitman (by *Gerald A. Fisher),* for defendant.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

PER CURIAM. While being arrested for violation of the Pontiac disorderly person ordinance, Pontiac Ordinances, No. 728, § 1, the defendant resisted arrest. On December 20, 1972, a district court judge accepted the defendant's plea of nolo contendere to the charge of disorderly creating a disturbance. Subsequent thereto, the plaintiff filed an information in Oakland County Circuit Court charging the defendant with resisting and obstructing an officer in the discharge of his duty, contrary to MCLA 750.479; MSA 28.747. Defendant moved to quash the information on the ground that he was being placed in jeopardy twice for the same act or offense. Following the trial court's denial of this motion, this Court granted defendant's application for leave to appeal prior to trial.

The specific issue raised by defendant on appeal has been recently considered by a panel of this Court in *People v Davenport (On Remand),* 51 Mich App 484; 215 NW2d 702(1974). In *Davenport,*

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

as in the instant case, a police officer attempted to arrest the defendant for the ordinance violation of being a disorderly person and the defendant resisted. He was acquitted by a district court jury of the disorderly person charge, but later convicted by a circuit court jury of resisting arrest. In reversing that conviction and ordering the defendant discharged, this Court stated at pp 485–486:

"In *People v White,* 390 Mich [245, 257–258; 212 NW2d 222, 227 (1973)], our Supreme Court adopted the 'same transaction' test as the 'only meaningful approach to the constitutional protection against being placed twice in jeopardy'. The Court also observed that 'a procedural rule allocating jurisdiction to try offenses between the several courts of the state must be subordinated to a defendant's constitutional right not to be put twice in jeopardy for the same offense'. (Citations omitted.)

"As in *People v White, supra,* the two crimes with which defendant was charged were committed, if committed at all, in a continuous time sequence and in pursuit of a single intent or goal. When a police officer stopped defendant for a traffic infraction, defendant allegedly refused to cooperate with him and directed obscene epithets at him, and then, when the officer attempted to arrest defendant because of those epithets, defendant refused to submit peacefully. The continuousness of the time sequence is obvious. The unity of intent is also readily apparent—a refusal to submit to a police officer's authority."

We note that *Davenport* is distinguishable factually from the case at bar, since in *Davenport* the defendant had been tried and acquitted of the first offense while in the instant case the defendant entered a plea of nolo contendere to the first offense. However, although there is a factual difference between the two cases, the principle announced in *Davenport* is nevertheless sound and in our opinion controlling and this conclusion com-

pels the dismissal of the charge of resisting arrest pending against the defendant.

As in *People v White, supra,* and *Davenport,* the two crimes with which defendant was charged were committed in a continuous time sequence, and plaintiff conceded in its brief and at oral argument that both charges arose out of the same transaction. When the police arrived at the scene of the accident and began questioning defendant, defendant became a disorderly person directing profane language at the officers. When defendant was being arrested for disorderly conduct, he also refused to submit peacefully. As in *Davenport,* the continuousness of the time sequence was obvious, and the unity of intent was also apparent—the defendant's refusal to submit to the police officers' authority.

We are aware that this case, like *Davenport,* involves a conflict between the allocation of jurisdiction to the district court where ordinance violations must be tried[1] and circuit court, which is vested with jurisdiction over the resisting arrest charge.[2] However, the allocation of jurisdiction cannot defeat the defendant's right against double jeopardy. *Davenport, supra.* We agree that resolution of this conflict is not within the powers of this Court. Therefore, until such time as this conflict is resolved by either the Legislature or the Supreme Court,[3] prosecutors must elect which charge to pursue when confronted with such a case.

[1] MCLA 600.8311(b); MSA 27A.8311(b)

[2] MCLA 600.601; MSA 27A.601

[3] As the *Davenport* Court noted, one way to resolve the conflict between the protection against double jeopardy and the allocation of jurisdiction among the district and circuit courts would be to authorize one of those courts to try all charges, misdemeanors and felonies, in cases such as this. But a grant of such authority may be made only by the Legislature or the Supreme Court. Const 1963, art 6, § 13.

The motion to quash should have been granted. The defendant is ordered discharged, and the charge pending against him dismissed.

ANDERSON v RICHTER

1. DEEDS—LIFE ESTATES—REMAINDERS—EXPECTANCIES—SURVIVORS.

A deed executed by a defendant, through a strawman, to defendant and plaintiff, "or survivor", created joint life estates in plaintiff and defendant with the remainder in fee to the survivor, not merely an estate in expectancy to the plaintiff which was revocable during the defendant's life; the defendant therefore was not entitled to have the plaintiff's name expunged from the deed upon the assertion that her intent had been for the deed to operate only as a will.

2. PARTITION—LIFE ESTATES—REMAINDERS—CONTINGENT INTERESTS.

Partition of land was properly denied where plaintiff and defendant had joint life estates with remainder to the survivor, and where the plaintiff was aware that the defendant had intended that the plaintiff's interest in the land was to be contingent upon the defendant's death and the plaintiff by her actions had shown that she believed the defendant was to have quiet enjoyment of the property during defendant's lifetime.

Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 April 11, 1974, at Detroit. (Docket No. 17708.) Decided July 25, 1974.

Complaint by Hattie Anderson against Helen Richter for a partition of land. Defendant counterclaimed for reformation of a deed. Judgment for defendant. Plaintiff appeals. Reversed in part, affirmed in part.

DeBiasi & Carrier, P. C., for plaintiff.

Markus S. Simon, for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1] 51 Am Jur 2d, Life Tenants and Remaindermen § 1.

[2] 51 Am Jur 2d, Life Tenants and Remaindermen §§ 82, 90–92.

Before: J. H. GILLIS, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

PER CURIAM. The sole question here presented is whether the trial court correctly construed that the deed executed on March 25, 1944 created in plaintiff merely an estate in expectancy of demise rather than an immediate conveyance of title to plaintiff.

The series of events which gave rise to the present litigation began in November, 1924 when the defendant received a deed from her grandfather conveying 19 acres in the City of Taylor, Michigan. This deed was given in return for defendant's care of him in his last illness and payment of the balance due on his mortgage, all of his obligations and his funeral bill. Defendant has lived on the property for 50 years, maintained it, and paid the taxes, with some recent exceptions, since that time.

Sometime in 1927 the plaintiff, sister of defendant, who had witnessed the 1924 deed and knew of the arrangements, together with her two brothers demanded of defendant that the property be shared with them. Defendant agreed to do so on the condition that each pay a fourth of the expenses. This offer was refused.

Nothing further happened until March 25, 1944 when the defendant, while not feeling well, conveyed the property through a strawman, plaintiff's husband, to "Helen Richter and Hattie Anderson, or survivor." This deed was recorded on April 12, 1944.[1]

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

[1] While it is of no import with respect to the present litigation,

Somewhat later 3.89 acres of the parcel were conveyed to plaintiff's son. Both parties joined in the execution of the deed conveying that portion of the parcel.

On August 23, 1971, plaintiff filed a complaint alleging that she and her sister, the defendant, were "tenants in common" of the remaining portion of the parcel, some 15 acres, and prayed for a partition of the acreage on the theory that the taxes were delinquent and that defendant was in no position to pay them. Defendant filed an answer, and along with it she filed a counterclaim which asserted that plaintiff had no interest in the property, since the deed was intended to create title in plaintiff only upon defendant's death. Defendant asked that plaintiff's name be expunged from the recorded deed.

After hearing the testimony, the trial court held that a judgment of no cause of action be entered on plaintiff's complaint, that the "defendant granted only an estate in expectancy to the plaintiff," and that the name of Hattie Anderson be removed and expunged from the deed. From that judgment plaintiff appeals as of right.

An action to partition land is equitable in nature. MCLA 600.3301; MSA 27A.3301. So too is defendant's counterclaim to quiet title in the land and reform the deed. As such this Court hears the appeal *de novo* on the record. While we are inclined to give great weight to the findings and determination of the trial court, we cannot, after a thorough review of this record and the applicable

since more than ten years have elapsed since the recording of that deed, we note that the deed failed to indicate the strawman's marital status and was thus not in compliance with MCLA 565.221; MSA 26.581.

case law, agree with the trial court's finding that the deed merely created an ambulatory estate in expectancy which was revocable during defendant's life.

The nature of the deed itself and the manner by which it was executed belie the present assertion by defendant that the deed was meant to operate merely as a will. First, it is the well established law of this state that the language "to A and B, or survivor" creates joint life estates in A and B with the remainder in fee to the survivor. *Rowerdink v Carothers,* 334 Mich 454; 54 NW2d 715 (1952); *Ames v Cheyne,* 290 Mich 215; 287 NW 439 (1939); *Jones v Snyder,* 218 Mich 446; 188 NW 505 (1922); *Finch v Haynes,* 144 Mich 352; 107 NW 910 (1906); *Schulz v Brohl,* 116 Mich 603; 74 NW 1012 (1898). Second, it should be clear even to a layman that the language used conveyed some form of title or interest in the property at the time of execution. Third, the fact that defendant jointly executed the deed which conveyed a portion of the parcel to plaintiff's son is indicative of the fact that defendant believed, and thereby acknowledged, that plaintiff had such an interest in the land as would require plaintiff to be a necessary party to a sale of a portion of the land. Fourth, even if defendant felt at the time of the execution of the 1944 deed that plaintiff was only receiving an estate in expectancy, the joint deed to plaintiff's son indicates that she felt that plaintiff might have some vested interest in the land; therefore, it was incumbent that defendant, if she then had some doubt as to the status of her title to the land, undertake such actions at that time as were necessary to reform the deed to conform to what she now asserts was the true intent. Having failed to do it then, she is guilty of laches.

We are compelled to conclude on the basis of this record that the trial court erred in holding that the deed created a mere estate in expectancy which was revocable by defendant during her lifetime. Accordingly, the trial court erred in granting defendant's requested relief of removing and expunging plaintiff's name from the deed.

While the trial court erred in granting defendant's counterclaim, the court properly denied plaintiff's petition for partition. There is some authority for the proposition that where there are joint life estates with the remainder to the survivor, partition is improper. See *Ames v Cheyne, supra,* p 218.[2] More importantly, the record clearly supports the finding that plaintiff was aware of the fact that defendant intended plaintiff to only have a contingent remainder in the property, the contingency being that plaintiff survive defendant. The testimony by defendant with respect to the statements regarding her intent which she made at the time of the execution of the deed in question, coupled with the total absence of any contributions by plaintiff for the maintenance of the property or the payment of the taxes thereon, convinces this Court that plaintiff at all prior times believed and conceded that defendant was to have quiet enjoyment of the property during her lifetime. Partition being equitable in nature, it matters not whether we hold that plaintiff's present claim of interest in the property is tardy and therefore subject to laches or that plaintiff, by failing to do equity, cannot seek equity; the result

[2] The criticism of the *Ames* case found in the committee comment to MCLA 600.3304; MSA 27A.3304 appears to be misplaced. Contrary to the belief of the committee the *ratio decidendi* of the holding in *Ames* was not the existence of the contract but rather the nature of the estates created, *i.e.* joint life estates with cross contingent remainders to the survivors.

in either case is that plaintiff is not entitled to the equitable relief she now seeks.

Reversed in part, affirmed in part. Remanded for the entry of judgment consistent with this opinion. No costs.

STARLINE CONSTRUCTION COMPANY v CITY OF SWARTZ CREEK

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—ORDINANCES—SEWER ASSESSMENTS—CLASSIFICATION—DUE PROCESS—EQUAL PROTECTION.

A municipal ordinance which requires payment of a fee for tapping into a public sewer system for homes constructed and occupied after the effective date of the ordinance in addition to an annual front-foot assessment, whereas prior to the ordinance only the front-foot assessment was charged, is constitutional and does not deny due process or equal protection to a builder who owns several lots upon which he is constructing houses, and as to which he has paid annual assessments on a front-foot basis, where no arbitrary classification or exemption was attempted by the ordinance (Swartz Creek Ordinance No. 76, § 12.1).

Appeal from Genesee, Ollie B. Bivins, Jr., J. Submitted Division 2 May 7, 1974, at Lansing. (Docket No. 17715.) Decided July 25, 1974. Leave to appeal applied for.

Complaint by Starline Construction Company against the City of Swartz Creek, seeking a judgment declaring an ordinance invalid. Judgment for defendant. Plaintiff appeals. Affirmed.

Robert M. Crites, for plaintiff.

Edward P. Joseph, for defendant.

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

REFERENCE FOR POINTS IN HEADNOTE

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 345, 365, 366.

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

PER CURIAM. Plaintiff commenced an action for a declaratory judgment seeking to declare invalid Ordinance No. 76, Section 12.1, of the City of Swartz Creek. In an opinion entered May 30, 1973, the trial court upheld the constitutionality of the ordinance. A judgment for defendant was entered on July 2, 1973. Plaintiff appeals as of right.

The parties have stipulated to a statement of facts contained in plaintiff's brief. The following is a summary of the statement:

Plaintiff, a builder, is the owner of several lots in the Otterburn Heights subdivision, City of Swartz Creek. Prior to April 28, 1969, the city constructed sewer lines throughout the city, including the Otterburn Heights subdivision, and issued bonds to pay for the cost of the lines. To retire the bonds, the city assessed those lots served by the sewer lines on a front-foot basis. The lots in question have been so assessed annually.

On April 28, 1969, the city enacted Ordinance No. 76 "to provide for the operation of the sewage disposal system". Section 12.1 of Ordinance No. 76 provides, in part:

> "Construction and occupancy taking place after the effective date of this ordinance shall be required to pay fees for tapping into the public sewer according to the following schedule:
> "(a) Single Family Residence—$500.00"

Thus, under Section 12.1 homes constructed and occupied after the effective date of the ordinance are required to pay a $500 tap-in fee, in addition to the annual front-foot assessment. Prior to the ordinance, only the front-foot assessment plus a $35 installation inspection charge was required.

The new tap-in fees are used to retire the bonds.

Plaintiff has built houses on several of the lots

in question, and intends to build additional houses on the remaining unoccupied lots. All of these houses have been "constructed and occupied" after the effective date of the ordinance. Plaintiff has paid the tap-in fees, pursuant to Section 12.1., under protest.

On September 16, 1971, plaintiff commenced this action seeking to declare Section 12.1 of the ordinance invalid as a denial of due process and equal protection.

In an opinion entered May 30, 1973, the trial court upheld the constitutionality of Section 12.1.

The issue is controlled by *Seltzer v Sterling Township,* 371 Mich 214; 123 NW2d 722 (1963).

Plaintiff's reliance upon *Beauty Built Construction Corp v City of Warren,* 375 Mich 229; 134 NW2d 214 (1965), is misplaced. The Supreme Court was well aware of *Seltzer* when it decided *Beauty Built.* The Court made the distinction which is binding upon us.

"In *Seltzer v Sterling Township* (citation omitted) this Court held that an ordinance imposing privilege fees on all homes connecting to the water system subsequent to the adoption of the ordinance not to be unconstitutional; no arbitrary classification or exemption was attempted by the ordinance in *Seltzer* as in the instant case.

"In *Seltzer* the ordinance provided that all those *connecting* to the Sterling township water system must pay the privilege fee, while in the instant controversy, an exemption was created requiring all those *building* subsequent to the adoption of the ordinance to pay the tap-in fee." 375 Mich at 236; 134 NW2d at 218.

The trial judge recognized the distinction made by the Supreme Court.

So must we.

Affirmed. No costs. A public question.

PEOPLE v SANDERS

1. CRIMINAL LAW—PLEA OF GUILTY—ADVICE OF RIGHTS—CONFRONTATION.

A defendant was substantially advised of his right of confrontation prior to his plea of guilty when he was advised that he could cross-examine any witnesses called to testify at his trial.

2. CRIMINAL LAW—PLEA OF GUILTY—ADVICE OF RIGHTS—COURT RULES—SUBSTANTIAL COMPLIANCE.

Substantial compliance with the court rule concerning the advice of rights to be given a criminal defendant before accepting a plea of guilty does not rest on phraseology but rather on the substance of the advice given (GCR 1963, 785.7).

3. CRIMINAL LAW—PLEA OF GUILTY—VOLUNTARINESS—PROMISES OF LENIENCY.

A defendant may be held to his on-the-record statement that no promises, inducements, coercion, or other undue influences had been offered to him or brought to bear upon him prior to his plea of guilty, notwithstanding his later allegations to the contrary.

4. CRIMINAL LAW—PLEA OF GUILTY—PROMISES OF LENIENCY—DEFENDANT'S AFFIDAVIT—SUFFICIENCY OF EVIDENCE.

A defendant's affidavit supporting his claim that his plea of guilty should be set aside because it was the product of an unkept promise of leniency made by his attorney is insufficient to require the Court of Appeals to remand the case for an evidentiary hearing on the alleged promise of leniency.

5. CRIMINAL LAW—SENTENCING—MULTIPLE DEFENDANTS—SHARED COUNSEL—RESENTENCING.

A defendant is entitled to assignment of new counsel for resentencing where the defendant had to share counsel with two codefendants at sentencing and the positions of the defendant

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 21 Am Jur 2d, Criminal Law § 484 *et seq.*
29 Am Jur 2d, Evidence §§ 523–596.

[5] 21 Am Jur 2d, Criminal Law § 533 *et seq.*

and his codefendants at the sentencing proceedings were so divergent as to have required their attorney to argue for substantially different penalties, and where the record reveals that the codefendants made statements putting most of the blame on defendant.

Appeal from Berrien, Julian E. Hughes, J. Submitted Division 3 June 6, 1974, at Grand Rapids. (Docket No. 18432.) Decided July 25, 1974.

Oscar L. Sanders was convicted, on his plea of guilty, of conspiracy to commit larceny from the person. Defendant appeals. Conviction affirmed; remanded for resentencing.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *John Jeffrey Long,* Assistant Prosecuting Attorney, for the people.

Marshall S. Redman, Assistant State Appellate Defender, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

PER CURIAM. On June 11, 1973, defendant Oscar L. Sanders was convicted upon his plea of guilty to the crime of conspiracy to commit larceny from a person, MCLA 750.157a; MSA 28.354(1); MCLA 750.357; MSA 28.589. He was sentenced to a term of from six to ten years in prison, and now appeals as of right.

Defendant first contends that the trial court failed to comply with our newly enacted court rule[1] when it informed him of his right to confront

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

[1] GCR 1963, 785.7, effective June 1, 1973, and applicable to defendant's June 11, 1973, plea.

adverse witnesses if he should elect to go to trial rather than plead guilty.

In the course of taking the plea of guilty, the trial court advised the defendant as follows:

"*The Court:* Further, if we have a trial, you'd have the right to call witnesses to help you and the public would pay for the expense of bringing them in and you'd also have the right to cross-examine any witnesses against you.

"*Defendant:* I understand."

In *People v Butler,* 387 Mich 1; 195 NW2d 268 (1972), our Supreme Court held that what is required is that a defendant must be "substantially advised of each of his rights". We hold that this defendant was substantially advised of his right of confrontation when he was advised that he could cross-examine any witnesses called to testify at his trial. *Jaworski*[2] and *Boykin*[3] do not require a parroted incantation of defendant's constitutional rights. What is required of the trial court is that it convey to the defendant in a way defendant can understand what his rights are so that he can act intelligently as concerns these rights. *People v Chappell,* 44 Mich App 204, 207; 205 NW2d 285 (1972). In this case the trial court employed plain and simple language to fully inform defendant of his right of confrontation which he then knowingly waived. In *People v Mathis,* 52 Mich App 140, 142; 216 NW2d 467 (1974), we said that substantial compliance with *Boykin* and *Jaworski* does not rest on phraseology but rather on the substance of the advice given. This statement is

[2] *People v Jaworski,* 387 Mich 21; 194 NW2d 868 (1972).

[3] *Boykin v Alabama,* 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969).

equally applicable when we speak of substantial compliance with a court rule. We find no error.

We are aware of *People v D'Argis,* 44 Mich App 186; 205 NW2d 19 (1972), but we feel that the holding in that case should be confined to its facts. We find *People v Chappell, supra,* applicable to our case and supportive of our position. See also *People v Kuchulan,* 390 Mich 701; 213 NW2d 95 (1973); *People v Mathis, supra;* and *People v Ward,* 391 Mich 71; 214 NW2d 831 (1974).

Defendant also claims that his guilty plea should be set aside because it was the product of an unkept promise of leniency made by his attorney. Defendant's claim is supported only by his own affidavit. Defendant alleges that his plea of guilty was given because he was led to believe by his attorney that he would receive a sentence of not more than 1-1/2 to 10 years in prison. However, the record of the plea taking reveals that defendant specifically stated that no one had told him he would receive a lighter sentence if he pled guilty. This Court has long held that when a defendant unequivocally states on the record that no promises, inducements, coercion, or other undue influences have been offered to him or brought to bear upon him, he may be held to his on-the-record denial of such improper pressures, notwithstanding his later allegations to the contrary. *People v Godsey,* 35 Mich App 399; 192 NW2d 674 (1971); *People v Inosencio,* 35 Mich App 236; 192 NW2d 339 (1971); *People v Peterson,* 30 Mich App 215; 185 NW2d 915 (1971); *People v Pledger,* 20 Mich App 314; 174 NW2d 41 (1969); *People v Gant,* 4 Mich App 671; 145 NW2d 381 (1966). Furthermore, we hold that defendant's affidavit, standing by itself, is insufficient to require us to remand this case for an evidentiary hearing on this alleged

promise of leniency. *People v Smith,* 52 Mich App 731; 218 NW2d 151 (1974); *People v Chester Davis,* 41 Mich App 224; 200 NW2d 109 (1972), *lv den,* 388 Mich 781 (1972).

Finally, defendant argues that he was effectively denied counsel at the time of his sentencing. This claim relates to the sentence he received and not his conviction.

Defendant argues that he was prejudiced due to the fact that he had to share one attorney with his three codefendants. Specifically, defendant alleges that two of his codefendants, at the time of their sentencing, charged defendant with being the leader and instigator of the crime.

In *People v Johnson,* 386 Mich 305, 317; 192 NW2d 482 (1971), our Supreme Court, in dealing with this question, stated:

> "The defendant should have been represented by his own counsel. A situation in which a single attorney represents two or more defendants easily gives rise to a conflict of interest."

The Court went on to point out that in *Glasser v United States,* 315 US 60; 62 S Ct 457; 86 L Ed 680 (1941), the United States Supreme Court held that when the possibility exists that conflicting interests may arise, two defendants should not be represented by the same attorney. In *People v Dockery,* 20 Mich App 201, 209–210; 173 NW2d 726 (1969), this Court listed a number of criteria to be considered in determining whether a conflicting interest is present when codefendants share the same attorney. Two of the criteria are relevant here: (1) where the case involves "one defendant making an exculpatory statement putting most of the blame on the codefendant", and (2) where at the sentencing hearing there is an indication "that

the positions of the codefendants were so divergent that their attorney would have been forced to argue for substantially different penalties".

We find that the positions of the defendant and his codefendants at the sentencing proceedings were so divergent as to have required their attorney to argue for substantially different penalties. Furthermore, the record reveals that the codefendants made statements putting most of the blame on defendant. Therefore, this case must be remanded for the assignment of new counsel to defendant and for resentencing.

Conviction affirmed; remanded for resentencing.

DAY v GERDS

1. MUNICIPAL CORPORATIONS—CIVIL SERVICE—POLICE DEPARTMENT—FIRE DEPARTMENT—STATUTES.

The purpose of the act establishing a civil service system for municipal police and firemen is to benefit the public by providing better qualified personnel and to protect the officers and employees from arbitrary and unjust removal (MCLA 38.501 *et seq.*).

2. MUNICIPAL CORPORATIONS—CIVIL SERVICE—POLICE DEPARTMENT—FIRE DEPARTMENT—ELIGIBILITY LISTS—AMENDMENTS—STATUTES.

An eligibility list, once created in conformance with the terms of the civil service act for municipal police and firemen, is good for a period of two years and is not alterable or amendable during that period unless it be shown that such amendment is necessary to satisfy some constitutional deficiency; therefore, amendment of an eligibility list before its two-year term had expired simply because a municipal civil service commission had administratively determined that the grading procedures earlier employed were too harsh was impermissible (MCLA 38.501 *et seq.*).

Appeal from Macomb, Alton H. Noe, J. Submitted Division 2 May 16, 1974, at Detroit. (Docket No. 18232.) Decided August 1, 1974. Leave to appeal applied for.

Complaint by Howard R. Day and John R. Neal against Walter Gerds, the Clinton Township Police and Fire Civil Service Commission, and others to enjoin the promotion of Stanley Rich, who intervened as a defendant. Judgment for defendants.

REFERENCES FOR POINTS IN HEADNOTES

[1] 15 Am Jur 2d, Civil Service §§ 1–3.

[2] 15 Am Jur 2d, Civil Service §§ 23, 25, 32, 41.

Plaintiffs appeal. Reversed and remanded for further proceedings.

Dank, Peterson & Hay, P. C., for plaintiffs.

Towner, Rosin, York & McNamara, for defendants.

Richard J. Liedel, for intervening defendant.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

V. J. BRENNAN, P. J. On April 4, 1972, a written examination for candidates seeking promotion from the rank of sergeant to the rank of lieutenant in the Clinton Township Police Department was held under the direction of the defendant civil service commission. Four candidates, including the plaintiffs and the intervening defendant, Sergeant Stanley Rich, took the written examination. The plaintiffs and the fourth candidate, Sergeant James F. Cooper, received certified scores of 70% or better on this examination and were allowed to take the second part of the test, an oral examination. Sergeant Rich, who received a score below 70%, was not permitted to take the second part of the test.

On April 11, 1972, following the oral examination, a promotional eligibility list was certified by the commission chairman and transmitted in due course to the appropriate appointing authority. Sergeant Cooper, the highest ranking candidate, was promoted to lieutenant on April 17, 1972, leaving only the plaintiffs on the eligibility list. Approximately 2-1/2 months later, the defendant

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

commission decided to regrade the original written examination. As a result of this, Sergeant Rich, the intervening defendant, was given a passing score and allowed to take a special oral examination on June 30, 1972. His performance on the subjectively graded oral examination was so strong that his total score on the two-part examination placed him at the top of a newly certified eligibility list published on July 1, 1972. On July 12, 1972, Sergeant Rich was promoted to lieutenant, effective retroactively to July 1, 1972. The following day plaintiffs brought this action in the Macomb Circuit Court seeking to enjoin the promotion of Sergeant Rich. Plaintiffs alleged that the promotion of Sergeant Rich was made in a manner inconsistent with the procedures set forth in the firemen and policemen civil service act (MCLA 38.501 *et seq.;* MSA 5.3351 *et seq.)* and that the promotion procedures were, in fact, unfair. In addition to injunctive relief against the promotion of Sergeant Rich, plaintiffs sought a temporary injunction pending the outcome of the litigation. A temporary restraining order was issued pending a show cause hearing to determine whether the temporary injunction should issue. On August 28, 1972, following the hearing, the temporary restraining order was dissolved and plaintiffs' request for a temporary injunction denied. This Court denied plaintiffs' application for leave to appeal from the circuit court's decision in this regard on February 5, 1973, and leave to appeal was also denied by our Supreme Court on April 27, 1973, for "failure to persuade of the need for immediate appellate review". *Day v Gerds,* 389 Mich 788 (1973).

On August 28, 1973, trial was had on the merits before Circuit Court Judge Alton H. Noe, who

found in favor of defendants. Judge Noe found that the unusual procedures here followed were necessitated by a subsequent realization on the part of the commission that the grading procedures employed were too harsh and that what was done complied with the act's requirement that examinations be competitive. It is from this decision that plaintiffs now appeal.

Plaintiffs present several issues for our consideration in support of their position that the trial judge erroneously concluded that the procedures employed by the defendant commission were proper under the act. A proper disposition of this case, however, does not require us to reach all the issues presented. Consideration of plaintiffs' contention that eligibility lists, once created, are not alterable or amendable for a two-year period is sufficient to dispose of the case presently before us.

The civil service act here involved was enacted to provide a civil service system based upon "examination and investigation as to merit, efficiency and fitness for appointment, employment and promotion of all officers and men". *Olson v Highland Park,* 345 Mich 345; 76 NW2d 13 (1956); *Killingsworth v Police and Fire Department Civil Service Commission of the City of Saginaw,* 12 Mich App 340; 162 NW2d 826 (1968). Its purpose was to benefit the public by providing better qualified personnel and to protect the officers and employees from arbitrary and unjust removal. *Wayne County Prosecuting Attorney ex rel Taxpayers v Highland Park,* 308 Mich 425; 14 NW2d 53 (1944). In order to facilitate the selection of better qualified people the act calls for appointments to be made on the basis of competitive examinations. MCLA 38.507; MSA 5.3357. In the event a vacancy occurs in a given position which the appointing

authority desires to fill, the act specifies that the commission, upon notification, is to certify to the appointing authority, from an eligibility list, the name of the highest ranking candidate for appointment. MCLA 38.511(b); MSA 5.3361(b). The appointing authority is not required by the act to fill vacancies which occur. *Small v Saginaw City Manager,* 39 Mich App 418; 197 NW2d 850 (1972), *lv den,* 387 Mich 797 (1972). If, however, a vacancy occurs which the appointing authority does desire to fill, it must be done in accordance with the procedures set forth in the act. This means that all vacancies are to be filled from eligibility lists except, of course, those permitted for "urgent reasons" under MCLA 38.511(c); MSA 5.3361(c). While the act does not require the continuous maintenance of eligibility lists, *Killingsworth v Civil Service Commission, supra,* it does require that appointments be made from them if such lists exist and, if they do not, then MCLA 38.511(c); MSA 5.3361(c) permits temporary appointments to be made for a period not to exceed three months. Upon completion of this temporary period, or sooner, selection and appointment is required by the act to be made from an eligibility list.

Eligibility lists contain the names of those persons who, by examination and testing, have been deemed eligible for appointment to a certain position. Each eligible person on the list is ranked according to his performance on the examinations and it is the name of the highest ranking person on this list that is required by the act to be certified to the appointing authority for appointment. The eligibility list, once established, is good for a period of two years from the date of its creation unless it is earlier exhausted. See *Killingsworth v Civil Service Commission, supra.* This

two-year period can neither be reduced nor extended by either the commission or the appointing authority. See 2 OAG, 1959–1960, No 3514, p 68 (April 4, 1960) and 1 OAG, 1957–1958, No 2994, p 353 (July 22, 1957).

In the case at bar an eligibility list was created and certified to the appointing authority on April 11, 1972 with its expiration date listed thereon as April 11, 1974. The commission, however, on July 1, 1972, certified a new list to the appointing authority which contained the additional name of defendant Rich. In so doing the commission shortened the term of the initial list to a matter of months which, as we have stated earlier, is impermissible under the act. An eligibility list, once established in conformance with the procedures set forth in the act, as the initial list here was, is to remain in effect for a period of two years and all promotions are to be made therefrom. This was not done in the instant case and the promotion of defendant Rich to the rank of lieutenant was, accordingly, improper.

In arguing that the amendment of the eligibility list here involved was proper under the act, defendants place much reliance on *Amendola v Bronstein,* 66 Misc 2d 50; 320 NYS2d 373 (1971). That case, however, involved a court-ordered amendment of an eligibility list after it was determined that certain questions contained in the written examination were graded in a manner inconsistent with article 5, § 6 of the New York Constitution. *Amendola* would be highly persuasive if the eligibility list here involved was amended because of the commission's failure to follow the provisions of the act or because the grading procedures initially employed were, in some manner, constitutionally impermissible. Such

is not the case, however. The regrading in the instant case was done simply because the commission administratively determined that the grading procedures earlier employed were too harsh. This type of after-the-fact determination is not sufficient to bring this case within the limits of *Amendola.*

We hold, therefore, that an eligibility list, once created in conformance with the terms of the act, is good for a period of two years and is not alterable or amendable during that period unless it be shown that such amendment is necessary to bring the list within the terms of the act or to satisfy some constitutional deficiency. Since this procedure was not followed in the instant case it is clear that the promotion of defendant Rich was improper and that the trial court erred. We therefore reverse the decision of the trial court and remand the case to the trial court for proceedings not inconsistent with this opinion.

Reversed and remanded for proceedings not inconsistent with this opinion.

All concurred.

PEOPLE v HARRELL

1. WITNESSES—RES GESTAE—INDORSEMENT.

A res gestae witness whose identity is unknown to the prosecutor either at the time the information is filed or at the time of trial need not be indorsed.

2. JURY—VOIR DIRE—JUDICIAL DISCRETION.

The extent of allowable voir dire is largely a matter of judicial discretion and the court is not required to conduct the voir dire in the precise language proposed by counsel.

3. JURY—VOIR DIRE.

A defendant was not denied a trial by a fair and impartial jury because the trial court failed to ask the prospective jurors a list of questions, submitted by the defendant, relating to racial prejudice where the court's voir dire covered the subject generally and was sufficient to afford the defense attorney information necessary to challenge the prospective jurors, and where the defense attorney did not exhaust his peremptory challenges and expressed satisfaction with the jury at the end of the voir dire.

4. APPEAL AND ERROR—EVIDENCE—JUDICIAL DISCRETION.

Decisions on the materiality and relevancy of proffered evidence are within the discretion of the trial court, and review of a decision to admit or exclude that evidence is limited to a determination of whether the trial court abused its discretion.

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur 2d, Indictments and Informations §§ 56, 60.

[2] 47 Am Jur 2d, Jury §§ 200, 201.

[3] 47 Am Jur 2d, Jury §§ 200, 201, 284.

Racial, religious, economic, social, or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal case. 54 ALR2d 1204.

[4] 5 Am Jur 2d, Appeal and Error §§ 737, 738, 772–774, 880–883.

[5] 5 Am Jur 2d, Arrest § 80 *et seq.*

[6] 58 Am Jur, Witnesses § 674 *et seq.*

[7] 58 Am Jur, Witnesses § 865.

[8] 53 Am Jur, Trial §§ 787, 795.

5. CRIMINAL LAW—ELUDING POLICE OFFICERS—ELEMENTS OF CRIME—STATUTES.

The fact that a defendant intentionally and knowingly attempted to elude police officers is sufficient to warrant a finding that he did so willfully in violation of the statute (MCLA 750.479[a]).

6. CRIMINAL LAW—EVIDENCE—WITNESSES—IMPEACHMENT—BIAS:

A witness under attack must first have been questioned about the facts and cross-examined before the witness can be impeached by calling other witnesses to prove acts or declarations showing bias; therefore, testimony offered to show that a police officer was biased against blacks was properly excluded where a proper foundation was not laid.

7. CRIMINAL LAW—EVIDENCE—WITNESSES—IMPEACHMENT—HARMLESS ERROR.

A witness who testifies that he does not remember the occurrence of a specific event may not be impeached by testimony that the event occurred; thus admission of the testimony of a doctor that a defendant's mother had refused permission to take a sample of her son's blood to determine whether or not he was intoxicated, after the mother testified that she did not recall refusing such permission, was error; however, because the testimony was upon a collateral issue which had no relation to the defendant's guilt or innocence of the crime charged, such error was harmless.

8. CRIMINAL LAW—EVIDENCE—INSTRUCTIONS TO JURY.

Failure to give a limiting instruction to the effect that certain rebuttal testimony was relevant only to the credibility of a witness is not reversible error absent a proper request for such an instruction or an objection.

Appeal from Jackson, Gordon W. Britten, J. Submitted Division 2 June 3, 1974, at Lansing. (Docket No. 13068.) Decided August 12, 1974.

Walter G. Harrell, Jr., was convicted of assaulting a police officer and of fleeing and eluding a police officer. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Bruce A. Barton,*

Prosecuting Attorney, and *James M. Justin,* Assistant Prosecuting Attorney, for the people.

Marshall S. Redman, Assistant State Appellate Defender, for defendant.

Before: McGREGOR, P. J., and R. B. BURNS and O'HARA,* JJ.

McGREGOR, P. J. Defendant was convicted by a jury of assaulting a police officer, MCLA 750.479; MSA 28.747, and fleeing and eluding a police officer, MCLA 750.479(a); MSA 28.747(1). On December 23, 1971, defendant was sentenced to 6 months in jail and $150 costs, or an additional 30 days in jail on one count, and a suspended sentence of $100 fine and $100 costs on the other count.

Because defendant does not challenge the sufficiency of the evidence to support the convictions, we need not set out at length the conflicting testimony adduced at trial. For our purposes here, it is sufficient to summarize the opposing versions of what transpired on New Year's Eve, 1970.

According to testimony presented by the people, two Jackson police officers attempted to stop a vehicle operated by the defendant for a minor traffic offense. Rather than heeding the officers' directions that he pull over, the defendant led them on a high speed vehicular chase through the streets of Jackson, committing additional traffic violations in the process. Unsuccessful in his attempts to elude the officers by automobile, defendant parked his car in front of a residence located on Euclid Street and ran to the back door of the house. While defendant was trying to enter the

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

house by that door, the law, in the form of one patrolman Williams, caught up with defendant. Officer Williams placed defendant in a "bear hug" and advised him that he was under arrest for fleeing a police officer. Officer Williams testified that, as he started to bring the defendant around the house towards the street, the defendant struggled, tried to break the officer's hold, and attempted to trip him. Officer Williams then put defendant to the ground and unsuccessfully endeavored to handcuff his hands behind his back. At this point, 10 or 15 people emerged from the house, one identifying herself as the defendant's mother. Apparently sympathizing with defendant's plight, the assembled citizens threateningly demanded his immediate release; resorting to a more basic level of communication, members of the group allegedly struck the officer. Officer Williams was soon joined by one Officer Fredericks, but due to physical harrassment by the crowd, they were unsuccessful in handcuffing the defendant. When additional police reinforcements arrived on the scene, the defendant was handcuffed and dragged to a waiting cruiser. Officer Williams testified that prior to being handcuffed, the defendant hit, bit, and kicked him.

Testimony elicited by the defense tended to indicate that defendant violated no traffic ordinances; that he attempted to elude the police when they turned on their sirens because he had been beaten by police officers two nights before this incident; that he did not kick, hit, or bite anyone; and finally, that the police officers, without provocation, physically assaulted him.

On appeal, defendant raises seven issues for our consideration. Further pertinent facts will be given in our discussion of those issues.

Defendant first contends that the prosecutor's failure to endorse certain res gestae witnesses was reversible error.

At trial, defense counsel objected to the prosecuting attorney's failure to endorse certain unspecified res gestae witnesses (apparently those who witnessed the altercation between the police and the defendant, numbering at least 30 to 40 people). The prosecutor responded that the only unendorsed res gestae witnesses known to him were the defendant's parents and that he would endorse them, if defense counsel wished. Relying principally on *People v Harrison,* 44 Mich App 578; 205 NW2d 900 (1973), defendant now asserts that the people were under an affirmative obligation to discover the identity of the unendorsed witnesses and present them at trial.

Defendant's reliance on *Harrison, supra,* is clearly misplaced. In *Harrison, at the time of trial,* the prosecutor knew the identity of the five res gestae witnesses defense counsel wished to be endorsed.[1] The prosecutor's position on appeal was that he was under no obligation to endorse witnesses whose identity he had acquired after the filing of the information. This Court rejected that contention and held that the prosecutor may be obligated to endorse witnesses whose identity he learns after the information is filed but before the trial begins. In the present case, the prosecutor did not know the names of the res gestae witnesses, either at the time the information was filed or at the time of trial. Under these circumstances, *Harrison* is inapplicable and the general rule, that the

[1] As this Court noted in *Harrison, supra,* 585:

"In the case at bar, the record affirmatively discloses that the prosecutor was fully apprised concerning these witnesses by defense counsel's repeated and timely motions. At or before the time of trial, the prosecutor knew these witnesses existed."

prosecutor need not endorse res gestae witnesses whose identity is unknown to him, governs. *People v Loggins,* 17 Mich App 388; 169 NW2d 519 (1969).

Defendant's next contention, that the prosecutor's closing remarks were so prejudicial as to deny him a fair trial, is similarly without merit. Since we find that any alleged prejudice resulting from the remarks in question could have been vitiated by a curative instruction, defense counsel's failure to object is fatal to the present claim on appeal. *People v Tarpley,* 41 Mich App 227; 199 NW2d 839 (1972).

Defendant next alleges that the trial court's failure to examine the jury on voir dire, as requested, with respect to racial prejudice denied him his constitutional right to a trial by a fair and impartial jury and mandates reversal.

Prior to trial, defense counsel submitted 120 questions to be asked during voir dire. Although the trial court chose not to ask the specific questions propounded by defense counsel, he did cover the subject matter involved in those questions thoroughly. For example, the trial court asked the following questions during voir dire:

"Have any of you had any dealings or experiences with black persons that might make it difficult for you to sit in impartial judgment on this case? By 'you' I mean also members of your immediate family, your spouse, your children?

"(none)

"*The Court:* Will the fact that the defendant is black in anyway affect your judgment in this cause?

"(none)

"*The Court:* Would any of you give more credence to the testimony of a white person than you would give to the testimony of a black person, everything else being equal?

"(none)

"*The Court:* That is give two persons of equal stature and so forth upon the stand, equal appearance, and one is a white skin, one has a black skin, would that in anyway prejudice you in either way?

"(none)

"*The Court:* Would any of you give the police officers any more credence in their testimony than you would a person who is not a police officer, because of the fact that the witness was a police officer?"

The extent of allowable voir dire is largely a matter of judicial discretion as to manner and scope and the trial court is not required to conduct the voir dire in the precise language proposed by counsel. *People v Hoffmeister,* 52 Mich App 219; 217 NW2d 58 (1974). The trial court's voir dire was sufficient to afford defense counsel information necessary to challenge the prospective jurors, either peremptorily or for cause. Further, in light of the fact that defense counsel did not exhaust his peremptory challenges and expressed satisfaction with the jury at the end of the trial court's extensive voir dire, the defendant's position is without merit.

Next, defendant challenges the trial court's rulings with respect to a number of evidential questions.

During trial, defense counsel attempted to introduce testimony that, two nights before the incident in question, the defendant had been beaten by police officers. Counsel apparently did so in an effort to show that the defendant attempted to elude the police because he was frightened by the prospect of being beaten again. The trial court ruled the proffered testimony inadmissible.

Decisions with respect to the materiality and relevancy of proffered evidence are within the discretion of the trial court and our review of such

decisions is limited to a determination of whether the trial court abused that discretion in admitting or excluding the proffered testimonial or physical evidence. *People v Moore,* 51 Mich App 48; 214 NW2d 548 (1974); *People v Hodo,* 51 Mich App 628; 215 NW2d 733 (1974). Defendant claims that the excluded testimony was both material and relevant to the question of whether he "willfully" attempted to elude the police officers as is required by MCLA 750.479(a); MSA 28.747(1). We disagree.

Whatever may have been the defendant's motive for attempting to elude the police officers, both his own testimony and that of his companion clearly demonstrates that he did so voluntarily, consciously, and intentionally. The mere fact that he did, intentionally and knowingly, what the statute forbids is sufficient to warrant the finding that he acted willfully. *Detroit v Pillon,* 18 Mich App 373; 171 NW2d 484 (1969). Furthermore, defense counsel produced no evidence linking the police officers involved in the New Year's Eve incident with those who allegedly beat the defendant two nights before. In these circumstances we cannot say that the trial court abused its discretion in excluding the testimony.

Defense counsel also sought to introduce testimony that the police officer who was bitten by the defendant had been in a fight with a black male in the past, had filed a complaint of assaulting a police officer against that individual, and that the individual had been acquitted. The trial court sustained the prosecutor's objection to this testimony.

It would appear that defense counsel was attempting to impeach the credibility of the complaining officer by showing a bias against blacks. However, before a witness can be impeached by

calling other witnesses to prove acts or declarations showing bias, the witness under attack must first have been asked about these facts and cross-examined. McCormick, Evidence (2d ed), § 40, p 80. In the present case, the proper foundation was not laid and the trial court did not err in failing to admit the impeaching evidence. *People v Brocato,* 17 Mich App 277; 169 NW2d 483 (1969).

During trial, the defendant's mother testified that she did not remember refusing to allow an emergency room doctor to take a sample of her son's blood to determine whether or not he was intoxicated. Over defense objection, the prosecutor called the emergency room doctor as a rebuttal witness; the doctor testified that, although Mrs. Harrell agreed to the blood test at first, she later refused and denied permission. Defendant now contends that the admission of the doctor's rebuttal testimony was reversible error.

Defendant properly cites *People v Durkee,* 369 Mich 618; 120 NW2d 729 (1963), and *People v Miller,* 49 Mich App 53; 211 NW2d 242 (1973), for the proposition that a witness who testifies that he does not remember the occurrence of a specific event may not be impeached by testimony that that event occurred. This is so, primarily because the witness's testimony does not concern itself with the occurrence or non-occurrence of the event, but only with whether or not the witness can recall it happening. Hence, testimony offered for impeachment to the effect that the event, in fact, did occur, does not discredit the witness's testimony that he cannot recall it. Under both *Durkee* and *Miller,* the trial courts' admission of the emergency room doctor's testimony with respect to the blood test was error; however, we find that error to be harmless. Whereas in *Durkee* and

Miller the impeachment testimony was material and directly related to the defendant's criminal liability, in the present case the doctor's testimony was on a collateral issue which had no relation to defendant's guilt or innocence of the crime charged. In light of that fact, we find that the trial court's error in admitting the testimony does not require or justify reversal of defendant's conviction.

Defendant's next contention, that the trial court injected disposition into the jury's deliberations by indicating that both charges were misdemeanors, is without merit, in light of this Court's recent decision in *People v Ritchie,* 52 Mich App 380; 217 NW2d 439 (1974).

Defendant also argues that the trial court erred in failing to give a limiting instruction to the effect that the emergency room doctor's testimony was only relevant to the credibility of defendant's mother.

Although counsel on appeal asserts that trial counsel requested the limiting instruction, the record indicates only that he expressed his intention, at the time the doctor was called on rebuttal, to request such an instruction at the conclusion of trial. No such request was ever made before the jury retired. In the absence of a proper request or objection, the trial court's failure to give the limiting instruction is not reversible error. *People v DerMartzex,* 390 Mich 410; 213 NW2d 97 (1972).

Finally, relying on *Tate v Short,* 401 US 395; 91 S Ct 668; 28 L Ed 2d 130 (1971), defendant argues that the sentence imposed by the trial court violates the Fourteenth Amendment. Counsel's argument with respect to this issue is conclusory and without merit. Although it is claimed that defendant is an indigent, we note that he was repre-

sented by retained counsel throughout the bulk of these proceedings and posted an appeal bond of $1,000. Furthermore, counsel on appeal does not even contend that defendant served any time in jail as a result of the sentence imposed. *Tate, supra,* simply is not applicable in these circumstances.

Conviction affirmed.

All concurred.

PEOPLE v BOWERS

INFANTS—JUVENILE COURTS—PROBATE COURTS—JURISDICTION—WAIVER—COURT RULES.

A probate court hearing for waiver of jurisdiction of a juvenile to a circuit court for criminal proceedings was not adequately in compliance with the court rule where the only criterion covered by the testimony was the defendant's prior criminal record; the court rule governing waiver hearings requires consideration of a variety of criteria to determine whether the interest of the child and the public would best be served by granting a waiver of jurisdiction (JCR 1969, 11.1[B]).

Appeal from St. Joseph, Robert E. A. Boyle, J. Submitted Division 3 June 4, 1974, at Grand Rapids. (Docket No. 14112.) Decided August 12, 1974.

Steven N. Bowers, a juvenile, was charged with breaking and entering and the probate court waived jurisdiction to the circuit court. From denial of a motion to remand to the probate court, defendant appeals by leave granted. Reversed and remanded.

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

Bucknell, Gergely & Foley, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

REFERENCE FOR POINTS IN HEADNOTE

47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 19.

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

R. L. SMITH, J. Defendant appeals by leave granted from a denial of his motion to remand to probate court for the purpose of reviewing an order waiving jurisdiction of defendant to circuit court. Defendant was born on March 18, 1956. It is alleged that on or about November 12, 1971, the defendant broke and entered an occupied home for the purpose of committing a larceny therein. On November 26, 1971, he was taken into custody on an order of the probate court of St. Joseph county.

A hearing was held on a petition to waive jurisdiction of the juvenile court to circuit court on November 30, 1971. The prosecutor presented a total of five witnesses during this hearing, with the first four dealing only with the issue of probable cause. The fifth witness, a juvenile probation officer of St. Joseph county, testified that on August 28, 1968, when the defendant was 12 years old, he was placed on probation for one year following his plea of guilty to a charge of malicious destruction of property and that on July 29, 1970, when he was 14 years of age, defendant was again placed on one year's probation when he pleaded guilty to a charge of larceny of a gas lantern from a garage. His testimony disclosed that the malicious destruction of property charge resulted from the opening of the controls of a soft drink machine allowing some $45 worth of mix and carbonated water to flow onto the floor of a mobile trailer. This was the extent of the hearing. The probate court made the following findings of fact.

"*The Court:* These waiver hearings consist of two phases. The first phase is to determine whether there is probable cause to believe the child has committed an offense, and the offense committed by the law would be a felony. There appears to be sufficient evidence, here, for the court to determine that there is probable cause

to believe that an offense has been committed by this child, which committed by an adult would be a felony.

"The second phase of this waiver hearing is the more difficult one. That has to do with the criteria for waiver and demand. The file shows that this child has a prior record. The seriousness of the offense is another consideration and even though it be less serious, the offenses would lead to a determination that the child may be beyond rehabilitation under the regular juvenile procedures. There is further consideration that there is a lack of suitable programs and facilities available to the juvenile, legally statewide as far as that goes, and the final consideration is in the best interest of the public welfare and protection of the public security that said juvenile be required to stand trial.

"In light of all the evidence and the length of this hearing this afternoon, particularly the evidence as shown by the 13 exhibits that have been received in evidence, and the identification of this juvenile, I feel I have no alternative, in absence of any other program to turn to, but to waive this juvenile to stand trial in the circuit court as an adult."

The Juvenile Court Rules of 1969, Rule 11.1, provide the following:

".1 *Hearing; Quantum of Proof; Criteria for Waiver.* Where a petition is filed requesting a waiver of jurisdiction under the provisions of Section 4 of Act 54 of the extra session of 1944, as amended, the hearing shall consist of two phases. Duration of an interval of time, if any, shall be discretionary with the court:

"(A) *Phase 1: Showing of Probable Cause:* The court shall first determine if there is probable cause to believe that the child has committed an offense which, if committed by an adult, would be a felony.

"(B) *Phase 2: Criteria for Waiver:* Upon a showing of probable cause, the court shall proceed to conduct a full investigation to determine whether or not the interests of the child and the public would best be served by granting a waiver of jurisdiction to the criminal court.

"In making such determination, the following criteria shall be considered:

(1) the prior record and character of the child, his physical and mental maturity, and his pattern of living;

(2) the seriousness of the offense;

(3) even though less serious, if the offense is part of a repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under the regular statutory juvenile procedures;

(4) the relative suitability of programs and facilities available to the juvenile and criminal courts for the child;

(5) where it is found to be in the best interests of the public welfare and for the protection of the public security, generally, that said juvenile be required to stand trial as an adult offender."

In respect to phase 1 of the hearing the defendant alleges no error concerning the finding of probable cause. The defendant questions the adequacy of the court's compliance with JCR 1969, 11.1(B) in waiving jurisdiction.

A review of the record as it pertains to phase 2 of the hearing under Rule 11.1 reveals that the only criterion covered by the testimony was the defendant's prior criminal record. The record is completely barren of any testimony considering the character of the child, his physical and mental maturity, and his pattern of living. The record is also silent as to the seriousness of the offense except to the facts concerning the offense itself. No one can deny that breaking and entering an occupied dwelling with intent to commit larceny is a serious offense, but extenuating circumstances may exist which bear upon the relative seriousness of the offense as committed by this child. The court makes no reference to the presence or absence of extenuating circumstances in its findings. There was no testimony relative to the possibility

of a pattern of offenses involving defendant and a finding from that pattern that he might be beyond rehabilitation under the available juvenile procedures. The only reference to this criterion was the mention of two 1-year probationary dispositions. There was no testimony as to the relative suitability of programs and facilities available to the juvenile and criminal courts for the child.

In summation it appears that there was not a full investigation to determine whether or not the interest of the child and the public would best be served by granting a waiver of jurisdiction to the criminal court as Rule 11.1(B) requires. The silent record affords no basis for review by the circuit court or this Court. *People v Rubin Williams,* 50 Mich App 270; 213 NW2d 307 (1973), and *People v White,* 51 Mich App 1; 214 NW2d 326 (1973), are not in point because the opinions disclose that a complete record was made on the waiver hearings. We hold that this defendant was denied the full investigation he was legally entitled to in the waiver of jurisdiction hearing and that the case should be remanded to the probate court for St. Joseph county for hearing as mandated by JCR 1969, 11.1(B).

Reversed and remanded for further proceedings consistent with this opinion.

All concurred.

FRALEY v CITY OF FLINT

1. EVIDENCE—WITNESSES—EXPERT WITNESSES—OVERLAPPING TESTIMONY—AUTOMOBILES.

   Testimony of three eyewitnesses to an automobile accident and that of an expert witness did not impermissibly overlap where the eyewitnesses by their testimony showed the accident was caused by inadequate notice to a truck driver of a traffic light change, while the expert's testimony concerned the question whether the traffic light cycle could reasonably be judged to provide adequate notice of light changes to truck drivers; neither the expert nor the eyewitnesses invaded the other's area of expertise.

2. HIGHWAYS—GOVERNMENTAL AGENCIES—DUTY—STANDARD OF CARE.

   Governmental agencies having jurisdiction over highways have a duty to maintain and design them with reasonable care.

3. HIGHWAYS—TRAFFIC SIGNALS—AMBER LIGHT INTERVALS—REASONABLENESS—STATUTES—MUNICIPAL CORPORATIONS—IMMUNITY.

   A defendant municipality was not immune from tort liability for the alleged improper timing of a traffic control signal merely because the cycle fell within the recommended range of amber light intervals found in a statute and in the Michigan Manual on Uniform Traffic Control Devices; the range of recommended cycles is too broad to allow mere compliance with it to be deemed reasonable without regard to the peculiarity of the intersection involved (MCLA 257.610).

4. HIGHWAYS—DEFECTIVE DESIGN—MUNICIPAL CORPORATIONS—LIABILITY.

   A municipality is liable for flagrant defects in the design of its highways.

REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur 2d, Expert and Opinion Evidence §§ 34, 39–41.

[2] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 113, 371, 372, 1703 *et seq.*

[3] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 407, 492.

[4] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 64, 71–74, 105–109, 347, 348.

[5] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 340, 357, 371, 579.

5. HIGHWAYS—DEFECTIVE DESIGN—FLAGRANT DEFECT—EVIDENCE—MUNICIPAL CORPORATIONS.

A jury properly found a flagrant defect in a highway intersection designed by a municipality as if it were used exclusively by automobiles where about 3,000 trucks passed through the intersection each day because statutes recognize, and expert testimony showed, that it takes more time and space to stop a truck than it does to stop a car (MCLA 257.627, 257.705).

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 June 5, 1974, at Lansing. (Docket No. 14208.) Decided August 12, 1974.

Complaint by Billie J. Fraley against the City of Flint for damages for wrongful death resulting from an automobile accident. Judgment for plaintiff. Defendant appeals. Affirmed.

Robert A. Grimes, for plaintiff.

Patrick H. Hynes, City Attorney *(Keil & King,* of counsel), for defendant.

Before: MCGREGOR, P. J., and R. B. BURNS and O'HARA,* JJ.

R. B. BURNS, J. Plaintiff's decedent, James Fraley, Jr., was involved in an automobile-truck accident at the intersection of Pierson and Clio Roads in the City of Flint. Fraley was killed in the accident. At the time of the collision, Fraley was driving north on Clio Road. As his automobile entered the intersection on a green light, it was struck broadside by a tractor-trailer truck being driven east on Pierson Road. The light had just turned green as Fraley entered the intersection.

Plaintiff brought this wrongful death action

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

against the truck driver, his employer, and the defendant. Plaintiff's claims against the driver and his employer were settled out of court. The gravamen of plaintiff's complaint is that the defendant negligently failed to establish adequate traffic light intervals at the intersection so as to permit east-west truck traffic on Pierson Road to clear the intersection before the Clio Road traffic signal turned green. Judgment was for plaintiff; defendant appeals.

Defendant alleges two grounds for appeal. Its first contention is that the trial court erred when it admitted the testimony of plaintiff's expert witness into evidence. Defendant reasons that since there were three eyewitnesses to the accident there was no need for the testimony of plaintiff's expert. Therefore, its admission is claimed to be contrary to the rulings of *People v Zimmerman,* 385 Mich 417; 189 NW2d 259 (1971), and *O'Dowd v Linehan,* 385 Mich 491; 189 NW2d 333 (1971). We disagree.

It must be pointed out that this controversy involves two different elements of the plaintiff's case: whether the traffic light intervals were *negligently* set, and whether the accident was *caused* by the negligently set traffic light. The eyewitnesses testified that the truck approached the intersection in compliance with the speed limit, that the light changed from green to amber when the truck was 60 to 70 feet from the intersection, that the driver realized he could not stop so he attempted to proceed through the intersection, that the light changed while the truck was in the intersection or nearly into it, and that the Fraley car was, in the meantime, approaching the intersection from another direction and entered the intersection on the green light. The crash

ensued. This evidence was neither contradicted nor added to by the plaintiff's expert. While this testimony indicates the possibility of defendant's negligence, it cannot be said to adequately prove the negligent light setting that plaintiff alleged. It only bears directly on the cause.

Plaintiff's expert testified on other matters. His testimony covered the various relevant statutory regulations on truck length, braking efficiency, and weight. He discussed the average driver reaction time and the distance covered in that time. He stated the coefficient of friction of the type of pavement used at the intersection. By combining these and other factors, the expert came to the conclusion that the traffic light's cycle provided too short a notice for an average truck with an average driver to stop. Thus, the testimony of the eyewitnesses and the expert do not impermissibly overlap. The expert's testimony goes to whether the traffic light cycle could reasonably be judged to provide adequate notice of light changes to truck drivers. The eyewitnesses showed the accident was caused by that inadequate notice. Neither the expert nor the eyewitnesses could have invaded, or did invade, the other's area of expertise. The expert's testimony was needed to establish an essential element of plaintiff's case, consequently, *Zimmerman, supra,* is satisfied. Since his testimony was needed it was obviously useful as well. Plaintiff's expert was undeniably an expert; he testified on an area within his competence; and the testimony was on an area of knowledge belonging more to him than the common man, complying with *O'Dowd, supra,* and *In re Blackwell Estate,* 50 Mich App 204; 213 NW2d 201 (1973). The trial judge correctly used his discretion to allow the admission of the testimony. *Friedman v Farming-*

ton Twp School Dist, 40 Mich App 197; 198 NW2d 785 (1972).

The defendant's second contention is that a municipality cannot, as a matter of law, be held liable in tort for the alleged improper timing of a traffic control signal. Defendant claims that the traffic light cycle was set to fall within the recommended range of time intervals for amber lights found in statute MCLA 257.610; MSA 9.2310, and in the Michigan Manual on Uniform Traffic Control Devices. Defendant claims that so long as the cycle falls within the recommended parameters it is immune from tort liability. We disagree.

Michigan law imposes a duty upon each governmental agency having jurisdiction over highways to maintain and design them with reasonable care. *Mullins v Wayne County,* 16 Mich App 365; 168 NW2d 246(1969), *Lynes v St Joseph County Road Comm,* 29 Mich App 51; 185 NW2d 111 (1970), *Hargis v Dearborn Heights,* 34 Mich App 594; 192 NW2d 44 (1971), and *Weckler v Berrien County Road Comm,* 55 Mich App 7; 222 NW2d 9 (1974). The range of recommended cycles is too broad to allow mere compliance with it to be deemed reasonable without regard to the peculiarities of the intersection involved. The uniform traffic signal statute and manual cannot be used to shield defendant from its statutory liability. *Mullins, supra,* p 381.

A municipality is liable for flagrant defects in the design of its highways. *Mullins, supra,* and *Hargis, supra.* Defendant's own witness testified that about 3,000 trucks passed through the intersection each day. The same witness also stated that this truck traffic was not specifically figured into defendant's computations on which the traffic light cycle was based. Michigan statutes, MCLA

257.705; MSA 9.2405 and MCLA 257.627; MSA 9.2327, recognize, and plaintiff's expert's testimony shows, that it takes more time and space to stop a truck than it does to stop a car. Yet, defendant ignored this fact and designed the intersection as if it were used exclusively by automobiles. This oversight was so severe as to predispose the intersection to the kind of accident that occurred in the present case. The jury, as the trier of facts, found a flagrant defect in the intersection's design.

Affirmed.

All concurred.

PEOPLE v WATKINS

1. CRIMINAL LAW—WITNESSES—DEFENSES—ALIBI—NOTICE—STATUTES.
   Alibi witnesses were properly precluded from testifying before the jury where the defense attorney had failed to file a timely notice of alibi defense as required by statute (MCLA 768.20).

2. CRIMINAL LAW—DEFENSES—ALIBI—NOTICE—EVIDENCE—STATUTES.
   Testimony by a defendant as to his whereabouts, offered for the purpose of generally denying the charges against him, is not alibi testimony per se, and does not open the door to corroborating alibi witnesses where the defendant has not filed notice of an alibi defense (MCLA 768.20).

3. CRIMINAL LAW—DEFENSES—ALIBI—EVIDENCE.
   Testimony offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime is alibi testimony, even if that testimony does not account for all of the defendant's time during the period in question.

4. CRIMINAL LAW—ALIBI—NOTICE—APPEAL AND ERROR—PRESERVING QUESTION.
   A defendant who challenges the constitutionality of a statute which requires notice of an alibi defense without provision for reciprocal discovery of the people's witnesses did not preserve the issue for appeal where he had not requested reciprocal discovery in the trial court nor made any objections to the proceedings at trial on the question (MCLA 768.20).

5. CRIMINAL LAW—REPORTING OF CRIME—INVESTIGATION OF CRIME—CONVERSATION WITH SUSPECT—ACCUSATION.
   The reporting of a crime to the police will not ordinarily be

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 21 Am Jur 2d, Criminal Law §§ 136, 137.
Constitutionality, construction, and effect of statutes requiring notice of prosecution of accused's intention to rely upon alibi as defense. 30 ALR2d 480.
[4] 5 Am Jur 2d, Appeal and Error § 545 *et seq.*
[5] 41 Am Jur 2d, Indictments and Informations §§ 1, 2.
[6] 21 Am Jur 2d, Criminal Law § 314.
[7] 58 Am Jur 2d, New Trial § 160.

sufficient to transform any conversation with a possible suspect into an official accusation.

6. CRIMINAL LAW—EVIDENCE—INVESTIGATION—ACCUSATION—CONSTITUTIONAL LAW—MIRANDA RULE.

An investigation had not yet become accusatory where the police stopped a defendant and questioned him regarding the sale of guns, issued him a traffic citation, and noticed a button missing from his shirt; the shirt and the button, later found at the scene of the crime, were not products of a violation of the *Miranda* rule and were properly admitted into evidence.

7. TRIAL—MISTAKE—NEW TRIAL.

A new trial will be granted where a defendant asserts that a serious mistake by his attorney resulted in an unfair trial only when it appears that the new trial, wherein the mistake would not be repeated, will in all likelihood result in an acquittal.

Appeal from Kent, John T. Letts, J. Submitted Division 3 April 3, 1974, at Grand Rapids. (Docket No. 14270.) Decided August 12, 1974.

Leonard A. Watkins was convicted of breaking and entering an occupied dwelling. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, *Donald A. Johnston, III,* Chief Appellate Attorney, and *David A. Dodge,* Assistant Appellate Attorney, for the people.

Roach, Twohey, Benson & Brady, for defendant on appeal.

Before: ALLEN, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. On February 29, 1972, defendant Leonard Allen Watkins was convicted by a jury of breaking and entering an occupied dwelling,

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

MCLA 750.110; MSA 28.305. On April 12, 1972, he was sentenced to a term of 4-1/2 to 15 years in prison and now appeals as of right.

On September 17, 1971, sometime between the hours of 8:30 a.m. and 3:45 p.m., the Olin house was broken into and a television and four guns were taken. The co-owner of a furniture store testified at trial that the defendant offered to sell a television and some guns to him on September 17, at approximately 1:30 p.m., and that he purchased the television from defendant for $30. The owner of a gun shop testified that he purchased some guns from the defendant for $70 sometime during the afternoon of September 17, 1971.

A state trooper testified that after he received a call at about 2 p.m. on the 17th that a man was trying to sell a television and some guns, he proceeded to investigate and eventually stopped the defendant's automobile. The trooper asked defendant if he had been trying to sell some guns and a television, and defendant admitted that he had. The defendant was then taken to the patrol car, issued a traffic citation, and given the *Miranda* warnings.[1] While the trooper continued to question the defendant about the sale of the television and guns, the two were joined by a second trooper who observed that defendant was missing a button from his shirt. After they had proceeded to the State Police post, the officers received a call that a home had been broken into and that a television and guns had been taken. The description of the goods matched those sold by defendant, and he was arrested for receiving and concealing stolen property. After further investigation, the charge was changed to breaking and entering. A button

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966).

found at the scene of the crime was linked as the one missing from defendant's shirt and was subsequently admitted into evidence at trial.

Defendant did not deny that he sold the television and four guns. Instead he claimed that he had bought them from some winos for $27. Defense counsel also did not deny that the button in question was from defendant's shirt.

On the day of the trial, defense counsel made a motion to call certain alibi witnesses. These six witnesses testified out of the presence of the jury that they either were with defendant for a portion of the time period in question or verified other witnesses' testimony and the defendant's testimony that he was with them during the time he claimed. The witnesses' testimony did not cover all of the time period in question. The trial court ruled that the witnesses were alibi witnesses and that since defense counsel had failed to properly file a timely notice of alibi defense, these witnesses were precluded from testifying before the jury.

Defendant first contends that the prosecution waived its objection to testimony concerning defendant's alibi by permitting defendant himself to testify as to his alibi. Defendant argues that since the prosecution did not object to defendant's testimony as to his whereabouts on the day in question, the prosecution waived its right to exclude corroborative witnesses offered on behalf of the defendant.

We disagree. In *People v Crawford,* 16 Mich App 92, 95; 167 NW2d 814 (1969), in discussing the defense of alibi, this Court stated:

> "The hard fact remains that despite the testimony of defendant when he took the stand, the defense of alibi was not properly pleaded (by filing of notice) and as such cannot be considered a part of the defense per se."

We interpret this language to mean that when a defendant takes the stand for the purpose of generally denying the charges against him, testimony with respect to his whereabouts is not considered alibi testimony per se and this does not open the door to corroborating alibi witnesses. Therefore, the prosecutor in this case did not waive his objection to the defendant's presentation of corroborating alibi witnesses.

Defendant next claims that the witnesses who were precluded from testifying before the jury by the trial court were not alibi witnesses because their testimony would not have accounted for all the time in question. Defendant's ingenious argument is that since these witnesses could not establish an airtight alibi for him, but could only state that he was at certain places for part of the time in question, they were not alibi witnesses.

With this argument, we are not impressed. It is true, as defendant claims, that the testimony in question did not account for all the defendant's time during the period in question and, therefore, failed to establish an alibi. However, this does not mean that it was not alibi testimony. The trial court correctly concluded that testimony offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime is alibi testimony.[2] Such testimony would have no relevancy for any other purpose.

Relying upon *Wardius v Oregon,* 412 US 470, 93 S Ct 2208; 37 L Ed 2d 82 (1973), defendant argues that the lack of a provision for reciprocal discovery of the people's witnesses in the notice of alibi statute, MCLA 768.20; MSA 28.1043, renders that

[2] Black's Law Dictionary defines alibi, in the context of criminal law, as "elsewhere; in another place". Black's Law Dictionary (4th ed), p 95. See also *People v Mullane,* 256 Mich 54, 58; 239 NW 282, 283 (1931).

statute unconstitutional. Defendant's argument is not properly before this Court. Defense counsel failed to make such an argument before the trial court. Due to the fact that no request for reciprocal discovery was made in the trial court and since no objections were made to the proceedings in the trial court on this question of the constitutionality of the statute, we find that defendant has not properly preserved this issue for appellate review. See *People v Bennett,* 52 Mich App 742; 218 NW2d 407 (1974). Furthermore, "the record herein does not demonstrate * * * [a clear and manifest] injustice". *People v Ray Clifton Smith,* 20 Mich App 243, 245; 174 NW2d 22 (1969); *People v Bennett, supra.*[3]

Defendant next asserts that the shirt and button admitted into evidence at trial were products of a violation of the *Miranda* rule. As mentioned earlier, defendant was stopped by a state trooper and subsequently asked whether he had sold a television and some guns. After defendant admitted he had made such sales, he was taken to the patrol car and given a traffic citation and given the *Miranda* warnings. A second trooper arrived and noticed defendant's shirt button was missing, but it was only after the troopers and defendant had returned to the State Police post that the troopers learned that the Olin house had been broken into.

The basic question thus is whether at this time

[3] While *Raymond v District Court,* 14 Crim L Rptr 2291 (January 9, 1974), a Colorado opinion later withdrawn by the Colorado Supreme Court, 518 P2d 286 (1974), was the only reported state court opinion which had specifically followed *Wardius,* our Legislature has seen fit to amend the provisions of our statute, here challenged by defendant, to eliminate any question as to their constitutionality. 1974 PA 63, effective May 1, 1974, amends our statute to now provide for reciprocal discovery. It is clear that the present statute, as amended, complies with the mandate of *Wardius.* Therefore, it would be pointless for us to now consider the constitutionality of the former statute, where such consideration is not necessary to dispose of this case.

the investigation had become accusatory. If the investigation had reached that stage, the defendant was entitled to be advised of his constitutional rights. *Escobedo v Illinois,* 378 US 478; 84 S Ct 1758; 12 L Ed 2d 977 (1964); *Miranda v Arizona, supra.*

We are of the opinion that the questioning here was clearly investigatory. A crime had not yet been reported, and as we noted in *People v Gilbert,* 21 Mich App 442, 447; 175 NW2d 547, 549 (1970), even the reporting of a crime to the police will not ordinarily be sufficient to transform any conversation with a possible suspect into an official accusation. In this case the trooper was routinely following up a reported attempt to sell guns, an activity which in and of itself is not a crime. After the trooper's suspicion had been aroused and the defendant was in custody in the patrol car, the trooper gave the *Miranda* warnings to defendant before he asked any further questions. We find that there was no illegal police conduct and that the shirt and button were properly ruled admissible by the trial court.

Defendant finally asserts that the failure of defense counsel to file a timely and otherwise proper notice of alibi deprived him of the effective assistance of counsel.

Both the defendant and the people would have us apply the "sham" test set forth in *People v Degraffenreid,* 19 Mich App 702; 173 NW2d 317 (1969), to the present case. However, that test is inapplicable since the defendant does not claim that he was represented by a bad lawyer, but instead alleges that a constitutionally adequate lawyer made a serious mistake.

The proper test to be applied where a mistake of

counsel is alleged was stated by this Court in *People v Tumpkin,* 49 Mich App 262, 264; 212 NW2d 38 (1973):

"Where a defendant asserts that a serious mistake on the part of the defense counsel resulted in an unfair trial, a new trial will only be granted when it appears that the new trial, wherein the mistake complained of would not be repeated, will in all likelihood result in an acquittal. *People v Degraffenreid,* 19 Mich App 702; 173 NW2d 317 (1969)."

In the present case, defense counsel filed an inadequate notice of alibi on the day of trial. The trial court refused the alibi defense and on a separate record determined that since defendant's proposed witnesses were alibi witnesses, their testimony was to be excluded. The separate record indicates that these six witnesses accounted for defendant's whereabouts only for a portion of the entire time period in question.

Under the circumstances of this case, it is readily apparent that defense counsel did make a serious mistake in not properly filing notice of an alibi defense. However, applying the above mentioned test to the facts of this case, we are convinced that at a new trial, even if these witnesses were permitted to testify, defendant would again be convicted, based upon the other evidence presented against him and the gaps in the alibi testimony. Therefore, we conclude that the defendant's conviction cannot be attributed to his trial counsel's mistake in failing to file a timely and otherwise proper notice of alibi and that a new trial would serve no useful purpose.

Affirmed.

All concurred.

DENOLF v FRANK L. JURSIK COMPANY

1. CORPORATIONS—ACQUISITION OF CORPORATION—PURCHASE OF ASSETS—LIABILITY OF PURCHASER.

An acquiring corporation which purchases the assets of another generally is not liable for the seller's liability absent some exception or consolidation or merger.

2. MOTIONS—DIRECTED VERDICT—JUDGMENT NOTWITHSTANDING VERDICT—BURDEN OF PROOF.

A defendant corporation's motions for a directed verdict of no cause of action on the ground that it neither designed, manufactured, sold, nor installed a lift gate on a truck which injured the plaintiff, and its later motion for judgment notwithstanding the verdict should have been granted, where the plaintiff alleged faulty design and manufacture of the equipment but failed to prove manufacture, installation, and contractual or statutory liability on the part of the defendant corporation.

3. EVIDENCE—NEGLIGENCE—SUBSEQUENT REPAIRS—CHANGE OF CONDITIONS—SUBSEQUENT PRECAUTIONS—ADMISSIBILITY.

Evidence of repairs, change of conditions, or precautions taken after an accident or injury almost universally is not admissible as evidence or an admission of negligence before the accident.

4. EVIDENCE—PHOTOGRAPHS—SUBSEQUENT REPAIRS—SUBSEQUENT PRECAUTIONS—JURY VIEW—ADMISSIBILITY—EXCEPTIONS.

The admission of photographs showing subsequent repairs or precautions by a third party to a lift mechanism on a truck that caused an injury to the plaintiff and the jury's viewing of the truck in its changed condition, both over the objections of a defendant, were improper, where the defendant did nothing but install according to directions a system designed and manufac-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 19 Am Jur 2d, Corporations §§ 1546–1553, 1558–1567.
Liability of corporation for debts of predecessor. 149 ALR 787.

[2] 47 Am Jur 2d, Judgments § 970.

[3, 4] 29 Am Jur 2d, Evidence §§ 275, 628.
Admissibility of evidence of repairs, change of conditions, or precautions taken after accident. 170 ALR 9, s. 64 ALR2d 1296.

tured by another party and the repairs were made by and at a time that the apparatus was under control of yet another party, and no clear foundation for exception to the general rule prohibiting evidence of subsequent repair was laid.

Appeals from Wayne, William J. Beer, J. Submitted Division 3 December 6, 1973, at Detroit. (Docket Nos. 14520, 14521.) Decided August 12, 1974. Leave to appeal applied for.

Complaint by Adhemar Denolf against Frank L. Jursik Company for damages for personal injuries received from a side-lift elevator on a truck. Third-party complaint by Jursik against Todco Division of the Overhead Door Corporation for indemnification and contribution. Verdict and judgment for plaintiff. Jursik and Todco appeal. Reversed as to Jursik and remanded for new trial. Reversed as to Todco without new trial.

Charfoos & Charfoos (Hayim I. Gross, of counsel), for plaintiff.

Plunkett, Cooney, Rutt & Peacock (by *John D. Dougherty),* for Frank L. Jursik Company.

Vandeveer, Doelle, Garzia, Tonkin & Kerr (Haggerty & Franklin, of counsel), for Todco Division of the Overhead Door Corporation.

Before: V. J. BRENNAN, P. J., and QUINN and CARLAND,* JJ.

CARLAND, J. This is a consolidated appeal from a jury verdict in favor of plaintiff Adhemar Denolf in the sum of $42,500 against Frank L. Jursik Company, a Michigan corporation, and Todco Divi-

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

sion of the Overhead Door Corporation. Plaintiff's injuries were sustained in the course of his employment as a milkman for the Borden Company while operating a side-lift elevator mounted to the chassis of a truck owned by his employer. The lift was used to load and unload cargo while making delivery of Borden products.

On November 14, 1969, the plaintiff, a long-time employee of Borden, was making deliveries and in so doing was for the first time using the truck in question. The lift about which this controversy revolves was also being used and operated by plaintiff for the first time. After making his last delivery at the "Sweden House Restaurant" in St. Clair Shores, the plaintiff began to put the lift into the travelling position. This operation, however, was never completed. Because plaintiff had a new truck equipped with a new lift, he wanted to demonstrate the same to an employee of "Sweden House". He lowered the lift, dropped the pan and plaintiff and said employee stood on the pan and inspected the interior of the truck body. The lift was so designed that it could be activated or stopped through the use of one or two control levers located on either side of the mechanism.

After inspecting the interior of the truck, the two men stepped off the pan and plaintiff, using both hands, then picked up the pan from its horizontal position and rotated it in an arc to its vertical position. Plaintiff removed his right hand from the pan edge and with his left hand attempted to push the pan into its cradle. In some manner, although plaintiff testified that he touched neither control lever, the lift was activated and plaintiff's left hand was caught between the pan and the bottom of the truck resulting in injuries for which recovery is sought.

The lift in question was manufactured by H. S. Watson Company and sold by it to defendant and third-party plaintiff F. L. Jursik Company, hereinafter called Jursik, on or before February 20, 1967. It was installed by Jursik on Borden's truck shortly before September 25, 1969 when the truck was first put into operation. The installation was done pursuant to blueprints "drawn by H. S. Watson Company of Emeryville, California and Toledo, Ohio", in June of 1968. Todco Division of Overhead Door Corporation (hereinafter called Todco) acquired the Watson-Atlas Division of H. S. Watson Company. This was well over a year after the sale to Jursik. It should also be noted that H. S. Watson Company still maintains its corporate identity.

In March of 1970, plaintiff filed this action against Jursik alleging unsafe installation and design of the lift as the proximate cause of his injuries. These allegations are denied by Jursik.

During pretrial discovery, a witness testified that the name "Todco" appeared on some portion of the equipment, whereupon and without further investigation, Jursik filed a third-party complaint against Todco alleging faulty design and manufacture of the equipment by Todco and seeking indemnification and contribution in the event plaintiff obtained a judgment against it. Thereafter, plaintiff adopted Jursik's third-party complaint.

Some three days prior to trial, it was established for the first time that the lift had in fact been manufactured by H. S. Watson Company and not Todco. Jursik thereupon filed a motion for adjournment and permission to add Watson as a third-party defendant. This motion was denied and the case proceeded to trial.

At the conclusion of plaintiff's proofs, Todco moved for a directed verdict of no cause for action

on the ground that it had neither designed, manufactured, sold, nor installed the lift gate. This motion was renewed at the close of Jursik's proofs and again renewed at the conclusion of all proofs. Following verdict, Todco's motion for judgment notwithstanding the verdict or in the alternative for a new trial was also denied, as had been the previous motions.

The question of whether the trial court's denial of the motions made by Todco as set forth above resulted in reversible error should first be answered, because if answered in the affirmative, it will be dispositive so far as Todco's liability is concerned.

The undisputed proofs establish that the lift was manufactured by H. S. Watson Company and sold to Jursik some two and one-half years prior to the accident. There are no proofs that Todco participated in the installation of the lift on the Borden truck. Neither is it disputed that in June of 1968, Todco acquired Watson-Atlas Company, a division of H. S. Watson Company. No proofs were offered as to the relationship between H. S. Watson and Watson-Atlas other than that the latter was described as a division of the former. Whether Watson-Atlas had a separate corporate existence or was only an operational division is left only to conjecture. We can therefore only conclude that certain assets of H. S. Watson were acquired by Todco. We are further left completely in the dark as to whether the acquisition was through merger, consolidation or purchase. The burden was upon those asserting Todco's liability to prove either manufacture or installation by Todco. This they failed to do. Upon such failure, Todco's liability can only be imposed because of this acquisition either by operation of law or by the terms of its

contract with Watson or by both. Here again, the burden of proof is upon the plaintiffs.

Since there are no proofs as to the terms of the contract, we must conclude that no Todco liability is thereby fixed.

The general rule is that an acquiring corporation which purchases the assets of another is not liable for the seller's liability absent some exception or consolidation or merger, 19 Am Jur 2d, Corporations, § 1546 *et seq.,* p 922 *et seq.* In *Chase v Michigan Telephone Co,* 121 Mich 631; 80 NW 717 (1899), the plaintiff was an employee of a construction company which was consolidated with defendant company. Plaintiff sought to hold defendant company liable in a tort action for injuries received by plaintiff while in the employ of defendant's predecessor. The plaintiff recovered below and the Supreme Court in granting a reversal said on page 634 as follows:

"The law is well settled in regard to liability of the consolidated or purchasing corporation for the debts and liabilities of the consolidating or selling corporation. Such obligations are assumed (1) when two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of the old; (2) when by agreement, express or implied, a purchasing corporation promises to pay the debts of the selling corporation; (3) when the new corporation is a mere continuance of the old; (4) when the sale is fraudulent, and the property of the old corporation, liable for its debts, can be followed into the hands of the purchaser. *Austin v Bank,* 49 Neb 412 [68 NW 628 (1896)]. Plaintiff produced no evidence tending to bring the defendant within any of these cases."

Further, on page 636, the Court said:

"The record is barren of evidence to show a consolidation. It shows only a sale. The *onus probandi* was on

plaintiff to show that the purchase was made subject to the obligations of the construction company. Upon this point the record is also barren of evidence. The court should have directed a verdict for defendant."

No claim is here asserted by plaintiff as to any statutory liability of Todco. The portions of the applicable Michigan statutes in force at the time of the acquisition here in question as they pertain to this case were MCLA 450.53; MSA 21.53 and MCLA 450.55; MSA 21.55 (these sections of the act were repealed January 1, 1973 by the new Michigan corporation code and these sections have been consolidated in MCLA 450.1722; MSA 21.200[722]).

Whether liability is to be imposed by statute depends upon the form of acquisition and not merely that acquisition occurred. There appear to be three basic forms either by merger, consolidation or purchase. The statutes above referred to when read with MCLA 450.52; MSA 21.52 use the terms "consolidation and merger". Nowhere does the word "purchase" appear. Since the record is barren as to the form of acquisition, no statutory liability may be imposed upon Todco.

The plaintiffs having failed to prove manufacture, installation, contractual or statutory liability, the motions of Todco should have been granted and the case dismissed as to it. We reverse as to Todco without new trial. Todco may recover costs.

As above stated, the equipment here in question was purchased by Jursik from Watson on or before February 20, 1967. It was installed by Jursik on the truck owned by Borden sometime in September of 1969. In the interim between the date of the accident and the date of the trial, Borden caused to be installed a metal block on the underside of the truck chassis, thereby prohibiting the lift pan from rotating past the perpendicular when such

pan was at a certain height. The object of this installation was to prevent the lift pan from coming in contact with the connecting "tie rod" and "teardrop" and thereby accidentally activating the motor controlling such pan.

That it was the contention of plaintiff that had this metal block been originally installed no accident would have occurred is made demonstrably clear upon consideration of the testimony of plaintiff's expert:

"*Q.* In your opinion, say September 19, 1969, was there a method available to avoid that possibility?

"*A.* Yes, sir.

"*Q.* Could you tell the jury how that could be avoided:

"*A.* By installing a guard adjacent to this teardrop and this control rod.

"*Q.* And what effect would that have, sir?

"*A.* The guard would have been insulated, would have isolated the edge of the pan from coming in contact with either the teardrop or the control rod."

Not content with this testimony, the plaintiff then offered photographs clearly showing the changes made by Borden which were received over objection and likewise the jury, at the request of plaintiff, was permitted to view the truck in its changed condition, again over the objection of defendant.

Therefore we are confronted with the necessity of deciding whether the admissions of the photographs showing subsequent repairs or precautions by a third party, when coupled with the fact of view by the jury, constitutes error requiring reversal and new trial.

"It is almost universally held that evidence of repairs, change of conditions, or precautions taken after an accident or injury, is not admissible as evidence or an

admission of negligence before the accident. It has been said in support of the rule, that such evidence is incompetent or inadmissible because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant. Many decisions emphasize, in excluding evidence of subsequent repairs made or precautions taken after an accident, that if the rule was otherwise and such evidence was to be admitted, it would amount to an admission or confession of negligence on the part of the defendant and would bring collateral issues into the case." 29 Am Jur 2d, Evidence, § 275, pp 323–324.

The above-stated general rule has been recognized in Michigan. Also recognized in Michigan are several exceptions to the general exclusionary rule of subsequent precautions. Among these exceptions are (1) impeachment of a witness's testimony that such precautions were not taken and, (2) to show ownership and control of the instrumentality causing plaintiff's injury and, (3) where defendant himself has already admitted that such precautions were taken and, (4) generally where such evidence is admitted to prove an issue collateral to defendant's negligence. See *Little v Borman Food Stores, Inc,* 33 Mich App 609; 190 NW2d 269 (1971); *Thompson v Essex Wire Co,* 27 Mich App 516; 183 NW2d 818 (1970); *Snider v Jennings,* 11 Mich App 562; 161 NW2d 594 (1968).

Although, as above stated, the reason for the rule is that such evidence implies a confession of negligence and that the admission of such evidence would discourage persons from taking subsequent precautions to avoid similar accidents in the future, Michigan courts have long recognized that another reason for this exclusionary rule is that

evidence of subsequent precautions is incompetent to prove foreknowledge of a dangerous condition, *Fulton Iron & Engine Works v Kimball Twp,* 52 Mich 146, 149; 17 NW 733 (1883).

In *Langworthy v Green Twp,* 88 Mich 207; 50 NW 130 (1891), our Supreme Court rejects the third-party exception to the exclusionary rule of subsequent precautions. There the plaintiff sued the township because of the claimed defective maintenance of a log road. Specifically, it was alleged that the township had allowed a log which formed a part of the roadbed to protrude above the surface of the highway. Over objection, one Fryburg, an overseer of highways of this road district, was permitted to testify that he cut off the exposed portion of the log subsequent to the accident. Fryburg was clearly a third party not directly involved in the lawsuit and the Court in holding that the admission of his testimony constituted reversible error said on pages 217–218 as follows:

> "The evident purpose was to show that the township admitted by this act the defect, the dangerous character of this obstruction, and that the road was not reasonably safe by reason of its existence. After an accident a precaution may be taken which did not suggest itself before the accident, and, in the absence of any instructions from the court guarding the jury against the use of such testimony as an admission on the part of the township, the admission of the testimony is ground for reversal. *Fulton Iron & Engine Works v Kimball Twp,* 52 Mich [146; 17 NW 733 (1883)]; *Lombar v Village of East Tawas,* 86 [Mich] 14 [48 NW 947 (1891)]; *Hodges v Percival,* 132 Ill 53 (23 NE 423) [1890]."

We believe that the Michigan rule of the inadmissibility of evidence of subsequent repairs made by third persons because of the implication of negligence which might be made by a jury, when

coupled with the exclusionary rule that subsequent precaution is incompetent to prove foreknowledge of a dangerous condition, makes *Wallner v Kitchens of Sara Lee, Inc,* 419 F2d 1028 (CA 7, 1969), relied on by the plaintiff, inapplicable to the case at bar.

The photographs were improperly admitted against Jursik since it did nothing but install according to directions a system designed and manufactured apparently by Todco's predecessor and the repairs were made by and at a time that the apparatus was under the control of Borden.

In *Grawey v Genesee Road Commissioners,* 48 Mich App 742, 751; 211 NW2d 68 (1973), this Court has spoken as follows:

> "The general rule prohibiting evidence of subsequent repair should be adhered to unless there is a clear foundation for an exception to the rule. Such evidence is tantamount to an admission of negligence and is bound to prejudice a defendant who is charged with negligent conduct. Upon retrial, this case should be tried on the facts as they existed before or at the time of the accident, and not on the basis of subsequent repairs which may or may not have been necessary."

There appears to be no clear foundation for exception to the rule in the instant case. We find no merit as to the other issues raised by Jursik.

Reversed as to Jursik and remanded for new trial. Jursik may recover costs.

All concurred.

TASSE v KAUFMAN

NEGLIGENCE—MALPRACTICE—EXPERT TESTIMONY—DIRECTED VERDICT.

A directed verdict was properly entered in favor of a defendant dentist in an action for malpractice where the plaintiff claimed the dentist "poked a hole" into her maxillary sinus permitting bacteria to enter and infect it but where, even if penetration had occurred, there was no expert testimony that it was negligent for the dentist to do so; lack of professional care was not so manifest that expert testimony was unnecessary.

Appeal from Wayne, Nathan J. Kaufman, J. Submitted Division 1 June 10, 1974, at Detroit. (Docket No. 16386.) Decided August 12, 1974.

Complaint by Bette Tasse against Dr. Myron Kaufman and Bloom Associates for damages for malpractice. Directed verdict for defendants. Plaintiff appeals. Affirmed.

Ripple & Chambers, P. C. (by *John J. Grech),* for plaintiff.

Harvey, Kruse & Westen, P. C. (by *James D. Hunter* and *James N. Martin),* for defendants.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ELLIOTT, J. Plaintiff appeals a directed verdict for defendant dentist and his professional corpora-

REFERENCES FOR POINTS IN HEADNOTE

61 Am Jur 2d, Physicians and Surgeons § 209.

Liability of dentist to patient. 83 ALR2d 7.

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

tion. While a variety of claims were pleaded, plaintiff narrowed trial to a single issue: whether, during oral surgery, defendant dentist "poked a hole" into the maxillary sinus permitting bacteria to enter and infect it. The only witnesses were defendant dentist, called under the statute and court rule, and an osteopathic physician specializing in nuclear medicine (not involved in this case) who treated plaintiff for a painful and disabling strep infection that he believed was occasioned by the defendant's oral surgery. Plaintiff died before trial. Her death was not related and her case survived.

The defendant dentist described how he cut and pushed back the gum tissue on the toothless roof of plaintiff's mouth between the sites of bicuspids, removed nine months earlier, and filed off two or three millimeters of bone ridges to smooth the surface so the dentures would fit more comfortably. He said that occasionally the sinus is invaded in that type of operation, but awareness of the condition is immediate. That did not happen to plaintiff. Where he was working, the bone separating the sinus from the mouth is relatively thick. The only evidence from any witness about nonadherence to the applicable standard of care was his answer, "In this instance, no", when asked by plaintiff's lawyer: "Doctor you wouldn't say that it would be part of the normal surgical procedure that you performed to invade the maxillary sinus would you?"

The physician treating plaintiff's sinusitis surmised that an invasion of the sinus occurred during the oral surgery because of the immediate severe infection with pus draining from sutures in her mouth. He could not determine the location of the hole into the sinus. He knew that roots of some bicuspids, canine, and molar teeth sometimes

enter the sinus and leave a hole when removed. The separating bone could become thin by atrophy in the absence of teeth. When asked if he could say with any degree of medical certainty whether the sinus infection was primary (caused by surgery) or secondary (resulting without direct contact) he said "Well, I guess not".

It could be logically inferred that the infection, and its treatment, pain, and disability, resulted in some way from the oral surgery, but it would be conjectural to conclude that the dentist negligently penetrated the sinus. The hole is plausibly explained as being left by extracted teeth uncovered during the surgery. Moreover, the infection might have been secondary and could have existed before the surgery. Even if penetration occurred, there was no expert testimony that it was negligent for defendant to do so.

This is not a case, such as *Higdon v Carlebach,* 348 Mich 363; 83 NW2d 296 (1957), where lack of professional care is so manifest that expert testimony is unnecessary.

Our agreement with the trial judge makes discussion of another issue pointless.

Affirmed.

All concurred.

PEOPLE v RICHTER

OPINION OF THE COURT

1. CRIMINAL LAW—CONFESSIONS—VOLUNTARINESS—THREATS—DEFENDANT'S CHILDREN.

   Removing a defendant's daughter from her and taking the daughter into juvenile custody and threatening the defendant with permanent deprivation sufficed to overcome her will and rendered her subsequent confession of a crime involuntary and inadmissible.

2. CRIMINAL LAW—CONFESSIONS—VOLUNTARINESS—TRUTH.

   Questions of voluntariness do not turn on the truth or falsity of the confession.

3. CRIMINAL LAW—CONFESSIONS—VOLUNTARINESS—THREATS—TIME LAPSE.

   A lapse of a few hours between the time of a threat made to a defendant by police and the defendant's subsequent confession to a crime do not suffice to make the confession voluntary; in fact, a time lapse may cause the threat to become more deeply imbedded in a defendant's mind.

4. PERJURY—DEFENSES—COMPULSION—EVIDENCE—QUESTION FOR JURY.

   Ruling that threats against the life of a defendant were insufficient, as a matter of law, to make out a defense of compulsion to a charge of perjury was error where, when considering the evidence most favorably to the defendant, testimony showed a threat to kill the defendant or her daughter by a prison escapee who was convicted later of first-degree murder and conspiracy to commit murder, because given this threat, a jury might find that the compulsion under which the defendant operated was present, immediate, and impending, and fostered a well-grounded apprehension of death or serious bodily injury.

REFERENCES FOR POINTS IN HEADNOTES

[1–3, 6] 29 Am Jur 2d, Evidence §§ 529, 531, 537, 542–554, 582.

[4, 5, 7, 8] 60 Am Jur 2d, Perjury § 49.

5. PERJURY—DEFENSES—COMPULSION—TIME LAPSE—QUESTION FOR JURY.

A threat occurring three weeks prior to the giving of perjured testimony does not make it impossible, as a matter of law, for the *compulsion* to be present, imminent, or impending, and fostering a well-grounded apprehension of death or serious bodily injury at the time of the perjury; such issue was for the jury.

DISSENT BY ELLIOTT, J.

6. CRIMINAL LAW—CONFESSIONS—VOLUNTARINESS—COERCION—PRESERVING QUESTION.

A conclusion by the Court of Appeals that a defendant's confession was coerced which was based on hearsay was improper where coercion was not claimed or argued on appeal.

7. CRIMINAL LAW—DEFENSES—COMPULSION—ELEMENTS.

There are three elements to the defense of compulsion: a present, imminent, impending threat fostering a well-grounded apprehension of death or serious physical harm; the absence of fault in the circumstances from which the threat arises; and no reasonable opportunity to escape the compulsion and avoid commission of the crime.

8. PERJURY—DEFENSES—COMPULSION—EVIDENCE.

The defense of compulsion to the crime of perjury was not available where the threat was three weeks before the perjury and the imminence of danger had passed since an escapist making the threat was gone; the defendant was at fault in the circumstances from which the threat arose since she had aided the person who threatened her in his escape from jail; and where there was a reasonable opportunity to escape the compulsion and avoid commission of the crime in that the perjured testimony was given at a secret grand jury proceeding at which the defendant could have refused to answer under the Fifth Amendment.

Appeal from Kalamazoo, Raymond W. Fox, J. Submitted Division 3 June 10, 1974, at Detroit. (Docket No. 16454.) Decided August 12, 1974.

Betty Richter was convicted of perjury. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald A. Burge,* Prosecuting Attorney, and *Stephen M. Wheeler,* Chief of Appellate Division, for the people.

Dennis S. McCune, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

J. H. GILLIS, P. J. A jury convicted defendant of perjury. MCLA 767.19d; MSA 28.959(4); MCLA 750.423; MSA 28.665. She was sentenced to six months probation and appeals as of right. On appeal, we reverse.

On August 29, 1971, Richard Cook, a convicted felon and veteran escapist, while awaiting trial on murder charges, hacksawed his way out of the Kalamazoo County Jail. He was assisted in that effort by his cousin, defendant herein. The day after his escape, Cook threatened to murder either defendant or her daughter if she divulged any information concerning that escape. A grand jury, convened three weeks later to investigate Cook's escape, subpoenaed Mrs. Richter. Under oath, she denied having seen or aided Cook. Thereafter, on November 24, 1971, Mrs. Richter was charged with aiding and abetting an escape, a misdemeanor, and released on bond. At the time of her arrest, her ward, whom she had reared since birth and whom she referred to as her daughter, was taken into juvenile custody.

Defendant's testimony on this point is uncontradicted:

"*Q.* You did contact Sergeant Van Welden, is that correct?

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

"*A.* Yes, my son did.

"*Q.* And you gave him that full and complete statement, is that correct?

"*A.* Yes.

"*Q.* What prompted you to do that, Mrs. Richter?

"*A.* Well, because the night of the 22nd or 23rd, they arrested me, they took my little girl and my kid got me out on bond the next day, and we went and picked her up at a foster home, and *he told the kid that I had better tell the truth or they were going to take her away from me for good,* so that is why I told it and I thought he said he would help me—no, he didn't say he would help, he said he would do his best so I wouldn't have to lose Sue Ellen.

"*Q.* Who said that?

"*A.* Sergeant Van Welden." (Emphasis supplied.)

Sergeant Van Welden testified that late in the evening on November 24, 1971 defendant's son contacted him because his mother wanted to talk. After midnight, defendant, her son, daughter, daughter-in-law, Sgt. Van Welden, and FBI Special Agent William Downey met for some two hours questioning. At 2:55 a.m. Mrs. Richter signed a statement handwritten by Sgt. Van Welden admitting her participation in the escape plans. Prior to interrogation, Sgt. Van Welden advised defendant of her *Miranda* rights. Defendant asked whether she was entitled to appointed counsel. Sgt. Van Welden stated that because she was charged with a misdemeanor, she had no right to the assistance of appointed counsel. Thereafter, Mrs. Richter's confession was offered to prove she committed perjury, a felony punishable by up to 15 years imprisonment.

The obvious issue is whether the confession was properly admitted in the perjury trial. The trial court, after a *Walker* hearing, held it inadmissible but later reversed itself, finding the statement

"volunteered" and thus outside the ambit of *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We cannot agree with that conclusion.

We do not reach the intricate and unresolved question as to whether *Miranda* provides a Fifth Amendment right to counsel apart from the Sixth Amendment. Thus, the mere fact that at the time of trial a Sixth Amendment right to appointed counsel for misdemeanants did not exist may not be controlling in *Miranda* situations. Nor do we consider whether the officer, well aware of her grand jury testimony, was obliged to inform defendant that any statement she made could be introduced in a perjury trial *(i.e.,* that the officer had to inform defendant of the specific charges to be lodged against her).

For we think a more fundamental ground exists to exclude this confession. That analysis applies whether pre- or post-*Miranda.*[1] We think removing defendant's "daughter" and threatening her with

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Recently, Justice Rehnquist in *Michigan v Tucker,* — US —, —; 94 S Ct 2357, 2363–2364; 41 L Ed 2d 182, 193 (1974), reinterpreting *Miranda* prophylactic safeguards, explained:

"The Court said that the defendant, of course, could waive these rights, but that any waiver must have been made 'voluntarily, knowingly and intelligently.' 384 US at 444; 86 S Ct at 1612; 16 L Ed 2d at 707.

"The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:

" '[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' 384 US at 467; 86 S Ct at 1624; 16 L Ed 2d at 719–720.

"The suggested safeguards were not intended to 'create a constitutional straightjacket,' 384 US at 467; 86 S Ct at 1624; 16 L Ed 2d at 720, but rather to provide practical reinforcement for the right against compulsory self-incrimination."

We will not permit *Miranda* to operate as a constitutional straitjacket in these circumstances.

permanent deprivation sufficed to overcome her will, rendering her confession classically involuntary. The tactic, albeit unusual, has previously been used and reviewed. The United States Supreme Court agrees with us. *Lynumn v Illinois,* 372 US 528; 83 S Ct 917; 9 L Ed 2d 922 (1963). That case reveals:

"'* * * Then he started telling me I could get 10 years and the children could be taken away, and after I got out they would be taken away and strangers would have them, and if I could cooperate he would see they weren't; and he would recommend leniency and I had better do what they told me if I wanted to see my kids again. The two children are three and four years old. Their father is dead; they live with me. I love my children very much. I have never been arrested for anything in my whole life before. I did not know how much power a policeman had in a recommendation to the State's Attorney or to the Court. I did not know that a Court and a State's Attorney are not bound by a police officer's recommendations. I did not know anything about it. All the officers talked to me about my children and the time I could get for not cooperating. All three officers did. After that conversation I believed that if I cooperated with them and answered the questions the way they wanted me to answer, I believed that I would not be prosecuted. They had said I had better say what they wanted me to, or I would lose the kids. I said I would say anything they wanted me to say. I asked what I was to say. I was told to say "You must admit you gave Zeno the package" so I said, "Yes, I gave it to him."

* * *

"'* * * The only reason I had for admitting it to the police was the hope of saving myself from going to jail and being taken away from my children. The statement I made to the police after they promised that they would intercede for me, the statements admitting the crime, were false.'" 372 US at 531–532; 83 S Ct at 919; 9 L Ed 2d at 925.

The Court said in examining the circumstances:

"We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. (Citations omitted.) If so, the confession cannot be deemed 'the product of a rational intellect and a free will.' " (Citations omitted.) 372 US at 534; 83 S Ct at 920; 9 L Ed 2d at 926.

We are mindful that questions of voluntariness do not turn on the truth or falsity of the confession. *Rogers v Richmond,* 365 US 534; 81 S Ct 735; 5 L Ed 2d 760 (1961).

Like the petitioner in *Lynumn,* defendant here apparently had little prior experience with the criminal law, and no reason not to believe the police officer had ample power to execute his threat. We do not think the lapse of a few hours time between the threat and the confession sufficed to make the confession voluntary; in fact, a time lapse may well have caused the threat to become more deeply imbedded in defendant's mind. Nor did the presence of her children during questioning cure the taint. We think the psychological coercion practiced here, the threat to permanently remove defendant's child if she did not tell the truth, was no less devastating to the exercise of free will than physical torture, and no less excusable. *Payne v Arkansas,* 356 US 560; 78 S Ct 844; 2 L Ed 2d 975 (1958). On balance, the defective *Miranda* warnings, in the context of this case, did not overcome the coercive atmosphere. The confession should have been suppressed. *Cf. People v Griner,* 30 Mich App 612; 186 NW2d 800 (1971).

Next, defendant claims that the trial judge erred

reversibly by ruling at the close of defendant's case that threats against her life were insufficient as a matter of law, and took the matter away from the jury. Defendant admitted she had perjured herself, but offered a defense of duress. The court ruled that since three weeks had elapsed, the threat was not sufficiently contemporaneous to create a legal defense to the charged crime.

Again, we disagree. On these facts, a jury case was made out. *People v Merhige,* 212 Mich 601; 180 NW 418 (1920), states the applicable rules for duress. However, what constitutes present, immediate, and impending compulsion depends on the circumstances of each case. Considering the evidence most favorably to defendant, testimony showed a threat by Cook to kill defendant or her daughter if she divulged any information. Cook told defendant that if he was unable to kill her, his friends would. The fact that Cook was convicted later not only of first-degree murder but conspiracy to commit murder offers some indication that this was more than an idle threat. Given this threat, a jury might find that the compulsion under which defendant operated was present, immediate, and impending and fostered a well-grounded apprehension of death or serious bodily injury. We think the trial court erred in removing this matter from the jury's consideration.

People v Kelly, 51 Mich App 28, 30; 214 NW2d 334, 335–336 (1973):

> "There is no evidence that the defendant was negligent in putting himself in the position of being imminently threatened. The crucial question in regard to the defense of duress was not the defendant's negligence, but *whether the alleged compulsion was present, imminent, impending, and fostering a well-grounded apprehension of death or serious bodily injury."* (Emphasis supplied.)

We do not think that a threat occurring three weeks earlier makes it impossible, as a matter of law, for the *compulsion* to be present, imminent or impending, and fostering a well-grounded apprehension of death or serious bodily injury. The issue was for the jury.

In light of our disposition, other allegations of error are rendered moot.

Reversed and remanded.

ALLEN, J., concurred.

ELLIOTT, J. I dissent.

The Coercion

The conclusion that the confession was coerced is based on one sentence of defendant's trial testimony. It is hearsay; what she said the child said the detective said. It sounds like another lie. It was uncontradicted because it first came after a suppression hearing (at which coercion was not claimed) and after the confession was already admitted and read to the jury.

Coercion has not been claimed or argued in this appeal.

The Compulsion

There are three elements of the defense of compulsion (see 22 CJS, Criminal Law, § 44, pp 135–136):

(1) a present, imminent, impending threat fostering a well-grounded apprehension of death or serious physical harm;

(2) the absence of fault in the circumstances from which the threat arises; and

(3) no reasonable opportunity to escape the compulsion and avoid commission of the crime.

Let us apply the elements to this case:

(1) The threat was three weeks before the perjury. Why would the escapist care what his cousin said after he was long gone?

(2) Her smuggling of hacksaw blades into jail and hiding the killer in her home for several days with the child, is fault. She lied because of this fault, her guilt.

(3) Grand jury testimony is secret. Defendant could have refused to answer under the Fifth Amendment. She could have said she was too scared and faced contempt. She could have told the truth and asked for protection. Certainly, she did not have to lie.

Perjury is a serious threat to the accuracy and integrity of judicial proceedings. I would not excuse it by a claim of a past threat, a claim almost impossible to disprove. When a lying witness is accused, the best policy should not be more lies.

The sentence was a short term of probation without jail time, fine, or costs. Justice does not require a new trial in this case, in my opinion.

MAZZOLA v VINEYARD HOMES, INC.

1. JUDGMENT—RES JUDICATA.

The doctrine of res judicata will not apply as a bar to the maintenance of a subsequent action unless it appears that the prior action was rendered on the merits, on the same matter in issue, and between the same parties or their privies.

2. JUDGMENT—RES JUDICATA—IDENTITY OF CLAIMS—IDENTITY OF FACTS—IDENTITY OF EVIDENCE.

The test for determining identity of claims, in a case where a defendant seeks to invoke the doctrine of res judicata, is to consider the identity of facts essential to the maintenance of both actions, or whether the same evidence would sustain both, and if the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.

3. JUDGMENT—RES JUDICATA—FRAUD—BREACH OF AGREEMENT—EVIDENCE.

A plaintiff is not precluded by the doctrine of res judicata from maintaining an action against a homebuilder for an injunction and damages for alleged fraudulent misrepresentation, where the plaintiff was also one of a number of plaintiffs in a prior action against the same builder which sought to restrain threatened violations of alleged agreements relating to development of adjoining land, because the evidence that would sufficiently establish a threatened breach of an enforceable agreement so as to warrant issuance of an injunction is substantially different from that required to establish fraud.

4. FRAUD—ACTIONABLE FRAUD—REQUIREMENTS.

The requirements for actionable fraud are that the defendant made a material representation, which was false, that he knew it to be false or made it recklessly without knowledge of its truth, that he intended that the plaintiff would act upon it,

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5] 46 Am Jur 2d, Judgments §§ 404, 406–414, 417, 418.

[3] 46 Am Jur 2d, Judgments §§ 473, 575, 576, 602.

[4] 37 Am Jur 2d, Fraud and Deceit § 12.

that the plaintiff did act in reliance upon it, and thereby suffered injury.

5. JUDGMENT—RES JUDICATA—CAUSES OF ACTION—ESTOPPEL.

If a second action between the same parties is brought upon the same cause of action as the previous action, the prior judgment is conclusive upon every matter that might have been litigated, whether it was in fact litigated or not, but if the second action is upon a different cause of action, the prior judgment operates as an estoppel only as to the facts or questions actually litigated and determined.

Appeal from Macomb, Howard R. Carroll, J. Submitted Division 1 April 2, 1974, at Detroit. (Docket No. 16518.) Decided August 12, 1974.

Complaint by Joseph P. and Rosemarie I. Mazzola against Vineyard Homes, Inc., for an injunction to prevent certain building operations and for damages for fraudulent misrepresentation. Accelerated judgment for defendant. Plaintiffs appeal. Reversed and remanded.

Berry, Hopson, Francis & Mack (Robert W. Kefgen, of counsel), for plaintiffs.

Daner, Freeman, McKenzie & Matthews, P. C. (by *Kenneth E. Scherer),* for defendant.

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

V. J. BRENNAN, J. On March 16, 1971, plaintiffs, Joseph and Rosemarie Mazzola, brought this action in the Macomb County Circuit Court against defendant, Vineyard Homes, Inc. By their complaint plaintiffs sought an injunction restraining defendants from building homes of a certain type in Hatherly Village, a subdivision located in the city of Sterling Heights, Michigan and damages for alleged fraudulent misrepresentations. The trial

judge granted defendant's motion for accelerated judgment (GCR 1963, 116.1[5]) and plaintiffs now appeal as of right.

The difficulty in the instant case arises from the fact that the plaintiffs herein were also among the plaintiffs in an earlier class action, *Lopinski v Vineyard Homes, Inc*,[1] an action brought against the same defendant. The plaintiffs in *Lopinski,* including the plaintiffs herein, were all alleged to be homeowners in one of two Hatherly subdivisions, denominated Hatherly Village, subdivision #1 and Hatherly Village, subdivision #2. The plaintiffs in *Lopinski* alleged that defendant had agreed with them, at the time they purchased their homes, to develop a 9-1/2-acre "commons" area containing paved walkways, bicycle paths, a stream with rustic bridges crossing over it and other, similar types of landscaping. The plaintiffs in *Lopinski* further alleged that defendant also had agreed to restrict the type of dwellings that were to be placed on a 54-acre tract owned by defendant and adjoining the Hatherly subdivisions to those types of homes permitted to be built in Hatherly. The *Lopinski* plaintiffs also alleged that defendant proposed to sell the 54-acre tract to a buyer who planned to develop homes thereon in a manner contrary to the alleged agreement and, further, that defendant was planning to construct homes on the commons area. They therefore sought an injunction restraining defendant from selling or otherwise disposing of the property in any manner inconsistent with the terms of the alleged agreement. Maple Associates, a Michigan co-partnership that contracted to purchase the 54-acre tract, was permitted by the trial court to

[1] Macomb County Circuit Court No. X 70-5519, decided November 18, 1970.

intervene in the action pursuant to GCR 1963, 209.1(3). Defendant answered plaintiffs' complaint and interposed two affirmative defenses: the statute of frauds (MCLA 566.108; MSA 26.908) and laches. Thereafter, on November 18, 1970, the trial judge granted summary judgment in favor of defendant Vineyard Homes "[f]or reasons set forth in the record" and also granted summary judgment of no cause for action in favor of Maple Associates for the same reasons. No appeal from this decision was ever taken by the *Lopinski* plaintiffs.

Four months after the decision in *Lopinski* was rendered, the plaintiffs herein brought this action against defendant in two counts. Count I sought an injunction restraining defendant from building certain types of homes in Hatherly Village, subdivision #1. Plaintiffs alleged in their complaint that during the discussions leading to their purchase of a home in Hatherly Village, subdivision #1, one of defendant's sales personnel represented to them that all homes in this particular subdivision would be in the $60,000-and-up price range. They further stated in their complaint that certain brochures were shown to them with pictures of the types of homes to be built in the subdivision contained therein and that it was explained to them that none of the pictured homes cost less than $60,000. Plaintiffs also averred that defendant was in the process of constructing homes in the subdivision which would be offered for sale at a price not in excess of $45,000 and built upon lots smaller in size than those originally platted. They alleged that if such construction was permitted to continue they would be irreparably harmed and therefore sought an injunction restraining defendant from constructing such homes in Hatherly Village, subdivision #1.

Count II sought damages against defendant for fraudulent misrepresentation. Plaintiffs re-alleged the allegations contained in Count I and further alleged that defendant represented to them that Hatherly Village, subdivision #1, would contain or be served by a commons area of approximately nine acres, that they relied on these representations in purchasing their home and that defendant, contrary to the representations earlier made, sold the commons area to another real estate developer or land company. Plaintiffs alleged that they suffered damage as a result of these allegedly fraudulent misrepresentations and, therefore, sought $15,000 in damages, this being the alleged diminution in the value of their property.

Defendant answered the plaintiffs' complaint by way of general denial and attacked the sufficiency of both counts of the plaintiffs' complaint for failure to state with sufficient clarity the factual circumstances upon which plaintiffs based their claim for relief. Defendant also raised, as an affirmative defense, the decision in *Lopinski* as being res judicata of the issues presented in this second action. Discovery was had and the trial date adjourned several times to a later term of the court. On October 2, 1972, defendant filed motions for accelerated and summary judgment pursuant to GCR 1963, 116.1 and 117.2(1). Defendant argued that *Lopinski* was res judicata of the instant action and that the plaintiffs' complaint was inadequate to sustain a claim of fraud because it contained no allegation that defendant made misrepresentations concerning an existing fact. Subsequently, on October 6, 1972, defendant filed another motion for summary judgment alleging that plaintiffs failed to state a claim upon which relief could be granted. GCR 1963, 117.2(1). On January

12, 1973, after a hearing was held on the above motions, the trial judge filed a written opinion granting defendant's motion for accelerated judgment. Treating the decision in *Lopinski* as if the summary judgment granted therein was based on both the statute of frauds and laches, Judge Carroll characterized the dominant issue in the present case as "whether an oral misrepresentation made by the defendant but not reduced into the [purchase] agreement is barred by the statute of frauds". He held that this was the same issue presented in the first action and that the prior judgment, therefore, operated "as a bar to the present litigation". It is from this decision that plaintiffs now appeal.

For the doctrine of res judicata to apply as a bar to the maintenance of a subsequent action it must appear that the prior action was rendered on the merits, on the same matter in issue and between the same parties or their privies. *Zak v Gray,* 324 Mich 522; 37 NW2d 550 (1949); *Hewett Grocery Co v Biddle Purchasing Co,* 289 Mich 225; 286 NW 221 (1939); *Gomber v Dutch Maid Dairy,* 42 Mich App 505; 202 NW2d 566 (1972), *lv den,* 389 Mich 752 (1972). The plaintiffs herein do not dispute that the prior action was rendered on the merits nor that the two suits involved the same parties. Plaintiffs do contend, however, that they are here asserting a different claim.

The test for determining identity of claims was set forth in *Rose v Rose,* 10 Mich App 233, 236–237; 157 NW2d 16, 18 (1968), quoting from 30A Am Jur, Judgments, § 365, pp 407–408:

" 'In the application of the doctrine of *res judicata,* if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their main-

tenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.' "

A careful examination of what was sought to be adjudicated in both this case and the *Lopinski* case reveals that the plaintiffs here are, indeed, asserting a separate and distinct cause of action. The class of plaintiffs involved in *Lopinski* sought to restrain threatened violations of certain alleged agreements relating to the development of a commons area and an adjoining 54-acre tract of land. The evidence required to support this claim is not the same as that required to support the claims asserted in the instant case. Plaintiffs, by their complaint, seek an injunction and damages for alleged fraudulent misrepresentations made with respect to the development of two separate parcels of land, only one of which was the subject of the prior suit. In *Lopinski* no allegation was made concerning the development of Hatherly Village, subdivision #1, and the injunction sought therein did not relate to this parcel of land. The action in *Lopinski* only involved the 54-acre tract and the commons area—it did not involve the building of homes of less than a stated value within this particular subdivision. Since the plaintiffs' rights in this respect were not determined in the prior action, their action here seeking an injunction and damages for the alleged misrepresentation concerning the types of homes to be built in Hatherly Village, subdivision #1, is not precluded by the doctrine of res judicata. *Sheridan Drive Associa-*

tion v Woodlawn Backproperty Owners Association, 29 Mich App 64; 185 NW2d 107 (1970).

Furthermore, the action in *Lopinski* was premised on an alleged agreement, not fraud. The evidence that would sufficiently establish a threatened breach of an enforceable agreement so as to warrant the issuance of an injunction is substantially different from that required to establish fraud. An important difference in this respect is that for plaintiffs to succeed in their action for fraud they must show that they were in some way damaged through their reliance on defendant's alleged misrepresentations.

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury." *Candler v Heigho,* 208 Mich 115, 121; 175 NW 141, 143 (1919). See also *Farida v Zahar,* 50 Mich App 137; 212 NW2d 739 (1973).[2]

At the time the first action was brought defendant had not yet acted in any manner which would cause damage to plaintiffs—such action was merely threatened. The law is clear in this state that for actionable fraud to exist the plaintiff must have suffered damage. It is clear, therefore, that the plaintiffs' cause of action for fraudulent misrepresentations made by defendant with respect to

[2] The limited applicability of this rule when scienter is in issue, as explained in *Irwin v Carlton,* 369 Mich 92; 119 NW2d 617 (1963), should, of course, not be ignored. See also *Callihan v Talkowski,* 372 Mich 1; 124 NW2d 788 (1963); *Peoples Furniture & Appliance Co v Healy,* 365 Mich 522; 113 NW2d 802 (1962); and *Freeman v Massachusetts Mutual Life Insurance Co,* 27 Mich App 572; 183 NW2d 832 (1970).

the types of homes to be built in the subdivision *and* with respect to the commons area did not arise until after the decision in *Lopinski*—when the development of the two pieces of property contrary to the alleged earlier representations began.

Since the cause of action asserted herein is not the same as that earlier presented, *Lopinski* only serves as an estoppel to the issues therein actually determined. The rule in this regard was well stated in *Gomber v Dutch Maid Dairy, supra,* pp 509–510, quoting from Anno, *Default Judgment as Res Judicata,* 128 ALR 472, 483:

" 'It is a well-settled general rule that where a judgment is asserted as an absolute bar to another action on the same demand or cause of action, it is conclusive not only as to every matter that was offered in the former action to sustain or defeat the demand, but as to every other matter that might have been offered for that purpose. On the other hand, where the subsequent action is on a different demand or cause of action, the judgment operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In other words, where the second action is upon the same cause of action, the judgment is conclusive upon every matter that might have been litigated in the former action, whether it was in fact litigated or not, while if the second action is upon a different cause of action, the judgment operates as an estoppel only as to the facts or questions actually litigated and determined.' "

In *Lopinski* the trial judge held that certain alleged agreements between plaintiffs and defendant were barred from enforcement by the statute of frauds and laches. If plaintiffs herein were proceeding on the basis of these same agreements in the present case *Lopinski* would be determina-

tive. Plaintiffs here are not, however, asserting any rights under these alleged agreements but, rather, are proceeding on the basis that defendant fraudulently misrepresented certain facts to them during the course of their discussions. *Lopinski*, therefore does not act as an estoppel to bar plaintiffs' claims herein. The statute of frauds has no application in the instant case as plaintiffs are not proceeding on the basis of any alleged agreement. They are seeking recovery for fraud.

Defendant argues that plaintiffs' pleadings do not contain sufficient allegations to support an action in fraud. This issue is prematurely before this Court, however, since the trial judge made no express determination on this point in the proceedings below. Whether plaintiffs' complaint is sufficient under the law of this state is a decision initially to be made by the trial judge.

Reversed and remanded for proceedings not inconsistent with this opinion.

All concurred.

PEOPLE v KEATTS

OPINION OF THE COURT

1. CRIMINAL LAW—LESSER INCLUDED OFFENSES—ELEMENTS OF CRIMES.

The general rule for determination whether an offense is a lesser included offense is that if the greater offense includes all of the elements of the lesser, then the greater includes the lesser, but if the lesser offense requires an element not required in the greater offense, the lesser is not necessarily included in the greater.

2. LARCENY—ATTEMPTED LARCENY—FELONIOUS INTENT—BREAKING AND ENTERING—LESSER INCLUDED OFFENSES—ELEMENTS OF CRIME.

Attempted larceny in a building is not a lesser included offense of breaking and entering with intent to commit larceny because the essential elements of attempted larceny in a building, proof that a larceny was attempted and a showing of overt acts going beyond mere preparation, are not elements included in breaking and entering with intent to commit larceny.

3. LARCENY—ATTEMPTED LARCENY—INTENT.

Showing of an actual larceny or the attempt to commit a larceny is not necessary to support a finding of the intent to commit larceny.

4. LARCENY—ATTEMPTED LARCENY—FELONIOUS INTENT—BREAKING AND ENTERING—LESSER INCLUDED OFFENSES—IMPLIED ACQUITTAL.

A defendant who was charged with breaking and entering a building with intent to commit larceny, and was erroneously convicted of attempted larceny in a building, because this was not a lesser included offense under the charge, cannot be

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 185–187, 189, 212.
Conviction of lesser offense as bar to prosecution for greater on new trial. 61 ALR2d 1141.

[2, 4, 5] 50 Am Jur 2d, Larceny §§ 35–43, 116.

[3] 50 Am Jur 2d, Larceny § 56.

retried for the original charge of breaking and entering a building with intent to commit larceny because his conviction serves as an acquittal of the charge of breaking and entering.

DISSENT BY BASHARA, P. J.

5. LARCENY—ATTEMPTED LARCENY—FELONIOUS INTENT—BREAKING AND ENTERING—LESSER INCLUDED OFFENSES—OVERT ACTS.

Attempted larceny in a building is a lesser included offense of breaking and entering with intent to commit a larceny because in both crimes the felonious intent is the same, and the overt act can be the breaking and entering; the greater offense is completed upon the breaking and entering, while the lesser upon an overt act going beyond mere preparation.

Appeal from Recorder's Court of Detroit, George W. Crockett, J. Submitted Division 1 May 10, 1974, at Detroit. (Docket No. 16631.) Decided August 12, 1974. Leave to appeal applied for.

Raymond Keatts, also known as Melvin Bell, was convicted of attempted larceny in a building. Defendant appeals. Reversed.

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

Carl Ziemba, for defendant on appeal.

Before: BASHARA, P. J., and MCGREGOR and VAN VALKENBURG,* JJ.

MCGREGOR, J. Defendant appeals his non-jury conviction of attempted larceny in a building, MCLA 750.360; MSA 28.592, MCLA 750.92; MSA

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

28.287, and his subsequent sentence of two years probation.

Initially, defendant was charged in a one-count information of breaking and entering a building with intent to commit larceny, contrary to MCLA 750.110; MSA 28.305.

The single issue raised by defendant on appeal is whether his conviction must be set aside for the reason that the crime of which he was convicted is not a lesser included offense of the crime of which he was charged. Only if the crime of which the defendant was convicted is a lesser included offense of the crime of which he was charged can the conviction be upheld. The question thus presented is whether attempted larceny in a building is a lesser included offense of the crime of breaking and entering a building with intent to commit larceny.

The elements for the charge of breaking and entering a building with intent to commit larceny are: (1) breaking and entering, (2) with felonious intent, (3) of an occupied dwelling. See *People v D'Argis,* 44 Mich App 186; 205 NW2d 19 (1972).

Elements of the crime of attempted larceny in a building are: (1) felonious intent to commit a larceny, *People v Hillhouse,* 80 Mich 580; 45 NW 484 (1890), (2) an overt act going beyond mere preparation towards the commission of the crime, *People v Youngs,* 122 Mich 292; 81 NW 114 (1899); *People v Coleman,* 350 Mich 268, 276; 86 NW2d 281 (1957), and (3) that it occurred in a building. See also *People v Bowen,* 10 Mich App 1, 7; 158 NW2d 794 (1968); *People v Sheppard,* 33 Mich App 363; 189 NW2d 794 (1971).

This Court has defined a lesser included offense:

"Indeed, the area of what constitutes a lesser in-

cluded offense has frequently caused confusion in criminal prosecutions.

"The general rule is succinctly set forth in 4 Wharton's Criminal Law & Procedure, § 1888, pp 753, 754, wherein it is stated, 'if the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater.'" *People v Simpson,* 5 Mich App 479, 485–486, 146 NW2d 828 (1966).

The only step which remains is to compare the elements of the two charges to determine their compliance with the requirements of *Simpson, supra.* Such a comparison was made in *People v Huffman,* 315 Mich 134, 139–140; 23 NW2d 236 (1946):

"In the present case it is clear that the offense of breaking and entering a store building in the nighttime with intent to commit larceny * * * is a separate and distinct offense from that of larceny from a store building, * * * . As said in *People v Stuart* [274 Mich 246; 264 NW 359 (1936)], 'The essential elements of these two statutory offenses are different.' Furthermore, the evidence required to establish the offense charged in the first * * * is substantially different from that required to establish the offense charged in the second."

See also *In re Doelle,* 323 Mich 241, 245; 35 NW2d 251 (1948).

It thus appears that, since an essential element of larceny in a building is proof that a larceny has been committed and that an overt act going beyond mere preparation has occurred, larceny in a building is not a lesser included offense. Such elements are not included under breaking and entering with intent to commit larceny. *A fortiori,* an essential element of attempted larceny in a

building is proof that a larceny was attempted showing overt acts going beyond mere preparation. Such elements are not included in breaking and entering with intent to commit larceny. The only difference between larceny and attempted larceny seems to be the fact that the defendant was caught in the act, under attempted larceny.

Larcenous intent, necessary to be shown to convict one of breaking and entering with intent to commit larceny, does not have to show an actual larceny or the attempt to commit a larceny. Thus, in *People v Lambo,* 8 Mich App 320, 324; 154 NW2d 583 (1967), this Court said:

> "The unexplained presence of the defendant in a grocery store at 3:45 a.m. would be sufficient alone to permit the jury to find the intent to commit larceny."

This Court agrees with the defendant, that attempted larceny in a building is not a lesser included offense of breaking and entering with intent to commit larceny. As such, the defendant was denied due process, as he was convicted of a crime for which he was not charged. See *People v Mercer,* 6 Mich App 644; 150 NW2d 183 (1967); *People v Anderson,* 8 Mich App 110; 153 NW2d 885 (1967).

Furthermore, as the defendant was charged with breaking and entering with intent to commit larceny, and was convicted of larceny in a building, which serves to acquit him of the charge of breaking and entering, he cannot be retried on the latter offense. *Green v United States,* 355 US 184; 78 S Ct 221; 2 L Ed 2d 199 (1957); *People v Hilliker,* 29 Mich App 543; 185 NW2d 831 (1971); *People v McPherson,* 21 Mich App 385; 175 NW2d 828 (1970).

Conviction reversed.

VAN VALKENBURG, J., concurred.

BASHARA, P. J. *(dissenting).* Adopting the majority test of what a lesser included offense consists of, I find that *attempted* larceny in a building is a lesser included offense of breaking and entering with intent to commit a larceny.

The elements of breaking and entering with intent to commit larceny as set forth in the majority opinion are: (1) breaking and entering; (2) with felonious intent to commit larceny; (3) in a building.

The elements of attempted larceny in a building are: (1) felonious intent to commit a larceny; and (2) an overt act of going beyond mere preparation.

Analyzing the elements, the felonious intent is the same, and the overt act can be the breaking and entering. The greater offense is completed upon the breaking and entering, while the lesser upon an overt act.

The cases cited by the majority opinion are distinguishable since they speak of completed larcenies from a building as not being a lesser included crime. The instant case involves an attempted larceny from a building, not a completed one.

For the above reasons, I respectfully dissent, and would affirm the trial court's conviction.

PEOPLE v KOEHLER

OPINION OF THE COURT

1. DRUGS AND NARCOTICS—EVIDENCE—CHEMICAL ANALYSIS—DISCRETION.

Admitting into evidence in a criminal trial three unanalyzed tablets allegedly containing LSD was not an abuse of discretion where a police officer testified that he had purchased from the defendant four purple tablets said by defendant to be LSD, and where the prosecution's expert witness testified that he had scientifically analyzed one of the four purple tablets given him for analysis, that his analysis conclusively demonstrated the presence of LSD in the tablet tested, and that the remaining tablets appeared to be physically identical with the one tablet analyzed; the defendant's objection with respect to the three unanalyzed tablets is more properly addressed to their probative value than to their admissibility.

2. DRUGS AND NARCOTICS—SALE OR DELIVERY—EVIDENCE—USABLE AMOUNT.

It is not incumbent upon the prosecution to prove that a defendant charged with sale or delivery of narcotics delivered a usable amount of narcotics.

3. DRUGS AND NARCOTICS—EVIDENCE—OTHER OFFENSES—ADMISSIBILITY.

Introduction of testimony concerning a police officer's attempted purchase of PCP, an illegal narcotic drug, from a defendant charged with delivery of heroin and LSD was not reversible error where the testimony was arguably admissible to show the defendant's scheme, plan, or intent as a dealer in illegal

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REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur 2d, Drugs and Narcotics § 44 *et seq.*

[2] 25 Am Jur 2d, Drugs and Narcotics §§ 20–22.

[3] 25 Am Jur 2d, Drugs and Narcotics §§ 46, 47.

[4] 21 Am Jur 2d, Criminal Law §§ 143–145.

Entrapment to commit bribery or offer to bribe. 69 ALR2d 1397.

[5] 41 Am Jur 2d, Indictment and Information §§ 56, 60.

[6–8] 58 Am Jur, Witnesses § 3; 29 Am Jur 2d, Evidence § 708 *et seq.*

narcotic drugs, the conversation the defendant had with the officer regarding PCP constituted a vital portion of the res gestae of the crimes charged, the prosecution was entitled to show that the defendant was in fact a drug dealer willing to sell to anyone he could without getting into trouble with the police because defendant's defense consisted of an allegation of entrapment, and where the admission of the testimony with respect to PCP could not have prejudiced the defendant in light of his admission that he sold heroin and LSD to the officer (MCLA 768.27).

4. CRIMINAL LAW—DEFENSES—ENTRAPMENT—OBJECTIVE TEST—RETROACTIVITY.

The Michigan Supreme Court decision which adopted an objective standard with respect to the defense of entrapment is not retroactive.

5. INDICTMENT AND INFORMATION—WITNESSES—RES GESTAE WITNESSES—INDORSEMENT OF WITNESSES—PRODUCTION OF WITNESSES.

The prosecution has a clear duty to indorse the names of all res gestae witnesses upon the information and to produce them for examination at trial (MCLA 767.40).

6. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESSES—PRODUCTION OF WITNESSES—EXCEPTIONS.

There are four well-recognized exceptions to the general rule requiring production of res gestae witnesses at trial: when the prosecution makes a showing of due diligence in attempting to produce the witness; when the testimony of the missing res gestae witness would be merely cumulative; when the res gestae witness was a participant in the crime; and when the identity of the res gestae witness is made known to the defendant during trial, or even before, and the defendant does not move for the indorsement or production of the witness.

7. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESSES—PRODUCTION OF WITNESSES—MISCARRIAGE OF JUSTICE.

Failure of the prosecution to produce a res gestae witness at trial could have resulted in a miscarriage of justice where a key witness with respect to a crucial question of entrapment was not produced and where the defendant's only hope for acquittal rested on the defense of entrapment; the case must be remanded to the trial court for a hearing to determine whether the testimony of the res gestae witness would have been cumulative.

8. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESSES—PRODUCTION OF WITNESSES—MISCARRIAGE OF JUSTICE—CASE PRECEDENT—PROSPECTIVE APPLICATION.

A decision of the Michigan Supreme Court establishing a precedent to remand cases where the nonproduction of res gestae witnesses may have possibly resulted in a miscarriage of justice is by its express terms prospective and does not apply to an appeal filed prior to the decision's publication date.

Appeal from Berrien, Julian Hughes, J. Submitted Division 3 June 3, 1974, at Lansing. (Docket No. 16756.) Decided August 12, 1974.

Michael D. Koehler was convicted of delivery of heroin and delivery of LSD. Defendant appeals. Remanded with instructions.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *John Smietanka,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Howard C. Marderosian,* Acting Director, of counsel), for the people.

Judith K. Munger, Assistant State Appellate Defender, for defendant.

Before: MCGREGOR, P. J., and R. B. BURNS and O'HARA,* JJ.

MCGREGOR, P. J. Defendant appeals as of right his jury conviction, on October 26, 1972, of delivery of heroin, contrary to MCLA 335.341(1)(a); MSA 18.1070(41)(1)(a), and delivery of LSD, contrary to MCLA 335.341(1)(b); MSA 18.1070(41)(1)(b).

On July 20, 1972, a complaint and warrant were

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

issued charging defendant with the two crimes; subsequent to his preliminary examination on August 1, 1972, defendant was bound over to circuit court for trial; and on August 21, 1972, an information was filed, charging defendant in Count I with delivery of heroin, and in Count II with delivery of LSD. Defendant was convicted by a jury of each count and, on December 4, 1972, was sentenced to 3 to 20 years imprisonment on Count I, and 3 to 7 years imprisonment on Count II.

At trial, the people's case opened with the testimony of Michigan State Police Officer Huston, who stated that, on May 24, 1972, he and a police informant, Janice Stevens, drove to defendant's residence in Berrien County, Michigan, where the witness spoke with defendant and stated he would like to purchase some heroin. According to Officer Huston, he and the defendant walked to the rear of an old car on defendant's premises and defendant opened the trunk, removed a small box therefrom, and exhibited to the witness four small paper packets, a quantity of small brown tablets, and a quantity of purple tablets. In response to Huston's query, defendant identified the purple tablets as LSD, described the brown tablets as PCP (Phencyclidine), and sold to the witness two paper packets allegedly containing heroin for $20 and four purple tablets allegedly composed of LSD for $4. The witness averred that there was no haggling between the parties concerning the price, that defendant identified the material in the paper packets as heroin and the purple tablets as LSD, and, as Officer Huston prepared to leave, asked him if he (Huston) had a "works".

During cross-examination, Huston stated that he met with Janice Stevens at approximately 10:30 a.m. on May 24, 1972, because she had previously

told him that she could introduce him to a person who was allegedly dealing in heroin. The witness denied that he had told Mrs. Stevens anything which would have led her to believe that he needed heroin. Huston and Mrs. Stevens stopped their vehicle at one point while Mrs. Stevens talked with a friend, Larry Johnson, and although the witness did not hear the conversation between Mrs. Stevens and Johnson, he related that it was his understanding that Mrs. Stevens had told Johnson that Huston had a brother who was a "junkie". This impression was based on the fact that Mrs. Stevens had earlier told Huston that, in order to ingratiate himself with the drug dealer, Huston would "have to have something to make them think you are cool", whereupon Huston told Mrs. Stevens, "Why don't you tell him I have got a brother that's a junkie?", although he did not tell her to tell Johnson that Huston's "brother" was with him in the area. The witness denied that he acted as though he were under the influence of drugs when talking with defendant preparatory to purchasing the narcotics. Huston stated that his automobile followed a vehicle which he was told was driven by Mr. Johnson, and which led the way to defendant's residence on the day in question. The witness described three purple tablets introduced into evidence at trial as identical in appearance with those he had purchased from defendant and which defendant had stated contained LSD.

Donald Collins, an employee of the Michigan Department of State Police Scientific Laboratory Unit, testified that the total weight of white powder in the two packets turned over to him for analysis amounted to approximately 0.1 gram, and averred that his laboratory analyses confirmed that each packet contained heroin.

Ralph Sochocki, an employee of the Michigan Department of Public Health Division of Crime Detection, testified that he had analyzed one of the four purple tablets which were turned over to him for inspection, and had conclusively established the presence of LSD in the tablet analyzed. Sochocki related that, although he had not analyzed the three other tablets, the one tablet which he had analyzed appeared to be physically identical to the remaining three tablets. On cross-examination, the following colloquy transpired:

"*Q.* Do you have any opinion as to the quality of that one packet, the one pill that you examined?

"*A.* I am going to base this on a chemical reactivity and my instrumental analysis, it reacted very well in the instrumental analysis indicating that it was above the average."

The defense initiated its case, based on the defense of entrapment, with the testimony of Larry Johnson, who stated that on the day in question he was working at a gasoline service station in St. Joseph, Michigan, when Officer Huston and Mrs. Stevens drove into the station, inquired where the defendant lived, and asked Johnson to show them defendant's residence because Mrs. Stevens wanted to get some "acid" from him. According to the witness, he then drove his vehicle to defendant's home while Huston and Mrs. Stevens followed in their own car, but returned to the service station upon finding that defendant was not then at home. The witness related that, before leaving the station, Mrs. Stevens had told him that Huston's brother was "strung out" and "needed some stuff", and averred that he cooperated with Huston and Mrs. Stevens because the latter was a close friend whom he

trusted. According to the witness, Huston and Mrs. Stevens returned to the gas station at approximately noon on May 24, and again asked him to take them to defendant's residence, whereupon he led the way in a car driven by Douglas Fast, while Huston and Mrs. Stevens followed in their own vehicle. This time defendant was at home and the witness told him that Mrs. Stevens wanted to "buy some stuff", whereupon Huston walked up and said he wanted to talk to defendant, at which point this witness turned around and walked away.

On cross-examination, Mr. Johnson testified that Mrs. Stevens had told him that Huston's brother was "all strung up" and stated that it was his understanding that Huston's brother was a "junkie".

Douglas Fast testified that at approximately noon on May 24, he drove Larry Johnson from the gas station to defendant's house while Huston and Mrs. Stevens followed in their own vehicle. Although the witness did not hear any conversation between defendant and Johnson or Huston, he stated that on the way to defendant's residence, Johnson had told him that they were driving there because Huston had a brother who "was in pretty bad shape and needed some stuff". On cross-examination, Fast reiterated his testimony regarding Johnson's conversation with him concerning Huston's brother.

Testifying in his own behalf, defendant related that on the day in question, Mrs. Stevens, Johnson, and Huston came to his house and, after conversation, Huston stated that he needed to buy some acid and that defendant agreed to sell him drugs because "I trusted him because I trusted the people who he was with". Defendant candidly

admitted that he then escorted Huston to an automobile parked on defendant's premises, opened the trunk, showed Huston some drugs, told him which pills were LSD, and sold Huston four LSD tablets and two packets of heroin.

On cross-examination, defendant agreed that he remembered having had heroin and LSD in the trunk of his automobile and that he had sold some of these drugs to Huston on the day in question. The defendant acknowledged that he "probably" would have sold drugs to Mrs. Stevens and to Larry Johnson if they had wanted to buy them, whereupon the following colloquy ensued:

"*Q.* So the only people that you would sell to are the ones that you know well enough that you are pretty sure they wouldn't be a 'narc', wouldn't turn you in, is that right?

"*A.* Yes.

"*Q.* You were ready, willing and able to sell to anybody that you knew were *[sic]* safe, right?

"*A.* A person I trusted, yes."

Later, during cross-examination, the following exchange occurred:

"*Q.* Now, you heard your two friends, Larry Johnson and Douglas Fast talk about Bill's brother being strung out. I didn't hear you testify about that.

"*A.* I never heard about that.

"*Q.* You didn't hear about that?

"*A.* No, sir.

"*Q.* That wasn't the reason you sold them drugs because his brother was strung out then?

"*A.* No, Janice told me that he was from Chicago and that he needed it bad, is what she told me.

* * *

"*Q.* So you sold heroin and LSD to Bill because you thought it was safe to do so, right?

"*A.* Yah, I said that before."

Plaintiff presented as a rebuttal witness Detective-Sergeant Paul Whitford, of the Michigan State Police, who testified that he had "trailed" Officer Huston in another automobile from 9 a.m. to 2 p.m. on May 24, 1972, and that, during his continuous surveillance of the officer during that period of time, Huston had never stopped at any gasoline station in the Benton Harbor or St. Joseph area, as claimed by Larry Johnson and Douglas Fast, in their earlier testimony.

During defense counsel's cross-examination of Detective Whitford, the following colloquy transpired:

"*Q.* Do you know where Janice Stevens is today?
"*A.* No, I do not.
"*Q.* You were in pretty close contact with her, weren't you?
"*A.* No, sir, I never was in that close of contact.
"*Q.* But you met with her at Howard Johnson's that morning?
"*A.* That is correct.
"*Q.* She came there voluntarily, isn't that correct?
"*A.* That is correct.
"*Q.* So you don't know where she's at today?
"*A.* I do not.
"*Q.* She could also tell us that they never stopped at a gas station, is that correct?
"*A.* That is correct.
"*Q.* Or she could deny that too, couldn't she?
"*A.* Not if she were telling the truth, no.
"*Q.* But you don't know where she's at?
"*A.* No, I don't."

Redirect examination then proceeded as follows:

"*Q.* Do you know of any efforts that have been made to find out where she's at to secure her for a witness today?

"*A.* Yes, sir, I do.

"*Q.* What efforts are those?

"*A.* The Michigan State Police Post at the Benton Harbor Post and the Sheriff's office from this county, both have been notified and attempted to locate her and have been unable to do so."

During his closing argument, defense counsel stated:

"You know who Janice is. Now, she wasn't here today —and by the way, Mr. Whitford told you that the Michigan State Police and the Sheriff's office has been looking for her. Do you know who they have been looking for her for? Me. I requested her. They didn't request her. Why did I request her? Because, again, when the defense of entrapment came up it became critical that I show you that he went—that Huston tried to go there and couldn't do it."

Defendant was convicted of both counts by the jury and on December 4, 1972, was sentenced to serve 3 to 20 years in prison on Count I, and 3 to 7 years on Count II.

On appeal, defendant claims that the trial court abused its discretion by admitting into evidence the three unanalyzed tablets allegedly containing LSD.

We cannot agree. Officer Huston testified that he purchased four purple tablets from defendant, after defendant told him the tablets were LSD, and testified at trial that the three purple tablets introduced by the people appeared to be the same ones he had purchased from the defendant. The prosecution's expert witness testified that he had scientifically analyzed one of the four purple tablets given him for analysis and that his analyses conclusively demonstrated the presence of LSD in the tablet tested, and that, although he did not

chemically analyze the remaining three tablets, they appeared physically identical with the one tablet which he had analyzed. This testimony established an adequate factual foundation for introduction of the three purple tablets at trial. *Cf. People v Ortiz,* 32 Mich App 372; 188 NW2d 635 (1971); *People v Mason,* 29 Mich App 613; 185 NW2d 822 (1971); *People v Kelly,* 386 Mich 330; 192 NW2d 494 (1971). Defendant's objection with respect to the three unanalyzed tablets is more properly addressed to their probative value than to their admissibility.

Relying upon *People v Harrington,* 33 Mich App 548; 190 NW2d 343 (1971), *lv den,* 385 Mich 775 (1971), defendant argues that it was incumbent upon the prosecution to prove that the defendant had delivered a usable amount of heroin or LSD to Officer Huston. Defendant's reliance is misplaced. This Court has held that *Harrington,* a case involving the unlawful possession of narcotics, is inapplicable to a prosecution for sale or delivery of narcotics. *People v Gaffney,* 51 Mich App 526, 529; 215 NW2d 587, 589 (1974); See also *People v McCullough,* 51 Mich App 534, 536; 215 NW2d 774, 775–776 (1974).

Defendant next argues that the introduction of Officer Huston's testimony concerning his attempted purchase of PCP from defendant was reversible error because it tended to show the commission of a distinct criminal offense with which defendant was not charged.

Defendant's argument is not well taken for a number of reasons. First, it is arguable that the testimony regarding the PCP was admissible at trial to show defendant's scheme, plan, or intent as a dealer in illegal narcotic drugs. See MCLA 768.27; MSA 28.1050; *People v Jones,* 38 Mich App

512; 196 NW2d 817 (1972). Second, defendant's showing of the brown tablets to Officer Huston, his statement that these tablets were PCP, and his further remark that he could not sell any of these to Huston because he was holding them for another, constituted a vital portion of the res gestae of the crime and were properly put before the jury as an integral portion of the entire transaction. See *People v Behm,* 45 Mich App 614; 207 NW2d 200 (1973), and *People v Williams #2,* 45 Mich App 630; 207 NW2d 180 (1973). Third, the testimony regarding defendant's alleged possession of PCP was admissible with respect to the question of whether or not defendant had been entrapped under the subjective entrapment test existing in this jurisdiction at the time of trial in this case. Since defendant's defense at trial consisted of an allegation of entrapment, the prosecution was entitled to show that, far from being trapped, defendant was in fact a ready and willing drug dealer who possessed a veritable "drug supermarket" and was willing to sell to anyone he could without getting into trouble with the police. Finally, it is difficult to see how the admission of the testimony with respect to PCP in any way prejudiced the defendant in light of his admission that he had sold heroin and LSD to Officer Huston.

Defendant next contends that he was entrapped as a matter of law and that the trial court's instructions with respect to that question were prejudicial and reversibly erroneous.

Defendant's argument is predicated upon the recent decision of our Supreme Court in *People v Turner,* 390 Mich 7; 210 NW2d 336 (1973), in which an objective standard with respect to the defense of entrapment is adopted. However, this Court has refused to accord *Turner* retroactive

effect. *People v Gaines,* 53 Mich App 443; 220 NW2d 76 (1974). Under the then prevailing subjective test of entrapment, the trial court's instructions to the jury were not erroneous. Further, there was sufficient evidence adduced at trial to warrant a finding that the defendant was not entrapped as a matter of law.

We come finally to defendant's most forceful and persuasive argument: that his conviction must be reversed because the prosecutor failed to endorse the name of Janice Stevens on the information and failed to produce her as a witness at the trial.

It will be recalled that Janice Stevens was the police informant who initially indicated to Officer Huston that she might be able to lead him to a dope dealer, and who accompanied Huston in his vehicle to defendant's home at the time of the drug purchase, on May 24, 1972. Throughout the trial, Mrs. Stevens *in absentia* played a central role. Defense counsel, in his opening statement, indicated that he planned to present as a witness "possibly a young lady by the name of Janice Stevens" and the trial judge at one point during the trial stated:

> "I don't see the problem here of the confidential informant or anything else so far as Mrs. Stevens is involved. Mrs. Stevens' name has been mentioned as a possible witness in this case, which has also been testified here already. I don't see any problem there now as far as she is concerned. Furthermore, I understand there are some subpoenas out for her right now.
>
> "*Mr. Black [assistant prosecutor]:* That is correct, your Honor."

Defense counsel's reference during his closing argument to Mrs. Stevens' absence at trial has already been discussed above.

Defendant asserts, the testimony indicates, and

the people do not deny, that Mrs. Stevens was a res gestae witness. Furthermore, as the prosecutor concedes, Mrs. Stevens' name was never endorsed on the information in this case and she was never called by the people as a witness at trial. The people do not contend that the production of Mrs. Stevens at trial was excused by a showing of due diligence in attempting to secure her attendance. Instead, the people merely point out that defendant, although well aware of Mrs. Stevens' potential as a witness in this case, never moved to have her name endorsed on the information and never moved to have the prosecution produce her as a witness at trial. Therefore, say the people, the defendant is precluded from claiming error on appeal with respect to Mrs. Stevens' nonproduction.

The law in Michigan imposes a clear duty on the prosecution to endorse the names of all res gestae witnesses upon the information and to produce them for examination at trial. MCLA 767.40; MSA 28.980; *Hurd v People,* 25 Mich 405, 416 (1872). There are, however, four well-recognized exceptions to this general rule requiring production of res gestae witnesses at trial:

"(1) When the prosecution makes a showing of due diligence in attempting to produce the witness, *People v Gibson,* 253 Mich 476; 235 NW 225 (1931), and *People v Kern,* 6 Mich App 406; 149 NW2d 216 (1967);

"(2) When the testimony of the missing res gestae witness would be merely cumulative, 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 605, p 782;

"(3) When the res gestae witness was a participant in the crime, *People v Lyle Brown,* 37 Mich App 25; 194 NW2d 450 (1971);

"(4) When the identity of the res gestae witness is made known to the defendant during trial, or even before, and defendant does not move for the indorse-

ment or production of the witness, *People v Gibson, supra; People v Rasmus,* 8 Mich App 239; 154 NW2d 590 (1967); *People v Love,* 18 Mich App 228; 171 NW2d 33 (1969); *People v Printess C Jackson,* 11 Mich App 727; 162 NW2d 163 (1968); *People v May,* 34 Mich App 130; 190 NW2d 739 (1971); *People v Fuston Thomas,* 36 Mich App 23; 193 NW2d 189 (1971); *People v Williams,* 42 Mich App 278; 201 NW2d 286 (1972)." *People v Bennett,* 46 Mich App 598, 619–620; 208 NW2d 624 (1973).

In the present case, defense counsel failed formally to move for Mrs. Stevens' endorsement or production at trial. In light of the fact that he obviously knew of her importance prior to trial, we would normally hold that defendant is barred from appellate relief by the fourth exception above stated.

However, we cannot ignore the Michigan Supreme Court's recent decision in *People v Robinson,* 390 Mich 629; 213 NW2d 106 (1973), in which Justice COLEMAN, writing on behalf of a unanimous Court, stated:

"There is but one issue. Is defendant denied a fair trial when the prosecutor fails to indorse on the information the name of a possible res gestae witness who was, or should have been, known to him prior to trial and when he fails to produce such witness at trial?

"Defendant says that the duty of the prosecutor to indorse and produce all res gestae witnesses is an essential ingredient of a fair trial. *Although no objection was raised during trial, failure of the prosecutor to act is said to demand reversal.*

"The people reply by claiming that the record does not show that the prosecution knew of the unindorsed witness before trial. Even if they had, any testimony in addition to that presented at trial would have been cumulative. *The people also remind us that defendant's trial counsel did not seek an adjournment or move that the witness be indorsed or even mention his existence.*

"Of the approximately three dozen individuals named in the information, at the preliminary exam or during trial, only one was not accounted for at trial. It is the unexplained omission of this individual's name from the information and his nonproduction at trial that is the basis of defendant's claim in this Court.

* * *

"During the trial, defendant's attorney on two occasions affirmatively waived the presence of certain witnesses. Three were unable to be brought into court despite the prosecution's diligent efforts. One witness was deceased. The doctor who pronounced Howard Wright's death and two police officers stationed at the hospital were waived. Two other patrolmen were waived as their testimony would have been cumulative. At no time was the presence of Eugene Smith formally waived or excused. *At no time did defendant's counsel seek to have Eugene Smith indorsed or produced.*

* * *

"In order to prevent what might possibly be a useless new trial, but also *in order to avoid a possible miscarriage of justice,* we retain jurisdiction and remand to the trial court pursuant to GCR 1963, 865.1(5)." (Emphasis added.)

If ever there were a case where the prosecution's failure to produce a res gestae witness at trial could result in a "possible miscarriage of justice", this is it. Because defendant admitted delivery of heroin and LSD to Officer Huston, his only hope for acquittal rested on the defense of entrapment. Concerning that defense, what witness could be more vital than the informant who served as the liason between police and the defendant? Certainly Mrs. Stevens' testimony would have been crucial and perhaps decisive during the jury's deliberations with respect to the question of entrapment. If the Supreme Court remands because one of three dozen witnesses is not produced at trial, can we do less where the key witness with respect to the

crucial question of entrapment is not produced? We think not.

In accordance with *People v Robinson, supra,* and *People v James,* 51 Mich App 777, 784–785; 216 NW2d 473 (1974), we retain jurisdiction of this case and remand to the trial court for a hearing to determine whether or not Mrs. Stevens' testimony would have been cumulative. The trial judge shall require the prosecutor to produce Mrs. Stevens at a hearing within 45 days from the release of this opinion. Mrs. Stevens shall be examined regarding her knowledge of the crime of which the defendant was convicted. At the conclusion of the hearing, the trial judge shall either grant the defendant a new trial or shall, within ten days after the end of the hearing, state his reasons for denying defendant a new trial. The trial judge's findings and a transcript of the hearing shall be forwarded to this Court. Defendant may file a supplemental brief within 15 days after the trial court reaches its decision, and the people may file their brief within 15 days after receipt of defendant's brief. If Mrs. Stevens cannot be located, the prosecutor must "bear the consequences" of the same and defendant shall be granted a new trial. *People v King,* 50 Mich App 487, 491; 213 NW2d 597 (1973).

Remanded for further proceedings consistent with this opinion. We retain jurisdiction.

R. B. BURNS, J., concurred.

O'HARA, J. *(dissenting).* The opinion relied upon by my colleague to mandate remand is by its express terms prospective and limited to appeals filed after its date of publication (January 28, 1974). See *People v Robinson,* 390 Mich 629, 634; 213 NW2d 106, 109 (1973).

I find no error and vote to affirm the conviction.

GOSSMAN v LAMBRECHT

1. LANDLORD AND TENANT—DUTY—NEGLIGENCE—ICE AND SNOW—COMMON PASSAGEWAYS—LIABILITY.

   A landlord, absent a contract, has no duty to his tenant to remove from common passageways any natural accumulation of snow and ice; however, he may be liable when a dangerous accumulation or condition has arisen artificially from his negligent maintenance of the common passageway or some other part of the premises.

2. NEGLIGENCE—INVITEE—ICE AND SNOW—LIABILITY.

   Nonliability to invitees for injuries resulting from falls on natural ice and snow applies to all landowners, including homeowners, store owners, and other businessmen.

3. STATUTES—HOUSING LAW—CLEANLINESS OF DWELLINGS—ICE AND SNOW—LANDOWNERS—BUSINESS PARKING LOTS—BUSINESS ENTRANCES—DUTY—INVITEE.

   The section of the Housing Law of Michigan providing for the cleanliness of dwellings should not be interpreted to require all owners of dwellings, in the cities and suburbs affected, to remove natural accumulations of ice and snow from residential lots when that duty is not shared by businesses openly inviting the public to use their parking lots and entrances (MCLA 125.474).

4. STATUTES—HOUSING LAW—CLEANLINESS OF DWELLINGS—ICE AND SNOW.

   The section of the Housing Law of Michigan providing for the cleanliness of dwellings requires no more of a landowner than is required by the common law with respect to removal of ice and snow (MCLA 125.474).

5. APPEAL AND ERROR—CHANGE IN LAW—LANDLORD AND TENANT—DUTY—ICE AND SNOW—LEGISLATURE—SUPREME COURT.

   A change in Michigan law covering a landlord's duty to his tenants in keeping the premises free from natural accumula-

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REFERENCES FOR POINTS IN HEADNOTES

[1–5] 49 Am Jur 2d, Landlord and Tenant §§ 822, 823.

Liability of landlord for personal injury or death due to defective inside or stairways for use of several tenants. 25 ALR2d 364.

tions of ice and snow should be made by the Legislature or by the Michigan Supreme Court.

Appeal from Wayne, James L. Ryan, J. Submitted Division 1 June 12, 1974, at Detroit. (Docket No. 16809.) Decided August 12, 1974. Leave to appeal granted, 393 Mich —.

Complaint by Robert C. Gossman and Nancy E. Gossman against Edward F. Lambrecht, Jr., and Robert P. Lambrecht, doing business as Arbor Forest Apartments, for damages for injuries sustained in a fall on ice. Verdict and judgment for plaintiffs. Defendants appeal. Reversed and remanded for a new trial.

Lampert & Fried (by *David M. Fried* and *Gary E. Levitt),* for plaintiffs.

Bileti & Valenti (Norman L. Zemke, of counsel), for defendants.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ELLIOTT, J. Plaintiffs, Robert and Nancy Gossman, moved into the defendants' three-year-old Arbor Forest Apartments in East Lansing two years before Mr. Gossman slipped and fell on ice. The apartment complex consists of 8 or 9 two-story buildings with 8 to 15 units in each. On Monday, January 26, 1970, Mr. Gossman left the apartment for work shortly before 7:45 a.m. It had been cold and snowy the previous week, but on Sunday, the 25th, "it got warm, the sun was out and everything was thawing and it was a real nice day". It had become colder in the evening, and overnight

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

there was a freezing rain. As he left the apartment building he observed the sidewalk covered with wet ice. An ice glaze coated the snow in the yards and the banks along the sidewalks. He saw others scraping ice off of their car windshields, and he thought that his car door might be iced-over. To reach his parking space he had to walk upon a sidewalk in front of a clubhouse. Thawing ice dripped from the overhanging clubhouse roof onto the sloped and uneven sidewalk below. The slope toward the clubhouse permitted water to collect and ice to accumulate. He walked carefully noticing that the sidewalk in front of the clubhouse was a bit wetter than the rest of the ice. Near the clubhouse door, he reported, "all of a sudden my feet went right out in front of me". He fractured two vertebrae when he landed on his back. Defendants appeal verdicts of $50,000 and $5,000 for plaintiffs.

Plaintiffs abandoned a common-law theory of recovery requiring a showing, under *Betts v Carpenter,* 239 Mich 260; 214 NW 96 (1927), that the ice and water on the sidewalk did not result from natural causes but were produced artificially by the construction or maintenance of the clubhouse eaves or sidewalk below, or both. Plaintiffs' chosen theory, based on *Feldman v Stein Bldg & Lumber Co,* 6 Mich App 180; 148 NW2d 544 (1967), posited a statutory duty on the apartment owner to remove ice and snow from the sidewalk, imposed by the Michigan Housing Law (MCLA 125.401 *et seq.;* MSA 5.2771 *et seq.).*

Plaintiffs requested an instruction that if defendants knew or should have known of the dangerous conditions created by ice and snow accumulations and failed to remove it to permit safe use by the tenants, then defendants were negligent as a mat-

ter of law; and that defendants had a statutory duty to make reasonable inspections. Essentially, the court gave these instructions, rejecting defense requests that the jury must find in their favor if the condition resulted from a natural accumulation of ice on a normal, outdoor, unobstructed sidewalk and not from any other cause. The court also rejected an alternative request that defendants must have had a reasonable opportunity to correct the condition before this accident occurred or liability could not arise. Thus, if the condition arose suddenly and the landowners, after they knew or should have known of it, did not have sufficient time to correct the condition the jury must find for defendants. Defendants claim instructional error.

The issue requires first an examination of *Feldman, supra.* The section of the Housing Law it considered provides:

"Sec. 74. Cleanliness of dwellings. Every dwelling and every part thereof shall be kept clean and shall also be kept free from any accumulation of dirt, filth, rubbish, garbage or other matter in or on the same, or in the yards, courts, passages, areas or alleys connected therewith or belonging to the same. The owner of every dwelling shall be responsible for keeping the entire building free from vermin. The owner shall also be responsible for complying with the provisions of this section except that the tenants shall be responsible for the cleanliness of those parts of the premises that they occupy and control." MCLA 125.474; MSA 5.2846.

Feldman, supra, p 183, held:

"In the absence of Michigan case law construing this language to either exclude or include snow removal, we turn to construction of analogous statutory language out-of-state. In *Greenstein v Springfield Development Corp* (1960), 22 Misc 2d 740 (204 NY Supp 2d 518), the

New York court determined that an icy pathway on the premises was within the contemplation of similar language. We agree. A common sense reading of the language of the Michigan provision must necessarily include snow and ice."

Later and higher New York authority, *Doyle v Streifer,* 34 App Div 2d 183; 310 NYS2d 165 (1970), reconsidered the section of the New York Multiple Residence Law relied on in *Greenstein* and similar to our Housing Law, quoted above, and reached a conclusion opposite to *Greenstein* and *Feldman,* holding (p 185):

"There is nothing in the legislative history of this section which would indicate that it was intended to apply to snow and ice cases which arise as a result of precipitation from the sky, and such a construction, it seems obvious, was not the intention of the Legislature and is improper."

Doyle, supra, states the duty of a New York apartment owner (p 185):

"The landlord is under a duty to use reasonable care to keep the walks and areaways which constitute the ingress and egress of the tenant reasonably safe, but cannot be held liable for a defect in his property unless he has notice of the defect or in the exercise of due care should have had such notice. In these snow and ice situations he may know that snow has fallen and thus realize that a dangerous condition exists but he is entitled to remedy the condition. Where he has not had a sufficient time to remedy the condition caused by the elements liability will not result." (Citations omitted.)

According to *Doyle, supra,* New York imposes the Connecticut rule. Michigan, although not explicitly, has followed the Massachusetts rule. Under that view a landlord, absent a contract, has no duty to his tenant to remove from common pas-

sageways any natural accumulation of snow and ice. However, a landlord may be liable when a dangerous accumulation or condition has arisen artificially from the landlord's negligent maintenance of the common passageway or some other part of the premises. In Michigan, nonliability to invitees for injuries resulting from natural ice and snow applies to all landowners, including homeowners, store owners and other businessmen; *Gillen v Martini,* 31 Mich App 685; 188 NW2d 43 (1971); *Bard v Weathervane of Michigan,* 51 Mich App 329; 214 NW2d 709 (1974). *Bard* states the question and answer (pp 330–331):

> "What duty does the operator of a business owe to invitees of the business with respect to the icy, rutted condition of the business parking lot arising from traffic on natural accumulation of snow?
>
> "[T]he basic duty of an invitor to an invitee [is] inapplicable to the case before us, which involves a hazard created by natural elements.
>
> "Snow falls on invitor, invitee, and all residents of the snow area alike. All are, or should be, aware of the hazards arising from natural accumulations of snow such as icy conditions and ruts from traffic. These are common wintertime hazards to all who live in areas where snow accumulates, and these hazards, without more, give rise to no duty owed by an invitor to an invitee.
>
> "Given the conditions that existed in this case, what was the duty that defendant owed to plaintiffs? It was to not increase these natural hazards or create a new hazard by any affirmative act, *Weider v Goldsmith,* 353 Mich 339; 91 NW2d 283 (1958)."

Adherents of the Massachusetts rule believe it better suited to northern climates where slippery conditions from ice and snow are natural, frequent and without fault of the landowner, unless he increases the hazard. A duty to remove naturally

formed ice and snow is seen as both unjust and impractical. Shoveling a layer of snow on a sidewalk in freezing, drifting weather may make the surface more slippery.

The Rhode Island Supreme Court recently explained the rationale and requirements of the Connecticut rule in discarding the Massachusetts rule and adopting the Connecticut rule in *Fuller v Housing Authority of Providence,* 108 RI 770; 279 A2d 438; 49 ALR3rd 382 (1971), followed by an annotation on the subject:

"The soundness of the Connecticut Rule becomes evident when one considers today's tendency for apartment-house living. In any one building are apt to be found tenants of all ages. Some may seldom wander far from the apartment complex. They should be furnished with reasonably safe common ways as they come and go to and from their apartments. One could see the difficulty if a tenant, faced with the Massachusetts Rule, sought to seek agreement among his fellow tenants for the sharing of the responsibility of removing snow and ice which have collected on the common premises. The landlord with a minimum of expense can and should attend to these details.

"As we adopt the Connecticut Rule, we wish to emphasize that a landlord is not a guarantor for the safety of his tenants as they proceed along the common ways. What we do say, however, is that an accumulation of ice or snow upon those portions of the premises reserved for the common use of his tenants may make the landlord liable for injuries sustained by his tenant which are due to such an accumulation, provided the landlord knows, or should have known, of the condition and failed to act within a reasonable time thereafter to protect against injuries caused thereby. The mere accumulation of snow or ice does not ipso facto make the landlord liable; he must be given a reasonable time after the storm has ceased to remove the accumulation of snow or ice found on the common ways or to take such measures as will make the common areas reason-

ably safe from the hazards arising from such a condition. We would also point out that a tenant, who has at his disposal more than one route of ingress and egress to his premises, may not benefit from the Connecticut Rule if it be shown that he was aware that his landlord had furnished him with one reasonably safe approach to his dwelling place but instead chose to travel on another yet unshoveled or unsalted passageway." *Fuller v Housing Authority of Providence, supra,* pp 774–775.

Our comments thus far provide background for a consideration of the Michigan housing act and *Feldman, supra,* which sought out-state aid in construing our statute. Its search located *Greenstein* as the only authority deciding a similar question. In *Greenstein,* the statute applied only to owners of multiple dwellings. The tenant slipped two days after the landlord knew of the slippery natural condition. *Doyle, supra,* overruled *Greenstein's* interpretation of the New York statute.

MCLA 125.474; MSA 5.2846 applies to all dwellings covered by the act; it is not limited to owners of multiple dwellings or apartment houses. It covers owners and tenants of single-family homes, house trailers or any structure used for sleeping. It prohibits unclean accumulations not only on common passages but also on "yards" defined as the entire lot. An obvious purpose of the legislation is to control accumulations on residential properties that breed vermin (flies, roachs, rats etc.) or increase the hazard of fire or like dangers to the dwellers. A violation of the section is a crime. Although this section does not expressly create civil liability, a violation has been held to be negligence per se in *Bravo v Chernick,* 28 Mich App 210; 184 NW2d 357 (1970). "Accumulation" connotes a buildup over a period of time. Dirt, garbage and rubbish do not accumulate quickly and inevitably as do snow and ice from winter

storms. The effect on our citizens' hearts and backs should be considered.

It does not seem "common sense" to continue an interpretation of that section, relying on a case rejected in its own state and without support in any other, requiring all owners of dwellings (in the cities and suburbs covered) to remove natural accumulations of ice and snow from residential lots when that duty is not shared by businesses openly inviting the public to use their parking lots and entrances. Certainly a statutory duty imposing a criminal penalty on owners of dwellings cannot require them to shovel, scrape, chip or melt possibly acres of paved areas before a storm has subsided and a reasonable time for the effort has elapsed.

Moreover, *Feldman* concerned the validity of an exculpatory lease provision relieving the landlord from liability for any act or neglect of the lessor or its agents; the case does not indicate whether the ice accumulation was natural or unnatural. That appeal arose from a summary judgment based on the exculpatory clause. We think the interpretation of MCLA 125.474; MSA 5.2846 in *Feldman,* if it includes a duty to remove natural accumulations of ice and snow, was mistaken. The interpretation was not decisionally necessary.

We think MCLA 125.474; MSA 5.2846 requires no more of a landowner than is required by the common law with respect to removal of ice and snow.

Yet, the legislative interest, apparent in the statute, to protect inhabitants of multiple and other dwellings from unreasonable dangers which can be remedied by ordinary care and the considerations persuading several states to espouse the Connecticut rule cause us to wonder whether

Michigan should not follow the example of Rhode Island and other states by doing so. Both Dean Prosser and 2 Harper & James, The Law of Torts, § 27.17, pp 1516–1517, endorse the Connecticut rule.[1]

We do not decide whether Michigan should adopt the Connecticut rule. First, we do not believe an apartment owner's general duty of reasonable care should include reasonable efforts within a reasonable time to remove natural accumulations of snow and ice unless a similar requirement is also owed by a business to its customers or other invitees. Second, we think that such a change in Michigan law, if desirable, should be made by the Legislature or by our Supreme Court, whose rulings we are bound to fathom and to follow. Finally, adoption of the Connecticut rule would not sustain the verdict in this case. The trial judge instructed the jury that a violation of the statute, which included a duty to remove snow and ice, once the existence of it was known, or should have been, was negligence as a matter of law. He did not include the requested instruction that the landlord must have had sufficient time before the accident to correct the natural condition. Under the Connecticut rule, defendants would have been entitled to that instruction. Mr. Gossman slipped at 7:45 a.m. which, we notice, was ten minutes before the sun would rise that mid-winter day on an ice-covered community.

Therefore we reverse for a new trial in which

[1] Prosser, Torts (3rd ed), § 63, p 420, states:

"The prevailing view, by a scant margin, is that the (lessor's general) duty extends to conditions of purely natural origin, such as ice and snow on the steps; and there seems to be little reason in the distinction as to such conditions made by some of the courts"; a footnote adds: "Reasonable care may, however, permit the landlord to wait until the end of a storm".

the rule of *Betts, supra, Weider, supra, Gillen, supra,* and *Bard, supra,* should be applied.

Reversed and remanded.

All concurred.

PEOPLE v SMITH

1. CRIMINAL LAW—INSTRUCTIONS TO JURY—PRESERVING QUESTION—MATERIAL ELEMENT OF DEFENSE.

An appellate court is not precluded from considering a defendant's claim that an instruction to the jury was erroneous even though no objection was raised below where the alleged error in the instruction relates to a material element of the defendant's defense.

2. HOMICIDE—MANSLAUGHTER—DEFENSES—SELF-DEFENSE—DUTY TO RETREAT—DWELLING—INSTRUCTIONS TO JURY.

Instructing a jury in a manslaughter trial that the defendant claiming self-defense had a duty to retreat was reversible error where the defendant was in his dwelling at the time of the homicide.

3. HOMICIDE—MANSLAUGHTER—DEFENSES—SELF-DEFENSE—DUTY TO RETREAT—DWELLING.

A defendant convicted of manslaughter who had left his own home and had been staying with a friend at her apartment for approximately one week prior to the homicide was, for all practical purposes, in his own dwelling when at that apartment; therefore, the defendant had no duty to retreat to claim self-defense as to a homicide which occurred at that apartment.

Appeal from Saginaw, Eugene Snow Huff, J. Submitted Division 3 March 6, 1974, at Grand Rapids. (Docket No. 16858.) Decided August 12, 1974.

Samuel W. Smith was convicted of manslaughter. Defendant appeals. Reversed and remanded for new trial.

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial §§ 650, 651.

[2, 3] 40 Am Jur 2d, Homicide §§ 145, 151.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *E. Brady Denton,* Prosecuting Attorney, and *Daniel R. Connell,* Chief Appellate Attorney, for the people.

Michael C. Moran, Assistant State Appellate Defender, for defendant.

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

V. J. BRENNAN, J. Defendant, Samuel W. Smith, was convicted of manslaughter (MCLA 750.321; MSA 28.553) by a jury in the Saginaw Circuit Court and sentenced to from 5 to 15 years in prison. He now appeals as of right.

Defendant and Rebecca Norris, the deceased, had been living together for a number of years. In an effort to break off the relationship defendant moved out of his house until Rebecca could find a new residence. Defendant moved to the apartment of Linda Guerrero, where the fatal shooting took place approximately one week later. On the night of the slaying, the deceased came to Linda Guerrero's apartment and an argument developed between the defendant and the deceased. The deceased grabbed a loaded shotgun sitting in the corner of the room and fired two shots, both of which ended in the ceiling. Testimony was presented that the deceased, before the second shot was fired, aimed the shotgun directly at defendant and that other persons in the room diverted the gun in such a manner as to cause the blast to go into the ceiling. What actually happened after this is not at all clear from the record, there being several different versions. Suffice it to say that a struggle ensued, that other guns were present in the room at one time or another and that defend-

ant shot and killed the deceased, allegedly out of fear for his own life.

The trial judge instructed the jury on the law of self-defense in the following manner:

"As you know members of this jury by this time the defendant in justification of the offense here charged against him, has interposed a plea of self defense, and under certain circumstances this is a good defense. To make the plea available it must appear that the defendant Samuel W. Smith was without fault upon his part. If he himself 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 imminent danger of losing his own life or suffering some grievous bodily injury, and there was no way open for him to retreat, as he saw it, and his only safety lay in firing the shot which caused the death of the deceased Rebecca Norris. Self defense in proper cases, is the right of every person but it will not justify the taking of a human life unless you jurors shall be satisfied from the testimony; first, that the defendant was not the aggressor in bringing on the difficulty, as has just been pointed out; second, that there existed, at the time of the firing of the fatal shot in the defendant's mind, a present and impending necessity to fire such shots in order to save himself from death or some great bodily harm; and third, there must have been no way open whereby he could have retreated, as it appeared to him at that time, to a place of safety and thus avoided the conflict. Unless you find all three of these elements in the case, then the plea of self defense failed."

Defendant claims that this instruction was reversibly erroneous. Although no objection to the above instruction was raised below, we are not precluded from considering the issue now presented since the alleged error in the instruction relates to a material element of defendant's defense.[1]

[1] *People v Townes,* 391 Mich 578; 218 NW2d 136 (1974); *People v*

Defendant contends that, since he was confronted by the deceased in what was his dwelling at the time of the shooting, he was under no duty to retreat and that the court's instruction to the contrary constitutes reversible error. We agree. The instruction given in the instant case was almost identical to that found objectionable by another panel of this Court in *People v McGrandy,* 9 Mich App 187; 156 NW2d 48 (1967). The prosecution argues that the defendant herein was not in his own dwelling at the time of the shooting but, rather, he was only temporarily present in the dwelling of another. While this is true we do not, under the facts of this case, consider this to be sufficient to warrant a different result. Defendant left his home and took up residence at Linda Guerrero's apartment where he stayed for approximately one week and where he intended to stay until the deceased left his home. This was, for all practical purposes, his dwelling.

Sufficient facts were here presented to make the question of whether defendant killed the deceased in self-defense a jury-submissible question and he was entitled to have the jury properly instructed. This was not done. The instructions, insofar as they instructed the jury that defendant had a duty to retreat, were reversibly erroneous.[2]

We do not find it necessary to reach defendant's additional contentions, as they are not likely to occur on retrial. It should be noted, however, that

Paxton, 47 Mich App 144; 209 NW2d 251 (1973). *People v Broom,* 50 Mich App 337; 213 NW2d 247 (1973), is not to the contrary. *Broom* decided only that under the peculiar facts of that particular case the instruction there complained of was not such as to require reversal of that defendant's conviction.

[2] *See People v Townes, supra,* for the circumstances under which it is proper for the trial judge to instruct the jury on the effect of defendant being the aggressor in the confrontation, an issue not here raised.

the admissibility of evidence relating to the deceased's reputation for violence is to be judged by the standard set forth in *People v Stallworth,* 364 Mich 528; 111 NW2d 742 (1961).

Reversed and remanded for new trial.

All concurred.

MOORE v McDOWELL

1. EQUITY—CLAIMS—DILIGENCE—JUDGMENTS.

In a case where there are several claimants against a fund and there is no showing of a lack of diligence by any claimant, to permit the fund to be exhausted by those who first obtained judgments would deny equity to those who through no fault of their own have not yet reduced their claims to judgment.

2. INTERPLEADER—MOTOR VEHICLE ACCIDENT CLAIMS FUND—JUDGMENTS—DOUBLE LIABILITY—COURT RULE.

Interpleader was available to the Motor Vehicle Accident Claims Fund against all of the claims which arose from an automobile-bus collision whether or not the claims had been reduced to judgments because under the court rule interpleader will cover any situation where a plaintiff is, or may be, exposed to double or multiple liability (GCR 1963, 210).

3. EQUITY—EQUALITY.

Michigan courts have long recognized the efficacy of applying, under appropriate circumstances, the maxim "that equality is equity".

4. INTERPLEADER—EQUITY—DISTRIBUTION OF FUNDS—PRO RATA DISTRIBUTION.

The equitable nature of interpleader mandates the pro rata distribution of a fund among all claimants to it where they have been interpleaded and a likelihood arises that the total of all claims would exceed the total proceeds available in the fund.

Appeal from Wayne, Thomas Roumell, J. Submitted Division 1 April 4, 1974, at Detroit. (Docket No. 16863.) Decided August 13, 1974.

REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur 2d, Equity §§ 154–156.
[2, 4] 27 Am Jur 2d, Equity §§ 26, 43.
[3] 27 Am Jur 2d, Equity § 125.

Complaint by Edward Moore and Edward Moore, Sr., against Lonzo L. McDowell for negligence. The Motor Vehicle Accident Claims Fund moved to interplead by cross-complaint other possible claimants, to enjoin litigation by them, and to pay the limit of its liability into court. Judgment in favor of the Motor Vehicle Accident Claims Fund. Plaintiffs appeal by leave granted. Reversed in part and remanded with instructions.

Milan & Miller, for plaintiffs.

Gerald M. Lorence, for defendants Glen Allen and Tom Barge.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Joseph B. Bilitzke* and *Carl K. Carlsen,* Assistants Attorney General, for intervening defendant Michigan Department of State, Motor Vehicle Accident Claims Fund.

Before: BASHARA, P. J., and BRONSON and CARLAND,* JJ.

CARLAND, J. On May 26, 1970, an automobile driven by the defendant Lonzo L. McDowell, an uninsured motorist, collided with a DSR bus in the City of Detroit. Twenty-three of the 35 bus passengers suffered injuries and thus became possible claimants against the Motor Vehicle Accident Claims Fund, hereinafter referred to as "the Fund". On March 3, 1972, Edward Moore, a minor who was injured in the accident, and his father Edward Moore, Sr., commenced this action in the Wayne County Circuit Court. On September 29,

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

1972, the Fund moved to interplead by cross-complaint other possible claimants and for an injunction against the maintenance of litigation or execution in other law suits by other possible claimants and offered to pay into court the $20,000 limit of the Fund's liability for damages resulting from any one accident under the Motor Vehicle Accident Claims Act, MCLA 257.1123; MSA 9.2823.

On December 22, 1971, the defendants-appellees Glen Allen and Tom Barge commenced law suits in the Common Pleas Court for the City of Detroit against Lonzo L. McDowell and the Fund. The action was later dismissed as to the Fund. These actions resulted in judgments in favor of Allen in the amount of $2,400 and in favor of Barge in the amount of $1,400. Thus Allen and Barge became judgment creditors. Both Allen and Barge filed answers in opposition to the Fund's motion to add parties defendant for the purpose of interpleading and for authority to deposit the $20,000 with the court and also opposed the granting of the injunctive relief sought.

On November 10, 1972, the trial judge in this action granted the Fund the relief sought. The court thereby ordered the Secretary of State to pay to the clerk the sum of $20,000 and further ordered the clerk to pay Allen and Barge the amount of their judgments plus $218.50 costs and attorney fees. The requested injunctive relief was granted and all possible claimants were restrained from pleading in any other case and ordered that their claims be submitted to an arbitrator to be appointed by the court.

On July 6, 1973, this Court granted plaintiffs leave to appeal from the trial court's order of November 10, 1972, and stayed the payment of the judgments of Allen and Barge.

It is the claim of the plaintiffs that where as in the case at bar all interested parties have been interpleaded and where the damage claims of a number of claimants could exceed the fund from which the claims are to be paid, that all claims filed against the Fund should be paid pro rata regardless of the fact that some claimants have already obtained judgments.

There is considerable legal authority which supports plaintiffs' contention where, as in the instant case, the liability insurer has filed an interpleader action against all claimants. To this effect we find both CJS and Am Jur in agreement:

> "If more than one injured person recovers judgment against insured and insurer interpleads in equity, each person has been held entitled to receive a pro rata share in the payment due under the policy regardless of the time the actions were commenced or the judgments rendered." 46 CJS, Insurance, § 1191(9), p 126; 7 Am Jur 2d, Automobile Insurance, § 198, p 541.

These authorities together with the courts which have confronted this problem recognize the distinction that where no interpleader has been filed multiple claimants against an inadequate insurance fund are entitled to priority in their recoveries on the basis of when their judgments were docketed and there need be no prorationing with dilatory claimants. Thus in the cases relied upon by Allen and Barge where the equitable principles of interpleader were not involved the courts rejected prorationing, *Clarke v Brown,* 101 NJ Super 404; 244 A2d 514 (1968); *Goad v Fisher,* 255 Md 131; 257 A2d 433 (1969); *Richter v Vitale,* 59 Misc 2d 374; 299 NYS2d 293 (1969).

On the other hand, in the identical situation, except for the interpleader action by the insurer, the courts have held that the equitable nature of

the action should control and equity being equality, have prorated the claimants' recoveries. In *Century Indemnity Co v Kofsky,* 115 Conn 193; 161 A 101 (1932), the Court in prorating a fund held by the insurer between several claimants, stated on page 200; 161 A 103 as follows:

"While equity may not seize upon a controversy merely to apply the maxim that equality is equity, when it does have before it a proper proceeding in equity, it is free to apply that maxim. 'Under the limitation last stated, that the subject-matter properly belongs to the equitable jurisdiction, the following general principle may be regarded as firmly established and of wide application: Whenever several persons are all entitled to participate in a common fund, or are all creditors of a common debtor, equity will award a distribution of the fund, or a satisfaction of the claims, in accordance with the maxim, equality is equity; in other words, if the fund is not sufficient to discharge all claims upon it in full, or if the debtor is insolvent, equity will incline to regard all the demands as standing upon equal footing, and will decree a pro rata distribution or payment.' 1 Pomeroy's Equity Jurisprudence (4th ed), § 407. The plaintiff has submitted to the court in a proceeding in equity the question of its liability to pay to the various defendants the amounts due under the policy; justice requires that they share in equal proportions in the sums due under it on account of the particular kind of injuries suffered; and in the circumstances of this case that result can be accomplished without violating any legal principle."

The above-stated view has been followed in *Underwriters for Lloyds of London v Jones,* 261 SW2d 686, 688 (Ky, 1953); *Sheehan v Liberty Mutual Fire Insurance Co,* 288 Ala 137, 144; 258 So 2d 719, 724 (1972); *Burchfield v Bevans,* 242 F2d 239 (CA 10, 1957).

Throughout all of the cases wherein proration has been approved its opponents have argued for

priority on the basis that they have first filed claims, or first filed suits, or first obtained judgments. In effect, they have urged that courts follow the oft-stated principle of "First in time, first in right", and by so doing award the race only to the swift. However, where, as in the instant case, there is no showing of lack of diligence by any claimant to permit the fund to be exhausted by those who first reached the finishing line would deny equity to those who through no fault of their own have not yet reduced their claims to judgment. That some claims were first adjudicated may be the result of a variety of reasons; *i.e.* the happy choice of a forum whose docket is less crowded than others; the seriousness and extent of the injuries suffered thereby determining at what time the full extent of the claim may be asserted.

"A rule of priority dependent upon the time when actions are begun against the insured would be likely to lead to a race to begin such actions, with an added burden of litigation to parties and the courts and a tendency to prevent or render more difficult the settlement of claims. A rule of priority made dependent upon the time when judgments were rendered against the insured would often make controlling the adventitious circumstances attending litigation, often beyond the control or responsibility of the parties." *Century Indemnity Co, supra,* p 199; 161 A 103.

In this case interpleader was clearly available to the Fund against all claims whether or not reduced to judgment because GCR 1963, 210 broadened interpleader "to cover any situation where a plaintiff is, or may be, exposed to double or multiple liability", *City of Warren v Mac-Way Construction Co,* 20 Mich App 84, 98; 173 NW2d 767 (1969). Michigan courts have long recognized the efficacy of applying the maxim "that equality is equity"

under appropriate circumstances, *Hollister v Loud, Johnson & Higby,* 2 Mich 309, 314–315 (1852); *Ellis v Phillips,* 363 Mich 587, 598; 110 NW2d 772 (1961). Once properly invoked by the Secretary of State on September 28, 1972, interpleader's equitable principles mandated a pro rata distribution of the funds deposited in court despite the status of Allen and Barge as judgment creditors because equality is equity.

We find no merit to the claim of the appellants that they are entitled to recover because of the Secretary of State's negligence.

As to appellant's claim that the $20,000 per accident limitation for recoveries against the Fund unconstitutionally discriminates in favor of single claimants against multiple claimants, it is sufficient to say that their arguments do not overcome the presumed constitutional validity of the statute.

We further discern no error in the allowance of attorney fees and costs by the trial court. Such payment does not reduce the fund and the allowance is within the sound discretion of the court.

We reverse insofar as the trial court's judgment grants to Allen and Barge more than a pro rata share of the sum deposited in court and remand with direction that the sum so deposited to be distributed pro rata among all claimants.

No costs are awarded.

All concurred.

KAR v HOGAN

OPINION OF THE COURT

1. EQUITY—JURY—ADVISORY VERDICT—EFFECT ON CHANCELLOR.
An advisory jury verdict does not bind a chancellor in equity.

2. APPEAL AND ERROR—EQUITY—DE NOVO REVIEW—FINDINGS.
The Court of Appeals ordinarily reviews chancery cases *de novo*, giving considerable weight to the trial judge's findings; only if the Court finds, upon examination of the entire record, that it would have been required to reach a different result had it been in the chancellor's position, will the Court disturb those findings.

3. APPEAL AND ERROR—JUDGE'S FINDINGS—JUDGE'S REMARKS.
The Court of Appeals will not disturb a trial judge's findings even though the judge made a statement which might possibly be construed as a declaration of his decision before hearing the entire case, where the statement did not demonstrate that the judge closed his mind to the balance of the proofs, and a careful reading of the judge's opinion shows he strove to balance justice's scales throughout the proceedings and he accurately and carefully assessed the proofs supporting each side.

DISSENT BY HOLBROOK, J.

4. EQUITY—CONFIDENTIAL RELATIONSHIP—UNDUE INFLUENCE—PRESUMPTIONS.
A prima facie case of undue influence will arise from facts

REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur 2d, Equity § 243.
Nature and effect of jury's verdict in equity. 156 ALR 1147.
[2, 3] 27 Am Jur 2d, Equity §§ 266, 267.
[4] 27 Am Jur 2d, Equity § 43.
[5] 53 Am Jur, Trial § 93.
[6] 16 Am Jur 2d, Constitutional Law §§ 542–547.
[7] 20 Am Jur 2d, Courts §§ 82–86.
Power of court to prescribe rules of pleading, practice, or procedure. 158 ALR 715.

sufficient to show a confidential relationship as the confidential relationship raises a rebuttable presumption of undue influence.

5. TRIAL—JUDGES—PREJUDGMENT OF CASE—QUESTIONS OF FACT—PROOFS.

A trial judge should not make up his mind or render his decision prior to hearing the entire case where there are questions of fact to be determined and the parties have not been given full opportunity to present all their proofs and to argue their respective positions; even the mere implication that an impartial forum may not have been provided is inappropriate.

6. CONSTITUTIONAL LAW—DUE PROCESS—CIVIL MATTERS—CRIMINAL MATTERS—JUDICIAL PROCESS—RIGHT TO TRIAL.

Due process is equally important in civil and criminal matters; it requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

7. TRIAL—JUDGES—CONCLUSIONS OF FACT—EVIDENCE—COURT RULE.

A trial judge may not make conclusions of fact *which are not fully supported by the record. (GCR 1963, 517.1).*

Appeal from Wayne, George E. Bowles, J. Submitted Division 1 April 9, 1974, at Detroit. (Docket No. 16953.) Decided August 13, 1974. Leave to appeal granted, 393 Mich —.

Complaint by Edward W. Kar and Irene Altshuler against Fred H. Hogan, executor of the estate of Edward Merkiel, deceased, to avoid a deed. Judgment for defendant. Plaintiffs appeal. Affirmed.

Komjathy & Komjathy, for plaintiffs.

Alton P. Shirley (George Stone, of counsel), for defendant.

Before: J. H. GILLIS, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

J. H. GILLIS, P. J. Plaintiffs, stepchildren of Julia Kar, sought to invalidate a deed because of undue influence. From a judgment in favor of defendant, plaintiffs appeal.

John Kar, plaintiffs' father, married Julia in 1914. Julia, who remained childless, reared plaintiffs as though they were her own children. In 1917, the Kars purchased a farm which, at time of trial, was valued at approximately $300,000. In 1951, John Kar died. In 1953, Julia married Edward Merkiel. In 1957 and 1966, Julia signed wills devising the bulk of her estate to plaintiffs, and creating a life estate in her husband. However, in 1969, Julia, in a "strawman" transaction, deeded the farm to her husband and herself by the entireties. Julia died in 1970, and Edward in 1971. Edward's executor, Fred Hogan, is named defendant in this case.

Plaintiffs claimed that the disinheriting deed should be set aside because of confidential relationship and undue influence. The trial court ruled that Edward's confidential relationship with Julia placed the burden on defendant to overcome the presumption of undue influence. *In re Wood Estate,* 374 Mich 278; 132 NW2d 35 (1965). An advisory jury rendered a verdict for plaintiffs, but the trial court disregarded its findings and ruled for defendant. GCR 1963, 509.4.

Clearly, an advisory jury's opinion does not bind a chancellor in equity. *Abner A Wolf, Inc v Walch,* 385 Mich 253; 188 NW2d 544 (1971).

This Court ordinarily reviews chancery cases *de novo,* giving considerable weight to the trial

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

judge's findings. Only if we find, upon examination of the entire record, that we would have been required to reach a different result had we been in the chancellor's position, will we disturb those findings. *In re Hartman Estate,* 51 Mich App 192, 203–204; 215 NW2d 202, 208 (1974); *Dare v O'Connor,* 50 Mich App 550, 554; 213 NW2d 774, 776 (1973). A careful review of the record reveals a trial of confused facts, but does not convince us that we would have been required to reach a different result.

In examining the record, however, we have carefully scrutinized a statement of the trial judge which might possibly be construed as a declaration of the trial judge's decision before hearing the entire case. The trial judge stated:

"I want to be frank with able counsel. If I was deciding this nonjury, I would have no difficulty with it at all. I would hold for the defendant. I think all plaintiffs have shown was that *[sic]* the many, many plaintiffs have shown, namely, the opportunity of undue influence because this disposition of property was different from what the plaintiffs thought it was going to be. That doesn't make out a case of undue influence; it is an opportunity for undue influence. There is not one scintilla of evidence in this case. As a matter of fact, it is all to the contrary. She got sick, but to get sick, is, I think to dispose of one's state *[sic]*—most of us will never get to dispose of our estates—many of these are disposed of while they are thinking, you know, what is going to happen to it when we are sick. I am going to be very frank with counsel. To me there isn't even a prima facie case made out by the plaintiff. It is quite a different thing when you have the free jury situation *I think a jury case has been made out and the only question is in my mind is whether there is a jury case both as to the confidential fiduciary relationship and the undue influence.* I have to say that because of the nature of the relationship, namely, husband and wife, that in and of itself is a fiduciary relationship and

therefore it would go to the jury merely on undue influence." (Emphasis supplied.)

After careful scrutiny, we do not believe this statement violates the standard enunciated in *Wayne County Prosecutor v Doerfler,* 14 Mich App 428; 165 NW2d 648 (1968). Granted, the excerpted statement is ambiguous and confusing. The court asserts that plaintiffs offered not a scintilla of evidence, but rules nonetheless that a jury case has been made out. However, a common-sense reading shows that the court believes, and properly, that the burden of proof shifts to defendant upon proof of the existence of a confidential relationship. *Totorean v Samuels,* 52 Mich App 14; 216 NW2d 429 (1974). Further, *aside from* the fact of marriage, the court believes not a scintilla of evidence has been offered in support of plaintiffs' case. Indeed, plaintiffs themselves testified that their mother remained strong-willed, although physically ill. This ruling on the evidence does not demonstrate a closed or prejudiced mind.[1] Prejudice "stems from prae-judicare, to judge before one knows the facts".[2] To assume impartiality and fairness requires the fact-trier to retain a blank mind, forming no opinion until the moment of ultimate judgment, is both misleading and undesirable. The judge's statement does *not* demonstrate that the court closed its mind to the balance of the proofs. Indeed, a careful reading of the trial

[1] *Cf.* Nizer, *The Implosion Conspiracy,* 1973, pp 12–13:

"[A] judge * * * rendered a record number of decisions in one year. He was besieged by newspapermen to explain his achievement.

" 'Well,' he said, 'I listen to the plaintiff and decide the case immediately.'

" 'Don't you listen to the defendant too?' they ask.

" 'I used to,' he replied, 'but I found it confused me.' "

The trial judge cannot be accused of this fault.

[2] Nizer, *supra,* p 12.

judge's opinion shows he strove to balance justice's scales throughout the proceedings. He accurately and carefully assessed the proofs supporting each side, and concluded, against the advisory jury, that the disposition was the free act of Julia Kar Merkiel. Having carefully considered this record, we find no error on this ground.

Affirmed. Costs to defendant.

VAN VALKENBURG, J., concurred.

HOLBROOK, J. *(dissenting).* This writer must dissent. This decision is the result of many troubled hours of consideration and reconsideration.

A review of the record presently before us reveals a trial of confused and difficult facts. This writer would be hard pressed to find that he would have been required to have reached a different result than the trial judge or that he would have been required to reach a different result than that of the jury had he been the trial chancellor. Were it not for the ill-advised statement by the trial judge following the presentation of plaintiffs' proofs, this writer could conscientiously affirm. It is unfortunate that this occurred, as otherwise the court's conduct of the trial, including the instructions to the jury, was exemplary. After completion of plaintiffs' case in chief, the trial court said:

"I want to be frank with able counsel. If I was deciding this nonjury, I would have no difficulty with it at all. I would hold for the defendant. I think all plaintiffs have shown was that *[sic]* the many, many plaintiffs have shown, namely, the opportunity of undue influence because this disposition of property was different from what the plaintiffs thought it was going to be. That doesn't make out a case of undue influence; it is an opportunity for undue influence. *There is not one scintilla of evidence in this case.* As a matter of fact, it

is all to the contrary. She got sick, but to get sick, is, I think to dispose of one's state *[sic]*—most of us will never get to dispose of our estates—many of these are disposed of while they are thinking, you know, what is going to happen to it when we are sick. I am going to be very frank with counsel. *To me there isn't even a prima facie case made out by the plaintiff.* It is quite a different thing when you have the free jury situation *I think a jury case has been made out and the only question is in my mind is whether there is a jury case both as to the confidential fiduciary relationship and the undue influence.* I have to say that because of the nature of the relationship, namely, husband and wife, that in and of itself is a fiduciary relationship and therefore it would go to the jury merely on undue influence." (Emphasis supplied.)

Preliminarily, this writer notes that there is internal inconsistency in the finding that there is not a prima facie case made and yet that the case was jury submissible. While not faced with a motion for directed verdict, it was inconsistent to find that there was not one scintilla of evidence but determine that at least two issues were for the jury. Black's Law Dictionary defines prima facie case as:

"Such as will suffice until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded.

" 'A litigating party is said to have a *prima facie* case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side. In some cases the only question to be considered is whether there is a *prima facie* case or no. Thus a grand jury are bound to find a true bill of indictment, if the evidence before them creates a *prima facie* case against the accused; and for this purpose, therefore, it is not necessary for

them to hear the evidence for the defense. Mozley & Whitley.' " (Citations omitted.)

A prima facie case of undue influence will arise from facts sufficient to show a confidential relationship (which is itself a question of fact), as the confidential relationship raises a rebuttable presumption of undue influence. *In re Wood Estate,* 374 Mich 278; 132 NW2d 35 (1965); *Totorean v Samuels,* 52 Mich App 14; 216 NW2d 429 (1974). *Cf. In re Kanable Estate,* 47 Mich App 299, 303–305; 209 NW2d 452, 454–455 (1973), which was an action to set aside a will as being a product of undue influence. The Court wrote:

"The motion for directed verdict made by the proponents required the judge to decide whether, viewing all the competent evidence and permissible inferences drawn from it in the light most favorable to the contestants, the jury could reasonably return a verdict in favor of the contestants. See *In re Wood Estate,* 374 Mich 278, 291; 132 NW2d 35, 44 (1965).

"Proper consideration of the disposition of the motion is complicated by the presumption of undue influence, which is usually proven by circumstantial evidence. That presumption shifts the burden of proof to the proponents when the contestant produces the facts which give rise to the presumption. In order to raise the presumption of undue influence the contestant must establish a confidential or fiduciary relationship between the testatrix and beneficiary under the contested will and benefits flowing to the beneficiary due to the relationship. Proponents here assert contestants failed to establish those basic facts. Proponents contend the only evidence produced by contestants showing a fiduciary or confidential relationship was the fact they had frequent visits with Mrs. Kanable and then lived with her just before her demise. Proponents cite *In re Cottrell's Estate,* 235 Mich 627; 209 NW 842 (1926), contending those facts were insufficient as a matter of law.

"*Cottrell* is distinguishable. There, the testator's

daughter had lived with the deceased for several years, and routinely carried on his business affairs. Other evidence influenced the Court in determining that those facts were insufficient to raise the presumption of undue influence, since other children had been in disfavor for several years, while the beneficiary was described as a 'dutiful daughter' who had 'practically given her life's work to her father'. The Court held the mere opportunity to exert undue influence, absent other elements, was not sufficient to raise the question. Here, there are other elements.

"The existence of a confidential relationship is a question of fact. The judge properly denied the motion for directed verdict for resolution by the jury of that question. As stated in *Taylor v Klahm,* 40 Mich App 255, 264–265; 198 NW2d 715, 720–721 (1972):

" 'The existence of a confidential relationship or fiduciary relationship is a question of fact. In *In re Wood Estate, supra,* the Court stated in part at pp 282–283, 285; 132 NW2d 39:

" ' " 'Another point in issue is whether there was a confidential or fiduciary relationship existing * * *

" ' " ' "One founded on trust or confidence reposed by one person in the integrity and fidelity of another. * * * The term is a very broad one. * * * The rule embraces both technical fiduciary relations, *and those informal relations which exist whenever one man trusts in and relies upon another."* Black's Law Dictionary (3d ed), Fiduciary or Confidential Relations, p 775.' "

* * *

" 'The principles announced in *In re Wood Estate, supra,* referred to in this Court's prior review of this case *(Taylor v Klahm,* 8 Mich App 516; 154 NW2d 529 [1967]) are pertinent to the facts of the instant case. In the case at hand, the jury could find, on the basis of the evidentiary facts, that the elderly decedent, in the last days of her long life, was in poor health and that her affairs were to a large extent taken over by defendants, in whose hands her care was placed.

" 'In view of the broad definition of the term "confidential relationship" as set forth in *In re Wood Estate, supra,* and in view of the facts concerning the close

relationship which existed between defendants and the deceased in the instant case, the trial court did not commit error in allowing the jury to determine the question as to the existence of a confidential relationship and the consequent applicability of the presumption of undue influence in regard to the conduct of either or both defendants toward decedent.' " (Emphasis in original.)

Here, there was the relationship of husband and wife plus failing health, ergo, there was enough evidence to stand as a prima facie case.

While at the time of the statement, the trial judge was traveling under the assumption that the final determination would be made by the jury (demand for which was made by plaintiffs), when, in fact, it was required to be made by him, the passage reveals a determination made early in the trial which, when compared with the final determination of the trial court, reveals a judgment of the case before it was finally submitted. In *Wayne County Prosecutor v Doerfler,* 14 Mich App 428, 440; 165 NW2d 648, 654 (1968), Judge (now Justice) FITZGERALD wrote:

"A judge is not expected to bring with him to the bench a blank mind and personality, as he becomes, by necessity, a composition of the general experiences of his life, refined and honed by his legal training and legal experience so that the desired judicial temperament will hopefully emerge. To require a blank mind is unreasonable, but to demand an impartial and clear appraisal of each new case is not. A judge may well be subconsciously prejudiced in one way towards the evidence or the parties in a case before him. It is his duty not to permit these prejudicies to override his responsibilities in providing a fair forum for the determination of controversy."

This writer is mindful that a trial judge should not make up his mind or render his decision prior

to hearing the entire case where there are questions of fact to be determined and the parties have not been given full opportunity to present all their proofs and to argue their respective positions. Even the mere implication that an impartial forum may not have been provided is inappropriate. In *People v Thomas,* 390 Mich 93, 95; 210 NW2d 776, 777 (1973), the Court wrote:

"Defendant Thomas was erroneously denied an essential element of his due process right to a hearing and of his right to the assistance of counsel when the trial judge would not allow his attorney to make a closing argument. Moreover, we also find that the trial judge erroneously disregarded his position as an impartial fact finder by finally settling his mind before defense counsel was given an opportunity to review the facts from defendant's point of view."

Here, defendant had not presented his case in chief, much less had plaintiffs been given a chance to offer rebuttal evidence and to make their closing argument. Due process is equally important in civil matters and criminal. See, for instance, *Fuentes v Shevin,* 407 US 67, 82; 92 S Ct 1983, 1995; 32 L Ed 2d 556, 571 (1972) (replevin action); *Sniadach v Family Finance Corp of Bay View,* 395 US 337; 89 S Ct 1820; 23 L Ed 2d 349 (1969) (garnishment); *Goldberg v Kelly,* 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970) (welfare benefits); *Bell v Burson,* 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971) (motor vehicle license); and, *Boddie v Connecticut,* 401 US 371, 377; 91 S Ct 780, 785; 28 L Ed 2d 113, 118 (1971) (access to courts for divorce actions by indigents), wherein the Court wrote:

"Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle

their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

This writer feels that in the case at bar, due to prejudgment, plaintiffs were not given a meaningful opportunity to be fully heard. In *Payne v Lee,* 222 Minn 269, 275; 24 NW2d 259, 263–264 (1946), the Supreme Court of Minnesota wrote:

"The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is also in violation of the due process clause of US Const, Am XIV, *Buck v Bell,* 143 Va 310; 130 SE 516; 51 ALR 855 [1925]; *Stahl v Board of Supervisors,* 187 Iowa 1342; 175 NW 772; 11 ALR 185 [1920]. In the latter case the Iowa Supreme Court said (187 Iowa 1352; 175 NW 776): 'The constitutional guaranties recognize, as a primal necessity that there be laws providing impartial tribunals for the adjudication of rights.' See 3 Willoughby, Constitution of the United States (2d ed), § 1124; 12 Am Jur, Constitutional Law, § 635."

The trial judge may well have been attempting to give direction in this difficult case, but his statement was inappropriate in that no matter how well or poorly the case was tried each party had the right to a complete hearing before a determination was made.

Additionally, certain other discrepancies militate towards reversal, as they demonstrate an understandable confusion on the part of the trial court. GCR 1963, 517.1 provides:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. It will be sufficient if the court makes brief, definite, and pertinent findings and conclusions upon the contested matters without over elaboration of detail

or particularization of facts. If an opinion or memorandum decision is filed, it will be sufficient if the findings and conclusions appear therein. The clerk shall notify the attorneys for both parties of the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions except as provided in subrule 504.2. The findings of a circuit court commissioner, to the extent that the court adopts them, shall be considered as findings of the court. Requests for findings are not necessary for purposes of review. No exception need be taken to any finding or decision. Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appeared before it."

The trial court complied with this court rule; however, this writer finds that the trial court made conclusions of *fact* which are not fully record supported.

The court found:

"There is absolutely no evidence that there was any persuasion or undue influence of any kind asserted by the attorney, Mr. Hogan. It was against his economic interest, prospectively, to remove the farm from the probate estate. The particular disposition as to terms made sense, that is, if he died first, she would get the property, an understandable arrangement. *Human vanity is such that she might well have thought she would outlive him* and then have a full and free opportunity to do with the property as she saw fit. It is a very safe guess that neither foresaw a situation where their children would be contesting over the property." (Emphasis supplied.)

Initially, the lack of undue influence on the part of the attorney is irrelevant. Secondly, while it may

be a rational conclusion that Mrs. Merkiel thought she would outlive Mr. Merkiel, the facts do not readily lead to this conclusion. While there was testimony that Mrs. Merkiel was a robust, strong-willed woman, there also was testimony that her health was failing in that she suffered from a heart condition, high blood pressure, was diabetic, and overweight. There was testimony that in the last two years of her lifetime Mrs. Merkiel was hospitalized three times for periods of approximately ten days each.

The trial judge further stated:

"The court can appreciate the displeasure and disappointment of the two children and it is not just economic. They feel hurt that their mother has not followed through on what they thought was a promise. They feel much closer to her, they believe, *than the second husband's children.*" (Emphasis supplied.)

The wording of this statement says that Mr. Merkiel had children. The evidence revealed that he had not been previously married and there is no basis to assume he had children of his own.

In all fairness to the trial judge, due to the confused nature of proofs, if any decision was to be reached, it had to, in no small measure, be founded upon inferences and deductions. Under the pressure of ever-increasing court dockets and backlogs, errors will be made, particularly in cases presented as vaguely as this one. This writer has the highest respect for the ability and integrity of the trial judge, but is also cognizant of the truth that even the most fair of individuals on rare occasions err.

The facts of this case require reversal and a remand for a new trial before another judge.

PEOPLE v WILLIAM JOHNSON

1. CRIMINAL LAW—DEFENDANT TESTIFYING—EVIDENCE—CROSS-EXAMINATION—PRIOR CRIMES—COLLATERAL FACTS.

Once a defendant admits on direct examination to a prior conviction, during cross-examination the prosecutor may not interrogate the defendant regarding the collateral facts comprising that prior conviction, where defense counsel has properly objected to such questioning.

2. CRIMINAL LAW—DEFENDANT TESTIFYING—EVIDENCE—CROSS-EXAMINATION—PRIOR CRIMES—COLLATERAL FACTS—INSTRUCTIONS TO JURY—PRESERVING QUESTION.

A cautionary instruction could not have cured the prejudicial error of admitting testimony, elicited by a prosecutor, regarding the factual basis of a defendant's prior conviction where the prosecutor, during closing arguments, stressed the specifics of defendant's prior conviction in a manner calculated to encourage the jury to conclude that if defendant had committed the prior crime, he must also have committed the charged offense; therefore, defense counsel's failure to object to the prosecutor's closing argument is not fatal to the issue on appeal.

3. CRIMINAL LAW—DEFENDANT TESTIFYING—EVIDENCE—PRIOR CRIMES—MISDEMEANORS—DISCRETION.

Admitting into evidence, over objection, testimony regarding a defendant's prior misdemeanor conviction for illegal possession of a starter pistol at defendant's trial on a charge of obtaining personal property by false pretenses was an abuse of discretion and mandates reversal of defendant's conviction because the misdemeanor conviction is entirely dissimilar from the false pretenses charge.

4. CRIMINAL LAW—DEFENSE—ALIBI—INSTRUCTIONS TO JURY—REASONABLE DOUBT.

An instruction to the jury regarding a defendant's alibi defense

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 21 Am Jur 2d, Criminal Law § 585.
[2] 53 Am Jur, Trial §§ 135, 136, 637.
[4] 21 Am Jur 2d, Criminal Law §§ 136, 137.

which does not instruct that if any reasonable doubt exists as to defendant's presence at the scene of the crime then the defendant is entitled to a verdict of acquittal, constitutes reversible error.

Appeal from Kent, Stuart Hoffius, J. Submitted Division 3 June 3, 1974, at Grand Rapids. (Docket No. 16969.) Decided August 13, 1974.

William H. Johnson was convicted of obtaining by false pretenses personal property valued at more than $100. Defendant appeals. Reversed and remanded for new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, *Donald A. Johnston, III,* Chief Appellate Attorney, and *David A. Dodge,* Assistant Appellate Attorney, for the people.

Joseph F. Deeb, Jr., for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. Defendant William Henry Johnson was convicted by a jury on January 3, 1973, of obtaining by false pretenses personal property valued at more than $100. MCLA 750.218; MSA 28.415. He was sentenced on February 15, 1973, to a prison term of from two to ten years and now appeals as of right.

Since defendant's allegations of error relate to the trial court's evidentiary rulings and instructions to the jury, a detailed recitation of the facts of this case is unnecessary to its disposition, and

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

thus only those facts pertinent to our discussion of the issues will be presented.

Defendant contends that the trial court committed reversible error when it allowed the assistant prosecutor, over defense counsel's objection, to inquire into the facts comprising defendant's prior conviction of uttering and publishing.

On direct examination by his attorney, defendant admitted to a 1967 conviction of uttering and publishing. During cross-examination, the trial court overruled defense counsel's objection and allowed the assistant prosecutor to question defendant extensively concerning the factual basis for the 1967 conviction. During closing argument, the assistant prosecutor, in referring to the details of this prior conviction, stated:

> "Another offense that involves misrepresenting facts, misrepresenting reality, holding out the check to be other than it was, namely something which would entitle him to payment. It was a flagrant forgery, that's all, and although he said the other checks involved were made out to him, those were after the first one, he did not recall what the name was on the first check."

Plaintiff asserts impeachment of defendant's credibility as an adequate ground for the admission of defendant's cross-examination testimony. We disagree, for it is well established that once a defendant admits on direct examination to a prior conviction, during cross-examination the prosecutor may not interrogate the defendant regarding the collateral facts comprising that prior conviction, where defense counsel has properly objected to such questioning. See *People v Falkner,* 389 Mich 682; 209 NW2d 193 (1973); and *People v Peabody,* 37 Mich App 87; 194 NW2d 532 (1971).

Nor are we able to conclude that the erroneous

admission of this testimony regarding the factual basis of defendant's prior conviction was harmless error. Rather, we feel it was prejudicial to the defendant. As we pointed out earlier, the assistant prosecutor during closing argument stressed the specifics of defendant's prior conviction in a manner calculated to encourage the jury to conclude that if defendant had defrauded someone in 1967 he must have also defrauded this complainant in 1972. It is true that defense counsel did not object to this part of the prosecutor's closing argument. However, we are of the opinion that a cautionary instruction could not have cured the error and, therefore, defense counsel's failure to object is not fatal to this appeal. *People v Majette,* 39 Mich App 35; 197 NW2d 78 (1972); *People v Humphreys,* 24 Mich App 411; 180 NW2d 328 (1970).

Defendant's second allegation of error is based upon the trial court's admission of a misdemeanor conviction for the purposes of impeachment. Upon cross-examination, defendant admitted a prior conviction for illegal possession of a starter pistol. Although defense counsel objected to the use of this conviction on the ground that it was irrelevant, the trial court permitted the inquiry. Defendant argues that the trial court committed reversible error. We agree.

In *People v Osteen,* 46 Mich App 409, 419–420; 208 NW2d 198 (1973), our Court, when dealing with this precise issue, stated:

"The prosecutor has no 'right' to stand before the jury and recite defendant's conviction record. When admission is challenged he must offer reasonable grounds upon which the trial judge can justify his exercise of discretion in favor of admission. The dissimilarity between an alleged conviction and charge was held by the Court in *People v Simard,* 314 Mich 624; 23 NW2d 106 (1946), to justify exclusion:

"' * * * The prosecution thus tried to show that defendant was guilty of a misdemeanor that *had not the remotest connection with the crime charged* and was *in no way similar in character.* * * * 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. * * * '

"This proposition is no less applicable to defendant's prior convictions which are entirely dissimilar from the sale of heroin charge." See also *People v Farrar,* 36 Mich App 294; 193 NW2d 363 (1971), quoted with approval in *Osteen, supra.*

The admission of defendant's misdemeanor conviction in the instant case is inconsistent with the guidelines set forth in *Osteen* and *Farrar, supra.* Defendant's misdemeanor conviction is entirely dissimilar to the false pretenses charge. The trial court abused its discretion in admitting the challenged misdemeanor, and such abuse of discretion mandates reversal of defendant's conviction.

Defendant's final allegation of error relates to the question of defendant's alleged alibi defense. Defendant claims that our alibi statute[1] is unconstitutional and that said statute does not apply to cases in which only the defendant himself proposes to give alibi testimony, as opposed to cases in which the defendant intends to call alibi witnesses to support his alibi defense. However, it is unnecessary for us to reach either the issues of the constitutionality[2] of the above statute or the ques-

[1] MCLA 768.20; MSA 28.1043

[2] Our Legislature has recently amended the provisions of our alibi statute, here challenged by defendant, to eliminate any questions as to their constitutionality. 1974 PA 63, effective May 1, 1974, now provides for reciprocal discovery. Therefore, it would serve no useful purpose for us to now consider the constitutionality of the former statute, where such consideration is not necessary to dispose of the present case.

tion of its application to the instant case, since the record herein reveals that the trial court's instruction on this subject was reversibly erroneous.

In its charge, the trial court *sua sponte* instructed the jury on the subject of alibi as follows:

"Now, an alibi is a legitimate defense, and if it is true that the defendant was not at the place where the crime was committed, that should and would be a perfect defense, but in considering that type of defense it is necessary for you to take into consideration the facts, and it is your duty as jurors to examine carefully the evidence on that point. * * * If it is established that the defendant was not in a position so he could have committed the crime or could not have been there, of course, that would be an absolute defense * * * ."

In *People v Erb,* 48 Mich App 622, 630; 211 NW2d 51 (1973), this Court enunciated the standard to be followed by trial courts when instructing on the question of alibi when we said:

"An instruction to the jury concerning the defense of alibi must clearly explain that this defense offers two avenues of relief for the defendant. First, if the alibi is established, a perfect defense has been shown and the defendant should accordingly be acquitted. Alternatively and, perhaps, more importantly, the *instruction must clearly indicate that if any reasonable doubt exists as to the presence of the defendant at the scene of the crime then, also, the defendant should be* acquitted. *People v Virgil Brown,* 15 Mich App 600, 605–606; 167 NW2d 107, 110 (1969); *People v Loudenslager,* 327 Mich 718, 726; 42 NW2d 834, 837 (1950)." (Emphasis supplied.) See also *People v Resh,* 107 Mich 251; 65 NW 99 (1895).

It is quite clear that the trial court's *sua sponte* instruction in this case did not comply with the standard set forth above. While the trial court did instruct the jury that if defendant's alibi defense

were established it would constitute an absolute defense to the crime charged, it did not instruct in the alternative that if any reasonable doubt existed as to defendant's presence at the scene of the crime, then defendant was entitled to a verdict of acquittal. This omission constitutes reversible error. See *People v McShan,* 53 Mich App 407; 219 NW2d 792 (1974).

We have closely examined the record and briefs and have found no merit in defendant's remaining assignment of error.

Reversed and remanded for a new trial.

All concurred.

PEOPLE *ex rel* DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES v MURRAY

1. NAVIGABLE WATERS—SUBMERGED LAND—CONVEYANCES—PATENTS.

   Submerged land on the water side of a meander line was not conveyed by a government patent because the government did not convey patents to entire sections where the section was cut off by navigable water, but rather conveyed only fractional parts of a section up to the meander line or at most to the water's edge.

2. NAVIGABLE WATERS—SUBMERGED LAND—STATES—PLATS—TITLE CLAIM—ESTOPPEL.

   The state is not estopped from claiming title to submerged land which a defendant planned to fill merely because the state had approved a subdivision plat which contained part of the land in question where the only reliance on the approved plat had been by the defendant to the extent of $2,500 which he paid for the plat, and where the relief sought by the state, to prevent defendant from filling the land, is consistent with the state's right to hold the land in trust for the public.

3. NAVIGABLE WATERS—SUBMERGED LAND—STATES—CLAIM—STATUTES—40-YEAR MARKETABLE TITLE.

   The state was not precluded from claiming title to submerged land despite a claim by a defendant that he and his heirs had held continuous title to the land for 40 years because provisions of the 40-year marketable title statute do not apply against the state, and title was in the state because title to lands beneath navigable water passed to the state upon admission to the Union (MCLA 565.104).

Appeal from St. Clair, Halford I. Streeter, J. Submitted Division 2 May 13, 1974, at Lansing. (Docket No. 17089.) Decided August 13, 1974.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 56 Am Jur, Waters §§ 462, 463.

[2, 3] 56 Am Jur, Waters §§ 453, 456, 469.

Complaint by the people of the State of Michigan on the relation of A. Gene Gazlay, Director of the Michigan Department of Natural Resources, against Peter A. Murray to enjoin the defendant from filling a parcel of submerged land and to require removal of two fences. Judgment for plaintiff. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Jerome Maslowski* and *Clive D. Gemmill,* Assistants Attorney General, for the people.

William Murray, for defendant.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

T. M. BURNS, J. This is an action instituted by the Department of Natural Resources in an attempt to enjoin the defendant, Peter Murray, from filling a parcel of submerged land located in or contiguous to Mallard Bay in St. Clair County, Michigan. Plaintiff also seeks an order requiring the defendant to remove two wooden fences that he has erected on the boundaries of the land in question.

Defendant asserts that the land in question is his property, and attempts to trace the title back to a land patent granted by President Benjamin Harrison. Conversely, plaintiff argues that the land is submerged below navigable water, is on the water side of the high-water mark, and that the land was not included in the patent. Plaintiff, therefore, contends that the land belongs to the people of the State of Michigan. Plaintiff also

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

argues that even if the land was included in the patent, the patent does not operate to take title to the land away from the people because the patent was not granted until after Michigan became a state. Finally plaintiff argues that defendant has not successfully traced his title from the patent.

The case went to trial on January 5 and February 9, 1973, in the St. Clair Circuit Court. The trial court, sitting without a jury, found that the patent covered neither Mallard Bay nor the land claimed by the defendant and that the land in question has always been submerged beneath navigable water and below the high-water mark. The trial court thus concluded that title to the land in question has never vested in any individual. The defendant appeals this decision as of right.

1. *Does the State of Michigan have title to all submerged land under a bay if the water is navigable and a United States patent to the land was not granted until after Michigan had already been admitted to statehood?*

The lower court made a finding of fact that the land in question was navigable. Since there was sufficient evidence presented to support that finding, we do not find the trial court's holding to be clearly erroneous, and proceed on the basis that the land in question was navigable.

Thus, unless the land in question was transferred by the Federal government by a patent prior to Michigan's admission to the Union, the land in question belongs to the people of the state, *Collins v Gerhardt,* 237 Mich 38, 46; 211 NW 115 (1926); *State v Venice of America Land Co,* 160 Mich 680, 701; 125 NW 770 (1910). However, if the land was patented by the United States to a private person before Michigan became a state, then the United States would have had no title to the property to

convey upon admission of Michigan to statehood and the title would thus remain in the patentee despite the fact that the patent conveyed lands under navigable water. See *Klais v Danowski,* 373 Mich 262, 271–272; 129 NW2d 414 (1964); *People ex rel Director of Conservation v Broedell,* 365 Mich 201, 206; 112 NW2d 517 (1961).

We find it unnecessary to consider the question of whether the patent was granted before or after Michigan became a state. Nor do we feel compelled to determine whether the rule that the patent relates back to the date of the original settlement applies to the case at bar. We need not decide these questions since we are of the opinion that the land in question was not covered by the land granted by the patent from the United States.

Defendant apparently traces his title back to a sale made by the United States of 477 acres of land in section 10, township 2, range 16 on October 29, 1818, to five individuals. The records of the United States Department of Interior, Bureau of Land Management, indicate that this land was patented on May 9, 1889. However, one of defendant's exhibits was a land patent from President Benjamin Harrison dated November 9, 1891, granting this land to the same five people. The patent states:

> "[T]hat full payment has been made for the South Fractional half of Section ten in Township two North of Range Sixteen East of the Detroit District, (containing one hundred nineteen acres and thirty six hundredths of an acre. *[sic]* of the Lands directed to be sold at Detroit, Michigan by the Act of Congress, entitled 'An Act providing for the sale of the Lands of the United States, in the Territory northwest of the Ohio, and above the mouth of Kentucky River,' and of the acts amendatory of the same."

One Alfred McCann, of the Department of Natural Resources, Engineering Division, and an expert surveyor, testified on behalf of the plaintiff that the property in question was not part of the property granted in the patent. After indicating that he had surveyed the land in question and studied the relevant records, he testified that according to the patent, the "South Fractional Half of Section ten" conveyed by the patent is 119.36 acres, while in the southern half of a true section, which would be one square mile, there would be 320 acres. He further testified that the acreage in the southern half of section 10 up to the meander line is only 119 acres and that all of the land in the 119 acres is north of the land in dispute here. Mr. McCann's testimony thus implied that "South Fractional half" does not refer to the southernmost portion of section 10, but rather that since section 10 is cut off by the navigable water, "South Fractional half" refers only to the part of the southern half north of the water. Therefore, the patent, which conveyed about the same amount of land, had no intent to convey any land that was part of the water.

Based primarily on Mr. McCann's testimony and the exhibits presented to it, the lower court found that the patent did not cover the bay, any part of the river, or the land claimed by defendant. The court thus held that title to the land had never vested in any individual.

We agree with the lower court's conclusion that the land in question was not covered by the patent. We find support for our interpretation in *Hilt v Weber,* 252 Mich 198, 204–205; 233 NW 159 (1930), where the Court stated that "A patent from the government was intended to carry title to the water's edge". The Court, quoting from *St Paul &*

P R Co v Schurmeier, 74 US (7 Wall) 272, 286–287; 19 L Ed 74, 78 (1869), further stated:

> "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."

Thus, it appears that when a section ran into navigable water, a "fractional portion" of the section up to the navigable water was conveyed. Assuming that there has been no great change in the surface of the land covered by water, the government would not normally convey underwater land by a patent. See also *Wilson v Hoffman,* 70 Mich 552, 557; 38 NW 558 (1888).

Therefore, since the government did not convey patents to entire sections where the section was cut off by navigable water, but rather conveyed only fractional parts of a section up to the meander line or at most to the water's edge, and since all of defendant's property was on the water side of the meander line, we conclude that the trial court's finding that the land in question was not conveyed by the patent was proper. It follows that the State of Michigan obtained title to this navigable water when it was admitted to statehood.

2. *Is the state estopped from claiming title to the land in question because it approved Supervisor's Plat Number 9 which contained part of the land in question?*

Relying on *Oliphant v Frazho,* 381 Mich 630; 167 NW2d 280 (1969), defendant contends that the state is estopped from claiming title to the land in question.

In *Oliphant,* the state and Mr. Nelson jointly executed and recorded a plat of Ardmore Park, a 90-lot subdivision. The plat was approved by the Michigan Auditor General, and the state land officer later conveyed all of the 90 lots in the subdivision to Nelson by deed. Relying on these conveyances, Nelson and his successors built homes on the lots and installed sewers, water mains, and paved streets.

Subsequently, the state, realizing that 40 of the lots and portions of several other lots were on land that had been navigable water which was filled in, sued claiming that it held the land lakeward of the patent line in trust for the public. The Supreme Court applied the doctrine of estoppel against the state and held that the state could not assert any claim to the filled land after 17 years of acquiescence.

We are of the opinion that the case at bar can be distinguished from *Oliphant* in several respects. First, the circumstances for applying the estoppel doctrine were much more compelling in the *Oliphant* case than they are in the present case. In the case at bar, the only reliance upon the supervisor's plat has been by defendant to the extent of $2,500 which he paid for the plat. In *Oliphant,* homes were built, sewers were dug, and streets were paved.

Furthermore, the state's involvement in *Oliphant* was much greater than in the case at bar. In the present case, the State Auditor General merely approved the supervisor's plat which had the land in question on it. In *Oliphant,* the Auditor General not only approved the plat, but himself joined in the platting of all the lots and actually conveyed these plats to Nelson by deed. The Supreme Court made it clear that "all" of

these facts combined to wipe out any notice that the subsequent land owners may have had. 381 Mich at 639.

Finally, the relief sought by the state in *Oliphant* was different from that sought in this case. In *Oliphant,* the state, while arguing that it had the right to hold the land in trust for the public, was simply seeking money damages from the owners. This demand for money damages was inconsistent with the state's argument that the land would be held in trust. In the case at bar, however, the state is seeking to prevent defendant from filling in the land. This remedy is consistent with holding the land in public trust.

We, therefore, conclude that *Oliphant* does not control or apply to the case at bar, and that the state was not estopped from claiming title to the land in question.

3. *Is plaintiff precluded from claiming title to the land in question because the defendant and his heirs have held continuous title to the land for over 40 years?*

As we indicated in our earlier discussion, the patent involved in this case did not transfer title to the land in question. Therefore, the title to this land passed to the State of Michigan upon its admission to the Union.

MCLA 565.104; MSA 26.1274 provides in pertinent part:

> "This act shall not * * * be deemed to affect any right, title or interest in any land owned by the state of Michigan, or by any department, commission or political subdivision thereof."

The 40-year statute thus does not apply against the state, and defendant cannot claim title to the land in question under this statute.

Affirmed.

All concurred.

PEOPLE v GORDON

1. SEARCHES AND SEIZURES—PROBABLE CAUSE.

Probable cause to search a defendant's automobile existed where the police had received a description of the car as having been involved in a crime, the police stopped the car and after questioning, arrested the driver.

2. SEARCHES AND SEIZURES—SEARCH WITHOUT WARRANT—DELAYED SEARCH—REASONABLENESS.

A search without warrant of a defendant's automobile, conducted at the police station eight hours after the arrest of the defendant and impoundment of the automobile, was reasonable where there was probable cause to search the car and the defendant remained in custody.

3. SEARCHES AND SEIZURES—SEARCH WITHOUT WARRANT—REASONABLENESS—CONSTITUTIONAL LAW.

The word "immediate" is not synonymous with "instantly", and in cases where a statute or an insurance policy has required immediate action the Supreme Court has consistently held that only action within a reasonable time is required; therefore, a search without warrant of a defendant's automobile eight hours after the arrest of the defendant and the impoundment of the automobile was reasonable and immediate and did not violate the defendant's Fourth Amendment rights against unreasonable searches and seizures.

Appeal from Tuscola, James P. Churchill, J. Submitted Division 2 May 15, 1974, at Lansing. (Docket No. 17101.) Decided August 13, 1974.

William G. Gordon was convicted of carrying a concealed weapon without a license. Defendant appeals. Affirmed.

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 5 Am Jur 2d, Arrest §§ 26, 28.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *George Holmes,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Howard C. Marderosian,* Acting Director, of counsel), for the people.

Forrest T. Walpole, for defendant.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

CARLAND, J. The defendant, William Glen Gordon, was convicted in a non-jury trial of the offense of carrying a concealed weapon without a license contrary to the provisions of MCLA 750.227; MSA 28.424. The defendant was sentenced to a prison term of three years and four months to five years. He appeals as of right.

The facts are not in dispute. On the evening of September 14, 1972, two officers of the Tuscola county sheriff's department while on patrol received a radio message reporting an alleged larceny of an undetermined amount of money from a Gulf gas station located in said county. The message indicated that the officers should be on the lookout for a beige or white 1965 or 1966 Chevrolet bearing license number WYZ-201. At approximately 1:30 a.m., a vehicle was spotted near the county border matching the description of the vehicle mentioned in the radio report. The officers, after making this observation, proceeded to stop the automobile. At the time the vehicle was stopped it was being driven by the defendant. The defendant was ordered from the car and subjected to a pat-down search for weapons. No weapons

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

were thus discovered. Following questioning by the officers, the defendant and his passenger were arrested and taken to the county jail. No search of the car was conducted at the scene of the arrest and about 2 a.m. it was towed to the sheriff's department where it was secured.

The defendant's car was not searched upon its arrival at the jail nor during the remainder of the night. Although no attempt was made to secure a search warrant, a thorough search of the car was carried out by the officers beginning at 10 a.m., or some eight hours after its arrival at the jail.

During the course of the warrantless search, both a .22-caliber and .38-caliber revolver were discovered and seized. A motion to suppress the introduction of the two weapons so seized was denied. At the trial the .22-caliber revolver was received in evidence over objection by defense counsel.

In the instant case we are confronted with the precise question which the Court faced in *Chambers v Maroney,* 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970). Here, as there, the question in the case concerns the admissibility of evidence seized from an automobile which the defendant was operating at the time of his arrest, after the automobile was taken to a police station and was there thoroughly searched without a warrant. Were the defendant's Fourth Amendment rights thereby violated?

To construe *Chambers, supra,* as did Judge LEVIN in *People v Weaver,* 35 Mich App 504; 192 NW2d 572 (1971), in order to support a finding that a two-day delay in conducting a search of defendant's car after impoundment by the police made the search unreasonable seems to misconstrue the plain language of Mr. Justice White

writing for the majority. On pages 51–52 we find the following language:

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." 399 US 51–52; 90 S Ct 1981; 26 L Ed 2d 428.

We hold that probable cause to search existed following the arrest of the defendant.

Nowhere in the *Chambers* opinion do we learn for what length of time the car was held at the police station prior to search. If it was searched immediately upon arrival at the police station, the search was reasonable. However, the case does not hold that a reasonable delay in searching violates the Fourth Amendment rights of the defendant. Indeed Mr. Justice Harlan in his dissenting opinion seems to so construe the majority holding with the following language on page 62:

"The Court holds that those steps include making a warrantless search of the entire vehicle on the highway —a conclusion reached by the Court in *Carroll;*[1] without discussion—and indeed appears to go further and to condone the removal of the car to the police station for a warrantless search there at the convenience of the police." 399 US 62; 90 S Ct 1987; 26 L Ed 2d 434–435.

[1] *Carroll v United States,* 267 US 132, 45 S Ct 280; 69 L Ed 543; 39 ALR 790 (1925).

It would seem to make small, if any, difference to a jailed defendant whether a warrantless search is conducted some eight hours after the impoundment of the car or whether it is searched after the passage of time necessary to prepare an application and obtain a warrant through the approval of a magistrate. The Court in *Chambers* continues further on page 52:

"On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." 399 US 52; 90 S Ct 1981; 26 L Ed 2d 428–429.

Assuming *arguendo* that immediacy is mandated where a car has been taken to a police station under circumstances as they appear in the instant case, does a warrantless search thereof by the police some eight hours thereafter meet the required mandate? Our answer is in the affirmative. The word "immediate" is not and cannot be construed to be synonymous with the word "instantly". In those cases where statutes or insurance policies have required immediate action upon the happening of certain events our Supreme Court has consistently held that only action within a reasonable time is required.

"Unquestionably the requirement that notice of default be given 'immediately' does not in the connection used mean 'without any time intervening' or 'instantly' as the lexicographers define the word; but it being

plainly the purpose and intent of such provision that prompt notice should be conveyed to the surety to enable it to take all then available steps for its protection, a fair construction of the condition precedent to that end is that the parties intended and understood it to mean the notice should be timely or promptly given, without unnecessary delay and with reasonable diligence." *Berkshire Land Co v Moran,* 210 Mich 77, 85–86; 177 NW 205 (1920). See also *Oakland Motor Co v American Fidelity Co,* 190 Mich 74; 155 NW 729 (1916), and *Red Star Motor Drivers Association v City of Detroit,* 244 Mich 480; 221 NW 622 (1928).

Under this realistic construction of the word "immediate" the words of Judge O'HARA in his dissenting opinion in *Weaver, supra,* seem significantly appropriate when on pages 520–521 he spoke as follows:

"To hold that detectives, patrol car drivers, clerk typists, and impoundment personnel must all drop everything each is doing at the time of one arrest and concentrate upon the search of one car to determine ownership instanter, is utterly unrealistic."

If immediacy is required, we hold the search here involved was within a reasonable time and was therefore immediate. The search did not violate the Fourth Amendment rights of the defendant and the revolver was properly received in evidence.

We affirm.

All concurred.

PEOPLE v PRINCE

1. CRIMINAL LAW—EVIDENCE—PHOTOGRAPHIC IDENTIFICATION—CONSTITUTIONAL LAW—DUE PROCESS.

A claim that a photographic identification of a defendant was so suggestive as to amount to a denial of due process of law must be determined in light of the totality of the surrounding circumstances.

2. CRIMINAL LAW—EVIDENCE—PHOTOGRAPHIC IDENTIFICATION—UNNECESSARY SUGGESTIONS.

Display of a photograph of a defendant to the complainant for purposes of identification was unnecessarily suggestive where the complainant was a ten-year-old girl who had previously identified the defendant from a group of photographs and at the time of the second identification only a single photograph was shown to the girl, she was told that it was a later photograph of the same man she had earlier identified, and was asked if she was still sure of the identification.

3. CRIMINAL LAW—EVIDENCE—PHOTOGRAPHIC IDENTIFICATION—FAIRNESS OF PROCEDURE.

The test of the fairness of a photographic identification procedure is the degree of suggestion inherent in the manner in which the suspect's photograph is presented to the witness.

Appeal from Eaton, Richard Robinson, J. Submitted Division 2 April 3, 1974, at Lansing. (Docket No. 17107.) Decided August 12, 1974.

William B. Prince was convicted of indecent exposure. Defendant appeals. Reversed and defendant discharged.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *David L. Smith,*

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 21 Am Jur 2d, Criminal Law §§ 368, 369.

Prosecuting Attorney, and *Chester S. Sugierski, Jr.,* Assistant Prosecuting Attorney, for the people.

Sinas, Dramis, Brake, Turner, Boughton & McIntyre, P. C., for defendant.

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

V. J. BRENNAN, J. Defendant, William B. Prince, was charged with the crime of indecent exposure (MCLA 750.335[a]; MSA 28.567[1]) and tried without a jury before Judge Richard Robinson of the Eaton County Circuit Court. He was found guilty of the above offense and placed on probation for a period of two years with the first 30 days to be spent in the Eaton County Jail. Defendant appeals as of right.

On April 19, 1972, a man seated in an automobile exposed himself to a ten-year-old girl as she was returning home from school. The school authorities and the police were informed of the incident and the next day the girl was questioned by the police at her school. A photographic display was conducted and the girl picked out a picture of defendant as the person she thought was the man who exposed himself to her. The picture of defendant which the girl selected was several years old and taken at a time when defendant had extremely short hair. A few days later another, more recent, photograph of defendant was shown to the girl by the investigating officer. This photograph showed defendant with longer hair. The officer showed the picture to the girl and explained that it was a later picture of the same man she had earlier identified. She was then asked whether she was still sure this was the same man. She said she thought so.

During the preliminary examination defense counsel questioned the girl about the second photograph. In response to these questions the girl stated that the fact that she knew this was a different picture of the man she had selected earlier helped her to identify him this second time as the man who had been in the car. She also stated that seeing the second picture aided her in making her in-court identification.

Before trial defendant filed a motion to suppress this identification testimony alleging that it was procured through unnecessarily suggestive pretrial identification procedures and that the second photographic identification was obtained in violation of his right to have counsel present. The trial judge denied defendant's motion and at trial the girl was permitted to make an in-court identification and to recount the events surrounding her initial photographic identification. Defendant's conviction resulted.

On this appeal defendant contends that the lower court erred in refusing to suppress the girl's identification testimony. In support of this contention defendant presents two issues for our consideration. We find it necessary to reach only one.

Defendant argues that the second photographic identification was so suggestive as to amount to a denial of due process of law. A claim such as this is one which must be determined in light of the totality of the surrounding circumstances. *Simmons v United States,* 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968). See *Stovall v Denno,* 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). Judged in this manner we find that the second photographic display was, as defendant argues, so unnecessarily suggestive "as to give rise to a very substantial likelihood of irreparable misidentifica-

tion". *Simmons v United States, supra,* p 384. Indeed, the procedure was so unduly prejudicial as to fatally taint the entire conviction.

The instant case was one where the guilt or innocence of defendant hinged upon the identification testimony of a ten-year-old child who had never before seen the man who exposed himself to her. Her ability to identify the man, therefore, was limited solely to her recollection of his features from this one brief encounter. Based on this she selected defendant's picture from the group she was first shown. The second photographic identification was made a short time later. At this time a single photograph was shown to the girl by a police officer at a time when no other person was present. The officer explained to the girl that this was another picture of the man she had earlier identified and then asked her whether she was still sure it was the man who exposed himself to her.

The inherent suggestiveness of this procedure is readily apparent. Not only does it serve to impress upon the identifying witness's mind that this is the same person earlier identified but also tends to minimize the effect of any doubt the identifying witness may entertain after viewing the second photograph by relating it to the former identification. Furthermore, the procedure employed also tends to suggest the response desired by the investigating officer. The importance of preserving the integrity of identification procedures was recently emphasized by our Supreme Court in *People v Lee,* 391 Mich 618, 626; 218 NW2d 655 (1974). The Court there said:

> "[I]t is important that there be safeguards to protect the innocent from misidentification. The showup procedures must minimize suggestiveness for viewers whenever possible.

"The fairness of the identification procedure must be evaluated in the light of the totality of the circumstances. The test is the degree of suggestion inherent in the manner in which the suspect's photograph is presented to the witness for identification."

Whether the girl would have identified this photograph of defendant if a correct procedure had been followed is impossible for us now to say. What we are able to say, though, is that the actual effect of the procedure employed in the case at bar is not something about which we can only guess. The girl testified that the officer's statement helped her to identify this later picture of defendant and that seeing the second picture aided her in making her in-court identification. These circumstances, considered together with the small amount of incriminating evidence presented in this case and with the fact that the prosecutor's case hinged upon the girl's identification of defendant, compel us to reverse this defendant's conviction and order him discharged. Defendant's right to a fair trial was seriously impaired by the procedure employed in this case and we are not persuaded that it did not affect and would not continue to affect defendant's ability to properly conduct a defense.

Conviction reversed; defendant discharged.

All concurred.

PEOPLE v ROBINSON

1. CRIMINAL LAW—DEFENSES—ALIBI—NOTICE—JUDICIAL DISCRETION—STATUTES.

   A defendant wishing to claim a defense of alibi is required to file a written notice of the defense with the prosecuting attorney; in the event of failure to file such a notice, the court in its discretion may exclude evidence offered by the defendant for the purpose of establishing an alibi (MCLA 768.20, 768.21).

2. CRIMINAL LAW—DEFENSES—ALIBI—NOTICE—PREJUDICE—JUDICIAL DISCRETION.

   A simple declaration that the prosecution would be prejudiced was not sufficient ground for excluding a defendant's proof of alibi where the statutory notice of alibi defense had not been given but the prosecutor had been notified orally one week before trial, knew the identity of the witnesses the defense wished to call, and the identified witnesses were lodged in the county jail and therefore were available for questioning by the prosecutor (MCLA 768.20, 768.21).

Appeal from Newaygo, Harold Van Domelen, J. Submitted Division 3 June 4, 1974, at Grand Rapids. (Docket No. 17165.) Decided August 13, 1974. Leave to appeal denied, 393 Mich —.

Douglas Robinson was convicted of breaking and entering. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Douglas A. Springstead,* Prosecuting Attorney, and *Richard J. Farabaugh,* Assistant Prosecuting Attorney, for the people.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 137.

Terrance R. Thomas, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. After a jury trial the defendant was convicted of breaking and entering. MCLA 750.110; MSA 28.305. He was sentenced to a term in prison of from two to ten years. Defendant now appeals and we reverse and remand for a new trial.

The defendant's defense was that he was not in Newaygo County at the time the offense was committed but was in the City of Grand Rapids. On the day of trial, prior to drawing the jury, defendant moved for permission to call two alibi witnesses. The following then ensued.

"*Mr. Thomas:* Your Honor, if it please the court. I have a preliminary motion to make in this regard. I had requested and advised the prosecutor that I wished to call two witnesses as alibi witnesses. One William Cobb, and one Lonnie Cobb who are currently in custody with the Newaygo County Sheriff's Department as alibi witnesses on behalf of the defendant. I admit as the attorney for the defendant that I did not serve the four-day notice as required by statute, and as a result of the same that prosecutor has denied my use of those witnesses. I wish to make a motion that they be allowed to testify irregardless of the four-day alibi rule.

"*Mr. Farabaugh:* May it please the court. The matter was brought to our attention, I believe it was the latter part of last week, and at that time there was *[sic]* four names mentioned as to possible alibi witnesses, and these names were not formally submitted to our office, and we would object to the use of any of these alibi witnesses.

"*The Court:* Will this prejudice you in any way, this lack of notice?

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

"*Mr. Farabaugh:* We have had no opportunity to speak to these witnesses, and, ah, investigate the alibi, and we feel it would, your honor.

"*The Court:* Very well. The court in its discretion hereby denies your motion for the reason that there has been no formal notice served upon the prosecutor as required by statute in the case of alibi witnesses, and, therefore, they have had no opportunity to investigate these alibi witnesses, and it would be prejudicial to their case in order to allow these witnesses to testify. Therefore, your motion is denied."

Defendant contends that a week before trial his counsel advised the prosecutor that there were two alibi witnesses, naming them, that he wished to call to establish that the defendant was in Grand Rapids at the time of the alleged offense. Defendant further contends that he was informed by the prosecutor that these two men were wanted by his office on an armed robbery charge and invited defense counsel to produce them as their whereabouts was unknown. Defendant argues that when his counsel observed the two young men in the courthouse in the custody of the sheriff on the date of trial, he then made the above motion. The prosecutor admits that about a week before trial defendant's attorney verbally informed him that there was a possibility of an alibi defense and the named parties were mentioned as alibi witnesses.

MCLA 768.20; MSA 28.1043 requires a defendant wishing to claim alibi to file a written notice of alibi with the prosecuting attorney, setting out the claim of alibi, the location the defendant claims to have been at the time of the offense and the names of the witnesses to be called in support of the alibi. MCLA 768.21; MSA 28.1044 provides:

"In the event of the failure of a defendant to file the written notice prescribed in the preceding section, the

court may in its discretion exclude evidence offered by such defendant for the purpose of establishing an alibi or the insanity of such defendant as set forth in the preceding section."

In *People v McFadden,* 347 Mich 357, 360; 79 NW2d 869 (1956), the Court stated:

"We think it apparent that the requirement of the code of criminal procedure with reference to giving notice of the defense of an alibi in certain cases was enacted for the benefit and protection of the public."

The soundness of this statement cannot be denied. It seems clear that any exercise of the discretion in allowing or disallowing alibi evidence, where there has been a failure to comply with the alibi statute, should be made with this in mind. But judicial discretion should be exercised. A simple declaration that the prosecution would be prejudiced would not serve as sufficient ground for a denial of proof of alibi where one week's oral notice and identity of the two alibi witnesses was admitted by the prosecutor. Furthermore, the identified witnesses were lodged in the Newaygo County jail sometime prior to the trial date and were thereafter available for questioning by the prosecutor. While the record is silent as to whether the prosecutor knew the place the defendant claimed to have been at the time of the alleged offense, it is clear that a question to the defendant's counsel or to the identified witnesses would have elicited this information. These circumstances indicate beyond a reasonable doubt that the people's case could not have been prejudiced but for the prosecutor's failure to investigate the information at hand and if need be move for an adjournment for that purpose. Accordingly, we find that the denial of defendant's request to call

two identified alibi witnesses to be a clear abuse of discretion. In view of our disposition of the above issue we decline to consider the question of the constitutionality of the Michigan alibi statute in light of *Wardius v Oregon,* 412 US 470; 93 S Ct 2208; 37 L Ed 2d 82 (1973).

Reversed and remanded.

All concurred.

BRYCE v JONES

1. DEEDS—MORTGAGES—EQUITABLE MORTGAGES—EVIDENCE.

A party asserting that a deed absolute is in reality an equitable mortgage must establish that claim by clear and convincing proof that a mortgage was intended by the parties at the time the deed was executed.

2. DEEDS—MORTGAGES—EQUITABLE MORTGAGES—EVIDENCE.

A deed from the titleholder should not be construed as an equitable mortgage where there was no proof offered which would support a finding that the titleholder intended the deed to be other than an absolute transfer of her property interest.

3. DEEDS—MORTGAGES—EQUITABLE MORTGAGES—EVIDENCE.

The belief on the part of one party that a deed was to operate as a mortgage is not sufficient to change the nature of the written instrument since the necessary indicia of proof is that both parties intended the deed to have that effect; absent such proof, there can be no clear showing that the deed should be treated as other than a deed.

4. PRINCIPAL AND AGENT—SALE OF PROPERTY—POWER OF AGENT—APPARENT AUTHORITY—EVIDENCE.

A person did not act as an agent for plaintiffs in the selling of property where there is no proof that plaintiffs ever empowered that person with the right to sell the property, and the defendants' reliance upon the apparent authority which arose out of the fact that the person collected land contract payments for

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 23 Am Jur 2d, Deeds §§ 8, 12.
55 Am Jur 2d, Mortgages §§ 11, 12, 39.

[4] 3 Am Jur 2d, Agency §§ 73–76.
Implied or apparent authority of agent to purchase or order goods or merchandise. 55 ALR2d 6.

[5] 3 Am Jur 2d, Agency §§ 282–284.
Comment Note.—Imputing to principal knowledge of agent having adverse interest or acting antagonistically to principal. 104 ALR 1246.

[6] 23 Am Jur 2d, Deeds § 155.

the property was unfounded where, even assuming that collection of land contract payments gives rise to apparent authority to convey title, there is no proof that plaintiffs authorized the person to collect the land contract payments.

5. PRINCIPAL AND AGENT—IMPUTATION OF KNOWLEDGE—AGENT'S ADVERSE INTEREST.

Knowledge on the part of an agent normally is imputable to the principal; but where the interest of the agent is adverse to that of his principal, the agent's knowledge is not imputable.

6. DEEDS—WARRANTY DEEDS—LAND CONTRACTS—RECORDING LAND CONTRACTS—STATUTES.

Bona fide purchasers of land, who received a warranty deed from the titleholder and who had no knowledge of an existing unrecorded land contract covering a prior sale of the land, took title free of the land contract interest (MCLA 565.29).

Appeal from Macomb, Alton H. Noe, J. Submitted Division 1 April 9, 1974, at Detroit. (Docket No. 17352.) Decided August 13, 1974. Leave to appeal applied for.

Complaint by Richard H. Bryce and Leona A. Bryce against Jimmie A. Jones, Arlyle R. Jones, and Citizens Federal Savings and Loan Association of Port Huron to have a deed set aside and their rights in certain property determined. Counterclaim by the Joneses against the plaintiffs seeking an order giving them legal title to the property. Counterclaim by the loan association against the plaintiffs seeking to have its mortgage lien given priority if it was determined that the plaintiffs' title was superior to that of the Joneses. Crossclaim by the loan association against the Joneses seeking the amount of the principal balance of its mortgage loan plus accrued interest and monies advanced if it was determined that the Joneses had no title to the property and that the loan association has no lien on the premises. Judgment for plaintiffs. Defendants appeal. Reversed and remanded with instructions.

Yoe, Casey & Moore, for plaintiffs.

Reid, Gilmore & Reid, for defendants Jones.

Touma, Watson & Andresen, for defendant Citizens Federal Savings and Loan Association of Port Huron.

Before: GILLIS, P. J., and HOLBROOK and VAN VALKENBURG,* JJ.

VAN VALKENBURG, J. The facts underlying this appeal read like what one would expect to find in a law school examination in a real property class. Prior to March 9, 1966 Lorraine Karpinsky owned the property which is the subject of this litigation. On that date she sold this lot to one Stanley Hojnacki on a land contract. The land contract was not recorded. On August 31, 1966 she conveyed the property to plaintiffs by warranty deed. There is nothing on the deed indicating the existence of the land contract or evidencing that the deed was only for the vendor's interest.

Lest the reader jump to the hasty conclusion that the villain of this story is Mrs. Karpinsky, we must digress for a moment to describe the nature of the events which led to this sale. Plaintiffs had on a number of prior occasions entered into certain financial transactions with one Louis H. Cheff, a real estate broker who operated a business known as Cheff Mortgage & Realty Company.[1] Plaintiffs at that point were satisfied with the nature of the prior investments made through

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

[1] This is not the first contact this Court has had with Mr. Cheff, he having appealed his November 1969 criminal conviction for obtaining money under false pretenses to this Court. *See People v Cheff,* 37 Mich App 1, 194 NW2d 401 (1971).

Cheff and trusted him. In August of 1966 plaintiffs were contacted by Cheff and were advised by him that Mrs. Karpinsky wanted to borrow $5,000 at 7% per annum and would put the property up as security. Dr. Bryce viewed the property and concluded that the property was worth that amount. Mrs. Bryce thereafter gave Cheff a check for $5,000 and later received the aforementioned deed. The deed was recorded on September 12, 1966. It should be noted that at trial plaintiffs denied any knowledge of the land contract. Plaintiffs believed that the monthly checks sent to them by Cheff represented interest payments on their $5,000 loan.

In April of 1967 defendants Jones contacted Sutter Realty about a lot upon which to build a home. Irving Little, a salesman with Sutter Realty, showed the Joneses the lot which is the subject of this litigation. Little, having handled the land contract sale to Hojnacki, put defendants Jones in touch with Hojnacki. The Joneses purchased from Hojnacki his vendee's interest. The Joneses decided to pay off the vendor's interest, and, therefore they, through Little, contacted Cheff. The reason that Cheff was contacted was that pursuant to an undated letter bearing the signature of Mrs. Karpinsky and written upon the letterhead of Cheff Realty, Sutter Realty, who had been collecting the land contract payments from Hojnacki, had been instructed to make such payments to Cheff. Thereafter, apparently without any personal contact between either Little and the Joneses and Cheff, the Joneses tendered a check in the amount of the balance due, $1,721.24, and they received in return a deed to the lot. It is conceded by all concerned that plaintiffs' signatures on the deed and their endorsements on the check were

forged. Defendants Jones thereafter built a house on the lot, they having secured a mortgage from defendant loan association in order to build said house.

Meanwhile, plaintiffs continued to receive monthly payments from Cheff until July of 1968, at which time payments suddenly stopped. It was not until 1970 that plaintiffs learned of the forged deed, and thereafter they commenced this action. In their complaint plaintiffs sought to have the forged deed set aside and their rights in the property determined and sought such other relief as might be necessary and proper.

Defendants Jones filed a counterclaim alleging that they paid in full and sought an order giving them legal title to the property.

Defendant loan association filed a counterclaim seeking to have its mortgage lien given priority if it was determined that plaintiffs' title was superior to that of defendants Jones.

The matter originally came to trial in November of 1971. At that time, at the close of plaintiffs' proofs defendants moved for a directed verdict, which was granted. Plaintiffs thereafter moved for a rehearing pursuant to GCR 1963, 527, which was granted. The matter finally came to trial again in May of 1973, at which time additional proofs were taken. At that time the trial court reversed himself and found for the plaintiffs. The judgment provided that plaintiffs had an equitable mortgage in the amount of $5000 plus interest from September 1, 1968 at the rate of 7% per annum. The judgment further provided that plaintiffs' equitable mortgage had priority over the equitable title acquired by defendants Jones by reason of their purchase of the unrecorded land contract. From that judgment defendants appeal.

Defendants assert that the trial court erred in holding that plaintiffs' deed from Mrs. Karpinsky should be construed as an equitable mortgage. We agree. It is the well-settled law of this state that the one asserting that a deed absolute is in reality an equitable mortgage must establish that claim by clear and convincing proof that a mortgage was intended by the parties at the time the deed was executed. *Sheets v Huben,* 354 Mich 536; 93 NW2d 168 (1958); *Ellis v Wayne Real Estate Company,* 357 Mich 115; 97 NW2d 758 (1959); *Staebler v Buchanan,* 45 Mich App 55; 205 NW2d 843 (1973). The touchstone is thus whether there was clear proof that the parties intended the deed to operate merely as a mortgage. While it is clear that plaintiffs felt that the deed was merely the means by which their "loan" was secured, there was absolutely no proof offered which would support a finding that Mrs. Karpinsky intended the deed to be other than an absolute transfer of her property interest. The belief on the part of one party that the deed was to operate as a mortgage is not sufficient to change the nature of the written instrument, since the necessary indicia of proof is that both parties intended the deed to have that effect. Absent such proof, there can be no clear showing that the deed should be treated as other than a deed. Accordingly, the trial court erred in holding the deed to be an equitable mortgage.

If plaintiffs do not have an equitable mortgage, what then is their interest in the property? Defendants argue that plaintiffs should be bound by the acts of their agent Cheff and be adjudged to have sold their property interest to defendants. We cannot agree with this contention. There is absolutely no proof that plaintiffs ever empowered Cheff with the right to sell the property. Defend-

ants however rely upon the apparent authority which arose out of the fact that Cheff collected the land contract payments from Hojnacki. Even assuming that collection of land contract payments gives rise to apparent authority to convey title, defendants' argument must fail, since there is absolutely no proof that plaintiffs authorized Cheff to collect the land contract payments. In fact, it was uncontroverted that plaintiffs were unaware of the existence of the land contract until after defendants purchased the land. It would therefore be anomalous to say that Cheff was plaintiffs' agent with respect to the collection of the land contract payments.

Since the forged deed did not convey plaintiffs' interest to defendants, the sole remaining question is what plaintiffs' interest is. Again we must return to the question of agency. It is uncontroverted that at the time plaintiffs acquired title to the property they had no actual notice of the unrecorded land contract. As such they took title to the property free from the land contract, unless Cheff had knowledge of the unrecorded land contract and plaintiffs are chargeable with that knowledge. Assuming that Cheff had knowledge of the fact that there was this unrecorded interest, under these circumstances we hold that plaintiffs are not chargeable with that knowledge. While normally knowledge on the part of an agent is imputable to the principal, where the interest of the agent is adverse to that of his principal, the agent's knowledge is not imputable to the principal. See *Luton v Sharp,* 94 Mich 202; 53 NW 1054 (1892); *Tapert v Lehmann,* 259 Mich 447; 243 NW 256 (1932); *Valley Jitney Jungle Co v Hamady,* 264 Mich 354; 249 NW 888 (1933); *Hoekzema v Van Haften,* 313 Mich 417; 21 NW2d 183 (1946). If

nothing else, the record before us supports a finding that Cheff's interest in the transaction was self-centered and clearly adverse to that of his principals, the plaintiffs. Accordingly, plaintiffs, being bona fide purchasers without knowledge of the unrecorded land contract, took title free from that land contract interest. See MCLA 565.29; MSA 26.547.

It is thus clear that defendants have no legal title to the property, the deed being a forgery and the land contract being void by reason of the above-cited recording statute. What equitable rights they may have with respect to the improvements can only be determined upon proofs in the trial court. While it is hoped that defendants still can recover from the bank the money wrongfully paid over the forged endorsements and/or can recover under the title insurance policy, this case does bring home the need for careful investigation before entering into any transaction as complex as the purchase of real estate.

Reversed and remanded for proceedings and orders consistent with this opinion. No costs, neither party having prevailed in full. This Court does not retain jurisdiction.

All concurred.

CATES v FREDERICK W. BALD ESTATE

1. LIMITATION OF ACTIONS—MALPRACTICE.

The statute of limitations for a malpractice action begins to run only when the plaintiff discovers, or by the exercise of reasonable care should have discovered, the asserted malpractice, whichever is later.

2. LIMITATION OF ACTIONS—MALPRACTICE—JUDGMENT—ACCELERATED JUDGMENT—QUESTION OF FACT.

The statute of limitations did not clearly bar a malpractice action and an accelerated judgment was improperly granted where there was a question of whether the plaintiff knew of the presence of a surgical needle in her abdomen longer than two years before starting the action (MCLA 600.5805).

3. PHYSICIANS AND SURGEONS—MALPRACTICE—QUESTION OF FACT.

It was a question for the jury whether a plaintiff had knowledge of, or should have had knowledge of, the presence of a surgical needle in her abdomen, left from a prior operation, where the plaintiff alleged that she was consistently misled with regard to the needle's presence and that she had relied upon the advice given her by the defendant doctors, and that they concealed the information from her.

Appeal from Genesee, Thomas C. Yeotis, J. Submitted Division 2 June 6, 1974, at Lansing. (Docket Nos. 17515, 17516.) Decided August 13, 1974. Leave to appeal applied for.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 61 Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 181–185.

Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner. 80 ALR2d 320.

Applicability, to negligence action against hospital, or statute of limitations applicable to malpractice and related actions against physicians, surgeons, or the like. 89 ALR2d 1180.

[2, 3] 61 Am Jur 2d, Physicians, Surgeons, and Other Healers § 213.

Complaints by Geneva Cates and Norvel Cates against the estate of Frederick W. Bald, Robert E. Anderson, Erwin J. Gutowitz, Orestes Iung, Henry Ford Hospital, and R. F. Gluckman for medical malpractice. Judgment for defendants. Plaintiffs appeal. Judgment vacated and remanded.

Shanahan & Scheid, for plaintiffs.

Kitch, Suhrheinrich & Getto, P. C. (by *Ronald F. DeNardis),* for defendants Orestes Iung, R. F. Gluckman, and Henry Ford Hospital.

Cline & Cline (by *Walter P. Griffin),* for defendant estate of Frederick W. Bald.

Before: QUINN, P. J., and R. B. BURNS and O'HARA,* JJ.

O'HARA, J. This is a medical malpractice case. The original malpractice charged occurred in 1949. A surgical needle 4 to 5 centimeters long was left in the lower quadrant of plaintiff's abdomen. The operating surgeon is deceased.

The specific grounds of negligence seem to be fraudulent concealment of the presence of the needle from the patient. This despite the fact that there is the admission in plaintiff wife's deposition that she told two of the treating doctors of the presence of the needle over the period specifically in 1962 and in 1969.

As to defendant Ford Hospital it is alleged that in transmitting the report of the findings made there at the request of a subsequent treating physician it omitted all reference to the presence

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

of the foreign body which was in fact known to it through members of its staff.

Finally in October, 1970 she consulted still another physician. She did not tell him of her knowledge of its presence. He discovered it and called in a surgeon. She was operated on in April, 1971 and the needle was removed. So the complaint says her symptoms, which incontestably were grave and her suffering very real, disappeared. She now enjoys good health.

This is a vexatious case. Limitations upon the time within which to bring actions are not to be taken lightly. Stale claims are tremendous burdens on defendants. See *Bennett v Carpenter,* 45 Mich App 552; 206 NW2d 803 (1973). Yet in medical malpractice cases[1] the literal reading of the statute[2] has been modified with good reason. In the case at bar a psychiatrist of national repute and a recognized authority in his field of doctor-patient relationships testified that plaintiff had been "programmed" out of taking any definitive action even though there is persuasive depositional testimony that in the ordinary sense of the term she "knew" of the presence of the foreign body at a time that would bar any action for medical malpractice. To this extent the question is one of first impression in this state.

There is no doubt that the totality of the material which should be considered by the trial judge fairly drips with disputed questions of fact. There is a plethora of "He did" and "He did nots", "She did" and "She did nots" and more than a sprin-

[1] MCLA 600.5805; MSA 27A.5805 prescribes a two-year limitations period in malpractice actions. The pertinent provision as to when a malpractice claim accrues is contained in MCLA 600.5838; MSA 27A.5838.

[2] MCLA 600.5838; MSA 27A.5838.

kling of "I don't knows" and "I don't remembers" —this last understandably.

The question is are there disputed material facts as the rule requires?

One of the difficulties is that the pleadings don't seem to pinpoint the issues. This is particularly true of the last amended and controlling complaint. It has an overlay of alleged conspiratorial withholding of information, support of which we candidly opine is lacking.

The whole thing boils down to this: If we read the complaint strictly and in what is usually termed the literal sense the trial judge was right and the grant of "summary judgment and/or accelerated judgment" should be affirmed.

If, per contra, we read and construe it liberally, there is no bar to proceeding with the cause of action and there is depositional support for the creation of a material fact issue.

Curiously enough the case we think is dispositive is cited in neither brief nor by the trial judge. Curiously enough also it is not mentioned by the Supreme Court in its recent opinion, *Dyke v Richard,* 390 Mich 739; 213 NW2d 185 (1973), which reiterates almost verbatim the language of a unanimous Supreme Court when it first promulgated the rule that the statute begins to run only when the plaintiff discovers or by the exercise of reasonable care should have discovered the asserted malpractice, whichever is later. We refer to *Johnson v Caldwell,* 371 Mich 368; 123 NW2d 785 (1963). Particularly we have reference to the following language:

"The grave inequities which could follow the application of the last treatment rule are well illustrated by the case at bar. Plaintiff testified, as pointed out earlier, 'I accepted his [defendant's] word [that] nothing could

be done for it.' As phrased in *Ayers v Morgan*,[3] *supra*, p 285, *it would be 'illogical and unintelligent' to require a patient to determine on the date he last consults a physician that malpractice has taken place, when he in fact relies upon the advice that constitutes the malpractice. So to hold would punish the patient who relies upon his doctor's advice and places a premium on skepticism and distrust.*

"Plaintiff, a 21-year-old girl, delivered of her first child and experiencing *post partum* difficulty relied on what the trier of facts determined to be the doctor's advice that 'nothing could be done about it'." 371 Mich at 379–380; 123 NW2d at 791 (emphasis supplied).

Such is almost the precise situation here. Of course, as we said earlier, in the usual sense of the word plaintiff knew of the presence of the foreign body long before the cause of action would have been outlawed by the statute. But the question abides how could she know it was malpractice (if it was) to be told "you forget about that needle" and "your trouble is nothing but nerves" and in the case of some defendants no reference at all to its presence even though its presence was known to them?

There is depositional reference to "encapsulation" of the needle and its effect upon her symptoms as she relayed them to the long list of treating doctors and the hospital.

We have read every deposition line by line. We have analyzed and reanalyzed the pleadings. We have studied with care the opinion of the learned trial judge.

In finality we have concluded that under the majority holding in *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973), which quotes with approval the language of Mr. Justice SOURIS in *Durant v Stahlin,* 375 Mich 628; 135 NW2d 392

[3] *Ayers v Morgan,* 397 Pa 282; 154 A2d 788 (1959).

(1965), thus making it precedent which is binding on us, we are obligated to reverse. We quote the excerpt from *Rizzo, supra:*

"By insisting that summary judgment is not available whenever a presented issue of material fact turns upon the credibility of an affiant or witness whose deposition has been taken, *we intend thereby to limit severely the circumstances in which summary judgment properly may be entered.* The alternative would require our abandonment of what has been called the 'truth-testing process of cross-examination' and would encourage unwarranted invasion by judges of the jury's exclusive province. *United States v United Marketing Association,* 291 F2d 851, 853–854 (CA 8, 1961)." 389 Mich at 373; 207 NW2d at 320–321. (Emphasis supplied in *Rizzo.)*

Strictly speaking what is involved here is an accelerated judgment.[4] The trial judge denominated it "summary judgment and/or accelerated judgment" in his opinion. No matter which is involved the interdiction against the invasion by the judge of the jury's exclusive province is still violated.

The order granting accelerated judgment is vacated. The cause is remanded to the trial court for further proceedings. Costs to the appellants.[5]

All concurred.

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[4] GCR 1963, 116.1(5).

[5] Originally there were two complaints filed; one on behalf of the wife and one on behalf of the husband. They were by order consolidated and our disposition applies to the case of both husband and wife.

PEOPLE v MURRAY

1. CRIMINAL LAW—WITNESSES—PROSECUTION WITNESSES—CREDIBILITY.

   A prosecutor is under a duty to disclose any information which would materially affect the credibility of his witnesses and any deals between the witnesses and the people.

2. CRIMINAL LAW—LINEUP—IDENTIFICATION—ATTORNEY AND CLIENT—WITNESSES—INDEPENDENT RECOLLECTION.

   Reversible error did not result because a defendant was not provided with counsel at his lineup although he should have been provided with such where the lineup identification procedures were not so suggestive as to unduly taint the in-court identification and the in-court identification was supported by strong independent recollection of the identifying witnesses.

3. DRUGS AND NARCOTICS—HEROIN—DELIVERY—WITNESSES—EVIDENCE—DOPE HOUSES—INSTRUCTIONS TO JURY.

   A prosecution witness's reference to "dope houses" in defendant's trial for unlawful delivery of heroin did not prejudice defendant's case where the context in which the reference appears in the record does not appear to associate defendant with any such places and the trial judge carefully and fully charged the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses §§ 471, 534.

[2] 21 Am Jur 2d, Criminal Law §§ 313, 368.

29 Am Jur 2d, Evidence § 371 *et seq.*

Accused's right to counsel under the Federal Constitution—Supreme Court cases. 2 L Ed 2d 1646, s. 9 L Ed 2d 1260.

Accused's constitutional right to assistance of counsel. 84 L Ed 383.

[3] 53 Am Jur, Trial §§ 566–569, 584, 775 *et seq.*

[4] 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 20–22.

Construction and effect of "sale" or "sell" in Uniform Narcotic Drug Act. 93 ALR2d 1008.

[5] 47 Am Jur 2d, Jury §§ 195, 198–202, 206–211.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

jury that there was no contention on the part of anyone that defendant was in any way connected with "dope houses".

4. DRUGS AND NARCOTICS—HEROIN—DELIVERY—UNLAWFUL SALE—USABLE AMOUNT—INSTRUCTIONS TO JURY.

The "usable amount" test for illegal possession of heroin does not extend to cases involving the unlawful sale of drugs, and where a witness in a prosecution for unlawful delivery of heroin testified that he used some of the heroin purchased from defendant, the contention that the people failed to establish that the amount was a usable amount is without merit (MCLA 335.341).

5. CONTINUANCE—CRIMINAL LAW—ATTORNEY AND CLIENT—JURY—VOIR DIRE—PREJUDICE.

Denial of continuance of defendant's trial requested on the ground that his attorney had won a criminal case a week before on a directed verdict before a jury drawn from the panel from which the jury for his trial would be selected was not error because the defendant had the right to examine the jurors on voir dire to determine whether prejudice resulted from the prior trial and where the record does not indicate that any of the previous jury were selected to serve in defendant's case.

Appeal from Kalamazoo, Lucien F. Sweet, J. Submitted Division 3 June 5, 1974, at Grand Rapids. (Docket No. 17588.) Decided August 13, 1974.

DeKent Murray was convicted of unlawful delivery of heroin. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Donald A. Burge,* Prosecuting Attorney, and *Stephen M. Wheeler,* Chief of Appellate Division, for the people.

Roman T. Plaszczak, for defendant on appeal.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

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

R. L. SMITH, J. Defendant appeals as of right from a sentence of 5 to 20 years following a jury conviction on a charge of delivery of heroin (MCLA 335.341[1][a]; MSA 18.1070[41][1][a]). We affirm.

James Delgado was working with the Michigan State Police Narcotics Team as an informer. Delgado had previously met Barry Lee who knew people in southwestern Michigan who were dealing in narcotics. Through Lee defendant was introduced to Delgado, and allegedly sold three tinfoil packets of heroin to Delgado. These packets were turned over to State Trooper Paul Whitford, who was monitoring the transaction, and Whitford gave them to Donald Collins, a laboratory specialist in the Police Crime Laboratory in East Lansing. One packet was analyzed and was found to contain heroin.

During the presentation of the people's case the prosecutor brought out the following facts on direct examination of Lee and Delgado. Lee and his wife had been charged with possession of heroin and both had agreed to cooperate with the police in the hope of receiving reduced charges. Delgado was a school dropout, a disappointed applicant to the Michigan State Police, and in the employ of the police as an informer. Defendant alleges that it is reversible error for the prosecutor to examine the past of these two prosecution witnesses.

The only novel feature of this claim is that defendant argues that it was his right to bring out evidence bearing on witness credibility and that by allowing the prosecutor to do so it amounts to impeachment of prosecution witnesses by the prosecutor. This Court has previously held that the prosecutor is under a duty to disclose any information which would materially affect the credibility

of his witnesses. *People v Nettles,* 41 Mich App 215; 199 NW2d 845 (1972); *People v Love,* 43 Mich App 608; 204 NW2d 714 (1972). These cases impose an obligation upon the prosecutor to disclose any deals between the witnesses and the people. It follows that such an obligation carries with it the right to disclose. We find no merit in this claim.

Defendant's request for an *Anderson* hearing was granted. *People v Anderson,* 389 Mich 155, 180; 205 NW2d 461 (1973). At this hearing it appeared that witnesses Delgado and Lee participated in both photographic and lineup identification proceedings. Delgado was unable to identify defendant from the photos shown but Lee readily identified him. At the lineup both Delgado and Lee identified defendant. Defendant was not represented by counsel at any of the identifying proceedings although he requested counsel at the lineup.

The trial judge determined that the photo-lineup identification procedures were not so suggestive as to unduly taint the in-court identification, and that the in-court identification was supported by strong independent recollection since Lee had known defendant for some period of time and had been with him on at least 20 occasions, and Delgado had concentrated his attention on identification since he knew he would be called upon to testify against defendant and had met defendant on a subsequent occasion when he was able to identify him.

We see no reason to disagree with the trial judge's findings in the *Anderson* hearing. Although defendant should have been provided with counsel at the lineup, *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974); *People v Anderson,* 391 Mich 419; 216 NW2d 780 (1974), we find no reversible error in view of these findings.

Defendant complains that reference to "dope houses" in the testimony of Delgado was highly prejudicial and reversible error. The context in which the reference appears in the record does not appear to associate defendant with any such places. The trial judge carefully and fully charged the jury that there was no contention on the part of anyone that defendant was in any way connected with "dope houses". Under these circumstances we find no miscarriage of justice. MCLA 769.26; MSA 28.1096.

Defendant contends that the people failed to establish that the amount of heroin involved was a usable amount, citing *People v Harrington,* 33 Mich App 548, 550; 190 NW2d 343 (1971). In *People v McCullough,* 51 Mich App 534; 215 NW2d 774 (1974), this Court refused to extend the *Harrington* rule involving possession of narcotics to sale. Furthermore, the record discloses that Lee testified that he used some of the heroin purchased from defendant by Delgado and the court charged the jury that they should find a usable amount. There is no merit to defendant's contention.

Defendant cites no authority for his claim that the trial judge should have granted his motion for a continuance on the ground that defendant's attorney had won a criminal case a week before on a directed verdict before a jury from the panel from which this jury would be selected. The court noted that the defendant would have a right to voir dire the jurors to determine whether prejudice resulted from the prior trial. The record does not indicate that any of the previous jury were selected to serve here. Defendant has failed to prove any prejudice as a result of the denial of a continuance. *People v Schneider,* 309 Mich 158; 14 NW2d 819 (1944).

The three tinfoil packets of heroin purchased from defendant were marked by James Delgado with his initials (J. D.) in green ink and marked as Exhibits 4, 5 and 6 by the stenographer. Delgado testified that he could recognize Exhibits 4 and 6 because his initials appeared thereon but that on Exhibit 5 he could only make out the initial J in green ink. The laboratory specialist Collins testified that Exhibit 5 was the packet he opened for examination which explained the missing initial D. Collins identified Exhibit 5 as one of the three packets he received from Trooper Whitford. Whitford testified the three packets were marked by Delgado in his presence and that he personally delivered them to Collins. This chain of evidence, if believed by the jury, provided conclusive proof that the three packets exhibited to the jury were the three packets purchased from defendant by Delgado. No error is apparent.

Affirmed.

All concurred.

PEOPLE v FRANKS

1. SEARCHES AND SEIZURES—SEARCH WARRANT—DESCRIPTION OF PREMISES—SUB-UNITS—SUFFICIENCY OF DESCRIPTION.

   A description in a search warrant must specify the appropriate sub-unit where a known apartment building, hotel, or rooming house is involved; a search warrant which fails to specify a known sub-unit is constitutionally defective.

2. SEARCHES AND SEIZURES—CONSTITUTIONAL LAW—SEARCH WARRANT—DESCRIPTION OF PREMISES—SUFFICIENCY OF DESCRIPTION.

   A search warrant described the place to be searched with sufficient particularity to meet the requirements of the United States and Michigan constitutions although it did not specify that there were separate living units in the described house but where from all indications the house appeared to be a single living unit and the police officers did not know nor should they have been expected to know of the multi-unit character of the house (US Const, Am IV; Const 1963, art 1, § 11).

3. SEARCHES AND SEIZURES—PROBABLE CAUSE—SEARCH WARRANT—DESCRIPTION OF PREMISES.

   Probable cause existed to search the entire premises where the search warrant described the house which was searched without reference to any sub-units within the house and a defendant alleged that the room he occupied was rented as a separate residence but it was shown that the occupants of the house were of a transient nature, exchanging sleeping places, and therefore the entire building functioned as a single unit.

4. SEARCHES AND SEIZURES—DRUGS AND NARCOTICS—SEARCH WARRANT—PLAIN VIEW.

   A bag of marijuana was properly seized during the search of a

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 68 Am Jur 2d, Searches and Seizures §§ 74, 75, 77.

Search warrant: Sufficiency of description of apartment or room to be searched in multiple-occupancy structure. 11 ALR3d 1330.

[3] Transiently occupied room in hotel, motel, or rooming-house as within provision forbidding unreasonable searches and seizures. 86 ALR2d 984.

[4] 68 Am Jur 2d, Searches and Seizures § 113.

house even though it was not specified in the search warrant where it was contraband in the plain view of officers conducting the search in an area where they had a right to be.

Appeal from Recorder's Court of Detroit, Elvin L. Davenport, J. Submitted Division 1 May 16, 1974, at Detroit. (Docket No. 17596.) Decided August 13, 1974.

Dennis C. Franks was charged with possession of marijuana with intent to deliver. From denial of his motion to suppress the evidence of his possession, defendant appeals by leave granted. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Patricia J. Boyle,* Principal Attorney, Research, Training and Appeals, and *Thomas M. Khalil,* Assistant Prosecuting Attorney, for the people.

Joseph Covington, for defendant.

Before: LESINSKI, C. J., and J. H. GILLIS and BRONSON, JJ.

LESINSKI, C. J. Defendant Dennis C. Franks was charged with unlawful possession of marihuana with intent to deliver, MCLA 335.341(1)(c); MSA 18.1070(41)(1)(c). This Court granted defendant leave to appeal following the trial court's denial of his motion to suppress the evidence of his possession of marihuana.

Defendant contends that the search warrant purportedly authorizing the seizure of this evidence failed to describe the place to be searched with the degree of particularity required by US

Const, Am IV; Const 1963, art 1, § 11, and MCLA 780.654; MSA 28.1259(4).[1]

The salient facts surrounding the issuance of this warrant and the search and seizure resulting in defendant's arrest are as follows: Between May 12, 1972 and June 24, 1972, Detroit police officers observed known narcotics users arriving at 19840 Winston, staying a short while and then leaving. The house described at 19840 Winston is a 1-1/2 story dwelling painted green with white trim, located in the city of Detroit. From its outward appearance it gave every indication of being a single family residence. On June 21, 1972, an informant, whose reliability and credibility were sworn to by Police Officer Douglas Tally, went to 19840 Winston and purchased bulk heroin from a man known as "Ed". On June 22, 1972, on the basis of this information sworn to by Officer Tally, Judge Joseph P. Maher issued a search warrant for "heroin, other narcotic drugs and paraphernalia". The specific description of the place to be searched was:

"The entire premises known as 19840 Winston, the second house north of Frisbee on the east side of the street. A one and one-half story frame dwelling painted

[1] US Const, Am IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Const 1963, art 1, § 11:

"The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

MCLA 780.654; MSA 28.1259(4):

"Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized."

light green with white trim, located in the City of Detroit, County of Wayne, State of Michigan."

On that same date police officers executed this warrant on 19840 Winston. There were 14 people in the house at the time that police officers approached the door, were refused admittance, and thereupon forced the door open. Once inside the house they conducted a general search of the premises. Defendant was in the southeast bedroom of the dwelling with four other people. Upon entry into defendant's room police officers observed a man bending over a brown paper bag in the center of the room. An examination of the contents of this bag disclosed 818.30 grams of marihuana.

Defendant contends that 19840 Winston is a collective in which he rented and had exclusive occupancy and control of the southeast bedroom in which the marihuana was seized. Defendant has maintained that the search warrant's failure to describe his room as a place to be searched made the warrant and accompanying search and seizure constitutionally defective. Accordingly, he argues that the trial court should have granted his motion to suppress.

We note at the outset of this opinion that the courts of this state have never delineated the specificity required in a search warrant's description of the place to be searched where the multi-unit character of the premises is not apparent. Nevertheless, we believe that there is ample Federal and State authority on this matter. See 11 ALR3d 1330.

As a basic proposition of law it has long been recognized that a search warrant which fails to specify a known sub-unit is constitutionally defective. *Tynan v United States,* 297 F 177 (CA 9, 1924), *cert den* 266 US 604; 45 S Ct 91; 69 L Ed

463 (1924). Consequently, where a known apartment building, hotel, or rooming house is involved, the warrant must specify the appropriate sub-unit to be valid. *United States v Barkouskas,* 38 F2d 837 (MD Pa, 1930); *United States v Mitchell,* 274 F 128 (ND Cal, 1921).

In *United States v Hinton,* 219 F2d 324, 325 (CA 7, 1955), the Court stated:

"For purposes of satisfying the Fourth Amendment, searching two or more apartments in the same building is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house or, in this case, each apartment. If such cause is shown there is no reason for requiring a separate warrant for each resident. A single warrant may cover several different places or residences in a single building. But probable cause must be shown for searching each residence unless it be shown that, although appearing to be a building of several apartments, the entire building is actually being used as a single unit."

In *United States v Esters,* 336 F Supp 214 (ED Mich, 1972), Judge Cornelia Kennedy stated that where officers involved do not know that the structure is a two-family dwelling "the test is whether they should have known that the building was not a one-family home".

In *Esters* the court granted a motion to suppress where it found that "a person who made a reasonable observation of the premises should have known that the structure at 4637 Newport was a two-family dwelling". In so ruling the court distinguished a series of cases which had held that where officers are unable to determine the two-family character of a dwelling, a warrant is nonetheless valid. The court stated at 221:

"In neither *Owens [infra], Ramos [infra], Gomez*

[United States v Gomez, 42 FRD 347 (SD NY, 1967)], nor *Santore [infra],* did the court find that the officers who either applied for or executed the respective search warrants could have or should have known that the description of the place to be searched contained in the warrant was not accurate; on the contrary, in each of those cases the court expressly stated that there was no way that the officers could have known of the misdescription in the warrant before execution. Given the circumstances of this case, that conclusion cannot be reached here. The dual mailboxes, doorbells and utility meters provided ample notice that the structure located at 4637 Newport was not a single-family dwelling. The description of the premises in the search warrant was not in accordance with the outward appearance of the structure. While there is no reason to believe that the Government agents did not honestly believe that the building was a single-family dwelling, the failure of the search warrant to accurately describe the place to be searched, as expressly required by the Fourth Amendment, simply cannot be excused."

In *Owens v Scafati,* 273 F Supp 428, 429 (D Mass, 1967), *cert den* 391 US 969; 88 S Ct 2043; 20 L Ed 2d 883 (1968), a search warrant was held to describe the premises to be searched with sufficient particularity in spite of its failure to recognize the dwelling's multi-unit character, where:

"There has been no showing that the police officers knew or should have known from its physical appearance that 1 Thomas Park was a multiple dwelling house when they applied for the warrants."

In *United States v Ramos,* 282 F Supp 354 (SD NY, 1968), a search made pursuant to a warrant describing the place to be searched as "130 West 74th Street, basement apartment, New York, New York" was held valid even though there was more than one basement apartment. The Court stated at 355:

"[I]t would have been impossible to discover that there was more than one basement apartment until after the rooms in the basement had been searched."

Again in *United States v Santore,* 290 F2d 51 (CA 2, 1960), *cert den,* 365 US 834; 81 S Ct 749; 5 L Ed 2d 744 (1961), the validity of the search warrant turned on the ability of the officers, upon making a reasonable observation, to determine whether the structure was a two-family dwelling. In *Santore* the Court held that from all outward appearances, the dwelling in question appeared to be a one-family house and therefore a warrant which so described it was valid.

Absent a finding by the trial court that the police officers knew or should have known when they obtained the search warrant that the building involved was multi-unit in character, the warrant and resultant search and seizure have been held to be constitutionally permissible. *People v Lucero,* 174 Colo 278; 483 P2d 968 (1971); *State v Chisholm,* 7 Wash App 279; 499 P2d 81 (1972).[2]

In the case at bar, the record mandates the conclusion that the officers did not know nor should they have been expected to know that there were allegedly separate living units at 19840 Winston. From all indications this house appeared to be a single living unit. We therefore find that the search warrant in question described the place to be searched with sufficient particularity to meet the requirements of the Fourth Amendment of the United States Constitution and the concomitant provisions of art 1, § 11 of the Michigan Constitution.

This Court also notes that even if we were to

[2] In *People v Avery,* 173 Colo 315; 478 P2d 310 (1970), the Court made the specific finding that the police officer should have known that the building involved was a rooming house and consequently the search warrant was held invalid.

reject the substantial authority previously cited and read the Fourth Amendment as requiring absolute accuracy in a search warrant, a proposition which we believe to be universally rejected by the courts of this land, we would nevertheless find that probable cause existed under this warrant to search the entire premises at 19840 Winston. As Judge Kennedy stated in *Esters, supra,* at 218, citing *United States v Hinton, supra,* at 326:

" 'But probable cause must be shown for searching each residence unless it is shown that, although appearing to be a building of several apartments, *the entire building is actually being used as a single unit.*' " (Emphasis supplied.)

By defendant's counsel's own assertion in his motion to suppress, 19840 Winston functioned as a single unit.

"*Mr. Covington:* There is one other point I would like to make here. The premises at 19840 Winston was not previously owned by any one or the other—a number of occupants were there. They would exchange sleeping places, going and,—going in and out of the place."

With the interchange of sleeping places among transient occupants, we find that for purposes of the issuance of this search warrant, 19840 Winston was used as a single unit. An examination of the search warrant and supporting affidavit further convinces this Court that the search warrant itself stated sufficient facts to provide probable cause for the issuance of this warrant.

The validity of the search warrant allowed the officers to enter and search the entire dwelling for heroin, other narcotic drugs and paraphernalia. Once officers entered defendant's room they observed a man bending over a bag which was in

plain view. An examination of this bag disclosed that it contained 818.30 grams of marihuana. The bag of marihuana being contraband "in plain view" in an area in which the officers had a right to be, it was seizable even though it was not specified in the warrant. As the United States Supreme Court has stated in *Harris v United States,* 331 US 145, 155; 67 S Ct 1098, 1103; 91 L Ed 1399, 1408 (1947):

> "If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated."

We find that the issuance of this search warrant and the resulting search and seizure conformed in all respects to constitutional requirements.

Affirmed.

All concurred.

PEOPLE v RANSOM

1. STATUTES—IN PARI MATERIA—CONSTRUCTION.

Statutes *in pari materia* are read together as components of one consistent constitutional system, and if inconsistencies can be reconciled by a reasonable construction and a purpose found to be served by each, both must stand and be given effect.

2. ESCAPE—STATE PRISON—DETROIT HOUSE OF CORRECTION—STATUTES.

All persons convicted of crimes punishable in state prison are subject to the statute providing for punishment for escape from state prison; therefore, an escaped convict who had been convicted of a crime punishable in state prison and who had been incarcerated in the Detroit House of Correction rather than the state prison because she was a female was properly convicted under the state prison escape statute rather than the Detroit House of Correction escape statute (MCLA 750.193, 750.194, 802.55).

Appeal from Wayne, Roland L. Olzark, J. Submitted Division 1 June 24, 1974, at Detroit. (Docket No. 17742.) Decided August 13, 1974.

Shirley A. Ransom was convicted of escaping prison. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Patricia J. Boyle,* Principal Attorney, Research, Training and Appeals, and *Ronald Weitzman,* Assistant Prosecuting Attorney, for the people.

Lawrence R. Greene, for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1] 73 Am Jur 2d, Statutes §§ 187–190.

[2] 27 Am Jur 2d, Escape, Prison Breaking, and Rescue § 26.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

CHURCHILL, J. The defendant was originally convicted in Muskegon Circuit Court of forgery and uttering and publishing. MCLA 750.248; MSA 28.445; MCLA 750.249; MSA 28.446. She received a sentence of 4 to 14 years. Because she was a female she was sentenced to Detroit House of Correction (Dehoco) as required by statute. MCLA 802.51; MSA 28.1841.

She entered Dehoco on May 27, 1970. Without being lawfully released she disappeared therefrom on July 10, 1972 and was later taken into custody in California. She was charged with and convicted of escaping prison contrary to the provisions of MCLA 750.193; MSA 28.390 and received a one- to five-year sentence. It is from this conviction that she appeals.

It is her claim that Dehoco is not a prison within the meaning of the statute under which she was convicted and that she should have been charged, if at all, under MCLA 750.194; MSA 28.391 which provides a different penalty for escapees who have been lawfully committed to Dehoco.

The statute under which she was convicted contains a definition of prison which does not, by its own terms, include Dehoco.

Another statute, however, provides:

"All laws now in force, applicable to persons confined in the state prison, shall be and are hereby made applicable to all persons who are, or hereafter shall be confined in said house of correction, who have been transferred to said house from the state prison, or who shall be sentenced to confinement in said house, on conviction of any offense punishable by confinement in the state prison." MCLA 802.55; MSA 28.1845.

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

In *People v Reese,* 363 Mich 329; 109 NW2d 868 (1961), the Supreme Court reversed the trial court's decision to quash an information charging violation of MCLA 750.193; MSA 28.390 following an escape from Dehoco. In *Reese,* the escapee had been transferred to Dehoco from the State Prison of Southern Michigan at Jackson, so the question of its applicability to a female sentenced to Dehoco on a felony conviction was not raised.

A prime canon of statutory construction is to read statutes *in pari materia* together as components of one consistent constitutional system. If inconsistencies can be reconciled by a reasonable construction and a purpose found to be served by each, both must stand and be given effect. *Browning v Michigan Dept of Corrections,* 385 Mich 179; 188 NW2d 552 (1971); 2A Sutherland, Statutes and Statutory Construction (4th ed), § 51.03, pp 298–313.

We find an intentional distinction between categories of prisoners, which emerges as a function of the crime for which they stand convicted. All persons convicted of crimes punishable in state prison, and only those persons, come under MCLA 750.193; MSA 28.390 if they escape or attempt to escape from Dehoco. Everyone else lawfully committed to Dehoco is controlled by MCLA 750.194; MSA 28.391. In this respect men and women are treated under the law alike.

We affirm.

All concurred.

KYES v ALLEGAN COUNTY BOARD OF COMMISSIONERS

1. MUNICIPAL CORPORATIONS—DECISIONS OF BOARDS—JUDICIAL INTERFERENCE.

The governmental decisions of municipal boards will not be interfered with by Michigan courts unless a board is found to have acted illegally, capriciously, or contrary to sound public policy.

2. COUNTIES—CONSTITUTIONAL LAW—LOCATION OF COUNTY OFFICES—CONSTRUCTION OF STATUTES.

Only those buildings necessary to house the offices of sheriff, county clerk, county treasurer, and register of deeds, as specified in the constitution, should be deemed "necessary" buildings within the meaning of the statute which requires the courthouse and "other necessary buildings" to be located at the county seat, in the absence of further legislation; the county social services offices are not among those specified in the constitution and therefore the county was free to construct them at a site other than at the county seat (Const 1963, art 7, § 5; MCLA 45.16).

3. COUNTIES—EXPENDITURES—REVENUE-SHARING FUNDS—VOTER APPROVAL.

Voter approval is not required for a county board of commissioners to authorize an expenditure of Federal revenue-sharing funds.

Appeal from Allegan, James M. Teahen, J. Submitted Division 3 July 30, 1974, at Grand Rapids. (Docket No. 20090.) Decided August 13, 1974. Leave to appeal denied, 392 Mich 820.

REFERENCES FOR POINTS IN HEADNOTES

[1] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 144, 145, 149.

[2] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 44–49.

[3] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 579 *et seq.*

Complaint by John Kyes and others against the Allegan County Board of Commissioners to enjoin construction of a county building. Judgment for defendants. Plaintiffs appeal. Affirmed.

Leo W. Hoffman and *Stephen M. Kantz,* for plaintiffs.

Peter Antkoviak, II, Assistant Prosecuting Attorney, for defendants.

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

R. B. BURNS, P. J. On August 7, 1973 the defendant Allegan County Board of Commissioners (hereinafter referred to as the board) voted unanimously to construct a building for the Department of Social Services at Dumont Lake some 3-1/2 miles from the city of Allegan, the Allegan County seat. The construction is to be paid for with Federal revenue-sharing funds.

Plaintiffs, a group of property owners and taxpayers residing within Allegan County, brought suit to enjoin the construction at the proposed site. Plaintiffs claimed that the board could not authorize construction at a location other than the county seat, that the board could not authorize the expenditure of the federal funds without voter approval, and that the board acted arbitrarily when it chose the Dumont Lake site.

Plaintiffs sought a temporary restraining order. The testimony revealed that the decision to build at Dumont Lake was carefully considered. The site had several advantages: (1) there was plenty of parking space; (2) the county already owned the land; (3) all needed utilities were already there; and (4) the traffic studies were favorable. The

board had considered other sites and had rejected them as being less advantageous. Finally, even the Allegan city manager, who opposed the site, conceded that the board acted without caprice or malice. The trial court denied relief to plaintiffs, and they appealed to this Court on the same three grounds alleged below.

Plaintiffs claim the board acted arbitrarily when it selected the Dumont Lake site.

When reviewing the governmental decisions of municipal boards, Michigan courts will not interfere unless the board is found to have acted illegally, capriciously, or contrary to sound public policy. *North Muskegon v Bolema Construction Co,* 335 Mich 520; 56 NW2d 371 (1953), and *Brent v Detroit,* 27 Mich App 628; 183 NW2d 908 (1970). The trial court found that the board had reached its decision in an entirely proper manner; such a finding should not be disturbed unless it is clearly erroneous. *Shaya v Stein,* 42 Mich App 91; 201 NW2d 273 (1972). The facts of this case do not warrant such a disturbance.

Plaintiffs next contend that the board lacked the authority to build at a location other than the county seat. Plaintiffs contend that MCLA 45.16; MSA 5.291 requires that all necessary public county buildings be kept at the county seat. Plaintiffs believe that the building housing the county offices for the Department of Social Services is a necessary building within the meaning of the act. We disagree.

While MCLA 45.16; MSA 5.291 does not explain what is meant by "all other necessary public buildings", we believe that the answer can be found in the constitutional framework from which this statute arose. OAG, 1939, No 13,321 (Nov 10, 1939). Article 7, § 5, of the 1963 Michigan Constitution

requires the sheriff, county clerk, county treasurer, and register of deeds to hold their principal offices at the county seat. In the absence of further legislation specifically requiring other offices to be located at the county seat, only those buildings necessary to house those constitutionally specified offices should be deemed necessary buildings. Plaintiffs have failed to call our attention to any statute that requires the county social services offices to be located at the county seat. The defendant was free to choose the construction site it did in accordance with its statutory obligations and powers. MCLA 400.45; MSA 16.445 and MCLA 46.11; MSA 5.331.

Finally, plaintiffs claim that the board could not authorize the expenditure of public funds without voter approval. This issue turns upon the proper construction of MCLA 141.61a; MSA 5.2251(1) which reads:

> "The board of commissioners without submitting the same to the vote of the electors shall have the right or power to authorize annually the expenditure of any funds on hand not raised by taxation for the purpose of constructing, equipping or making alterations in any of the public buildings in the county if said board of supervisors shall by resolution of a majority of the total membership of said board authorize the same: Provided, That no such moneys shall be expended without the vote of the people if said moneys are to be raised by taxation."

Plaintiffs contend that since Federal revenue-sharing funds are raised by taxation MCLA 141.61a; MSA 5.2251(1) requires voter approval of their expenditure on building projects.

We disagree.

It is undeniably true that Federal revenue-sharing funds are raised by taxation, but plaintiffs are

incorrect when they contend MCLA 141.61a; MSA 2251(1) is intended to regulate the securing or use of such money. That statute was designed to act as a legislative restriction upon the creation of municipal debts to be financed by purely local sources (*Alan v Wayne County,* 388 Mich 210; 200 NW2d 628 [1972]; and *Oakland County Taxpayers League v Oakland County Supervisors,* 355 Mich 305; 94 NW2d 875 [1959]); it does not purport to regulate municipal use of purely Federal funds. MCLA 141.61a; MSA 5.2251(1) is irrelevant to this situation. This is demonstrated by the manner in which state revenue-sharing funds are managed. Those funds are to be credited to the municipality's general fund (MCLA 141.917; MSA 5.3194[417]), and from there, they could be allocated to finance local construction projects without voter approval. MCLA 141.263; MSA 5.2770(3), *Oakland Taxpayers, supra.* Since the Michigan Legislature has approved of this procedure regarding state money, we do not believe the Legislature would intend its statutes to treat similar Federal funds differently. The trial court correctly denied plaintiffs any relief.

Affirmed. No costs, a public question.

All concurred.

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ACCORD AND SATISFACTION

1. Consideration is not necessary where an accord and satisfaction is in writing and signed by the party against whom enforcement is sought; but where the accord and satisfaction is oral,

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additional consideration is required (MCLA 566.1). *Melick v Nauman Vandervoort,* 171.

2. Acceptance of a check received and designated as payment in full constitutes settlement and satisfaction of the debt where there is a dispute of the amount due; there is no condition that there must be a meeting of the minds in fact between the parties in order to effect an accord and satisfaction, and a meeting of the minds "by implication" can be inferred from the actions of the parties to establish the accord and satisfaction. *Melick v Nauman Vandervoort,* 171.

3. Indorsement of checks from a corporation and delivery by parties to their attorneys constituted negotiation of the checks, and the attorneys by having the checks certified discharged the corporation from liability for the amounts thereof and effectively transferred the funds from the corporation; these actions of the parties constituted acceptance of an accord and satisfaction where the checks were tendered as full and final payment of a disputed debt (MCLA 440.3202, 440.3411). *Melick v Nauman Vandervoort,* 171.

4. A party seeking to avoid an accord and satisfaction must tender back amounts already paid pursuant to the accord and satisfaction, thus returning both parties to the status quo before instituting suit. *Melick v Nauman Vandervoort,* 172.

ACCRUAL OF CLAIMS—See
LIMITATION OF ACTIONS 5

ACCUSATIONS—See
CRIMINAL LAW 73, 74

ACQUITTAL—See
CRIMINAL LAW 35
LARCENY 3
TRIAL 4

ACTION—See
JUDGMENT 11–14
LIMITATION OF ACTIONS 1, 7

ACTIONABLE FRAUD—See
FRAUD 1

ADMINISTRATIVE AGENCIES—See
ADMINISTRATIVE LAW 4
APPEAL AND ERROR 6

ADMINISTRATIVE LAW

1. State equalization proceedings by the State Tax Commission are exempt from the contested-case provisions of the administrative procedures act; an equalization appeal could have a

ADMINISTRATIVE LAW—Cont'd
drastic effect upon the operations of local government, and therefore the policy which favors exemption of individual assessment appeals from the procedural requirements of the administrative procedures act furnishes even stronger reason for excluding equalization proceedings and appeals (MCLA 24.201 *et seq.,* 211.152). *Saginaw Co v Tax Commission,* 160.

2. Judicial review of a decision by the State Tax Commission relating to valuation is limited to questions of fraud, error of law, or adoption of wrong principles (Const 1963, art 6, § 28). *Saginaw Co v Tax Commission,* 162.

3. A statute which provides that the chief of police or a duly authorized police officer from an incorporated city or village in which the petitioner resides shall sit as a member of a licensing appeal board in driver's license revocation cases is not unconstitutional and will not be found violative of a driver's due process right to a fair hearing before an impartial tribunal where the record contains no proof of bias or unfairness on the part of the police department representative (MCLA 257.322). *Crampton v Department of State,* 211.

4. An order of superintending control in regard to procedural irregularities of an administrative tribunal should issue only if the plaintiff shows that unlawful procedure resulted in "material prejudice" to him (MCLA 24.306). *Montiy v East Detroit Civil Service,* 511.

See
MUNICIPAL CORPORATIONS 20
WORKMEN'S COMPENSATION 23

ADMINISTRATIVE ORDERS—See
COURTS 5
REPLEVIN 1

ADMINISTRATIVE PROCEDURES ACT—See
ADMINISTRATIVE LAW 1

ADMISSIBILITY—See
DRUGS AND NARCOTICS 6
EVIDENCE 3, 6, 7
WITNESSES 2

ADMISSION OF EVIDENCE—See
APPEAL AND ERROR 7

ADMISSIONS—See
CRIMINAL LAW 17, 86
EVIDENCE 1

ADOPTIVE ADMISSIONS—See
EVIDENCE 1

ADULT ADVISORS—See
CRIMINAL LAW 2

ADVERSE INTEREST—See
PRINCIPAL AND AGENT 2

ADVICE OF RIGHTS—See
CRIMINAL LAW 54–56, 60, 61

ADVISORY VERDICT—See
EQUITY 3

AFFIDAVIT HEARINGS—See
PLEADING 1

AFFIDAVITS—See
CRIMINAL LAW 63
JUDGMENT 6

AFFIRMATIVE DEFENSES—See
LIMITATION OF ACTIONS 3

AGENTS—See
INSURANCE 1, 2
LIMITATION OF ACTIONS 5, 6
PRINCIPAL AND AGENT 1, 2

AGGRESSORS—See
HOMICIDE 4

AIDING AND ABETTING—See
CRIMINAL LAW 31

ALCOHOLIC BEVERAGES—See
INTOXICATING LIQUORS 1–4
STATUTES 1, 3

ALIBI—See
ASSAULT AND BATTERY 1
CRIMINAL LAW 69–72, 89, 93, 94

ALIENATION—See
TRUSTS 3–5

ALTERCATIONS—See
HOMICIDE 4

AMBER LIGHT—See
HIGHWAYS 2

AMBIGUITY—See
CONTRACTS 1, 4
INSURANCE 18, 19
STATUTES 7

AMENDMENT—See
PLEADING 3

AMENDMENT OF CIVIL SERVICE LIST—See
MUNICIPAL CORPORATIONS 23

AMENDMENT OF STATUTES—See
CONSTITUTIONAL LAW 1, 2

AMPUTEES—See
WORKMEN'S COMPENSATION 13

ANNUAL REPORTS—See
CORPORATIONS 1, 2
JUDGMENT 4
LIMITATION OF ACTIONS 4

ANXIETY—See
CRIMINAL LAW 33

APPARENT AUTHORITY—See
INSURANCE 1, 2
PRINCIPAL AND AGENT 1

APPEAL AND ERROR

1. The Court of Appeals is not bound by a prosecutor's confession of error. *People v Inman,* 5.

2. A question of the propriety of the prosecutor's trial strategy was properly preserved for appellate review, even though there was no objection at trial to the prosecutor's closing argument or to the jury charge as given, where defense counsel had fully argued before the trial judge that references to a companion's cut throat in a trial for carrying a concealed weapon and an exhibition of the scar to the jury was prejudicial as inferring an additional crime, had objected to the prosecutor's trial strategy throughout, and had secured the assurance of the trial court that a cautionary instruction would be given to the jury but no such instruction was given in fact. *People v Charron,* 27.

3. The Court of Appeals will not substitute its judgment for that of a jury unless a careful review of the record reveals a miscarriage of justice. *Durbin v K-K-M Corp,* 40.

4. The Court of Appeals will review a jury instruction as a whole, rather than portions of it, to ascertain whether it has resulted in prejudice to a defendant. *People v Bradley,* 89.

5. An appellate court will review *de novo* the record of a suit

APPEAL AND ERROR—Cont'd
brought in equity, but in doing so will not ordinarily disturb findings of fact unless the court concludes that it would have arrived at a different result had it been in the position of the trial judge. *Wabeke v City of Holland,* 215.

6. A court reviewing an administrative tribunal decision reviews the original record to determine if the decision is supported by competent, material and substantial evidence, and will overturn a decision only when such decision is contrary to law, or is not supported by the necessary competent, material and substantial evidence; the court is without power to determine issues of fact that are disputed (Const 1963, art 6, § 28). *Montiy v East Detroit Civil Service,* 510.

7. Decisions on the materiality and relevancy of proffered evidence are within the discretion of the trial court, and review of a decision to admit or exclude that evidence is limited to a determination of whether the trial court abused its discretion. *People v Harrell,* 554.

8. A change in Michigan law covering a landlord's duty to his tenants in keeping the premises free from natural accumulations of ice and snow should be made by the Legislature or by the Michigan Supreme Court. *Gossman v Lambrecht,* 641.

9. The Court of Appeals ordinarily reviews chancery cases *de novo,* giving considerable weight to the trial judge's findings; only if the Court finds, upon examination of the entire record, that it would have been required to reach a different result had it been in the chancellor's position, will the Court disturb those findings. *Kar v Hogan,* 664.

10. The Court of Appeals will not disturb a trial judge's findings even though the judge made a statement which might possibly be construed as a declaration of his decision before hearing the entire case, where the statement did not demonstrate that the judge closed his mind to the balance of the proofs, and a careful reading of the judge's opinion shows he strove to balance justice's scales throughout the proceedings and he accurately and carefully assessed the proofs supporting each side. *Kar v Hogan,* 664.

See

ADMINISTRATIVE LAW 2
CRIMINAL LAW 8, 10, 15, 16, 24, 29, 72
EVIDENCE 3
MUNICIPAL CORPORATIONS 14
WITNESSES 4
WORKMEN'S COMPENSATION 1–3, 7, 10, 15

APPEAL BOARD—See

WORKMEN'S COMPENSATION 1–3, 9, 10, 21

APPEALS—See

ADMINISTRATIVE LAW 1

APPELLATE COUNSEL—See
CRIMINAL LAW 25

APPORTIONMENT OF EXPENSES—See
WORKMEN'S COMPENSATION 23

APPORTIONMENT OF LIABILITY—See
WORKMEN'S COMPENSATION 8

ARBITRARY CLASSIFICATION—See
MUNICIPAL CORPORATIONS 17

ARGUMENT OF COUNSEL—See
TRIAL 3

ARMED POLICEMEN—See
STATUTES 5

ARREST—See
CRIMINAL LAW 7, 57, 58
SEARCHES AND SEIZURES 1

ARREST AND CONVICTION—See
MUNICIPAL CORPORATIONS 19

ARREST AND TRIAL—See
CRIMINAL LAW 34

ASSAULT—See
HOMICIDE 1–3

ASSAULT AND BATTERY

1. Instructing a jury that the offense of gross indecency with a child could be regarded as proven should the proofs show any date within the statute of limitations and that the date of the offense was not a material element of the offense was error where testimony at trial confined the offense alleged to the last half of a month, or possibly the entire month, and the defense was alibi (MCLA 750.338). *People v Helzer,* 285.

2. *Children who are witnesses in a prosecution for gross indecency usually cannot be examined and cross-examined and remember specific dates, and therefore the only critical areas in such a prosecution are: Is this the person and what exactly was done?,* i.e., *identity and credibility of witnesses (MCLA 750.338). People v Helzer,* 285.

3. The intentional discharge of a firearm at someone within range is an assault and the usual result and purpose of such an assault is death; the unjustified and unexcused intention to kill when committing an assault constitutes the crime of assault with intent to commit murder (MCLA 750.83). *People v Johnson,* 303.

ASSAULT AND BATTERY—Cont'd
4. A jury could properly infer the existence of intent to commit murder where the evidence adduced at trial was that the defendant leaned out a car window and fired a sawed-off shotgun at a uniformed policeman chasing him on foot; therefore a jury conviction of assault with intent to do great bodily harm less than murder was sustainable (MCLA 750.84). *People v Johnson,* 303.

ASSERTION OF RIGHTS—See
CRIMINAL LAW 32

ASSESSMENTS—See
ADMINISTRATIVE LAW 1
MUNICIPAL CORPORATIONS 2–6

ASSETS—See
CORPORATIONS 3
TRUSTS 3

ASSIGNED COUNSEL—See
CRIMINAL LAW 64

ASSIGNMENT—See
TRUSTS 6, 7

ASSISTANCE OF COUNSEL—See
CONSTITUTIONAL LAW 4
CRIMINAL LAW 2, 11, 12, 14, 19, 25, 34, 64, 96
JURY 1
TRIAL 4

ATTEMPTED LARCENY—See
LARCENY 1–4

ATTORNEY AND CLIENT—See
CONTINUANCE 2
CRIMINAL LAW 19, 96

AUTHORITY—See
INSURANCE 1, 2

AUTOMOBILE INSURANCE—See
INSURANCE 7, 8

AUTOMOBILES
1. A defendant automobile owner in an action in circuit court seeking damages resulting from an automobile accident was sufficiently a party in a prior action in common pleas court involving the driver of the owner's automobile to claim conclusive defensive effect on the issue of the plaintiff's negligence which was actually litigated and established in the common pleas action by jury verdict and judgment where the defendant in circuit court had been a party to the common pleas action

AUTOMOBILES—Cont'd
until, prior to trial, the plaintiff in circuit court (defendant in the common pleas action) made full and final settlement with the owner in exchange for a binding release, and where, but for the settlement, the defendant in circuit court would have remained a party in the prior suit until judgment, and, had he done so, the jury's verdict would have required the same result that the settlement imposed. *Jones v Slaughter,* 120.

2. A plaintiff seeking to recover damages on a theory of negligent entrustment of an automobile must prove that the entrustment was causally connected with the injury of which he complains; even assuming that the entrustment was negligent, the causal chain between it and a plaintiff's injury was broken where the plaintiff was himself negligent. *Jones v Slaughter,* 120.

3. A recovery by a plaintiff's wife for loss of consortium resulting from an automobile accident is contingent upon recovery by her husband for his injuries when their actions are consolidated; therefore, where his action fails, her action must likewise fail. *Jones v Slaughter,* 121.

4. The immediate purpose of the implied consent law is to obtain the best evidence of blood alcohol content at the time of the arrest of a person reasonably believed to be driving while intoxicated (MCLA 257.625). *People v Kozar,* 503.

5. It was the Legislature's intent that, for the purpose of the implied consent statute, a defendant's blood alcohol content at the time of the offense should be regarded as equivalent to his blood alcohol content as determined by a subsequent chemical test provided such test was administered within a reasonable time after the defendant's arrest (MCLA 257.625a). *People v Kozar,* 503.

6. In a prosecution for driving a vehicle while under the influence of intoxicating liquor, the prosecutor is not required to introduce expert testimony to interpret and relate the results of chemical tests back to the time of the alleged offense, and such test results are admissible into evidence without such testimony provided the other prerequisites to admissibility have been met (MCLA 257.625a). *People v Kozar,* 503.

See
ADMINISTRATIVE LAW 3
DISCOVERY 2
EVIDENCE 5
HIGHWAYS 4
INSURANCE 9, 10, 13
INTERPLEADER 1
JUDGMENT 9
SEARCHES AND SEIZURES 7–9
STATUTES 1, 3

AVERAGE WEEKLY WAGE—See
WORKMEN'S COMPENSATION 17

BANKRUPTCY—See
COMPOSITIONS WITH CREDITORS 1

BARGAINING—See
LABOR RELATIONS 1

BARS—See
MUNICIPAL CORPORATIONS 13–15, 18

BASTARDS

1. The purpose of the Paternity Act is not to punish the putative father but rather to secure support for the child (MCLA 722.711 *et seq.). Artibee v Circuit Judge,* 433.

2. Confinement of a father is not the objective or result of a paternity proceeding, but rather is one possible result of a contempt of court proceeding; the only result of a paternity proceeding is an order of filiation establishing the father-child relationship and specifying the sum the father is required to pay for his child's support and education (MCLA 722.717, 722.719, 722.727). *Artibee v Circuit Judge,* 433.

See
CONSTITUTIONAL LAW 4

BENEFICIARIES—See
EVIDENCE 4
INSURANCE 11
MASTER AND SERVANT 5
TRUSTS 1–4, 6, 7

BENEFITS—See
WORKMEN'S COMPENSATION 14–18

BEST INTERESTS OF CHILD—See
INFANTS 1

BIAS—See
ADMINISTRATIVE LAW 3
CRIMINAL LAW 66

BINDERS—See
INSURANCE 2–5, 7, 8

BLOOD ALCOHOL CONTENT—See
AUTOMOBILES 4–6

BLOOD SAMPLES—See
CRIMINAL LAW 67

BODILY INJURY—See
INSURANCE 12

BONA FIDE DOUBT—See
CRIMINAL LAW 38

BONUS PLANS—See
MASTER AND SERVANT 3–5

BOUNDARIES

1. The primary rule in construing and interpreting a conveyance where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls which cannot be explained by any competent evidence is that the intention of the parties controls and is to be followed. *Murray v Buikema,* 382.

2. Terms of description in a conveyance repugnant to the identifiable description may be rejected. *Murray v Buikema,* 382.

3. Monuments control courses and distances in descriptions of real property and when monuments and measurements vary, the monuments always control. *Murray v Buikema,* 382.

4. A plattor intended that a plat's boundaries coincide with monuments used as calls in the legal description where otherwise monuments referred to as being on a section line also used as calls would have been omitted from the description; therefore, the monuments controlled in a boundary dispute which arose upon discovery that the section line was more than 200 feet from where the plattor thought it was. *Murray v Buikema,* 382.

5. A monument used in describing land is any physical object on the ground which helps establish the location of the line called for, and the term "monument" when used with reference to boundaries indicates a permanent object which may be either a natural or an artificial one; therefore a section line is not a monument. *Murray v Buikema,* 382.

6. The marketable record title act did not afford support to defendants in a boundary dispute where the unbroken chain of title under which defendants claimed the disputed parcel began with a deed which gave notice that all lands within a certain subdivision were excepted from the conveyance, and where the recorded plat of that subdivision, when examined in light of rules of construction applied when a legal description contains conflicting calls, showed that the subdivision obviously extended into the parcel claimed by defendants (MCLA 565.102). *Murray v Buikema,* 383.

BREACH OF CONTRACT—See
JUDGMENT 13
LIMITATION OF ACTIONS 7

BREACH OF DUTY—See
NEGLIGENCE 4

BREACH OF WARRANTY—See
LIMITATION OF ACTIONS 2
REPLEVIN 1

BREAKING AND ENTERING—See
LARCENY 1, 3, 4

BUILDERS—See
JUDGMENT 13
MUNICIPAL CORPORATIONS 21

BURDEN OF PROOF—See
CRIMINAL LAW 7, 17
DRUGS AND NARCOTICS 5
MOTIONS 1
MUNICIPAL CORPORATIONS 10
PROCESS 1
STATUTES 4
WORKMEN'S COMPENSATION 2, 19

BURGLARY—See
LARCENY 1, 3, 4

BUS DRIVERS—See
NEGLIGENCE 2, 3, 6

BUSES—See
INTERPLEADER 1

BUSINESS ENTRANCES—See
STATUTES 8

BUSINESS PARKING LOTS—See
STATUTES 8

CABARETS—See
MUNICIPAL CORPORATIONS 14, 16, 19

CANCELLATION—See
INSURANCE 7, 8

CARE, CUSTODY OR CONTROL—See
INSURANCE 18, 20

CARTRIDGES—See
SEARCHES AND SEIZURES 2

CASH VALUE—See
TAXATION 2, 3

CASUALTY INSURANCE—See
INSURANCE 5, 8

CAUSATION—See
AUTOMOBILES 2

CAUSE OF ACTION—See
JUDGMENT 14

CAUTIONARY INSTRUCTIONS—See
CRIMINAL LAW 87

CAUTION LIGHT—See
HIGHWAYS 2

CERTIFICATION—See
ACCORD AND SATISFACTION 3

CHAIN OF TITLE—See
BOUNDARIES 6

CHALLENGE—See
JURY 4

CHANCELLOR—See
APPEAL AND ERROR 9
EQUITY 3

CHANGE OF CONDITIONS—See
EVIDENCE 6

CHARCOAL BRIQUETTES—See
PRODUCTS LIABILITY 1

CHARTERS—See
COMPOSITIONS WITH CREDITORS 2
CORPORATIONS 1, 2
LABOR RELATIONS 1

CHECKS—See
ACCORD AND SATISFACTION 2, 3
FORGERY 1

CHEMICAL ANALYSIS—See
DRUGS AND NARCOTICS 4

CHEMICAL TESTS—See
AUTOMOBILES 5, 6

CHILD CUSTODY—See
CRIMINAL LAW 75

CHILDREN—See
ASSAULT AND BATTERY 2

CHILD SUPPORT—See
BASTARDS 1, 2

CIRCUIT COURT—See
CRIMINAL LAW 59

CIRCUMSTANTIAL EVIDENCE—See
INTOXICATING LIQUORS 3

CITY CHARTERS—See
LABOR RELATIONS 1

CITY ORDINANCES—See
INJUNCTION 2

CIVILIAN TRIAL BOARDS—See
LABOR RELATIONS 1

CIVIL LITIGATION—See
CONSTITUTIONAL LAW 7, 8

CIVIL SERVICE—See
MUNICIPAL CORPORATIONS 20, 22, 23

CLAIMS—See
EQUITY 1
JUDGMENT 12

CLAIMS AGAINST CHILD—See
PARENT AND CHILD 1

CLAIMS AGAINST THE STATE—See
CONSTITUTIONAL LAW 6

CLASSIFICATION—See
CONSTITUTIONAL LAW 5
MUNICIPAL CORPORATIONS 17, 18, 21
STATUTES 4, 5

CLEANLINESS OF DWELLINGS—See
STATUTES 8, 9

CLOSING ARGUMENT—See
APPEAL AND ERROR 2
CRIMINAL LAW 8

CODEFENDANTS—See
CRIMINAL LAW 31, 64

COERCION—See
CRIMINAL LAW 35, 44, 78

COLLATERAL—See
REPLEVIN 1

COLLATERAL ATTACK—See
JUDGMENT 7

COLLATERAL ESTOPPEL—See
AUTOMOBILES 1
NEGLIGENCE 1

COLLATERAL FACTS—See
CRIMINAL LAW 86, 87

COLLATERAL ISSUES—See
CRIMINAL LAW 67

COLLECTIVE BARGAINING—See
LABOR RELATIONS 1

COLLISIONS—See
INTERPLEADER 1

COMMITMENT—See
CRIMINAL LAW 41
ESCAPE 1

COMMON LAW—See
STATUTES 9

COMMON-LAW RIGHTS—See
WORKMEN'S COMPENSATION 24

COMMON PASSAGEWAYS—See
LANDLORD AND TENANT 1

COMPENSABLE DISABILITIES—See
WORKMEN'S COMPENSATION 22

COMPENSATION—See
MASTER AND SERVANT 3–5
WORKMEN'S COMPENSATION 1–21, 23, 24

COMPETENCE TO STAND TRIAL—See
CRIMINAL LAW 5, 14, 38, 39

COMPLAINT—See
PLEADING 2

COMPOSITIONS WITH CREDITORS

1. Language in an order approving a compromise arrangement between a corporation in receivership and its creditors over the objections of one of the creditors is invalid where the practical effect of the language is to discharge the corporation's obliga-

COMPOSITIONS—Cont'd
tions to the objecting creditor; the trial court has no authority to make such an order because the Federal bankruptcy act has preempted the field (11 USCA 1 *et seq.;* CL 1948, 450.4[3]). *Appeal of Coburn Leasing Co,* 228.

2. A creditor or a stockholder of a corporation in receivership may petition for a sanction by a court of a compromise arrangement between the corporation and its creditors, and it is unnecessary to consider the authority of the corporation to make such a petition when its corporate charter has been forfeited by operation of law where the petition is signed by one who is a creditor and stockholder of the corporation as well as its president (CL 1948, 450.4[3]). *Appeal of Coburn Leasing Co,* 228.

3. A creditor which did not consent to a compromise arrangement between a corporation in receivership and itself and other creditors may not contest an order approving the arrangement, where the receiver failed to file an inventory, have an appraisal and audit and to list the claims of creditors, on the ground that the consents of creditors were ineffective because based on inadequate information. *Appeal of Coburn Leasing Co,* 228.

COMPROMISE AGREEMENTS—See
COMPOSITIONS WITH CREDITORS 1–3

COMPROMISE AND SETTLEMENT

1. Settlements of disputes are favored by the law. *Melick v Nauman Vandervoort,* 171.

See
WORKMEN'S COMPENSATION 23, 24

COMPULSION—See
CRIMINAL LAW 79
PERJURY 1–3

COMPUTATION OF BENEFITS—See
WORKMEN'S COMPENSATION 14, 17

CONCEALED WEAPONS—See
APPEAL AND ERROR 2
CRIMINAL LAW 7, 43, 44
WEAPONS 1–3

CONCLUSIONS OF FACT—See
TRIAL 6

CONCLUSORY TERMS—See
PLEADING 2

CONDOMINIUMS—See
INJUNCTION 2

CONFESSIONS—See
CRIMINAL LAW 1–4, 16, 21, 75–78

CONFIDENTIAL RELATIONSHIPS—See
EQUITY 4

CONFLICTING DESCRIPTIONS—See
BOUNDARIES 1, 4

CONFLICT OF LAWS—See
LIMITATION OF ACTIONS 1, 2

CONFRONTATION—See
CRIMINAL LAW 22, 23, 60

CONSENT JUDGMENT—See
JUDGMENT 7

CONSIDERATION—See
ACCORD AND SATISFACTION 1
MASTER AND SERVANT 1

CONSOLIDATED ACTIONS—See
AUTOMOBILES 3

CONSOLIDATIONS—See
CORPORATIONS 3

CONSORTIUM—See
AUTOMOBILES 3

CONSTITUTIONAL DEFICIENCIES—See
MUNICIPAL CORPORATIONS 23

CONSTITUTIONAL LAW

1. A statute which abolishes and transfers the authority and functions of the State Board of Equalization without republishing at length the statutory framework thus amended for state equalization of property taxes does not offend a provision of the state constitution which requires that laws which are revised, altered or amended must be re-enacted and published at length; the statute is the result of a constitutional mandate to reorganize the executive branch of state government which required implementation by law within a set timetable and the Court cannot presume that the framers intended that all the compiled laws affected should be re-enacted and republished at length in the process (Const 1963, art 4, § 25, art 5, § 2; MCLA 16.186). *Saginaw Co v Tax Commission,* 160.

2. A major reason for requiring statutes which are revised or amended to be re-enacted and republished at length is to give notice to the Legislature and the public of what is being changed, and the Executive Organization Act of 1965, which

CONSTITUTIONAL LAW—Cont'd

consists of a sequence of several consolidations, transfers, and abolitions, satisfies the requirement of notice; the Constitutional provisions must be given a reasonable and practical interpretation (Const 1963, art 4, § 25; MCLA 16.101 *et seq.). Saginaw Co v Tax Commission,* 160.

3. The legitimacy of any exercise of police power depends upon the existence of a real and substantial relationship between the exercise of those powers in a particular manner in a given case and the public health, safety, morals, or the general welfare. *Tally v Detroit,* 328.

4. There is no constitutional right to counsel for defendants in paternity proceedings because the purposes and objectives of paternity proceedings are such that the direct result of these actions is *never* a deprivation or restriction of liberty (MCLA 722.711 *et seq.). Artibee v Circuit Judge,* 433.

5. The "rational basis" test of statutory classification applies when a law allegedly infringing equal protection creates no fundamental rights, and if a reasonable relation exists between the classification and some legitimate state interest, no denial of equal protection results. *Anderson v Detroit,* 496.

6. Withholding a legal remedy from persons injured by the state, while granting one to persons injured by nongovernmental tortfeasors, does not offend the equal protection clause. *Anderson v Detroit,* 496.

7. Substantive due process, state or Federal, does not offer a total right of access to the courts for civil litigants, and the right to sue for a future tortious injury is not property and may be abrogated by the Legislature (MCLA 691.1407). *Anderson v Detroit,* 496.

8. Due process is equally important in civil and criminal matters; it requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Kar v Hogan, 665.

See

APPEAL AND ERROR 6
CORPORATIONS 2
COUNTIES 1
CRIMINAL LAW 32, 49–51, 74
DRUGS AND NARCOTICS 2
MUNICIPAL CORPORATIONS 10, 15–19, 21
SEARCHES AND SEIZURES 11

CONSTITUTIONAL RIGHTS—See

ADMINISTRATIVE LAW 3
CRIMINAL LAW 20–23, 54, 90
SEARCHES AND SEIZURES 3

CONSTRUCTION OF CONTRACTS—See
INSURANCE 14–20

CONSTRUCTION OF STATUTES—See
COUNTIES 1
STATUTES 1–3, 6, 7, 10

CONTEMPT—See
BASTARDS 2

CONTENTIOUS LITIGATION—See
JUDGMENT 7

CONTESTED CASES—See
ADMINISTRATIVE LAW 1

CONTINGENT BENEFICIARIES—See
EVIDENCE 4
INSURANCE 11

CONTINGENT INTERESTS—See
PARTITION 1

CONTINUANCE

1. The granting or denial of a continuance is subject to the discretion of the trial court and absent a clear abuse of discretion the decision will not be overturned (GCR 1963, 503.2). *People v Carter,* 69.

2. Denial of continuance of defendant's trial requested on the ground that his attorney had won a criminal case a week before on a directed verdict before a jury drawn from the panel from which the jury for his trial would be selected was not error because the defendant had the right to examine the jurors on voir dire to determine whether prejudice resulted from the prior trial and where the record does not indicate that any of the previous jury were selected to serve in defendant's case. *People v Murray,* 724.

CONTRABAND—See
SEARCHES AND SEIZURES 13

CONTRACTS

1. The conduct of the parties cannot be used to prove that a contract means something other than what appears on its face when the contract is clear and unambiguous; only in cases of ambiguity in the terms of a written contract will courts resort to the use of extraneous evidence. *Gaydos v White Motor Corp,* 143.

2. Refusal to allow introduction of parol evidence offered by a defendant to support its interpretation of a unilateral contract written by the defendant was proper; such evidence would have

CONTRACTS—Cont'd
resulted in a one-sided, self-serving interpretation of the defendant's intention and construction of the contract. *Gaydos v White Motor Corp,* 143.

3. The primary role of a court in deciding a case involving a contract dispute is to ascertain the intent of the parties, and this must be done from an examination of the terms of the contract itself where at all possible. *Henry v J B Publishing Co,* 409.

4. If a contract term is ambiguous or rendered indefinite or uncertain when applied to the facts of a particular situation, then additional evidence should be considered to determine what the parties intended. *Henry v J B Publishing Co,* 409.

See
CORPORATIONS 1, 2
INSURANCE 1–7, 14–20
JUDGMENT 4, 13
LIMITATION OF ACTIONS 4, 7
MASTER AND SERVANT 1
REPLEVIN 1
TRIAL 1

CONTROLLED SUBSTANCES ACT—See
CRIMINAL LAW 42
DRUGS AND NARCOTICS 1

CONVERSATIONS WITH SUSPECTS—See
CRIMINAL LAW 73

CONVEYANCES—See
BOUNDARIES 1–3, 5
NAVIGABLE WATERS 1
TRUSTS 5

CONVICTION—See
ASSAULT AND BATTERY 4
ESCAPE 1
LARCENY 3

CONVICTIONS—See
CRIMINAL LAW 41

CORPORATE FEES—See
CORPORATIONS 1, 2

CORPORATE POWERS—See
CORPORATIONS 1, 2

CORPORATE REPORTS—See
JUDGMENT 4
LIMITATION OF ACTIONS 4

CORPORATIONS

1. A profit corporation may maintain an action based upon a contract entered into during the time that its charter was void for failure to pay its annual fees or file its annual reports for two consecutive years upon compliance with statutory provisions which enable the corporation, by filing the delinquent reports and paying the delinquent fees, to have the voidance waived and to be revived in full force and effect (MCLA 450.87, 450.91, 450.431, 450.432). *Shurlow Tile v Dahlmann Bldg,* 180.

2. The body of an act which provides that profit corporations whose charters have become void for failure to file annual reports and to pay fees may have the voidance waived and that all contracts entered into during such intervals shall become valid is germane to the general purpose of the act set forth in its title and is not constitutionally infirm for embracing more than one object (Const 1963, art 4, § 24; MCLA 450.431, 450.432). *Shurlow Tile v Dahlmann Bldg,* 180.

3. An acquiring corporation which purchases the assets of another generally is not liable for the seller's liability absent some exception or consolidation or merger. *Denolf v Frank L Jursik Co,* 584.

See

COMPOSITIONS WITH CREDITORS 1–3
JUDGMENT 4
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MASTER AND SERVANT 3–5
MOTIONS 1

CORPUS—See

TRUSTS 2, 4, 5

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CONSTITUTIONAL LAW 4
CRIMINAL LAW 2, 11, 12, 14, 19, 25, 34, 64, 96
JURY 1
TRIAL 3

COUNTIES

1. Only those buildings necessary to house the offices of sheriff, county clerk, county treasurer, and register of deeds, as specified in the constitution, should be deemed "necessary" buildings within the meaning of the statute which requires the courthouse and "other necessary buildings" to be located at the county seat, in the absence of further legislation; the county social services offices are not among those specified in the constitution and therefore the county was free to construct

COUNTIES—Cont'd
them at a site other than at the county seat (Const 1963, art 7, § 5; MCLA 45.16). *Kyes v Allegan Commissioners,* 741.

2. Voter approval is not required for a county board of commissioners to authorize an expenditure of Federal revenue-sharing funds. *Kyes v Allegan Commissioners,* 741.

COURSES AND DISTANCES—See
BOUNDARIES 3

COURT-APPOINTED COUNSEL—See
CRIMINAL LAW 19

COURT OF APPEALS—See
COURTS 5

COURT RULES—See
CONTINUANCE 1
CRIMINAL LAW 26, 54, 55, 61
INFANTS 1
INTERPLEADER 1
JUDGMENT 2, 4, 6
LIMITATION OF ACTIONS 3
PLEADING 1–3
TRIAL 6

COURTS

1. The three factors to be used in determining whether a law should be applied retroactively or prospectively are: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice. *People v Carter,* 69.

2. A dispute over the proceeds of a life insurance policy was properly before the circuit court because the question is one of resolving title to personal property; the probate court has no jurisdiction to determine questions of title. *Hilliker v Dowell,* 249.

3. Superintending control will not be granted where no action has been taken by the inferior tribunal and there is accordingly no record to review (GCR 1963, 711.1). *Dunlap v City of Southfield,* 398.

4. A court, in interpreting a statute or ordinance, must determine legislative intent from a consideration of all of the provisions of the enactment, and the purpose sought to be accomplished by it, and seeks to find a meaning which is reasonable and which gives effect to all parts of it; to effect this purpose, every clause and every word of the enactment is presumed to have some force and meaning, one part of a statute must not be so construed as to render another part nugatory or ineffective, and if there is any proper way in which claimed inconsistencies

COURTS—Cont'd
may be reconciled, the court will do so. *Montiy v East Detroit Civil Service,* 510.

5. The Court of Appeals is bound by administrative orders of the Supreme Court and must interpret the orders to the best of its ability. *Detroit & Northern v Woodworth,* 517.

See
COMPOSITIONS WITH CREDITORS 2
CONTRACTS 3
WORKMEN'S COMPENSATION 23

CRASH TESTS—See
DISCOVERY 2

CREDIBILITY—See
ASSAULT AND BATTERY 2
CRIMINAL LAW 3, 15, 68, 95
WITNESSES 6

CREDIT FOR BENEFITS PAID—See
WORKMEN'S COMPENSATION 23

CREDIT FOR TIME SERVED—See
CRIMINAL LAW 40, 41, 50, 51

CREDITORS—See
COMPOSITIONS WITH CREDITORS 1–3

CRIMINAL ACTIVITIES—See
MUNICIPAL CORPORATIONS 12

CRIMINAL LAW

1. A question of voluntariness of a confession is decided on the totality of the circumstances; therefore, a 17-year-old defendant's "mental age" of ten years and ten months was not enough, by itself, to render his confession involuntary where he did not come within the classification of "retarded" and was in fact considered "educable" by school officials, where the defendant had obtained a driver's license and must have possessed an ability to sufficiently understand questions which the driver education teacher had read to him, where defendant was able to handle his own money, feed and clothe himself, and travel about town by himself, and where the Court of Appeals found that the defendant was capable of comprehending the meaning and effect of his confession. *People v Inman,* 5.

2. A 17-year-old defendant's confession was not rendered involuntary merely because it was made in the absence of an adult advisor where the defendant was sufficiently advised of his right to the presence of an attorney or parent. *People v Inman,* 5.

3. The credibility of a defendant, at a hearing to determine the

CRIMINAL LAW—Cont'd

voluntariness of his confession, was not improperly weighed in light of innocence or guilt despite the judge's statement that he would be giving the defendant a "license to commit crime" if he quashed the confession, where the court also determined that the defendant had the ability to comprehend the proceedings and that he was able to understand his constitutional rights, accepted defendant's statement that he had not been abused, threatened, or promised anything, felt that defendant's mental capacity was sufficient to enable him to make a voluntary waiver of his rights, and held that the people had met their burden of proof to establish that defendant's confession was voluntary. *People v Inman,* 5.

4. No absolute rule prohibits a trial judge from presiding over both a hearing to determine the voluntariness of a defendant's confession and the nonjury trial of the defendant, especially where the defendant raises no objection to the procedure and where the trial judge did not hear anything at the hearing which later was deemed to be inadmissible at trial. *People v Inman,* 6.

5. Failure of a trial court to *sua sponte* order a hearing to determine whether a defendant was competent to stand trial was not error where the defendant gave no indication to the court that he was unable to understand the trial proceedings or assist defense counsel (MCLA 767.27a; GCR 1963, 786.2). *People v Inman,* 6.

6. A defendant has no right to demand that the judge proceed with sentencing without the presentence report. *People v Charron,* 27.

7. *The prosecution in a criminal case has the burden of showing all the facts surrounding an alleged crime; thus admission of testimony which constituted a part of the res gestae of the offense of carrying a concealed weapon was clearly proper where that testimony served to show the facts which directed the arresting officers' attention to the defendant and his companion and which aroused the officers' suspicions and illuminated for the jury the circumstances under which the officers observed the concealed weapon on the defendant, and such testimony was not rendered inadmissible simply because it tended to suggest that defendant may have committed another crime (MCLA 750.227). People v Charron,* 27.

8. *A defendant was not deprived of a fair trial because of improper closing arguments by the prosecutor or incomplete instructions to the jury by the judge where no objections were made at the trial to the arguments or to the instructions given and the error complained of could have been remedied had defendant objected to the arguments and the final charge. People v Charron,* 28.

9. A trial court cannot be faulted for permitting the impeachment of a defendant's testimony by reference to prior unspecified misdemeanors where the defendant made no objection to the

CRIMINAL LAW—Cont'd
admission of the testimony and thus did not invoke the judge's discretion. *People v Holt,* 60.

10. Taking into consideration in sentencing a defendant a prior conviction which has been reversed by the Court of Appeals is error. *People v Holt,* 60.

11. Defense counsel's questioning of the defendants and cross-examination of the people's witnesses concerning the sentences they were *currently* serving in a case where prison inmates killed another inmate was not a "serious mistake" requiring reversal, where the jury was taken to the prison for a view, and defense counsel's actions were part of trial strategy in light of the jury's knowledge. *People v Carter,* 69.

12. A defendant who enters a voluntary plea of guilty while represented by counsel waives all nonjurisdictional defects in prior stages of the proceedings; thus a defendant was not entitled to a preliminary examination where a request for such examination was denied prior to entry of a plea of guilty which was later set aside, and no further request for such preliminary examination was made at the time defendant entered a second plea of guilty. *People v Pogue,* 74.

13. Any defect in a defendant's preliminary examination, including improper waiver thereof, is waived by a plea of guilty which has been properly accepted. *People v Pogue,* 74.

14. Allowing a witness who stood charged with a murder and had been declared to be incompetent to stand trial on that charge to testify as a witness in another murder case was a proper exercise of discretion where a hearing was held to determine whether or not the witness was competent, counsel were permitted to participate, and at the conclusion of the hearing the court determined the witness to be a competent witness. *People v Bush,* 77.

15. A prosecution witness whose credibility was vital to the defense, who sought to bolster her trial testimony which was inconsistent with her prior testimony given on preliminary examination by referring to a lie-detector test which she had apparently passed, brought to the attention of the jury not only the fact of the taking of the test, but also its results, thereby accomplishing by indirection what the people could not have accomplished directly; the admission of such testimony was reversible error. *People v Bush,* 77.

16. A defendant may not claim upon appeal that an instruction to the jury that the trial judge had considered the defendant's confession and found it to be voluntary was erroneous where the defendant had failed to object to such an instruction. *People v Bradley,* 89.

17. An instruction to the jury that possession of stolen property raises a presumption that the possessor was the thief did not result in such manifest injustice as to require reversal where the defendant had admitted the theft, the court correctly instructed

CRIMINAL LAW—Cont'd

the jury on the presumption of innocence and the burden of proof, and the defendant did not object to the instruction when it was given. *People v Bradley,* 89.

18. Failure to instruct the jury on lesser included offenses was not reversible error where the defendant did not request such an instruction nor object to the instruction as given and did not rely upon any theory of attempt, and where the trial court did not affirmatively limit the jury's consideration of lesser included offenses. *People v Bradley,* 89.

19. A defendant who failed to show the existence of a bona fide dispute between himself and his court-appointed counsel was properly denied a substitution of counsel; an indigent defendant is entitled to a substitution of appointed counsel only when discharge of the first attorney is for good cause and does not disrupt the judicial process. *People v Bradley,* 90.

20. A defendant was not denied his constitutional right to a speedy trial, even though 13 months elapsed from the time of his arrest until his trial, where during that time he was in custody in two other states, Michigan had immediately begun extradition proceedings, and the defendant was actually in Michigan only 3-1/2 months prior to his trial, where the delay cannot be attributed to any deliberate attempt to hamper the defense nor was its cause the fault of the prosecutor, where sufficient showing of prejudice has not been made, and where no timely demand for a speedy trial was made to the trial court. *People v Bradley,* 90.

21. A finding that a defendant's confession was voluntarily made and therefore admissible was not clearly erroneous where the testimony indicates that the defendant was informed of his rights and acknowledged that he understood them, that he did not at any time intend to exercise his right to remain silent, and that he never made an unconditional demand that all questioning cease. *People v Bradley,* 90.

22. A defendant who was advised at an arraignment of his right to a trial by jury or without a jury, his right to confront his accusers, and his right against self-incrimination, was sufficiently advised of his rights even though he was not again informed of these rights at the time that he subsequently offered a plea of guilty; as long as it is clear from the record that a defendant had knowledge of his rights when he entered his plea of guilty, it is unimportant how or when he received the information. *People v Duck,* 125.

23. A defendant was sufficiently apprised of his constitutional right to confront his accusers, prior to the acceptance of his guilty plea, where the defendant was told in substance that he would be permitted through his counsel "to question each witness called by the prosecution". *People v Harris,* 246.

24. The issue of error in jury instructions was not preserved for appeal where allegedly prejudicial remarks were made by the

CRIMINAL LAW—Cont'd
prosecutor during his opening statement, the remarks were immediately objected to, the trial court instructed the jury to disregard the remarks, and defendant thereafter neither objected to the curative instructions nor requested any further instructions on the matter. *People v Tunstull,* 254.

25. Denial of a defendant's request, made by appellate counsel, to examine the presentence report was not reversible error where, at the time of sentencing, no request for the presentence report had been made by defendant's trial counsel. *People v Tunstull,* 254.

26. There was no requirement that a trial court must specifically inform a defendant that by pleading guilty he waives his right to be tried by a judge sitting without a jury prior to the adoption of a General Court Rule requiring that a defendant be so informed (GCR 1963, 785.7). *People v Taylor,* 275.

27. A criminal's intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows. *People v Johnson,* 303.

28. Testimony by the mother of a witness that the defendant and his wife attempted to influence the testimony of the witness, which was offered in rebuttal to the wife's denial of such attempt, was properly admitted; the mother's testimony was not impeachment of a witness on a collateral issue because there was evidence of the defendant's direct involvement. *People v Godsey,* 317.

29. Inflammatory and prejudicial remarks made by the prosecutor in his closing statement do not require reversal where any error involved could have been cured by objection or by instructions from the court and no objections nor requests for precautionary instructions were made. *People v White,* 342.

30. Failure to instruct a jury on lesser and included offenses was not reversible error where such an instruction was suggested by the court and defendant's attorney requested that it not be given. *People v White,* 343.

31. An instruction that a defendant could be convicted of aiding and abetting a shooting was proper where the defendant's gun was used in the shooting, the shots were fired from his apartment, and he remained in the apartment after the surrender of a codefendant, and thus there was sufficient circumstantial evidence to raise a jury question of his guilt as an accomplice of the codefendant. *People v White,* 343.

32. Factors to be weighed in a test of the constitutionality of a trial held after a long delay include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) any prejudice to the defendant. *People v White,* 343.

33. The right to a speedy trial was designed to (1) prevent oppres-

CRIMINAL LAW—Cont'd

sive pretrial incarceration; (2) minimize the anxiety and concern of the accused; and (3) limit the possibility that the defense will be impaired. *People v White,* 343.

34. A defendant was not prejudiced by a delay of 13 months between arrest and trial where for much of the time he was without an attorney because of the court's difficulty in obtaining and retaining an attorney for him, much time was consumed by motions and pretrial procedures both by defendant and by the people, the people were prepared for trial at all times with the exception of one conflict with another case in which both prosecutor and defense counsel were involved, and there was no indication that the defense was in any way impaired by the delay. *People v White,* 343.

35. An instruction to a jury that it could not consider lesser included offenses until it found the defendant not guilty of the primary charge was reversibly erroneous because of the possibility that jurors opposed to conviction on the primary charge may have been coerced into voting for conviction of the higher charge by the prospect that the lesser included offenses would not even be considered unless agreement could be reached on acquittal of the higher charge. *People v Harmon,* 393.

36. A jury may not be charged affirmatively irrespective of the quantum of proof of guilt, that upon uncontradicted proof of the essential elements of the offense charged or the essential elements of one or more of the lesser included offenses under the principal offense it must return a verdict of guilty of the principal charge or one of the lesser included offenses and that it may not return a verdict of not guilty. *People v Gillespie,* 419.

37. An instruction to the jury that "I am directed by Mighigan law to instruct that you must find * * * the defendant * * * [guilty] * * * you have no discretion to reach a contrary decision" is reversible error. *People v Gillespie,* 419.

38. A trial judge has a duty to raise the issue of competency, if facts are brought to his attention which raise a bona fide doubt as to a criminal defendant's capacity to stand trial; however, the question whether a bona fide doubt exists is within the discretion of the trial court, and that decision will be reversed only for an abuse of discretion (MCLA 767.27a). *People v Groeneveld,* 424.

39. Failure of a trial judge to raise *sua sponte* the issue of a defendant's competence to stand trial was not error, despite the fact that less than three months prior to defendant's arraignment for felonious assault the trial judge had ordered the defendant transferred to a state hospital, where the judge also knew that defendant had been released from the state hospital, and where the judge had access to a letter from two physicians on the hospital staff which said that defendant was not suffering from any mental disease; the trial judge could have reason-

CRIMINAL LAW—Cont'd

ably concluded that there was no question of defendant's competence to stand trial. *People v Groeneveld,* 424.

40. The statute requiring credit for time spent in jail before sentencing is remedial and should be liberally construed to effectuate the salutary purpose sought to be achieved by the Legislature in its enactment (MCLA 769.11b). *People v Groeneveld,* 424.

41. A defendant's commitment to a state mental hospital as the result of a civil proceeding bore no relationship to his subsequent conviction for felonious assault; therefore the defendant was not entitled to credit against his sentence for time spent in the state hospital (MCLA 330.21, 769.11b). *People v Groeneveld,* 424.

42. The procuring agent defense is not available to a defendant charged with delivery of a controlled substance because under the Controlled Substances Act if there is an actual, constructive or attempted delivery a crime has been committed regardless of any agency relationship, whether it be between the defendant and a narcotics agent or between the defendant and the suppliers (MCLA 335.304[1]). *People v Williams,* 448.

43. A defendant who was charged with sale of marijuana, carrying a concealed weapon, and possession of marijuana, and who pled guilty to the concealed weapon and possession charges, whereupon the sale charge was quashed, cannot again be charged with sale of marijuana when the convictions on the other two charges are vacated; upon the acceptance of a plea of guilty, the state, as a matter of policy, may not thereafter charge a higher offense arising out of the same transaction (MCLA 335.152, 335.153, 750.227). *People v Goins,* 456.

44. A defendant who pled guilty to a charge of carrying a concealed weapon, where he had also been improperly charged in a supplemental information with the sale of marijuana as a second felony offense and therefore subject to an increased sentence, is entitled to a new trial upon the concealed weapon charge because there is a question whether his guilty plea was voluntarily given or was coerced as the only way he could extricate himself from the threat of the improper charge of sale of marijuana. *People v Goins,* 456.

45. A series of cases which held that even where a plea of guilty of a lesser included offense is induced by a desire to avoid the possibility of conviction on a greater offense properly charged, that is not a ground for vacating the plea on the ground of involuntariness, does not apply to a case in which a defendant was improperly charged with a greater offense and pled guilty not to a lesser included offense but to an offense totally unrelated to the greater offense charged. *People v Goins,* 456.

46. The objective test of entrapment is applied by looking to the conduct of the police; if the crime was manufactured by the law

CRIMINAL LAW—Cont'd

enforcement officers, the defendant was entrapped. *People v Henley,* 463.

47. A defendant convicted of delivery of heroin was not entrapped where the facts demonstrate that he was ready and willing to commit the crime whenever the opportunity to do so arose and on each of several occasions, when requested by a police undercover agent to furnish drugs, the defendant left his premises and obtained the heroin without delay from sources apparently well known to him. *People v Henley,* 463.

48. A police undercover agent was not a res gestae witness where the agent had arranged delivery of drugs on occasions previous to the occurrence for which the defendant was charged, but was not present during the events leading up to or at the time of the delivery in question. *People v Henley,* 463.

49. A defendant may not be reprosecuted in order to impose upon him another sentence for the same offense (US Const, Am V; Const 1963, art 1, § 15). *People v Lacy,* 471.

50. Failure to grant a defendant credit for time spent on probation against a prison sentence imposed after the revocation of that probation does not place the defendant in double jeopardy. *People v Lacy,* 471.

51. Applying credit for time spent on parole against a prison sentence while failing to give credit for time spent on probation is not a violation of the constitutional guarantee of equal protection of the laws because the treatment afforded probationers as distinguished from the treatment of parolees is necessary for the achievement of a compelling state interest; the effectiveness of probation revocation as a tool for securing compliance with the terms of probation would be vitiated if credit were granted for time previously spent thereon, and trial courts could well be discouraged in the important and necessary exercise of discretion in sentencing defendants in a manner relevant to their characteristics and to the crime involved (MCLA 791.238). *People v Lacy,* 471.

52. The results of a polygraph examination are not admissible in evidence in a criminal case. *People v Levelston,* 477.

53. A large body of state and Federal case authority retains the traditional view that polygraph examination results are not admissible in evidence, and rulings which have held to the contrary have not been followed. *People v Levelston,* 477.

54. Explaining to a defendant, prior to accepting a plea of guilty, the meaning of the presumption of innocence and that a jury could not find him guilty unless its members were "completely convinced" that defendant had participated in each element of the charged offense substantially complied with the court rule requiring a trial court to inform the defendant of the "right to be presumed innocent until proven guilty beyond a reasonable doubt" (MCLA 769.26; GCR 1963, 529.1, 785.7[1][d][ii]). *People v Cureton,* 501.

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55. There was no requirement prior to the effective date of an amendment to the court rules that before a defendant's guilty plea could be taken he had to be informed that at trial his guilt would have to be proved beyond a reasonable doubt and that he would have the right to compulsory process for obtaining witnesses in his favor (GCR 1963, 785.7). *People v Gibbons,* 524.

56. A defendant must be informed at his guilty-plea proceedings that he has a right to trial by jury or by the court without a jury; a statement of the court that "you stay innocent until and unless a judge or a jury after they have weighed the evidence presented by the prosecution, decided after hearing that evidence, that you were guilty" was sufficient to inform defendant of his right. *People v Gibbons,* 524.

57. A defendant who pleaded nolo contendere to a disorderly person charge under a city ordinance cannot later be tried on the charge of resisting arrest where both charges resulted from the same transaction; to do so would place the defendant in jeopardy twice for the same act. *People v West,* 527.

58. Two crimes with which a defendant was charged arose from the same transaction where a defendant directed profane language at a police officer who was questioning him in regard to a traffic accident, and then when the officer arrested him for disorderly conduct in violation of a city ordinance, he refused to submit peacefully and was later charged with resisting and obstructing an officer in discharge of his duty; the crimes charged were committed in a continuous time sequence and there was unity of intent in the defendant's refusal to submit to the police officer's authority. *People v West,* 527.

59. The allocation of jurisdiction among separate courts cannot defeat a defendant's right against double jeopardy; thus in a case where a defendant is charged with two crimes arising from the same transaction, one of which must be tried in the district court and the other in the circuit court, the prosecutor must elect which charge to pursue. *People v West,* 527.

60. A defendant was substantially advised of his right of confrontation prior to his plea of guilty when he was advised that he could cross-examine any witnesses called to testify at his trial. *People v Sanders,* 541.

61. Substantial compliance with the court rule concerning the advice of rights to be given a criminal defendant before accepting a plea of guilty does not rest on phraseology but rather on the substance of the advice given (GCR 1963, 785.7). *People v Sanders,* 541.

62. A defendant may be held to his on-the-record statement that no promises, inducements, coercion, or other undue influences had been offered to him or brought to bear upon him prior to his plea of guilty, notwithstanding his later allegations to the contrary. *People v Sanders,* 541.

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63. A defendant's affidavit supporting his claim that his plea of guilty should be set aside because it was the product of an unkept promise of leniency made by his attorney is insufficient to require the Court of Appeals to remand the case for an evidentiary hearing on the alleged promise of leniency. *People v Sanders,* 541.

64. A defendant is entitled to assignment of new counsel for resentencing where the defendant had to share counsel with two codefendants at sentencing and the positions of the defendant and his codefendants at the sentencing proceedings were so divergent as to have required their attorney to argue for substantially different penalties, and where the record reveals that the codefendants made statements putting most of the blame on defendant. *People v Sanders,* 541.

65. The fact that a defendant intentionally and knowingly attempted too elude police officers is sufficient to warrant a finding that he did so willfully in violation of the statute (MCLA 750.479[a]). *People v Harrell,* 555.

66. A witness under attack must first have been questioned about the facts and cross-examined before the witness can be impeached by calling other witnesses to prove acts or declarations showing bias; therefore, testimony offered to show that a police officer was biased against blacks was properly excluded where a proper foundation was not laid. *People v Harrell,* 555.

67. A witness who testifies that he does not remember the occurrence of a specific event may not be impeached by testimony that the event occurred; thus admission of the testimony of a doctor that a defendant's mother had refused permission to take a sample of her son's blood to determine whether or not he was intoxicated, after the mother testified that she did not recall refusing such permission, was error; however, because the testimony was upon a collateral issue which had no relation to the defendant's guilt or innocence of the crime charged, such error was harmless. *People v Harrell,* 555.

68. Failure to give a limiting instruction to the effect that certain rebuttal testimony was relevant only to the credibility of a witness is not reversible error absent a proper request for such an instruction or an objection. *People v Harrell,* 555.

69. Alibi witnesses were properly precluded from testifying before the jury where the defense attorney had failed to file a timely notice of alibi defense as required by statute (MCLA 768.20). *People v Watkins,* 576.

70. Testimony by a defendant as to his whereabouts, offered for the purpose of generally denying the charges against him, is not alibi testimony per se, and does not open the door to corroborating alibi witnesses where the defendant has not filed notice of an alibi defense (MCLA 768.20). *People v Watkins,* 576.

71. Testimony offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime is alibi testimony,

CRIMINAL LAW—Cont'd
even if that testimony does not account for all of the defendant's time during the period in question. *People v Watkins,* 576.

72. A defendant who challenges the constitutionality of a statute which requires notice of an alibi defense without provision for reciprocal discovery of the people's witnesses did not preserve the issue for appeal where he had not requested reciprocal discovery in the trial court nor made any objections to the proceedings at trial on the question (MCLA 768.20). *People v Watkins,* 576.

73. The reporting of a crime to the police will not ordinarily be sufficient to transform any conversation with a possible suspect into an official accusation. *People v Watkins,* 576.

74. An investigation had not yet become accusatory where the police stopped a defendant and questioned him regarding the sale of guns, issued him a traffic citation, and noticed a button missing from his shirt; the shirt and the button, later found at the scene of the crime, were not products of a violation of the *Miranda* rule and were properly admitted into evidence. *People v Watkins,* 577.

75. Removing a defendant's daughter from her and taking the daughter into juvenile custody and threatening the defendant with permanent deprivation sufficed to overcome her will and rendered her subsequent confession of a crime involuntary and inadmissible. *People v Richter,* 598.

76. Questions of voluntariness do not turn on the truth or falsity of the confession. *People v Richter,* 598.

77. A lapse of a few hours between the time of a threat made to a defendant by police and the defendant's subsequent confession to a crime do not suffice to make the confession voluntary; in fact, a time lapse may cause the threat to become more deeply imbedded in a defendant's mind. *People v Richter,* 598.

78. A conclusion by the Court of Appeals that a defendant's confession was coerced which was based on hearsay was improper where coercion was not claimed or argued on appeal. People v Richter, 599.

79. There are three elements to the defense of compulsion: a present, imminent, impending threat fostering a well-grounded apprehension of death or serious physical harm; the absence of fault in the circumstances from which the threat arises; and no reasonable opportunity to escape the compulsion and avoid commission of the crime. People v Richter, 599.

80. The general rule for determination whether an offense is a lesser included offense is that if the greater offense includes all of the elements of the lesser, then the greater includes the lesser, but if the lesser offense requires an element not required in the greater offense, the lesser is not necessarily included in the greater. *People v Keatts,* 618.

81. The Michigan Supreme Court decision which adopted an objec-

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tive standard with respect to the defense of entrapment is not retroactive. *People v Koehler,* 625.

82. There are four well-recognized exceptions to the general rule requiring production of res gestae witnesses at trial: when the prosecution makes a showing of due diligence in attempting to produce the witness; when the testimony of the missing res gestae witness would be merely cumulative; when the res gestae witness was a participant in the crime; and when the identity of the res gestae witness is made known to the defendant during trial, or even before, and the defendant does not move for the indorsement or production of the witness. *People v Koehler,* 625.

83. Failure of the prosecution to produce a res gestae witness at trial could have resulted in a miscarriage of justice where a key witness with respect to a crucial question of entrapment was not produced and where the defendant's only hope for acquittal rested on the defense of entrapment; the case must be remanded to the trial court for a hearing to determine whether the testimony of the res gestae witness would have been cumulative. *People v Koehler,* 625.

84. A decision of the Michigan Supreme Court establishing a precedent to remand cases where the nonproduction of res gestae witnesses may have possibly resulted in a miscarriage of justice is by its express terms prospective and does not apply to an appeal filed prior to the decision's publication date. People v Koehler, 626.

85. An appellate court is not precluded from considering a defendant's claim that an instruction to the jury was erroneous even though no objection was raised below where the alleged error in the instruction relates to a material element of the defendant's defense. *People v Smith,* 652.

86. Once a defendant admits on direct examination to a prior conviction, during cross-examination the prosecutor may not interrogate the defendant regarding the collateral facts comprising that prior conviction, where defense counsel has properly objected to such questioning. *People v William Johnson,* 678.

87. A cautionary instruction could not have cured the prejudicial error of admitting testimony, elicited by a prosecutor, regarding the factual basis of a defendant's prior conviction where the prosecutor, during closing arguments, stressed the specifics of defendant's prior conviction in a manner calculated to encourage the jury to conclude that if defendant had committed the prior crime, he must also have committed the charged offense; therefore, defense counsel's failure to object to the prosecutor's closing argument is not fatal to the issue on appeal. *People v William Johnson,* 678.

88. Admitting into evidence, over objection, testimony regarding a defendant's prior misdemeanor conviction for illegal possession

CRIMINAL LAW—Cont'd

of a starter pistol at defendant's trial on a charge of obtaining personal property by false pretenses was an abuse of discretion and mandates reversal of defendant's conviction because the misdemeanor conviction is entirely dissimilar from the false pretenses charge. *People v William Johnson,* 678.

89. An instruction to the jury regarding a defendant's alibi defense which does not instruct that if any reasonable doubt exists as to defendant's presence at the scene of the crime then the defendant is entitled to a verdict of acquittal, constitutes reversible error. *People v William Johnson,* 678.

90. A claim that a photographic identification of a defendant was so suggestive as to amount to a denial of due process of law must be determined in light of the totality of the surrounding circumstances. *People v Prince,* 699.

91. Display of a photograph of a defendant to the complainant for purposes of identification was unnecessarily suggestive where the complainant was a ten-year-old girl who had previously identified the defendant from a group of photographs and at the time of the second identification only a single photograph was shown to the girl, she was told that it was a later photograph of the same man she had earlier identified, and was asked if she was still sure of the identification. *People v Prince,* 699.

92. The test of the fairness of a photographic identification procedure is the degree of suggestion inherent in the manner in which the suspect's photograph is presented to the witness. *People v Prince,* 699.

93. A defendant wishing to claim a defense of alibi is required to file a written notice of the defense with the prosecuting attorney; in the event of failure to file such a notice, the court in its discretion may exclude evidence offered by the defendant for the purpose of establishing an alibi (MCLA 768.20, 768.21). *People v Robinson,* 704.

94. A simple declaration that the prosecution would be prejudiced was not sufficient ground for excluding a defendant's proof of alibi where the statutory notice of alibi defense had not been given but the prosecutor had been notified orally one week before trial, knew the identity of the witnesses the defense wished to call, and the identified witnesses were lodged in the county jail and therefore were available for questioning by the prosecutor (MCLA 768.20, 768.21). *People v Robinson,* 704.

95. A prosecutor is under a duty to disclose any information which would materially affect the credibility of his witnesses and any deals between the witnesses and the people. *People v Murray,* 723.

96. Reversible error did not result because a defendant was not provided with counsel at his lineup although he should have been provided with such where the lineup identification procedures were not so suggestive as to unduly taint the in-court

CRIMINAL LAW—Cont'd
identification and the in-court identification was supported by strong independent recollection of the identifying witnesses. *People v Murray*, 723.

See
APPEAL AND ERROR 1
ASSAULT AND BATTERY 1–4
CONTINUANCE 2
ESCAPE 1, 2
HOMICIDE 1–4, 5, 6
INCULPATORY STATEMENTS 1–4
INDICTMENT AND INFORMATION 2
LARCENY 1–4
WEAPONS 2, 3

CRIMINAL LITIGATION—See
CONSTITUTIONAL LAW 8

CRIMINAL PROCEEDINGS—See
INFANTS 1

CROSS-EXAMINATION—See
CRIMINAL LAW 86, 87
EVIDENCE 2

CUMULATIVE TESTIMONY—See
CRIMINAL LAW 82, 83

CUSTODY—See
CRIMINAL LAW 75

DAMAGED PROPERTY—See
INSURANCE 19, 20

DAMAGES

1. An award of damages of $20,000 in a personal injury negligence action was not justified by the evidence and shocks the judicial conscience where the plaintiff claimed about $200 in medical expenses and an impairment of retirement activity, but showed no loss of wages nor other out-of-pocket expenses. Van Haaften v Miller-Davis Co, 186.

See
JUDGMENT 2
WORKMEN'S COMPENSATION 24

DANCERS—See
MUNICIPAL CORPORATIONS 14, 15, 18

DANGER—See
CRIMINAL LAW 79
PERJURY 3

DANGEROUS CONDITIONS—See
LANDLORD AND TENANT 1

DATE OF INJURY—See
WORKMEN'S COMPENSATION 6

DATE OF OFFENSE—See
ASSAULT AND BATTERY 1, 2
INDICTMENT AND INFORMATION 2

DEADLY FORCE—See
HOMICIDE 1

DEAD MAN'S STATUTE—See
EVIDENCE 4

DEATH BENEFITS—See
WORKMEN'S COMPENSATION 4, 5

DEBTS OF BENEFICIARIES—See
TRUSTS 3

DECEDENTS—See
INSURANCE 11

DECISIONS—See
COURTS 1

DEDICATION

1. A road was properly found to be private and never dedicated to the public, where the cost of repair had always been borne by the residents adjacent to the road and the city had never reported the road as public for purposes of state reimbursement, continually taxed abutting owners to the center of the road, and required anyone building adjacent to the road to maintain it in front of his property. *Moshier v City of Romulus,* 65.

2. In order to find that a piece of property has been dedicated to the public use by the owner of the property, there must appear a clear intent to do so; all of the facts and circumstances must positively and unequivocally disclose the requisite intention. *Moshier v City of Romulus,* 65.

DEEDS

1. A deed executed by a defendant, through a strawman, to defendant and plaintiff, "or survivor", created joint life estates in plaintiff and defendant with the remainder in fee to the survivor, not merely an estate in expectancy to the plaintiff which was revocable during the defendant's life; the defendant therefore was not entitled to have the plaintiff's name expunged from the deed upon the assertion that her intent had

DEEDS—Cont'd
been for the deed to operate only as a will. *Anderson v Richter,* 532.

2. A party asserting that a deed absolute is in reality an equitable mortgage must establish that claim by clear and convincing proof that a mortgage was intended by the parties at the time the deed was executed. *Bryce v Jones,* 709.

3. A deed from the titleholder should not be construed as an equitable mortgage where there was no proof offered which would support a finding that the titleholder intended the deed to be other than an absolute transfer of her property interest. *Bryce v Jones,* 709.

4. The belief on the part of one party that a deed was to operate as a mortgage is not sufficient to change the nature of the written instrument since the necessary proof is that both parties intended the deed to have that effect; absent such proof, there can be no clear showing that the deed should be treated as other than a deed. *Bryce v Jones,* 709.

5. Bona fide purchasers of land, who received a warranty deed from the titleholder and who had no knowledge of an existing unrecorded land contract covering a prior sale of the land, took title free of the land contract interest (MCLA 565.29). *Bryce v Jones,* 710.

DEFAULT—See
LIMITATION OF ACTIONS 4

DEFAULT JUDGMENT—See
JUDGMENT 1, 2
PROCESS 2

DEFECTIVE HIGHWAY DESIGN—See
HIGHWAYS 3, 4

DEFENDANT TESTIFYING—See
CRIMINAL LAW 3, 86, 88

DEFENSE OF INSURED—See
INSURANCE 12
PLEADING 3

DEFENSES—See
ASSAULT AND BATTERY 1
CRIMINAL LAW 33, 34, 42, 46, 69–72, 79, 81, 83, 85, 89, 93, 94
DRUGS AND NARCOTICS 6
HOMICIDE 1–3, 5, 6
LIMITATION OF ACTIONS 3
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DEFENSES—Cont'd
REPLEVIN 1

DEFINITIONS—See
DRUGS AND NARCOTICS 2, 3

DELAY—See
CRIMINAL LAW 20, 32–34
EXTRADITION 4

DELAYED SEARCHES—See
SEARCHES AND SEIZURES 8

DELINQUENT PAYMENT—See
WORKMEN'S COMPENSATION 18

DELIVERY OF HEROIN—See
CRIMINAL LAW 47, 48
DRUGS AND NARCOTICS 7, 8

DEMAND FOR SPEEDY TRIAL—See
CRIMINAL LAW 20

DE NOVO REVIEW—See
APPEAL AND ERROR 5, 9

DENTISTS—See
NEGLIGENCE 7

DEPENDENTS—See
WORKMEN'S COMPENSATION 4

DEPOSITIONS—See
EVIDENCE 2

DESCRIPTION OF PREMISES—See
SEARCHES AND SEIZURES 10–12

DESCRIPTION OF SUB-UNITS—See
SEARCHES AND SEIZURES 10

DESCRIPTIONS—See
BOUNDARIES 1–6

DESIGN OF HIGHWAYS—See
HIGHWAYS 3, 4

DETRIMENTAL ACTS—See
GUARDIAN AND WARD 2

DETROIT HOUSE OF CORRECTION—See
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DILIGENCE—See
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EQUITY 1

DIRECTED VERDICT—See
MOTIONS 1
NEGLIGENCE 6, 7
PHYSICIANS AND SURGEONS 1
TRIAL 1

DISABLING PAIN—See
WORKMEN'S COMPENSATION 12, 13

DISABILITIES—See
WORKMEN'S COMPENSATION 6, 8, 19, 20, 22

DISCHARGE OF FIREARMS—See
ASSAULT AND BATTERY 3, 4

DISCHARGE OF OBLIGATIONS—See
COMPOSITIONS WITH CREDITORS 1

DISCIPLINE OF WORKERS—See
MASTER AND SERVANT 2

DISCLAIMER—See
TRUSTS 7

DISCLOSURE—See
PROCESS 2

DISCOVERY

1. The purpose of discovery is to allow the parties to a lawsuit to have access to material which will assist them in preparing and trying their cases. *Rock Island Bank v Ford Motor,* 278.

2. Failure of a defendant automobile manufacturer to obey a discovery order to produce certain crash-test films entitled the plaintiffs in a products-liability action to a new trial; the Court of Appeals need not say with certainty that if plaintiffs had access to the films the jury would have found for the plaintiffs, because the films in question may have made a difference in the way plaintiffs' counsel approached the case or prepared for trial, and therefore plaintiffs may well have been denied their right to a fair trial. *Rock Island Bank v Ford Motor,* 278.

See
CRIMINAL LAW 72

DISCRETION—See
APPEAL AND ERROR 7
CONTINUANCE 1
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DRUGS AND NARCOTICS 4
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NEW TRIAL 1
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DISCRIMINATION—See
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DISORDERLY CONDUCT—See
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DISPUTES—See
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INTERPLEADER 2

DISTRICT COURTS—See
CRIMINAL LAW 59

DIVORCE—See
INSURANCE 11

DOPE HOUSES—See
DRUGS AND NARCOTICS 7

DOUBLE JEOPARDY—See
CRIMINAL LAW 49, 50, 57, 59

DOUBLE LIABILITY—See
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DOUBT—See
CRIMINAL LAW 89

DRAMSHOP ACT—See
INTOXICATING LIQUORS 1–4
RELEASE 1

DRINKING HABITS—See
INTOXICATING LIQUORS 1

DRIVERS—See
AUTOMOBILES 4–6
NEGLIGENCE 2, 3, 6

DRIVERS' LICENSES—See
ADMINISTRATIVE LAW 3

DRIVING UNDER THE INFLUENCE OF ALCOHOL—See
STATUTES 1, 3

DRIVING WHILE IMPAIRED—See
STATUTES 1, 3

DRUGS AND NARCOTICS

1. The Controlled Substances Act of 1971 only reaches conduct which occurred subsequent to April 1, 1972, its effective date, and a defendant cannot be properly convicted under it of dispensing marijuana when the act for which he was prosecuted occurred on October 7, 1971 (MCLA 335.361[1], 335.361[5]). *People v Elwell,* 306.

2. The definition of narcotics in the former narcotic drug act, insofar as it included marijuana, was unconstitutional, and could not support a prosecution for dispensing marijuana under that act (MCLA 335.151, 335.152). *People v Elwell,* 306.

3. The Supreme Court has previously considered and rejected the argument that equal protection of the laws was violated by the former narcotic drug act as it applied to the sale of marijuana (MCLA 335.152). People v Elwell, 306.

4. Admitting into evidence in a criminal trial three unanalyzed tablets allegedly containing LSD was not an abuse of discretion where a police officer testified that he had purchased from the defendant four purple tablets said by defendant to be LSD, and where the prosecution's expert witness testified that he had scientifically analyzed one of the four purple tablets given him for analysis, that his analysis conclusively demonstrated the presence of LSD in the tablet tested, and that the remaining tablets appeared to be physically identical with the one tablet analyzed; the defendant's objection with respect to the three unanalyzed tablets is more properly addressed to their probative value than to their admissibility. *People v Koehler,* 624.

5. It is not incumbent upon the prosecution to prove that a defendant charged with sale or delivery of narcotics delivered a usable amount of narcotics. *People v Koehler,* 624.

6. Introduction of testimony concerning a police officer's attempted purchase of PCP, an illegal narcotic drug, from a defendant charged with delivery of heroin and LSD was not reversible error where the testimony was arguably admissible to show the defendant's scheme, plan, or intent as a dealer in illegal narcotic drugs, the conversation the defendant had with the officer regarding PCP constituted a vital portion of the res gestae of the crimes charged, the prosecution was entitled to show that the defendant was in fact a drug dealer willing to sell to anyone he could without getting into trouble with the

DRUGS AND NARCOTICS—Cont'd
police because defendant's defense consisted of an allegation of entrapment, and where the admission of the testimony with respect to PCP could not have prejudiced the defendant in light of his admission that he sold heroin and LSD to the officer (MCLA 768.27). *People v Koehler,* 624.

7. A prosecution witness's reference to "dope houses" in defendant's trial for unlawful delivery of heroin did not prejudice defendant's case where the context in which the reference appears in the record does not appear to associate defendant with any such places and the trial judge carefully and fully charged the jury that there was not contention on the part of anyone that defendant was in any way connected with "dope houses". *People v Murray,* 723.

8. The "usable amount" test for illegal possession of heroin does not extend to cases involving the unlawful sale of drugs, and where a witness in a prosecution for unlawful delivery of heroin testified that he used some of the heroin purchased from defendant, the contention that the people failed to establish that the amount was a usable amount is without merit (MCLA 335.341). *People v Murray,* 724.

See
CRIMINAL LAW 42–44, 47, 48
SEARCHES AND SEIZURES 13

DRUNK DRIVERS—See
AUTOMOBILES 4–6

DUAL EMPLOYERS—See
WORKMEN'S COMPENSATION 15, 16

DUE PROCESS—See
ADMINISTRATIVE LAW 3
CONSTITUTIONAL LAW 7, 8
CRIMINAL LAW 90
MUNICIPAL CORPORATIONS 20, 21

DUTY—See
CRIMINAL LAW 38, 39
LANDLORD AND TENANT 1
NEGLIGENCE 4
STATUTES 8

DUTY OF COURT—See
CONTRACTS 3

DUTY OF LANDLORDS—See
APPEAL AND ERROR 8

DUTY TO DEFEND—See
INSURANCE 12

DUTY TO RETREAT—See
HOMICIDE 5, 6

DWELLINGS—See
HOMICIDE 1–3, 5, 6
INSURANCE 12
SEARCHES AND SEIZURES 4–6
STATUTES 8, 9

ECONOMIC REALITY TEST—See
MASTER AND SERVANT 2

EFFECTIVE DATE—See
DRUGS AND NARCOTICS 1

ELEMENTS OF CRIME—See
CRIMINAL LAW 65, 80
LARCENY 1

ELEMENTS OF DEFENSE—See
CRIMINAL LAW 79, 85

ELEMENTS OF FRAUD—See
FRAUD 1

ELIGIBILITY LISTS—See
MUNICIPAL CORPORATIONS 23

ELUDING POLICE OFFICERS—See
CRIMINAL LAW 65

EMOTIONAL DISTURBANCES—See
WORKMEN'S COMPENSATION 22

EMOTIONAL ILLNESS—See
WORKMEN'S COMPENSATION 20

EMPLOYERS AND EMPLOYEES—See
MASTER AND SERVANT 1–5
MUNICIPAL CORPORATIONS 20, 22
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WORKMEN'S COMPENSATION 6, 9, 10, 14–18, 20, 23, 24

EMPLOYMENT—See
WORKMEN'S COMPENSATION 2

EMPLOYMENT-RELATED INJURIES—See
WORKMEN'S COMPENSATION 12, 13

ENFORCEMENT OF CONTRACTS—See
CORPORATIONS 1, 2

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ENTRAPMENT—See
CRIMINAL LAW 46, 47, 81, 83
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ENTRUSTMENT—See
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TAXATION 1, 3, 4

EQUAL PROTECTION—See
CONSTITUTIONAL LAW 5, 6
CRIMINAL LAW 51
DRUGS AND NARCOTICS 3
MUNICIPAL CORPORATIONS 17, 18, 21

EQUITABLE MORTGAGES—See
DEEDS 2–4

EQUITY

1. In a case where there are several claimants against a fund and there is no showing of a lack of diligence by any claimant, to permit the fund to be exhausted by those who first obtained judgments would deny equity to those who through no fault of their own have not yet reduced their claims to judgment. *Moore v McDowell,* 657.

2. Michigan courts have long recognized the efficacy of applying, under appropriate circumstances, the maxim "that equality is equity". *Moore v McDowell,* 657.

3. An advisory jury verdict does not bind a chancellor in equity. *Kar v Hogan,* 664.

4. *A prima facie case of undue influence will arise from facts sufficient to show a confidential relationship as the confidential relationship raises a rebuttable presumption of undue influence. Kar v Hogan,* 664.

See
APPEAL AND ERROR 5, 9
INTERPLEADER 2

ERRONEOUS INSTRUCTIONS—See
CRIMINAL LAW 85, 89
HOMICIDE 5

ERROR—See
APPEAL AND ERROR 1

ESCAPE

1. An instruction to the jury that in order to convict a defendant of prison escape they would have to find beyond a reasonable doubt that the defendant had been committed under the terms of a mittimus was proper and did not require a charge that the jury must find that the defendant was legally imprisoned under a valid mittimus; the fact that the defendant's conviction was later reversed does not affect the validity of the mittimus and does not justify an escape from prison. *People v Holt,* 60.

2. All persons convicted of crimes punishable in state prison are subject to the statute providing for punishment for escape from state prison; therefore, an escaped convict who had been convicted of a crime punishable in state prison and who had been incarcerated in the Detroit House of Correction rather than the state prison because she was a female was properly convicted under the state prison escape statute rather than the Detroit House of Correction escape statute (MCLA 750.193, 750.194, 802.55). *People v Ransom,* 738.

See
CRIMINAL LAW 79
PERJURY 3

ESTATES—See
DEEDS 1
PARTITION 1
TRUSTS 1, 2

ESTOPPEL—See
AUTOMOBILES 1
INSURANCE 2
JUDGMENT 14
NAVIGABLE WATERS 2
NEGLIGENCE 1
PLEADING 3

EVIDENCE

1. An adoptive admission is the express adoption of another's statement as one's own on the part of a party which manifests circumstantially that party's assent in the truth of a statement made by another. *Durbin v K-K-M Corp,* 39.

2. Admitting into evidence a portion of a deposition which referred to a statement allegedly given by the deposed witness to an

EVIDENCE—Cont'd
investigator was error as hearsay where the witness was unavailable at trial for cross-examination and where it was not shown that the statement made to the investigator was the witness's statement for impeachment purposes; however, where two other witnesses testified regarding the same events covered by the deposition, and a review of the record does not show a miscarriage of justice, the parties complaining were not prejudiced so as to warrant reversal and another trial (MCLA 769.26). *Durbin v K-K-M Corp,* 39.

3. The results of polygraph tests are not admissible in evidence and their admission results in prejudicial error; neither the fact of the taking of a lie-detector test nor the results of such a test are admissible in evidence. *People v Bush,* 77.

4. The testimony of a plaintiff and her brother to establish that they were the "children" referred to as the contingent beneficiaries of an insurance policy was not barred by the dead man's statute where they also offered photographs as demonstrative evidence of the relationship; such photographs were sufficient to satisfy the statutory requirement of corroborating evidence (MCLA 600.2166). *Hilliker v Dowell,* 249.

5. Testimony of three eyewitnesses to an automobile accident and that of an expert witness did not impermissibly overlap where the eyewitnesses by their testimony showed the accident was caused by inadequate notice to a truck driver of a traffic light change, while the expert's testimony concerned the question whether the traffic light cycle could reasonably be judged to provide adequate notice of light changes to truck drivers; neither the expert nor the eyewitnesses invaded the other's area of expertise. *Fraley v City of Flint,* 570.

6. Evidence of repairs, change of conditions, or precautions taken after an accident or injury almost universally is not admissible as evidence or an admission of negligence before the accident. *Denolf v Frank L Jursik Co,* 584.

7. The admission of photographs showing subsequent repairs or precautions by a third party to a lift mechanism on a truck that caused an injury to the plaintiff and the jury's viewing of the truck in its changed condition, both over the objections of a defendant, were improper, where the defendant did nothing but install according to directions a system designed and manufactured by another party and the repairs were made by and at a time that the apparatus was under control of yet another party, and no clear foundation for exception to the general rule prohibiting evidence of subsequent repair was laid. *Denolf v Frank L Jursik Co,* 584.

See

APPEAL AND ERROR 6, 7
ASSAULT AND BATTERY 4
AUTOMOBILES 4, 6
CONTRACTS 1, 2

EVIDENCE—Cont'd
CRIMINAL LAW 7, 9, 14, 15, 27, 28, 52, 53, 63, 66–68, 70, 71, 74, 86–88, 90–92
DAMAGES 1
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WORKMEN'S COMPENSATION 2, 6, 7, 10, 19

EVIDENTIARY BASIS—See
WITNESSES 7

EXCEPTIONS—See
EVIDENCE 7

EXCESSIVE DAMAGES—See
DAMAGES 1

EXCLUSION—See
JURY 2

EXCLUSIONARY CLAUSES—See
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PLEADING 3

EXCLUSION OF EVIDENCE—See
APPEAL AND ERROR 7

EXECUTIVE ORGANIZATION ACT—See
CONSTITUTIONAL LAW 2

EXPECTANCIES—See
DEEDS 1

EXPENDITURES—See
COUNTIES 2

EXPENSES—See
DAMAGES 1

EXPERT TESTIMONY—See
AUTOMOBILES 6
DRUGS AND NARCOTICS 4
NEGLIGENCE 7

EXPERT WITNESSES—See
EVIDENCE 5
WITNESSES 7

EXTRADITION

1. The scope of extradition habeas corpus proceedings is limited to a determination of a defendant's identity as the wanted man, a determination of fugitivity, and a review of the regularity of the extradition proceedings. *In re Simmans,* 112.

2. A defendant is a "fugitive" under the Uniform Criminal Extradition Act where he is ascertained to be the person wanted in the demanding state and was present in the demanding state at the time the alleged offense occurred; therefore, a person may be extradited even though he left the demanding state with the knowledge and consent of officials of that state (MCLA 780.1 *et seq.). In re Simmans,* 112.

3. The section of the Uniform Criminal Extradition Act providing the requirements to be followed before an extradition application can be recognized does not set out all of the bases of fugitivity to the exclusion of others but is a compilation of the most common bases on which a defendant is determined to be a fugitive (MCLA 780.3). *In re Simmans,* 112.

4. A claim that delay in initiating extradition proceedings is a denial of a speedy trial is not an issue which may be raised in a habeas corpus proceeding challenging the validity of the extradition process but must be adjudicated in the demanding state. *In re Simmans,* 112.

See
CRIMINAL LAW 20

EXTRAJUDICIAL STATEMENTS—See
WITNESSES 4

EXTRANEOUS EVIDENCE—See
CONTRACTS 1

EYEWITNESSES—See
EVIDENCE 5

FACTS—See
CRIMINAL LAW 7
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FAIR TRIAL—See
CONSTITUTIONAL LAW 8
DISCOVERY 2
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FALSE CONFESSIONS—See
CRIMINAL LAW 76

FALSE REPRESENTATIONS—See
FRAUD 1

FATAL BLOWS—See
HOMICIDE 3

FATHER-CHILD RELATIONSHIP—See
BASTARDS 2

FAULTY DESIGN—See
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FEAR—See
CRIMINAL LAW 79
PERJURY 1, 2

FEDERAL REVENUE-SHARING FUNDS—See
COUNTIES 2

FELONIOUS ASSAULT—See
CRIMINAL LAW 39

FELONIOUS INTENT—See
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FIFTH AMENDMENT—See
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FILMS—See
DISCOVERY 2

FINDINGS OF FACT—See
APPEAL AND ERROR 5
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FIREARMS—See
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FIREMEN—See
MUNICIPAL CORPORATIONS 22, 23

FLAGRANT DEFECTS—See
HIGHWAYS 3, 4

FORCE—See
HOMICIDE 1

FORESEEABILITY—See
NEGLIGENCE 6

FORGERY

1. A defendant was improperly charged with uttering and publishing a false, altered or counterfeited order for the payment of money where the defendant signed his own name to a check drawn on a bank in which he had no account and gave identification information to the payee; the charge that should have been placed against the defendant was under another statute concerning the drawing of checks without an account (MCLA 750.131a, 750.249). *People v Finley,* 259.

40-YEAR MARKETABLE TABLE—See
NAVIGABLE WATERS 3

FOURTH AMENDMENT—See
SEARCHES AND SEIZURES 3

FRAUD

1. The requirements for actionable fraud are that the defendant made a material representation, which was false, that he knew it to be false or made it recklessly without knowledge of its truth, that he intended that the plaintiff would act upon it, that the plaintiff did act in reliance upon it, and thereby suffered injury. *Mazzola v Vineyard Homes, Inc,* 608.

See
JUDGMENT 13
TAXATION 4

FREEDOM OF SPEECH—See
MUNICIPAL CORPORATIONS 15

FRONT-FOOT ASSESSMENTS—See
MUNICIPAL CORPORATIONS 21

FUGITIVES—See
EXTRADITION 1–3

FUNDAMENTAL INTEREST—See
STATUTES 4

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TRUSTS 5

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WORKMEN'S COMPENSATION 20

GARAGEOWNERS—See
INSURANCE 18, 19

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GIFTS OF INCOME—See
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GO-GO BARS—See
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GOVERNMENTAL AGENCIES—See
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GOVERNMENTAL DECISIONS—See
MUNICIPAL CORPORATIONS 24

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GOVERNMENT BUILDINGS—See
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MUNICIPAL CORPORATIONS 23

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GRAND JURY INDICTMENT—See
INDICTMENT AND INFORMATION 1

GREATER OFFENSES—See
CRIMINAL LAW 43–45

GROSS INDECENCY—See
ASSAULT AND BATTERY 1, 2

GUARDIAN AND WARD

1. A guardian is without power to bind the infant or his estate unless authorized by statute. *Reliance Insurance Co v Haney*, 237.

GUARDIAN AND WARD—Cont'd
2. A guardian has no authority to do any act which is detrimental to his ward. *Reliance Insurance Co v Haney,* 237.

See
PARENT AND CHILD 2

GUILTY PLEA—See
CRIMINAL LAW 12, 13, 22, 23, 26, 43–45, 54–56, 60, 63

HABEAS CORPUS—See
EXTRADITION 1, 4

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CRIMINAL LAW 67
EVIDENCE 2

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WORKMEN'S COMPENSATION 6, 8

HEARINGS—See
CRIMINAL LAW 3–5
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HEARSAY—See
CRIMINAL LAW 78
EVIDENCE 2

HEROIN—See
CRIMINAL LAW 47, 48
DRUGS AND NARCOTICS 6–8

HIGH-RISE HOUSING—See
INJUNCTION 2

HIGHWAYS
1. Governmental agencies having jurisdiction over highways have a duty to maintain and design them with reasonable care. *Fraley v City of Flint,* 570.
2. A defendant municipality was not immune from tort liability for the alleged improper timing of a traffic control signal merely because the cycle fell within the recommended range of amber light intervals found in a statute and in the Michigan Manual on Uniform Traffic Control Devices; the range of recommended cycles is too broad to allow mere compliance with it to be deemed reasonable without regard to the peculiarity of the intersection involved (MCLA 257.610). *Fraley v City of Flint,* 570.
3. A municipality is liable for flagrant defects in the design of its highways. *Fraley v City of Flint,* 570.
4. A jury properly found a flagrant defect in a highway intersection designed by a municipality as if it were used exclusively by

HIGHWAYS—Cont'd
automobiles where about 3,000 trucks passed through the intersection each day because statutes recognize, and expert testimony showed, that it takes more time and space to stop a truck than it does to stop a car (MCLA 257.627, 257.705). *Fraley v City of Flint,* 571.

HIRING AND FIRING—See
MASTER AND SERVANT 2
WORKMEN'S COMPENSATION 16

HOMEBUILDERS—See
JUDGMENT 13

HOMEOWNERS—See
INJUNCTION 2
MUNICIPAL CORPORATIONS 21

HOME-RULE CITIES—See
MUNICIPAL CORPORATIONS 9

HOMES—See
SEARCHES AND SEIZURES 4–6

HOMICIDE
1. The general rule which requires retreat where practicable prior to utilization of deadly force in order to invoke a plea of self-defense to a charge of homicide is subject to the exception that deadly force may be utilized, with no retreat necessary, when one is assaulted in his dwelling. *People v Godsey,* 316.
2. A defendant charged with homicide, who invoked the defense of self-defense, was not entitled to an instruction *sua sponte* from the trial court with respect to the rule that no retreat is necessary when the defendant is assaulted in his own dwelling where the homicide did not take place within the defendant's home but near the lot line separating the defendant's property from that of the deceased. *People v Godsey,* 316.
3. *Failure to instruct the jury that no retreat was necessary where a defendant was assaulted in his dwelling in an instruction on self-defense in a trial for homicide was reversible error where the fatal blow was struck near the lot line dividing the property of the defendant from that of the deceased, and where the jury could have found from the evidence that the defendant was first assaulted on the front porch of his home. People v Godsey,* 316.
4. Evidence of a prior altercation between a defendant and the deceased, in a trial for homicide, was properly admitted, because a showing of the prior relations between the parties is permissible on the issue of who is the aggressor; a cautionary instruction would assist the jury in giving such evidence its proper perspective in relation to the circumstances. *People v Godsey,* 317.

HOMICIDE—Cont'd
5. Instructing a jury in a manslaughter trial that the defendant claiming self-defense had a duty to retreat was reversible error where the defendant was in his dwelling at the time of the homicide. *People v Smith,* 652.

6. A defendant convicted of manslaughter who had left his own home and had been staying with a friend at her apartment for approximately one week prior to the homicide was, for all practical purposes, in his own dwelling when at that apartment; therefore, the defendant had no duty to retreat to claim self-defense as to a homicide which occurred at that apartment. *People v Smith,* 652.

See
ASSAULT AND BATTERY 4

HOUSING LAW—See
STATUTES 8, 9

HOUSING UNITS—See
INJUNCTION 2

HYPOTHETICAL QUESTIONS—See
WITNESSES 7

ICE AND SNOW—See
APPEAL AND ERROR 8
LANDLORD AND TENANT 1
ICE AND SNOW 8
STATUTES 8, 9

IDENTIFICATION—See
CRIMINAL LAW 90–92, 96

IDENTIFICATION CARDS—See
MUNICIPAL CORPORATIONS 14, 18

IDENTITY—See
ASSAULT AND BATTERY 2
EXTRADITION 1

IDENTITY OF CLAIMS—See
JUDGMENT 12

IDENTITY OF EVIDENCE—See
JUDGMENT 12

IDENTITY OF FACTS—See
JUDGMENT 12

ILLEGAL ACTIVITIES—See
MUNICIPAL CORPORATIONS 12

ILLEGAL POSSESSION—See
DRUGS AND NARCOTICS 8

IMBECILITY—See
WORKMEN'S COMPENSATION 19

IMMEDIATE SEARCHES—See
SEARCHES AND SEIZURES 9

IMMINENT DANGER—See
CRIMINAL LAW 79
PERJURY 1–3

IMMUNITY—See
CONSTITUTIONAL LAW 6
HIGHWAYS 2
STATUTES 4, 5

IMPAIRMENT OF ACTIVITY—See
DAMAGES 1

IMPAIRMENT OF DEFENSE—See
CRIMINAL LAW 33, 34

IMPARTIAL FORUM—See
TRIAL 5

IMPARTIAL HEARING—See
ADMINISTRATIVE LAW 3

IMPARTIAL JURY—See
JURY 4

IMPEACHMENT—See
CRIMINAL LAW 9, 28, 66, 67
EVIDENCE 2
PROCESS 1
WITNESSES 1, 4, 6

IMPLIED ACQUITTAL—See
LARCENY 3

IMPLIED CONSENT—See
AUTOMOBILES 4–6

IMPROPER CHARGES—See
CRIMINAL LAW 44, 45
FORGERY 1

IMPUTATION OF KNOWLEDGE—See
PRINCIPAL AND AGENT 2

INABILITY TO WORK—See
WORKMEN'S COMPENSATION 22

INCARCERATION—See
CRIMINAL LAW 33, 40, 41
ESCAPE 2

INCLUDED OFFENSES—See
CRIMINAL LAW 18, 30

INCOME BENEFICIARIES—See
TRUSTS 1–4, 6, 7

INCOMPETENTS—See
CRIMINAL LAW 14

INCOMPLETE INSTRUCTIONS—See
CRIMINAL LAW 8

INCONSISTENT STATUTES—See
COURTS 4

INCONSISTENT TESTIMONY—See
CRIMINAL LAW 15

INCREASED VALUATION—See
TAXATION 4

INCURABLE INSANITY—See
WORKMEN'S COMPENSATION 20

INDIANA STATUTE OF LIMITATIONS—See
LIMITATION OF ACTIONS 1, 2

INDICTMENT AND INFORMATION

1. A holding of the Michigan Supreme Court that a defendant has a right to a preliminary examination following indictment by a grand jury is not retroactive. *People v Carter,* 69.

2. The people are entitled to some latitude in fixing the date of an offense, and variance between the proofs and the complaint is not fatal, provided the verdict is confined to the particular act within the scope of the complaint upon which the people introduce evidence for the purpose of procuring a conviction. *People v Helzer,* 285.

3. The prosecution has a clear duty to indorse the names of all res gestae witnesses upon the information and to produce them for examination at trial (MCLA 767.40). *People v Koehler,* 625.

INDIGENTS—See
CRIMINAL LAW 19

INDORSEMENT—See

CRIMINAL LAW 82
INDICTMENT AND INFORMATION 3
WITNESSES 9

INDUSTRIAL USE—See

WORKMEN'S COMPENSATION 12, 13

INFANTS

1. A probate court hearing for waiver of jurisdiction of a juvenile to a circuit court for criminal proceedings was not adequately in compliance with the court rule where the only criterion covered by the testimony was the defendant's prior criminal record; the court rule governing waiver hearings requires consideration of a variety of criteria to determine whether the interest of the child and the public would best be served by granting a waiver of jurisdiction (JCR 1969, 11.1[B]). *People v Bowers,* 565.

See

ASSAULT AND BATTERY 2
GUARDIAN AND WARD 1
INSURANCE 10
PARENT AND CHILD 1, 2

INFERENCES—See

ACCORD AND SATISFACTION 2
ASSAULT AND BATTERY 4
CRIMINAL LAW 27

INFLAMMATORY REMARKS—See

CRIMINAL LAW 29

INFLUENCING WITNESSES—See

CRIMINAL LAW 28

INJUNCTION

1. The use of a permanent injunction is an appropriate form of relief in a suit to enjoin misuse of public funds, and such an injunction was properly issued following a show cause hearing where several hearings had taken place, memoranda of law had been filed, testimony received, and no motion had been made by the defendant to take additional proofs. *Moshier v City of Romulus,* 65.

2. A group of homeowners cannot enjoin a city from consideration of a site plan for construction of high-rise condominium housing units which allegedly violate city zoning ordinances and threaten harm to the surrounding homeowners because it is within the realm of the city to consider such a plan and until the city has taken action on it any threatened injury or

INJUNCTION—Cont'd
violation of the ordinances is merely speculative and conjectural. *Dunlap v City of Southfield,* 398.

See
JUDGMENT 13

INJURIES—See
AUTOMOBILES 3
EVIDENCE 6, 7
LIMITATION OF ACTIONS 1, 2
NEGLIGENCE 4, 5, 8
WORKMEN'S COMPENSATION 2, 6, 8, 9, 12, 13

INJURY—See
FRAUD 1

IN PARI MATERIA—See
STATUTES 10

INSANITY—See
JUDGMENT 3
WORKMEN'S COMPENSATION 20

INSTALLMENT SALES CONTRACTS—See
REPLEVIN 1

INSTRUCTIONS TO JURY—See
APPEAL AND ERROR 2, 4
ASSAULT AND BATTERY 1, 2
CRIMINAL LAW 8, 16–18, 24, 30, 31, 35–37, 68, 85, 87, 89
DRUGS AND NARCOTICS 7, 8
ESCAPE 1
HOMICIDE 2–4
INTOXICATING LIQUORS 2, 4
NEGLIGENCE 2
TRIAL 2, 3

INSURANCE

1. Insurance companies are bound by all acts and contracts made by their agents which are within the apparent scope of authority conferred upon them; such authority, while not actually granted, is that which insurance companies knowingly permit agents to exercise or which is held out to the public and is not narrowed by limitations not communicated to the person with whom the agent deals. *State Auto Mut Ins Co v Babcock,* 194.

2. An insurance company is estopped from denial of coverage where its agent had apparent authority to issue a binder, he was in possession of binders and letterheads showing him to be the insurer's agent, he had application blanks which set out no restrictions on his powers, he was licensed and registered as an insurance agent in the state where there was a holding out of

INSURANCE—Cont'd

ability to transact business, and the insured and the Secretary of State relied on the agent's authority and ability to extend coverage. *State Auto Mut Ins Co v Babcock,* 194.

3. An insurance binder is a contract of temporary insurance to be effective insurance coverage until a formal policy is drafted and issued, is evidence of a contractual obligation to be expressed in complete written form at a later date, is used when a policy is not immediately issued to evidence that insurance coverage attaches at a specific time, and continues until the policy is issued or the risk is declined and notice thereof is given. *State Auto Mut Ins Co v Babcock,* 194.

4. The rights and liabilities of parties to a valid insurance binder are determined by reference to the conditions of the policy expected although that policy may never issue, and all ordinary provisions and exclusions of policies issued to cover similar risks will be read into the temporary binder unless there was an express agreement at the time of the issuance of the binder which would make such provisions and exclusions inconsistent with the intent of the binder agreement. *State Auto Mut Ins Co v Babcock,* 195.

5. A binder of insurance is an insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until the insurer gives notice of its election to terminate. *State Auto Mut Ins Co v Babcock,* 195.

6. Insurance contracts are subject to statutory regulation and are construed in light of statutory requirements; mandatory statutory provisions are read into insurance contracts. *State Auto Mut Ins Co v Babcock,* 195.

7. An insurer who has issued a binder and certified to the bureau of motor vehicles that the insured has obtained insurance is barred from asserting that the coverage failed to attach on the date of issuance, or that it failed to continue in force during the period in which the certificate of insurance remains uncancelled, that is, until the insurer has given the statutory notice required for cancellation. *State Auto Mut Ins Co v Babcock,* 195.

8. A valid binder of casualty insurance, excepting workmen's compensation, but including all classes of motor vehicle coverage, is subject to all statutory provisions; statutory cancellation notice provisions require a written ten-day notice of cancellation addressed to the insured (MCLA 500.3020). *State Auto Mut Ins Co v Babcock,* 195.

9. The language of a statute which required automobile liability insurance policies to protect the insured against uninsured motorists unless the named insured knowingly rejected such coverage was plain, unambiguous, and mandatory; the purpose of the statute was to place the victim of the uninsured motorist in the same position he would have occupied had the tortfeasor

INSURANCE—Cont'd

been insured (MCLA 500.3010). *Reliance Insurance Co v Haney,* 237.

10. A waiver of uninsured motorist coverage may have been invalid where the waiver was not made by the named insured as mandated by statute but rather by the named insured's father, and where the statute concerning uninsured motorist protection was not complied with in that the specified notice regarding uninsured motorist coverage was not displayed prominently on the front page of the insurance policy; therefore, a determination that as a matter of law the waiver of uninsured motorist coverage was fully dispositive of a claim by the named insured against the insurer was erroneous (MCLA 500.3010). *Reliance Insurance Co v Haney,* 237.

11. The proceeds of a life insurance policy were properly awarded to contingent beneficiaries, where the primary beneficiary, the decedent's former wife, was not entitled to the proceeds by reason of her divorce from the decedent and operation of statute, and where no provision of the policy required a different result (MCLA 552.101). *Hilliker v Dowell,* 249.

12. An insurer had no duty to defend an insured in an action for damages resulting from the asphyxiation and injury of the occupants of a dwelling owned by the insured but not specifically covered by the policy where the insurer's duty to defend was stated in the policy to be in any suit against the insured alleging bodily injury or property damage and seeking damages payable under the terms of the policy. *Schimmer v Wolverine Ins Co,* 292.

13. A section of a garageowner's liability insurance policy which excluded coverage of the purchaser of an automobile who had taken possession pursuant to an agreement of sale is invalid because it is contrary to the statute requiring that coverage extend to any permissive user of an insured vehicle (MCLA 257.520[b][2]). *Lilje v Allstate Ins Co,* 378.

14. The purpose of insurance is to insure; therefore a policy should not be construed to defeat that objective unless its language requires it. *Arrigo's Fleet Serv v Aetna,* 482.

15. Any doubts in the meaning of the terms of an insurance contract are to be resolved against the insurer and in favor of the insured. *Arrigo's Fleet Serv v Aetna,* 482.

16. The standard by which any contract of insurance is to be viewed is the understanding of an ordinary person. *Arrigo's Fleet Serv v Aetna,* 482.

17. Exclusionary clauses in insurance policies are to be strictly construed against the insurer. *Arrigo's Fleet Serv v Aetna,* 482.

18. A clause in a garageowner's liability insurance policy which excludes coverage of "property in the care, custody or control" of the insured is ambiguous, and is to be strictly construed against the insurer. *Arrigo's Fleet Serv v Aetna,* 482.

INSURANCE—Cont'd
19. Ambiguous language in a contract gives rise to a question of fact wherein the jury must determine the intent of the parties; thus, whether the contents of a trailer, damaged during repair of the trailer, were excluded from coverage by a garageowner's liability insurance policy was a question for the jury where the language of the policy's exclusionary clause was ambiguous. *Arrigo's Fleet Serv v Aetna,* 482.

20. The most valuable criterion for determining whether a policy of insurance on the liability of contractors, which excludes coverage of property "in the care, custody or control" of the insured, should include liability for such property if damaged, is to distinguish whether the damaged property is necessary to the insured's work or merely incidental to it; if the property is essential to the work being performed, it is within the "care, custody or control" of the insured and excluded, but if the property is not essential to the work it is not within the exclusion. *Arrigo's Fleet Serv v Aetna,* 483.

See
COURTS 2
EVIDENCE 4
JUDGMENT 9
LIMITATION OF ACTIONS 5–7
PLEADING 3
WORKMEN'S COMPENSATION 23

INSURANCE POLICIES—See
COURTS 2

INSURANCE PREMIUMS—See
MASTER AND SERVANT 5

INSURANCE PROCEEDS—See
MASTER AND SERVANT 4, 5

INTELLIGENCE TESTS—See
WORKMEN'S COMPENSATION 19

INTENT—See
BOUNDARIES 1
CONTRACTS 2–4
CRIMINAL LAW 27, 65
DEDICATION 2
DEEDS 2–4
INSURANCE 19
LARCENY 1–4
TRUSTS 6

INTENT TO COMMIT MURDER—See
ASSAULT AND BATTERY 3, 4

INTENT TO DEFRAUD—See
FRAUD 1

INTEREST—See
WORKMEN'S COMPENSATION 18

INTERPLEADER

1. Interpleader was available to the Motor Vehicle Accident Claims Fund against all of the claims which arose from an automobile-bus collision whether or not the claims had been reduced to judgments because under the court rule interpleader will cover any situation where a plaintiff is, or may be, exposed to double or multiple liability (GCR 1963, 210). *Moore v McDowell,* 657.
2. The equitable nature of interpleader mandates the pro rata distribution of a fund among all claimants to it where they have been interpleaded and a likelihood arises that the total of all claims would exceed the total proceeds available in the fund. *Moore v McDowell,* 657.

INTERPRETATION—See
COURTS 4

INTERPRETATION OF CONTRACTS—See
CONTRACTS 1, 2

INTERSECTIONS—See
HIGHWAYS 2, 4

INTERVENING CAUSE—See
NEGLIGENCE 5

INTERVENING PLAINTIFFS—See
WORKMEN'S COMPENSATION 24

INTOXICATING LIQUORS

1. Testimony of a decedent's drinking habits given by his wife in a dramshop action was properly excluded as self-serving where the decedent's wife had no personal knowledge of his state of intoxication on the day in question. *Durbin v K-K-M Corp,* 39.
2. Plaintiffs in a dramshop action were not prejudiced by the trial court's failure to read the entire dramshop statute in instructing the jury where the instructions adequately informed the jury that any person who sold intoxicating liquor to an intoxicated person would be liable for any injuries sustained as a result of the intoxication (MCLA 257.625a). *Durbin v K-K-M Corp,* 40.
3. An action under the dramshop act may be proved by circumstantial evidence. *Durbin v K-K-M Corp,* 40.
4. Failure of a trial court in a dramshop action to instruct the jury on the statutory presumption of intoxication was not

INTOXICATING LIQUORS—Cont'd
properly preserved for appeal where no objection was made at trial and where no manifest injustice is shown (MCLA 257.625a; GCR 1963, 516.2). *Durbin v K-K-M Corp,* 40.

See
MUNICIPAL CORPORATIONS 9
STATUTES 1, 3

INTOXICATION—See
AUTOMOBILES 4–6
CRIMINAL LAW 67

INTRUSION—See
SEARCHES AND SEIZURES 3–6

INVESTIGATIONS—See
CRIMINAL LAW 73, 74

INVITEES—See
NEGLIGENCE 8
STATUTES 8

INVOLUNTARY CONFESSIONS—See
CRIMINAL LAW 75–77

ISSUES—See
WITNESSES 7

JOINT LIFE ESTATES—See
DEEDS 1
PARTITION 1

JUDGES—See
CRIMINAL LAW 4, 38, 39
TRIAL 5, 6

JUDGES' REMARKS—See
APPEAL AND ERROR 10

JUDGMENT

1. Denial of a defendant's motion to set aside a default and a default judgment in a personal injury negligence action was not an abuse of discretion where the defendant conceded liability, a review of the record discloses evidentiary support for the damages awarded, and an award of $20,000 to an 85-year-old woman, who in addition to pain and suffering had to give up many of the things she enjoyed doing in retirement, does not shock the conscience of the Court of Appeals. *Van Haaften v Miller-Davis Co,* 186.

2. Failure to set aside a default and a default judgment in a personal injury negligence action was an abuse of discretion where good cause for failure of the defendant to make timely

JUDGMENT—Cont'd

response was shown in that the defendant's insurance carrier mislaid the summons and complaint until after the default judgment had been entered, where, despite an admission of liability, defendant had a meritorious argument that the damages assessed were substantially prejudicial, and where the required affidavit of facts was filed (GCR 1963, 520.4). Van Haaften v Miller-Davis Co, 186.

3. Entry of summary or accelerated judgment was improper where a plaintiff raised the question of tolling the statute of limitations by the disability of insanity, because this raised questions of fact to be determined at trial. *Van Buren v B & J Moving,* 266.

4. The requirements for the granting of an accelerated judgment were not met where there was disagreement between the parties regarding the making of a contract and the date upon which the defendant's default in filing a corporate report was terminated; a court rule requires a hearing of any disputed questions of fact (GCR 1963, 116.3). *Trans Plastic v Conser Const Co,* 270.

5. The Court of Appeals can give any judgment and make any order which should have been given or made in the trial court; therefore, a defendant's motion for accelerated judgment may be treated as one for summary judgment where the plaintiff failed to state a claim upon which relief could be granted and summary judgment was proper (GCR 1963, 116, 117, 820.1). *Schimmer v Wolverine Ins Co,* 291.

6. Supporting affidavits are required of a party making a motion for summary judgment on the ground that except as to damages there is no genuine issue as to any material fact (GCR 1963, 117.2[3]). *Lilje v Allstate Ins Co,* 378.

7. The principle that a judgment of a court of competent jurisdiction cannot be collaterally attacked applies to all judgments, whether they are consent judgments or the result of contentious litigation. *Dunlap v City of Southfield,* 398.

8. An accelerated judgment was properly granted on the ground that a plaintiff's claims were barred by a prior judgment where the prior judgment was obtained in a court which had proper jurisdiction and the subject matter of the two actions was identical. *Dunlap v City of Southfield,* 398.

9. A plaintiff in an automobile negligence action has the same rights against the defendant as the plaintiff's insurer had in a prior action by the insurer, as subrogee of the plaintiff, against the defendant, because the factors establishing defendant's liability to the plaintiff's insurer and the plaintiff are the same; therefore where the defendant obtained a judgment of no cause of action in the prior suit by plaintiff's insurer as subrogee, the defendant was entitled to accelerated judgment in a subsequent action instituted by the plaintiff. *Sorenson v Sawyer,* 416.

10. A legal action must fail where issues of fact or law which are

JUDGMENT—Cont'd
essential to the maintenance of that action have been finally decided by a court of competent jurisdiction in another legal action. *Sorenson v Sawyer,* 416.

11. The doctrine of res judicata will not apply as a bar to the maintenance of a subsequent action unless it appears that the prior action was rendered on the merits, on the same matter in issue, and between the same parties or their privies. *Mazzola v Vineyard Homes, Inc,* 608.

12. The test for determining identity of claims, in a case where a defendant seeks to invoke the doctrine of res judicata, is to consider the identity of facts essential to the maintenance of both actions, or whether the same evidence would sustain both, and if the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other. *Mazzola v Vineyard Homes, Inc,* 608.

13. A plaintiff is not precluded by the doctrine of res judicata from maintaining an action against a homebuilder for an injunction and damages for alleged fraudulent misrepresentation, where the plaintiff was also one of a number of plaintiffs in a prior action against the same builder which sought to restrain threatened violations of alleged agreements relating to development of adjoining land, because the evidence that would sufficiently establish a threatened breach of an enforceable agreement so as to warrant issuance of an injunction is substantially different from that required to establish fraud. *Mazzola v Vineyard Homes, Inc,* 608.

14. If a second action between the same parties is brought upon the same cause of action as the previous action, the prior judgment is conclusive upon every matter that might have been litigated, whether it was in fact litigated or not, but if the second action is upon a different cause of action, the prior judgment operates as an estoppel only as to the facts or questions actually litigated and determined. *Mazzola v Vineyard Homes, Inc,* 609.

See
EQUITY 1
INTERPLEADER 1
LIMITATION OF ACTIONS 6, 9
PLEADING 3
PROCESS 2
WORKMEN'S COMPENSATION 11

JUDGMENT NOTWITHSTANDING VERDICT—See
MOTIONS 1

JUDICIAL DISCRETION—See
APPEAL AND ERROR 7
CRIMINAL LAW 93, 94
JURY 3

JUDICIAL INTERFERENCE—See
MUNICIPAL CORPORATIONS 24

JUDICIAL PROCESS—See
CONSTITUTIONAL LAW 8

JUDICIAL REVIEW—See
MUNICIPAL CORPORATIONS 3, 4

JURISDICTION—See
COURTS 2
CRIMINAL LAW 59
INFANTS 1

JURY

1. A defendant's waiver of his right to a jury trial was valid and effective where the trial court explained to defendant the meaning of a jury trial and the effect of waiving the same, read a written waiver and explained it to the defendant, and had the defendant sign the form, and defense counsel presented it to the court (MCLA 763.3). *People v Inman,* 6.

2. There is insufficient proof of systematic exclusion or purposeful discrimination to require a remand for an evidentiary hearing on the matter of jury selection where a defendant merely challenges the exclusive use of voter registration lists from which to select prospective jurors and makes comparisons of percentages of blacks and young people on the voter registration lists with the actual numbers of these groups on the jury panel. *People v Tunstull,* 254.

3. The extent of allowable voir dire is largely a matter of judicial discretion and the court is not required to conduct the voir dire in the precise language proposed by counsel. *People v Harrell,* 554.

4. A defendant was not denied a trial by a fair and impartial jury because the trial court failed to ask the prospective jurors a list of questions, submitted by the defendant, relating to racial prejudice where the court's voir dire covered the subject generally and was sufficient to afford the defense attorney information necessary to challenge the prospective jurors, and where the defense attorney did not exhaust his peremptory challenges and expressed satisfaction with the jury at the end of the voir dire. *People v Harrell,* 554.

See
ASSAULT AND BATTERY 4
CONTINUANCE 2
CRIMINAL LAW 11
EQUITY 3
PERJURY 1
WITNESSES 5

JURY INSTRUCTIONS—See
APPEAL AND ERROR 2, 4
CRIMINAL LAW 8, 16–18, 24, 30, 31, 35–37, 68, 85, 87, 89
DRUGS AND NARCOTICS 7, 8
ESCAPE 1
HOMICIDE 2–4, 5
INTOXICATING LIQUORS 2, 4
NEGLIGENCE 2
TRIAL 2, 3

JURY QUESTION—See
NEGLIGENCE 3, 4

JURY TRIAL—See
CRIMINAL LAW 56
PLEADING 1

JURY VERDICT—See
APPEAL AND ERROR 3

JURY VIEW—See
EVIDENCE 7

JUSTIFIABLE INTRUSIONS—See
SEARCHES AND SEIZURES 3–5

JUVENILE COURTS—See
INFANTS 1

JUVENILE CUSTODY—See
CRIMINAL LAW 75

JUVENILES—See
CRIMINAL LAW 1, 2

KNOWLEDGE—See
DEEDS 5
PRINCIPAL AND AGENT 2

KNOWLEDGE OF RIGHTS—See
CRIMINAL LAW 22

LABOR BROKERS—See
WORKMEN'S COMPENSATION 14, 16

LABOR RELATIONS

1. The question of a civilian trial board for policemen is a permissive, not a mandatory subject, of collective bargaining between a city and a police officers association when the city charter provides for a police trial board. *Police Officers Assn v Pontiac (Supp)*, 282.

LABOR RELATIONS—Cont'd
See
MASTER AND SERVANT 2

LAND—See
NAVIGABLE WATERS 1–3

LAND CONTRACTS—See
DEEDS 5

LAND DEVELOPMENT—See
JUDGMENT 13

LANDLORD AND TENANT

1. A landlord, absent a contract, has no duty to his tenant to remove from common passageways any natural accumulation of snow and ice; however, he may be liable when a dangerous accumulation or condition has arisen artificially from his negligent maintenance of the common passageway or some other part of the premises. *Gossman v Lambrecht,* 641.

See
APPEAL AND ERROR 8

LANDOWNERS—See
DEDICATION 1, 2
MUNICIPAL CORPORATIONS 2–8
NEGLIGENCE 8
STATUTES 8, 9

LARCENY

1. Attempted larceny in a building is not a lesser included offense of breaking and entering with intent to commit larceny because the essential elements of attempted larceny in a building, proof that a larceny was attempted and a showing of overt acts going beyond mere preparation, are not elements included in breaking and entering with intent to commit larceny. *People v. Keatts,* 618.

2. Showing of an actual larceny or the attempt to commit a larceny is not necessary to support a finding of the intent to commit larceny. *People v Keatts,* 618.

3. A defendant who was charged with breaking and entering a building with intent to commit larceny, and was erroneously convicted of attempted larceny in a building, because this was not a lesser included offense under the charge, cannot be retried for the original charge of breaking and entering a building with intent to cimmit larceny because his conviction serves as an acquittal of the charge of breaking and entering. *People v Keatts,* 618.

4. Attempted larceny in a building is a lesser included offense of breaking and entering with intent to commit a larceny because in both crimes the felonious intent is the same, and the overt

LARCENY—Cont'd
act can be the breaking and entering; the greater offense is completed upon the breaking and entering, while the lesser upon an overt act going beyond mere preparation. People v Keatts, 619.

LAW ENFORCEMENT OFFICERS—See
CRIMINAL LAW 46–48

LAWFUL SEARCHES—See
SEARCHES AND SEIZURES 2

LAW REVISION—See
CONSTITUTIONAL LAW 1

LEGAL DESCRIPTIONS—See
BOUNDARIES 4, 6

LEGISLATION—See
APPEAL AND ERROR 8
CONSTITUTIONAL LAW 7
MUNICIPAL CORPORATIONS 17, 18

LEGISLATIVE INTENT—See
AUTOMOBILES 5
COURTS 4
CRIMINAL LAW 40
STATUTES 2, 3, 6

LEGS—See
WORKMEN'S COMPENSATION 12, 13

LENIENCY—See
CRIMINAL LAW 62, 63

LESSER INCLUDED OFFENSES—See
CRIMINAL LAW 18, 30, 35, 36, 45, 80
LARCENY 1, 3, 4

LIABILITY—See
HIGHWAYS 3
INSURANCE 9
INTERPLEADER 1
LANDLORD AND TENANT 1
NEGLIGENCE 8
WORKMEN'S COMPENSATION 8

LIABILITY FOR BENEFITS—See
WORKMEN'S COMPENSATION 15, 16

LIABILITY INSURANCE—See
INSURANCE 13, 18, 19

LIABILITY OF PURCHASERS—See
CORPORATIONS 3

LICENSES—See
MUNICIPAL CORPORATIONS 13, 14, 16, 19

LICENSING APPEAL BOARD—See
ADMINISTRATIVE LAW 3

LIE-DETECTOR TESTS—See
CRIMINAL LAW 15
EVIDENCE 3

LIFE BENEFICIARIES—See
TRUSTS 7

LIFE ESTATES—See
DEEDS 1
PARTITION 1

LIFE INSURANCE—See
COURTS 2
INSURANCE 11
MASTER AND SERVANT 4, 5

LIFE INTERESTS—See
TRUSTS 4, 6

LIFT GATES—See
EVIDENCE 7
MOTIONS 1

LIMITATION OF ACTIONS

1. The shorter Indiana two-year statute of limitations applicable to actions to recover for personal injuries was properly applied with respect to a plaintiffs' claim alleging common-law negligence, where the cause of action accrued in Indiana, the place of injury (MCLA 600.5861). *Waldron v Armstrong Rubber Co,* 154.

2. To the extent that characterization of a cause of action is necessary to determine which of two arguably applicable foreign statutes of limitations governs, as a procedural matter, the law of Michigan applies; therefore, a cause of action for breach of warranty to recover damages for injuries received in an accident in Indiana occasioned by a defective tire sounded in tort, in accordance with Michigan precedent, and a two-year Indiana statute of limitations applicable to actions to recover for personal injuries applied (MCLA 600.5861). *Waldron v Armstrong Rubber Co,* 154.

LIMITATION OF ACTIONS—Cont'd

3. The statute of limitations is an affirmative defense (GCR 1963, 111.7, 116.1[5]). *Van Buren v B & J Moving,* 266.

4. The two-year statute of limitations for filing an action against the officers of a corporation for liability on a contract entered into while the corporation was in default of filing its annual corporate report, contained in a former statute, did not begin to run until after the expiration of a grace period for filing the annual report (MCLA 450.87; 450.90). *Trans Plastic v Conser Const Co,* 270.

5. The statute of limitations for an action in tort begins to run at the time the claim accrues and therefore a claim of negligence on the part of an insurance agent in giving plaintiff bad advice in 1962 was barred in an action commenced in 1971 on the theory of tort (MCLA 600.5805). *Schimmer v Wolverine Ins Co,* 291.

6. A plaintiff cannot maintain an action against an insurance company for the negligence of its agent where a judgment has been rendered in favor of the agent, which determined that the applicable statutes of limitations had run, and that judgment has not been appealed from; a plaintiff who has chosen to proceed against an agent for misconduct and has been defeated is barred from litigating the same cause of action against the principal. *Schimmer v Wolverine Ins Co,* 291.

7. A plaintiff who brought an action alleging a breach of contract by a defendant insurance company's refusal to defend claims brought against the plaintiff could not maintain the action where it was commenced more than six years after the breach alleged (MCLA 600.5807). *Schimmer v Wolverine Ins Co,* 291.

8. The statute of limitations for a malpractice action begins to run only when the plaintiff discovers, or by the exercise of reasonable care should have discovered, the asserted malpractice, whichever is later. *Cates v F W Bald Estate,* 717.

9. The statute of limitations did not clearly bar a malpractice action and an accelerated judgment was improperly granted where there was a question of whether the plaintiff knew of the presence of a surgical needle in her abdomen longer than two years before starting the action (MCLA 600.5805). *Cates v F W Bald Estate,* 717.

See

ASSAULT AND BATTERY 1
JUDGMENT 3

LIMITED DISCRETION—See

MUNICIPAL CORPORATIONS 16

LIMITING INSTRUCTIONS—See

CRIMINAL LAW 68

LINEUPS—See
CRIMINAL LAW 96

LIQUOR CONTROL COMMISSION—See
MUNICIPAL CORPORATIONS 9

LITIGATION—See
CONSTITUTIONAL LAW 7

LOCATION OF COUNTY OFFICES—See
COUNTIES 1

LOSS OF CONSORTIUM—See
AUTOMOBILES 3

LOSS OF HEARING—See
WORKMEN'S COMPENSATION 6, 8

LOSS OF INDUSTRIAL USE—See
WORKMEN'S COMPENSATION 2, 12, 13

LSD—See
DRUGS AND NARCOTICS 4,6

MALPRACTICE—See
LIMITATION OF ACTIONS 8, 9
NEGLIGENCE 7
PHYSICIANS AND SURGEONS 1

MANDATORY STATUTORY PROVISIONS—See
INSURANCE 6

MANSLAUGHTER—See
HOMICIDE 5, 6

MANUFACTURED PRODUCTS—See
PRODUCTS LIABILITY 1

MARIJUANA—See
CRIMINAL LAW 43, 44
DRUGS AND NARCOTICS 1–3
SEARCHES AND SEIZURES 13

MARKETABLE RECORD TITLE ACT—See
BOUNDARIES 6

MARKETABLE TITLE—See
NAVIGABLE WATERS 3

MARKET VALUE—See
TAXATION 2, 3

MASTER AND SERVANT

1. A policy adopted by a defendant corporation providing for severance pay when employees were terminated at the company's request was not merely a unilaterally promulgated policy or a gratuity; the adoption of the policy by the company constituted an offer of a contract and consideration for a unilateral contract upon which the employees had the right to rely was supplied as the employees continued to work thereafter. *Gaydos v White Motor Corp,* 143.

2. The "economic reality" test for the existence of an employer-employee relationship includes as factors to be considered control over a worker's duties, payment of wages, the right to hire and the right to fire, and the right to discipline. *White v Extra Labor Power,* 370.

3. The purpose of profit-based bonus agreements between corporations and their employees is to encourage greater efforts in behalf of the corporation on the part of employees participating in such a plan. *Henry v J B Publishing Co,* 409.

4. Life insurance proceeds paid to a corporation upon the death of its president were not includible in the net profits of the corporation for the purpose of determining the amount of a bonus due to an employee of the corporation where the amount of the bonus was based on the net profits of the corporation, because inclusion of the life insurance proceeds in the net profits of the corporation would serve as a windfall to the employee, and would not further the generally understood purpose of such bonus agreements. *Henry v J B Publishing Co,* 409.

5. The fact that a corporation's payment of premiums for its president's life insurance policy naming the corporation as beneficiary out of its profits may have acted to reduce an employee's profit-based bonus does not require the inclusion of the life insurance proceeds in the corporation's net profits for the purpose of determining the amount of the employee's bonus; maintenance of such a policy on the life of the corporation's president was a legitimate expenditure and served a valid corporate purpose. *Henry v J B Publishing Co,* 410.

MATERIAL EVIDENCE—See
APPEAL AND ERROR 7

MATERIAL PREJUDICE—See
ADMINISTRATIVE LAW §

MEANDER LINE—See
NAVIGABLE WATERS 1

MEDICAL EXPENSES—See
DAMAGES 1

MEDICAL MALPRACTICE—See
PHYSICIANS AND SURGEONS 1

MEETING OF MINDS—See
ACCORD AND SATISFACTION 2

MEMORANDA—See
WITNESSES 2, 3

MEMORY—See
CRIMINAL LAW 67
WITNESSES 1, 2, 4

MENTAL CAPACITY—See
CRIMINAL LAW 1, 3

MENTAL HEALTH—See
WORKMEN'S COMPENSATION 20

MENTAL HOSPITALS—See
CRIMINAL LAW 41

MENTAL ILLNESS—See
CRIMINAL LAW 39

MERGERS—See
CORPORATIONS 3

MINORS—See
ASSAULT AND BATTERY 2
GUARDIAN AND WARD 1
INFANTS 1
INSURANCE 10
PARENT AND CHILD 1, 2

MIRANDA RULE—See
CRIMINAL LAW 74

MISCARRIAGE OF JUSTICE—See
APPEAL AND ERROR 3
CRIMINAL LAW 83, 84

MISDEMEANORS—See
CRIMINAL LAW 88

MISREPRESENTATION—See
JUDGMENT 13

MISTAKE OF COUNSEL—See
TRIAL 4

MISUSE OF PUBLIC FUNDS—See
INJUNCTION 1
MUNICIPAL CORPORATIONS 1

MITTIMUS—See
ESCAPE 1

MOBILE HOMES—See
REPLEVIN 1

MONUMENTS—See
BOUNDARIES 3–5

MORTGAGES—See
DEEDS 2–4

MOTIONS

1. A defendant corporation's motions for a directed verdict of no cause of action on the ground that it neither designed, manufactured, sold, nor installed a lift gate on a truck which injured the plaintiff, and its later motion for judgment notwithstanding the verdict should have been granted, where the plaintiff alleged faulty design and manufacture of the equipment but failed to prove manufacture, installation, and contractual or statutory liability on the part of the defendant corporation. *Denolf v Frank L Jursik Co,* 584.

See
JUDGMENT 1, 2, 5
PLEADING 3
TRIAL 1

MOTOR VEHICLE ACCIDENT CLAIMS FUND—See
INTERPLEADER 1

MOTOR VEHICLE INSURANCE—See
INSURANCE 7, 8

MOTOR VEHICLES—See
ADMINISTRATIVE LAW 3
AUTOMOBILES 1–3
DISCOVERY 2
EVIDENCE 5
HIGHWAYS 4
INSURANCE 9, 10, 13
JUDGMENT 9
NEGLIGENCE 2, 3, 6
SEARCHES AND SEIZURES 6–9
STATUTES 1, 3

MULTIPLE CLAIMS—See
EQUITY 1
INTERPLEADER 1, 2

MULTIPLE DEFENDANTS—See
CRIMINAL LAW 65

MULTI-UNIT RESIDENCES—See
SEARCHES AND SEIZURES 10–12

MUNICIPAL CORPORATIONS

1. A plaintiff taxpayer has standing to maintain an action against a municipality for misuse of public funds even if his interest in the outcome is financially insignificant; the misuse of public funds generally affects all taxpayers and entitles one to take action against such wrongful acts. *Moshier v City of Romulus,* 65.

2. Municipal corporations may levy special assessments upon abutting property for the purpose of street improvement, based upon the theory that a special benefit is conferred upon such property over and above the general benefit conferred upon the municipality as a whole. *Wabeke v City of Holland,* 215.

3. The legislative body imposing a special assessment for street improvement purposes is in the best position to determine whether a benefit is conferred upon the property so assessed and the amount of such benefit; courts are reluctant to interfere in such legislative determination unless there is fraud, mistake, discrimination or where the absence of the benefits claimed appears with certainty. *Wabeke v City of Holland,* 215.

4. The concept that road improvements automatically result in special benefits to the abutting properties, even when so determined by the legislative body imposing assessments, may be overturned where the record as a whole stretches credulity or shows beyond fair dispute that an overall harm results to the property owners assessed. *Wabeke v City of Holland,* 215.

5. A street-widening project purposely designed to maintain the essential residential character of the neighborhood, in which the street would remain two lanes, would only be widened from 22 to 25 feet plus a curb and gutter on each side, only three trees would be removed, and curves and grades would not be eliminated, confers a benefit upon the abutting property owners which would justify a special assessment, where the likelihood that the project would cause the neighborhood to lose its essential residential character is remote. *Wabeke v City of Holland,* 216.

6. Injury that might be suffered by owners of abutting property by reason of a street improvement program would be minimal and insufficient to justify enjoining a special assessment of those owners where there would be a loss of shoulder parking, but little shoulder parking is in fact done, where a majority of

MUNICIPAL CORP—Cont'd

the homes affected have either turn-around drives or use side-street exits and the others are to be accommodated by curb openings, and where the added width of the street could bring traffic only 1-1/2 feet closer to the residences. *Wabeke v City of Holland,* 216.

7. A special benefit to property owners, over and above the public benefit resulting from a street improvement, appears where the project will eliminate accumulated stormwater, stop the throwing of gravel onto front lawns, eliminate mud and dust, allow the city to sweep and to extend leaf-pickup service to the street, and in most cases will actually increase the size of front lawns. *Wabeke v City of Holland,* 216.

8. *A special assessment should not be levied because of a street improvement project where no special benefits will be conferred upon the residents bordering the street, the hazards of entering the street will be increased, at least two businesses will lose parking space presently used by their customers, air and noise pollution will be increased and moved closer to the homes on the street, and traffic and the speed of traffic will tend to increase. Wabeke v City of Holland,* 216.

9. A home-rule city has the power to regulate traffic in the liquor business within its own bounds through the exercise of its police powers subject to the authority of the Liquor Control Commission only when a conflict arises (MCLA 117.4j). *Tally v Detroit,* 328.

10. A municipal ordinance is presumed to be constitutionally valid and the party claiming that an ordinance is unreasonable has the burden of so proving. *Tally v Detroit,* 328.

11. Exercise of police power through the enactment of a municipal ordinance must be reasonable in two respects: first, it must be for the public welfare, and, second, the measures adopted must have relation to the purpose sought to be accomplished. *Tally v Detroit,* 329.

12. The protection of the public from illegal activity is a proper purpose for the exercise of police power and a business which is susceptible to the opportunity of criminal activity is a fit subject for strict regulation. *Tally v Detroit,* 329.

13. The operation of a topless go-go bar is a business so far affecting the public health, morals, and welfare as to authorize its regulation and licensing by a city (Detroit Municipal Code, ch 5, art 4). *Tally v Detroit,* 329.

14. A requirement that persons desiring to operate a cabaret must first obtain a license and that employees of such establishments who desire to dance topless must first obtain an identification card from the city police was found by a city's legislative body to be reasonably suited to the accomplishment of an objective within the city's police power, and such a determination should not easily be disturbed (Detroit Municipal Code, ch 5, art 4). *Tally v Detroit,* 329.

MUNICIPAL CORP—Cont'd

15. A municipal ordinance which regulates topless go-go dancers does not violate the First Amendment rights of such performers or their employers because a city, as agent of the state, has, under the Twenty-First Amendment, broad authority over public health, welfare, and morals, and because forms of expression which are in fact public acts are susceptible of greater regulation than traditional speech and writings (Detroit Municipal Code, ch 5, art 4). *Tally v Detroit,* 329.

16. A municipal ordinance which allows the mayor to deny an applicant a license to operate a cabaret upon proof of an arrest and conviction is not unconstitutionally vague or overbroad and does not allow the exercise of unlimited discretion (Detroit Municipal Code, ch 5, art 4). *Tally v Detroit,* 329.

17. A classification established by ordinance which has a rational basis in fact does not amount to discrimination or arbitrary classification such as to invalidate the ordinance or constitute it class legislation. *Tally v Detroit,* 330.

18. Legislation is not unconstitutional because it is legislation of a particular kind or character so long as the law operates equally upon those within the particular class; therefore, a municipal ordinance which requires all female entertainers who desire to dance topless to obtain an identification card, and which prohibits them from acting as waitresses, is not arbitrary or unreasonable or in violation of the equal protection clause (Detroit Municipal Code, ch 5, art 4). *Tally v Detroit,* 330.

19. A municipal ordinance which permitted the mayor to refuse to issue a cabaret license for what the mayor might determine to be "good, and satisfactory" evidence that the applicant had violated an ordinance or statute was properly modified by a trial court which allowed the mayor to deny a license only upon proof of arrest and conviction because a more definite standard was required to uphold the ordinance as constitutional (Detroit Municipal Code, ch 5, art 4). *Tally v Detroit,* 330.

20. The notice provision of a city's civil service rules, which requires a department head to give a suspended employee a written statement of the reasons for his suspension within 24 hours after it takes effect and file a copy thereof with the Civil Service Board, is designed to see that the suspended employee is accorded procedural due process; the civil service commission's actions in ruling that an employee's suspension was not effective until written notice was served did not prejudice an employee who received his notice more than 24 hours after his suspension because the ruling secured to the employee the full benefits of his position while maintaining all procedural safeguards (East Detroit Civil Service Rule 7.4). *Montiy v East Detroit Civil Service,* 510.

21. A municipal ordinance which requires payment of a fee for tapping into a public sewer system for homes constructed and occupied after the effective date of the ordinance in addition to an annual front-foot assessment, whereas prior to the ordi-

MUNICIPAL CORP—Cont'd
nance only the front-foot assessment was charged, is constitutional and does not deny due process or equal protection to a builder who owns several lots upon which he is constructing houses, and as to which he has paid annual assessments on a front-foot basis, where no arbitrary classification or exemption was attempted by the ordinance (Swartz Creek Ordinance No. 76, § 12.1). *Starline Const v Swartz Creek,* 538.

22. The purpose of the act establishing a civil service system for municipal police and firemen is to benefit the public by providing better qualified personnel and to protect the officers and employees from arbitrary and unjust removal (MCLA 38.501 *et seq.). Day v Gerds,* 547.

23. An eligibility list, once created in conformance with the terms of the civil service act for municipal police and firemen, is good for a period of two years and is not alterable or amendable during that period unless it be shown that such amendment is necessary to satisfy some constitutional deficiency; therefore amendment of an eligibility list before its two-year term had expired simply because a municipal civil service commission had administratively determined that the grading procedures earlier employed were too harsh was impermissible (MCLA 38.501 *et seq.). Day v Gerds,* 547.

24. The governmental decisions of municipal boards will not be interfered with by Michigan courts unless a board is found to have acted illegally, capriciously, or contrary to sound public policy. *Kyes v Allegan Commissioners,* 741.

See
DEDICATION 1, 2
HIGHWAYS 2–4
INJUNCTION 1, 2
LABOR RELATIONS 1

MURDER—See
ASSAULT AND BATTERY 3, 4

NARCOTICS—See
DRUGS AND NARCOTICS 1–8
SEARCHES AND SEIZURES 13

NARCOTICS AGENTS—See
CRIMINAL LAW 42

NAVIGABLE WATERS

1. Submerged land on the water side of a meander line was not conveyed by a government patent because the government did not convey patents to entire sections where the section was cut off by navigable water, but rather conveyed only fractional parts of a section up to the meander line or at most to the water's edge. *People ex rel DNR v Murray,* 685.

2. The state is not estopped from claiming title to submerged land

NAVIGABLE WATERS—Cont'd
which a defendant planned to fill merely because the state had approved a subdivision plat which contained part of the land in question where the only reliance on the approved plat had been by the defendant to the extent of $2,500 which he paid for the plat, and where the relief sought by the state, to prevent defendant from filling the land, is consistent with the state's right to hold the land in trust for the public. *People ex rel DNR v Murray,* 685.

3. The state was not precluded from claiming title to submerged land despite a claim by a defendant that he and his heirs and had held continuous title to the land for 40 years because provisions of the 40-year marketable title statute do not apply against the state, and title was in the state because title to lands beneath navigable water passed to the state upon admission to the Union (MCLA 565.104). *People ex rel DNR v Murray,* 685.

NEGLIGENCE

1. A plaintiff's action in circuit court for negligence must fail under the doctrine of collateral estoppel where the plaintiff's own negligence was established in a prior action in common pleas court involving the same parties and the same event. *Jones v Slaughter,* 120.

2. A school bus driver's violation of two provisions of a pupil transportation handbook published by the state board of education did not render the driver and his school district employer negligent as a matter of law in an action for damages for wrongful death of a pupil-passenger because, while violation of a statute is negligence per se, violations of duties imposed by such rules and regulations are evidence of negligence; therefore, instructions to the jury that the bus driver had the duty to use ordinary care for the safety of plaintiff's decedent and that the provisions of the handbook could be considered with all the other evidence in deciding whether the driver was negligent were proper. *Price v Manistique Schools,* 127.

3. Reasonable men could differ on the question of whether a school bus driver was negligent in leaving a six-year-old passenger at the edge of a highway accompanied by his ten-year-old brother and two playmates knowing that the child would have to cross the highway to reach his destination; therefore, the question of negligence was properly left for the jury's determination in an action against the bus driver and his school district employer for damages for the child's wrongful death. *Price v Manistique Schools,* 127.

4. The question of whether one's act or breach of duty is a proximate cause of a plaintiff's injury is for a jury to determine. *Price v Manistique Schools,* 127.

5. An intervening cause will not sever whatever connection there may be between a plaintiff's injuries and a defendant's negli-

NEGLIGENCE—Cont'd
gence if that intervening event was reasonably foreseeable. *Price v Manistique Schools,* 127.

6. Reasonable men could differ on the question of whether a defendant school bus driver could have reasonably foreseen that a passenger of his bus would be struck by another vehicle after leaving the bus; therefore, upon viewing the evidence in a light most favorable to the defendant driver and his school district employer, it was not error for the trial court to deny the plaintiff's motion for a directed verdict in an action for wrongful death. *Price v Manistique Schools,* 128.

7. A directed verdict was properly entered in favor of a defendant dentist in an action for malpractice where the plaintiff claimed the dentist "poked a hole" into her maxillary sinus permitting bacteria to enter and infect it but where, even if penetration had occurred, there was no expert testimony that it was negligent for the dentist to do so; lack of professional care was not so manifest that expert testimony was unncessary. *Tasse v Kaufman,* 595.

8. Nonliability to invitees for injuries resulting from falls on natural ice and snow applies to all landowners, including homeowners, store owners, and other businessmen. *Gossman v Lambrecht,* 641.

See
AUTOMOBILES 1–3
DAMAGES 1
EVIDENCE 6
JUDGMENT 1, 2, 9
LANDLORD AND TENANT 1
LIMITATION OF ACTIONS 1, 5, 6
PHYSICIANS AND SURGEONS 1
RELEASE 1

NEGLIGENCE PER SE—See
NEGLIGENCE 2

NEGLIGENT ENTRUSTMENT—See
AUTOMOBILES 2

NEGOTIATION—See
ACCORD AND SATISFACTION 3

NET PROFITS—See
MASTER AND SERVANT 4, 5

NEW TRIAL

1. The granting or denying of a motion for new trial rests within the sound discretion of the trial court and reversal of such an order is a function of whether prejudicial error was committed and an abuse of discretion is found. *Durbin v K-K-M Corp,* 40.

NEW TRIAL—Cont'd
See
DISCOVERY 2
TRIAL 4

NOISE—See
WORKMEN'S COMPENSATION 8

NOLO CONTENDERE—See
CRIMINAL LAW 57

NONJURY TRIAL—See
CRIMINAL LAW 26, 56

NO-RETREAT RULE—See
HOMICIDE 1–3, 5, 6

NOTICE—See
CONSTITUTIONAL LAW 1, 2
CRIMINAL LAW 69, 70, 72, 93, 94
DEEDS 5
EVIDENCE 5
INSURANCE 3, 5, 7, 8, 10
MUNICIPAL CORPORATIONS 20
PRINCIPAL AND AGENT 2
WORKMEN'S COMPENSATION 9–11

OBJECTIONS—See
CRIMINAL LAW 86, 87

OBJECTIVE TEST—See
CRIMINAL LAW 81

OCCUPANTS—See
INSURANCE 12

OCCUPATIONAL DISEASES—See
WORKMEN'S COMPENSATION 8

OFFENSES—See
CRIMINAL LAW 80

OPINIONS—See
WITNESSES 7

ORAL AGREEMENTS—See
ACCORD AND SATISFACTION 1

ORDER OF FILIATION—See
BASTARDS 2

ORDERS—See
WORKMEN'S COMPENSATION 1

ORDINANCES—See
COURTS 4
INJUNCTION 2
MUNICIPAL CORPORATIONS 10, 11, 16–19

OTHER CRIMES—See
CRIMINAL LAW 7
WEAPONS 3

OTHER OFFENSES—See
DRUGS AND NARCOTICS 6

OVERLAPPING TESTIMONY—See
EVIDENCE 5

OVERT ACTS—See
LARCENY 1, 4

PAIN—See
WORKMEN'S COMPENSATION 12, 13

PARENT AND CHILD

1. A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child. *Reliance Insurance Co v Haney,* 237.

2. The status of a parent is one of guardian by nature. *Reliance Insurance Co v Haney,* 237.

See
CRIMINAL LAW 75
INSURANCE 10

PAROLE—See
CRIMINAL LAW 51

PAROL EVIDENCE—See
CONTRACTS 2

PARTIAL DEPENDENTS—See
WORKMEN'S COMPENSATION 4, 5

PARTICIPANTS IN CRIME—See
CRIMINAL LAW 82

PARTIES—See
AUTOMOBILES 1
MUNICIPAL CORPORATIONS 1

PARTITION

1. Partition of land was properly denied where plaintiff and defendant had joint life estates with remainder to the survivor, and where the plaintiff was aware that the defendant had

PARTITION—Cont'd
intended that the plaintiff's interest in the land was to be contingent upon the defendant's death and the plaintiff by her actions had shown that she believed the defendant was to have quiet enjoyment of the property during defendant's lifetime. *Anderson v Richter,* 532.

PASSAGEWAYS—See
LANDLORD AND TENANT 1

PASSENGERS—See
NEGLIGENCE 2, 3, 6

PATENTS—See
NAVIGABLE WATERS 1

PATERNITY ACT—See
BASTARDS 1, 2
CONSTITUTIONAL LAW 4

PCP—See
DRUGS AND NARCOTICS 6

PEREMPTORY CHALLENGES—See
JURY 4

PERFORMERS—See
MUNICIPAL CORPORATIONS 15

PERJURY

1. Ruling that threats against the life of a defendant were insufficient, as a matter of law, to make out a defense of compulsion to charge a perjury was error where, when considering the evidence most favorably to the defendant, testimony showed a threat to kill the defendant or her daughter by a prison escapee who was convicted later of first-degree murder and conspiracy to commit murder, because given this threat, a jury might find that the compulsion under which the defendant operated was present, immediate, and impending, and fostered a well-grounded apprehension of death or serious bodily injury. *People v Richter,* 598.

2. A threat occurring three weeks prior to the giving of perjured testimony does not make it impossible, as a matter of law, for the *compulsion* to be present, imminent, or impending, and fostering a well-grounded apprehension of death or serious bodily injury at the time of the perjury; such issue was for the jury. *People v Richter,* 599.

3. The defense of compulsion to the crime of perjury was not available where the threat was three weeks before the perjury and the imminence of danger had passed since an escapist making the threat was gone; the defendant was at fault in the circumstances from which the threat arose since she had aided the person who threatened her in his escape from jail; and

PERJURY—Cont'd
where there was a reasonable opportunity to escape the compulsion and avoid commission of the crime in that the perjured testimony was given at a secret grand jury proceeding at which the defendant could have refused to answer under the Fifth Amendment. People v Richter, 599.

PERSONAL INJURY—See
DAMAGES 1
JUDGMENT 1, 2
LIMITATION OF ACTIONS 1, 2

PERSONAL PROPERTY—See
COURTS 2
REPLEVIN 1

PHOTOGRAPHIC IDENTIFICATION—See
CRIMINAL LAW 90–92

PHOTOGRAPHS—See
EVIDENCE 4

PHYSICIANS AND SURGEONS

1. A directed verdict for a defendant surgeon in a medical malpractice case was not proper where the record establishes that fact questions existed as to whether the defendant surgeon was negligent in not adequately securing the decedent's split sternum in a first operation and in inadvertently lacerating the decedent's heart in a subsequent operation; these were questions of fact and should properly have been submitted to the jury. *Richardson v Schlosser,* 1.

2. It was a question for the jury whether a plaintiff had knowledge of, or should have had knowledge of, the presence of a surgical needle in her abdomen, left from a prior operation, where the plaintiff alleged that she was consistently misled with regard to the needle's presence and that she had relied upon the advice given her by the defendant doctors, and that they concealed the information from her. *Cates v F W Bald Estate,* 717.

PLAIN VIEW—See
SEARCHES AND SEIZURES 2–5, 13

PLATS—See
BOUNDARIES 6
NAVIGABLE WATERS 2

PLEA OF GUILTY—See
CRIMINAL LAW 12, 13, 22, 23, 26, 43–45, 54–56, 60–63

PLEADING

1. Affidavit hearings and immediate trials concerning defenses

PLEADING—Cont'd
are available in certain circumstances but this procedure is not available if jury trial was timely demanded (GCR 1963, 116.3). *Van Buren v B & J Moving,* 266.

2. A complaint must set forth "a statement of the facts without repetition upon which the pleader relies" and may not be phrased in conclusory terms (GCR 1963, 111.1[1]). *Van Buren v B & J Moving,* 266.

3. A plaintiff's motion to amend her pleadings, made after summary judgment was entered against her, to plead estoppel of defendant insurance companies to raise exclusionary coverage defenses was properly denied where the defendants were not asserting exclusionary clauses, but rather that no coverage existed (GCR 1963, 117.3, 118.1). *Schimmer v Wolverine Ins Co,* 292.

POLICE—See
CRIMINAL LAW 46–48, 58, 65, 66, 73, 74, 77
DRUGS AND NARCOTICS 4, 6
MUNICIPAL CORPORATIONS 22, 23
SEARCHES AND SEIZURES 7, 8
STATUTES 5

POLICE POWER—See
CONSTITUTIONAL LAW 3
MUNICIPAL CORPORATIONS 9, 11–14

POLICE TRIAL BOARDS—See
LABOR RELATIONS 1

POLICIES—See
INSURANCE 3–5

POLYGRAPH EXAMINATIONS—See
CRIMINAL LAW 52, 53

POLYGRAPH TESTS—See
CRIMINAL LAW 15
EVIDENCE 3

POSSESSION—See
TRUSTS 1

POSSESSION OF STOLEN PROPERTY—See
CRIMINAL LAW 17

POWERS OF AGENT—See
PRINCIPAL AND AGENT 1

POWERS OF GUARDIANS—See
GUARDIAN AND WARD 1, 2

PRECAUTIONS—See
EVIDENCE 6, 7

PRECEDENT—See
CRIMINAL LAW 84

PREJUDGMENT—See
TRIAL 5

PREJUDICE—See
ADMINISTRATIVE LAW 4
APPEAL AND ERROR 2, 4
CONTINUANCE 2
CRIMINAL LAW 20, 24, 29, 32, 34, 94
DRUGS AND NARCOTICS 7
JUDGMENT 2
JURY 4
MUNICIPAL CORPORATIONS 20
NEW TRIAL 1
TAXATION 1
WEAPONS 2

PREJUDICIAL ERROR—See
CRIMINAL LAW 87
EVIDENCE 3

PRELIMINARY EXAMINATION—See
CRIMINAL LAW 12, 13
INDICTMENT AND INFORMATION 1

PREPONDERANCE OF EVIDENCE—See
PROCESS 2

PRESENTENCE REPORTS—See
CRIMINAL LAW 6, 25

PRESERVING EVIDENCE—See
SEARCHES AND SEIZURES 1

PRESERVING QUESTION—See
APPEAL AND ERROR 2
COMPOSITIONS WITH CREDITORS 3
CRIMINAL LAW 8, 16–18, 24, 29, 68, 72, 78, 85, 87
INTOXICATING LIQUORS 4
WORKMEN'S COMPENSATION 11

PRESUMPTION OF INNOCENCE—See
CRIMINAL LAW 17, 54

PRESUMPTION OF INTOXICATION—See
INTOXICATING LIQUORS 4

PRESUMPTIONS—See
EQUITY 4
MUNICIPAL CORPORATIONS 10

PRETRIAL INCARCERATION—See
CRIMINAL LAW 33

PRIMARY CHARGES—See
CRIMINAL LAW 35

PRINCIPAL AND AGENT

1. A person did not act as an agent for plaintiffs in the selling of property where there is no proof that plaintiffs ever empowered that person with the right to sell the property, and the defendants' reliance upon the apparent authority which arose out of the fact that the person collected land contract payments for the property was unfounded where, even assuming that collection of land contract payments gives rise to apparent authority to convey title, there is no proof that plaintiffs authorized the person to collect the land contract payments. *Bryce v Jones,* 709.

2. Knowledge of the part of an agent normally is imputable to the principal; but where the interest of the agent is adverse to that of his principal, the agent's knowledge is not imputable. *Bryce v Jones,* 710.

See
INSURANCE 1, 2
LIMITATION OF ACTIONS 6

PRIOR ACTION—See
JUDGMENT 11, 14

PRIOR ALTERCATIONS—See
HOMICIDE 4

PRIOR CONVICTIONS—See
CRIMINAL LAW 10, 11, 86–88

PRIOR CRIMINAL RECORD—See
INFANTS 1

PRIOR INCONSISTENT STATEMENTS—See
WITNESSES 4

PRIOR JUDGMENT—See
AUTOMOBILES 1
JUDGMENT 8, 14
LIMITATION OF ACTIONS 6
NEGLIGENCE 1

PRIOR OFFENSES—See
CRIMINAL LAW 9, 48

PRIOR SALES—See
DEEDS 5

PRIOR STATEMENTS—See
WITNESSES 6

PRISONERS—See
CRIMINAL LAW 11

PRISON ESCAPE—See
ESCAPE 1

PRIVATE ROADS—See
DEDICATION 1

PROBABLE CAUSE—See
SEARCHES AND SEIZURES 7, 8, 12

PROBATE COURT—See
COURTS 2
INFANTS 1

PROBATION—See
CRIMINAL LAW 50, 51

PROCESS

1. Corroboration and convincing proof are necessary to impeach a process server's return of service and the burden of proof is on the party who claims he was not served. *CR Mechanical v Temp-San Corp,* 83.

2. Setting aside a default judgment against a garnishee defendant who failed to file a disclosure on the ground that process was not served was error where the testimony of the defendant and his son that defendant was not served did not preponderate over the server's testimony and a corroborating affidavit that a writ had been served, and where no satisfactory explanation was offered by defendant as to why defense counsel originally filed a motion to set aside the default acknowledging service of the writ of garnishment and basing his request for relief instead on lack of liability. *CR Mechanical v Temp-San Corp,* 83.

PROCURING AGENTS—See
CRIMINAL LAW 42

PRODUCTION OF WITNESSES—See
CRIMINAL LAW 82–84
INDICTMENT AND INFORMATION 3

PRODUCTS LIABILITY

1. A manufacturer who has undertaken to explain or give warnings on the label concerning the use or propensities of its product has not discharged its duty, as a matter of law, to make a statement which is adequate under all the facts and circumstances where the explanation or warning is "the average standard in the industry"; the adequacy of the warning must be determined by the jury and a directed verdict in favor of the defendant manufacturer of charcoal briquettes was error where pleadings and stipulations of the parties showed that a bag of briquettes bore the legend on the bottom of both sides "CAUTION—FOR INDOOR USE—COOK ONLY IN PROPERLY VENTILATED AREAS" and death and injury resulted after plaintiff was using defendant's briquettes in a grill or brazier in a bedroom to provide heat for both herself and her children. *Hill v Husky Briquetting, Inc*, 17.

See
DISCOVERY 2
LIMITATION OF ACTIONS 2
MOTIONS 1

PROFANITY—See
CRIMINAL LAW 58

PROFESSIONAL CARE—See
NEGLIGENCE 7

PROFIT-BASED BONUS—See
MASTER AND SERVANT 3-5

PROMISES OF LENIENCY—See
CRIMINAL LAW 62, 63

PROOF—See
APPEAL AND ERROR 10
CRIMINAL LAW 36
INTOXICATING LIQUORS 3
JUDGMENT 12

PROOF OF PAYMENT—See
WORKMEN'S COMPENSATION 11

PROPERTY—See
COURTS 2

PROPERTY DAMAGE—See
INSURANCE 12

PROPERTY DESCRIPTIONS—See
BOUNDARIES 1-6

PROPERTY OWNERS—See
MUNICIPAL CORPORATIONS 2–8

PROPERTY TAXES—See
CONSTITUTIONAL LAW 1
TAXATION 2, 3

PROPERTY VALUES—See
TAXATION 1

PRO RATA DISTRIBUTION—See
INTERPLEADER 2

PROSECUTION WITNESSES—See
CRIMINAL LAW 95

PROSECUTORS—See
APPEAL AND ERROR 2

PROSECUTOR'S CHOICE—See
CRIMINAL LAW 59

PROSECUTOR'S DUTY—See
CRIMINAL LAW 82, 95
INDICTMENT AND INFORMATION 3

PROSECUTOR'S STATEMENTS—See
CRIMINAL LAW 29

PROSPECTIVE APPLICATION—See
COURTS 1

PROSPECTIVE JURORS—See
JURY 4

PROXIMATE CAUSE—See
NEGLIGENCE 4

PUBLICATION—See
CONSTITUTIONAL LAW 1, 2

PUBLIC BENEFITS—See
MUNICIPAL CORPORATIONS 6–8

PUBLIC BOARD MEETINGS—See
TAXATION 1

PUBLIC FUNDS—See
INJUNCTION 1
MUNICIPAL CORPORATIONS 1

PUBLIC INTEREST—See
INFANTS 1

PUBLIC POLICY—See
MUNICIPAL CORPORATIONS 24

PUBLIC USE—See
DEDICATION 1, 2

PUBLIC WELFARE—See
CONSTITUTIONAL LAW 3
MUNICIPAL CORPORATIONS 11, 13, 15

PUPIL TRANSPORTATION—See
NEGLIGENCE 2, 3

PURPOSE OF ACT—See
AUTOMOBILES 4

PURCHASE OF ASSETS—See
CORPORATIONS 3

PURCHASERS—See
INSURANCE 13

QUALIFIED RIGHTS—See
TRUSTS 2

QUESTION OF FACT—See
APPEAL AND ERROR 6
CRIMINAL LAW 27, 31
HOMICIDE 3
INSURANCE 19
JUDGMENT 3, 4
LIMITATION OF ACTIONS 9
NEGLIGENCE 3, 4, 6
PERJURY 1, 2
PHYSICIANS AND SURGEONS 1, 2
TRIAL 1, 5
WEAPONS 1
WORKMEN'S COMPENSATION 9, 15, 21

RACIAL PREJUDICE—See
CRIMINAL LAW 66
JURY 4

RATIONAL BASIS—See
CONSTITUTIONAL LAW 5
STATUTES 4, 5

REAL PROPERTY—See
DEEDS 1–5
MUNICIPAL CORPORATIONS 2–8
PARTITION 1

REAL PROPERTY—Cont'd
PRINCIPAL AND AGENT 1

REASONABLE DOUBT—See
CRIMINAL LAW 89

REASONABLE SEARCHES—See
SEARCHES AND SEIZURES 1, 6, 8, 9

REASONABLE TIME—See
HIGHWAYS 2
SEARCHES AND SEIZURES 9

REBUTTABLE PRESUMPTIONS—See
EQUITY 4

REBUTTAL WITNESSES—See
CRIMINAL LAW 28

RECEIVERSHIP—See
COMPOSITIONS WITH CREDITORS 1–3

RECIPROCAL DISCOVERY—See
CRIMINAL LAW 72

RECOLLECTION—See
CRIMINAL LAW 96
WITNESSES 1–4

REENACTMENT OF STATUTES—See
CONSTITUTIONAL LAW 1, 2

REFRESHING RECOLLECTION—See
WITNESSES 1–4

REGULATIONS—See
MUNICIPAL CORPORATIONS 9, 12, 13, 15
NEGLIGENCE 2

RELEASE

1. The release of one tortfeasor does not apply to another tortfeasor, where the released tortfeasor's liability is grounded on negligence and the other tortfeasor's liability is grounded on violation of the dramshop act (MCLA 436.22). *Northrup v Hyatt,* 390.

See
AUTOMOBILES 1
PARENT AND CHILD 1

RELEVANCE—See
APPEAL AND ERROR 7
RELEVANCE 68

REMAINDERMEN—See
TRUSTS 3, 5

REMAINDERS—See
DEEDS 1
PARTITION 1

REMEDIAL STATUTES—See
CRIMINAL LAW 40

REPAIRS—See
EVIDENCE 6, 7

REPLEVIN

1. An administrative order of the Supreme Court allows the defendant in an action to recover the possession of personal property to introduce, at a show-cause hearing, evidence of a meritorious defense including the defense of breach of warranty; therefore a trial court erred by limiting a show-cause hearing involving repossession of a mobile home sold under an installment sales contract to the questions of whether there was a contract, whether there was a default, and whether there was impairment of the collateral (Administrative order 1973–3). *Detroit & Northern v Woodworth,* 517.

REPORTING CRIMES—See
CRIMINAL LAW 73

REPOSSESSION—See
REPLEVIN 1

RESCISSION—See
ACCORD AND SATISFACTION 4

RESENTENCING—See
CRIMINAL LAW 64

RES GESTAE—See
CRIMINAL LAW 7
DRUGS AND NARCOTICS 6
INDICTMENT AND INFORMATION 3
WITNESSES 8

RES GESTAE EVIDENCE—See
WEAPONS 2

RES GESTAE WITNESSES—See
CRIMINAL LAW 48, 82–84

RESIDENCES—See
SEARCHES AND SEIZURES 10–12
STATUTES 8

RESIDENTIAL AREAS—See
MUNICIPAL CORPORATIONS 5–8

RESISTING ARREST—See
CRIMINAL LAW 57, 58

RES JUDICATA—See
JUDGMENT 9–14

RESTORATION OF STATUS QUO—See
ACCORD AND SATISFACTION 4

RESTRICTIONS ON ALIENATION—See
TRUSTS 5

RETREAT—See
HOMICIDE 1–3, 5, 6

RETROACTIVE APPLICATION—See
COURTS 1
INDICTMENT AND INFORMATION 1

RETROACTIVITY—See
CRIMINAL LAW 81

RETURN OF SERVICE—See
PROCESS 1

REVALUATION—See
TAXATION 4

REVENUE-SHARING FUNDS—See
COUNTIES 2

REVERSAL—See
CRIMINAL LAW 10
ESCAPE 1

REVIEW—See
ADMINISTRATIVE LAW 2
APPEAL AND ERROR 5, 9

REVIEW OF RECORD—See
COURTS 3

REVISION OF STATUTES—See
CONSTITUTIONAL LAW 1, 2

REVOCATION OF LICENSES—See
ADMINISTRATIVE LAW 3

REVOCATION OF PROBATION—See
CRIMINAL LAW 50, 51

RIFLES—See
SEARCHES AND SEIZURES 2

RIGHT OF CONFRONTATION—See
CRIMINAL LAW 60

RIGHT TO COMPULSORY PROCESS—See
CRIMINAL LAW 55

RIGHT TO COUNSEL—See
CONSTITUTIONAL LAW 4
CRIMINAL LAW 2, 19, 34, 64, 96

RIGHT TO JURY TRIAL—See
JURY 1

RIGHT TO REMAIN SILENT—See
CRIMINAL LAW 21

RIGHT TO TRIAL—See
CONSTITUTIONAL LAW 8
CRIMINAL LAW 22, 55, 56

RISKS—See
INSURANCE 4

ROADWAYS—See
DEDICATION 1

SALE OF GUNS—See
CRIMINAL LAW 74

SALE OF LIQUOR—See
INTOXICATING LIQUORS 2

SALE OF PROPERTY—See
DEEDS 5
PRINCIPAL AND AGENT 1

SALE OR DELIVERY—See
DRUGS AND NARCOTICS 5

SALES—See
REPLEVIN 1

SAME TRANSACTION—See
CRIMINAL LAW 43, 57–59

SANITY—See
JUDGMENT 3
WORKMEN'S COMPENSATION 20

SCHOOL BUSSES—See
NEGLIGENCE 2, 3, 6

SCOPE OF AUTHORITY—See
INSURANCE 1, 2

SEARCHES AND SEIZURES

1. A search by police of defendant's premises conducted without a search warrant was reasonable in light of the circumstances where the police had been fired upon from the apartment, the defendant had surrendered after a lengthy siege and was arrested outside the apartment, the search was simultaneous with the arrest, the police were unsure whether there were other assailants in the apartment, and they wished to preserve evidence and search for weapons. *People v White,* 342.

2. Police officers conducting a lawful search had the right to seize objects coming into plain view; thus a rifle which was found in a defendant's apartment, concededly belonging to the defendant and used in a shooting, was properly admitted into evidence, as were cartridges from the rifle found at the site of an earlier shooting. *People v White,* 342.

3. A police officer, in order to apply the plain view doctrine to justify a warrantless seizure of evidence, must be rightfully in a position where the evidence is plainly visible, must have prior justification for his intrusion, and must discover the evidence inadvertently. *People v Harden,* 353.

4. Police officers' initial intrusion into a residence was limited and justifiable and provided a basis for a later seizing of evidence without a warrant under the plain view doctrine where a next door neighbor who had been given a key, told to watch the house by the owners, and told that no one was to be inside, had called the police to investigate activity at the residence, and where, in response to a knock on the door and questioning, the police had been admitted to the foyer. *People v Harden,* 353..

5. Police intrusion into the kitchen of a private residence without a warrant was reasonable and justifiable following a justifiable entry into the foyer of the home where: first, testimony indicated that the police had been told that no one was supposed to be in the home because the owners were on vacation, second, when a son of the owners had met with the police in the foyer his hand was bleeding profusely, and, third, the officers had been led to believe that three persons they had seen from the foyer were the only persons in the house, and yet, after hearing

SEARCHES AND SEIZURES—Cont'd

noises, two other persons were found in a bedroom; under these circumstances, entry into the kitchen in quest of an explanation from defendants of the presence of the two strangers cannot be characterized as unreasonable, and evidence of a breaking and entering discovered inadvertently by the police in the kitchen was admissible under the plain view doctrine. *People v Harden,* 353.

6. Greater foundational facts are necessary to support a finding that a police intrusion was constitutionally reasonable when a house or a home is involved than if a moving vehicle were involved. *People v Harden,* 354.

7. Probable cause to search a defendant's automobile existed where the police had received a description of the car as having been involved in a crime, the police stopped the car and after questioning, arrested the driver. *People v Gordon,* 693.

8. A search without warrant of a defendant's automobile, conducted at the police station eight hours after the arrest of the defendant and impoundment of the automobile, was reasonable where there was probable cause to search the car and the defendant remained in custody. *People v Gordon,* 693.

9. The word "immediate" is not synonymous with "instantly", and in cases where a statute or an insurance policy has required immediate action the Supreme Court has consistently held that only action within a reasonable time is required; therefore, a search without warrant of a defendant's automobile eight hours after the arrest of the defendant and the impoundment of the automobile was reasonable and immediate and did not violate the defendant's Fourth Amendment rights against unreasonable searches and seizures. *People v Gordon,* 693.

10. A description in a search warrant must specify the appropriate sub-unit where a known apartment building, hotel, or rooming house is involved; a search warrant which fails to specify a known sub-unit is constitutionally defective. *People v Franks,* 729.

11. A search warrant described the place to be searched with sufficient particularity to meet the requirements of the United States and Michigan constitutions although it did not specify that there were separate living units in the described house but where from all indications the house appeared to be a single living unit and the police officers did not know nor should they have been expected to know of the multi-unit character of the house (US Const, Am IV; Const 1963, art 1, § 11). *People v Franks,* 729.

12. Probable cause existed to search the entire premises where the search warrant described the house which was searched without reference to any sub-units within the house and a defendant alleged that the room he occupied was rented as a separate residence but it was shown that the occupants of the house

SEARCHES AND SEIZURES—Cont'd
were of a transient nature, exchanging sleeping places, and therefore the entire building functioned as a single unit. *People v Franks,* 729.

13. A bag of marijuana was properly seized during the search of a house even though it was not specified in the search warrant where it was contraband in the plain view of officers conducting the search in an area where they had a right to be. *People v Franks,* 729.

SEARCH WARRANTS—See
SEARCHES AND SEIZURES 10–13

SECOND OFFENSE—See
STATUTES 1, 3

SECTION LINES—See
BOUNDARIES 4, 5

SEIZURE OF EVIDENCE—See
SEARCHES AND SEIZURES 3, 4

SELECTION OF JURIES—See
JURY 2

SELF-DEFENSE—See
HOMICIDE 1–3, 5, 6

SELF-INCRIMINATION—See
CRIMINAL LAW 22

SELF-SERVING TESTIMONY—See
INTOXICATING LIQUORS 1

SELLERS' LIABILITIES—See
CORPORATIONS 3

SELLING PRICE—See
TAXATION 2, 3

SENTENCES—See
CRIMINAL LAW 11, 40, 41, 50, 51

SENTENCING—See
CRIMINAL LAW 6, 10, 25, 64

SERVICE OF PROCESS—See
PROCESS 1, 2

SETOFF—See
WORKMEN'S COMPENSATION 11

SETTLEMENTS—See
ACCORD AND SATISFACTION 2
AUTOMOBILES 1
COMPROMISE AND SETTLEMENT 1
WORKMEN'S COMPENSATION 23

SEVERANCE PAY—See
MASTER AND SERVANT 1
TRIAL 1, 3

SEWER ASSESSMENTS—See
MUNICIPAL CORPORATIONS 21

SHARED COUNSEL—See
CRIMINAL LAW 64

SHOW CAUSE HEARINGS—See
REPLEVIN 1

SIGNED WRITINGS—See
ACCORD AND SATISFACTION 1

SITE PLANS—See
INJUNCTION 2

SLIP AND FALL—See
NEGLIGENCE 8

SNOW REMOVAL—See
APPEAL AND ERROR 8
LANDLORD AND TENANT 1
STATUTES 8, 9

SOCIAL SERVICES OFFICES—See
COUNTIES 1

SPECIAL ASSESSMENTS—See
MUNICIPAL CORPORATIONS 2–6, 8

SPECULATIVE INJURIES—See
INJUNCTION 2

SPEEDY TRIAL—See
CRIMINAL LAW 20, 32–34
EXTRADITION 4

SPENDTHRIFT TRUSTS—See
TRUSTS 1–7

STANDARD OF CARE—See
HIGHWAYS 1

STANDARD OF CARE IN TRADE OR INDUSTRY—See
PRODUCTS LIABILITY 1

STANDARDS—See
MUNICIPAL CORPORATIONS 19

STANFORD-BINET TEST—See
WORKMEN'S COMPENSATION 19

STATE HOSPITALS—See
CRIMINAL LAW 39, 41

STATE INTEREST—See
CONSTITUTIONAL LAW 5, 8

STATEMENT BY COURT—See
CRIMINAL LAW 56

STATE PRISONS—See
ESCAPE 2

STATES—See
NAVIGABLE WATERS 2, 3

STATE TAX COMMISSION—See
ADMINISTRATIVE LAW 1, 2

STATUS QUO—See
ACCORD AND SATISFACTION 4

STATUTE OF LIMITATIONS—See
ASSAULT AND BATTERY 1
JUDGMENT 3
LIMITATION OF ACTIONS 1–9

STATUTES

1. A conviction of a defendant under the second offense provision of the statute which proscribes driving while visibly impaired, where his first conviction was for operating a motor vehicle while under the influence of alcohol, was proper; when interpreting statutes relating to the same subject matter or having the same general purpose although containing no reference to each other, they should be construed together (MCLA 257.625a, 257.625b[b]). *People v Lawrence,* 13.

2. The purpose of the Legislature must be effectuated and other rules of construction serve only as a guide in ascertaining that intent, when interpreting statutes. *People v Lawrence,* 13.

3. The spirit and purpose of a statute should prevail over its strict letter; therefore, although the Legislature did not specifically state that a previous conviction of driving under the influence of alcohol could be utilized to convict under the second offense

STATUTES—Cont'd
provision of the impaired driving statute, the apparent purpose of the Legislature in adopting the second offender provisions was to deter persons who were once convicted under those statutes from repeatedly violating them (MCLA 257.625a, 257.625b[b]). *People v Lawrence,* 13.

4. The governmental immunity statute, in the absence of a suspect classification or the involvement of a fundamental interest, needs only a rational basis to be sustained and the litigant attacking the statute must carry the burden of showing it does not rest upon a rational basis (MCLA 691.1407). *Anderson v Detroit,* 496.

5. Armed police officers are not inherently a menance to society, their presence is not to harm but to protect, and their mere presence on the streets exposes no one to risk of serious bodily injury or death; therefore, there is a rational basis upon which the governmental immunity statute may apply to them (MCLA 691.1407). *Anderson v Detroit,* 496.

6. Legislative intent is to be gathered not from a particular provision of a statute, but from the act as a whole, giving meaning to all sections of the act. *People v Kozar,* 503.

7. When interpreting an act that is ambiguous the courts seek a reasonable construction in light of the purpose sought to be accomplished, and the intention is to be taken or presumed according to what is consonant to reason and good discretion. *People v Kozar,* 503.

8. The section of the Housing Law of Michigan providing for the cleanliness of dwellings should not be interpreted to require all owners of dwellings, in the cities and suburbs affected, to remove natural accumulations of ice and snow from residential lots when that duty is not shared by businesses openly inviting the public to use their parking lots and entrances (MCLA 125.474). *Gossman v Lambrecht,* 641.

9. The section of the Housing Law of Michigan providing for the cleanliness of dwellings requires no more of a landowner than is required by the common law with respect to removal of ice and snow (MCLA 125.474). *Gossman v Lambrecht,* 641.

10. Statutes *in pari materia* are read together as components of one consistent constitutional system, and if inconsistencies can be reconciled by a reasonable construction and a purpose found to be served by each, both must stand and be given effect. *People v Ransom,* 738.

See

ACCORD AND SATISFACTION 1, 3
ADMINISTRATIVE LAW 3, 4
ASSAULT AND BATTERY 3
BASTARDS 1
COMPOSITIONS WITH CREDITORS 1, 2
CONSTITUTIONAL LAW 1, 5, 6

STATUTES—Cont'd
CORPORATIONS 1, 2
COURTS 4
CRIMINAL LAW 40, 42, 51, 65, 70
DEEDS 5
DRUGS AND NARCOTICS 1
ESCAPE 2
EXTRADITION 2, 3
HIGHWAYS 2
INSURANCE 9, 10, 13
LIMITATION OF ACTIONS 4
MUNICIPAL CORPORATIONS 22, 23
NAVIGABLE WATERS 3
TAXATION 1
TRUSTS 7
WORKMEN'S COMPENSATION 5, 8, 13, 24

STATUTORY LIABILITY—See
MOTIONS 1

STATUTORY NOTICE—See
CRIMINAL LAW 69, 93, 94
INSURANCE 7, 8

STATUTORY PRESUMPTIONS—See
INTOXICATING LIQUORS 4

STATUTORY REGULATIONS—See
INSURANCE 6

STOCKHOLDERS—See
COMPOSITIONS WITH CREDITORS 2

STOLEN PROPERTY—See
CRIMINAL LAW 17

STOPPING TIME—See
HIGHWAYS 4

STREET IMPROVEMENTS—See
MUNICIPAL CORPORATIONS 2–8

STRICT CONSTRUCTION—See
INSURANCE 17, 18

STRICT REGULATION—See
MUNICIPAL CORPORATIONS 12

SUA SPONTE ORDERS—See
CRIMINAL LAW 5

SUBDIVISION PLATS—See
NAVIGABLE WATERS 2

SUBMERGED LAND—See
NAVIGABLE WATERS 1–3

SUBROGATION—See
JUDGMENT 9

SUBSEQUENT PRECAUTIONS—See
EVIDENCE 6, 7

SUBSEQUENT REPAIRS—See
EVIDENCE 6, 7

SUBSTITUTION OF COUNSEL—See
CRIMINAL LAW 19

SUB-UNITS OF RESIDENCE—See
SEARCHES AND SEIZURES 10

SUFFICIENCY OF DESCRIPTION—See
SEARCHES AND SEIZURES 11

SUFFICIENCY OF EVIDENCE—See
CRIMINAL LAW 63
WORKMEN'S COMPENSATION 2

SUGGESTIONS—See
CRIMINAL LAW 91, 92

SUMMARY JUDGMENT—See
JUDGMENT 3, 5, 6
PLEADING 3

SUPERINTENDING CONTROL—See
ADMINISTRATIVE LAW 4
COURTS 3

SUPPORT—See
BASTARDS 1, 2
TRUSTS 1

SUPPORTING PROOF—See
APPEAL AND ERROR 10

SUPREME COURT—See
COURTS 5
REPLEVIN 1

SURGEONS—See
PHYSICIANS AND SURGEONS 1

SURGERY—See

LIMITATION OF ACTIONS 9
PHYSICIANS AND SURGEONS 2

SURVIVORS—See

DEEDS 1
PARTITION 1

SUSPENDED CHARTERS—See

CORPORATIONS 1, 2

SUSPENDED EMPLOYEES—See

MUNICIPAL CORPORATIONS 20

SYSTEMATIC EXCLUSION—See

JURY 2

TAXATION

1. Equalized property values set by the state tax commissioners were not rendered void because the commissioners, following adjournment to consider statements of county representatives, did not reconvene their meeting to announce completion of their task before release of their final report, where, even if such procedure violated the public board meetings act, the record does not indicate that the plaintiff counties were prejudiced or that equalizations were based on factors other than those discussed or available to all in attendance at the public session (MCLA 15.251 *et seq.). Saginaw Co v Tax Commission,* 161.

2. True cash value of taxable property is the usual selling price or fair market value; there is no support for an argument that "true cash value" means "net proceeds in the hands of the hypothetical seller". *Saginaw Co v Tax Commission,* 161.

3. A definition of true cash value of taxable property which would exclude the expenses of closing a sale, even if otherwise acceptable, would not furnish a basis for judicial intervention into state equalization proceedings where the taxable wealth of all 83 counties was determined by the same standard of usual selling price or fair market value; where there is a conflict, equality of treatment should predominate over standards of cash value. *Saginaw Co v Tax Commission,* 161.

4. An increase of 30% in a county's equalized valuation was not shown to be fraudulent where the record did not disclose any indication that the increase was due to any factors other than general inflation, new construction within the county, and overdue revaluation. *Saginaw Co v Tax Commission,* 161.

See

ADMINISTRATIVE LAW 1
CONSTITUTIONAL LAW 1
DEDICATION 1

TAXPAYERS—See
MUNICIPAL CORPORATIONS 1

TEMPORARY INSURANCE—See
INSURANCE 3–5, 7, 8

TERMINATION OF EMPLOYMENT—See
TRIAL 1

THIRD-PARTY TORTFEASORS—See
WORKMEN'S COMPENSATION 23, 24

THREATENED VIOLATIONS—See
JUDGMENT 13

THREATS—See
CRIMINAL LAW 75, 77, 79
PERJURY 1–3

TIME ELEMENT—See
ASSAULT AND BATTERY 1
AUTOMOBILES 5, 6
INDICTMENT AND INFORMATION 2

TIME LAPSE—See
CRIMINAL LAW 77
PERJURY 2, 3

TIME SEQUENCE—See
CRIMINAL LAW 58

TIME SERVED—See
CRIMINAL LAW 40, 41

TIRES—See
LIMITATION OF ACTIONS 2

TITLE—See
COURTS 2

TITLE—See
DEEDS 2, 3, 5
PRINCIPAL AND AGENT 1

TITLE CLAIMS—See
NAVIGABLE WATERS 2, 3

TOLLING—See
JUDGMENT 3

TOPLESS GO-GO BARS—See
MUNICIPAL CORPORATIONS 13–15, 18

TORTFEASORS—See
CONSTITUTIONAL LAW 6
RELEASE 1
WORKMEN'S COMPENSATION 23

TORT LIABILITY—See
HIGHWAYS 2

TORTS—See
LIMITATION OF ACTIONS 5
RELEASE 1

TOTAL AND PERMANENT DISABILITY—See
WORKMEN'S COMPENSATION 19, 20

TRAFFIC—See
HIGHWAYS 4

TRAFFIC CITATIONS—See
CRIMINAL LAW 74

TRAFFIC SIGNALS—See
EVIDENCE 5
HIGHWAYS 2

TRIAL

1. Denial of a defendant's motion for a directed verdict in an action by employees for severance pay as a result of a sale of a unit of the defendant corporation was proper where there was evidence that the employees had in fact been terminated by the defendant corporation, because a court must view the evidence in the light most favorable to the party against whom such a motion is directed; the question of whether the defendant's severance pay contract applied to the plaintiffs was for the jury. *Gaydos v White Motor Corp,* 143.

2. Refusal to give a requested charge to the jury was proper where the evidence did not warrant such an instruction and the instruction which was given was legally and factually correct. *Gaydos v White Motor Corp,* 144.

3. A defendant corporation whose counsel in an action by employees for severance pay was allowed to argue in his closing statement regarding the past practices in application of a severance pay policy, where testimony regarding those practices was not allowed and a proposed jury instruction on those practices was rejected, cannot complain upon appeal that the jury was thereby confused; any such confusion would necessarily have resulted from the action of defendant's counsel. *Gaydos v White Motor Corp,* 144.

4. A new trial will be granted where a defendant asserts that a serious mistake by his attorney resulted in an unfair trial only

TRIAL—Cont'd
when it appears that the new trial, wherein the mistake would not be repeated, will in all likelihood result in an acquittal. *People v Watkins,* 577.

5. A trial judge should not make up his mind or render his decision prior to hearing the entire case where there are questions of fact to be determined and the parties have not been given full opportunity to present all their proofs and to argue their respective positions; even the mere implication that an imparital forum may not have been provided is inappropriate. Kar v Hogan, 665.

6. A trial judge may not make conclusions of fact which are not fully supported by the record. (GCR 1963, 517.1). Kar v Hogan, 665.

See
APPEAL AND ERROR 10
CRIMINAL LAW 4, 26, 32–34
JURY 1
PLEADING 1

TRIAL BOARDS—See
LABOR RELATIONS 1

TRIAL BY JURY—See
CRIMINAL LAW 22

TRIAL COUNSEL—See
CRIMINAL LAW 25

TRIAL STRATEGY—See
APPEAL AND ERROR 2
CRIMINAL LAW 11

TRUCK DRIVERS—See
EVIDENCE 5

TRUCKS—See
EVIDENCE 7
HIGHWAYS 4
MOTIONS 1

TRUE CASH VALUE—See
TAXATION 2, 3

TRUSTS

1. A valid spendthrift trust complies with certain prerequisites: (1) the gift is only of income, the beneficiary takes no estate whatever and has nothing to alienate, he has no right to possession and no beneficial interest but only a qualified right to support and an equitable interest only in the income; (2) the

TRUSTS—Cont'd

legal title must be vested in a trustee; (3) the trust must be an active one. *Preminger v Union Bank & Trust,* 361.

2. A spendthrift trust which gives the trustees the right to make payments to the beneficiaries when in the discretion of the trustees a need exists and after their determination that the beneficiaries cannot help themselves vests only a qualified right in the beneficiaries to receive any part of the corpus within the discretion of the trustees, and such an estate is not one which the beneficiaries could control, dispose of, or compel the trustees to deliver so as to render the trust not a spendthrift trust. *Preminger v Union Bank & Trust,* 361.

3. A trust which gave to the beneficiaries only the income of the trust assets during their lifetimes, provided for distribution of the trust assets to remaindermen upon the death of the last income beneficiary, gave to the trustees the power to invade principal for an income beneficiary when, in the discretion of the trustees, a need existed but only after a determination that the beneficiary could not help himself, and provided that neither principal nor income would be liable for the debts of a beneficiary and that no beneficiary could alienate his interest in principal or income, was a valid spendthrift trust. *Preminger v Union Bank & Trust,* 361.

4. Voluntary or involuntary alienation of the principal of a trust fund during the life interest of income beneficiaries may be validly restricted by the settlor, provided that the right to principal does not vest in the income beneficiary. *Preminger v Union Bank & Trust,* 362.

5. Conveyances by remaindermen of their future interests in the corpus of a spendthrift trust before the termination of the trust, in violation of restrictions on such alienation in the trust instrument, are void. *Preminger v Union Bank & Trust,* 362.

6. An attempted assignment by an income beneficiary of his life interest in a spendthrift trust will not be sanctioned where it was contrary to the provisions of the trust and the settlor's clear intent. *Preminger v Union Bank & Trust,* 362.

7. An assignment by one life beneficiary of a spendthrift trust to another life beneficiary was invalid because it was contrary to the provisions of the trust instrument, and could not operate as a disclaimer where it failed to conform to the requirements of the right of disclaimer act (MCLA 554.511). *Preminger v Union Bank & Trust,* 362.

TRUTH OF CONFESSIONS—See

CRIMINAL LAW 76

UNDERCOVER AGENTS—See

CRIMINAL LAW 47, 48

UNDUE INFLUENCE—See
CRIMINAL LAW 62
EQUITY 4

UNFAIR TRIAL—See
TRIAL 4

UNIFORM CRIMINAL EXTRADITION ACT—See
EXTRADITION 2, 3

UNILATERAL CONTRACTS—See
CONTRACTS 2
MASTER AND SERVANT 1

UNINSURED MOTORISTS—See
INSURANCE 9, 10

UNITY OF INTENT—See
CRIMINAL LAW 58

UNLAWFUL SALE—See
DRUGS AND NARCOTICS 8

UNREASONABLE SEARCHES—See
SEARCHES AND SEIZURES 9

UNRECORDED INSTRUMENTS—See
DEEDS 5

UNRELATED OFFENSES—See
CRIMINAL LAW 45

USABLE AMOUNT—See
DRUGS AND NARCOTICS 5, 8

UTTERING AND PUBLISHING—See
FORGERY 1

VAGUENESS—See
MUNICIPAL CORPORATIONS 16

VALIDITY OF COMMITMENT—See
ESCAPE 1

VALUATION—See
ADMINISTRATIVE LAW 2
TAXATION 2–4

VARIANCES—See
INDICTMENT AND INFORMATION 2

VEHICLES—See
SEARCHES AND SEIZURES 6

VENDOR AND PURCHASER—See
DEEDS 5
PRINCIPAL AND AGENT 1

VERDICT—See
APPEAL AND ERROR 3
CRIMINAL LAW 36, 37
TRIAL 1

VIOLATIONS—See
CRIMINAL LAW 65
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TAXATION 1

VOIR DIRE—See
CONTINUANCE 2
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VOLUNTARY CONFESSIONS—See
CRIMINAL LAW 1–4, 16, 21, 75–78

VOLUNTARY PLEA—See
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VOTER APPROVAL—See
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WAGES—See
MASTER AND SERVANT 2
WORKMEN'S COMPENSATION 14, 16, 17

WAITRESSES—See
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WAIVER—See
CRIMINAL LAW 3, 12, 13, 26
INFANTS 1
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PARENT AND CHILD 1

WARNINGS—See
PRODUCTS LIABILITY 1

WARRANTS—See
SEARCHES AND SEIZURES 3–5

WARRANTY—See
LIMITATION OF ACTIONS 2
REPLEVIN 1

WARRANTY DEEDS—See
DEEDS 5

WATER'S EDGE—See
NAVIGABLE WATERS 1

WEAPONS

1. The question of concealment is one for the jury in a prosecution for carrying of a concealed weapon, and the fact that the weapon is in plain view at one point does not negate, as a matter of law, a finding that the necessary concealment was there under any particular set of circumstances; thus, where the blade of a knife sticking from a defendant's pocket was visible to a police officer when the defendant was in the act of sitting down or standing up, there was a question of fact whether there was concealment within the meaning of the statute (MCLA 750.227). *People v Charron,* 26.

2. Testimony which was admitted as part of the res gestae showing that a defendant's companion at the time of arrest had a cut on his throat was not necessary or relevant to the prosecution on a charge of carrying a concealed weapon, and was prejudicial where the prosecutor, by his questioning and his closing argument, made it clear that he felt the defendant was guilty of inflicting the wound upon the companion (MCLA 750.227). *People v Charron,* 26.

3. Reversal of a defendant's conviction of carrying a concealed weapon is not required because the prosecutor had the defendant's companion exhibit a scar on his throat to the jury, thereby allegedly implying that defendant was guilty of inflicting the wound, where the fact that the companion had a cut on his throat was already properly before the jury and no claim was made that the scar was of such a nature as to inflame the passions of the jurors; the exhibition merely served to corroborate the earlier testimony. People v Charron, 27.

See
APPEAL AND ERROR 2
CRIMINAL LAW 7
SEARCHES AND SEIZURES 1, 2

WEIGHT OF EVIDENCE—See
WITNESSES 5

WILLFUL VIOLATIONS—See
CRIMINAL LAW 65

WILLS—See
COURTS 2
DEEDS 1

WINDFALL—See
MASTER AND SERVANT 4

WITHHOLDING EVIDENCE—See
DISCOVERY 2

WITHOUT WARRANT—See
SEARCHES AND SEIZURES 1, 3-6, 8, 9

WITNESSES

1. The purpose of refreshing a witness's recollection is to awaken memory and not to impeach or contradict the witness. *Durbin v K-K-M Corp,* 38.

2. An essential requirement in using memoranda to revive a witness's present recollection is the necessity to resort to the memoranda to refresh memory; however, it is not necessary to place the memoranda or notes in evidence because the recollection and not the memoranda is the evidence. *Durbin v K-K-M Corp,* 38.

3. The extent to which witnesses may refer to or read from refreshing memoranda and the extent to which such memoranda may be reviewed by counsel or the jury is usually a matter within the discretion of the trial court, and the trial court will not be reversed in the absence of abuse of discretion. *Durbin v K-K-M Corp,* 38.

4. Allowing defense counsel to use a prior inconsistent extrajudicial statement to refresh the recollection of a witness for the plaintiffs was not an abuse of discretion where the witness manifested much difficulty in recalling details and in fact noted that, to some degree, the statement had revived some memory; in any event the statement was properly used for impeachment purposes as a prior inconsistent statement and, on this ground alone, the action of the trial court was not erroneous because a right conclusion will not be disturbed on appeal even though based on the wrong theory. *Durbin v K-K-M Corp,* 38.

5. A jury is the sole judge of credibility of witnesses and the weight to be accorded their testimony. *Durbin v K-K-M Corp,* 39.

6. Prior statements introduced for impeachment purposes bear solely upon the credibility of the witness and are not considered for the purpose of establishing the substance or truth of the prior statements. *Durbin v K-K-M Corp,* 39.

WITNESSES—Cont'd

7. Hypothetical questions to expert witnesses must be based on firsthand knowledge or upon facts in the record at the time the expert gives his opinion or a combination of the two; therefore, allowance of hypothetical questions posed by defense counsel was not error where the questions were not completely afield of the issues at trial, and did not seek abstract answers. *Durbin v K-K-M Corp,* 39.

8. A res gestae witness whose identity is unknown to the prosecutor either at the time the information is filed or at the time of trial need not be indorsed. *People v Harrell,* 554.

See

ASSAULT AND BATTERY 2

CRIMINAL LAW 14, 15, 23, 28, 48, 55, 66, 67, 69, 70, 72, 82–84, 95, 96

DRUGS AND NARCOTICS 7

EVIDENCE 2, 5

INDICTMENT AND INFORMATION 3

WORDS AND PHRASES—See

EXTRADITION 2

WORKMEN'S COMPENSATION

1. The Court of Appeals has jurisdiction to decide questions presented to it by an appeal from an order of the Workmen's Compensation Appeal Board where the board's "order" was its final determination and where six members of the board signed the order which contained its findings of fact, even though a majority of the board did not concur in an "opinion". *Kozlowski v Chrysler Corporation,* 100.

2. A finding by the Workmen's Compensation Appeal Board that a plaintiff failed to sustain the burden of proof imposed upon her will not be reversed where there was sufficient evidence contained in the record to support the board's finding that the plaintiff had not lost the industrial use of her legs as a direct consequence of the injury sustained in the course of her employment. *Kozlowski v Chrysler Corporation,* 100.

3. It is not the function of the Court of Appeals to sit as a factfinder in cases where the Workmen's Compensation Appeal Board has not made findings of fact with consideration for the proper legal standard. Kozlowski v Chrysler Corporation, 100.

4. A plaintiff mother claiming benefits under the Workmen's Compensation Act as a dependent of her deceased son was only entitled to benefits as a partial dependent where the plaintiff received a pension and social security income amounting to $115 per month even though the decedent during his lifetime had paid the entire cost of maintaining the home he occupied with the plaintiff and an unmarried sister. *Ammons v Dunbar & Sullivan Co,* 107.

WORKMEN'S COMP—Cont'd

5. A plaintiff mother claiming death benefits under the Workmen's Compensation Act who was only partially dependent upon her deceased son is entitled to weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed to her maintenance by the deceased son bears to the annual earnings of the deceased at the time of his injury; it must be determined from proofs offered which part of the total sum contributed for the maintenance cost of a home occupied by the decedent, plaintiff, and an unmarried sister was for the plaintiff's support as distinguished from the total expenses of the family (MCLA 418.321). *Ammons v Dunbar & Sullivan Co,* 107.

6. The appropriate date of injury for workmen's compensation purposes, where evidence shows that the worker's injury was due to a slow erosion of his hearing capabilities over a span of 20 years due to the pernicious environment in which he worked and not the result of a single event, is the last day of work in the employment in which a worker was last subjected to the conditions resulting in disability (MCLA 418.301[1]). *Skowronski v Ajax Forging,* 136.

7. The findings of fact made by the Workmen's Compensation Appeal Board are conclusive on appeal; however, the appeal board's decision will be overturned when it is contrary to the law, misapplies legal standards, or is not supported by competent, material, and substantial evidence of the whole record. *Skowronski v Ajax Forging,* 136.

8. A noise-induced hearing loss is not an occupational disease within the meaning of the Workmen's Compensation Act of 1969 for compensation purposes; it is an injury not attributable to a single event and a kind of disability excluded from the coverage of the apportionment section of the Workmen's Compensation Act (MCLA 418.301[1], 418.401[c], 418.411, 418.435). *Skowronski v Ajax Forging,* 136.

9. The determination of whether an employer had notice of an injury entitling an employee to workmen's compensation benefits is a question of fact for the Workmen's Compensation Appeal Board. *Krol v Hamtramck,* 234.

10. A decision of the Workmen's Compensation Appeal Board that an employer had no notice of an injury entitling an employee to workmen's compensation benefits will be overturned only when it is contrary to law or not supported by competent, material, and substantial evidence on the whole record. *Krol v Hamtramck,* 234.

11. A circuit court must enter judgment on an award of workmen's compensation after a party presents a certified copy of the order of compensation and after seven days' notice to the opposite party unless proof of payment is made; therefore, a circuit court properly refused to consider a claim of setoff which a defendant waived by its failure to assert it in the prior

WORKMEN'S COMP—Cont'd
workmen's compensation proceeding (MCLA 418.863). *Simm v City of Dearborn,* 263.

12. Permanent and total loss of industrial use of both legs exists where, *inter alia,* (1) an employment-related injury in one or both legs causes pain or other condition that prevents use of both legs in industry, or (2) the use of one or both legs, whether or not injured, triggers an employment-related injury or malady in any part of the body, including one or both legs, that causes pain or other condition that prevents use of both legs in industry. *DeMott v Goodwill (Supplement),* 311.
13. A work-related injury which causes an amputee "leg-connected disabling pain associated primarily with the use of" the only leg she has, prevents the use of her "legs" in industry (MCLA 412.8a, 412.10[b][7]). *DeMott v Goodwill (Supplement),* 311.
14. The difference between the amount paid to a worker for his services by his employer, a labor broker, and the amount paid to the labor broker by the employer for whom the worker performed his services is not included in computing workmen's compensation benefits because the wage differential never accrued to the economic advantage of the worker but arose as a result of an agreement between the labor broker and the employer. *White v Extra Labor Power,* 370.
15. A determination of which of two employers is liable to pay workmen's compensation benefits is a question of fact, and where there is support in the record for the factual findings, that finding is conclusive and binding upon the Court of Appeals. *White v Extra Labor Power,* 370.
16. A labor broker was exclusively liable for the payment of workmen's compensation benefits to an employee who was injured while on the premises of another employer even though the employee was subject to direction and control of the latter employer's supervisory personnel where only the labor broker paid the injured worker's wages, and had the right to fire and to refuse to hire him. *White v Extra Labor Power,* 370.
17. Lack of factual support in the record for a workmen's compensation hearing referee's finding of an injured worker's average weekly wage requires a remand in order that the determination be made upon an established record. *White v Extra Labor Power,* 371.
18. Interest is allowable at the rate of five percent per annum on all delinquent workmen's compensation benefit payments from the date compensation would have been due had it been paid voluntarily (MCLA 438.7, 438.31). *White v Extra Labor Power,* 371.
19. The Stanford-Binet intelligence test has not been designated by the Legislature or the courts as the exclusive test to be used in determining imbecility; therefore, a finding by the Workmen's Compensation Appeal Board that a claimant seeking total and permanent disability benefits for imbecility failed to meet his burden of proof because of his inability to translate other test

WORKMEN'S COMP—Cont'd

results into the Stanford-Binet scale was prejudicial error (MCLA 418.361[2][f]). *Legut v Detroit Window Clean,* 404.

20. An employee is incurably insane under the Workmen's Compensation Act if the occupationally related mental or emotional illness which impairs the employee's mental processes is of totally disabling proportions and is likely to be of long and indefinite duration, thus making gainful employment impossible (MCLA 418.361[2][f]). *Legut v Detroit Window Clean,* 404.

21. Findings of fact of the Workmen's Compensation Appeal Board which are supported by the evidence are conclusive and binding. *Milton v Oakland Co Bd of Auditors,* 429.

22. An employee's inability to work which was caused not by his working conditions but by his own emotional difficulties preceding his employment with the defendant and his failure to attain self-imposed goals is not a work-related disability. *Milton v Oakland Co Bd of Auditors,* 429.

23. Credit to which a workmen's compensation insurer is entitled for benefits paid to an injured employee, in a settlement of the employee's claim against a third-party tortfeasor, is for the Bureau of Workmen's Compensation to determine, and a trial court which apportioned the expenses of litigation between the employee and the insurer committed error when it also fixed the credit for benefits paid. *Hakkinen v Lake Superior Dist Power,* 451.

24. An injured employee has the right to settle his claim against a third-party tortfeasor for damages independent of workmen's compensation and the Workmen's Compensation Act does not prohibit such a settlement; the statute preserves the employee's common-law rights aside from his rights under the Workmen's Compensation Act, and where a compensation insurance carrier was a protected intervening plaintiff and knew of the settlement but failed to exercise any rights respecting it, such a good-faith settlement should be upheld (MCLA 413.15). Hakkinen v Lake Superior Dist Power, 451.

WORK-RELATED DISABILITIES—See

WORKMEN'S COMPENSATION 22

WRONGFUL DEATH—See

NEGLIGENCE 2, 3, 6

ZONING—See

INJUNCTION 2

40-YEAR MARKETABLE TITLE—See

NAVIGABLE WATERS 3