MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN COURT OF APPEALS

FROM

August 14, 1974 to October 7, 1974

HOWARD L. ELLIS[1]
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
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CHIEF JUDGE PRO TEM

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JOHN H. GILLIS, GROSSE POINTE	Jan. 1, 1977
DONALD E. HOLBROOK, CLARE	Jan. 1, 1979
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[1] Retired September 20, 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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4. GORDON W. BRITTEN, Grass Lake	Jan. 1, 1977
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RICHARD E. ROBINSON, Eaton Rapids	Jan. 1, 1979
6. WILLIAM R. BEASLEY, Birmingham	Jan. 1, 1979
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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[1]
14.	FREDRIC A. GRIMM, Muskegon	Jan. 1, 1977[2]
	CHARLES A. LARNARD, Jr., Muskegon	Jan. 1, 1975
	JOHN H. PIERCEY, Muskegon Heights	Jan. 1, 1975
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

[1] Died September 8, 1974.

[2] From September 17, 1974.

		Term Expires
	PATRICK J. CONLIN, Ann Arbor	Jan. 1, 1979
	EDWARD D. DEAKE, Ypsilanti	Jan. 1, 1979
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
34.	CARL L. HORN, Standish	Jan. 1, 1979
35.	JAMES M. TEAHEN, Jr., Owosso	Jan. 1, 1979[1]
	PETER J. MARUTIAK, Corunna	Jan. 1, 1977[2]
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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JAMES DEL RIO
ROBERT L. EVANS
GERALDINE BLEDSOE FORD
SAMUEL C. GARDNER
JOSEPH A. GILLIS
JAMES A. HATHAWAY

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[1] Resigned September 3, 1974.

[2] From September 3, 1974.

RECORDER'S COURT OF DETROIT

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CLARENCE LASTER, JR.
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JOSEPH E. MAHER
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JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	23
Alger	Munising	11
Allegan	Allegan	20
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	28
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	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
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	40
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
Wayne	Detroit	3
Wexford	Cadillac	28

TABLE OF CASES REPORTED

A

Page

Acme Equipment Company, Hubbert v 313
AFT Local 698, East Detroit Federation of Teachers, v East Detroit Board of Education 451
Aleman, People v 445
Al-Huribi, Wilson v 95
American Bakery & Pastry, Inc. v City of Warren 245
Anchor Bay Board of Education, Anchor Bay Concerned Citizens v 428
Anchor Bay Concerned Citizens v Anchor Bay Board of Education 428
Anderson, People v 317
Ann Arbor (City of), Michigan Baptist Homes & Development Company v 725
Appeal of Fisher (Hudson v Kolar) 114
Arlee v Wayne County Sheriff (Arlee v Lucas) 340
Atlas Township, Tocco v 160
Attorney Fees of Hayes, In the Matter of 30
Attorney General, People *ex rel,* v Fairfax Family Fund, Inc. 305

B

Page

Barron, Murphy Real Estate Corporation v .. 210
Barrow v Saly 156
Bates, People v 1
Beall v DRT Sportservice, Inc. 567
Beasley, People v 583
Benjamin Rich Realty Company, Head v..... 348
Berrien County Road Commission, Weckler v 7
Bloomfield Township, Land Development Corporation v 438
Board of Education of Anchor Bay, Anchor Bay Concerned Citizens v..... 428
Board of Education of Detroit v Detroit Federation of Teachers 499
Board of Education of East Detroit, East Detroit Federation of Teachers, AFT Local 698 v 451
Braxton v Litchalk..... 708
Bridgeport Township Planning Commission, Davis v..... 15
Brown, People v 124
Burnett, People v 649

C

Campbell, Wyant & Cannon Foundry Company, Huey v 227
Carrollton Township, Houlihan Brothers Builders, Inc. v 80
Circuit Judge (Jackson), Jackson County Prosecuting Attorney v..... 121
City of Ann Arbor, Michigan Baptist Homes & Development Company v..... 725
City of Detroit, Detroit Fire Fighters Association Local No. 344, IAFF v 276
City of Lansing, Schwan v 191

Page

City of Livonia, Robert J. Eliassen & Sons v . 596
City of Petoskey, George v 433
City of Riverview, Smith, Hinchman & Grylls Associates, Inc. v 703
City of Warren, American Bakery & Pastry, Inc. v 245
City of Ypsilanti v Civil Rights Commission.. 103
Civil Rights Commission, City of Ypsilanti v . 103
Clark v Texaco, Inc..... 100
Clyburn, People v 454
Concerned Citizens of Anchor Bay, Anchor Bay Board of Education v 428
Conville, People v 251
Cooke Contracting Company v Department of State Highways (On Rehearing) #1 336
Cooke Contracting Company v Department of State Highways #2 479
Cora v Patterson..... 298
County of Berrien Road Commission, Weckler v 7
County of Jackson Prosecuting Attorney v Jackson Circuit Judge..... 121
County Sheriff of Wayne, Arlee v 340
Cullens, People v 272

D

Davis v Bridgeport Township Planning Commission 15
Department of State Highways, Detroit Bank & Trust Company v 131
Department of State Highways (On Rehearing) #1, The Cooke Contracting Company v 336
Department of State Highways #2, The Cooke Contracting Company v 479

Page

Detroit Bank & Trust Company v Department of State Highways 131
Detroit Board of Education v Detroit Federation of Teachers 499
Detroit Federation of Teachers, Detroit Board of Education v 499
Detroit (City of), Detroit Fire Fighters Association Local No. 344, IAFF v 276
Detroit Fire Fighters Association Local No. 344, IAFF, v City of Detroit..... 276
District Judge of 7th District, People v 471
Douglas & Lomason, Jones v..... 323
Doyle Vacuum Cleaner Company v F. J. Siller & Company..... 601
DRT Sportservice, Inc., Koehler, Beall, Hotton, Wichtman, Sieloff v..... 567
Duncan, People v 403

E

East Detroit Board of Education, East Detroit Federation of Teachers, AFT Local 698 v .. 451
East Detroit Federation of Teachers, AFT Local 698 v East Detroit Board of Education 451
Edwards, People v 256
Eliassen & Sons v City of Livonia 596
Emerson-Dumont Distributing Corporation, Rich v 142
Estate of Fair, *In re*..... 35

F

Fair Estate, *In re* 35
Fairfax Family Fund, Inc., People, *ex rel* Attorney General, v 305
Feldman v Feldman..... 147

Page

Federation of Teachers of Detroit, Detroit Board of Education v 499
Federation of Teachers of East Detroit, AFT Local 698 v East Detroit Board of Education 451
Feder, Romisch v 496
Fields, People v 265
Fire Fighters Association of Detroit Local No. 344, IAFF, v City of Detroit 276
Fisher, Appeal of (Hudson v Kolar) 114
F. J. Siller & Company, Doyle Vacuum Cleaner Company v 601
Flynn v McLouth Steel Corporation 669
Ford Hospital, McKinstrie v 659
Freeman, Snow v 84
Fry, People v 18

G

Gallagher, People v 613
Gant, People v 510
Gehrke v Janowitz 643
George v City of Petoskey 433
Gilbert, People v 168
Goldsmith, Maxman v 656
Graham, People v 590
Gross, People v 198

H

Hayes, In the Matter of Attorney Fees 30
Head v Benjamin Rich Realty Company 348
Henry Ford Hospital, McKinstrie v 659
Highway Department, Detroit Bank & Trust Company v 131
Highway Department (On Rehearing) #1, The Cooke Contracting Company v 336

Page

Highway Department #2, The Cooke Contracting Company v 479
Hinterman v Stine 282
Hotton v DRT Sportservice, Inc. 567
Houlihan Brothers Builders, Inc. v Carrollton Township 80
Hubbert v Acme Equipment Company 313
Hudson, Kolar v (Appeal of Fisher) 114
Hudson v Maher 90
Huey v Campbell, Wayant & Cannon Foundry Company 227

I

In re Fair Estate 35
Insurance Company of North America v Radiant Electric Company 410
International Association of Fire Fighters, Detroit Fire Fighters Association Local No. 344, v City of Detroit 276
In the Matter of the Attorney Fees of Hayes. 30

J

Jackson Circuit Judge, Jackson County Prosecuting Attorney v 121
Jackson County Prosecuting Attorney v Jackson Circuit Judge 121
Janowitz, Gehrke v 643
Joines, People v (On Remand) 334
Jones v Douglas & Lomason 323
Judge of 7th District, People v 471

K

Kennington, People v 61
Kiilunen v Moodie 128
Kita v Matuszak 288

Page

Kochan, People v 326
Koehler v DRT Sportservice, Inc 567
Kolar v Hudson (Appeal of Fisher) 114
Kunde v Teesdale Lumber Company (Amended Opinion) 546

L

Land Development Corporation v Township of Bloomfield 438
Lansing (City of), Schwan v 191
LeBlanc, People v 684
Litchalk, Braxton v 708
Livonia (City of), Robert J. Eliassen & Sons v 596
Local No. 344, Detroit Fire Fighters Association, IAFF, v City of Detroit 276
Local 698, AFT, East Detroit Federation of Teachers, v East Detroit Board of Education 451
Lucas (Wayne County Sheriff), Arlee v 340

M

Madden, People v 363
Madison District Public Schools, Shippey v .. 663
Maher, Hudson v 90
Manufacturers National Bank of Detroit, Sinclair v 530
Mathis (Paul), People v 694
Mathis (Thomas), People v 699
Matter of the Attorney Fees of Hayes 30
Matuszak, Kita v 288
Maxman v Goldsmith 656
McBride, People v 234
McFarland, People v 678
McIntosh, People v 403
McKinstrie v Henry Ford Hospital 659
McLott, People v 198

Page

McLouth Steel Corporation, Flynn v 669
Mellish, Michaels v 374
Michaels v Mellish 374
Michigan Baptist Homes & Development Company v City of Ann Arbor 725
Moodie, Kiilunen v 128
Moore (Donald), People v 139
Moore (Terry), People v 678
Moore v State Veterans' Facility *(In re* Fair Estate) 35
Mordell, People v 462
Murphy Real Estate Corporation v Barron ... 210

N

Northwestern National Insurance Company v Pennington Brothers, Inc. 66

P

Palmer, People v 43
Patterson, Cora v 298
Pennington Brothers, Inc., Northwestern National Insurance Company v 66
People v Aleman 445
People v Anderson 317
People v Bates 1
People v Beasley 583
People v Brown 128
People v Burnett 649
People v Clyburn 454
People v Conville 251
People v Cullens 272
People v Duncan 403
People v Edwards 256
People v Fields 265
People v Fry 18
People v Gallagher 613

Page

People v Gant 510
People v Gilbert 168
People v Graham 590
People v Gross 198
People v Joines (On Remand) 334
People v Kennington 61
People v Kochan 326
People v LeBlanc 684
People v Madden 363
People v Paul Mathis 694
People v Thomas Mathis 699
People v McBride 234
People v McFarland 678
People v McIntosh 403
People v McLott 198
People v Donald Moore 139
People v Terry Moore 678
People v Mordell 462
People v Palmer 43
People v Potts 622
People v Rappuhn 52
People v Roberson 413
People v Rogers 491
People v Scott 739
People v Serra 514
People v 7th District Judge 471
People v Smith 184
People v Strodder (Matter of Attorney Fees) . 30
People v Thomas 368
People v Tooks 537
People v Wheat 559
People, *ex rel* Attorney General, v Fairfax Family Fund, Inc 305
Petoskey (City of), George v 433
Planning Commission of Bridgeport Township, Davis v 15

Page

Potts, People v 622
Practical Home Builders, Inc., Yoakum v 384
Prosecuting Attorney of Jackson County v Jackson Circuit Judge 121
Public Schools of Madison District, Shippey v 663

R

Radiant Electric Company, Insurance Company of North America v 410
Rappuhn, People v 52
Rich (Benjamin) Realty Company, Head v ... 348
Rich v Emerson-Dumont Distributing Corporation 142
Riverview (City of), Smith, Hinchman & Grylls Associates, Inc. v 703
Road Commission of Berrien County, Weckler v 7
Roberson, People v 413
Robert J. Eliassen & Sons v City of Livonia .. 596
Rogers, People v 491
Romisch v Feder 496

S

Saly, Barrow v 156
Schwan v City of Lansing 191
Scott, People v 739
Serra, People v 514
7th District Judge, People v 471
Sheriff of Wayne County, Arlee v 340
Shippey v Madison District Public Schools ... 663
Sieloff v DRT Sportservice, Inc. 567
Siller & Company, Doyle Vacuum Cleaner Company v 601
Sinclair v Manufacturers National Bank of Detroit 530

Page

Slazinski, Williams v 221
Smith, Hinchman & Grylls Associates, Inc. v City of Riverview 703
Smith, People v 184
Snow v Freeman 84
State Highway Department, Detroit Bank & Trust Company v 131
State Highway Department (On Rehearing) #1, The Cooke Contracting Company v 336
State Highway Department #2, The Cooke Contracting Company v 479
State Veterans' Facility, Moore v *(In re* Fair Estate) 35
Stine, Hinterman v 282
Strodder, People v (Matter of Attorney Fees). 30

T

Teachers Federation of Detroit, Detroit Board of Education v 499
Teesdale Lumber Company, Kunde v (Amended Opinion) 546
Texaco, Inc., Clark v 100
The Cooke Contracting Company v Department of State Highways (On Rehearing) #1 336
The Cooke Contracting Company v Department of State Highways #2 479
The Travelers Indemnity Company, Werner v 390
Thomas, People v 368
Tocco v Atlas Township 160
Tooks, People v 537
Township of Atlas, Tocco v 160
Township of Bloomfield, Land Development Corporation v 438
Township of Bridgeport Planning Commission, Davis v 15

Page

Township of Carrollton, Houlihan Brothers Builders, Inc. v 80
Travelers Indemnity Company, Werner v 390

V

Veterans Facility of Michigan, Moore v *(In re* Fair Estate) 35

W

Warren (City of), American Bakery & Pastry, Inc. v 245
Wayne County Sheriff, Arlee v 340
Weckler v Berrien County Road Commission. 7
Werner v The Travelers Indemnity Company 390
Wheat, People v 559
Wichtman v DRT Sportservice, Inc. 567
Williams v Slazinski 221
Wilson v Al-Huribi 95

Y

Yoakum v Practical Home Builders, Inc. 384
Ypsilanti (City of) v Civil Rights Commission 103

7th District Judge, People v 471

PEOPLE v BATES

1. CRIMINAL LAW—INSTRUCTIONS TO JURY—REINSTRUCTION—OVEREMPHASIS—LESSER INCLUDED OFFENSES.

Twice rereading instructions to a jury in a criminal trial in response to the jury's request for reinstruction did not constitute impermissible overemphasis and was not reversibly prejudicial where on both occasions all possible verdicts including all lesser included offenses were explained.

2. CRIMINAL LAW—INSTRUCTIONS TO JURY—DEFENDANT'S THEORY—DUTY OF COURT—PRESERVING QUESTION.

A trial court is obligated to present to a jury in a criminal trial the defendant's theory of the case if a proper request is made and supported by competent testimony; however, a defendant cannot complain that the failure to give a charge was error where the defendant made no request to charge concerning his theory.

3. CRIMINAL LAW—WITNESSES—RES GESTAE WITNESSES—CROSS-EXAMINATION—HOSTILE WITNESSES—JUDGE'S REMARKS.

A trial court's characterization of a defendant's girlfriend, who was called by the prosecution as a res gestae witness, as "hostile" was not necessary in order to allow the prosecution to cross-examine her, but was not reversibly prejudicial where it told the jury no more than was already obvious from the witness's testimony and her relationship with the defendant (MCLA 767.40).

4. CRIMINAL LAW—INSTRUCTIONS TO JURY—LESSER INCLUDED OFFENSES—SEQUENCE OF DELIBERATION—PRESERVING QUESTION.

A trial court's instruction that a jury should deliberate initially

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 512 *et seq.*
[2] 53 Am Jur, Trial §§ 511, 513, 514.
5 Am Jur 2d, Appeal and Error § 623.
[3] 53 Am Jur, Trial §§ 81, 82.
58 Am Jur, Witnesses § 718.
[4] 53 Am Jur, Trial §§ 286, 796–802.
5 Am Jur 2d, Appeal and Error § 623.

on the major charge, then weigh the lesser included offenses, and finally consider an acquittal did not impose a requirement of unanimous agreement at each stage of the jury's deliberation, but merely indicated a logical method whereby the various possible verdicts would be considered in an orderly sequence, and was not reversibly erroneous where no objection was made at trial.

Appeal from St. Clair, Halford I. Streeter, J. Submitted Division 2 June 24, 1974, at Detroit. (Docket No. 17873.) Decided August 14, 1974.

James E. Bates was convicted of felonious assault. Defendant appeals. Affirmed.

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.

Stuart M. Israel, Assistant State Appellate Defender, for defendant.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

DANHOF, J. Defendant was tried before a jury on a charge of assault with intent to do great bodily harm less than murder, MCLA 750.84; MSA 28.279. He was convicted of the lesser included offense of felonious assault, MCLA 750.82; MSA 28.277. He was sentenced to serve 4 years probation, to spend 90 days in jail, and to pay $200 in court costs. He appeals, and we affirm.

The charge stemmed from an altercation between the defendant and a complaining witness, the owner of a combination bar and hotel in which defendant rented a room. In the early morning

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

hours of August 27, 1972, complainant encountered the defendant and his girlfriend in the hall on the hotel's second floor. The complainant had previously told the defendant that women were not to be brought to his room. A discussion of the girlfriend's presence degenerated into a physical struggle. The complainant fared the worse in the battle; he testified later that he was "stomped".

During a lull in the fight, the complainant was able to make his way to the first floor where the bar was operated. Defendant overtook him and administered another beating, this time with the blunt end of a pool cue. After gathering his belongings, defendant and his girlfriend left the building.

At trial it was established that complainant had suffered serious lacerations and bruises, but no concussion or fractures. Defendant's girlfriend was called as the only res gestae witness. Defendant also took the stand. He testified that the complainant started the fight, and that he beat him with the pool cue when he went to the bar where he believed that the complainant may have had a gun.

Two issues are raised by the defendant before this Court. First, he argues that the trial court's instruction to the jury, while not necessarily incorrect, was nevertheless reversibly erroneous because it de-emphasized the lesser included offenses thereby detracting from the defendant's theory, not raised at trial, that two fights took place. According to this argument, defendant might have been guilty of an assault and battery in the original struggle on the second floor of the hotel, but he may have been acting in justifiable self-defense when he used the pool cue. Separate examination of both parts of this issue reveals the unsoundness of the defendant's position.

In support of his contention that the trial court's instruction underemphasized the lesser included offenses, defendant relies primarily upon *People v Reece,* 9 Mich App 108; 155 NW2d 870 (1967), *leave to appeal denied,* 380 Mich 763 (1968). The relevance of that case is weakened to a large extent by the fact that the defendant in *Reece* was convicted of the greater offense while the defendant here was convicted of a lesser included offense. Here, the trial court's instruction did not so obscure the lesser offenses that the jury could not give them meaningful consideration.

A reading of the jury instructions in their entirety reveals no improper emphasis. The record does disclose that defendant's trial counsel objected to what he believed to be the trial court's overemphasis of the felonious assault instruction. The jury was immediately recalled and cautioned that the trial court did not intend to stress any of the possible verdicts. Counsel had indicated that this was his only objection to the instruction; he expressed no dissatisfaction at the conclusion of the cautionary instruction.

The jury experienced some difficulty in arriving at a verdict. They deliberated for an entire day during which time they twice requested that the instruction be reread. On both occasions, all possible verdicts including all lesser included offenses were explained. Since this repetition occurred in response to the jury's request for reinstruction, it did not constitute impermissible overemphasis and it was not reversibly prejudicial. *People v McGuire,* 39 Mich App 308, 320; 197 NW2d 469, 476 (1972), *leave to appeal denied,* 387 Mich 810 (1972).

The second part of this issue is the defendant's argument that the trial court erred by treating the affray as a single occurrence, even though no

contrary suggestion was advanced at trial. Defendant claims that the trial court should have instructed the jury *sua sponte* on this theory of the case. A trial court is obligated to present to the jury the defendant's theory of the case, but this duty arises "if a proper request is made and supported by competent testimony". *People v Bonello,* 25 Mich App 600, 602; 181 NW2d 652, 654 (1970). Defendant made no request to charge concerning this theory; he cannot now complain that the failure to give such a charge was error. *People v Levy,* 28 Mich App 339, 342–343; 184 NW2d 325, 327 (1970), *leave to appeal denied,* 384 Mich 801 (1971).

Defendant also objects on appeal to the trial court's characterization of the defendant's girlfriend as a "hostile" witness when she was called by the prosecution. Since she was called as a res gestae witness pursuant to the statute, MCLA 767.40; MSA 28.980, it was not necessary that she be ruled hostile in order to allow the prosecution to cross-examine her. Nevertheless, the trial court's remark was not reversibly prejudicial. It told the jury no more than was already obvious from the witness's testimony and her relationship with the defendant. Neither the trial court's remark, nor the prosecutor's subsequent brief reference to it during his closing statement were objected to by defendant's counsel. The trial court's comments on the nature of the witness's testimony clearly did not result in a miscarriage of justice, hence reversal is not required. *People v Burnette,* 19 Mich App 336, 343; 172 NW2d 453, 456 (1969); *People v Parker,* 50 Mich App 537, 540; 213 NW2d 576, 578 (1973). Any possible prejudice created by the prosecutor's comment could have easily been corrected by a curative instruction which the de-

fense neglected to invite by timely objection. *People v Pacely,* 51 Mich App 67; 214 NW2d 561 (1974).

On oral argument, the contention was raised that the trial court's instruction to the jury was reversibly erroneous under the holding in *People v Ray,* 43 Mich App 45, 49; 204 NW2d 38, 40 (1972). The instruction in *Ray* which was held to have been "coercive, unduly restrictive and reversible" required the jury to reach "unanimous agreement on defendant's innocence of the greater charge before they could consider the lesser charges".

The trial court in the present case indicated that the jury should deliberate initially on the major charge, then weigh the lesser included offenses, and finally consider an acquittal. This instruction did not impose a requirement of unanimous agreement at each stage of the jury's deliberation. The trial court merely indicated a logical method whereby the various possible verdicts would be considered in an orderly sequence. This instruction, to which no objection was made at trial, is not reversibly erroneous. *People v James,* 51 Mich App 777, 786; 216 NW2d 473, 478 (1974).

Affirmed.

All concurred.

WECKLER v BERRIEN COUNTY ROAD COMMISSION

OPINION OF THE COURT

1. HIGHWAYS—COUNTY ROAD COMMISSIONS—STATUTES—MAINTENANCE OF HIGHWAYS—BREACH OF DUTY—QUESTION OF FACT—JUDGMENT—SUMMARY JUDGMENT.

A county road commission is bound by statute to keep a highway in a condition reasonably safe and fit for travel; summary judgment for a defendant road commission was error where whether this duty was breached by a failure to erect snow barriers at a point where an accident occurred, under an allegation in the complaint and the facts in the case, was a question of fact for jury determination (MCLA 224.21).

CONCURRENCE BY J. H. GILLIS, J.

2. HIGHWAYS—COUNTY ROAD COMMISSIONS—STATUTES—MAINTENANCE OF HIGHWAYS—LIABILITY FOR INJURIES.

A county road commission has the statutory duty to keep roads under its jurisdiction in reasonable repair so that they shall be reasonably safe and convenient for public travel, but is not liable for injuries caused by the usual and natural accumulation of snow and ice on its roads (MCLA 224.21).

3. HIGHWAYS—COUNTY ROAD COMMISSIONS—STATUTES—DESIGN OF HIGHWAYS—DEFECTS IN DESIGN—DUTY.

A statute imposes upon a county road commission a duty to design roadways in a reasonably safe manner and to correct defects in design (MCLA 224.21).

Appeal from Berrien, William S. White, J. Submitted Division 3 May 8, 1974, at Grand Rapids. (Docket No. 17925.) Decided August 14, 1974.

REFERENCES FOR POINTS IN HEADNOTES

[1] 39 Am Jur 2d, Highways, Streets, and Bridges §§ 340, 579.
[2] 39 Am Jur 2d, Highways, Streets, and Bridges § 509.
[3] 39 Am Jur 2d, Highways, Streets, and Bridges § 411 *et seq.*

Complaint by Kathleen J. Weckler against the Berrien County Road Commission for negligence. Summary judgment for defendant. Plaintiff appeals. Reversed.

Butzbaugh, Page, Butzbaugh & Dewane, for plaintiff.

Seymour, Seymour, Conybeare & Hosbein, for defendant.

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

QUINN, J. By her complaint, plaintiff sought to recover damages for personal injuries sustained as a result of the alleged negligence of defendant. She appeals from the trial court's grant of summary judgment in favor of defendant.

April 2, 1970, plaintiff was driving her automobile in a westerly direction on Napier Avenue in Berrien County. As she approached the intersection of Napier and Hillendale Road, she collided with a vehicle travelling in an easterly direction on Napier and driven by Donald Selters. Selters and his wife filed suit against plaintiff and her father to recover damages for personal injuries, and this suit was settled out of court. Before this settlement, however, plaintiff filed a counterclaim against the Selters and a cross-claim against defendant. The cross-claim is the action involved in this appeal.

The original cross-complaint of plaintiff alleged that defendant was negligent in failing (1) to "use reasonable means to inspect" the road to ascertain when it was impassable because of an accumulation of snow, and (2) to "remove the snow which had accumulated" on the road. Defendant's motion

for summary judgment on the ground that plaintiff had failed to state a claim upon which relief can be granted, GCR 1963, 117.2(1) was granted conditionally, plaintiff being given 20 days to file an amended complaint.

The amended complaint added an allegation that defendant was negligent in failing "to take reasonable steps to correct a defective design in said roadway". Subsequently, plaintiff filed a more definite statement that the defective design "consisted of the failure to erect snow barriers, or other means, along the roadway to prevent the excessive and dangerous accumulation of snow on said roadway". Defendant's motion to reinstate the grant of summary judgment was granted, and this appeal followed.

By MCLA 224.21; MSA 9.121, defendant was statutorily bound to keep the highway in a condition reasonably safe and fit for travel. On appeal, we accept as true the well pleaded facts in plaintiff's complaint, *Johnston's Administrator v United Airlines,* 23 Mich App 279; 178 NW2d 536 (1970). The allegation "consisted of the failure to erect snow barriers, or other means, along the roadway to prevent the excessive and dangerous accumulation of snow on said roadway" implies a failure to maintain the roadway in a condition reasonably safe and convenient for public travel. Under that allegation and the facts of this case, it appears to us that the issue raised may be stated as, "Was the duty of defendant to maintain the highway in a condition reasonably safe and fit for travel breached by its failure to erect snow fences at the point in the highway where the accident occurred?" This is a question of fact for jury determination.

Since plaintiff's pleadings presented a fact ques-

tion for jury determination, it was error for the trial court to reinstate the summary judgment on defendant's motion therefor.

Reversed and remanded with costs to plaintiff.

ALLEN, P. J., concurred.

J. H. GILLIS, J. *(concurring).* On April 2, 1970, Kathleen Weckler, plaintiff herein, was driving her automobile in a westerly direction on Napier Avenue in Berrien County. As she approached the intersection of Napier and Hillendale Road, she collided with a vehicle traveling in an easterly direction on Napier and driven by Donald Selters. Mr. Selters and his wife, Isabelle, a passenger, brought suit against Kathleen, a minor, and her father, Donald, as next friend, to recover damages for personal injuries. The Wecklers filed a counterclaim against the Selters and a cross-claim against defendant herein, Berrien County Road Commission.[1]

In her original complaint plaintiff alleged defendant was negligent in failing (1) to "use reasonable means to inspect" the road to ascertain whether it was impassable because of an accumulation of snow, and (2) to "remove the snow which had accumulated" on the road. Defendant filed a motion for summary judgment on the ground that plaintiff had failed "to state a claim upon which relief can be granted". GCR 1963, 117.2(1). The motion was conditionally granted, plaintiff being given 20 days to file an amended complaint.[2] Plain-

[1] Kathleen Weckler has since reached the age of majority and is the sole plaintiff-appellant. The suit between the Selters and Wecklers was settled out of court, and, consequently, only Kathleen Weckler's claim against Berrien County Road Commission is before this Court.

[2] In his order granting the summary judgment the circuit court judge said: "It is further ordered that third-party plaintiff shall have 20 days within which to file an amended complaint in the event he

tiff did so file, alleging additionally that defendant was negligent in failing "to take reasonable steps to correct a defective design in said roadway". In a subsequently filed more definite statement, plaintiff said the defective design "consisted of the failure to erect snow barriers, or other means, along the roadway to prevent the excessive and dangerous accumulation of snow on said roadway". After a hearing, the court granted defendant's motion to reinstate the grant of summary judgment. Plaintiff appeals.

A county road commission has the statutory duty to keep roads under its jurisdiction in reasonable repair so that they shall be reasonably safe and convenient for public travel.[3] However, the majority and Michigan rule is that a municipality is not liable for injuries caused by the usual and natural accumulation of snow and ice on its roads. *Johnson v Marquette,* 154 Mich 50; 117 NW 658 (1908); *Gerrie v Port Huron,* 226 Mich 630; 198 NW 236 (1924); 19 McQuillin, Municipal Corporations (3d Ed), § 54.79, pp 254–259. Therefore, we think the lower court was correct in its ruling that plaintiff failed to state a claim in her original complaint. However, the propriety of the summary judgment as to the additional allegation in plaintiff's amended complaint is a different matter.

On appeal, we accept as true the well-pleaded

should so desire." We think these words make the order conditional since this is the only rational interpretation in light of the future actions of the parties.

[3] MCLA 224.21; MSA 9.121 provides: "It is hereby made the duty of the counties to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all county roads, bridges and culverts that are within their jurisdiction and under their care and control and which are open to public travel. The provisions of law respecting the liability of townships, cities, villages and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control, shall apply to counties adopting such county road system."

facts in plaintiff's complaint. *Johnston's Administrator v United Airlines,* 23 Mich App 279; 178 NW2d 536 (1970). Therefore, we must accept as true plaintiff's allegation that the roadway was defectively designed because of the failure of defendant to erect snow barriers.[4] Thus, the question becomes simply: Does MCLA 224.21; MSA 9.121 impose upon a county road commission a duty to design roadways in a reasonably safe manner and to correct defects in design? We think it does.

In *Mullins v Wayne County,* 16 Mich App 365, 372–375; 168 NW2d 246, 248–250 (1969), this Court reasoned:

"The prior decision of our Court[5] would limit the road authority's obligation under the applicable statute to preservation of the status quo. More specifically, if a road has been built and goes into disrepair, the road authority is obliged to repair it. If it becomes obstructed, the obstruction must be removed without regard to who places it there. If a sign has been erected and falls down, it must be replaced. But, says that opinion, that is where the road authority's duty ends.

"The prior opinion italicized the words 'to keep in reasonable repair' in the quotation of the relevant portion of the applicable statute * * * . That 'emphasis supplied' emphasizes the theoretical basis for the Court's opinion, *i.e.,* there is a duty to keep in reasonable *repair*—to maintain the status quo—but not a duty

[4] Usually, when we think of snow barriers, we think of temporary fences erected in the fall and taken down in the spring. If these are the type of barriers contemplated by plaintiff, an allegation of "failure to maintain" would seem to be more appropriate than an allegation of "defective design". However, the question is really one of semantics. In fact, if plaintiff intends to prove that some type of permanent barriers should have been erected, "defective design" would seem to be the correct phraseology.

[5] *Mullins v Wayne County,* 4 Mich App 359; 144 NW2d 829 (1966). This decision was affirmed by an evenly divided Supreme Court, 380 Mich 151; 156 NW2d 546 (1968). The order of affirmance was subsequently vacated by the Supreme Court on April 1, 1968, and the case remanded for a rehearing *en banc* by this Court.

to construct or keep the road so that it is 'reasonably safe and convenient for public travel'.

"Such view was, indeed, once the law in Michigan but it has not been the rule since the enactment of the legislation here under consideration and the construction of that legislation by the Michigan Supreme Court in *Joslyn v City of Detroit,* 74 Mich 458; 42 NW 50 (1889), and *Malloy v Township of Walker,* 77 Mich 448; 43 NW 1012 (1889) (6 LRA 695). In *Joslyn,* the Court held that the road authority is liable not only 'for injuries occurring through neglect to keep the streets in repair, but also for such as occur by reason of the neglect of the city to keep its streets in a condition reasonably safe and fit for travel'. In *Joslyn* an obstruction was permitted to continue in the midst of the road without warning lights. In language which should guide us in this case, the Court declared (p 461):

" 'It [the statute] requires everything to be done by the city necessary to make travel upon its streets reasonably safe. If in so doing it becomes necessary to place signals or other safeguards at given points, or give other proper warning, it is the duty of the city to see that it is done or that the street is closed to travel; and that duty is imposed by the express language of the statute, and the injury arising from the neglect of such duty to the citizen will make the municipality responsible to the party injured.'

"In *Malloy* the Court carefully reviewed the history of prior decisions, including those to the effect that negligence in the plan of construction, as distinguished from negligence in the execution of the plan, was not actionable. It held that such earlier case law had been superseded by the enactment of the statutory language then before the Court and now before us.

"The specific allegation of negligence in *Malloy* shows that the duty of the road building authority goes beyond the preservation of the status quo, that it does indeed have the affirmative duty to design and construct the road and keep it 'reasonably safe and convenient for public travel'.

"The specific claim of negligence in *Malloy* was that the road authority was negligent in not constructing

railings or barriers alongside an embankment. The Michigan Supreme Court concluded that it was for a jury to decide whether railings or barriers were required in the circumstances of the case then at bar. Thus, the Court ruled that even if the surface of the road was perfectly engineered and constructed, the failure to design the road in a reasonably safe manner, including the erection of railings and barriers, could be an act of negligence." (Footnotes omitted.) See *Hargis v Dearborn Heights,* 34 Mich App 594; 192 NW2d 44 (1971).

Thus, defendant does have a duty to design its roadways in a reasonably safe manner. Since plaintiff has stated a claim which, if proven, entitles her to relief, defendant's motion to reinstate the summary judgment should have been denied.

Reversed. Costs to appellant.

DAVIS v BRIDGEPORT TOWNSHIP PLANNING COMMISSION

1. ZONING—REVIEW—DE NOVO REVIEW.

The Court of Appeals reviews the decisions of trial courts *de novo* in zoning cases although great weight is accorded the trial judge's decision.

2. ZONING—SUITABILITY FOR USE—ACTUAL USE.

A zoning ordinance was erroneously declared unconstitutional as applied to plaintiffs' land where the plaintiffs wished to use the land, which was zoned single family agricultural, for a mobile home park and the court found that the land was not suitable for single family residential development but failed to consider its suitability for farming, for which it was actually used.

Appeal from Saginaw, Fred J. Borchard, J. Submitted Division 3 June 4, 1974, at Lansing. (Docket No. 17936.) Decided August 14, 1974.

Complaint by Vibert H. Davis, Ione G. Davis and Quality Home Parks, Inc. against the Township of Bridgeport Planning Commission and Bridgeport Charter Township to enjoin enforcement of the township's zoning ordinance as applied to plaintiff's land. Judgment for plaintiffs. Defendant appeals. Reversed and remanded.

Liberson, Fink, Feiler, Crystal & Burdick, P. C., for plaintiffs.

Haines & Marti, for defendants.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning § 229 *et seq.*

[2] 58 Am Jur, Zoning § 178 *et seq.*

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

R. B. BURNS, J. Vibert and Ione Davis own a parcel of land in Bridgeport Township, Saginaw County, Michigan. The Davises have entered into a purchase agreement with Quality Home Parks, Inc., which plans to develop the land as a mobile home park.

The land consists of 92 acres and is zoned R-1A (single-family agricultural).

The trial judge found:

"From the testimony presented at trial the court finds that the subject parcel could not be effectively developed as single family residential use with the industrial complex, brine and sewage treatment plant in such close proximity. Due to circumstances surrounding the subject property, its zoning classification is unreasonable and as such would render development economically unfeasible."

In zoning cases this Court reviews the decisions of trial courts *de novo,* although we accord great weight to the trial judge's decision. *Sabo v Monroe Township,* 46 Mich App 344; 208 NW2d 57 (1973).

Recently, our Supreme Court in *Kropf v Sterling Heights,* 391 Mich 139, 156–157; 215 NW2d 179, 186 (1974), stated:

"Plaintiffs must bear the burden of proof in attacking the constitutionality of the ordinance in question. It is up to them to present sufficient proofs to the court showing that the defendant city by its action violated one of their aforesaid constitutional rights and thus acted 'unreasonably'. They must show that the city, via its ordinance denied them substantive or procedural due process, equal protection of the laws, or deprived

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

them of their property without just compensation. To each of these claims the court will apply their proofs presented and determine if they have met their burden in showing the ordinance in question to be 'unreasonable', for, as we have said, reasonableness is the test of its validity."

The record substantiates the trial court's findings that the land in question cannot be developed for single family residential use. The industrial complex, brine pond and sewage treatment plant all being in close proximity to the land in question effectively forecloses any real opportunity to develop the land as single family residences.

However, in our opinion, the trial court focused on the one permitted use (single family dwellings) without considering the actual use to which the land was being put: farming.

The record shows that the plaintiffs rent the land to a third party, Mr. Popp, who actively farms a good share of the 92 acres. Mr. Popp has rented the land from the plaintiffs for the last 17 years and it would appear he has paid $600 per year. Mr. Popp receives $1,100 per year from the soil bank for letting 7 acres of the land lie fallow.

The case is reversed and remanded to the trial court for a determination of the economic feasibility of using the land for agricultural purposes as zoned.

Costs to abide the final determination.

All concurred.

PEOPLE v FRY

1. CRIMINAL LAW—IDENTIFICATION—ILLEGAL CONFRONTATION—IN-COURT IDENTIFICATION—INDEPENDENT BASIS.

An in-court identification preceded by a questionable or illegal confrontation will not be deemed inadmissible or prejudicial if the in-court identification has an independent basis.

2. CRIMINAL LAW—IN-COURT IDENTIFICATION—INDEPENDENT BASIS.

There was an independent basis for an in-court identification where the complainant was in the same room with his attacker for several hours, the attacker stayed overnight, the complainant went with him to a bank and was assaulted and robbed by him, and the complainant was able to describe his clothes and height.

3. CRIMINAL LAW—IDENTIFICATION—PHOTOGRAPHIC IDENTIFICATION—CASE PRECEDENT—RETROACTIVE APPLICATION.

Case law which disallows identification by photo when the accused is in custody is not to be applied retroactively.

4. CRIMINAL LAW—EVIDENCE—CREDIBILITY—PRIOR CONVICTIONS.

A defendant's prior felony convictions are admissible to test his credibility; therefore, it was not an abuse of discretion to deny defense counsel's motion to preclude the use of the defendant's prior convictions for credibility purposes (MCLA 600.2158).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 334, 335.
[3] 73 Am Jur 2d, Statutes § 347 *et seq.*
[4] 58 Am Jur, Witnesses § 734 *et seq.*
[5] 53 Am Jur, Trial §§ 511, 513, 514.
5 Am Jur 2d, Appeal and Error § 623.
[6] 53 Am Jur, Trial §§ 511, 513, 514.
67 Am Jur 2d, Robbery §§ 68, 69.
[7] 53 Am Jur, Trial §§ 699–701.
Right of accused to instruction that his failure to testify shall not be taken against him. 84 L Ed 2d 261.
[8–10] 21 Am Jur 2d, Criminal Law §§ 533, 569, 572.
[9, 10] 21 Am Jur 2d, Criminal Law §§ 316–323.

5. CRIMINAL LAW—INSTRUCTIONS TO JURY—REQUEST FOR INSTRUCTIONS—IDENTIFICATION OF SOURCE.

It is improper for a court to inform the jury as to which party requested instructions; however, a conviction will not be reversed where no miscarriage of justice resulted when the trial court informed the jury that defense counsel requested instructions on two lesser included offenses (MCLA 769.26).

6. ROBBERY—INSTRUCTIONS TO JURY—SPECIFIC INTENT.

Failure to use the term "specific intent to permanently deprive the owner of his property" when charging the jury in a prosecution for unarmed robbery is not assignable as error where no request was made to instruct on intent and no objection was recorded; and there was no reversible error where the instructions did not mislead the jury and were adequate and consistent with substantial justice (MCLA 769.26; GCR 1963, 516.2).

7. CRIMINAL LAW—INSTRUCTIONS TO JURY—SELF-INCRIMINATION.

It is not reversible error to give to the jury, *sua sponte,* the standard instruction regarding a defendant's right not to take the witness stand.

8. CRIMINAL LAW—APPEAL AND ERROR—SENTENCING—PRIOR CONVICTIONS—RIGHT TO COUNSEL.

A defendant's claim that his sentence was improperly imposed by a sentencing judge who considered prior convictions which were invalid because the defendant was indigent on each occasion and was not offered counsel or informed of his right to counsel will not be considered for the first time on appeal.

9. CRIMINAL LAW—SENTENCES—PRIOR CONVICTIONS—VALIDITY OF PRIOR CONVICTIONS—RIGHT TO COUNSEL—HEARING—EVIDENCE—BURDEN OF PROOF—DISTRICT AND PROSECUTING ATTORNEYS.

A defendant, to pursue a hearing to determine if the sentence might have been different if the sentencing judge had known that defendant's previous convictions had been unconstitutionally obtained because the defendant had been unrepresented by counsel and he had been neither advised of his right to legal assistance nor had he intelligently and understandingly waived his right to the assistance of counsel, must (1) present prima facie proof that a previous conviction was violative of his right to counsel, such as a docket entry showing the absence of counsel or a transcript evidencing the same; or (2) present evidence that he has requested such records from the sentencing court and it has failed to reply or has refused to furnish

copies of records within a reasonable period of time; upon such presentation, either (1) or (2), the burden will then be upon the prosecutor to establish the constitutional validity of the prior conviction; thus, if the prosecutor contends that the defendant waived counsel, the burden will be on him to show affirmative record evidence of waiver, and if he obtains and furnishes the judge and the defendant or his lawyer with photocopies of records establishing the constitutional validity of the prior conviction, the judge may decide the matter on the papers presented unless the defendant, on notice, shows cause to hold a hearing at which he is present; unless the prosecutor furnishes such evidence within one month of the defendant's motion, the judge shall set the matter for an early hearing and order the production of the defendant at the hearing.

10. CRIMINAL LAW—SENTENCING—RESENTENCING—PRESENCE OF COUNSEL.

A defendant should be resentenced where he appeared at the sentencing *in propria persona,* the transcript is silent concerning the presence or advice of counsel, and the prosecutor stipulated that he should be resentenced.

Appeal from Kent, John H. Vander Wal, J. Submitted Division 3 June 6, 1974, at Grand Rapids. (Docket Nos. 18034–18035.) Decided August 14, 1974.

Donald L. Fry was convicted of unarmed robbery and, on his plea of guilty, of a fourth felony. Defendant appeals. Affirmed and remanded for resentencing as a fourth felony offender.

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.

Judith K. Munger, Assistant State Appellate Defender, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

HOLBROOK, P. J. Defendant was convicted by a jury of unarmed robbery. MCLA 750.530; MSA 28.798. Defendant was also charged as a habitual criminal. MCLA 769.12; MSA 28.1084. A plea of guilty was entered on this charge. Concurrent sentences of 7-1/2 to 15 years were given by the trial judge.

The complainant, Edward Mohney, was assaulted and robbed. This fact is not disputed or challenged. Mohney and a friend, Bill Britt, were drinking wine at Mohney's residence. Britt admitted two men, a white and an Indian. All four stayed overnight. The next morning Britt and the two men left. A short time later, the two men returned. Mohney received a compensation check for $56 in the afternoon mail. The defendant went with Mohney to a nearby bank and he cashed the check. When they returned to the Mohney apartment, complainant was brutally beaten and robbed.

Mohney was able to identify defendant as his assailant from a photographic display and made an in-court identification of defendant at trial.

Mohney was 75 years of age. He had admittedly poor eyesight.

On appeal defendant challenges the Mohney identification, alleges instructional error, trial errors and improper sentence.

I and II

Was defendant denied due process of law by the

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

employment of a photographic show-up in this case?

Was defendant denied his constitutional right to counsel by the pretrial photographic identification procedure?

The credibility of identification testimony, *viz.,* impaired vision and what the complainant was able to see, is a matter left solely with the jury and this Court does not substitute its judgment for theirs. *People v Harper,* 43 Mich App 500; 204 NW2d 263 (1972); *People v Watson,* 52 Mich App 211; 217 NW2d 121 (1974).

An in-court identification which was preceded by a questionable or illegal confrontation will not be deemed inadmissible or prejudicial if the in-court identification has an independent basis. *People v Rush,* 48 Mich App 478; 210 NW2d 467 (1973); *People v Harper,* 43 Mich App 500; 204 NW2d 263 (1972).

Mohney had ample opportunity to observe his attacker. He was in the same room with him for several hours; the attacker stayed overnight. Mohney went with him to the bank and he was assaulted and robbed by him. He was able to describe his clothes and height. There was a sufficient independent basis for identification irrespective of any pretrial photo show-up. This was enough to admit the in-court identification.

People v Anderson, 389 Mich 155; 205 NW2d 461 (1973), disallows identification by photo when the accused is in custody. But this rule is not retroactively applied. *People v Duke,* 50 Mich App 714; 213 NW2d 769 (1973). Defendant's trial was on January 30, 1973, and prior to the *Anderson* decision (March 27, 1973). This defense is unavailable.

III

Did the trial court abuse its discretion by denying defense counsel's motion to preclude the use of defendant's prior convictions for credibility purposes?

Defendant alleges that the trial court abused its discretion by denying defense counsel's motion to preclude the use of defendant's prior convictions for credibility purposes. The trial court properly refused to grant the motion. MCLA 600.2158; MSA 27A.2158; *Sting v Davis,* 384 Mich 608; 185 NW2d 360 (1971). The three prior felony convictions of the defendant were admissible on cross-examination of defendant, if he had taken the witness stand. This would have been for the purpose of testing credibility, as the trial judge ruled.

IV

Did the trial court err in stating that an instruction was requested by defense counsel?

This claim of error is based upon the following transcript information:

"Defense counsel has called to my attention that there may be two included offenses in this charge, although it is not stated in the information and that is in addition to the principal charge in this case there may be another charge which may be applicable in this matter. That is known as an aggravated assault, which is an assault, an attempt to do a harm with the ability to carry it out coupled with a serious or aggravated injury. In other words, if you just find he just made an assault on the body of Mr. Mohney, but there was no robbery, then he could be guilty of aggravated assault.

"Then the other charge would be a simple assault and battery. If he just made an assault, struck Mr. Mohney it would be a simple assault and battery. I am including these two lesser offenses so you have four possible verdicts to bring in."

Instructions must emanate from the court, and it is improper practice to inform the jury as to the source of requested instructions. *Reetz v Rigg,* 367 Mich 35; 116 NW2d 323 (1962); *People v Hunter,* 370 Mich 262; 121 NW2d 442 (1963); *People v Carter,* 28 Mich App 83; 184 NW2d 373 (1970); *rev'd* 387 Mich 397, 412; 197 NW2d 57, 64 (1972); *People v Coates,* 40 Mich App 212; 198 NW2d 837 (1972).

In *Coates* the Court on page 216; 198 NW2d 839 stated:

> "This Court in *People v Thomas,* 7 Mich App 519, 533; 152 NW2d 166, 172 (1967), while acknowledging that identification of the party requesting an instruction is improper, found no deprivation of substantial rights or a miscarriage of justice. See also *People v Waters,* 16 Mich App 33, 37; 167 NW2d 487, 489 (1969); *People v Carter,* 28 Mich App 83, 103; 184 NW2d 373, 381 (1970). While we agree that it was improper for the trial court to identify defendant as the party requesting the instruction, we find no prejudice to the defendant through the court's inadvertent error.
> "Affirmed."

In *Carter,* 387 Mich 397, 412; 197 NW2d 57, 64 (1972), the Supreme Court disapproved of the practice of identifying the source of instructions: "Again, we regard the statement by the judge as an inadvertent aside which will not be repeated".

In this case, we find insufficient prejudice to cause a reversal and we further find no miscarriage of justice. MCLA 769.26; MSA 28.1096.

V

Did the trial court properly charge the jury regarding the offense of unarmed robbery, when the term "specific intent to permanently deprive

the owner of his property" was not mentioned to the jury?

In *People v Noyes,* 328 Mich 207, 212; 43 NW2d 331, 333 (1950), the Court held: "In our opinion the reading of the statute relating to the crime is an instruction to the jury and is to be considered by them as any other given instruction". This rule has been adopted in *People v Kruper,* 340 Mich 114; 64 NW2d 629 (1954), and *People v Cardenas,* 21 Mich App 636, 639; 176 NW2d 447, 448 (1970).

The court instructed the jury in pertinent parts as follows:

"Ladies and gentlemen of the jury, one of the penal statutes of this state reads as follows:

" 'Any person who shall by force and violence or put in fear feloniously rob, steal or take away from the person of another, or in his presence any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony punishable by the laws of this state.'

* * *

"Now what do we mean by the offense charged here and what are the elements. Well the statute says any person who shall by force and violence or by an assault or by putting in fear, feloniously rob, steal and take away from a person of another or in his presence, any money or other property contrary to his will which may be the subject of larceny, and such robber not being armed with a dangerous weapon.

"So the first element is that the respondent feloniously without any claim or color of right stole or took property from Mr. Mohney.

"Two,—that he made an assault upon Mr. Mohney to place him in fear with violence with the purpose of taking away the money. Now an assault is defined as follows: It is an attempt with force or violence to do a corporal harm to another with the apparent ability to carry it out. I am going to repeat that. An assault is

defined as an attempt with force or violence to commit an injury to the body of another or place him in fear with the apparent ability to carry it out.

"Three,—that such robbery was accompanied by an assault of force and violence * * * I mentioned that, * * * finally that such robbery had some value, no matter how slight.

"Four,—that the respondent was not at the time armed with a dangerous weapon. We have four elements.

"One,—that there was an assault made upon the body and person of Mr. Mohney; two,—it was done with the intent to rob,—for the purpose of committing a robbery and that one did take place. Three,—that it was done without the consent of the person who was robbed. Four,—it was, whatever was taken was of some value, no matter how slight, those are the four elements.

"Ladies and gentlemen of the jury, if you should find by evidence beyond a reasonable doubt that there was an assault made upon the person and body of Mr. Mohney; and that it was done for the purpose of robbing him; that there was a robbery, taking of his money without his consent, or property without his consent; that it had some value, no matter how slight, that he was not armed with a dangerous weapon. I say if you find by evidence beyond a reasonable doubt, those four elements, it would be your duty to find the respondent guilty as charged."

As in *Cardenas,* no request was made to instruct on intent and no objection was recorded. We rule that "The alleged error relating to instructions is not before this Court. GCR 1963, 516.2". 21 Mich App 636, 639; 176 NW2d 447, 448. We further rule that the instructions of the trial court, when reviewed as a whole, did not mislead the jury and were adequate and are not inconsistent with substantial justice. *People v Turner,* 31 Mich App 44; 187 NW2d 241 (1971).

VI

Did the trial court commit reversible error by *sua sponte* giving the standard instruction to the jury regarding the defendant's right not to take the witness stand?

This issue has been ruled on adversely to defendant's position in the cases of *People v Waters,* 16 Mich App 33; 167 NW2d 487 (1969), and *People v Andrews #1,* 52 Mich App 719; 218 NW2d 379 (1974). See also *People v Harris,* 52 Mich App 739; 218 NW2d 150 (1974).

Also, the defendant made no objection to the instruction nor requested it not be given. This precludes appellate review. GCR 1963, 516.2.

VII

Was defendant's sentence improperly imposed when there were other prior convictions listed in the presentence report which was made available to the trial judge, when the defendant now claims that these convictions were invalid?

Defendant *now* claims that a number of convictions listed in the presentence report were invalid because he was indigent on each occasion and was not offered counsel, nor was he informed of his right to counsel. Defendant has now offered his affidavit to this Court asserting the claimed facts. Defendant claims that the trial judge considered said convictions in sentencing the defendant. The case of *People v Moore,* 391 Mich 426, 440–441; 216 NW2d 770, 777–778 (1974), sets forth the correct procedure for a defendant to pursue a *Tucker* hearing *(United States v Tucker,* 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 [1972]), the issue now presented to this Court. It is stated by Mr. Justice LEVIN as follows:

"In the future, post-sentencing *Tucker* claims should be initially decided by the sentencing judge or his successor. He is in the best position to explore and decide the factual issues and, if necessary, the defendant can then be resentenced. The Court of Appeals may refrain from considering a *Tucker* claim until the sentencing court has had an opportunity to resolve it.

"To invoke a *Tucker* hearing, the defendant must (1) present prima facie proof that a previous conviction was violative of *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799; 93 ALR2d 733 (1963), such as a docket entry showing the absence of counsel or a transcript evidencing the same; or (2) present evidence that he has requested such records from the sentencing court and it has failed to reply or has refused to furnish copies of records within a reasonable period of time, say four weeks. Upon such presentation, either (1) or (2), the burden will then be upon the prosecutor to establish the constitutional validity of the prior conviction. Thus, if the prosecutor contends that the defendant waived counsel, the burden will be on him to show affirmative record evidence of waiver.

"If the prosecutor obtains and furnishes the judge and the defendant or his lawyer with photocopies of records establishing the constitutional validity of the prior conviction, the judge may decide the matter on the papers presented unless the defendant, on notice, shows cause to hold a hearing at which he is present. Unless the prosecutor furnishes such evidence within one month of the defendant's motion, the judge shall set the matter for an early hearing and order the production of the defendant at the hearing."

Inasmuch as the defendant has failed to comply with either of the two requirements stated in *Moore, supra,* we refrain from further considering this issue. This ruling is made without prejudice to defendant to bring a proper motion in the trial court.

VIII

Was defendant denied the effective assistance of

counsel by the absence of his attorney at sentencing?

Defendant was with counsel at the sentencing for the unarmed robbery. This sentence is valid.

At sentencing on the habitual offender crime, defendant appeared *in propria persona.* The sentence transcript is silent concerning the presence of counsel or advice of counsel to defendant.

The people agree in its brief with defendant's arguments and position: "Accordingly, the people will stipulate that appellant should be resentenced on the conviction of the offense set out in the supplemental information".

We therefore remand for resentencing of defendant on the conviction for the offense set out in the supplemental information, with counsel present.

Other errors alleged by defendant do not merit discussion.

Affirmed and remanded as herein stated.

All concurred.

IN THE MATTER OF THE ATTORNEY FEES OF WILLIAM J. HAYES

(PEOPLE v STRODDER)

1. ATTORNEY AND CLIENT—STATUTES—ASSIGNED COUNSEL—INDIGENTS—FEES—JUDICIAL DISCRETION.

   The statute which authorizes the appointment of attorneys to represent indigent defendants gives the judge presiding at trial wide discretion to determine the value of services rendered by an appointed attorney (MCLA 775.16).

2. ATTORNEY AND CLIENT—ASSIGNED COUNSEL—UNPROFESSIONAL CONDUCT—FEES—JUDICIAL DISCRETION.

   Denial of payment of attorney fees to a court-assigned attorney who engaged in unprofessional and contemptuous conduct and refused to proceed with the case prior to completion of the trial, necessitating appointment of another attorney to continue the defense, was not an abuse of the judge's discretion.

Appeal from Genesee, Philip C. Elliott, J. Submitted Division 2 June 27, 1974, at Detroit. (Docket No. 18099.) Decided August 14, 1974. Amended opinion filed September 16, 1974. Leave to appeal applied for.

Petition by William J. Hayes for payment of attorney fees as court-appointed attorney for defendant Mandric V. Strodder. From an order denying payment of fees, plaintiff appeals by leave granted. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Attorneys at Law § 207.
21 Am Jur 2d, Criminal Law §§ 318–323.
Compensation by public of attorney for services under appointment by court in defending indigent person charged with crime. 130 ALR 1444, s. 144 ALR 847.

[2] 7 Am Jur 2d, Attorneys at Law §§ 93, 207.

William J. Hayes, in propria persona.

Robert F. Leonard, Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Joel B. Saxe,* Assistant Prosecuting Attorney, for the people.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

AMENDED OPINION

BASHARA, P. J. We amend our decision in this cause to clear up any possible misunderstanding that may have arisen. The record discloses that appellant Hayes rejoined the defense of the principal case, after his refusal to proceed necessitated the appointment of subsequent counsel by the trial judge.

Thus, we amend the issue stated on page 2 of this opinion *(post,* p 32) to read as follows: May a trial judge deny appointed counsel fees where some services have been performed but where counsel's refusal to proceed prior to completion of the case necessitated the trial court's appointment of substitute counsel?

In all other respects we affirm our prior holding.

ORIGINAL OPINION

BASHARA, P. J. This is an appeal by leave initiated by attorney William J. Hayes, from an order of Genesee County Circuit Judge Philip Elliott denying Mr. Hayes' petition for fees. Attorney Hayes was court-appointed counsel for defendant, who was charged with and later convicted of first-degree murder. That conviction is the subject of an independent appeal.

In the instant matter the circuit judge had

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

issued a "Compliance Order" in accordance with this Court's order to settle the record and certify a proposed concise statement of facts. The judge stated that he denied the petition for fees because five days after trial commenced, Mr. Hayes refused to conduct the defense of defendant Strodder. This necessitated the appointment of Mr. Ivor Jones to continue the defense. Mr. Jones was subsequently paid $1,500 by the county.

Judge Elliott also emphasized that the record was replete with instances of totally unprofessional and contemptuous conduct by Mr. Hayes. The judge further indicated his belief that the time spent in preparation, which was sworn to in Mr. Hayes' petition for fees, was untrue and also that the expenses he claimed were without verification.

As a result of Mr. Hayes' conduct in this case, Judge Elliott referred the matter to the State Bar Grievance Committee. That body recognized that Mr. Hayes had performed some services for the defendant, but recommended that he be suspended from the practice of law for 90 days.

Without further delineation of facts, this novel issue is squarely before us. May a trial judge deny appointed counsel fees where some services have been performed, but where he has *abandoned* his client's case prior to completion?

There are few guidelines to assist us. Counsel for Judge Elliott refers to *Rippey v Wilson,* 280 Mich 233; 273 NW 552 (1937), which clearly holds that retained counsel may lose his right to fees for unprofessional conduct or abandonment of his client's case. Mr. Hayes, on the other hand, believes that *In re Meizlish,* 387 Mich 228; 196 NW2d 129 (1972), controls. That case, however, only determined the constitutionality of a fee schedule for

the representation of indigent defendants and does not, in our opinion, address itself to the problem presented.

We must turn to the statute authorizing the appointment of counsel for indigent defendants. MCLA 775.16; MSA 28.1253 states in pertinent part:

> " * * * upon proper showing the presiding judge shall appoint some attorney to conduct the accused's examination before a justice court or examining magistrate and to conduct the defense, and the attorney so appointed shall be entitled to receive from the county treasurer on the certificate of the presiding judge that such services have been duly rendered, *such an amount as the presiding judge shall in his discretion deem reasonable compensation for the services performed."* (Emphasis added.)

Thus, it appears the statute has given wide discretion to the presiding judge at trial to determine the value of services rendered by counsel appointed to represent an indigent defendant. The presiding judge has placed his faith in appointed counsel to fairly and properly represent the indigent defendant. The landmark decision of *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799; 93 ALR 2d 733 (1963), clearly intended that appointed counsel would not only provide fair and adequate representation for indigents, but that counsel would see the case to its conclusion with the same mandates as retained counsel.

A survey of other jurisdictions with statutes similar to ours have generally held that the courts in which the services were performed have a large measure of discretion in fixing or recommending fees to be paid. See *Johnson & Douglas v Superior Court,* 101 Ariz 373; 419 P2d 730 (1966); see also 18 ALR3d 1074, 1104.

We must admit to finding favor with the language of Justice FEAD speaking for our Supreme Court in *Hightower v Detroit Edison Co,* 262 Mich 1, 13; 247 NW 97 (1933). While the discussion is again of retained counsel the following is pertinent to this discussion:

> "Appellant's representation of Donohue was not only a breach of professional ethics and standards, of duty to the client, and in aid of violation of law, but was a fraud on the court, going directly to the integrity of the relationship between bench and bar and to the heart of the orderly administration of justice. To say that, although such misconduct may justify disbarment or contempt proceedings, the court must award compensation to an attorney for services tainted thereby would put the court in a position of approving or ignoring gross breach of duty to client and court. * * * But we lay denial upon the broader ground that the judgment of the court will not be given in aid of or to encourage unprofessional conduct infringing the integrity of judicial proceedings."

We, therefore, hold that the right of the trial judge to determine or deny fees to appointed counsel should remain clear and unalterable, save for a gross abuse of discretion. We find none under the facts of this case.

Affirmed.

All concurred.

In re FAIR ESTATE

MOORE v STATE VETERANS' FACILITY OF MICHIGAN

1. NOTICE—NOTICE OF CLAIM—COURT OF CLAIMS—STATUTES—PURPOSE OF ACT.

   The purpose of the statute requiring that notice of a claim against the state must be filed in the Court of Claims within one year after such claim has accrued is to apprise the governmental agency that an action is contemplated so that it may take appropriate measures to gather evidence before the requisite information is lost (MCLA 600.6431[1]).

2. NOTICE—NOTICE OF CLAIM—STATUTES—NONCOMPLIANCE.

   Statutes requiring notice of claim are not aimed at forestalling litigation altogether, but mainly seek to provide a governmental authority with early warning so that it can assemble information in support of a defense on the merits while the evidentiary trail is still hot; therefore, it frequently would be excessive to treat noncompliance with a notice requirement as being as irremediable as a failure to commence an action within the time period established in a statute of limitation.

3. NOTICE—STATUTES—SUBSTANTIAL COMPLIANCE—CASE LAW.

   Only substantial compliance with the notice provisions of a statute is required under case law.

4. NOTICE—COURT OF CLAIMS—VERIFICATION—STATUTES—ATTORNEY'S SIGNATURE—SUBSTANTIAL COMPLIANCE—PREJUDICE—COURT RULES.

   Statutory notice provisions for claims in the Court of Claims which include a requirement of verification of the claim or nature of claim were substantially complied with where an unverified complaint was signed by the plaintiff's attorney, and where the defendant failed to demonstrate in what manner it

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 680 *et seq.*

[4] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 740.

was prejudiced by the unverified complaint, because verification is a certification of truth and an attorney who signs a complaint certifies that to the best of his knowledge, information, and belief there is good ground to support it; such certification is the equivalent of a verification (MCLA 600.6431[1]; GCR 1963, 114.2).

Appeal from Court of Claims, Willard L. Mikesell, J. Submitted Division 2 June 6, 1974, at Lansing. (Docket No. 18222.) Decided August 14, 1974.

Complaint by Walton B. Moore, administrator of the estate of Clesson B. Fair, deceased, against the State Veterans' Facility of Michigan to recover monies remaining in the decedent's escrow account and personal property held by the defendant. Accelerated judgment for defendant. Plaintiff appeals. Reversed and remanded.

Best, Arnold, Gleeson & Best, P. C. (James M. Justin, of counsel), for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Roderick T. MacGillis,* Assistant Attorney General, for defendant.

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

MCGREGOR, P. J. Plaintiff appeals from an August 10, 1973 opinion and a September 4, 1973 order of the Court of Claims, granting defendant's motion for accelerated judgment.

Clesson F. Fair was admitted as a resident of the

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

Michigan Veterans' Facility on or about May 2, 1969, and remained there until his death on March 30, 1970. During that period of time, certain monies were received from the Veterans Administration and from the Social Security Administration which were used in part to cover the cost of his care. The balance of the money was deposited in his name in the pension trust account maintained by the board of managers of the veterans facility. At the time of Mr. Fair's death, his account totalled $5,151.32. Additionally, it is alleged that the decedent was possessed of certain other personal property, including a man's diamond ring and a wallet containing $100. Subsequently, the fund was transferred from the pension trust account to the deceased member's escrow account and $578.50 was paid therefrom to a funeral home, to cover a portion of decedent's funeral bill which was not paid either by social security or the Veterans Administration.

On March 17, 1971, the probate court appointed plaintiff Walton B. Moore as the administrator of the estate of Clesson F. Fair.

On March 23, 1971, plaintiff, on behalf of the estate, filed a complaint in the Court of Claims for the balance of monies remaining in the deceased member's escrow account and for the personal property mentioned above. The complaint was signed by plaintiff's attorney, but was unverified. On April 8, 1971, the defendant, the State Veterans' Facility of Michigan, filed an answer to plaintiff's complaint, claiming entitlement to decedent's escrow account by virtue of an assignment executed by the decedent in accordance with MCLA 36.11; MSA 4.878, and alleging that the personal effects of the decedent were delivered to his relatives and receipts taken therefor. Defendant's an-

swer raised no objection to the lack of verification of the complaint.

On May 11, 1971, plaintiff filed a reply to the answer, and on June 3, 1971, pretrial statements were filed by both parties.

Pretrial conference was held on June 28, 1971, at which time the plaintiff filed an amended complaint, the only change being verification of the original complaint. On August 11, 1971, the defendant filed a motion for accelerated judgment, based on the untimeliness of the verified complaint. On January 5, 1972, plaintiff answered defendant's motion and filed a petition for leave to file an amended complaint. On January 25, 1972, defendant filed a reply brief, and oral arguments were heard before the court on February 5, 1972.

A little over 1-1/2 years later, the trial court rendered an opinion, on August 10, 1973, granting defendant's motion for accelerated judgment. Pursuant to that opinion, an order for accelerated judgment was entered on September 4, 1973, and it is from this order that plaintiff appeals.

The dispositive issue before us is whether the trial court erred in granting defendant's motion for accelerated judgment, based on plaintiff's failure to verify the original complaint, as required by MCLA 600.6431(1); MSA 27A.6431(1).

The present dispute is centered on the notice requirements which must be met when an action is brought in the Court of Claims. The applicable statute, MCLA 600.6431(1); MSA 27A.6431(1), provides:

"No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its

departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, *which claim or notice shall be signed and verified by the claimant* before an officer authorized to administer oaths." (Emphasis added.)

The purpose of such statute is to apprise the governmental agency that an action is contemplated, so that they may take appropriate measures to gather evidence before the requisite information is lost. In a concurring opinion, then Judge, now Justice, LEVIN stated in *Dover & Co v United Pacific Insurance Co,* 38 Mich App 727, 730; 197 NW2d 126 (1972):

"Statutes requiring notice of claim serve a different purpose than statutes of limitations. Statutes of limitations establish an absolute time limit for the commencement of litigation. Statutes requiring notice of claim are not aimed at forestalling litigation altogether, but mainly seek to provide a governmental authority with early warning so that it can assemble information in support of a defense on the merits while the evidentiary trail is still hot.

"In recent years there has been a clear tendency in the cases to enforce notice of claim statutes less strictly than in former times. It has come to be recognized that it frequently would be excessive to treat noncompliance with a notice requirement as being as irremediable as a failure to commence an action within the time period established in a statute of limitation."

See also *Lisee v Secretary of State,* 388 Mich 32, 44; 199 NW2d 188 (1972).

The case before us provides an excellent illustration of the injustice that may occur if noncompliance with a technical aspect of the notice requirement is not allowed to be remedied. The decedent passed away on March 30, 1970; the probate court

did not appoint an administrator for the decedent's estate until March 17, 1971, less than two weeks before the one-year requirement of the statute would have expired. The original complaint was filed with commendable diligence on March 23, 1971, six days after the appointment of the administrator. The complaint was signed by plaintiff's counsel, a sworn officer of the court; however, the complaint was not signed by the complainant or verified.

Nowhere does the defendant aver that it was surprised by the bringing of this action or prejudiced by the absence of verification. The defendant would have this Court deprive plaintiff of his day in court for a mere noncompliance with a much-attacked technical aspect of the statute.

In *Meredith v City of Melvindale,* 381 Mich 572, 580; 165 NW2d 7 (1969), the Michigan Supreme Court said, in a case concerning a city charter provision requiring notice as a precondition to suit against the city, that:

> "This Court is committed to the rule requiring only substantial compliance with the notice provisions of a statute or charter. See *Swanson v City of Marquette,* 357 Mich 424; 98 NW2d 574 (1959); *Pearll v City of Bay City,* 174 Mich 643; 140 NW 938 (1913); *Ridgeway v City of Escanaba,* 154 Mich 68; 117 NW 550 (1908); *Penix v City of St Johns,* 354 Mich 259; 92 NW2d 332 (1958)."

Recently, in *Nor-Cote, Inc v Wayne County,* 47 Mich App 563, 566; 209 NW2d 602 (1973), this Court considered the notice provisions of the general property tax act. Once again, commenting that the purpose of the notice statute is to provide governmental authority with forewarning, this Court stated:

> "It is apparent that the courts today take a less rigid

view of a failure to comply with a provision requiring notice of claim. As we said in *Hussey v Muskegon Heights,* 36 Mich App 264, 270; 193 NW2d 421 (1971); 'deficiencies in a notice of injury and defect are not of jurisdictional import, and an injured person may not be denied his day in court on that account absent a showing by the governmental agency that it has been thereby prejudiced.' "

With respect to the more specific question of verification, we stated in *Jackson v Detroit Board of Education,* 18 Mich App 73, 80; 170 NW2d 489 (1969):

"The verification is a certification of truth. The court rule provides that an attorney who signs a complaint certifies that 'to the best of his knowledge, information and belief there is good ground to support it.' GCR 1963, 114.2. Having in mind that substantial compliance with the notice requirement is sufficient, we are persuaded that the attorney's certification was the equivalent of a verification."

Additionally, in *Davidson v State of Michigan,* 42 Mich App 80, 85; 201 NW2d 296 (1972), we noted:

"The requirements of MCLA 600.6431; MSA 27A.6431 are being construed very liberally. See *Meredith v City of Melvindale,* 381 Mich 572; 165 NW2d 7 (1969). In fact, in 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), committee comments to rule 114, p 271, the author states that the requirement of verifying a complaint 'is a useless formality'. This is also recognized by GCR 1963, 114.3 where all that is required is verification 'of the party or someone having knowledge of the facts pleaded'."

In light of defendant's failure to demonstrate in what manner it was prejudiced by the unverified complaint, we hold, in accordance with the above-quoted precedent, that plaintiff substantially com-

plied with the notice requirements of MCLA 600.6431(1); MSA 27A.6431(1) and that the trial court erred in granting defendant's motion for accelerated judgment.

In light of this disposition, we refrain from passing upon plaintiff's constitutional objections—voiced for the first time in this Court—to the foregoing notice requirements. See *Bullerman v Employment Security Commission,* 25 Mich App 242; 181 NW2d 330 (1970); *Stanek v Secretary of State,* 33 Mich App 527; 190 NW2d 288 (1971).

Reversed and remanded.

All concurred.

PEOPLE v PALMER

1. ASSAULT AND BATTERY—CRIMINAL LAW—PLEA OF GUILTY—FACTUAL BASIS.

A factual basis for a defendant's plea of guilty of assault with intent to rob while armed was established where the defendant told the court that he had entered a bar by the back door with a gun in a bag, when an accomplice announced a holdup he pulled out the gun and proceeded to rob the bar and the patrons, and that he was pleading guilty because he was guilty and that he had told the judge the truth.

2. ASSAULT AND BATTERY—CRIMINAL LAW—PLEA OF GUILTY—PROMISE OF LENIENCY—COURT RULES.

A defendant who received a maximum sentence of ten years upon his plea of guilty of assault with intent to rob while armed, an offense for the conviction of which the statute provides imprisonment for life or for any term of years, was not impermissibly induced to plead guilty because of a promise of leniency through a ten-year maximum sentence where he could have chosen to be tried on the charge of armed robbery and face a possible sentence of life imprisonment; the court agreed to a ten-year maximum because the defendant had cooperated with the police in solving several other cases, and the court rule governing the taking of pleas was fully complied with (MCLA 750.89; GCR 1963, 785.7).

3. CRIMINAL LAW—SENTENCING—LENIENCY IN SENTENCING—PLEA OF GUILTY.

It is as permissible to have the expected lesser sentence accomplished by a stated sentence concession as by reduction of the charge to fit the sentence expectation where leniency in sentencing is appropriate.

4. CRIMINAL LAW—PLEA OF GUILTY—AGREEMENT.

A plea of guilty is not made involuntary by the existence of an agreement, whether the agreement was a charge reduction,

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 459, 484.

[2–4] 21 Am Jur 2d, Criminal Law §§ 485, 493, 494.

dismissal of other charges, or the expectation of a stated sentence concession.

Appeal from Recorder's Court of Detroit, John P. O'Brien, J. Submitted Division 1 June 14, 1974, at Detroit. (Docket No. 18451.) Decided August 14, 1974.

Ernest Palmer was convicted, on his plea of guilty, of assault with intent to rob while armed. Defendant appeals. Affirmed.

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

Ostrowski, Wilson, Belanger & Boman, P. C., for defendant on appeal.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ELLIOTT, J. GCR 1963, 785.7 was fully and carefully complied with when defendant, who was charged with armed robbery, entered a guilty plea to an added count of assault with intent to rob while armed. He was sentenced to a maximum term of ten years with the greatest minimum term, six and two-thirds years, permitted by *People v Tanner,* 387 Mich 683; 199 NW2d 202 (1972).

There is no merit to the contention that a factual basis for the plea was not established as required by subparagraph 3 of that rule. Defendant told the judge that he entered the bar by the

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

back door with a gun in a bag. When an accomplice announced a holdup, defendant pulled out his gun and they proceeded to rob the bar and patrons of approximately $500. He said he was pleading guilty because he was guilty and that he had told the judge the truth.

Defendant further contends that he received an impermissible promise of leniency which induced him to plead guilty rather than take the chance of being convicted of armed robbery and face a possible sentence of life imprisonment. This claim is made by reason of the following portion of the plea-taking record:

"*Q.* Do you know what the maximum sentence is on that charge?

"*A.* Yes, I do, sir.

"*Q.* What is it?

"*A.* I believe it carries life, I'm not sure.

"*The Court:* Is there a minimum sentence?

"*Mr. Daggs:* It carries life down to probation, any number of years.

"*The Court:* Let the record show, at this point that we have had Sergeant Provencal from the Armed Robbery, Major Theft Section of the Police Department here and Sergeant Provencal made a statement on this record yesterday. He suggested to me that because of your cooperation with the Police Department at the present time in solving several other cases, two other mean [sic] were arrested and one has already pled guilty; these arrests and the solution of many of these armed robbery cases came about as a result of your assistance to the Police Department. He suggested to me that I treat this case with a ten-year maximum.

"Now although this crime does carry a life sentence, at this time I would assure you and Mr. Daggs that I would treat this as a ten-year maximum, the worse *[sic]* I can do for you is put you in jail for ten years.

"I want the record to also reflect, Mr. Daggs and Mr. Palmer, if after I see a probation report in this matter,

my conscience and duties as a judge incline me toward the feeling I have to give you more than that, I will set this plea aside. At this time I see no reason for that to happen, do you understand that?

"*Mr. Daggs:* Yes, your Honor.

"*Q.* (By the court, continuing): Knowing all that, Mr. Palmer, you still want to plead guilty, is that right?

"*A.* Yes, sir.

"*Q.* And you are pleading guilty here because you are guilty?

"*A.* Yes, I am."

Later, after the waiver of each right covered by GCR 1963, 785.7(1)(d) and a determination from personal inquiry of defendant that his plea was freely, understandingly and voluntarily made and not the result of undue influence, compulsion or duress, the following dialogue is transcribed:

"*Q.* (By the court, continuing): Now has anybody made any promises to you other than the promise I have already given you myself on the record here this morning?

"*A.* No.

"*Q.* No other promises have been made?

"*A.* No.

"*Q.* You don't have any deals going with anyone about the outcome of this case other than this arrangement I've discussed here on the record?

"*A.* No."

GCR 1963, 785.7(2) provides in part:

"If the tendered plea is the result of an agreement between the prosecutor and the defendant or his lawyer regarding the entry of a plea, the agreement shall be stated on the record and affirmatively acknowledged by the defendant, his lawyer and the prosecutor."

This sentence admirably brings plea agreements into the open.

The unanimous opinion of the United States Supreme Court in *Santobello v New York,* 404 US 257, 260–262; 92 S Ct 495, 498–499; 30 L Ed 2d 427, 432–433 (1971), states:

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

"Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. * * *

"However, all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counseled, absent a waiver. * * * Fed Rule Crim Proc 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record,* the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge. The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. * * * A court may reject a plea in exercise of sound judicial discretion.

"This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of

guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v New York, supra.* (Citations and footnotes omitted.)

Federal Rules of Criminal Procedure, 11, has been amended and transmitted to Congress according to law to be effective August 1, 1974. As amended,[1] the rule requires that the court deter-

[1] "Rule 11. Pleas.

"(a) *Alternatives.*—A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

"(b) *Nolo contendere.*—A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

"(c) *Advice to defendant.*—The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

"(1) the nature of the charge to which the plea is offered; and

"(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and

"(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

"(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

"(d) *Insuring that the plea is voluntary.*—The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

"(e) *Plea agreement procedure.*

"(1) *In general.*—The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or

mine "that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement". It permits agreement for a plea to a lesser or related charge, or predicated on

to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

"(2) *Notice of such agreement.*—If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

"(3) *Acceptance of plea.*—If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

"(4) *Rejection of plea.*—If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

"(5) *Time of plea agreement procedure.*—Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

"(6) *Inadmissibility of plea discussions.*—Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

"(f) *Determining accuracy of plea.*—Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

"(g) *Record of proceedings.*—A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea."

dismissal of other charges, or with a promise that the prosecutor "will recommend or not oppose the imposition of a particular sentence, or will do both". Further, "if a plea agreement has been reached * * * in the expectation that a specific sentence will be imposed * * * the court may accept or reject the agreement, or may defer its decision * * * until there has been an opportunity to consider the presentence report". Finally, "if the court rejects the plea agreement, the court shall * * * advise the defendant personally * * * [and] afford the defendant the opportunity to then withdraw his plea * * * ".

This procedure is essentially that which ABA Standards for Administration of Criminal Justice, Pleas of Guilty, recommends. The authors suggest that among appropriate considerations in determining a charge or sentence concession is "that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct". ABA Standards, Pleas of Guilty, *supra,* 1.8(a)(v).

The courts of Michigan are bound by GCR 1963, 785 and court decisions and not by the Federal rules at present nor after August 1, 1974. However, our court rule contemplates plea agreements. Defendant cites no case that holds a plea induced by promise of a certain maximum sentence is involuntary. Negotiated pleas to reduced charges are common and approved. The sentence limit achieved by this defendant could have been accomplished by allowing him to plead to larceny from a person, a felony punishable by ten years imprisonment. When leniency is appropriate, it seems at least as permissible to have the expectation accomplished by a stated sentence concession as by

reduction of the charge to fit the sentence expectation. Defendant is primarily interested in the sentence not the charge, and should have less reason to complain about a sentence within the limits of his agreement. A plea to the charge with a sentence recommendation, binding the court to fulfill that recommendation or allow withdrawal of the plea, results in a conviction for the crime actually committed and acknowledged, and, if for some reason the plea is faulty, a trial after the plea is set aside will be upon a charge that the proofs will describe. *People v McMiller,* 389 Mich 425, 434; 208 NW2d 451 (1973), holds:

> "If the prescribed guilty plea procedure is observed in taking the plea, the conviction will stand. If the procedure is not observed, the conviction will be set aside and the defendant ordered tried on the charge to which the plea was offered."

In this case, the guilty plea procedure (GCR 1963, 785.7) was observed. It can be said with respect to any negotiated plea that it was induced by the agreement; that is naturally and inevitably so whether the agreement was a charge reduction, dismissal of other charges or the expectation of a stated sentence concession. The existence of any such agreement does not make the plea involuntary. Frequently the agreement makes the plea not only voluntary but earnestly desired by the defendant. The conviction will stand.

Affirmed.

All concurred.

PEOPLE v RAPPUHN

1. HOMICIDE—PREMEDITATION—EVIDENCE—INFERENCES.

Premeditation may be inferred from the facts and circumstances surrounding a killing.

2. HOMICIDE—PREMEDITATION—QUESTION FOR JURY—APPEAL AND ERROR.

Premeditation is a question for the jury and on appeal a jury's finding of premeditation will not be disturbed unless there is no evidence which would support a reasonable inference thereof.

3. HOMICIDE—PREMEDITATION—EVIDENCE—SECOND LOOK.

Sufficient evidence was produced to support a reasonable inference of premeditation where testimony clearly established that the defendant left the victim's apartment to remove a knife from his pocket and open the blade, and returned to the apartment to repeatedly stab the victim; the trip outside the apartment to open the knife and the pauses of the defendant between stabbings indicate the presence of the "second look" necessary to a finding of premeditation.

4. CRIMINAL LAW—TRIAL—OBJECTION TO ERROR—PRESERVING QUESTION.

Counsel cannot sit back and harbor error to be used as an

REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur 2d, Homicide § 264.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

[1, 2] Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

[2] 40 Am Jur 2d, Homicide § 472.

[3] 40 Am Jur 2d, Homicide §§ 50, 264, 438, 439.

[4] 5 Am Jur 2d, Appeal and Error § 545 *et seq.*

[5] 29 Am Jur 2d, Evidence §§ 430, 431, 433.

Admissibility of evidence obtained by wire tapping as affected by § 605 of Federal Communications Act—federal cases. 2 L Ed 2d 1603.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message. 134 ALR 614.

appellate parachute in the event of a jury failure and should make any relevant objections during the course of the trial.

5. CONSTITUTIONAL LAW—CRIMINAL LAW—EVIDENCE—TELEPHONE CONVERSATIONS—CONSENT.

The Federal Constitution does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it; therefore, a defendant's constitutionally protected rights were not violated by the admission of testimony regarding a telephone conversation which was voluntarily entered into by the defendant with a brother who had consented that the conversation be overheard by the police.

Appeal from Oakland, James S. Thorburn, J. Submitted Division 2 June 13, 1974, at Lansing. (Docket No. 18472.) Decided August 14, 1974. Leave to appeal applied for.

Keith Rappuhn was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, and *Sandra M. Kabboush,* Assistant Prosecuting Attorney, for the people.

Geoffrey H. Davis, for defendant.

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

CARLAND, J. The defendant was charged in an information alleging an open count of murder arising as the result of the slaying of one Glenda Joyce Moss on February 8, 1971. Following a preliminary examination, the defendant was bound over to the circuit court for trial on such open count of murder contrary to MCLA 750.316; MSA 28.548; MCLA 750.317; MSA 28.549. Following jury trial, the defendant was convicted of

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

murder in the first degree and appeals as a matter of right.

The victim was discovered by her husband upon his return from work in the early morning hours of February 8, 1971. Upon entering his apartment, the husband was able to see his wife lying nude upon a mattress which apparently had been removed from the bed and placed upon the floor. She was covered with blood and her wrists and throat had been slashed. There was blood throughout the area. The husband notified the police and covered the body with a blanket. Mrs. Moss was last seen by a neighbor, Janice Dukette, as the victim returned to her apartment after making a telephone call between the hours of 9:30 and 10 p.m. A short time thereafter this neighbor heard someone come upstairs and knock on the Moss door.

Investigation by the police after receiving the husband's call revealed that death had ensued and that the victim had been slashed and stabbed over almost her entire body and red stains smeared the walls. A wine bottle was seized in order that it might be processed for fingerprints.

An autopsy was performed by Dr. John Burton, Oakland County Medical Examiner, who concluded that death was caused from shock and hemorrhage due to some 60 stab wounds found upon the body. He further concluded that all of the wounds were attributable to the same instrument.

James Lafnear testified that in the early hours of February 8th the defendant came to his home and that there was blood upon his hands and clothing. The defendant explained that his hands had been cut while attempting to assist a man involved in a serious automobile accident. A check of the police records disclosed that no accident had been reported in the area as claimed by the de-

fendant. Lafnear assisted the defendant in removing most of the blood. Following a phone call, the defendant's brother and father arrived and, after a private conversation, they left the Lafnear home in the company of the defendant. That later that day, the defendant returned and asked Lafnear not to mention the alleged accident. Lafnear also discovered a blood-soaked woman's blouse upon the floor of his utility room which he threw in the garbage after learning that it was unfamiliar to anyone in his household. After reading of the Glenda Moss murder, he contacted the police about this blouse. An eleven-year-old niece of Lafnear testified that she heard the defendant on February 8th telling someone that "he was afraid he was going to prison".

The defendant's brother, Jerry Rappuhn, in contradiction of defendant's story to Lafnear, testified that the defendant had told him that he cut his hand on the horn ring of his own automobile.

Another brother, Robert Rappuhn, testified that on February 8th the defendant told him that he had "hurt a girl", and had cut his hand. That as a result "he was in trouble, and that he didn't really know what to do". The defendant further stated that he knew that the girl was dead.

On another occasion, the defendant disclosed to Robert that he had gone over to the girl's home knowing that she would be alone because her husband worked nights and she had no children. That after having some wine, he left the apartment under the pretense of going to the bathroom and put on gloves and took out a penknife he had in his pocket. That he returned to the apartment and told the girl he was going to have "sex" with her and put the knife to her throat. That she advised him that they could do it on friendlier

terms and that as a result, he had sex with her but was afraid that "she would tell on him". That he tried to choke her but being unsuccessful, began to repeatedly stab her. That he paused only to inquire if she knew him and that each time she repeated his name, he would stab her again. The defendant also admitted striking and kicking the victim.

About a week after this conversation, Robert Rappuhn conferred with Detective Duby of the Pontiac Police. Robert had asked for the conference. After further conversation with the police and an assistant prosecutor, Robert spoke to the defendant over the phone and permitted the police to listen to the conversation. This conversation was testified to by both Robert and Captain Raymond Meggitt, who stated that the defendant spoke of throwing out his shirt and a blouse that was "at Connie's".

The fingerprints lifted at the scene were identified as being the prints of the defendant and the blood samples removed from the site of the murder were identified as being of the same type as those of both the victim and the defendant.

The defendant testifying in his own behalf generally denied the testimony of his brother Robert. Essentially, however, he testified that at his mother's birthday party he drank a considerable amount of beer and whiskey. That thereafter he drove to Glenda's apartment, but because he was drunk, he was unable to recall the route travelled. That Glenda and he arrived at a mutual decision to have "sex" but because of his drinking he was unable to perform. That the victim thereupon expressed her disappointment by "grabbing him in the groin". That because of excruciating pain, he was unable to recall anything from that moment

until he left the apartment and that while realizing that he had stabbed her, he was oblivious as to her condition. On cross-examination he did recall having a knife in his pocket which he had to open in order to expose the blade. He also recalled being nude during the ill-fated lovemaking, and that his clothes were on the floor and that the blade of the knife was not exposed while in his pocket. Although being unable to remember getting dressed, he did know that he left his victim "all bloody".

The defendant maintains on appeal that insufficient evidence of premeditation was produced to support the jury's verdict of first-degree murder. In so doing, he relies upon *People v Allen,* 390 Mich 383; 212 NW2d 21 (1973). We find *Allen* to have no application in the instant case, since *Allen* only held that in a felony murder the "corpus delicti" could not be established by the extrajudicial statements of the defendant alone.

In reaching our decision as to the question here raised by the defendant, we assume that the verdict was reached by a properly instructed jury since no claim to the contrary is here asserted. Further, no claim is made by the defendant or anyone on his behalf that he was not guilty of the murder. Here, as distinguished from *Allen, supra,* the danger of the unreliability of extrajudicial statements of guilt allegedly made to officers or other third parties does not exist, since the judicial confession of the defendant from the witness stand as to his guilt makes the testimony of his brother merely corroborative. The defendant's own testimony in open court is consistent with the testimony of his brother Robert in almost every essential detail, except the defendant's attempt to exculpate himself through his assertion that his attack upon the victim arose because of the pain inflicted

upon him by the deceased rather than because of his fear of recognition.

There is abundant case law to the effect that the fact of premeditation may be inferred from the facts and circumstances surrounding the killing. Whether the defendant premeditated the stabbing and killing of Glenda Moss was a question of fact for the jury. On appeal, the jury's finding of premeditation will not be disturbed unless there is no evidence which would support a reasonable inference thereof, *People v Corsa,* 50 Mich App 479, 482; 213 NW2d 579 (1973); *People v Meier,* 47 Mich App 179, 183; 209 NW2d 311 (1973).

In *Meier, supra,* Judge HOLBROOK developed guidelines which provide an orderly approach to the question of determining the fact of premeditation. At pages 191–192 of *Meier,* he stated:

"Our own answer to the question of the appropriate rule to follow as to what constitutes premeditation in a first-degree murder case is not a definition. Rather, it is a reaffirmation of the role of the trier of fact in deciding the degree of guilt of an accused under the following established principles:

"(1) Premeditation can be reasonably inferred from the circumstances surrounding the killing;

"(2) A defendant may not be found guilty of first-degree murder if he did not have an opportunity to subject the nature of his response to a second look or reflection, *i.e.,* one cannot instantaneously premeditate a murder;

"(3) A sufficient time lapse to provide an opportunity for a 'second look' may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing;

"(4) Where it is factually clear that there is *no* evidence of premeditation, the trier of fact may not consider a charge of first-degree murder.

"Attempting to further clarify this 'definition' in the past has, we believe, led to an invasion by the appellate

courts into areas rightfully left to the trial court in its factfinding processes, with the diverging results we have noted in the cases cited above."

The testimony clearly establishes that the defendant left the apartment and went to the bathroom; that either while there, or at a later point in time, he removed the knife from his back pocket and opened its blade. That, if the defendant's brother was believed by the jury, the defendant repeatedly stabbed the victim out of fear the girl would tell on him, pausing only to inquire as to whether she knew him. By the defendant's own testimony, the victim was repeatedly stabbed after he was grabbed in the groin. That he left the apartment realizing that he had stabbed her although he was oblivious to her condition. The trip to the bathroom and the pauses of the defendant between stabbings would indicate the presence of the "second look" necessary to a finding of premeditation as required by *People v Morrin,* 31 Mich App 301; 187 NW2d 434 (1971). The attempts made to choke the victim serve also as a basis upon which premeditation might be properly inferred.

Utilizing the criteria of *Meier, supra,* in testing the evidence in the case at bar, we are persuaded that sufficient evidence was produced to support a reasonable inference of premeditation and that, therefore, the jury's finding of this fact should not be disturbed.

We find no merit to defendant's contention that he was improperly bound over for trial by the examining magistrate.

Finally, were the defendant's constitutionally protected rights violated through the admission of testimony as to a telephone conversation that was voluntarily entered into by the defendant with

defendant's brother who had consented to the conversation being overheard by the police?

It should be pointed out that during the course of the trial no objection was made by defendant's counsel to either the testimony of the police officer or to the testimony of Robert Rappuhn concerning this phone conversation.

"Counsel cannot sit back and harbor error to be used as an appellate parachute in the event of a jury failure." *People v Morgan,* 50 Mich App 288; 213 NW2d 276 (1973); *People v Brocato,* 17 Mich App 277; 169 NW2d 483 (1969).

We conclude that this question is clearly answered in *Hoffa v United States,* 385 US 293; 87 S Ct 408; 17 L Ed 2d 374 (1966). Here the Court speaking through Justice Stewart stated:

"Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

We therefore affirm.

PEOPLE v KENNINGTON

OPINION OF THE COURT

1. CRIMINAL LAW—MOTION FOR COMMITMENT—COMPETENCE TO STAND TRIAL—SUFFICIENCY OF SHOWING.

   A defendant's oral motion for commitment to the center for forensic psychiatry to determine competency to stand trial, made on the day of the trial, was properly denied where the only showing of incompetence to stand trial was that the defendant was reserved, that he had been a user of heavy narcotics and had not had access to them while in jail, and where his attorney had met with him at various times prior to the trial and had not presented a petition for an examination nor provided any information to help determine whether an examination was necessary.

2. CRIMINAL LAW—WITNESSES—IDENTIFICATION—PHOTOGRAPHIC IDENTIFICATION—COURT RULING—RETROACTIVITY.

   No reversible error was committed where a witness identified the defendant by photograph while the defendant was in custody and this identification occurred before the release of a Supreme Court ruling, which has not conclusively been held retroactive, interdicting such an identification.

CONCURRENCE BY R. B. BURNS, J.

3. CRIMINAL LAW—COMPETENCE TO STAND TRIAL—PSYCHIATRIC EXAMINATION—MOTION FOR COMMITMENT—COURT RULES.

   A trial judge has no discretion and must commit a defendant to the center for forensic psychiatry for determination of compe-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 70.

[1, 3] Validity and construction of statute providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

Investigation of present sanity to determine whether accused should be put, or continue, on trial. 142 ALR 961.

[2] 73 Am Jur 2d, Statutes § 347 *et seq.*

[3] 21 Am Jur 2d, Criminal Law §§ 63, 70, 73.

tence to stand trial when a proper motion for commitment is made; however, a court rule requires such a motion to be made in writing prior to trial (GCR 1963, 786.1).

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 June 4, 1974, at Lansing. (Docket No. 18517.) Decided August 14, 1974.

Daniel R. Kennington was convicted of armed robbery. Defendant appeals. Affirmed.

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

Dennis C. Karas, for defendant.

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

O'HARA, J. Defendant was convicted of armed robbery, MCLA 750.529; MSA 28.797, by a jury and was sentenced to serve 15 to 25 years in prison. He appeals as of right.

His first assignment of error is the trial judge's denial of an oral motion for commitment to the center for forensic psychiatry made on the day of trial. The issue is controlled by *People v Sherman Williams,* 38 Mich App 370; 196 NW2d 327 (1972).

"[W]hen prior to trial a motion raising the issue of incompetency is made, commitment to a diagnostic facility will be mandated only if a sufficient showing of mental incompetency is made by the moving party, or when other evidence is before the court which raises a bona fide doubt as to the defendant's mental competency to stand trial.

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

* * *

"GCR 1963, 786.4 wisely provides that if the motion is made by a person other than the defendant then the defendant shall be given the opportunity to challenge that motion before he is committed.

"If the defendant raises the issue of incompetency, then the court must commit the defendant to a diagnostic facility upon a requisite reasonable showing.

"In either situation, the *sine qua non* is a reasonable showing that incompetence to stand trial may exist." 38 Mich App at 382, 385; 196 NW2d at 333, 335.

As we read the record herein the only showing made was summarized accurately by the trial judge. We set it forth:

"*The Court:* Well, I think what it amounts to is this: I still have to make a determination whether or not there are circumstances that have been described to me that would require such a forensic examination, and as I listen to the representations we have a man who is more reserved then other clients, who would like to have an examination, who in the past has used heavy narcotics, who has not had access to those narcotics while in the county jail, and although claiming to have had access on other occasions by prescription to one drug, and on other occasions not by prescription to other drugs, a recitation that the attorney has been with the client at various times during the five months, has not presented a petition nor had any information that could be helpful to the court in determining whether, in fact, an examination is required, I think leads me to the conclusion that we have a self-serving statement by the defendant who would like to get examined without substantiation, and I don't think there is any basis in law for this."

There was no abuse of discretion and no reversible error.

The second error claimed is identification by photograph while the defendant was in custody.

This, of course, is interdicted by *People v Anderson,* 389 Mich 155; 205 NW2d 461 (1973). The photographs were shown to the witness *before* the release of *Anderson, supra.*

As to the question of retroactivity the Supreme Court has said:

"It, therefore, appears that at least as to appeals from Wayne County, *Anderson* ought to be retroactive to at least June 11, 1969, the date on which the *Adams*[1] case was submitted. Jackson is, therefore, entitled to the benefit of the rule stated in *Anderson. We reserve the question whether Anderson should have greater retroactivity as we think that other considerations may be relevant in appeals from less populous counties and there is no need, decisionally,* to reach that question." (Emphasis supplied). *People v Jackson,* 391 Mich 323, 340; 217 NW2d 22, 28 (1974).

We would deem it imprudent to decide that *Anderson* is retroactive in view of the foregoing language.

We find no reversible error. The conviction is affirmed.

MCGREGOR, P. J. concurred.

R. B. BURNS, J. *(concurring in results).* I must disagree with the majority insofar as they hold that a trial judge has any discretion in committing a defendant to the center for forensic psychiatry, once a proper motion has been made for such commitment.

In my opinion, when a defendant makes a proper motion in the trial court, for commitment to the center, it is mandatory that the trial judge then commit him. *People v Ledbetter,* 31 Mich App 160; 187 NW2d 507 (1971); *People v Howard,*

[1] *People v Adams,* 19 Mich App 131; 172 NW2d 547 (1969).

37 Mich App 662; 195 NW2d 289 (1972); *People v Jackson,* 40 Mich App 237; 198 NW2d 714 (1972).

However, in my opinion the defendant did not file a proper motion in the trial court for such a determination. The defendant raised the issue of competency to stand trial by an oral motion on the date of trial.

GCR 1963, 786.1 states:

"The issue of a defendant's competence to stand trial * * * may be raised at any time before trial by a written motion to commit the defendant to the department of Mental Health."

Affirmed.

NORTHWESTERN NATIONAL INSURANCE COMPANY v PENNINGTON BROTHERS, INC.

1. INSURANCE—CONTRACTS—LIABILITY POLICY—EXCLUSIONARY CLAUSES—CONSTRUCTION.

The applicability of a clause in a policy of insurance on the liability of contractors and garagemen which excludes coverage of property in the "care, custody or control * * * [or] for any purpose exercising physical control" is a question of fact, not law; the clause is inherently ambiguous and thus is to be strictly construed against the insurer; the most valuable indicium of applicability is whether the property damaged was necessary to the insured's work or merely incidental, and physical control connotes some degree of responsibility.

2. INSURANCE—CONTRACTS—LIABILITY POLICY—EXCLUSIONARY CLAUSES—CONSTRUCTION—REAL PROPERTY.

A trial judge in a suit for construction of a policy of insurance between a plaintiff insurance company and an insured defendant who had contracted with another to clean and gas-free an oil tank, where the issue was whether or not the tank was under the care, custody, or control of the insured at the time of a fire in the tank, erred in failing to determine whether the tank was so affixed to the real estate as to have become part of it or whether the tank was movable.

3. INSURANCE—CONTRACTS—LIABILITY POLICY—EXCLUSIONARY CLAUSES—PROPERTY.

Property damaged by an insured contractor which is merely incidental to the property upon which work is being performed by the insured under a policy of liability insurance is not

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 43 Am Jur 2d, Insurance §§ 271–276.
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.
Risks covered by contractor's liability policy. 156 ALR 1285.
[5, 6] 63 Am Jur 2d, Property § 31 *et seq.*

considered as in such "care, custody or control" of the insured to be excluded under the exclusionary clause found in the liability policy; but where the damaged property is under the immediate supervision of the insured and is a necessary element of the work involved, it is considered as under the care, custody or control of the insured, and the insurer is not liable.

4. INSURANCE—CONTRACTS—LIABILITY POLICY—EXCLUSIONARY CLAUSES—REAL PROPERTY.

The exclusionary clause of property in the care, custody, or control of an insured which is commonly found in contractors' and garagemen's liability policies has only rarely been applied to realty, and courts have refused to extend the insured's work on a specific item of property to cover the care, custody or control of the building or surrounding area.

5. PROPERTY—REAL PROPERTY—POSSESSION—CONTROL—OCCUPATION.

Possession or control of real property is indicated by an occupation exclusive of the control of anyone else.

6. PROPERTY—CARE—CUSTODY—CONTROL—RIGHT OF ACCESS.

Care, custody or control of property implies more than the mere right of access to it.

Appeal from Muskegon, John H. Piercey, J. Submitted Division 3 June 7, 1974, at Grand Rapids. (Docket No. 18537.) Decided August 14, 1974.

Complaint by Northwestern National Insurance Company against Pennington Brothers, Inc., for construction of a policy of insurance issued by plaintiff to defendant to determine whether an exclusion clause precluded liability on the part of the plaintiff. Judgment for plaintiff. Defendant appeals on leave granted. Reversed and remanded with instructions.

Landman, Hathaway, Latimer, Clink & Robb (by *Charles H. Rawlings),* for plaintiff.

White, Spaniola, Knudsen, Stariha & Potuznik, P. C. (by *Darrel G. Brown),* for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

HOLBROOK, P. J. For the purposes of this appeal, the opinion of the trial court will adequately suffice to explain facts of and give background to the case. The case was tried before the trial judge without a jury.

"On November 15, 1969, plaintiff herein, Northwestern National Insurance Company, issued to defendants herein, Pennington Brothers, Inc., its General Liability Policy No. BCP 505680.

"On or about March 13, 1970, the defendant entered into a contract with the Prairie Tank & Construction Company to clean and gas free one cone roof tank located at Covert, Michigan. It was the job of Prairie Tank & Construction Company to cut down the tank with torches and remove it from its location at Covert to another location, and rebuild the tank at the new location. The tank belonged to Lakeside Refining Company of Kalamazoo, Michigan.

"The Prairie Tank & Construction Company would perform its job by cutting the tank into pieces with the welding torches and reassemble it at its new location by welding the tank together again. In order to do this welding the tank must be free of explosive gases. The tank contained several thousand gallons of crude oil. Prairie Tank & Construction Company sub-contracted the job of removing the crude oil to Pennington Brothers, Inc.

"Apparently, several thousand gallons of water was *[sic]* under the crude oil. To facilitate the removal of all of the contents of the tank it was deemed necessary by Pennington Brothers to cut a section out of the tank 6 feet by 8 feet. Pennington Brothers had removed approximately one-half of the contents of the tank by pumping operations, but in removing the last half of

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

the contents of the tank it would be necessary to hog it out by men carrying 5 gallon buckets.

"When it came time to make the cut by a torch on the side of the tank, Pennington Brothers had no one experienced in making such a cut. Pennington then hired a welder from Prairie Tank & Construction Company by the name of Thomas Croasdale and indicated their willingness to pay for his travel, per diem, and salary.

"On April 24, 1970, Mr. Kenneth Clayton from Pennington Brothers, and Mr. Thomas Croasdale appeared on the job site where the tank was located, and after steaming the inside of the tank and making appropriate tests indicating that it was safe to make the cut, Mr. Croasdale proceeded to cut the section one foot by one foot and later, the section 6 feet by 8 feet which included the one foot cut. After completing the 6 by 8 foot cut the plate which had intended to be cut was still held in place by slag. After attempting to break the plate loose and failing, the torch was again used to cut the slag particles and it was at this time that the gas assembled in the tank ignited, setting fire to the materials located therein. The steam was again induced into the tank putting out the fire but not until the tank was damaged as disclosed by Exhibit 2.

"In due time all of the contents of the tank were removed and the tank was cut down and rebuilt at the new location.

"The Prairie Tank & Construction Company has commenced suit against Pennington Brothers, Inc., in the Federal Court for the Western District of Michigan, Southern Division, to recoup the losses sustained by the fire occasioned by the cut of the 6 by 8 foot plate at the side of the tank.

"The suit in the Circuit Court for the County of Muskegon is by Northwestern National Insurance Company against its insured, Pennington Brothers, Inc., for construction of the policy of insurance in existence between Northwestern National Insurance Company and Pennington Brothers, at the time of the fire, being policy number BCP 505680, attached to the pleadings and the matter to be decided by this court is whether or

not the tank in question was 'under the care, custody, or control, of the insured, or as to which the insured is for any purpose exercising physical control.' The policy of insurance contains an exclusion clause to 'property in the care, custody, or control of the insured or as to which the insured is for any purpose exercising physical control.' It will not, therefore, be necessary for Northwestern National Insurance Company, to defend the Federal District suit between Prairie Tank & Construction Company and Pennington Brothers, Inc., if this court finds that the tank in question was under the control of Pennington Brothers. If it is found that the tank was not under the control of Pennington Brothers at the time of the fire, it will be necessary for Northwestern National Insurance Company to defend the action in the Federal District Court.

"The parties to this action have presented the case in the following manner: A copy of the insurance policy has been filed with the court together with certain other exhibits consisting of four photographs of the tank in question; the contract between Pennington Brothers and the Prairie Tank & Construction Company; and the depositions of J. Spencer Van Alsburg, Tommy Howard Croasdale, and Kenneth Clayton. The parties have filed briefs with the court.

"The court has carefully reviewed the exhibits offered in evidence, including more than 200 pages of deposition testimony, and has given careful consideration to the briefs submitted by the respective parties. I am led to the conclusion that the tank was under the care, custody, and control of the defendant, Pennington Brothers within the meaning of the exclusionary clause found in the insurance contract. Pennington Brothers were hired by Prairie Tank & Construction Company to remove the contents of the tank consisting primarily of crude oil and several thousand gallons of water lying under the crude oil. Defendant argues that it controlled only two manholes and at most the contents of the tank, but not the entire tank. The fact remains, however, that nothing could be done by Prairie Tank towards the performance of its job which was the dismantling of the tank until it had been emptied nor is it controlling that Thomas Croasdale was normally an

employee of Prairie Tank & Construction Company because on the date in question, for all practical purposes, he had been hired by Pennington Brothers (see page 38 of the deposition of Kenneth Clayton).

"Defendant Pennington Brothers undertook the job of removing the contents of the tank and until such time as the tank was emptied and cleaned it was under their control within the meaning of the policy, and since the accident occurred while under their control, the exclusionary clause of the contract is applicable."

This panel in *Arrigo's Fleet Service, Inc v Aetna Life & Casualty Co,* 54 Mich App 482; 221 NW2d 206 (1974), has recently reviewed this exclusionary clause, which is commonly found in contractor's and garagemen's liability policies, in great depth. We there found that: 1) the applicability of the "care, custody or control * * * [or] for any purpose exercising physical control" exclusion is a question of fact, not law; 2) the clause is inherently ambiguous and thus is to be strictly construed against the insurer; 3) the most valuable indicium of applicability is whether the property damaged was necessary to the insured's work or merely incidental thereto;[1] and, 4) physical control connotes some degree of responsibility.[2] Here, the trial court determined the question on the facts and, without so stating, found the tank to be necessary rather than incidental to the insured's work.

Were it not that the trial court, in its otherwise fine opinion, neglected to determine one necessary issue of fact, we would be constrained to affirm.

[1] This criterion is best explained in *Goswick v Employers' Casualty Co,* 440 SW2d 287 (Tex, 1969); *Boswell v Travelers Indemnity Co,* 38 NJ Super 599; 120 A2d 250 (1956); and *Maryland Casualty Co v Hopper,* 237 SW2d 411 (Tex Civ App, 1950).

[2] This criterion is better explained in *Maryland Casualty, supra; Klapper v Hanover Insurance Co,* 39 Misc 2d 215; 240 NYS2d 284 (1963); *Leiter Electric Co v Bituminous Casualty Corp,* 99 Ill App 2d 386; 241 NE2d 325 (1968); and *Bituminous Casualty Corp v Chicago, R I & P R Co,* 8 Ill App 3d 172; 289 NE2d 464 (1972).

Black's Law Dictionary defines fixture as:

"A chattel attached to realty. Becoming accessory to it and part and parcel of it. * * *

"A thing is deemed to be affixed to land when it is attached to it by roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." (Citations omitted.)

It is necessary to determine whether the tank was so affixed to the real estate as to have become part of it or whether the tank was movable. In *Goswick v Employers' Casualty Co,* 440 SW2d 287, 290 (Tex, 1969), the Court said: "Only rarely has the exclusion been applied to realty".

In *Boswell v Travelers Indemnity Co,* 38 NJ Super 599; 120 A2d 250 (1956), the plaintiff was in the business of repairing steam boilers. He contracted to replace all the tubes of two heat exchange units in an office building. After replacement, a hydrostatic test was run. By mistake the water was run through the outer shells of the units rather than the tubes. As a result, one shell cracked from end to end. The Court held the clause inapplicable, relying upon, *inter alia, Maryland Casualty Co v Hopper,* 237 SW2d 411 (Tex Civ App, 1950).

In *Maryland Casualty,* Hopper was an independent contractor who was hired to lay flow lines connecting an oil well to a battery of two 500-barrel capacity oil storage tanks (the oil tank involved in the present case is distinctly larger) and lay a pipeline from the gathering pipeline system to the storage tanks. In the course of this operation a valve to one tank was left open, allowing gas to escape from one tank to the other. At one point, it was necessary to bend a 3-inch pipe to

an angle of 45 degrees—in order to so do, an acetylene torch was used and an explosion resulted which destroyed one of the tanks. The Court found the clause inapplicable and wrote:

"*It was not in the care, custody or control of appellee, but was merely necessary or incidental to his work of laying and connecting the tanks with the well and with the gathering pipe line.* The tanks had been installed by the Mapp Tank Company and were supported by a foundation and an embankment. We understand *they were so firmly attached to the realty as to become a part of it.* Certainly it could not have been contemplated by the owners of the leasehold estate that such real estate should be placed in the care, custody or control of appellee during his operations. He was merely permitted to use the tanks as well as the surface of the leased property for the purpose of accomplishing the work he was employed to do. See *A T Morris & Co v Lumber Mutual Cas Ins Co of New York,* 163 Misc 715; 298 NYS 227 (1937)." *Maryland Casualty, supra,* 237 SW2d 416. (Emphasis supplied.)

In *Goswick, supra,* Leon Goswick was hired to remove a defective pump from an oil well. The pump was at a depth of approximately 6,000 feet and was connected to an activating unit on the surface by rods. The pump was stuck and it was necessary to pull out tubing along with the pump and rods. Gas was thus allowed to escape and an explosion ensued. A settlement was had against Goswick by the well owners, and he sought to recover the expenses from his insurer. The insurer refused on the basis, among others, of an exclusion such as is present in the instant case. The Court wrote:

"The general rule has often been stated to this effect: where the property damaged is merely incidental to the property upon which the work is being performed by the insured, it is not considered as in such 'care, cus-

tody or control' of the insured to be excluded under the policy. Where, however, the damaged property is under the immediate supervision of the insured and is a necessary element of the work involved, it is considered as under the 'care, custody or control' of the insured, and the insurer is not liable. Anno: Liability Insurance —Custody of Insured, 62 ALR2d 1242.

"Goswick had removed rods and tubing from this well and had stacked them on the surface. He was lifting the remainder of the tubing and rods, together with the pump, up the well hole. He was exercising full physical control of those items of property, and the exclusion applies as to them.

"Employers contends that the exclusion applies to all of the damages to the outer casing within the hole and to the blockage of the hole itself which prevented subsequent oil production. The policy does not exclude damages caused *by* (emphasis in original) property in the insured's control. It is immaterial that the tubing which did the damage was in the control of the insured. The question is whether Goswick had the described control of the underground well itself.

"The Supreme Court of Louisiana had before it the case of an insured who was dismantling a statue and its supporting stone column. The base upon which these had rested, and a cast iron urn, were damaged when the column was dropped. Since the granite slab and urn at the base were not the subject of the insured's work and not actually used as equipment by the insured in his work, they were held to be merely incidental and not excluded from policy coverage. *Hooley & Sons v Zurick General Accident & Liability Insurance Co,* 235 La 289; 103 So 2d 449 (1958). The casing and earth wall of Pan American's well are analogous to the supporting base of the statue and column.

"In *Maryland Casualty Co v Hopper,* 237 SW2d 411 (Tex Civ App, 1950, no writ), the insured was constructing lines from an oil well to two storage tanks, and from the tanks to the pipeline gathering system. He failed to close a valve on one of the tanks, and consequently the tank was destroyed by an explosion. Though the tank connection and valves were used for the purpose of accomplishing the work, the court held

that the tanks themselves were incidental to the construction and not within the care, custody or control of the insured.

"*Only rarely has the exclusion been applied to realty, as where the insured was building and installing entire new boilers affixed to the realty. Condenser Service & Engineering Co v American Mutual Liability Insurance Co,* 58 NJ Super 179; 155 A2d 789 (App Div, 1959). *The courts have refused to extend the insured's work on a specific item of property into care, custody or control of the building or surrounding area. Newfoundland American Insurance Co v Kamieniecki,* 104 NH 425; 188 A2d 480 (1963); *Boston Insurance Company v Gable,* 352 F2d 368 (CA 5, 1965).

"Goswick was at the well to replace the pump. To do this, he had to take complete physical control of the rods and tubing. He was not there to operate upon the mineral formations or upon the wall of the well, and he did not. Under the agreed facts of this case, we hold as a matter of law that Goswick was not exercising care, custody or control over Pan American's well so as to bring it within the exclusion." (Emphasis supplied.) *Goswick.* 440 SW2d 290.

In *Klapper v Hanover Insurance Co,* 39 Misc 2d 215; 240 NYS2d 284 (1963), the Hanover Insurance Company told defendant Klapper that they would not defend an action against him for improper work under a contract to clean windows. The New York Court held that the care, custody, control or exercising physical control clause was inapplicable, and wrote:

"For the Court to hold that the windows in question were in the care, custody and control of the plaintiff, who was upon the premises for the purpose of cleaning said windows, is, in the Court's opinion, stretching a point. *Possession or control of real property is indicated by an occupation exclusive of the control of any one else.* Plaintiff and his employees were upon the premises temporarily for the purpose of doing the work, and control of the property remained in the general contrac-

tor or owners. *(Rex Roofing Co, Inc v Lumber Mutual Casualty Insurance Co of New York,* 280 App Div 665; 116 NYS2d 876 [1952]; *General Mutual Insurance Co v Wright,* 7 Misc 2d 331; 161 NYS2d 974 [1957]; *A T Morris & Co, Inc v Lumber Mutual Casualty Insurance Co of New York,* 163 Misc 715; 298 NYS 227 [1937]." (Emphasis supplied.) *Klapper,* 39 Misc 2d 216.

In *Michigan Mutual Liability Co v Mattox,* 173 So 2d 754 (Fla App, 1965), O'Neil Mattox was a subcontractor for electrical work on the municipal civic auditorium in Jacksonville, Florida. At some time after the main switchboard had been completed and turned over to the general contractor, the building's lights went out and several of Mattox's employees went to the switchboard room. One of the employees activated a circuit breaker and an explosion occurred which severely damaged the switchboard. Mattox's insurer denied coverage and the insured brought suit gaining a jury verdict in his favor. The insurer appealed. The Florida District Court of Appeals affirmed the verdict, relying on *Klapper, supra,* and *Elcar Mobile Homes, Inc v D K Baxter, Inc,* 66 NJ Super 478; 169 A2d 509 (1961).

In *Gibson v Glens Falls Insurance Co,* 241 SC 293, 298; 128 SE2d 157, 159–160 (1962), the insured had contracted to clean a swimming pool. The pool was damaged. The insurer refused to pay for the damage on the basis of the care, custody, or control exclusion. The Court found the applicability of the clause to be factual[3] and wrote:

"Under the facts of this case, the plaintiff was not exercising care, custody or control of the swimming pool at the time of the injury. The pool was located on the property of the owner, near his residence. The contract

[3] *Cf. Arrigo's Fleet Service, Inc v Aetna Life & Casualty Co,* 54 Mich App 482; 221 NW2d 206 (1974).

of the plaintiff provided only for the cleaning of the inside walls and floor of the pool, and he had access to it for that purpose only. At the time that the pool rose from its foundation, neither the plaintiff nor his employees were on the premises, having ceased their operations several hours before. It is true that the plaintiff intended to return the next day to finish cleaning the pool, but this fact only established his right to access to the pool to finish the cleaning and did not within itself place the pool in his care, custody or control. Care, custody or control of property implies more than the mere right of access to it, which was all that the plaintiff had at the time of the accidental loss."

In *Leiter Electric Co v Bituminous Casualty Corp,* 99 Ill App 2d 386, 389–390; 241 NE2d 325, 327–328 (1968), plaintiff was a subcontractor who was to ground an electrical system by attaching copper wire to a water pipe system which was being constructed ten feet below the ground. The wire was attached by a brazing procedure which involved the use of an acetylene torch. The pipe cracked at the point of each of the connections. Plaintiff felt that the brazing was the cause of the damage and accordingly paid for the damage. Upon claim his insurer refused to pay. The Court wrote:

"*[I]t may be seen that where the property damaged is chattel in nature i.e. movable or capable of being handled, the care, custody or control by the insured which may be found to exist, depends in large measure upon the nature of possession of which such property is susceptible. To be sure this does not mean that the exclusionary provision is limited to chattel property but it does reveal that our concepts of possession of chattel property and hence care, custody or control thereof are not readily applicable where the property damaged is in the nature of real property. This is particularly true where the property damaged is more or less firmly and permanently attached to the real estate.* Under such

circumstances the insured may be deemed to have temporary or incidental access to the property or limited possession of an area of the property rather than care, custody or control of the property itself.

"In the following cases the courts have applied the 'temporary access' or 'limited possession' doctrines and have held that the damaged property was not within the care, custody or control of the insured. In *Klapper v Hanover Insurance Co,* 39 Misc 2d 215; 240 NYS2d 284 (1963), windows were so badly scratched by the insured, a window washing contractor, that they had to be replaced. In *Boston Insurance Co v Gable,* 352 F2d 368 (CA 5, 1965), the insured, a painting contractor, gouged and burned the exterior of a house which he had been employed to prepare and paint. In *Boswell v Travelers Indemnity Co,* 38 NJ Super 599; 120 A2d 250 (1956), damage to two ten ton heat exchange units resulted from the testing thereof after the insured had replaced and repaired the tubes. In *Gibson v Glen [sic] Falls Insurance Co,* 241 SC 293; 128 SE2d 157 (1962), the foundations and floor of a swimming pool were damaged by hydrostatic pressure resulting from the drainage of the water from the pool in order that the insured's employees could clean the inside of the pool with muriatic acid. We believe that the reasoning in the foregoing cases is applicable to the facts of this case and requires the conclusion that the plaintiff did not have care, custody or control of the damaged water main. In our view of this case the plaintiff had temporary access to and limited possession of an area of the water main but not care, custody or control of such main the same remaining with the pipe crew which excavated the trench, laid and connected the pipe."

In *Bituminous Casualty Corp v Chicago, R I & P R Co,* 8 Ill App 3d 172, 174; 289 NE2d 464, 466 (1972), a boxcar had derailed and turned over alongside a railroad track. The car was too heavy to move without being unloaded. Ray Frietsch was engaged to unload the car. Frietsch's foreman was told by railroad personnel to use a welding torch to cut a hole to reach certain items which were

otherwise inaccessible. Sparks started a fire which destroyed most of the boxcar and its contents. The railroad sued Frietsch on the basis of negligence. Bituminous Casualty refused to defend and filed a declaratory judgment action. The Court said:

"Contractors liability policies commonly contain such a clause; there is authority to the effect that the clause is inherently ambiguous, and, on the other hand, that the clause is clear and unambiguous. 62 ALR2d 1242. In two prior cases the clause has been construed in Illinois Courts. In *Maryland Casualty Co v Holmsgaard,* 10 Ill App 2d 1; 133 NE2d 910 (1956), the court held that the carrier was relieved of liability due to a bailment situation. In *Leiter Electric Co v Bituminous Casualty Corp,* 99 Ill App 2d 386; 241 NE2d 325 (1968), this court held the carrier liable where the property damaged was more or less firmly and permanently attached to the real estate. The court said, ' * * * the insured may be deemed to have temporary or incidental access to the property or limited possession of an area of the property rather than care, custody or control of the property itself.'

"Here, the railroad retained the care, custody and control of its own boxcar. It was on its right of way, and while it was a chattel it was certainly immovable at the time of loss. We believe that in this case the insured only had temporary access to the property rather than the care, custody or control of the property itself."

Reversed and remanded for further proceedings, including the determination whether or not the tank was a part of the realty, so as to come within the pertinent herein cited cases. Costs to defendant.

All concurred.

HOULIHAN BROTHERS BUILDERS, INC. v CARROLLTON TOWNSHIP

TOWNS—WATER AND SEWER SYSTEMS—CONTRACTS—REFUND AGREEMENTS—AUTHORITY TO PAY.

A township must refund sums advanced to it by a builder to enable the township to construct extensions of the township water and sewer system to the builder's subdivision developments under agreements whereby such refunds were to be made after completion of the work where those extensions were at all times in the possession and control of the township and the township collected and retained all revenues from the operation of the facilities thus acquired; the township had the authority to construct the system and it must follow that it has the authority to pay for the project.

Appeal from Saginaw, Hazen R. Armstrong, J. Submitted Division 3 June 4, 1974, at Lansing. (Docket No. 18548.) Decided August 14, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Houlihan Brothers Builders, Inc. against Carrollton Township for repayment of money advanced to the township. Judgment for plaintiff. Defendant appeals. Affirmed.

van Benschoten & van Benschoten, P. C., for plaintiff.

Gerald G. Danin (Virtue & Carpenter, P. A., of counsel), for defendant.

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

REFERENCE FOR POINTS IN HEADNOTE

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 568, 569.

* 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 appeals a judgment for $165,434.18 rendered in favor of the plaintiff by the trial judge.

In a well-written opinion the trial judge set forth the following facts:

"Plaintiff, Houlihan Bros Builders, Inc., entered into a series of watermain and sewer extension agreements with defendant Carrollton Township. Those agreements, with one exception to be discussed later in this opinion, were in writing and executed by the respective parties on forms prepared and provided for use by the defendant Carrollton Township's Board of Trustees.

"Plaintiff wanted the extensions so it could build and sell new homes. The defendant township wanted to encourage new home construction by plaintiff and others, but had no funds available for the needed sewer and watermain extensions.

"The essence of each contract was that the plaintiff builder would deposit a specified sum of money with the Carrollton Township treasurer, based on a calculation by the township engineer as to the probable cost of the proposed sewer or watermain extension. Thereafter, the township would construct the desired sewer or water extension, and plaintiff would be required to deposit additional sums, or would be given a refund of a part of its original deposit, so that the adjusted deposit covered the actual cost of the extension as completed.

"The adjusted figure and the agreement for refunding were then put into a formal document (with the one exception mentioned) and signed by the respective parties. Each such written agreement provided in part:

" 'Whereas, it is the intent of this agreement that the total amount of all of the deposits made by the "sponsor" *(i.e.,* Houlihan Bros Builders, Inc.) prior to, during, and after construction be rebated to the sponsor, it is hereby mutually agreed that the rebate shall be without interest, and in such amounts and/or installments and at such time and/or times as funds become available and at the complete discretion of the township

board.' (Plaintiff's Exhibit 1) The same or similar language appears in each signed watermain extension agreement and in each signed sanitary sewer extension agreement between plaintiff and the defendant township.

"The signed agreements were received in evidence and show the following adjusted amounts unpaid thereunder:

	"Water	Sewer	Date Signed
"Plaintiff's Ex. 1	$ 8,944.01	$16,505.40	4/29/60
Plaintiff's Ex. 2	8,656.77	11,072.87	5/2/61
Plaintiff's Ex. 3	6,430.08	6,781.04	12/29/61
Plaintiff's Ex. 4	8,602.64	7,600.89	10/26/62
Plaintiff's Ex. 5	4,377.47	7,377.15	3/27/64
Plaintiff's Ex. 6	11,484.88	17,993.72	3/29/65
Plaintiff's Ex. 8	11,931.26	15,553.00	10/4/65
Totals	$60,427.11	$82,884.07	
		60,427.11	
GRAND TOTAL		$143,311.18	

"All of the deposits and deposit adjustments were made, and each of the projects listed above was constructed by the township, before the agreement for refunding was signed. The newly constructed sewer and watermain extensions were at all times in the sole possession and control of Carrollton Township, and the township collected and retained all revenues from the operation of the new township facilities thus acquired.

"Throughout the entire period, from the time of completion until shortly before suit was filed by plaintiff, the plaintiff company was repeatedly assured by successive supervisors of defendant Carrollton Township that all of the agreements would be honored as soon as the funds were available. In fact, each year the township treasurer sent out a written acknowledgment to plaintiff of the debt evidenced by the written contracts. The last such acknowledgment of record was dated July 1, 1969, and reaffirmed defendant's indebtedness to plaintiff on the written agreements as follows:

" 'At June 20, 1969, the Water and Sewer Department was indebted to you in the amount of $143,311.18 for cash advances used for extension of mains.' (Plain-

tiff's Exhibit 14) Prior annual written acknowledgments from the township treasurer were addressed to plaintiff in the same language *(e.g.,* Plaintiff's Exhibits 11, 12 and 13).

"The only sewer and watermain extension agreement not in writing, related to a Carrollton Township subdivision known as Skyhaven Park No. 4. The agreement between the parties as to Skyhaven Park No. 4 was exactly the same as it had been on the previous extension projects. The usual estimates, deposits and adjusted deposits were made by October 4, 1967 (See Plaintiff's Exhibit 9), but the difference was that even though the extensions were constructed and all deposit adjustments were made, the defendant township board would not give plaintiff a signed refund contract as previously done.

"The adjusted deposit was $22,123.00 (Plaintiff's Exhibit 9). The record shows that plaintiff did not intend to give this money to the township, nor did the township then disclaim liability for the refund. It simply refused to sign the formal document.

"Not until November of 1970 was plaintiff notified for the first time that the defendant township refused to refund any of the sums advanced to the township by plaintiff for the extension of sewers and watermains. On December 2, 1970, plaintiff filed the instant suit.

"Many defenses are raised, both in the pleaded 'Affirmative Defenses' and in defendant's brief."

The defenses raised by the defendant are the same defenses raised by the same defendant when the same water system was originally constructed. *Morley Bros v Carrollton Township,* 305 Mich 285; 9 NW2d 543 (1943).

We reach the same decision in this case that the Supreme Court reached in the *Morley Bros* case. The defendant had the authority to construct the water system and it must follow it has the authority to pay for the project.

The trial court is affirmed. Costs to plaintiff.

All concurred.

SNOW v FREEMAN

1. CONSTITUTIONAL LAW—GOVERNMENTAL IMMUNITY—EQUAL PROTECTION.

   Withholding a legal remedy from persons injured by the state, while granting one to persons injured by a non-governmental tortfeasor, does not offend the equal protection clause.

2. CONSTITUTIONAL LAW—DUE PROCESS—PROPERTY—VESTED RIGHT.

   The constitutional provision of due process extends to protect that property considered to be a vested right; for a right to be considered vested it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another (Const 1963, art 1, § 17).

3. CONSTITUTIONAL LAW—DUE PROCESS—DEPRIVATION OF PROPERTY—VESTED RIGHTS—GOVERNMENTAL IMMUNITY.

   The governmental immunity statute which denies a plaintiff his right to enforce a cause of action does not result in a deprivation of property where the plaintiff's cause of action was never a vested or accrued right (MCLA 691.1407).

4. NEGLIGENCE—MALPRACTICE—NUISANCE—GOVERNMENTAL IMMUNITY.

   There is no authority for the proposition that malpractice is synonymous with nuisance; therefore, an action in the nature of malpractice against a municipally-owned hospital may not be aligned with nuisance and thus deprive the hospital of the defense of immunity.

REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur 2d, Constitutional Law § 488.
57 Am Jur 2d, Municipal, School, and State Tort Liability § 53 *et seq.*

[2, 3] 16 Am Jur 2d, Constitutional Law §§ 365, 424 *et seq.*

[4, 5] 40 Am Jur 2d, Hospitals and Asylums § 22.
Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital. 25 ALR2d 203.

5. TORTS—NEGLIGENCE—GOVERNMENTAL IMMUNITY—MUNICIPAL CORPORATIONS—HOSPITALS—GOVERNMENTAL FUNCTION—PROPRIETARY FUNCTION.

A governmental agency is immune from tort liability where the operation of the agency constitutes a governmental as opposed to a proprietary function; the operation of a municipally-owned hospital was a governmental function where the activity of the hospital was for the common good and not for corporate benefit or pecuniary profit (MCLA 691.1407, 691.1413).

Appeal from Wayne, Thomas J. Brennan, J. Submitted Division 1 May 13, 1974, at Detroit. (Docket No. 18557.) Decided August 14, 1974.

Complaint by Rosemary Snow, administratrix of the estate of Bobby Gene Snow, against Dr. Richard Freeman, Dr. Parras, and Outer Drive Hospital for malpractice. Accelerated judgment for defendant hospital. Plaintiff appeals. Affirmed.

Lopatin, Miller, Bindes & Freedman (by *Michael A. Gantz),* for plaintiff.

Cozadd, Shangle & Smith (by *Daniel J. Andrews* and *B. Ward Smith),* for defendant Outer Drive Hospital.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

V. J. BRENNAN, P. J. Plaintiff appeals an accelerated judgment of dismissal in favor of defendant Outer Drive Hospital granted by the Honorable Thomas J. Brennan in the Circuit Court for the County of Wayne.

This action was instituted by the administratrix of the estate of Bobby Gene Snow, deceased. The

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

complaint alleged malpractice against the defendant hospital and two physicians.

Outer Drive Hospital is owned and operated by the People's Community Hospital Authority. Defendant hospital moved the trial court for a summary and/or accelerated judgment on the basis that as a governmental unit, it is immune from plaintiff's claims against it.

On September 24, 1973, the trial court issued its opinion granting defendant Outer Drive Hospital an accelerated judgment based on governmental immunity. An order of accelerated judgment of dismissal was entered on October 11, 1973. From this judgment plaintiff appeals.

The issue herein presented is whether a municipally-owned hospital is immune from suits against it for acts constituting malpractice? In *Kriger v South Oakland County Mutual Aid Pact,* 49 Mich App 7; 211 NW2d 228 (1973), this Court stated that withholding a 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. Equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, and such a course would also be applied to any other person in the state under similar circumstances and conditions. States have the power to enact laws which affect some groups of citizens differently from others, and one who has assailed the classification in the statute on the ground that it violates equal protection has the burden of showing that the classification has no reasonable basis. Withholding a 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, supra.*

Plaintiff also contends that the governmental immunity statute is unconstitutional and violative of due process as a deprivation of a property right without just compensation. In *McNees v Scholley,* 46 Mich App 702; 208 NW2d 643 (1973), this Court declined to hold governmental immunity unconstitutional because of the many cases in Michigan upholding the principle of governmental immunity. We concur. The constitutional provision of due process extends to protect that "property" construed to be a *vested* right, and generally an *accrued* right of action is a vested property right which may not be arbitrarily impinged. (Michigan Const 1963, Art I, § 17). *Grubaugh v City of St. Johns,* 384 Mich 165; 180 NW2d 778 (1970). For a right to be considered a vested right "it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another". *Minty v Board of State Auditors,* 336 Mich 370, 390; 58 NW2d 106 (1953), quoting from 2 Cooley's Constitutional Limitations (8th Ed), p 749. See *Campbell v City of Detroit,* 51 Mich App 34; 214 NW2d 337 (1973).

In judging plaintiff's cause of action, it must be asked whether it is an accrued vested right. In the cases cited above, the repeal of a statute subsequent to the date of injury could not deny plaintiff his right to enforce a cause of action. In the instant case plaintiff never had a cause of action which was an accrued right which subsequently could be denied, resulting in a deprivation of property. It seems clear that the instant case is distinguishable from the cases cited above.

Plaintiff cites *Buckeye Union Fire Ins Co v Michigan,* 383 Mich 630; 178 NW2d 476 (1970), for

the proposition that malpractice in the instant case should be aligned with nuisance. As a nuisance, the state could not have the defense of immunity. The *Buckeye* case is distinguishable on the facts from the instant case since there a nuisance existed which the state failed to abate. However, the case at bar seems to be an action in the nature of malpractice. There seems to exist no authority for the proposition that malpractice is synonymous with nuisance.

The controlling statute states:

"Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function." MCLA 691.1407; MSA 3.996(107).

Plaintiff's final contention is that the operation of a municipally-owned hospital providing medical service for a fee constitutes a proprietary as opposed to a governmental function. In *Pichette v Manistique Public Schools,* 50 Mich App 770, 777–778; 213 NW2d 784 (1973), this Court stated the formula for ascertaining whether a particular function is governmental or proprietary quoting from *Daszkiewicz v Detroit Board of Education,* 301 Mich 212, 223; 3 NW2d 71 (1942):

"The test for determining whether a particular activity engaged in by a public corporation is purely a governmental function or is proprietary in nature is stated in *Gunther v Cheboygan County Road Commissioners,* 225 Mich 619, 621; 196 NW 386, 387 (1923), as follows:

" 'The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no

liability; if it is not, there may be liability. That it may be undertaken voluntarily and not under compulsion of statute is not of consequence.' "

The definition of a proprietary function is found at MCLA 691.1413; MSA 3.996(113). The defendant is immune as long as it is not doing something for its corporate benefit or for its pecuniary profit. Affidavits which defendant has attached to his brief state that defendant has always been supported by taxes and fees and has not realized a profit since its inception. Plaintiff's complaint showed no allegation that the defendant hospital is operating as a proprietary function. As quoted by the trial court in its opinion:

"The law is well settled in this State that the furnishing by a public hospital the facilities in the interest of public health and for the benefit of the communities served which has been established under state statute, is a governmental agency. Many decisions have recognized People's Community Hospital as a Public Hospital Authority and a state agency. *People's Community Hospital Authority v City of Ecorse,* 342 Mich 510; 70 NW2d 749 (1955); *Bullinger v Gremore,* 343 Mich 516; 72 NW2d 777 (1955); *Ecorse v People's Community Hospital Authority,* 336 Mich 490; 58 NW2d 159 (1953); *Milford v People's Community Hospital Authority,* 380 Mich 49; 155 NW2d 835 (1968).

"Further, a review of the decisions on the question of 'governmental function' of a public hospital, the court has found that such hospital did, indeed, perform a governmental function. *Harrison v City of Pontiac,* 285 F2d 305 (CA 6, 1961); *Martinson v City of Alpena,* 328 Mich 595; 44 NW2d 148 (1950); *McCann v State of Michigan,* 47 Mich App 326; 209 NW2d 456 (1973)."

Affirmed.

All concurred.

HUDSON v MAHER

1. TORTS—ACCRUAL OF CLAIM—CLAIMANTS—CREDITORS.

A tort claimant is a creditor from the date of the tort.

2. FRAUDULENT CONVEYANCES—FAIR CONSIDERATION—INSOLVENCY—INTENT.

The actual intent of one who transfers assets to others without a fair consideration is unimportant where it leaves the transferor insolvent.

3. JUDGMENT—SUMMARY JUDGMENT—INSOLVENCY—INTENT TO DEFRAUD.

Plaintiffs were entitled to a summary judgment as a matter of law on the questions of insolvency and intent to defraud on the part of the defendant where there was no genuine issue of any material fact regarding these questions (GCR 1963, 117.2[3]).

4. EQUITY—JURISDICTION—TRANSFER OF PROPERTY—JURY TRIAL.

Equity has jurisdiction where complete protection and relief requires the cancellation of written instruments, the rescission of a transaction, or other specific relief of an equitable character and therefore a demand for a jury trial was properly denied because equity disposition was required where transfers of real estate and stock were contested.

5. TRIAL—NONJURY TRIAL—FINDINGS OF FACT—REVIEW—COURT RULES.

Findings of fact based upon credibility assessment and conflicting evidence in an action tried upon the facts without a jury will

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Creditors' Bills § 57.

[2] 37 Am Jur 2d, Fraudulent Conveyances §§ 15–18.

[3] 47 Am Jur 2d, Judgments § 980.

73 Am Jur 2d, Summary Judgment §§ 4, 5.

[4] 27 Am Jur 2d, Equity §§ 102–117.

[5] 53 Am Jur, Trial § 1131.

20 Am Jur 2d, Courts §§ 82–86.

Power of court to prescribe rules of pleading, practice, or procedure. 158 ALR 715.

not be overturned where review of the record does not indicate they are clearly erroneous (GCR 1963, 517.1).

Appeal from Barry, Richard Robinson, J. Submitted Division 3 June 6, 1974, at Lansing. (Docket No. 18583.) Decided August 15, 1974.

Complaint by Andrew Hudson and Deborah Hudson, a minor, against Lela May Maher, Richard W. Maher, James A. Maher, and Charles Burton for the annulment of fraudulent transfers of property. Judgment for plaintiffs. Defendants appeal. Affirmed.

John P. O'Brien, for plaintiffs.

Orr, Tompert & Holmes, for defendants.

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

R. B. BURNS, J. This appeal involves fraudulent conveyances. On August 5, 1966, Lela Maher was involved in an automobile accident with the Hudsons.

On October 5, 1967, the defendant transferred her home and lake cottage to her stepsons. No cash was received; these transfers were described as gifts so the boys could share in their deceased father's community property.

On March 2, 1972, the Hudsons recovered a judgment in the amount of $100,000. Lela's insurance company paid plaintiffs $20,000, leaving a balance of $80,000. Her total assets at the time of the accident consisted of her home ($12,000); the cottage ($10,000); stocks ($27,000) for a total approximating $49,000.

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

On March 10, 1972, she then transferred stocks to defendant Burton who was her nephew and an attorney. No money was exchanged.

On May 18, 1973, summary judgment was entered setting aside the real estate conveyances of October 5, 1967, to the stepsons.

As a result of a non-jury trial on October 18, 1973, an order was entered setting aside the stock transfers to Burton. The Mahers and Burton appeal.

The Maher defendants contend that the order of summary judgment must be set aside and that a trial on the merits must be allowed on the questions of insolvency and intent to defraud.

A tort claimant is a creditor from the date of the tort. *Ashbaugh v Sauer,* 268 Mich 467, 472; 256 NW 486, 487 (1934); *Iden v Huber,* 259 Mich 3; 242 NW 818 (1932).

The transferees did not pay a valid consideration. Gifts or the satisfaction of moral obligations do not constitute equivalent value. MCLA 566.13; MSA 26.883.

The transfers rendered Lela Maher insolvent as to any future substantial tort debt. Plaintiffs' debt matured through the judgment. The combined value of the real estate was $22,000, the tort liability $80,000. The stock value, $27,000, later transferred to Charles Burton, does not change the fact of insolvency.

The actual intent of one who transfers assets to others without a fair consideration is unimportant where it leaves the transferor insolvent. *Farrell v Paulus,* 309 Mich 441; 15 NW2d 700 (1944); MCLA 566.14; MSA 26.884.

This case presents no genuine issue as to any material fact regarding insolvency or intent to defraud. Plaintiffs are, therefore, entitled to judg-

ment of these questions as a matter of law. GCR 1963, 117.2(3).

The motion for summary judgment was accompanied only by Lela Maher's deposition transcript. Defendants claim error on the ground that the special affidavits required by GCR 1963, 117.3 were not filed.

There was no objection or ruling by the court. The motion was thereafter argued in open court. We decline to consider this issue on appeal. 7A Callaghan's Michigan Pleading & Practice, § 57.31, p 301; *Jacobs v Martz,* 15 Mich App 186, 189; 166 NW2d 303, 304–305 (1968).

Lela Maher claims she had a right to a trial by jury in contesting the real estate and stock transfers. Jury consideration was requested and denied. The court's ruling was correct. Equity has jurisdiction where complete protection and relief requires the cancellation of written instruments, the rescission of a transaction, or other specific relief of an equitable character. *Haylor v Grigg-Hanna Lumber & Box Co,* 287 Mich 127, 133; 283 NW 1, 3 (1938); *First Baptist Church v Solner,* 341 Mich 209, 217; 67 NW2d 252, 256 (1954). See *Hosner v Brown,* 40 Mich App 515, 539; 199 NW2d 295, 308 (1972). This case required equity disposition. There was no error in the denial of the demand for jury trial.

Lela Maher testified that Charles Burton was a creditor who had performed substantial services for her in the past.

Charles Burton submitted a bill for $1,200 for services.

The trial court found as a fact, following the non-jury trial, that there was no enforceable agreement between Burton and Lela Maher, no services were rendered of a quantity or quality to consti-

tute adequate consideration and that the transfers were made for the purpose of avoiding creditors. Stated in simple terms, the court found Burton had no contract, he didn't do anything (quantity or quality) and he had nothing coming.

These findings are based upon credibility assessment and conflicting evidence. Our review of the record does not indicate they are clearly erroneous. GCR 1963, 517.1; *Roberts v Duddles,* 47 Mich App 601, 604; 209 NW2d 720, 722 (1973). Nor, are we convinced an opposite result should have been reached concerning the claims of Charles Burton. *Tait v Ross,* 37 Mich App 205; 194 NW2d 554 (1971); *Leidig v Rockwood & Co,* 48 Mich App 248, 252; 210 NW2d 257, 259 (1973).

Affirmed. Costs to plaintiffs.

All concurred.

WILSON v AL-HURIBI

1. WORKMEN'S COMPENSATION—THIRD PARTY LIABILITY—FELLOW EMPLOYEES—COURSE OF EMPLOYMENT—EXEMPTIONS FROM LIABILITY.

   The phrase "natural person in the same employ" as used in the third-party tortfeasor section of the Workmen's Compensation Act has been construed to require that the employee be in the course of his employment at the time of the injury in order for the statutory bar to operate (MCLA 418.827).

2. AUTOMOBILES—OWNER'S LIABILITY—STATUTES—WORKMEN'S COMPENSATION.

   An action against the owner of a motor vehicle based upon the owner's civil liability statute is not precluded even though an action against the driver of the vehicle is barred by the Workmen's Compensation Act (MCLA 257.401, 418.827).

3. AUTOMOBILES—OWNER'S LIABILITY—STATUTES—WORKMEN'S COMPENSATION—FELLOW EMPLOYEES—TORTS—EXEMPTIONS FROM LIABILITY—CONSTRUCTION.

   Resolution of a driver's status as a coemployee of a party injured in an automobile accident with the resultant tort immunity provided by the Workmen's Compensation Act does not control the question of the owner's employee status or his possible civil liability under the owner's civil liability statute; this question must be answered separately, and immunity from liability should be given a strict construction (MCLA 257.401, 418.827).

4. WORKMEN'S COMPENSATION—AUTOMOBILES—THIRD-PARTY TORTFEASOR—COURSE OF EMPLOYMENT—EXEMPTIONS FROM LIABILITY—STATUTES.

   An action brought by a plaintiff who was injured in an automo-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 58 Am Jur, Workmen's Compensation §§ 5, 212.
53 Am Jur 2d, Master and Servant §§ 426–440.

[2, 3] 58 Am Jur, Workmen's Compensation § 7.
8 Am Jur 2d, Automobiles and Highway Traffic § 645.
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.

bile accident in a collision with a car driven by a coemployee against the defendant owner of that other vehicle is not barred by the third-party tortfeasor section of the Workmen's Compensation Act unless the defendant owner was acting in the course of his employment (MCLA 418.827).

Appeal from Wayne, Neal Fitzgerald, J. Submitted Division 1 June 26, 1974, at Detroit. (Docket No. 18668.) Decided August 15, 1974.

Complaint by Annie Wilson against Mohamed Abdul-Rub Al-Huribi and Nasser M. Yafai for damages for injuries received in an automobile accident. Summary judgment for defendants. Plaintiff appeals as to defendant Yafai. Reversed and remanded for trial.

Blum, Graber, Meklir & Rosenberg, P. C., for plaintiff.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen (by *Lawrence R. Donaldson* and *John P. Jacobs),* for defendants.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

DANHOF, J. On December 22, 1971, while in the parking lot of the Chrysler Corporation Hamtramck Assembly Plant, plaintiff was struck by an automobile driven by defendant Al-Huribi and owned by defendant Yafai. Plaintiff and both defendants[1] were fellow employees at the plant. The parties are in agreement that plaintiff and defendant Al-Huribi were in the course of their employ-

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

[1] Shortly before oral argument in this case, the parties stipulated to the dismissal of defendant Mohamed Abdul-Rub Al-Huribi from this appeal with prejudice and without costs. This appeal continues as to defendant Nasser M. Yafai alone.

ment at the time of the accident. There is no such agreement as to defendant Yafai.

Plaintiff applied for workmen's compensation benefits, and she also brought suit against the defendants. Defendants moved for a summary judgment, GCR 1963, 117.2(1), on the ground that suit was barred by the exclusivity provisions of the Workmen's Compensation Act, MCLA 418.131; MSA 17.237(131). At a hearing on the motion, plaintiff conceded that the suit against Al-Huribi was barred because it was clear he was in the course of his employment at the time of the accident. As to defendant Yafai, plaintiff argued that her action, based on the owner's civil liability statute, MCLA 257.401; MSA 9.2101, was not barred because it was not alleged or shown that he was in the course of his employment. On October 22, 1973, a summary judgment of no cause for action was entered in favor of the defendants. Plaintiff appeals as to defendant Yafai alone.

Central to the present controversy is the third-party tortfeasor section of the Workmen's Compensation Act, MCLA 418.827; MSA 17.237(827) which provides in relevant part:

> "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with the provisions of this section."

The phrase "natural person in the same employ" as used in this statute has been construed to

require that the employee be in the course of his employment at the time of the injury in order for the statutory bar to operate. *Helmic v Paine,* 369 Mich 114, 119; 119 NW2d 574, 576 (1963); *Fidelity & Casualty Co v DeShone,* 384 Mich 686, 691–693; 187 NW2d 215, 217, 218 (1971).

Plaintiff's action against defendant Yafai is predicated upon the owner's civil liability statute, MCLA 257.401; MSA 9.2101. It is now firmly established that an action based upon this statute is not precluded even though an action against the driver is barred by MCLA 418.827; MSA 17.237(827). *Dale v Whiteman,* 388 Mich 698; 202 NW2d 797 (1972); *Ladner v Vander Band,* 376 Mich 321; 136 NW2d 916 (1965).

These cases also established the principle that the owner's liability under the statute is nonderivative. *Frazier v Rumisek,* 358 Mich 455; 100 NW2d 442 (1960). Hence, resolution of the driver's status as a coemployee with the resultant tort immunity provided by MCLA 418.827; MSA 17.237(827) does not control the question of the owner's employee status or his possible civil liability under MCLA 257.401; MSA 9.2101. This question must be answered separately, remembering that "an immunity from liability should be given a strict construction". *Mathews v Wosek,* 44 Mich App 706, 712; 205 NW2d 813, 816 (1973).

Nothing in the defendants' answer to the complaint, or in the affidavit in support of the motion for summary judgment, indicates whether or not defendant Yafai was in the course of his employment either when he allowed defendant Al-Huribi to use his automobile or when the accident occurred. Nevertheless, the trial court determined that the plaintiff's action against defendant Yafai was barred by § 827 of the Workmen's Compensation Act. In so doing, the trial court erred.

The plaintiff's action would not be barred by the statute unless defendant Yafai was acting in the course of his employment. There is less in the present case to indicate that the defendant was so acting than there was in *Brooks v Fields,* 375 Mich 667, 670; 135 NW2d 346, 347 (1965), in which the Supreme Court concluded:

> "Aside from pleading such conclusion as an affirmative defense, denied by plaintiffs, there was nothing before the trial court, not even an affidavit, from which such a finding could be made even if it were then appropriately the function of the judge to make such findings. Under such circumstances, summary judgment as provided for by GCR 1963, 117, should not have been entered."

This deficiency cannot be remedied by the statutory presumption created by MCLA 418.301; MSA 17.237(301) because there was no showing that defendant Yafai was going to or coming from work or that he was on his employer's premises at the time of the accident. Defendant's reliance on *Threet v Pinkston,* 20 Mich App 39; 173 NW2d 731 (1969), is misplaced. In that case, the defendant owner had already reported for work. Thus, there was no doubt that he was in the course of his employment and that he came within the immunity provisions of the statute.

Reversed and remanded for trial. No costs, the construction of a statute being involved.

All concurred.

CLARK v TEXACO, INC.

1. JUDGMENT—SUMMARY JUDGMENT—PRINCIPAL AND AGENT—AGENCY BY ESTOPPEL.

Summary judgment was erroneously granted a defendant gasoline service station owner where the plaintiff customer was bitten by the station operator's dog, the plaintiff contended in her complaint and at the hearing in opposition to the motion that the owner, a major oil company, was more than merely passively involved with the dealer's business, and the plaintiff could possibly be able to prove at a trial that the involvement of the oil company was so substantial as to justify application of the doctrine of agency by estoppel.

2. JUDGMENT—SUMMARY JUDGMENT—LANDLORD AND TENANT—BUSINESS INVITEES—LANDLORD'S LIABILITY.

Summary judgment was erroneously granted a defendant oil company where the plaintiff, a customer at a gasoline service station, could conceivably establish her contentions that the oil company, as a landlord, was so involved with the solicitation of business invitees to the leased premises that it became liable to those invitees who responded to its efforts.

Appeal from Washtenaw, Patrick J. Conlin, J. Submitted Division 1 June 6, 1974, at Lansing. (Docket No. 18767.) Decided August 15, 1974.

Complaint by Lynn A. Clark against Texaco, Inc., for negligence. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded.

White & Carter, for plaintiff.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 3 Am Jur 2d, Agency § 19.

Estoppel as ground for holding defendant liable for negligence in conduct of business which appears to be his but which in fact belongs to another. 122 ALR 256.

Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P. C. (by *John J. Lynch),* for defendant.

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

R. B. BURNS, J. Plaintiff drove her car into a retail Texaco Service Station operated by Lawrence Risner. While there, she was bitten by Risner's German shepherd guard dog as she was showing the attendant the location of the car's trunk. The dog had a history of attacking customers, but no precautions had been taken to ensure their protection.

Plaintiff brought suit against defendant Texaco, Inc. Plaintiff alleged that Risner was a Texaco agent, that both Texaco and Risner knew or should have known of the threat that the dog was dangerous, and that they, nevertheless, failed to attempt to lessen that danger. Texaco moved for summary judgment on the grounds that plaintiff had failed to state a claim upon which relief could be granted and that there was no genuine issue as to any material fact. Plaintiff countered that the facts, as alleged, showed Texaco had breached the duty of care it owed plaintiff both as a landlord and as a principal. The trial court granted Texaco's motion, and plaintiff appeals.

We think plaintiff has stated a cognizable claim. Plaintiff may be able to prove, as she has contended both in her complaint and at the hearing in opposition to Texaco's motion, that Texaco was more than merely passively involved with its dealer's business. Once at trial, plaintiff might be able to prove that the involvement "of the man who wears the star" is so substantial as to justify the

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

application of the agency by estoppel doctrine. *Johnston v American Oil Co,* 51 Mich App 646; 215 NW2d 719 (1974); *Gizzi v Texaco, Inc,* 437 F2d 308 (CA 3, 1971); *Apple v Standard Oil, Division of American Oil Co,* 307 F Supp 107 (ND Cal, 1969).

Similarly, plaintiff could conceivably establish her contentions that Texaco, as a landlord, was so involved with the solicitation of business invitees to the leased premises that it became liable to those invitees who responded to its efforts. *Eckerle v Twenty Grand Corp,* 8 Mich App 1; 153 NW2d 369 (1967).

Reversed and remanded for proceedings consistent with this opinion. Costs to plaintiff.

All concurred.

CITY OF YPSILANTI v CIVIL RIGHTS COMMISSION

OPINION OF THE COURT

1. CIVIL RIGHTS—COMMISSION—JURISDICTION—CONSTITUTIONAL LAW—STATUTES.

   The Civil Rights Commission has jurisdiction to entertain a complaint of employment discrimination on the basis of age and sex although the constitutional provision which created the commission authorized it to investigate only discrimination because of "religion, race, color or national origin"; legislation which subsequently expanded the jurisdiction of the commission to include complaints of discrimination because of age and sex is constitutionally valid (Const 1963, art v, § 29; MCLA 423.303a).

2. MUNICIPAL CORPORATIONS—HOME RULE CITIES—POWERS.

   The legislative body of a home rule city is permitted to make policy that is not inconsistent with state statutes or is not constitutionally infirm.

3. MUNICIPAL CORPORATIONS—EMPLOYMENT—OCCUPATIONAL QUALIFICATIONS—POWERS.

   A municipality has the right to establish bona fide occupational qualifications for various job classifications (MCLA 423.303a).

REFERENCES FOR POINTS IN HEADNOTES

[1] 15 Am Jur 2d, Civil Rights § 56 *et seq.*

[2] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 125, 126.

[3] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 246 *et seq.*

63 Am Jur 2d, Public Officers and Employees § 44 *et seq.*

[4] 2 Am Jur 2d, Administrative Law § 327 *et seq.*

[5] 2 Am Jur 2d, Administrative Law § 595 *et seq.*

[6, 9] 20 Am Jur 2d, Courts § 117.

[6, 9, 10] Superintending control over inferior tribunals. 112 ALR 1351.

[7] 27 Am Jur 2d, Equity § 100.

[8] 2 Am Jur 2d, Administrative Law § 596.

[10] 20 Am Jur 2d, Courts § 116.

4. CIVIL RIGHTS—COMMISSION—JURISDICTION—MUNICIPAL CORPORATIONS—OCCUPATIONAL QUALIFICATIONS

The Civil Rights Commission lacked jurisdiction as a matter of law to consider a complaint against a city alleging age and sex discrimination in employment where the city, pursuant to a statute authorizing it to establish bona fide occupational qualifications for various job classifications, limited prospective new employees of its police force to those persons between the ages of 21 and 31 (MCLA 423.303a).

CONCURRENCE IN PART, DISSENT IN PART BY DANHOF, P. J.

5. CIVIL RIGHTS—COMMISSION—ADMINISTRATIVE LAW—EXHAUSTION OF REMEDIES.

A city, faced with a complaint from the Civil Rights Commission alleging discrimination in its employment practices, prematurely started suit against the commission in circuit court; it should have answered and defended on the merits before the commission.

6. CIVIL RIGHTS—COMMISSION—SUPERINTENDING CONTROL—ADMINISTRATIVE LAW—INTERFERENCE WITH FUNCTIONS.

An order of superintending control, the effect of which is to prevent the Civil Rights Commission from proceeding upon a complaint of employment discrimination, should not be issued because the courts should not act on such a matter and prevent the commission from functioning effectively.

7. CIVIL RIGHTS—COMMISSION—MUNICIPAL CORPORATIONS—EQUITABLE RELIEF.

A plaintiff city is not entitled to equitable relief against the Civil Rights Commission where it has not made a sufficient showing that it would suffer harm if required to proceed initially before the commission.

8. ADMINISTRATIVE LAW—EXHAUSTION OF REMEDIES—JUDICIAL REVIEW.

A fundamental principle of administrative law requires that all administrative remedies be exhausted before judicial relief is sought, and this rule is not suspended merely because the administrative action may be erroneous.

9. APPEAL AND ERROR—SUPERINTENDING CONTROL—ALTERNATIVE REMEDIES.

An order of superintending control will not issue where an alternative remedy is available.

10. APPEAL AND ERROR—SUPERINTENDING CONTROL—DISCRETION—REVIEW.

Grant or denial of an order of superintending control is within the sound discretion of the court and a denial of the order should be upheld where no clear abuse of that discretion is shown.

Appeal from Washtenaw, Edward D. Deake, J. Submitted Division 2 June 7, 1974, at Lansing. (Docket No. 18991.) Decided August 15, 1974. Leave to appeal applied for.

Complaint by the City of Ypsilanti against the Civil Rights Commission for an order of superintending control. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

Bronson & Egnor (by *Walter K. Hamilton),* for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Michael A. Lockman* and *Howard E. Goldberg,* Assistants Attorney General, for defendant.

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

O'HARA, J. In 1963 this state adopted a new constitution. One of its provisions, article V, § 29, provides as follows:

"There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the senate, for four-year terms not more than two of which shall expire in the same year. It shall be the duty of the commission in a manner which may be prescribed by law to investigate

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

alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. The legislature shall provide an annual appropriation for the effective operation of the commission.

"The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. The commission shall have other powers provided by law to carry out its purposes. Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

"Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law." Const 1963, art V, § 29.

It is to be noted carefully that the four factors of unlawful discrimination over which the commission was granted jurisdiction were "religion, race, color or national origin". No more, no less.

However, before the Constitution of 1963 was adopted, the Legislature had enacted a Fair Employment Practices Act. MCLA 423.301 et seq.; MSA 17.458(1) et seq. Its legislative history is as follows:

1955 PA 251 was given effect October 14 of that year. Then, effective January 1, 1964, the Legislature enacted yet another statute. It purported to transfer to the Civil Rights Commission the powers and duties of the Fair Employment Practices Commission. MCLA 37.6; MSA 3.548(6). In 1965

the Fair Employment Practices Act was amended to grant the Civil Rights Commission, successor agency to the now defunct Fair Employment Practices Commission, jurisdiction over discriminatory employment practices with respect to age. MCLA 423.303a; MSA 17.458(3a). By a 1966 amendment the Civil Rights Commission's jurisdiction was further expanded to include complaints involving sex discrimination in employment. MCLA 423.303a, *supra.*

The statements of questions involved are stated, almost to the word, identically.

"I.

"Whether Section 37.6 and related sections of the Compiled Laws of the State of Michigan, extending the jurisdiction of the Civil Rights Commission beyond the expressed grant of jurisdiction embodied within the Constitution of 1963 are constitutionally valid.

"The trial court answered this question 'yes'.

"The defendant-appellee would answer this question 'yes'.

"II.

"Assuming the validity of the statutes in question, whether the allegations contained within the charge of the Civil Rights Commission are sufficient to confer jurisdiction upon the Civil Rights Commission within the terms of that statute.

"The trial court answered this question 'yes'.

"The defendant-appellee would answer this question 'yes'."

The facts, which were stipulated, necessary to an understanding of the stated legal issues are as follows. One Mary Foley applied for a position as a member of the police force of plaintiff city. She was rejected. She filed a complaint with defendant

Civil Rights Commission alleging unlawful discrimination because of her age, race and sex. The commission conducted an investigation, and found probable cause to support Mary's complaint as to *age* and *sex* only.

Plaintiff city did not answer the complaint on the merits. Rather it started a suit in circuit court seeking an order of superintending control directing the commission to cease its proceedings as being in excess of its constitutional powers, which could not be legislatively expanded. Additionally, said the city, not only does the commission lack jurisdiction, Mary did not make out a case of discrimination on the merits. Thirdly, the city alleged that Mary was disqualified because Ypsilanti as a home-rule city is clearly entitled to prescribe reasonable regulations for the qualifications of its employees.

The trial judge held against the city on the first stated question and did not pass upon the second. He favored us with a detailed and well documented opinion. We take this opportunity also to commend both counsel for their comprehensive briefs and their incisive oral presentations.

At our level of adjudication we are bound by precedential opinion of the Supreme Court. On the first question as to the right of the commission to entertain the complaint we affirm the trial judge on the authority of *Beech Grove Investment Co v Civil Rights Commission,* 380 Mich 405; 157 NW2d 213 (1968). The opinion reflects differing views of the problem before us. Justice ADAMS stands for a liberal view of the authority of the commission to enforce any right that may fairly be called a "civil right" and which stems from the constitutional provision itself, any other statute dealing with a civil right, together with all rights emanating from the common law of this State.

Justice SOURIS in a separate opinion held that the commission had the right and duty, with or without express enabling legislation, to protect against discriminatory denial of those civil rights which are of the magnitude of fundamental rights of citizenship and of the essence of civil freedom.

Justices BLACK, DETHMERS, and KELLY in dissent held tersely and clearly that legislative implementation was requisite under the stipulated question of that case.

The majority of the Court approved the grant of additional rights and duties to the commission. We are bound by the spirit and letter of that holding.[1]

We turn now to what we consider the dispositive issue.

Ypsilanti is a home-rule city. Its legislative body is permitted to make policy that is not inconsistent with state statutes or is not constitutionally infirm.

In the exercise of this legislative judgment it chose to restrict candidates for members of its police force to applicants between the ages 21 and 31.[2] Certainly the municipality has the right to establish bona fide occupational qualifications for various job classifications.[3]

It is not for this Court or any judicial reviewing authority so far as we know to say to Ypsilanti "you must consider applicants for membership of the police force begining at age 18 or extending to age 45". We cannot by judicial fiat disenfranchise the voters of Ypsilanti in a purely legislative question.

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[1] For a thoughtful discussion relative to the possible implications of *Beech Grove Investment Co v Civil Rights Commission*, 380 Mich 405; 157 NW2d 213 (1968), see 15 Wayne L Rev 3, 27–29 (1968).

[2] It may be more than mere coincidence that the regulations of the City of Ypsilanti contain virtually identical age limitations to those found in MCLA 38.510; MSA 5.3360.

[3] See MCLA 423.303a(a); MSA 17.458(3a)(a).

Under the stipulated facts applicant Foley was ineligible for consideration as a matter of law.

That part of the opinion and order of the trial judge authorizing the commission to proceed with the charge of unlawful discrimination on the grounds of age and sex is reversed. The cause is remanded to the trial court for entry of a judgment granting superintending control over the commission to the extent herein delineated.

No costs, a public question.

HOLBROOK, J., concurred.

DANHOF, P. J. *(concurring in part, dissenting in part).* That part of the majority's opinion resolving the first issue is strengthened by the decision in *Michigan Civil Rights Commission v Clark,* 390 Mich 717, 727; 212 NW2d 912, 916 (1973). I am in agreement with that part of the opinion.

However, I must dissent from the manner in which the majority has resolved the second issue because it is inappropriate at this stage of this case. The majority's opinion may well encourage other respondents to attempt to similarly circumvent the Civil Rights Commission.

There is no doubt that the plaintiff city has the right to establish bona fide occupational qualifications for various job classifications. There is considerable doubt, however, as to the advisability of making the initial determination in the circuit court or this Court as to what constitutes a bona fide occupational qualification before the Civil Rights Commission has had an opportunity to pass upon the question. The plaintiff city chose to respond to the complaint by starting suit in circuit court rather than by answering and defending on the merits before the commission. Recourse to the court at that point was premature.

The constitutional stature of the Civil Rights Commission has been reaffirmed in *Michigan Civil Rights Commission v Clark, supra,* 390 Mich 726; 212 NW2d 915, 916 (1973), which held that the provisions of MCLA 564.401a; MSA 26.1300(401a) authorizing the removal of a proceeding before the commission to the circuit court was unconstitutional. Justice LEVIN, writing for the majority, reasoned that just as the Legislature may not prevent the executive or judicial branches of government from exercising their powers, similarly the Legislature could not prevent the Civil Rights Commission from functioning effectively.

The majority has recognized the significance of the spirit as well as the letter of the holdings of the Supreme Court. This recognition prevents me from joining in the decision to reverse. The courts no less than the Legislature should not act in a matter which prevents the Civil Rights Commission from functioning effectively. The decision of the majority ordering the issuance of the order of superintending control will interfere with the orderly functioning of the commission.

Another reason for not issuing the order of superintending control under circumstances such as these was referred to in *Clark:*

> " 'An individual against whom the Commission has proceeded may seek injunctive relief from threatened harm under the same principles applicable to threatened illegal action by other administrative agencies', including further developments (after the adoption of the 1963 Constitution) of general application of such principles." *Michigan Civil Rights Commission v Clark, supra,* 390 Mich 725; 212 NW2d 915.

In the present case, equitable relief is not warranted because the city has not made a sufficient showing that it will suffer harm if required to

proceed initially before the Civil Rights Commission.

One of the fundamental principles of administrative law requires that all administrative remedies be exhausted before judicial relief is sought. *Holman v Industrial Stamping & Manufacturing Co,* 344 Mich 235; 74 NW2d 322 (1955); *Craig v Detroit Police Department,* 49 Mich App 599; 212 NW2d 235 (1973). This rule was based upon the presumption that the administrative agency will decide the issue correctly if it is given an opportunity to do so. The rule is not suspended merely by the fact that the administrative action may be erroneous. *Bennett v Royal Oak School District,* 10 Mich App 265, 159 NW2d 245 (1968), *leave to appeal denied,* 381 Mich 755 (1968).

In addition, the policy considerations governing the issuance of an order of superintending control, expressed in GCR 1963, 711.2, are further indication of the unsuitability of that relief in this case:

> "The order of superintending control should not be issued if another plain, speedy and adequate remedy is available to the party seeking the order."

The city has another adequate remedy; it can participate in the proceedings before the commission, reserving resort to the courts until the commission's ruling is known. Where an alternative remedy is available, the order of superintending control will not issue. *Bennett v Royal Oak School District, supra.*

There is a strong possibility that, following a hearing, the Civil Rights Commission would have determined that the age restriction was a "bona fide occupational qualification" and, therefore, that it did not constitute an unfair employment practice under MCLA 423.303a(a); MSA 17.458(3a)(a).

After such a determination had been made, the city, if still dissatisfied, could have taken an appeal to the circuit court on the record developed before the commission. *Lesniak v Fair Employment Practices Commission,* 364 Mich 495, 506; 111 NW2d 790, 796 (1961). Had the city allowed the administrative process to continue to completion, it is conceivable that no court action would have been required. *Burton v Velosky,* 22 Mich App 646, 649–650; 177 NW2d 679, 681 (1970).

Finally, the grant or denial of an order of superintending control is within the sound discretion of the trial court. A denial of the order should be upheld in the absence of a clear abuse of that discretion. *People v East Lansing Judge,* 42 Mich App 32, 36; 201 NW2d 318, 321 (1972); *LaPratt v Keego Harbor Justice of the Peace,* 1 Mich App 657, 660; 137 NW2d 769, 770–771 (1965). There has been no showing that the trial court abused its discretion in the present case. I would affirm.

KOLAR v HUDSON

APPEAL OF FISHER

PARTIES—INTERVENTION—PLEADING—COURT RULES.

A party's motion for intervention is required by court rule to be accompanied by a pleading setting forth a claim or defense; absent a complaint setting forth the intervening plaintiff's claim, the claim is never before the trial court so as to vest jurisdiction in the court to render a judgment upon the claim (GCR 1963, 209).

Appeal from Oakland, William J. Beer, J. Submitted Division 2 June 7, 1974, at Detroit. (Docket No. 19081.) Decided August 15, 1974. Leave to appeal applied for.

Complaint by Richard Kolar against John Hudson and David R. Anderson for damages for personal injuries received in a pedestrian-automobile accident. William L. Fisher intervened as a plaintiff claiming certain attorney fees. Plaintiff Kolar settled with the defendants who tendered the settled amount to the county clerk's office. Plaintiff Kolar's motion for a determination of disbursement of the settlement funds granted. Intervening plaintiff appeals. Affirmed and remanded with instructions.

George LaPlata, for plaintiff.

William L. Fisher, in propria persona.

REFERENCES FOR POINTS IN HEADNOTE

20 Am Jur 2d, Courts § 94.

59 Am Jur 2d, Parties § 129 *et seq.*

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

VAN VALKENBURG, J. This appeal deals solely with the claim by intervening plaintiff Fisher for certain attorney fees allegedly owing by the principal plaintiff to intervening plaintiff, said fees allegedly resulting from services rendered by Fisher in the preparation of Kolar's suit against defendants. The underlying auto negligence action need not concern us, since that claim was settled and defendants tendered the settled amount to the county clerk's office as required by the order of the trial court.

It appears that plaintiff Kolar entered into an agreement with his uncle, intervening plaintiff Fisher, whereby Fisher, an attorney, would represent him for the purpose of pursuing his claim against defendants. Plaintiff Kolar apparently became dissatisfied with Fisher's efforts and sought to discharge Fisher and secure other counsel. Plaintiff Kolar allegedly executed a written instrument which purportedly gave intervening plaintiff Fisher an interest in plaintiff's cause of action and a lien against any recovery against defendants in the amount of $4333.33 plus interest at six percent per annum for the services rendered by Fisher in preparing the case. Plaintiff Kolar's new attorney thereafter filed a complaint on Kolar's behalf against defendants.

It further appears that after Kolar commenced his action against defendants, he filed a Request for Investigation against Fisher with the State Bar Grievance Board, alleging that Fisher neglected his duty in failing to commence the suit within a reasonable period of time and that Fisher solicited

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

the case; and, therefore, Fisher should not be allowed to seek attorney fees if Kolar received a favorable judgment. Fisher filed his reply with the Grievance Board asserting that the matter of the fees was the subject of the aforementioned written agreement. The Grievance Board wrote a letter to Fisher seeking further information as to the basis of the $4333.33 recited in the "agreement", indicated that the "agreement" did not divest the Grievance Board of jurisdiction to investigate Kolar's complaint and informed Fisher that he must file a responsive answer to the complaint within 20 days or face an entry of a default.

At this point Fisher filed a document with the circuit court having jurisdiction over Kolar's suit against defendants entitled "Petition for Intervention and for Other Relief". In that document Fisher indicated that he had a right to intervene by virtue of the contract assigning him an interest in the litigation and a lien on any recovery to the extent of the agreed-upon amount of $4333.33 plus interest. This document further requested injunctive relief enjoining Kolar, his present attorney, and the Grievance Board and its attorney from proceeding on the matter before the Grievance Board. Fisher sought and obtained an *ex parte* temporary restraining order. A show-cause hearing was scheduled.

The Grievance Board and its attorney moved for accelerated judgment on the basis of lack of jurisdiction. Plaintiff Kolar filed an answer to the motion to intervene asserting generally that Fisher's proper avenue of relief was either a separate contract action or arbitration before the arbitration panel of the Bar Association of Michigan. After the show-cause hearing, the trial court ordered the action for injunctive relief against the

Grievance Board and its attorney dismissed. The trial court also ordered that "Petitioner, William L. Fisher, is allowed only subordinate intervention as an unnamed party Plaintiff in this cause * * * " and that " * * * any sums of money whatsoever achieved or resulting from this litigation by settlement, judgment or any form whatsoever shall be paid into the Oakland County Clerk for distribution only on the order of this Court".

Thereafter, Kolar settled with defendants for $8500. Kolar's attorney moved for a determination of disbursement of the settlement funds, filing with that motion a notice of hearing for that motion and a proof of service indicating that a copy of the notice of hearing had been sent to Fisher by certified mail. Fisher did not appear for the hearing. The trial court thereafter determined that $6100 should go to the plaintiff Kolar and $2400 should go to Fisher.[1] An order was prepared and signed which provided that $6100 be paid to Kolar and that the $2400 be paid to Fisher upon receipt of his full and complete release or in the alternative that it be paid to Oakland County Clerk to be held for disbursement subject to the terms of the order.

Fisher moved for a rehearing with respect to the disbursement order alleging that he had never received notice of the hearing on the order, and that the order as entered was contrary to law. Kolar answered the motion for rehearing asserting that Fisher had refused to accept delivery of the certified letter containing the notice of the hearing and attached a copy of the envelope used to send the notice upon which was written the postal

[1] The apparent basis upon which the trial court arrived at the $2400 figure was the indication by counsel that Kolar had made an offer of settlement to Fisher in that amount; an offer which Fisher had refused.

service's notation indicating the refusal to accept delivery. The trial court denied Fisher's motion for rehearing. Fisher now appeals as of right.

On appeal Fisher argues that the trial court improperly entered the order of distribution of funds whereby Fisher was to receive $2400 for his services if and when he released Kolar. We need not reach that question. It is clear from the record below that Fisher never perfected his status as an intervening plaintiff, and, thus, he is not an aggrieved party within the meaning of GCR 1963, 806.1, such that he has a right to appeal to this Court.

The practice and procedure with respect to intervention is governed by GCR 1963, 209. Fisher's right to intervene, if any, would be pursuant to either subsection (3) or (4) of GCR 1963, 209.1. As such intervention is permitted only upon a timely application to intervene. The procedure with respect to interventions is set forth in GCR 1963, 209.3, which provides, in pertinent part:

> "When an application for intervention is required a person shall apply to the court by motion to intervene and shall give notice in writing to all parties. The motion shall state the grounds for intervention and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

The rule clearly requires that the motion for intervention be accompanied by a pleading setting forth the claim or defense. While Fisher did file the necessary motion stating the grounds for intervention, there is nothing in the lower court record evidencing that he filed the pleading setting forth his claim. The meaning of the term "pleading" as used in the General Court Rules is set forth in GCR 1963, 110.1, which provides:

"Pleadings. There shall be a complaint; an answer; a reply to an answer demanding a reply and to a counterclaim denominated as such; an answer to a cross-claim if the answer contains a cross-claim; a third-party complaint if a person who was not an original party is summoned under Rule 204; and a third-party answer if a third-party complaint is served. No other pleading shall be allowed except that a reply may be made to an answer or a third-party answer."

Since Fisher's claim was not in the nature of an answer, a reply to an answer, an answer to a cross-claim, a third-party complaint brought pursuant to GCR 1963, 204 or an answer thereto, the appropriate pleading would have been a complaint setting forth his claim. The logic of requiring such a pleading when intervention is sought is obvious. Absent a complaint setting forth the intervening plaintiff's claim, the claim is never technically before the trial court so as to vest jurisdiction in the court to render a judgment upon the claim. It would therefore appear that the trial court erred in granting Fisher's motion to intervene, since his motion was not accompanied by the appropriate pleading, and was thus not in compliance with the mandate of GCR 1963, 209.3.

Even were we to hold that the trial court could grant the motion to intervene absent the appropriate pleading, it would not avail Fisher. The order granting intervention merely granted Fisher the right to intervene; however, absent the necessary pleading that right is inchoate in nature. Since Fisher at no time filed a complaint setting forth his claim, he never exercised his bare "right" to intervene, and thus never became a party to the action prior to the settlement. By never perfecting his right to become a party to the action, he lacks standing to now challenge any orders entered in that action. Obviously, since he was not a party to

this action, he cannot be bound by the trial court's "determination" of what was proper compensation, unless Fisher chooses to accept the $2400 in exchange for his full and complete release as provided by the trial court's order allowing distribution.

Since plaintiff Kolar has not brought an appeal from the trial court's order granting Fisher $2400 upon executing a release, we need not determine the propriety of that order. Neither do we express any opinion as to what shall be done if Fisher chooses to refuse to take the $2400 in exchange for his release but rather chooses to commence an independent contract action for the contract amount. It will suffice to say that on the basis of the narrow question here decided, the trial court is affirmed. It is, however, clear that some additional order by the trial court will be necessary as to the disposition of the settlement funds if Fisher chooses to avail himself of his right to bring his contract claim in a separate action.

Affirmed, but remanded to the trial court for such additional orders as may be required for a disposition consistent with this opinion. Costs to plaintiff Kolar.

All concurred.

JACKSON COUNTY PROSECUTING ATTORNEY v JACKSON CIRCUIT JUDGE

CRIMINAL LAW—SENTENCING—PRISON ESCAPE—CREDIT FOR TIME SERVED.

No credit for time spent in prison while awaiting trial for prison escape can be given when sentencing a defendant for the prison escape (MCLA 769.11b).

Original action in the Court of Appeals. Submitted Division 2 June 25, 1974, at Detroit. (Docket No. 19599.) Decided August 15, 1974.

Complaint by the Jackson County Prosecuting Attorney, Bruce A. Barton, against Jackson Circuit Judge Gordon W. Britten for an order of superintending control prohibiting defendant from granting Leonard C. Dersa and others credit for time spent in prison while awaiting trial when sentencing for prison escape. Order granted.

James M. Justin, Assistant Prosecuting Attorney, for plaintiff.

Marc L. Goldman, Assistant State Appellate Defender, for Leonard C. Dersa.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

REFERENCES FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law § 545.

27 Am Jur 2d, Escape, Prison Breaking, and Rescue § 20.

Time of beginning of sentence for escape or attempted escape. 92 L Ed 449.

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

DANHOF, J. Plaintiff, the Jackson County Prosecutor, filed an original complaint seeking an Order of Superintending Control requiring that the defendant Jackson County Circuit Judge, Gordon W. Britten, grant no credit for time spent in prison while awaiting trial when sentencing for prison escape, MCLA 750.193; MSA 28.390. Defendant Dersa is one of the more than 60 defendants sentenced by Judge Britten for prison escape who have been given credit against their sentences for that period of imprisonment between arraignment and sentencing.

Various panels of this Court have differed over the application of the statute providing sentence credit for pretrial incarceration, MCLA 769.11b; MSA 28.1083(2), to those cases in which a defendant who is already imprisoned for an unrelated offense commits yet another crime. One of these cases was interpreted by the defendant judge as requiring him to grant sentence credit to every defendant regardless of the nature of the crime subsequently committed. That decision has been reversed by *People v Patterson,* 392 Mich 83; 219 NW2d 31 (1974), in which it was held that the sentence credit statute cannot be construed as entitling a defendant to credit for time he was already obliged to serve under a prior sentence. Language in that opinion indicates that the matter is not discretionary:

"[C]redit cannot be granted for the pretrial incarceration of defendant serving a prison sentence arising from a prior crime."

Patterson involved a subsequent crime other than prison escape. Where the subsequent crime has been committed in prison or while on escape from prison, sentence credit has generally been

given. See *People v Hall,* 19 Mich App 95; 172 NW2d 473 (1969); *People v Lewis,* 42 Mich App 121; 201 NW2d 341 (1972). Where, as in the present case, the subsequent crime is prison escape, this Court has uniformly held that sentence credit should not be given. *People v Pruitt,* 23 Mich App 510; 179 NW2d 22 (1970); *People v Brooks,* 33 Mich App 297; 189 NW2d 816 (1971). Later decisions have interpreted MCLA 750.193; MSA 28.390, the statute imposing a mandatory consecutive sentence upon conviction of prison escape, to create an exception to the sentence credit granting statute. *People v Bachman,* 50 Mich App 682; 213 NW2d 800 (1973), *lv den* 392 Mich 776 (1974); *People v Andrews #2,* 52 Mich App 728; 218 NW2d 383 (1974). Under the Supreme Court's holding in *Patterson,* it appears that the exception has now become the rule. In any event, if credit cannot now be given where a separate crime committed while under a valid sentence is involved, then certainly there can be no credit given in a case involving prison escape.

Plaintiff is entitled to the relief sought. An Order of Superintending Control implementing this decision will issue.

All concurred.

PEOPLE v BROWN

CRIMINAL LAW—CONSTITUTIONAL LAW—RIGHT AGAINST SELF-INCRIMINATION—EVIDENCE—PSYCHIATRIC EXAMINATION—DEFENSES—INSANITY—INTOXICATION.

A defendant's right against self-incrimination was not violated by allowing a court-appointed psychiatrist to testify in rebuttal to the testimony of a defense psychiatrist where the defendant had originally undergone examination by court order because he had given notice of the defense of insanity, and later changed his defense to one of intoxication, and where the psychiatrist's testimony was offered solely to rebut the claim that defendant was suffering from alcohol and drug induced amnesia at the time of the crime and did not extend to any other statements made by the accused in the course of the court-ordered examination.

Appeal from Lenawee, Rex B. Martin, J. Submitted Division 2 June 13, 1974, at Detroit. (Docket No. 16376.) Decided August 15, 1974.

Otis Brown was convicted of assault with intent to commit murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Harvey A. Koselka,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Edward R. Wilson,* Director, and *William P. Weiner,* Special Assistant Attorney General, of counsel), for the people.

Stuart M. Israel, Assistant State Appellate Defender, for defendant.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 48, 69, 357.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

PER CURIAM. Defendant was tried and found guilty by a jury of assault with intent to commit murder, MCLA 750.83; MSA 28.278, and was sentenced to 14 to 60 years in prison. He appeals as of right.

This action arises out of a March 10, 1972 shooting incident in which defendant allegedly shot his former girl friend twice in the head. Prior to trial, defendant filed a notice of insanity defense. At the prosecution's request, the trial court ordered defendant to submit to an examination by the people's psychiatrist, Dr. Clifford Keeler. The examination took place August 11, 1972.

However, defendant concluded that an insanity defense was not feasible, and instead sought to establish an intoxication defense. Defendant testified that he had been drinking and taking drugs continuously during the 12 hours before the shooting, and that, consequently, he did not remember any of the criminal acts he allegedly committed. In support of this claim a defense psychiatrist testified that he concluded from his examination of defendant that defendant had suffered from liquor and drug induced amnesia on March 10, 1972.

The prosecution then called Dr. Keeler as a rebuttal witness. He testified that defendant indicated to him during the court-ordered psychiatric examination that he had not been drinking or consuming drugs during the 24 hours preceding the shooting. Dr. Keeler further testified that he thought defendant's inability to remember his criminal acts was a mental defense mechanism for coping with the situation.

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

Defendant contends that it was reversible error to permit Dr. Keeler to testify as to matters learned during the psychiatric examination, because he was ordered to examine defendant only with regard to the insanity defense and that defense was not asserted at trial. It is argued that to permit the prosecution to make use of this examination for a purpose other than that for which it was originally ordered violates defendant's right against self-incrimination.

There is no authority to support defendant's sweeping proposition. Admittedly, it has been held that,

> "no statement made by an accused in the course of a court ordered examination shall be admitted in evidence on the issue of guilt at the accused's trial." *People v Stevens,* 386 Mich 579, 585; 194 NW2d 370, 373 (1972).

Stevens is mandated by the right against self-incrimination. However, neither this right, any other constitutional provision, nor public policy requires that we extend the ban on the use of statements from court-ordered psychiatric examinations to the situation in the instant case. The prosecution psychiatrist's testimony was offered solely for the purpose of rebutting the defense's claim that defendant was suffering from alcohol and drug induced amnesia at the time of the assault. His testimony went no further than was necessary to rebut that claim. Dr. Keeler did not testify about the commission of the crime; no statements of the defendant concerning the shooting were admitted into evidence. We hold that it was not error to allow the prosecution psychiatrist to testify in rebuttal to defendant's claim of intoxication.

We have reviewed defendant's other assignments of error and find them without merit.

Affirmed.

KIILUNEN v MOODIE

1. JUDGMENT—DEFAULT JUDGMENT—SETTING ASIDE JUDGMENT—PRETRIAL CONFERENCE—NONAPPEARANCE—GOOD CAUSE—MERITORIOUS DEFENSE.

   A trial court properly refused to set aside a default judgment entered because of defense counsel's failure to appear for a scheduled pretrial conference, where defendant showed neither good cause to set aside the default nor filed an affidavit showing a meritorious defense (GCR 1963, 520.4).

2. JUDGMENT—DEFAULT JUDGMENT—SETTING ASIDE JUDGMENT—GOOD CAUSE.

   Good cause to set aside a default judgment includes (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.

3. TRIAL—PRETRIAL CONFERENCE—NOTICE—COURT RULES.

   The pretrial conference notice requirements of the general court rules apply only to the circuit court for Wayne County; therefore, a failure to receive official notice did not excuse the nonappearance of counsel at a pretrial conference in the Circuit Court for Livingston County, where counsel knew of the conference because he was present when the conference was scheduled (GCR 1963, 301.10).

Appeal from Livingston, Paul R. Mahinske, J. Submitted Division 2 June 6, 1974, at Lansing. (Docket No. 16917.) Decided August 15, 1974. Rehearing granted; appeal dismissed by stipulation November 27, 1974.

Complaint by Matt and Lillian Kiilunen against

REFERENCES FOR POINTS IN HEADNOTES

[1] 46 Am Jur 2d, Judgments § 724 *et seq.*

[1, 3] 62 Am Jur 2d, Pretrial Conference § 14.

[2] 47 Am Jur 2d, Judgments § 708.

Jean Jolly Moodie for conveyance of property purchased on land contract. Default judgment for plaintiffs. Defendant appeals. Affirmed.

McCririe & Latreille, for plaintiffs.

Smith, Losh, Kovaleski & Krafsur, for defendant.

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

PER CURIAM. Defendant appeals from the trial judge's refusal to set aside a default judgment entered when defense counsel failed to appear for a scheduled pretrial conference. Defense counsel claimed lack of official notice as justification for his nonappearance at the pretrial conference.

GCR 1963, 301.9 authorizes the taking of a default when the counsel fails to appear for a pretrial conference:

"Default. Failure to appear at a duly scheduled pretrial conference, unless said conference has been waived in accordance with sub-rule 301.8, shall constitute a default to which provisions of GCR 520 shall be applicable." (Added by amendment of November 11, 1966, effective February 1, 1967).

GCR 1963, 301.10 requires that notice of pretrial be forwarded to counsel at least six weeks before the conference. This notice requirement, however, is applicable to Wayne County Circuit Courts only.

In reviewing the record below, it is clear that defense counsel was present when the conference was scheduled, along with other counsel. On the

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

day of the pretrial, all appeared, with no further notice, except defense counsel.

Defense counsel urged on this appeal that his excuse for nonappearance, in spite of his presence when the date for the pretrial was set, was his expectation of further "official notice", and that failure to send such notice excused his nonappearance.

In *Mission Investment Co v Perfect Totalisator Corp,* 51 Mich App 376; 214 NW2d 898 (1974), we cited GCR 1963, 520.4 for the requirement that a motion to set aside a default judgment shall be granted "only if good cause is shown and an affidavit of facts showing a meritorious defense is filed". In *Milinsky v Schmidt, Ellis & Associates, Inc,* 48 Mich App 192, 195; 210 NW2d 367, 368 (1973), "good cause" was defined:

> " 'to include (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.' "

Defendant did not comply with the affidavit requirement of GCR 1963, 520.4 nor do we otherwise find "good cause" for defense counsel's failure to appear at the pretrial conference. Defendant claims that the failure of the trial court to send notice was an "irregularity" in the proceeding. As noted above, notice is required by Wayne County Circuit Courts only; this action was in Livingston County. Likewise, defendant has not satisfied requirements (2) and (3) set out in *Milinsky, supra.*

We find that defense counsel's failure to attend the pretrial conference was not excused and, therefore, the trial judge committed no error in refusing to set aside the default.

Affirmed, with costs to the plaintiffs.

DETROIT BANK & TRUST COMPANY v DEPARTMENT OF STATE HIGHWAYS

1. HIGHWAYS—MEDIANS—MAINTENANCE AND REPAIRS—DUTY—STATUTES.

   The state is statutorily obligated to maintain a highway median in reasonable repair so that the median is reasonably safe for its intended use as an adjunct of the paved portion of the highway (MCLA 691.1402).

2. HIGHWAYS—IMPROVED PORTION—MEDIANS—STATUTES.

   Highway medians are an integral part of the improved portion of a highway (MCLA 691.1402).

3. HIGHWAYS—IMPROVED PORTION—NEGLIGENCE—PROXIMATE CAUSE.

   The state is not an insurer and a motorist who misuses any part of the improved portion of a highway is answerable for his own negligence which could bar his recovery against the state; the asserted negligence of the state must be established as the proximate cause of the claimed injury and damage (MCLA 691.1402).

4. APPEAL AND ERROR—NONJURY TRIAL—FINDINGS—EVIDENCE.

   The Court of Appeals has a duty to accept a trial judge's conclusion, after a nonjury trial, where it was supported by competent, credible and virtually uncontradicted testimony.

Appeal from Court of Claims, Norman A. Baguley, J. Submitted Division 2 June 5, 1974, at Lansing. (Docket No. 17606.) Decided August 15, 1974. Leave to appeal denied, 392 Mich 820.

Complaint by the Detroit Bank and Trust Company and Betty J. Alluvot, coadministrators of the

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 39 Am Jur 2d, Highways, Streets and Bridges § 392.
[3] 39 Am Jur 2d, Highways, Streets and Bridges § 103.
[4] 5 Am Jur 2d, Appeal and Error § 839 *et seq.*

estate of Frank Alluvot, Jr., deceased, against the Department of State Highways for damages arising from decedent's death. Continental National American Group intervened as a plaintiff. Judgment for plaintiffs and intervening plaintiff. Defendant appeals. Affirmed.

Bellinson, Doctoroff & Wartell and *David F. Breck,* for plaintiffs.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen (by *Thomas P. Bingman, Jr.),* for intervening plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Louis J. Caruso* and *Myron A. McMillan,* Assistants Attorney General, for the defendant.

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

PER CURIAM. This is an appeal of right from an award of the Court of Claims based upon the claims of negligence and nuisance on the part of the State of Michigan through its Department of State Highways. The award, which is not relevant to the issues of negligence, nuisance, contributory negligence or proximate cause, was $944,068.35. No issue as to its excessiveness is raised.

Death was virtually instantaneous. It was caused by the end of a guardrail penetrating decedent's car which in turn caused the decedent to be partially ejected from the vehicle. The guardrail is located in the strip separating a divided highway. This area is referred to as the "median".

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

Manifestly the first question to be decided is whether the statute by which the state waived its sovereign immunity and allowed itself to be sued extends to the median. If it does not, the lawsuit ends there and the shield of immunity obtains.

The statute reads in relevant part:

"Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him from such governmental agency. * * * The duty of the state and the county road commissions to repair and maintain highways, and the liability therefor, *shall extend only to the improved portion of the highway designed for vehicular travel* and shall not include sidewalks, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel." (Emphasis supplied.) MCLA 691.1402; MSA 3.996(102).

We think the difficulty in the position of the state in this and in several prior cases decided by this Court is that it construes the prior underlined excerpt from the statute to use the "improved portion of the highway designed for vehicular travel" to mean the "paved" portion used for vehicular travel.

Obviously the median was not designed for vehicular travel at expressway speeds in order to pass other cars to get from place to place or to be used as a crossover. The latter is expressly forbidden by another statute.[1] But in construing the statute we simply can't read out the words "improved por-

[1] MCLA 257.644; MSA 9.2344.

tion" even though those words are modified and limited by the phrase "designed for vehicular travel".

A highway is the composite of many components: slabs of poured concrete, shoulders, usually of gravel, markings, traffic control signals, speed control signs. These stated are exemplary only and not intended to be decisionally limiting.

The median did not magically appear between the paved portions of the divided highway. It was created or constructed by the state. The guardrail in the middle was manufactured to the department's specifications and installed by their contractors. We cannot but conclude that it is an "improved portion" in the same sense the shoulders were held to be in *Johnson v Michigan,* 32 Mich App 37, 39; 188 NW2d 33, 35 (1971), in which we said:

> "The shoulders of a highway are designed for vehicular traffic although not of the same character as vehicular traffic on the paved portion of the highway. We read the statutory duty of the state with respect to the repair of shoulders to be that the state is obligated to maintain the shoulders in reasonable repair so that they are reasonably safe for their intended use as adjuncts of the paved portion of the highway."

Or as in *Lynes v St Joseph County Road Commission,* 29 Mich App 51, 59; 185 NW2d 111, 114–115 (1970):

> "Traffic signals which control the flow of traffic are an integral part of the improved portion of the highway. The presence or absence of such signals, as well as the conditions in which they are maintained, directly relates to the statutory duty imposed upon the defendant to maintain the highway in a condition safe and fit for travel."

We add a stern and needed caveat. The state is not an insurer. The motorist who misuses any part of the improved portion of the highway is answerable for his own negligence which could bar his recovery. The asserted negligence of the state must be established as the proximate cause of the claimed injury and damage.

The question of whether decedent's injury and damage was proximately caused by one or more of the acts of negligence alleged is one of fact. See generally *Kubasinski v Johnson,* 46 Mich App 287; 208 NW2d 74 (1973), and cases cited therein. See also 57 Am Jur 2d, Negligence, § 136, pp 487–488. The question of whether enough evidence has been adduced to support plaintiffs' claim of proximate causality so as to make the issue one of fact is a question of law for the court. 57 Am Jur 2d, Negligence, § 137, pp 489–490.

Consequentially we examine plaintiffs' proofs in this regard. The allegation is that the metal guardrail was negligently designed and constituted a continuing nuisance.

The only eyewitness to the collision testified that the guardrail was:

"Metal, with a very blunt, relatively rounded end that reminded you of a boxer's glove, just a fist sticking out at you."

Charles S. Michalski, a traffic engineering consultant, testified quite extensively as to his evaluation of the effect of the defendant's failure to install the extension guardrail called for by its own plans:

"If a single guardrail had been installed, as indicated earlier in my testimony, a vehicle travelling north in the left-most lane would probably collide with that guardrail, a single guardrail, at an acute angle, and the

results of such a collision would be very less disastrous than colliding with the bitter end of a guardrail."

He further testified that if the car had struck the end of the proposed single guardrail extension head-on:

"[T]here would be some penetration of the car and the effects could be quite damaging, but if it struck the rail on the bias, and that would be highly probable if it were properly installed, then the effects would not be as damaging, there would be a lot of side damage but no penetration."

When asked what difference, if any, the proposed extension guardrail would have made, Michalski testified:

"Yes, because we have—the extension was a single offset guardrail, only two steel rails on it, compared to the four that we had at the end of the guardrail at station 857, so I would expect the effects of a side collision with a single rail to be less damaging, because the single guardrail would offer less resistance to buckling or being deflected."

Henry Cremin, a professional civil engineer, testified as to the purpose of the extension on the guardrail called for by the original plans:

"I feel that the purpose of it was to provide additional safety for a vehicle leaving the main traveled portion of the roadway, so that it would not strike the blunt end guardrail section and, in fact, it would be deflected and not fully impact itself on the south end of the double guardrail section. The 103 feet was angled slightly in a southwesterly direction, meaning that it was intended to pick up northbound traffic traveling in that direction that might leave the curve, the reverse-curve area, and to prevent that traffic from striking the blunt end guardrail section."

When asked whether he had an opinion as to what effect the proposed but not constructed extension guardrail would have had on the damages sustained, Mr. Cremin testified:

"Yes, I certainly do, and if I may just back up for a moment to say the double end guardrail section, as I think most any layman can appreciate, is a very strong structural section. The purpose of a guardrail is to be somewhat yielding, to provide a give, so to speak, to protect from that vehicle going across, perhaps, to protect it from leaving the roadway, but the blunt end of a double guardrail section is an extremely strong structural member, that is four guardrail sections all united in one single structure, and while it is true that the post sheared, the tremendous structural value of that has to be appreciated, it is just almost like a concrete bin sitting there to be run into. A single guardrail section extending south and angled from that has considerably more give to it and, in addition, it was angled to the southwest so that a vehicle *would not* strike against the end of the guardrail section. The intention of that section, I believe, was to deflect or to pocket or provide a give to a car that might perhaps leave the roadway surface and strike that, or head toward that double guardrail section, you would strike the single guardrail before it got to that blunt end of the double guardrail section and thereby would be deflected from hitting the blunt end of the double guardrail section. I believe the accident would have been considerably less severe had that 103.5 feet of single guardrail section been in place." (Emphasis supplied.)

Whatever the weight and credibility of this testimony was for the trial judge sitting without a jury. Certainly we must hold that in the aggregate it created a question of fact and was not susceptible of disposition by the judge as a matter of law.

In weighing the weight and credibility and making his fact-finding the trial judge held:

"It is obvious to the court that this device created a dangerous situation on a high-speed highway. The plans for the construction of this roadway anticipated a single offset guardrail extending at an angle to the southwest leading away from the southern-most blunt end of the double guardrail. It is apparent that such an extension would greatly alleviate the potential danger of the blunt end of the guardrail. By failing to install this safety feature, the defendant was negligent and permitted a nuisance to exist, such condition being inherently dangerous to persons using the highway.

"It is also readily apparent to the court that this condition caused the injuries leading to the decedent's death. Therefore such negligence on the part of the defendant and the nuisance created by the defendant was a proximate cause of the injuries of the decedent."

His conclusion was supported by competent, credible testimony. The testimony was virtually uncontradicted.

It is our duty to accept it under these circumstances.

The judgment of the Court of Claims is affirmed.[2] Costs to the appellees.

[2] We do not discuss the claim of the intervening plaintiff compensation insurance carrier, separately. Its position is identical with that of the administrator of the deceased's estate. Division of the award will, of course, follow the controlling statute.

PEOPLE v DONALD MOORE

1. CRIMINAL LAW—PROBATION—VIOLATION OF PROBATION—APPEAL.

An appeal as of right following a determination of probation violation and sentence is limited to those matters relating to the probation violation and the hearing thereon and is not available as to matters concerning the original conviction for which probation was imposed.

2. CRIMINAL LAW—PROBATION—PROBATION HEARING—NOTICE—RIGHT TO PRODUCE WITNESSES.

A defendant's claim that he was not given a written copy of the charges of probation violation against him and was not informed of his right to produce witnesses in his behalf is without merit where the record indicates that two days before he pled guilty to violating his probation, he was served with a copy of a notice of the violation of probation, and that at the hearing he was represented by counsel and was adequately informed of his right to present a defense to the charge.

Appeal from Recorder's Court of Detroit, Henry Heading, J. Submitted Division 1 June 25, 1974, at Detroit. (Docket No. 17633.) Decided August 15, 1974.

Donald Moore was convicted, on his plea of guilty, of a violation of probation. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 59 Am Jur 2d, Pardon and Parole § 34 *et seq.*

[2] 59 Am Jur 2d, Pardon and Parole §§ 92, 95, 97.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 ALR2d 1074.

Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Lewis, White, Lee, Clay & Graves, P. C., for defendant on appeal.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

PER CURIAM. On February 20, 1970 defendant pled guilty to assault with intent to rob being armed, MCLA 750.89; MSA 28.284, and he was sentenced to five years probation. On January 16, 1973, defendant was convicted of larceny, MCLA 750.356; MSA 28.588. A probation revocation hearing was held on March 12, 1973. Defendant pled guilty to violation of probation and he was sentenced to three to ten years in prison. Defendant filed a claim of appeal from the judgment and sentence of March 12, 1973.

Defendant raises three issues, two of which concern allegations of error in the original guilty plea proceeding. Those two issues are not properly before this Court. The Michigan Supreme Court has recently decided in *People v Pickett,* 391 Mich 305, 316; 215 NW2d 695, 701 (1974):

"that an appeal as of right is available either after conviction and imposition of probation or after determination of probation violation and prison sentence."

However, the scope of the second appeal is limited in that

"the appeal as of right following determination of probation violation and sentence must necessarily be lim-

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

ited to those matters relating to the probation violation and the hearing thereon."

Therefore, those matters concerning the guilty plea proceeding are not appealable as of right at this time. GCR 1963, 803.1.

The third issue raised by the defendant involves matters relating to the probation violation hearing and is, therefore, appealable as of right under the holding of *Pickett, supra.*

Defendant argues that at the probation revocation hearing he was not given a written copy of the charges against him, and that he was not informed of his right to produce witnesses in his behalf. This argument is not factually supportable. Although the hearing transcript does not refer to the written charge, the lower court record indicates that on March 9, 1973, two days before he pled guilty to violating his probation, defendant was served with a copy of a notice of violation of probation. *People v Springer,* 17 Mich App 406; 169 NW2d 507 (1969). The record also discloses that during the hearing, at which he was represented by counsel, defendant was adequately informed of his right to present a defense to the charge.

Affirmed.

RICH v EMERSON-DUMONT DISTRIBUTING CORPORATION

1. BROKERS—REAL ESTATE—LEASES—COMMISSIONS—CONTINGENT COMMISSIONS—GENERAL RULES—AGREEMENTS.

   The general rules that a broker is deemed to have earned his commission when the seller and the purchaser enter into a binding agreement, and that a broker and his principal may agree that the broker's right to a commission is contingent upon the actual performance of an executory agreement are applicable to a lease as well as to a sale.

2. BROKERS—REAL ESTATE—COMMISSIONS—LEASES—FAILURE TO EXECUTE.

   A broker did not earn his commission under the terms of an offer to lease which provided that the lessor would pay the broker's commission "upon execution of lease" where the lease was never executed.

3. BROKERS—REAL ESTATE LEASES—COMMISSIONS—IMPLIED OBLIGATION—DEFAULT OF LESSEE.

   A purchaser or lessee is not subject to an implied obligation to a broker to complete a purchase or lease nor is he held liable to pay the broker's commission upon default in completion of the contract or lease.

Appeal from Oakland, John N. O'Brien, J. Submitted Division 2 May 14, 1974, at Lansing. (Docket No. 18204.) Decided August 15, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Irving Rich against Emerson-Dumont Distributing Corporation, National Union Electric Corporation, and Robert Piche, for damages for breach of contract. Judgment for defendants. Plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 12 Am Jur 2d, Brokers §§ 160, 194, 195, 237.

Broker's right to commission on renewal, extension, or renegotiation of lease. 79 ALR2d 1063.

Schussel, Lifton, Simon, Rands & Kaufman (by *Joseph F. Galvin* and *Ronald H. Riback),* for plaintiff.

Miller, Canfield, Paddock & Stone (by *Gordon A. Becker),* for defendants.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

PER CURIAM. Plaintiff Irving Rich is a real estate broker duly authorized and licensed under the laws of the State of Michigan. On or about August 1, 1972, defendants, through their agent, Robert Piche, solicited plaintiff's services for the purpose of locating suitable warehouse space for defendants' use. Plaintiff subsequently located suitable space and on or about August 31, 1972, executed an "offer to lease". On or about September 1, 1972, the lessor of the premises in question, one Delmer G. Garrison, accepted the "offer to lease" and on September 5, 1972, the defendants' agent, Robert Piche, acknowledged receipt of the "accepted offer to lease".

Defendants thereafter failed to consummate the lease. Plaintiff commenced suit alleging that defendants had breached an implied promise to consummate the lease and claiming damages in the amount of $8,000, a figure equivalent to the commission to be paid him upon consummation of the lease.

The Oakland County Circuit Court granted defendants' motion for a summary judgment on the basis that the complaint failed to state a claim upon which relief could be granted. GCR 1963, 117.2(1). Plaintiff thereafter filed a motion for

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

judgment notwithstanding the verdict. The trial court denied the motion, thus reaffirming its dismissal of the complaint. Plaintiff now brings this appeal as of right.

The sole issue presented on appeal is:

Where a prospective lessee enters into an executory agreement with a property owner to enter into a lease at a later time, which executory agreement contains an express promise by the owner to the real estate broker to pay him a commission at the time the lease is consummated, and where the prospective lessee does not consummate the lease, is the real estate broker entitled to recover his commission from the prospective lessee?

In the absence of a special agreement, the general rule is that a broker is deemed to have earned his commission when the seller and the purchaser enter into a binding agreement. *Hayman Management Co v Dura Corporation,* 45 Mich App 522; 206 NW2d 754 (1973); *Smith-Burns Investment Co v Jones,* 240 Mich 89; 214 NW 946 (1927). However, a broker and his principal may, and usually do, agree that the broker's right to a commission is contingent on the actual performance of an executory agreement for the sale and purchase of property. *Hayman Management Co, supra; Fortner v Connell,* 367 Mich 146; 116 NW2d 37 (1962). Although the instant case deals with a lease rather than a contract for the sale of land, we think the principles enunciated above are nevertheless applicable.

In this case, there was no contract between plaintiff and defendant either with respect to employment or the lease arrangement. Rather, under the terms of the offer to lease, it was the lessor, and not the defendant-lessee, who agreed to pay

plaintiff a commission "upon execution of lease". Thus we see that plaintiff's right to a commission was not absolute, but contingent "upon execution of lease". Since the lease was never executed, plaintiff, under the terms of the offer to lease, has not earned his commission. Thus, the terms of the offer to lease preclude recovery of a commission by plaintiff in the absence of an executed lease.

Plaintiff, citing *Ellsworth Dobbs, Inc v Johnson,* 50 NJ 528; 236 A2d 843 (1967), asks us to imply a promise on the part of the defendant-lessee to consummate the lease and further urges us to hold that since the defendant failed to consummate the lease, he is liable to plaintiff for breach of the implied promise. *Ellsworth* is distinguishable from the case at bar since in *Ellsworth* the plaintiff was the vendor's broker, while such is not the case here. Furthermore, in *Ellsworth,* the New Jersey Supreme Court was merely extending a rule it had stated in an earlier opinion.[1] However, in our research efforts we have not uncovered any authority in this jurisdiction subjecting a purchaser or lessee to an implied obligation to a broker to complete a purchase or lease. Neither have we located any cases holding the purchaser or lessee liable to pay the broker's commission upon default in completion of the contract or lease. Nor do we think that such a rule should be applied to the facts of the present case.

The offer to lease specifically stated that the lessor was the party who would pay plaintiff his commission "upon execution of lease". As mentioned earlier, there was no express contract between plaintiff and defendant with respect to either employment or the lease transaction. Plaintiff had the opportunity to obtain from defendant an

[1] *Tanner Associates, Inc v Ciraldo,* 33 NJ 51; 161 A2d 725 (1960).

express promise to execute the lease or pay his commission upon failure to do so. Since plaintiff failed to procure such promise from defendant, this Court will not, as an afterthought, now imply such a promise for him.

The trial court acted properly in granting defendants' motion for summary judgment.[2]

Affirmed.

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[2] We wish to note that our decision does not leave plaintiff totally remediless. There is evidence in the record that an action by the landlord against the defendant-lessee is currently pending. Plaintiff can await final outcome of that case, and if specific performance or damages is awarded, plaintiff's commission could be advanced therefrom, since plaintiff could maintain an action against the landlord for commission earned and unpaid. Alternatively, plaintiff could seek to join in the pending action between the landlord and the defendant lessee.

FELDMAN v FELDMAN

1. DIVORCE—CHILD CUSTODY—APPEAL AND ERROR—EVIDENCE—DISCRETION.

   A trial court's custody adjudication will not be disturbed unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue (MCLA 722.28).

2. DIVORCE—CHILD CUSTODY—BEST INTEREST OF CHILDREN—MORAL FITNESS.

   Moral fitness is only one of the factors which a court considers in determining the best interest of the child in custody disputes; therefore, the best interests of the children would be served by giving custody to the plaintiff who had admittedly engaged in two adulterous affairs where the plaintiff had been a good mother, had been solely responsible for her sons' religious education, and evidence damaging to the defendant husband regarding his mental health had been introduced.

3. DIVORCE—PROPERTY AWARD—DISCRETION—APPEAL AND ERROR.

   The trial court has wide discretion in dividing property of a marital estate and the Court of Appeals will not reverse or modify a property award in a divorce action unless convinced that a different result would have been reached had the Court of Appeals occupied the position of the trial court.

4. DIVORCE—PROPERTY AWARD—SOURCE OF PROPERTY—MARITAL ASSETS.

   A court is not required to return property to the party who brought it into the marriage; property may be considered a marital asset even though one spouse accumulated it prior to marriage; therefore, the trial court properly ruled that the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur 2d, Divorce and Separation §§ 791, 793, 795, 839 *et seq.*, 868.

[2] 24 Am Jur 2d, Divorce and Separation §§ 787, 788.
Religion as factor in awarding custody of child. 66 ALR2d 1410.

[3, 4] 24 Am Jur 2d, Divorce and Separation §§ 839 *et seq.*, 868, 929, 933.

total equity of $35,350 in the parties' home was a marital asset even though the defendant husband had made a $25,000 down payment from funds accumulated prior to the marriage.

Appeal from Oakland, William R. Beasley, J. Submitted Division 2 December 10, 1973, at Lansing. (Docket No. 17508.) Decided February 11, 1974. Leave to appeal denied, 391 Mich 823.

Complaint by Nada Sue Feldman against Lester M. Feldman for divorce. Judgment of divorce for plaintiff. Defendant appeals. Affirmed in part, reversed in part.

Chase, Portney & Geller, for plaintiff.

Watson, Wunsch & Keidan, P. C., for defendant.

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

J. H. GILLIS, P. J. Plaintiff, Nada Sue Feldman, and defendant, Lester M. Feldman, married in 1965, are the parents of two sons, Eric, age 7, and Darin, age 4. Plaintiff brought her action for divorce in August, 1971. In June, 1973, the trial court granted plaintiff a no-fault divorce pursuant to MCLA 552.6; MSA 25.86, awarding her custody of the children and dividing the marital property. From this judgment defendant appeals. Since a divorce action is equitable in nature, our review is *de novo. Hutchins v Hutchins,* 36 Mich App 675; 194 NW2d 6 (1971).

First, defendant contends the trial court erred in granting plaintiff custody of the children. We do not disturb a trial court's child custody adjudication "unless the trial judge made findings of fact

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

against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCLA 722.28; MSA 25.312(8). The children's best interest is the guiding factor in child custody matters. MCLA 722.25; MSA 25.312(5); *Kurtz v Kurtz,* 32 Mich App 366; 188 NW2d 653 (1971).[1]

" 'Best interests of the child' means the sum total of the following factors to be considered, evaluated and determined by the court:

"(a) The love, affection and other emotional ties existing between the competing parties and the child.

"(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

"(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

"(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

"(e) The permanence, as a family unit, of the existing or proposed custodial home.

"(f) The moral fitness of the competing parties.

"(g) The mental and physical health of the competing parties.

"(h) The home, school and community record of the child.

"(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

"(j) Any other factor considered by the court to be

[1] The Child Custody Act of 1970, MCLA 722.21 *et seq.;* MSA 25.312(1) *et seq.,* repeals the preference for maternal custody of children under the age of 12. MCLA 722.541; MSA 25.311 [repealed by MCLA 722.29; MSA 25.312(9)].

relevant to a particular child custody dispute." MCLA 722.23; MSA 25.312(3).[2]

The keystone of defendant's argument is the alleged moral unfitness of his wife. Considerable testimony supports this allegation. Plaintiff admitted that during 1970 and 1971 she engaged in adulterous affairs with two men. Defendant alleged his wife committed adultery with a third man, but this was denied. Uncontroverted testimony of defendant and a third party also indicates plaintiff used profanity several times in the presence of the children. Defendant testified that his wife frequently walked around the house in front of the children partially or totally undressed. The trial court in its findings of fact stated:

"With respect to the plaintiff, the court finds her to be lacking in credibility and judgment. She appears to be an immature, selfish young lady. It has been suggested that she possesses credibility because on trial she was candid and frank about her marital misconduct. In the circumstances of this case, where the record shows a family conference, including all four parents of the parties, concerning her infidelity toward her husband and in the light of the photographs taken of her and her man friend outside of his apartment late at night, she was hardly in a position other than to admit her marital misconduct. This court is also satisfied that she was guilty of marital misconduct during the Florida vacation in the summer of 1968. This court is satisfied from the testimony that plaintiff made a regular practice of deceiving and lying to defendant."

Two points should be made on plaintiff's behalf. First, there were no allegations or proof of any marital misconduct by plaintiff since 1971. Second, Mrs. Feldman's use of profanity apparently oc-

[2] Factor (i) was correctly ruled to be inapplicable here because of the tender age of the children.

curred at times of marital discord; her swearing was directed at her husband, not the children. However, even conceding these two "plus points", we think, as did the trial court, that as between plaintiff and defendant, defendant is the more morally fit.

But, "(f)", moral fitness of the competing parties, is only one of ten factors which the court considers in child custody disputes. It is important to place the highly prejudicial evidence against plaintiff in the proper perspective. This the trial court did. Neighbors, babysitters and teachers testified on behalf of plaintiff. Their testimony leads us, as it did the trial court, to this conclusion: plaintiff has been a good mother to her two sons, who, for their ages, are normal well-adjusted children. The trial judge found that,

> "plaintiff mother has carried the bulk of the day-to-day responsibilities for the children's education, medical care and maintenance. The evidence indicates that as an interested, concerned parent she keeps contact with the school teachers and with the children's doctors. The court is satisfied that plaintiff has kept the children clean, properly dressed, adequately fed, and has not left them unattended. The court believes that she has a closer, more intimate relationship with the children than defendant."

In addition, plaintiff has been solely responsible for her sons' religious education; she enrolled them in Hebrew school and took them to synagogue on high holy days.

Lastly, evidence damaging to defendant was introduced regarding his mental health. Plaintiff testified that Mr. Feldman attempted suicide in 1966 by drinking Bowlene, a toilet bowl cleaner. Defendant denied this, but hospital records later introduced confirmed plaintiff's testimony.

In ruling that the best interests of the Feldman children would be served by giving custody to the plaintiff, the trial court concluded:

"In this case the plaintiff has, in most * * * respects, shown herself to be a concerned, interested mother. The court also notes that plaintiff has appeared to recognize that her behavior with other men has not been a good example for the parties' sons. This court believes plaintiff's feelings for the children are genuine and that she will not repeat the behavior that has jeopardized her right to custody of them. As between the parties, this court believes that although it is a close question, the evidence indicates that the best interests of the children will be best served by placing their custody in their mother."

We agree that the question of custody here is a close one. Being a close question, it is clear that the trial court's decision was not against the great weight of the evidence. Therefore, we uphold the court's decision as to custody.

Secondly, defendant challenges the division of the marital property. He argues that the court erred in including the total equity in the parties' residence in Southfield in the marital estate. The total equity in the home was determined to be $35,350. The court ordered the property sold, the net proceeds to be applied as follows: (1) $2,700 to pay plaintiff's attorney fees; (2) $25,000 to plaintiff; and (3) the balance to be divided equally between plaintiff and defendant. The $25,000 down payment was paid by defendant from his funds, most of which were accumulated prior to the marriage. Defendant contends that this $25,000 is not a marital asset, and that the court should have only considered the remaining equity of $10,350 when making its property division. In essence, defendant is saying that the court is required to restore to a

husband all property (or its value if converted to another asset) he owned prior to the marriage. We disagree.

The trial court has wide discretion in dividing the property of the marital estate. *Czuhai v Czuhai,* 30 Mich App 208; 186 NW2d 32 (1971). We will not reverse or modify a trial court's property award unless convinced that we would have reached a different result in its position. *Paul v Paul,* 362 Mich 43; 106 NW2d 384 (1960); *Dral v Dral,* 8 Mich App 663; 155 NW2d 236 (1967).

"The division of property in a divorce action is not governed by any rigid rules or mathematical formula. Each case depends on the particular facts involved. * * *

"The portion of property awarded to each party depends upon all of the equitable factors involved, including the following: source of property, contribution towards its acquisition, the years of married life, the needs of the parties, their earning ability and also the cause for divorce." *Johnson v Johnson,* 346 Mich 418, 431; 78 NW2d 216, 222 (1956).

The fact that the source of property and contributions towards its acquisition are only two of several factors to be considered in the property settlement indicates that courts in this state are not required to return property to the party who brought it into the marriage. Michigan statutory law is in accord.[3] Therefore, property is considered a marital asset even though the spouse accumulated it prior to the marriage. *Hutchins v Hutchins, supra,* confirms the view we take here. There the marital property consisted primarily of a $5,351 antique collection, most of which the husband

[3] MCLA 552.19; MSA 25.99, provides the court *may* restore to a party that property which he owned prior to marriage. Thus, restoration is only discretionary.

had accumulated before his marriage, and a home valued at approximately $18,000, which the husband owned prior to the marriage. In its settlement the trial court ordered the antique collection sold and the proceeds divided equally, and awarded each party a one-half interest in the realty. Thus, a considerable portion of that property which the husband owned prior to marriage was not restored to him. This Court approved that distribution. In the case at bar the trial court correctly ruled that the total equity of $35,350 in the Southfield home was a marital asset, and its division of that asset was proper.[4] We have reviewed defendant's other assignments of error with regard to the property settlement and find them without merit.

Lastly, there is the question of alimony. The trial court ordered defendant to pay plaintiff $60 per week for six months. Prior to 1970, MCLA 552.23; MSA 25.103, prohibited a court award of alimony to an adulterous wife. This section has been recently amended and the alimony ban has been deleted. Alimony is now, in all instances, discretionary with the court. It is readily apparent that the Legislature did not feel that a spouse who commits a single act of adultery during the course of a marriage of long duration should be denied alimony. But that is not the case here. We do not think, considering the age of the plaintiff, the length of the marriage and the extensive marital misconduct on her part, that she should receive alimony. In our *de novo* review and pursuant to GCR 1963, 820.1(7), we direct the trial court to enter an order striking the alimony award.

[4] It should be noted that defendant, owner of a custom drapery store valued at $115,000, was awarded all right, title and interest in this business, even though it had appreciated approximately $39,000 during the marriage.

Affirmed in part, reversed in part. No costs, neither party having prevailed in full.

All concurred.

BARROW v SALY

1. TRIAL—PRETRIAL CONFERENCE—PURPOSE.

A pretrial conference is conducted to simplify and narrow the issues of the case for expeditious trial and to avoid traps and surprises.

2. TRIAL—PRETRIAL CONFERENCE—PRETRIAL SUMMARY—PURPOSE—MODIFICATION—DISCRETION.

The modification of a pretrial summary rests with the sound discretion of the trial judge, but a party may generally rely on a pretrial summary to frame the triable issues.

3. TRIAL—PRETRIAL CONFERENCE—CROSS-CLAIM—INDEMNITY—DISMISSAL OF ACTION—DISCRETION.

A trial court abused its discretion creating injustice by dismissing a defendant's cross-claim against another defendant for indemnification because it was filed after the pretrial conference where almost seven months elapsed between the filing of the cross-claim and the actual start of the trial; the parties were entitled, in view of the lengthy passage of time between the filing of the cross-claim and the trial, to know what their respective positions were at trial; that knowledge may well have altered preparation or trial tactics, and it was the duty of the judge to place the parties in their correct stance for trial.

Appeal from Oakland, Clark J. Adams, J. Submitted Division 2 June 26, 1974, at Detroit. (Docket No. 17794.) Decided August 16, 1974. Leave to appeal denied, 393 Mich —.

Complaint by William A. Barrow, Inez Barrow, and Mary F. Healander for herself and as administratrix of the estate of Samuel Healander, deceased, against Movita Saly and Jerome-Duncan, Inc., for damages for injuries received in an auto-

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial §§ 8–11.

[3] 24 Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 89, 90.

mobile accident. Verdict and judgment for plaintiffs. Jerome-Duncan satisfied the judgment and appeals the dismissal of its cross-claim against Saly for indemnification. Reversed and remanded for trial on the issue of indemnification.

Garan, Lucow, Miller, Lehman, Seward & Cooper (by *Ronald C. Winiemko),* for Jerome-Duncan, Inc.

Eggenberger, Eggenberger, McKinney & Weber, for Movita Saly.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

PER CURIAM. Defendant, Jerome-Duncan, Inc., (hereinafter referred to as Jerome) appeals from an order of the trial court dismissing its cross-complaint for indemnity against defendant Movita Saly.

The cause of action arose out of an automobile accident wherein defendant Saly was driving an automobile owned by defendant Jerome. Plaintiffs, as a result of the accident, filed suit naming both Saly and Jerome as defendants.

A pretrial conference was held and a pretrial summary was issued by the trial judge to all the parties which read in part:

"The Court inquired of the parties as to whether or not all claims arising out of the transaction or occurrence which is the subject matter of this action have been joined. Counsel agreed that all related matters have been joined in this action."

GCR 1963, 301.3 deals with pretrial conferences and provides in pertinent part:

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

"Pretrial Summary. The judge shall prepare, file, and cause to be served upon the attorneys of record, at least 10 days in advance of trial a summary of the results of the pretrial conference specifically covering each of the items herein stated. The summary of results controls the subsequent course of the action unless modified at or before trial to prevent manifest injustice."

The purpose of the pretrial statement and summary have been discussed by this Court in several recent cases. In *Reinhardt v Bennett,* 45 Mich App 18, 22, 25; 205 NW2d 847 (1973), we stated:

"The pretrial conference is conducted to simplify and narrow the issues of the case for expeditious trial and to avoid traps and surprises.

* * *

"The modification of a pretrial summary rests with the sound discretion of the trial court and while a party may generally rely on the pretrial summary to frame the triable issues, our primary concern is to see that justice is done."

On April 23, 1971, two weeks before the case was scheduled for trial, Jerome filed a cross-complaint seeking indemnification from Saly if liability to plaintiffs was found.[1] Trial was then delayed until November 22, 1971, wherein a jury verdict was returned in favor of plaintiffs against both defendants.[2] Prior to the commencement of the trial, the judge reserved judgment on Jerome's cross-complaint.

Jerome on October 18, 1972 filed a motion for entry of judgment on the cross-complaint. A hearing was held on January 17, 1973, at which time the court ruled that Jerome's cross-complaint

[1] Saly filed a motion to strike the cross-complaint which was granted by the judge on January 22, 1973.

[2] Subsequently, Jerome paid plaintiffs, satisfying the judgment.

should be dismissed because it was filed after the pretrial conference.

We are of the opinion that the trial court abused its discretion creating injustice by dismissing the cross-complaint. Almost seven months elapsed between the filing of the cross-complaint and the actual start of the trial. Saly certainly cannot claim that considering the question of indemnity at trial would have constituted a trap or a surprise. The parties were entitled, in view of the lengthy passage of time between the filing of the cross-complaint and the trial, to know what their respective positions were at trial. That knowledge may well have altered preparation or trial tactics, and it was the duty of the judge to place the parties in their correct stance for trial.

Reversed and remanded solely for trial on the issue of indemnity between the two defendants.

TOCCO v ATLAS TOWNSHIP

1. ZONING—ORDINANCES—EXCLUDED USE—CONSTITUTIONAL LAW—EQUAL PROTECTION.

   A zoning ordinance which, on its face, *totally* excludes from a municipality a use recognized by the constitution or other laws of the state as legitimate carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use; however, such a taint is not presumed when the general use is reasonably permitted in the community and the only issue is whether it was arbitrarily or capriciously denied as to a particular parcel of land.

2. ZONING—ORDINANCES—CONSTITUTIONAL LAW—PRESUMPTION OF VALIDITY.

   Zoning ordinances enjoy a presumption of validity and that presumption is rebutted only when constitutional defects appear on the face of the ordinance or are shown by competent evidence.

3. ZONING—ORDINANCES—INVALIDITY—CLASSIFICATION.

   Invalidity does not appear on the face of a zoning ordinance merely from its classification of certain property for use as single residences only.

4. ZONING—ORDINANCES—CONSTITUTIONAL LAW—MOBILE HOMES—TRAILER PARKS—TOTAL EXCLUSION—ARBITRARY EXCLUSION.

   A township zoning ordinance is invalid insofar as it prevents the plaintiff from using his property as a mobile home park site where the plaintiff's property was not suitable for single family residential development, as presently zoned, no land in the defendant township was in fact zoned for trailer parks, no rational reasons were advanced for denial of plaintiff's rezoning

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REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning § 20.
[2] 58 Am Jur, Zoning §§ 16, 21.
[3] 58 Am Jur, Zoning § 43.
[4] 58 Am Jur, Zoning § 63.

Maintenance or regulation by public authorities of tourist or trailer camps, motor courts, or motels. 22 ALR2d 774.

petition and the defendant affirmatively sought to zone trailer parks out altogether; the exclusion of plaintiff's proposed use is arbitrary, capricious, and fanciful.

Appeal from Genesee, Donald R. Freeman, J. Submitted Division 2 June 4, 1974, at Lansing. (Docket No. 13951.) Decided August 27, 1974.

Complaint by Paul Tocco against Atlas Township for a declaratory judgment that defendant's zoning ordinance is unconstitutional as applied to plaintiff's property. Judgment for plaintiff. Defendant appeals. Affirmed.

Neithercut & Neithercut (by *Robert L. Shegos),* for plaintiff.

Lattie & Anastor, for defendant.

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

O'HARA, J. Plaintiff initiated this action on August 24, 1970, seeking to have defendant's zoning ordinance declared unconstitutional as applied to his Lake Shinanguag property in Genesee County. The trial judge so held. He entered judgment. From that judgment, the defendant appeals.

Plaintiff purchased certain property in Atlas Township, Genesee County, in 1968. His purpose in buying this land was assertedly to build and operate a mobile home park on it. He knew the acreage was zoned for agricultural use but nevertheless went ahead with the deal. At the time of purchase, the land was not under cultivation.

Testimony at trial tended to establish that this parcel would be worth more if zoned for a trailer

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

park rather than single-family homes. Testimony also established that Atlas Township was primarily rural and barren of mobile home parks at the time. The principal issue was whether the land concerned was suitable for residential development.

Paul J. Monohon, a civil engineer and land surveyor retained by the plaintiff to lay out his proposed facility, conducted soil borings on a random basis and concluded that this property was unsuitable for septic tanks. He opined that "an offsite disposal plant consisting of a 24-hour extended aeration [treatment] plant followed by sand filters" would be required. The expense made subdivision development of the plaintiff's acreage economically impractical.

John Loizon, an architect specializing in site planning for mobile home parks, testified that the plaintiff's property could not be subdivided for more than 66 to 80 homes. The approximately $1,000,000 to $1,500,000 entailed made that unfeasible, so Loizon "revised [his] thinking to development of a trailer park since * * * there were none in this area". Such a development would embrace 310 sites at a total cost of $750,000–$800,000. No projections on commercial or multiple-dwelling uses were run.

Between 31 and 52 new homes had been built annually in Atlas Township from 1967 to 1971. In the immediate area of Lake Shinanguag, 33 new homes have been built since 1967. Approximately four of these, situated to the immediate north of the plaintiff's property, were constructed within the last 30 months prior to trial. Two others were built on sites directly adjacent to it. Existing homes on the lakeshore cluster "on the east side and stretch down to Mr. Tocco's property".

James Galbraith, a professional planner retained by the defendant in contemplation of this lawsuit, testified as to the suburban-agricultural character of the Lake Shinanguag shoreline. To preserve that environment, he asserted, it should be zoned single-family residential. Mobile homes, he said, are a transitional use not compatible with such zoning. Mr. Galbraith admitted that Atlas Township contained no mobile home parks but insisted that existing zoning made ample provision for them.

William Hohloch, a consulting engineer retained to prepare sewerage studies for the defendant, testified for the defendant. Between 1968 and January, 1970, he claimed, he had developed a plan for the defendant. Applications for construction grants from the state and Federal governments were filed on September 15, 1970. Although no formal plans had been signed, defendant was proceeding to implement this plan when this case came to trial. No sanitary sewers were operating at that time.

Prior to the zoning changes that precipitated this litigation, approximately 200 acres within the defendant's boundaries were zoned for C-4 use—the classification then covering trailer parks. Various property so zoned was the site of a country club, storage facilities, and the county road commission's garage. The record indicates that certain other parcels were as yet undeveloped.

The remaining facts are not disputed. Soon after purchasing this property, the plaintiff petitioned the defendant to rezone it from RSA[1] to C-4[2] so that a trailer park could be located on it. The defendant denied that petition—even though the

[1] Residential Suburban Agricultural.

[2] C-4 is a commercial classification.

Genesee County Metropolitan Planning Commission[3] approved the same—and amended its zoning ordinance to provide a separate "RTP"[4] category for mobile home parks. No land in the township is so zoned. There was some conflicting evidence by township employees or officers as to whether they considered the C-4 land which had hitherto been set aside for mobile home trailer parks to have become RTP land under the amendment to the zoning ordinance. The township thereafter summarily denied a second petition of the plaintiff's and rejected those of four other applicants as well. There are still no trailer parks and no land specifically zoned for such use appeared on the zoning map.

The trial judge made specific findings of fact. We quote:

"1. The soil borings show that the property is not suitable for single dwellings.

"2. An extended aeration sewage treatment plant would be required for the proposed mobile home park, at a cost of $100,000 to $150,000.

"3. Soil conditions make it unfeasible for the use of septic tanks, ordinarily used for private residences at this site.

"4. There are no sites in Atlas Township presently being used for mobile home parks.

"5. The township is essentially rural, with approximately 100 homes on both sides of Lake Shinanguag, the largest concentration being on the M-15 side, the largest number of homes not being in the near proximity of the subject property.

"6. Considerable difficulty is encountered in recording of the property under the Plat Act because soil conditions make it unsuitable for usual sewage systems."

[3] The record is somewhat confusing and to a degree unclear as to the difference between the Genesee County Metropolitan Planning Commission and the Genesee County Zoning Coordinating Committee.

[4] RTP being a residential or rural trailer park classification.

The judge concluded that the defendant had sought to zone out trailer parks and that the plaintiff's property was unsuitable for the residential development which its present zoning required. A judgment was entered invalidating the ordinance. Defendant appeals of right.

In *Kropf v City of Sterling Heights,* 391 Mich 139, 155–156; 215 NW2d 179, 185 (1974), Chief Justice KAVANAGH has stated the controlling doctrine succinctly:

> "On its face, an ordinance which *totally* excludes from a municipality a use recognized by the constitution or other laws of this state as legitimate also carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use. Such a taint can hardly be presumed to be present in cases such as that presently before us when the general use is reasonably permitted in the community and the only issue is whether it was arbitrarily or capriciously denied as to the particular parcel of land."

The opinion expressly overruled the "preferred use" concept developed by this Court in *Bristow v City of Woodhaven,* 35 Mich App 205; 192 NW2d 322 (1971).

Kropf thus makes clear that the plaintiff must demonstrate that zoning ordinances are unreasonable as applied to his property. They enjoy a presumption of validity. That presumption is rebutted only when alleged constitutional defects appear on the face of the ordinance or are buttressed by competent evidence. "Invalidity does not appear on the face of the ordinance merely from its classification of certain property for use for single residences only." *Northwood Properties Co v Royal Oak City Inspector,* 325 Mich 419, 423; 39 NW2d 25, 26 (1949), quoted with approval in *Kropf,* 391 Mich at 156; 215 NW2d at 186.

The *Kropf* test establishes that the revision of its zoning ordinance by the defendant is not prima facie unconstitutional. Localities can constitutionally restrict certain land to certain uses. It follows that they can also constitutionally revise zoning laws.

The challengers must show not that the challenged action presents a debatable issue but that it is "a whimsical *ipse dixit*" admitting "no room for a legitimate difference of opinion concerning its reasonableness". *Brae Burn, Inc v Bloomfield Hills,* 350 Mich 425, 432; 86 NW2d 166, 170 (1957), quoted with approval in *Kropf,* 391 Mich at 162; 195 NW2d at 189.

We think plaintiff here has carried his burden of proof. Defendant admits that there are no mobile home parks within its limits. It also concedes that such parks were a use permitted by the C-4 designation at the time of the plaintiff's original petition for rezoning and that his petition prompted the revisions involved in this case. No land was in fact zoned RTP at the time of trial. If the plaintiff is to be believed, the defendant has since denied rezoning petitions for four other developers. The defendant itself admits to denying the plaintiff's second petition when he presented it after the creation of RTP. No rational reasons for the denial were advanced.

Our review of this record supports the conclusion of the trial judge that the defendant de facto affirmatively sought to zone trailer parks out altogether.

Part of plaintiff's claim reduces itself to a contention that his property could be more profitably developed as a mobile home park than as a subdivision. That is not enough to make its current zoning for single-family residential use unconstitutional.

The land need not be zoned for its most lucrative use. *Scholnick v Bloomfield Hills,* 350 Mich 187; 86 NW2d 324 (1957). Although depreciation of property values is one factor to be considered, *Smith v Village of Wood Creek Farms,* 371 Mich 127; 123 NW2d 210 (1963), zoning classifications may be valid despite substantial disparities in value. *Yale Development Co v City of Portage,* 11 Mich App 83; 160 NW2d 604 (1968). Residential classifications are not unreasonable simply because the parcels concerned could be more profitably put to commercial use. But such zoning may be arbitrary and irrational if the lots are in fact totally unsuitable for residential use and have neither market nor value for that purpose.

The question becomes whether the exclusion of plaintiff's proposed use is arbitrary, capricious or fanciful. The trial judge made detailed findings of fact. They are supported by credible evidence. We accord them respectful weight. They preponderate in our view.

Kropf, supra, is a powerful opinion. It restores Michigan zoning law to the *Brae Burn* days. But even under the *Brae Burn* aegis courts were not stripped of all right of judicial review in zoning cases.

We have hereinbefore quoted from the trial judge's findings of fact and we agree with them.

Powerful as *Kropf, supra,* is, it is not, as we read it, a judicial straightjacket mandating the approval by reviewing courts of every zoning ordinance however worded or however in fact applied.

The judgment of the circuit court is affirmed. No costs.

All concurred.

PEOPLE v GILBERT

OPINION OF THE COURT

1. CRIMINAL LAW—CONFESSIONS—VOLUNTARINESS—HEARING—FINDINGS—APPEAL AND ERROR.

The findings of a trial court in a hearing to determine the voluntariness of a confession will be reversed upon appeal only if they are clearly erroneous.

2. CRIMINAL LAW—EVIDENCE—CONFESSIONS—VOLUNTARINESS—CREDIBILITY.

A confession properly admitted into evidence is on an equal footing with all other properly admitted evidence, and the defendant is free to familiarize the jury with the circumstances that attended the taking of his confession, including facts bearing on voluntariness, to impeach its credibility, or to challenge the fact that it was ever given at all.

3. CRIMINAL LAW—INSTRUCTIONS TO JURY—CONFESSIONS—PRETRIAL HEARING—VOLUNTARINESS—JURY—PROVINCE OF JURY.

Informing a jury of the existence, nature, and results of a pretrial hearing to determine the voluntariness and admissibility of a defendant's confession improperly impinges upon the province of the jury; such information makes it unlikely that the jury will thereafter decide that the confession was never made and tends to unfairly discount the credibility of the defendant's impeaching evidence, especially that properly admitted evidence which relates to voluntariness.

4. HOMICIDE—MURDER—GENERAL VERDICT—PREMEDITATED MURDER—FELONY MURDER.

A defendant's conviction of first-degree murder in a general verdict must be reversed where the jury was instructed upon

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 29 Am Jur 2d, Evidence §§ 523–596.
[3, 5] 29 Am Jur 2d, Evidence § 584.
[4] 53 Am Jur, Trial §§ 286, 290, 627.
[6–9] 30 Am Jur 2d, Evidence §§ 1140–1142.
[10] 53 Am Jur, Trial §§ 1005, 1035–1062.

both premeditated and felony murder theories but the felony murder theory was proved only by the defendant's confession and was therefore not sufficiently established, because a conviction must be reversed where it rests upon one of the two theories, one of which is permissible and one of which is not, and it is not possible to say for sure upon which theory the conviction rests (MCLA 750.316).

CONCURRENCE IN PART, DISSENT IN PART, BY O'HARA, J.

5. CRIMINAL LAW—CONFESSIONS—PRETRIAL HEARING—INSTRUCTIONS TO JURY—EVIDENCE.

It is proper for a trial judge to inform the jury of a pretrial hearing to determine the voluntariness and admissibility of a confession where the defense has challenged the credibility of the confession by attempting to introduce evidence bearing on its voluntariness.

6. CRIMINAL LAW—CONFESSIONS—CORPUS DELICTI—INCULPATORY STATEMENTS OF FACT.

The corpus delicti was proved by more than the accused's naked confession where there was sufficient other evidence in the several statements that the accused made to the police regarding the crime which were simple statements of fact that may have had inculpatory overtones but were far short of a confession.

7. CRIMINAL LAW—CONFESSIONS—ADMISSIBILITY.

A confession itself becomes admissible when there is any evidence of the corpus delicti dehors the confession.

8. HOMICIDE—MURDER—CORPUS DELICTI—EVIDENCE—CIRCUMSTANTIAL EVIDENCE—INFERENCES.

The corpus delicti refers to the crime, not to the accused perpetrator, and proof of the identity of the perpetrator of the crime is not a part of the corpus delicti; therefore, in a murder case, the corpus delicti was sufficiently established where the evidence consisted of the identification of two dead bodies riddled by gunshots, bits of glass which matched the broken headlights of the car abandoned by the accused, and testimony of a witness who saw two men running near the house where the bodies were found and who saw them leaving in the car which was later found and identified as the car involved; the corpus delicti may be established by circumstantial evidence and reasonable inferences.

9. CRIMINAL LAW—EVIDENCE—CIRCUMSTANTIAL EVIDENCE—CORPUS DELICTI—ORDER OF PROOF.

It is not necessary to prove the corpus delicti beyond a reasonable doubt before proof is admissible tending to connect the accused with the crime where the same set of facts, in a case of circumstantial evidence, tends to connect the defendant with the commission of the crime and to prove the corpus delicti.

10. CRIMINAL LAW—JURY—VERDICTS—GENERAL VERDICTS—FORM OF VERDICTS.

A jury in a criminal case has the right to return a general verdict on the merits, and there is no authority which holds that, when the case is submitted to the jury on two theories, the form of the verdict must specify upon which theory the jury based the verdict.

Appeal from Ingham, Jack W. Warren, J. Submitted Division 2 June 4, 1974, at Lansing. (Docket No. 15536.) Decided August 27, 1974. Leave to appeal denied, 393 Mich —.

Wayne Gilbert, Jr., was convicted of first-degree murder. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Raymond L. Scodeller,* Prosecuting Attorney, and *Corbin R. Davis,* Assistant Prosecuting Attorney, for the people.

Stiles, Fowler & Dudley, P. C., for defendant.

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

R. B. BURNS, J. Defendant Wayne Gilbert, Jr. was convicted for the first-degree murders of Ruth Parrish and Debbie Ann Berger. He appeals.

The first ground for defendant's appeal is that the trial court erroneously failed to suppress the

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

defendant's confession. Defendant was arrested in Wisconsin. Defendant claims that while in the custody of the Wisconsin authorities he was forced to confess as a result of coercive tactics such as sleep deprivation, food deprivation, improper advice of his rights, isolation, and other intimidation. Because he had given such a confession to the Wisconsin authorities defendant gave an ostensibly admissible confession to the Michigan authorities, who were kept unaware of the improprieties, when they arrived to extradict him. Pursuant to *People v Walker,* 374 Mich 331; 132 NW2d 87 (1965), a suppression hearing was held on the matter. The trial court found that the confessions were voluntarily made. The findings of a trial court in a *Walker* hearing will only be reversed on appeal if they are clearly erroneous. *People v Hummel,* 19 Mich App 266; 172 NW2d 550 (1969), and *People v Toneff,* 37 Mich App 221; 194 NW2d 390 (1971). A review of the record fails to substantiate any claim that the trial court's determination was clearly erroneous.

Defendant also challenges the propriety of the trial court's jury instructions. After the defendant's confession had been admitted into evidence before the jury, defense counsel attempted to impeach its credibility by producing evidence that touched upon its voluntariness, as well. As a result, the trial court instructed the jury that a *Walker* hearing had been held, that the defendant's confession was held to have been voluntarily given, and that the jury's determinations were limited to assigning the proper weight and credibility to the statements. Defense counsel timely objected to the instruction. Thus, the issue is preserved. GCR 1963, 516.2.

The court said:

"All right, ladies of the jury. Ladies of the jury, I want to make abundantly clear to you something which I instructed you upon prior to your being excused momentarily. I discussed with you the matter of what happens where a defendant makes a confession or an admission against interest. And I indicated to you * * * the defendant is entitled to a * * * hearing in advance of the trial * * * before the judge on a separate record. The judge determines whether or not that confession * * * [was] voluntarily made. If they were voluntarily made, * * * if the judge looks at the duration and conditions of detention, the attitude of the police officers, the physical, mental state of the accused, the diverse pressures that might sap the accused's strength and so forth; if the judge declares, or, determines * * * that the confession * * * was voluntarily given to the police in this case, he then on the record indicates that this confession * * * shall be admissible in evidence.

* * *

"Now, in this case I have made such a determination, that that could come before you, was voluntarily made, so far as any conduct of the police officers were *[sic]* concerned. It is for you the jury to consider and determine the weight and credibility of that confession * * * ."

The purpose of the suppression hearing was to determine the admissibility of defendant's confession as evidence. A resolution in favor of admissibility merely placed the confession on an equal footing with all other properly admitted evidence. Defendant is as free as he was before the *Walker* hearing to familiarize the jury with the circumstances that attended the taking of his confession, including facts bearing on voluntariness, to impeach its credibility or to challenge the fact that it was ever given at all. *Lego v Twomey,* 404 US 477, 485–486; 92 S Ct 619, 625; 30 L Ed 2d 618, 625 (1971). After such evidence has been admitted, the trial judge may instruct the jury that they should

determine, on the basis of all the relevant evidence, 1) if the confession was made, and 2) if they so find, they should decide if the statement is true. *People v Williams,* 46 Mich App 165; 207 NW2d 480 (1973).

The trial court should not, as happened in this case, go on to discuss anything more. For, to inform the jury of the existence, nature, and results of a *Walker* hearing not only makes it unlikely that the jury will thereafter decide the confession was never made, *Williams, supra,* but it also tends to unfairly discount the credibility of defendant's impeaching evidence, especially that properly admitted evidence that relates to voluntariness. The trial court thus would improperly impinge upon the province of the jury.

Michigan has long recognized the critical role confessions play in criminal trials. *People v Summers,* 15 Mich App 346; 166 NW2d 672 (1968). A properly preserved error that crippled the defendant's ability to challenge a confession cannot, in light of this precedent, be deemed harmless.

To avoid repetitious appeals, we will also consider the defendant's third ground for appeal. Defendant was charged on an open count of murder. At trial, evidence was produced to support both premeditated and felony murder theories. However, the only evidence bearing on the felony murder theory was defendant's confession itself. The jury was instructed on both theories, and defendant was found guilty of first-degree murder in a general verdict. While there is some evidence strongly suggesting the jury relied on a felony murder theory, there is no definite proof showing whether the jury relied on either or both theories to reach the verdict. The corpus delicti must be established by evidence other than the accused's

confession. *People v Allen,* 390 Mich 383; 212 NW2d 21 (1973), and *People v Sparks,* 53 Mich App 452; 220 NW2d 153 (1974). With only a confession to prove it, the felony murder theory was not sufficiently established in this case. When the defendant stands convicted on one of two theories, one of which is permissible and one of which is not, the inability to say for sure on which the conviction rests demands reversal. *Stromberg v California,* 283 US 359; 51 S Ct 532; 75 L Ed 1117 (1931), *People v Purifoy,* 34 Mich App 318; 191 NW2d 63 (1971), and *People v Davenport,* 39 Mich App 252; 197 NW2d 521 (1972).

Reversed and remanded for a new trial.

McGREGOR, P. J., concurred.

O'HARA, J. *(concurring in part, dissenting in part).* My colleagues have made decisional holdings on three issues. With one I agree. With the other two I am in disagreement.

I am of necessity going to add factual background to my opinion because discussion of legal questions in the sterility of abstract theories very often, in my view, can lead to the omission of facts that materially affect an application of what otherwise might be an acceptable statement of a legal principle.

The first point made by the majority is that the finding of a trial judge in a *Walker*[1] hearing will not be reversed unless clearly erroneous. I agree that this is a correct principle of law.

The second issue discussed by the majority is: Was it reversible error for the trial judge to charge the jury as hereinafter quoted since defense

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

counsel challenged the credibility of defendant's confession by attempting to introduce evidence that went to the question of its voluntariness. The court included the following excerpt in his charge to the jury:

"All right, ladies of the jury. Ladies of the jury, I want to make abundantly clear to you something which I instructed you upon prior to your being excused momentarily. I discussed with you the matter of what happens where a defendant makes a confession or an admission against interest. And I indicated to you * * * the defendant is entitled to a * * * hearing in advance of the trial * * * before the judge on a separate record. The judge determines whether or not that confession * * * [was] voluntarily made. If they were voluntarily made, * * * if the judge looks at the duration and conditions of detention, the attitude of the police officers, the physical, mental state of the accused, the diverse pressures that might sap the accused's strength and so forth; if the judge declares, or, determines * * * that the confession * * * was voluntarily given to the police in this case, he then on the record indicates that this confession * * * shall be admissible in evidence.

* * *

"Now, in this case, I have made such a determination, that that could come before you, was voluntarily made, so far as any conduct of the police officers were *[sic]* concerned. It is for you the jury to consider and determine the weight and credibility of that confession * * * ."

There was no error in this instruction. Under the circumstances of the record he could not leave the jury without any explanation of why it could not consider the issue. He did it fairly to the prosecution and the defendant. He followed with precision the rule permitted to the states by *Jackson v Denno,* 378 US 368; 84 S Ct 1774; 12 L Ed 2d 908; 1 ALR 3d 1205 (1964), and adopted by this

state in *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965).

I am not clear for what purpose the majority cites *Lego v Twomey,* 404 US 477; 92 S Ct 619; 30 L Ed 2d 618 (1971). All *Lego* did was reaffirm what the Supreme Court said in *Jackson, supra* and reemphasize it.

"We also reject petitioner's final contention that, even though the trial judge ruled on his coercion claim, he was entitled to have the jury decide the claim anew. To the extent this argument asserts that the judge's determination was insufficiently reliable, it is no more persuasive than petitioner's other contentions. To the extent the position assumes that a jury is better suited than a judge to determine voluntariness, it questions the basic assumptions of *Jackson v Denno [supra];* it also ignores that *Jackson* neither raised any question about the constitutional validity of the so-called orthodox rule for judging the admissibility of confessions nor even suggested that the constitution requires submission of voluntariness claims to a jury as well as a judge. Finally, *Duncan v Louisiana,* 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968), which made the Sixth Amendment right to trial by jury applicable to the states, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury. Nor did that decision require that both judge and jury pass upon the admissibility of evidence when constitutional grounds are asserted for excluding it. We are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim." 404 US at 489–490; 92 S Ct at 627; 30 L Ed 2d at 627–628.

If the citation is in support of the error the majority held was present in the trial judge's charge, it seems to me it not only doesn't support it, rather it reaffirms on the highest constitutional

authority exactly what the trial court stated in his instruction.

It is true that some passing reference to a "better practice" is made in *People v Williams,* 46 Mich App 165, 170; 207 NW2d 480, 483 (1973). It was, however, far from a decisional holding. Failure to comport with the suggestion cannot possibly be stretched into reversible error.

I feel obliged to address myself to the following language of the majority:

"Defendant was charged on an open count of murder. At trial, evidence was produced to support both premeditated and felony murder theories. However, the only evidence bearing on the felony murder theory was defendant's confession, itself. The jury was instructed on both theories, and defendant was found guilty of first-degree murder in a general verdict. While there is some evidence strongly suggesting the jury relied on a felony murder theory, there is no definite proof showing whether the jury relied on either or both theories to reach the verdict. The *corpus delicti* must be established by evidence other than the accused's confession. *People v Allen,* 390 Mich 383; 212 NW2d 21 (1973), and *People v Sparks,* 53 Mich App 452; 220 NW2d 153 (1974). With only a confession to prove it, the felony murder theory was not sufficiently established in this case. When the defendant stands convicted on one of two theories, one of which is permissible and one which is not, the inability to say for sure on which the conviction rests demands reversal."

No one in the judicial system, I suppose, disagrees that it is settled law that the corpus delicti of the charged crime must be proved by evidence other than by the accused's naked confession, but I am puzzled by the placement of the reference to the failure of proof of the corpus delicti in the whole excerpt.

The balance of the quote seems to raise three

separate issues. First, that the corpus delicti was not proved dehors the accused's confession. To this I reply the majority fails to make the essential distinction between a confession and statements of fact that may have inculpatory overtones. As our Supreme Court has said:

"Defendant does not distinguish between confessions and admissions of fact. If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession but an admission and, therefore, is not within the range of cases cited." *People v Porter,* 269 Mich 284, 290; 257 NW 705, 707 (1934).

Much of what was told by the accused to both the Michigan and Wisconsin police were simple statements of fact far short of a confession to first-degree murder.

The second point in the third division of the majority opinion seems to me to relate to the sufficiency of proof of the corpus delicti. If so, I am at complete variance with my colleagues. For a half century our Supreme Court has recognized the rule that:

"Where there is *any* evidence of the *corpus delicti* dehors the confessions, the confessions themselves become admissible." (Citations omitted.) *People v Lapidus,* 167 Mich 53, 56; 132 NW 470, 471 (1911).[2] (Emphasis supplied.)

As late as *People v Allen,* 39 Mich App 483, 494; 197 NW2d 874, 880 (1972), Judge (now Justice)

[2] Overruled on other grounds in *People v Kirby,* 223 Mich 440, 452; 194 NW 142, 146 (1923).

LEVIN commented in a dissenting opinion subsequently adopted by the Supreme Court:[3]

"The *corpus delicti* may, of course, be established by circumstantial evidence and *reasonable inferences.*" (Emphasis supplied.)

Completely unrelated to the confession the prosecution introduced evidence consisting of: the identification of two dead bodies riddled by gunshots that could not possibly have been self-inflicted; bits of glass which matched that of the broken headlights of the car the accused had abandoned in Chicago; testimony of a witness that two young men were running in a suspicious manner near the house where the bodies were found and then "peeling" in a blue Chevrolet. The blue Chevrolet was later found and identified as the car involved. Short of an invitation to someone to witness the execution I don't know what more was needed or could be supplied by the prosecution. It is well to remember that the corpus delicti refers to the crime, not to the accused perpetrator thereof.

"The *corpus delicti* may be established by showing that a crime has been committed or by showing an act and that it was committed by a criminal agency. Proof of the identity of the perpetrator of the act or crime is not a part of the *corpus delicti.*" *United States v Di Orio,* 150 F2d 938, 939 (CA 3, 1945), *cert den,* 326 US 771; 66 S Ct 175; 90 L Ed 465 (1945).

If the majority questions the order of proof, I call attention to this Supreme Court holding:

"Complaint is made as to the order of proof. It is urged by the defendant that testimony as to other material and relevant facts was received before the *corpus delicti* had been proven. An examination of the

[3] 390 Mich 383; 212 NW2d 21 (1973).

record clearly discloses that the objection on this ground was properly overruled because proof of the *corpus delicti* had been presented prior to the time this objection was made. *And further, it is not necessary that the corpus delicti should be established beyond a reasonable doubt before proof is admissible tending to connect the accused with the offense. People v Trine,* 164 Mich 1; 129 NW 3 (1910)." *People v Gerndt,* 244 Mich 622, 633; 222 NW 185, 189 (1928). (Emphasis supplied.)

We should also heed these modifying words of the Supreme Court bearing on the general rule of the order of proof:

"We think, however, that trial courts cannot be too particular in following the wholesome general rule that in such cases it is necessary to prove the *corpus delicti* first. *That there are exceptions where the same set of facts, in cases of circumstantial evidence, tend to connect the defendant with the commission of the crime, and also at the same time to prove the corpus delicti has been held, and the rule has been somewhat relaxed in such cases." People v Jackzo,* 206 Mich 183, 190; 172 NW 557, 559 (1919). (Emphasis supplied.)

Such is the precise situation in this case in the conversations between the accused and the Michigan and Wisconsin police officers wherein fact statements concerning a proposed kidnapping were voluntarily made.

The last postulate I gather the majority advances is that a "general" verdict was rendered. While the case went to the jury on two theories, I do not know the authority for the majority's statement that the jury was required to return a verdict which in effect said "We find you guilty of first-degree murder in that you did murder the deceased while perpetrating or attempting to perpetrate the offense of arson, or rape or robbery or

any other one of the specified felonies".[4] Or alternatively, "We find you guilty of a wilful, deliberate and premeditated killing". In fact the only law on the subject I can find is to the exact contrary. Again I quote the Supreme Court:

"One of the substantial elements of the constitutional right to trial by jury is *the right of the jury, in criminal cases, to give a general verdict on the merits."* (Citations omitted.) *People v Clark,* 295 Mich 704, 707; 295 NW 370, 371 (1940). (Emphasis supplied.)

The jury knew exactly what the issue was as evidenced by the quoted question asked of the trial judge during their deliberations:

"*Juror Greenless:* Yes, your Honor. The question has been brought up as maybe if you would define murder in the first degree again.

"The part about premeditation, the part that perhaps I think you'll have to go into kidnapping along with it."

Since the majority write to the point of avoiding "repetitious appeals", I feel free to add additional material that I think should be available to the Supreme Court decisionally in the event leave to appeal is sought and granted.

Part of the record in the court below consists of six exhibits of media reporting of the crime. Five are Lansing newspaper articles, one is a transcript of the sound track on telecasts. They were introduced in support of a motion for a change of venue. The coverage area of both media is described.

To say the event commanded prime and continued coverage is a gross understatement. The change of venue was granted. The case was tried

[4] The statute under which defendant was charged is MCLA 750.316; MSA 28.548.

in one of the northernmost counties of the Lower Peninsula, out of the normal range of the circulation and viewing area of both media.

The trial transcript proper is 748 pages. The *Walker* hearing is 182 pages. The change of venue motion and attendant exhibits are almost as large in size as the *Walker* hearing transcript.

After studying them all with extreme care, I have serious doubts that the issue of the admissibility of a "confession" in the full legal sense of the word is even present in this case. There was no written confession. There is a plethora of fact statements by defendant, not one of which, nor all of which in combination, contains a confession containing an admission of all the elements of first-degree murder, either by reason of being committed in the perpetration or attempt to perpetrate a felony or by being committed wilfully, deliberately and with premeditation, thus qualifying the admissions as a confession.

From the evidence to which I earlier alluded together with *statements* made by the defendant there was more than ample proof of the corpus delicti of both theories upon which the case was submitted to the jury.

The trial judge in his rulings on objections was incisive but never curt or partial. His charge was crystal clear and legally correct. He submitted the case on the alternative theories of the prosecution and was meticulous in explaining the elements of each. That the jury understood them is attested to by the question of one of the members to the court which I quoted earlier herein and also by the form of the verdict rendered.

I quote it in its entirety:

"Our verdict on the charge of murder of Mrs. Ruth

Parrish is guilty in the first degree. Our verdict on the murder of Debbie Berger is murder in the first degree."[5]

All of this carnage—and I think of no other word for it—because Debbie Berger was pregnant by the defendant and he planned to force her and her mother to go to Chicago to submit to an abortion on Debbie.

These two killings were brutal and shocking.

Even so defendant had sacred constitutional protections in a criminal prosecution. However, society has concomitant rights. As I read this record, line by line, I conclude that the correlative rights of both were strictly observed.

The defendant had a fair trial before an impartial jury. He was ably defended by skilled and experienced counsel. What more can be asked of our system?

I vote to affirm.

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[5] For example compare with *People v Dupuis,* 371 Mich 395; 124 NW2d 242 (1963).

PEOPLE v SMITH

1. CRIMINAL LAW—INSTRUCTIONS TO JURY—LESSER INCLUDED OFFENSES—EVIDENCE.

No charge as to a lesser included offense need be given if there is a request to charge as to a lesser included offense but there is no evidence of such a lesser included offense or the facts are such that the court or the jury would be obliged to conclude that the defendant was guilty of the offense charged or not guilty; however, if the evidence is subject to different interpretations that would justify a finding of a lesser offense, a charge as to the lesser offense, especially if one is requested, should be given.

2. HOMICIDE—MURDER—FELONY MURDER—CONTINUOUS TRANSACTION.

A murder committed while attempting to escape from or prevent detection of a felony is felony murder, but only if the murder is committed as part of a continuous transaction with, or is otherwise immediately connected with, the underlying felony.

3. HOMICIDE—MURDER—FELONY MURDER—INSTRUCTIONS TO JURY—LESSER INCLUDED OFFENSES.

Refusal of the trial court to instruct the jury on the lesser included offenses of second-degree murder and voluntary manslaughter in a felony-murder trial was error where the jury could find that the homicide was not committed while attempting to escape, was not committed while attempting to prevent detection of the felony, and was not immediately connected with the underlying felony.

Appeal from Recorder's Court of Detroit, Richard D. Dunn, J. Submitted Division 1 June 13,

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 511.

[2] 40 Am Jur 2d, Homicide §§ 34, 35, 46.

Felony-murder doctrine: application of felony-murder doctrine where felony relied upon is an includible offense with the homicide. 40 ALR3d 1341.

[3] 40 Am Jur 2d, Homicide § 525 *et seq.*

1974, at Detroit (Docket No. 15822.) Decided August 27, 1974. Leave to appeal applied for.

Archie M. Smith was convicted of murder of the first degree. Defendant appeals. Reversed and remanded.

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

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

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

J. H. GILLIS, P. J. Defendant was charged with felony murder (MCLA 750.316; MSA 28.548),[1] the underlying felony being robbery. Mr. Smith defended himself and prior to the jury instructions the following exchange occurred:

"*Mr. Smith:* As far as the evidence, I feel they [the jury] could be charged with murder one or two or manslaughter.

"*The Court:* No, only murder one.

"*Mr. Monash [Prosecutor]:* Do you want any included offenses?

"*The Court:* Any homicide perpetrated with another

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

[1] MCLA 750.316; MSA 28.548, provides in pertinent part:

"All *murder* * * * which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree." (Emphasis supplied.)

felony is murder one. It is not murder two or manslaughter.

* * *

"*Mr. Smith:* You said you won't say manslaughter or second degree?

"*The Court:* I will not charge them. It is either murder one or you are innocent. One or the other."

The jury found defendant guilty as charged and he was sentenced to life imprisonment. On appeal, defendant argues that the court's refusal to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter constitutes reversible error.

This Court has split on the question raised here. People v Bufkin, 43 Mich App 585, 589; 204 NW2d 762, 763 (1972), held:

"[T]hat in a prosecution for felony murder, that is to say any homicide committed in the perpetration, or the attempt to perpetrate one of the statutorily specified offenses, the trial judge is obliged to instruct the jury that its verdict shall be guilty of murder in the first degree or not guilty."

See *People v Graves,* 52 Mich App 326; 217 NW2d 78 (1974). However, in *People v Wimbush,* 45 Mich App 42, 45–46; 205 NW2d 890, 892–893 (1973), another panel of this Court responded:

"Recently, a panel of this Court held that henceforward 'in a prosecution for felony murder * * * the trial judge is obliged to instruct the jury that its verdict shall be guilty of murder in the first degree or not guilty.' *People v Bufkin,* 43 Mich App 585; 204 NW2d 762 (1972). We disagree that such is the law of Michigan or even a wise rule. There have been cases in which what appeared to have been a felony murder was less. A rigid rule, such as that announced in *Bufkin,* may allow an individual guilty of second-degree murder or manslaughter to escape conviction, or may tempt a

jury to convict a man of a more serious crime rather than acquit him or properly return a verdict of guilty of homicide of a lesser degree than first-degree murder."

We think *Wimbush* is not only the better rule but also more accurately reflects the state of the law in Michigan.

Bufkin relies primarily on *People v Dupuis,* 371 Mich 395; 124 NW2d 242 (1963). This reliance is not so much misplaced as it is overplaced. In *Dupuis* the Court refused to instruct on lesser offenses, charging the jury that defendant was either guilty of first degree murder or he was innocent. However, in that case "the undisputed proofs showed that the murder was committed in the perpetration of a robbery". *Dupuis,* 371 Mich 401; 124 NW2d 245. We do not quarrel with this holding. But we think it is wrong to extend its application, as *Bufkin* did, to all cases, regardless of the factual setting, in which felony murder is charged.

The correct rule—the one adopted in *Wimbush* and the one we will apply to the facts of this case—is set forth in *People v Carter,* 387 Mich 397, 422–423; 197 NW2d 57, 69 (1972):

"In a criminal case, if there is a request to charge as to a lesser included offense, but there is no evidence of such a lesser included offense, or the facts are such that the court or the jury would be obliged to conclude that the defendant was guilty of the offense charged or not guilty, no charge as to a lesser included offense need be given.

"But if the evidence is subject to different interpretations that would justify a finding of a lesser offense, a charge as to such lesser offense, especially if one is requested, should be given."[2]

[2] We note that as authority for the first sentence we quote from *People v Carter,* 387 Mich 397, 422; 197 NW2d 57, 69 (1972), the Court cited *People v Dupuis,* 371 Mich 395; 124 NW2d 242 (1963).

Thus, the question becomes: Do the facts of the instant case admit to an interpretation which would justify a jury returning a verdict of a lesser offense? If they do, then we must reverse.

The only eyewitness testimony was that of Joseph Pruitt. He testified that at approximately 12:30 a.m. on December 26, 1971, he and David Bowers were at Pruitt's Detroit apartment when defendant telephoned and asked if he could come over to the apartment. (Defendant was a casual acquaintance of Pruitt's.) Shortly thereafter defendant and his cousin, William Smith, Jr., arrived at the apartment asking for money. When the request was refused, defendant and his cousin tied up Pruitt and Bowers and took several items from the apartment and placed them in garbage bags. The four men then left the apartment, got into a car occupied by two others, and drove to defendant's grandmother's house. After leaving the stolen goods there, the group of six then drove back to Pruitt's apartment. All of the men except the driver went back into the apartment and removed three television sets, but took them back when they discovered the car had been driven away.

Defendant and the four others then walked to a bus stop. Neither defendant nor anyone else in the group had any stolen goods in his possession. Pruitt told defendant's cousin that he would not get on a bus. Defendant's cousin consented, and when the bus arrived Pruitt waited until the others had boarded and then walked away. Pruitt testified that it was between 1:30 a.m. and 2 a.m. when he left the group. The police received a report of a shooting at approximately 2:45 a.m., which led them to the body of David Bowers. The body was found about a mile and a half from the bus stop.

In order to convict a defendant of felony murder under MCLA 750.316; MSA 28.548, the prosecution must establish that the murder occurred in the perpetration or attempt to perpetrate one of the enumerated felonies. A robber is engaged in the perpetration of the crime "while he is endeavoring to escape and make away with the goods taken. And a homicide committed *immediately* after a robbery, apparently for the purpose of *preventing detection,"* is felony murder. (Emphasis supplied.) *People v Podolski,* 332 Mich 508, 518; 52 NW2d 201, 205 (1952); see *People v Bowen,* 12 Mich App 438; 162 NW2d 911 (1968); *People v Goree,* 30 Mich App 490; 186 NW2d 872 (1971). Likewise the New York Court of Appeals said that in order for a killing to be felony murder it

"must occur while the actor or one or more of his confederates is engaged in securing the plunder or in doing something immediately connected with the underlying crime *(Dolan v People,* 64 NY 485 [1876]); that escape may, under certain unities of time, manner, and place, be a matter so immediately connected with the crime as to be part of its commission *(People v Giro,* 197 NY 152; 90 NE 432 [1910]); but that where there is * * * a complete intervening desistance from the crime, as by the abandonment of the loot and running away, the subsequent homicide is not murder in the first degree without proof of deliberation and intent." *People v Jackson,* 20 NY2d 440, 454; 285 NYS2d 8, 21; 231 NE2d 722, 732 (1967). See *People v Ford,* 65 Cal 2d 41; 52 Cal Rptr 228; 416 P2d 132 (1966).

Thus, if a murder is committed while attempting to escape from or prevent detection of the felony, it is felony murder, but only if it is committed as a part of a continuous transaction with, or is otherwise "immediately connected" with, the underlying felony.

Applying this concept of felony murder to the

facts of the present case, we think a jury could find that the homicide was not committed in the perpetration or attempt to perpetrate the robbery. First, a jury could find that the killing was not committed while attempting to escape. They could find that defendant had already successfully made his "getaway". Defendant was not being pursued by the police. Nor were he and his accomplices being pursued by the victims. On the contrary, Pruitt and Bowers were forced to accompany the felons to the bus stop. Secondly, a jury could find that the homicide was not committed while attempting to prevent detection of the robbery. It would make little sense for defendant to kill one victim of the robbery in order to prevent its detection when the other victim, Pruitt, had already been set free and could inform the police of the crime. And, lastly, on the facts of this case it is a jury question whether or not the homicide was "immediately connected" with the underlying felony. The stolen goods were disposed of and the actual robbery completed an hour to an hour and a half before the killing. And the homicide occurred a couple of miles from the robbery scene.

The trial court erred in refusing to instruct the jury on the lesser offenses of second degree murder and voluntary manslaughter.[3] Since this error compels us to reverse defendant's conviction, we do not reach defendant's other assignments of error.

Reversed and remanded.

All concurred.

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[3] We note that while we think a jury could conclude that this homicide was not felony murder, we also think it could conclude the killing was felony murder. Consequently, we reject defendant's argument that it was error to instruct the jury on felony murder.

SCHWAN v CITY OF LANSING

1. APPEAL AND ERROR—SUPERINTENDING CONTROL—REMEDIES.

An order of superintending control should not be issued if another plain, speedy and adequate remedy is available to the party seeking the order (GCR 1963, 711.2).

2. TAXATION—ASSESSMENT—PROTEST—BOARD OF REVIEW—REMEDIES—SUPERINTENDING CONTROL.

A trial court improvidently assumed superintending control in a tax assessment matter over proceedings conducted by the Lansing Board of Review where the plaintiffs had available two plain, speedy, and adequate remedies to satisfy their grievances in respect to their tax assessments, either to appeal their assessments to the Michigan State Tax Commission, or to pay their taxes under protest and then file suit in circuit court within 30 days (MCLA 211.53, 211.152).

3. TAXATION—ASSESSMENT—PROTEST—REVIEW—BURDEN OF PROOF.

Taxpayers who have paid their taxes and protested the decision of the Board of Review are entitled to review of their tax assessments by the courts; correction of assessments is the only proper relief provided by statute and the burden of proof is on the taxpayers.

Appeal from Eaton, Willard L. Mikesell, J. Submitted Division 2 March 8, 1974, at Lansing. (Docket Nos. 16122, 16123.) Decided August 27, 1974.

Complaint by William H. Schwan and others, for themselves and all other taxpayers similarly situated, against the City of Lansing and others for an order of superintending control to compel refund

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 20 Am Jur 2d, Courts § 117.

Superintending control over inferior tribunals. 112 ALR 1351.

[3] 74 Am Jur 2d, Taxpayers' Actions §§ 44, 65.

of their 1970 taxes, to establish a new Board of Review, and for new assessments for all their properties. Judgment for plaintiffs. Defendants appeal. Reversed and remanded for further proceedings.

William H. Schwan, for Class I plaintiffs.

C. Laverne Roberts, for plaintiffs Laverne and Bertha Roberts.

Delmer R. Smith, for plaintiffs Delmer and Marjorie Smith.

Charles J. Daudert, for plaintiff Kassuba Realty Corporation.

Peter D. Houk, City Attorney (by *Patrick Kowaleski,* Chief Assistant City Attorney), for defendants City of Lansing, City Assessor, and the members of the Board of Review.

Michael G. Harrison, Ingham County Corporation Counsel, for defendant Ingham County.

MacLean, Seaman, Laing & Guildford, for defendant Lansing Community College.

Stuart J. Dunnings, Jr., for defendant Board of Education of Lansing School District.

Before: MCGREGOR, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. In 1970 the City of Lansing raised its approximately 42,000 real property assessments from approximately 38% to 40% of cash

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

value to 50% of cash value as required by Const 1963, art 9, § 3, and MCLA 211.27; MSA 7.27. This reassessment resulted in appeals being filed as to 2,514 parcels of land to be heard by the five member Board of Review.

Pursuant to ch 9, § 9.9 of the Lansing city charter, the Board of Review commenced hearing these tax appeals on March 16, 1970, and as required by law completed its review by April 6, 1970. Early in the review process it became obvious that in order to dispose of the appeals in the brief time allotted by the city charter and statute the board would have to modify its ordinary hearing procedures. Consequently, the Board of Review first divided itself into one sub-board of three members and another sub-board composed of two members. These sub-boards considered appeals during the first three days of hearings. Subsequently, the board again reorganized itself into three sub-boards, consisting of two sub-boards of two members each and one sub-board composed of one member. Each of these sub-boards heard approximately 60 appeals per day and on Saturday and Sundays the entire board met to review each appeal individually. This procedure by the board continued right up to the time that the board certified the assessment role on April 6, 1970.

On April 23, 1970, plaintiffs William H. and Marie J. Schwan filed a class action in Ingham County circuit court on behalf of themselves and all other taxpayers similarly situated seeking an order of superintending control against the City of Lansing, its tax assessor and the five-member Board of Review. In their complaint plaintiffs alleged that they had protested their 1970 assessment to the Board of Review but that at their hearing only two of the five board members were

present. Plaintiffs complained of this procedure and further alleged that the city had not divulged the information upon which it had relied in making its assessment and had failed to allow the assessor to be cross-examined by the plaintiffs. It was alleged that these circumstances denied the plaintiffs a fair and lawful hearing and constituted denial of due process and equal protection in violation of the United States and Michigan constitutions. Plaintiffs sought a declaration that their taxes and the taxes of others similarly situated were illegal and were to be refunded to all such plaintiffs. Plaintiffs further sought to have a new Board of Review established and to set new assessments for all of plaintiffs' properties. Plaintiffs also sought attorneys' fees.

On August 18, 1970, by order of the trial court plaintiffs amended their complaint to describe the class of complainants as all those persons who appealed their 1970 assessments and were not given a hearing before the full five-man Board of Review. The same order established that the first class of plaintiffs were those who received a hearing before two or fewer board members and were given no relief.

A change of venue to Eaton County was ordered on February 16, 1971. Motions for partial summary judgment and for summary judgment were heard by an Eaton County circuit judge. The issues raised by plaintiffs included those raised in the complaint and additional issues raised for the first time in the motions. The plaintiffs contend that the board acted illegally in sitting on Sunday, contrary to MCLA 600.1425; MSA 27A.1425, that the make-up of the board was improper, and that there were improper assessments of exempt personal property. The motion for summary judgment

filed by defendants raised the issues that plaintiffs were not entitled to superintending control since they failed to appeal the decisions of the Board of Review either to the Michigan State Tax Commission as provided in MCLA 211.152; MSA 7.210 or in the alternative to pay their taxes under protest and then file suit in circuit court within 30 days thereafter as provided in MCLA 211.53; MSA 7.97.

In his opinion the trial judge found that plaintiffs were denied due process where appeals were heard by less than a quorum of the Board of Review, that the decisions of the board rendered on Sunday were voidable, that an appeal to the Tax Commission would not constitute an adequate remedy, that the plaintiffs' alternative remedy of payment of taxes under protest followed by suit in circuit court was substantially complied with by their suit asking for superintending control, that the plaintiffs had the right to examine adverse witnesses before the Board of Review and to full disclosure of the information upon which assessments were made, and that the Board of Review had the burden of proof. The court further declared that the taxes levied and collected under the 1970 assessment were void and determined that all taxes levied and collected under the 1970 assessment and thereafter must be based on the last legal assessment, *i.e.,* 1969. The court also granted plaintiffs a refund of all taxes levied on any increased assessment. The court also indicated that the City of Lansing should create a fund for the purpose of making refunds to plaintiffs and awarded attorneys' fees and costs to be paid out of public funds.

We believe that the controlling issue in this case is whether the trial court properly assumed superintending control over proceedings conducted by the Lansing Board of Review.

GCR 1963, 711.2 provides that an order of superintending control should not be issued if another plain, speedy and adequate remedy is available to the party seeking the order. In the instant case plaintiffs had available to them two plain, speedy and adequate remedies to satisfy whatever grievance they may have had in respect to their 1970 assessment. One such remedy was to appeal their assessment to the Michigan State Tax Commission pursuant to MCLA 211.152; MSA 7.210. The other remedy was to pay their taxes under protest and then file suit in circuit court within 30 days thereafter as provided in MCLA 211.53; MSA 7.97. Consequently, we hold that the trial court improvidently assumed superintending control over the Board of Review proceedings. *Bennett v City of Royal Oak School District,* 10 Mich App 265; 159 NW2d 245 (1968).

When plaintiffs became disenchanted with the treatment afforded them by the Board of Review they by-passed the appeal procedure provided for them in favor of a proceeding in which they sought expanded relief over and above that provided in the alternative appeals. They sought to be relieved of their obligation to pay the 1970 taxes and relief in respect to the taxes for subsequent years. They were rewarded by the trial court for their choice of actions. The issues raised in the complaint for superintending control and the relief granted the plaintiffs went beyond that to which the plaintiffs were entitled. The only proper relief would be correction of the assessments. Had the trial court limited his consideration to this issue and made a determination of each 1970 assessment he would have given the plaintiffs what the statute provided and all they were entitled to.

We recognize that the plaintiffs in their com-

plaint, in the alternative, asked for a new review of their 1970 assessments. We believe that they are entitled to such a review and on oral argument the defendants have suggested that there be a remand for this purpose. We limit the plaintiffs who are entitled to a review to those who have protested their Board of Review results and who have paid their 1970 taxes. In such a hearing it is our view that the taxpayer has the burden of proof. *Kelsey v Burns Township,* 223 Mich 173; 193 NW 822 (1923). It is also our view that costs and attorneys' fees should not be awarded.

Reversed and remanded for further proceedings consistent with this opinion. No costs, a public question being involved.

All concurred.

PEOPLE v McLOTT

PEOPLE v GROSS

1. RECEIVING STOLEN GOODS—CONSPIRACY—EVIDENCE—IDENTITY OF STOLEN GOODS—PRELIMINARY EXAMINATION.

Testimony at a preliminary examination by two persons that they had observed the loading of a trailer and inventoried the goods and subsequently examined the trailer at the defendant's warehouse and identified the goods therein as those that they had observed being loaded was sufficient evidence of the identity of the goods, which had been stolen, to justify binding the defendants over for trial on charges of conspiring to receive and conceal stolen property and receiving and concealing stolen property.

2. RECEIVING STOLEN GOODS—EVIDENCE—POSSESSION OF STOLEN GOODS—KNOWLEDGE.

Possession and use of stolen merchandise, near in time to its misappropriation, is some evidence that those in possession acquired it with knowledge that it was stolen.

3. RECEIVING STOLEN GOODS—EVIDENCE—KNOWLEDGE—PRELIMINARY EXAMINATION.

Evidence presented at a preliminary examination was sufficient to warrant a magistrate in finding that two defendants had acquired property knowing it to be stolen and in binding the defendants over for trial where they were found with the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 62 Am Jur 2d, Pretrial Conference and Procedure § 15.
66 Am Jur 2d, Receiving and Transporting Stolen Property §§ 19 *et seq.*, 26.
[2, 3] 66 Am Jur 2d, Receiving and Transporting Stolen Property § 25.
[4] 53 Am Jur, Trial § 336.
[5, 6] 53 Am Jur, Trial § 511.
[7, 8] 5 Am Jur 2d, Arrest §§ 24, 31, 44 *et seq.*
68 Am Jur 2d, Searches and Seizures §§ 41, 42, 88.
[9] 5 Am Jur 2d, Arrest § 73.
[10] 66 Am Jur 2d, Receiving and Transporting Stolen Property §§ 3, 4, 34.

property shortly after it had been stolen, where one defendant had stated to the police that he did not have any paperwork pertaining to the goods and later at the police station ripped up a tally sheet which had been prepared by the shipper of the goods, and where the other defendant had made a patently false statement to the police that he had ordered the goods several days before.

4. CRIMINAL LAW—DIRECTED VERDICT—EVIDENCE—MATERIAL ELEMENTS OF OFFENSE.

A defendant's motion for a directed verdict was properly denied where there was some evidence, either direct or circumstantial, on each material element of the offense charged.

5. CRIMINAL LAW—INSTRUCTIONS TO JURY—ESSENTIAL ELEMENTS OF OFFENSE.

The trial court must instruct the jury as to all the essential elements of the crime charged, and the entire charge to the jury is considered in determining whether the court's instructions were proper.

6. CRIMINAL LAW—APPEAL AND ERROR—INSTRUCTIONS TO JURY—REQUESTED INSTRUCTIONS.

Failure of the trial court to give the jury an instruction requested by a defendant in the precise form sought is not reversible error where the substance of the requested instruction was given.

7. ARREST—PROBABLE CAUSE.

Probable cause for arrest existed where the arresting officer knew that a trailer loaded with auto parts had been stolen, the defendants were found unloading auto parts from a trailer matching the description of the one stolen, and the defendants had no bill of lading or other paperwork to indicate that their possession was rightful.

8. SEARCHES AND SEIZURES—PLAIN VIEW—PROPER ARREST.

A seizure was proper where the evidence was in the plain view of the police at the time they made a proper arrest and the evidence, consisting of a trailer which was backed up to a warehouse and boxes of auto parts both in the trailer and in the warehouse, was seized immediately upon the arrest of two defendants who were in the process of unloading the trailer.

9. SEARCHES AND SEIZURES—POSSESSION OF EVIDENCE—CONTROL OF EVIDENCE—REMOVAL OF PROPERTY—CONSTITUTIONAL LAW.

A seizure of evidence occurred when the police unequivocally

took possession and control of a warehouse and trailer containing stolen boxes of goods; the mere fact that, for practical reasons, the property was not physically removed until some later time is constitutionally irrelevant (US Const, Am IV).

10. RECEIVING STOLEN GOODS—SENTENCING—CONSECUTIVE SENTENCES.

There is no statutory authorization for the imposition of consecutive sentences for conspiring to receive and conceal stolen goods and the concealing and receiving of stolen goods.

Appeal from Oakland, Arthur E. Moore, J. Submitted Division 2 June 7, 1974, at Lansing. (Docket Nos. 16244, 16245.) Decided August 27, 1974.

Frederick J. McLott and Sidney R. Gross were each convicted of conspiracy to receive and conceal stolen property and of receiving and concealing stolen property. Defendants appeal. Affirmed and remanded for resentencing.

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.

Bain & Shapero, P. C., for defendants.

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

MCGREGOR, P. J. On December 7, 1972, the defendants were found guilty by a jury of conspiracy to receive and conceal stolen property, MCLA 750.157(a); MSA 28.354(1), and receiving and concealing stolen property, MCLA 750.535; MSA 28.803. The trial court sentenced both defendants

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

to consecutive sentences of three years and four months on each count, and they appeal as of right.

Factually, the record indicates that, on April 7, 1972, at 5:30 p.m., two police officers observed defendants in possession of a trailer containing nearly $200,000 worth of AC auto parts. The trailer was backed up to an open warehouse door at the Wolverine Expediters building. Defendant McLott was the owner of Wolverine Expediters, an auto parts company; defendant Gross was a salesman of the Wolverine Expediters. When the police arrived, Gross was observed with a box of AC auto parts, and defendant McLott was observed crouched in the truck. Gross stated that he was "in charge", while McLott stated that he had ordered the load "a couple days ago". The parts in question, however, had been destined for a General Motors Parts Division warehouse in Drayton Plains, from which they had been reported missing by General Motors at 2:30 p.m. that day.

The officers asked the defendants if they had a bill of lading or other paper work pertaining to the shipment; defendants replied that they did not. Defendants were then placed under arrest, along with a warehouse employee who was observed unloading AC parts from the trailer.

The arresting officer testified that the doors to the trailer and warehouse were open and that he observed AC parts in both places while standing outside. After defendants' arrest, the officer testified, the police "took control" of the building and the trailer. A uniformed officer was placed inside the building at all times; the goods inside the building and trailer were not removed for several days. Photographs were taken of the evidence inside the building; the physical evidence and the photographs were later admitted at trial, over

defense objections. While in the police station, defendant Gross ripped up a piece of paper, which was later determined to be a tally sheet prepared by the AC Spark Plug Division of General Motors in Flint. Additional facts will be presented as necessary in the discussion of the issues raised.

Defendants first argue that the trial court erred in failing to quash the information on the grounds that there was insufficient evidence adduced at the preliminary examination with respect to the identity of the goods and the defendants' knowledge that they were stolen to warrant binding them over for trial.

With respect to the identity of the stolen goods, this Court stated, in *People v Martinovich,* 18 Mich App 253, 257–258; 170 NW2d 899 (1969):

> "Proof that the goods found in defendants' possession were the same as the goods alleged to have been stolen must be introduced to supply a basis for the findings of probable cause required of the magistrate at the preliminary examination."

Noting that none of the items found in defendants' possession were produced or identified by the complaining witness "at the examination as being his and having been stolen", this Court, in *Martinovich,* remanded for a new preliminary examination.

However, in the present case, two employees of the AC Spark Plug Division of General Motors testified at the preliminary examination that they observed the loading of the trailer in Flint and inventoried the goods. Subsequently, they examined the trailer in defendants' warehouse and identified the goods as being those that were loaded in Flint. This testimony serves to distinguish the present case from *Martinovich, supra,*

and is sufficient to support the trial court's finding with respect to the identity of the goods.

Defendants' assertion that the prosecution failed to adduce any testimony with respect to their knowledge that the goods were stolen is not borne out by the record. While it may be true, as defendants assert, that "mere possession" of stolen property is legally insufficient to support a finding that they acquired possession with the requisite *mens rea,* a good deal more than mere possession was shown by the prosecutor here. First, the defendants were discovered unloading the stolen merchandise only three hours after its theft was reported. Certainly, possession and use of the stolen merchandise, so near in time to its misappropriation, is some evidence that those in possession acquired it with knowledge that it was stolen. *Cf. People v Hutton,* 50 Mich App 351; 213 NW2d 320 (1973). Second, one of the police officers testified that defendant Gross stated that he had no bill of lading or other paper work pertaining to the goods he was unloading from the trailer. Nevertheless, at the police station, defendant Gross ripped up a tally sheet prepared by AC Spark Plug Division, which he had had in his pocket. Defendant Gross' false statements to the police, along with his action at the police station, are further circumstances indicating that he knew the property had been stolen at the time he obtained possession. Third, defendant McLott's statement to the police officers that he had ordered the load several days before was patently false, and also indicates that he knew his possession of the merchandise was unlawful. There were sufficient other facts and circumstances, in addition to defendants' possession of the stolen property, to warrant the magistrate finding that defendants acquired the prop-

erty with the requisite *mens rea* and binding them over for trial. *Cf. People v Tantenella,* 212 Mich 614; 180 NW 474 (1920).

Defendants' second argument—that the trial court erred in denying their motion at trial for a directed verdict—is premised on this same assertion, that nothing more than mere possession was shown and, hence, the necessary *mens rea* was not established. Since the testimony with respect to this issue at the preliminary examination and at trial was essentially the same, we need not discuss again the additional evidence tending to show that defendants received the stolen property with knowledge that it was stolen. Since there was some evidence, either direct or circumstantial, presented on each material element of the offense, defendants' motion for a directed verdict was properly denied. *People v Garcia,* 33 Mich App 598; 190 NW2d 347 (1971).

Defendants next argue that the trial court committed reversible error in refusing to give their requested instruction regarding guilty knowledge.

Defendants requested the following instruction:

> "Mere possession of stolen property, standing alone and unconnected with any other circumstances, does not afford a presumption of guilt, and under such circumstances, the defendants' possession must be regarded as innocent, unless it is shown that they received the goods with knowledge that they had been stolen, or, under such circumstances as to justify you jurors finding that they possessed such knowledge at the time the goods came into their possession."

The trial judge declined to give the instruction requested because it would be "repetitious" but said that he would "give carefully the elements of the crime which includes the element of knowledge". Defense counsel then noted "I think any-

thing short of an instruction substantially to this wording would not do justice, would not clear the minds of the jury". Defense counsel reiterated his objection at the conclusion of the trial court's charge to the jury.

The trial court must instruct the jury as to all the essential elements of the crime. *People v Hooper,* 50 Mich App 186; 212 NW2d 786 (1973); *People v Miller,* 35 Mich App 627; 192 NW2d 517 (1971). Further, the entire charge is considered in determining whether the court's instructions were proper. *People v Mayberry,* 25 Mich App 677; 181 NW2d 616 (1970); *People v Thomas,* 7 Mich App 519; 152 NW2d 166 (1967).

In the present case, the trial court instructed the jury several times that guilty knowledge was an essential element of the crime. The court then detailed defendants' theories of the case and in particular, their contentions regarding the element of guilty knowledge. With respect to defendant Gross, the trial court stated:

> "Mr. Gross contends that he had no knowledge of the parts or trailer or tractor, no knowledge that it had been stolen or of any fact which might cause him to suspect that it had been stolen. Thus, Mr. Gross contends that he is innocent accordingly."

With respect to defendant McLott, the trial court stated:

> "Mr. McLott contends he is not guilty and he asserts the theory that the people have failed to bear their burden of proof with relation to the essential elements, primarily the element of knowledge. * * * This defendant contends that the case * * * as presented by the prosecution is merely circumstantial * * * and asserts that there was nothing unusual about the circumstances that would lead him to believe that the property was stolen."

Thereafter, the trial court thoroughly instructed the jury with respect to the weight and effect of circumstantial evidence. In particular, the court noted:

> "But to justify the inference of guilt from circumstantial evidence the facts proven from which it is asked the guilt of the defendant be inferred, must be consistent with each other and must not only clearly point to his guilt but must be inconsistent with any other reasonable hypothesis upon which his innocence might be maintained."

In addition, the trial court properly instructed the jury with respect to the presumption of innocence and the prosecution's burden of proof.

It is clear from a thorough review of the trial court's instructions that the substance of defendants' requested charge was given. Thus, the failure of the trial court to give the requested instruction in the precise form sought is not reversible error. *People v Mayberry, supra,* and *People v Thomas, supra.*

Next, defendants argue that the trial court erred in denying their motion to suppress certain evidence. Specifically, it is contended that boxes of auto parts seized from the warehouse and trailer and photographs thereof, along with the tally sheet which defendant Gross attempted to destroy, were acquired by the police via an unconstitutional search and seizure and therefore, were inadmissible at trial. The search and seizure was improper, say defendants, because (1) their arrest was invalid due to the absence of probable cause, (2) the search and seizure of the evidence took place after the defendants had been arrested and taken from the scene, and (3) no warrant authorizing the search was issued.

Regarding the validity of the arrest, the record demonstrates clearly that the arresting officer was in possession, at the time of effectuating the arrest, of sufficient information to "create an honest belief in the mind of a reasonably prudent man that an offense ha[d] been committed and that the person[s] arrested committed it". *People v Gunn,* 48 Mich App 772, 777; 211 NW2d 84 (1973). Testimony adduced at the preliminary examination demonstrates that the arresting officer knew at the time of the arrest that (1) the Michigan State Police had reported the stolen truck—a Bancroft trailer No. 4505—loaded with AC parts, (2) that the defendants were found unloading AC auto parts from a trailer matching the description provided by the State Police, and (3) that the defendants had no bill of lading or other paperwork indicating that their possession was rightful. When considered in the aggregate, these facts more than constitute probable cause for effectuating defendants' arrest.

Having concluded that the arrest was proper, the remaining question is whether the subsequent seizure of the evidence was lawful.

When he arrived at the scene, the arresting officer observed boxes containing AC parts inside the open warehouse door and inside the open trailer which was backed up to the warehouse. Boxes of AC parts were observed prior to defendants' arrest. Immediately after defendants' arrest, the officer "seized the contents" of the trailer and the boxes inside the building. A uniformed officer was placed on guard in the building "until such time as he could remove the property". The arresting officer testified that it was not practical to remove the property immediately after the arrest and they were not so removed until several days

thereafter. Photographs of the boxes were also taken subsequent to the defendants' arrest and while the police were in control of the building.

In these circumstances, we hold that the seizure of the evidence in question was proper by virtue of the "plain view" doctrine. As our Supreme Court recently had occasion to note, the "seizure of objects within the plain view of an officer, lawfully in a place where he had a right to be, [is] not proscribed by the constitution". *People v Whalen,* 390 Mich 672, 677; 213 NW2d 116 (1973). In the present case, the officer was "lawfully in a place where he had a right to be" at the time he observed the parts in question. Upon arresting defendants, the police immediately "took control" of the premises, *i.e.,* seized the evidence. Defendants' argument that the evidence was not "seized" until it was removed a few days later is not well taken. Where, as here, it is clear that the police unequivocally take possession and assert dominion over physical evidence, it would be absurd to assert that a seizure thereof has not occurred for purposes of the Fourth Amendment. The mere fact that, for practical reasons, the police do not physically remove the property until some later time is constitutionally irrelevant.

The trial court properly denied defendants' motion to suppress the evidence in question.

Defendants' remaining contentions deal with the question of sentencing. Defendants contend, and the prosecutor agrees, that the trial court erred in ordering that their sentences, for conspiracy to receive and conceal stolen goods, and the concealing and receiving of stolen goods, run consecutively. Since there is no applicable statutory authorization for the imposition of consecutive sentences in this case, the trial court did err in failing to

direct that the sentences be served concurrently. *Browning v Michigan Department of Corrections,* 385 Mich 179; 188 NW2d 552 (1971). It is, therefore, necessary to remand for resentencing.

Defendants' objection to the failure of the trial court to allow them to examine their presentence reports at the time of sentencing is thus moot, for defendants will have the benefit of GCR 1963, 785.12 at such resentencing.

Convictions affirmed; defendants remanded for resentencing.

All concurred.

MURPHY REAL ESTATE CORPORATION v BARRON

1. BROKERS—COMMISSIONS—CONTRACTS—LISTING AGREEMENTS—INTERPRETATION OF CONTRACT.

A clause in a real estate company's listing agreement which states that the broker must produce a purchaser "ready, willing and able" to purchase before it was entitled to a commission is interpreted to mean that the purchaser must be ready, willing and able to purchase the property within the time limitations provided in the listing agreement.

2. BROKERS—CONTRACTS—LISTING AGREEMENTS—AMBIGUITY—CONSTRUCTION.

Any imperfections or ambiguities in a real estate listing agreement on a form drawn up by a broker must be construed most strongly against the broker.

3. BROKERS—COMMISSIONS—SALES AGREEMENTS—LISTING AGREEMENTS—EXPIRATION OF LISTING—CONTRACTS—LAND CONTRACTS.

A real estate broker cannot recover its commission under a clause in a buy and sell agreement providing that "seller also agrees to pay broker above named a commission equal to 6% of the sale price for negotiating the sale" where the purchaser it had found for sellers' property was not able to secure financing in conformity with the buy and sell agreement and where finally some nine months after the listing agreement between the broker and the property owners had expired the sellers made a new agreement to sell to the same purchasers on land contract terms; a sale was never consummated according to the terms of the agreement and the broker cannot recover a commission for negotiating a sale that never took place.

REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur 2d, Brokers §§ 183, 184.

[2] 12 Am Jur 2d, Brokers § 33.

[3–5] 12 Am Jur 2d, Brokers § 216 *et seq.*

Broker's right to commission on sales consummated after termination of employment. 27 ALR2d 1348.

[6, 7] 24 Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 4, 53 *et seq.*

53 Am Jur, Trial § 304 *et seq.*

4. BROKERS—SALES AGREEMENTS—EARNEST MONEY—CONTRACTS—TERMINATION OF CONTRACT—LISTING AGREEMENTS—EXPIRATION OF LISTING—LAND CONTRACTS.

An agreement to mutually terminate a buy and sell agreement because of a potential purchaser's inability to secure financing, the real estate broker's refunding of the earnest money, and the lapse of a considerable period of time after the listing agreement had expired before the property owners had agreed to a new sale of the property on land contract, support a conclusion that the buy and sell agreement terminated prior to the land contract negotiations.

5. BROKERS—COMMISSIONS—PROCURING SALE—LISTING AGREEMENTS—EXPIRATION OF LISTING—LAND CONTRACTS.

A real estate broker was not the procuring cause of a sale and was not entitled to a commission where while the ultimate purchaser learned of the property through the broker, it was not through the broker's efforts that the sale was made; the sale was a direct result of the efforts of the owners themselves to willingly accommodate a buyer, who was experiencing financial difficulties, with a land contract arrangement some nine months after the listing agreement had expired.

6. MOTIONS—MOTION TO DISMISS—INFERENCES—EVIDENCE—COURT RULES.

A trial court, in ruling upon a motion to dismiss, is not required to give the plaintiff the advantage of every inference and the most favorable interpretation of the evidence (GCR 1963, 504.2; DCR 504.2).

7. MOTIONS—MOTION TO DISMISS—NONJURY TRIAL—JUDGES—FUNCTION OF JUDGE—COURT RULES.

A motion at the close of a plaintiff's proof for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief is available only in cases tried without a jury; the judge, in passing on the motion, may exercise his function as trier of facts, weighing the evidence, passing upon the credibility of witnesses, and selecting between conflicting inferences, and if his resulting findings of fact leave the plaintiff unqualified for relief, the action is to be dismissed (GCR 1963, 504.2; DCR 504.2).

Appeal from Kent, John H. Vander Wal, J. Submitted Division 3 June 4, 1974, at Grand Rapids. (Docket No. 16909.) Decided August 27, 1974.

Complaint in district court by Murphy Real Estate Corporation against Harry H. Barron and Katherine Barron to recover a broker's commission under a buy and sell agreement. Defendants' motion to dismiss granted. Plaintiff appealed to circuit court. Affirmed. Plaintiff appeals on leave granted. Affirmed.

Wiarda & Starr, for plaintiff.

Wierenga & Sevensma, for defendants.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. We are here presented with the question of a broker's right to recover its commission under an exclusive listing contract, where a sale had not been consummated during the listing period, but where the owner later sold to an individual with whom the broker had negotiations.

On April 6, 1970, Mr. and Mrs. Harry H. Barron, defendants herein, signed an agreement with the plaintiff, Murphy Real Estate Corporation, giving the company the exclusive right to sell their home for a period of six months. The terms of the listing contract provided that payment of plaintiff's commission was contingent upon the occurrence of any of the following three events: (1) the sale of the property during the listing period by either the owner, the broker or anyone else; (2) the broker producing a purchaser ready, willing and able to purchase the property; or (3) the sale of the property within six months after the expiration of the listing agreement to any person to

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

whom the property had been shown during the listed period.

The listing contract called for a purchase price of $22,900 payable by cash, FHA or VA terms. Plaintiff discovered an interested buyer in one Rosa Mae Ledbetter. Mrs. Ledbetter submitted an offer set out in a buy and sell agreement dated June 22, 1970. The defendants then made a counteroffer which was accepted by the buyer. The agreement provided that:

> "This offer is made contingent upon close of sale of buyer's property to the City of Grand Rapids. Buyer shall have the option to buy FHA or equity out. Buyer offers to rent said property for the sum of $150.00 per month until sale * * * . Buyer to pay utilities during rental period."

The buy and sell agreement called for a purchase price of $20,900 financed by a 30-year FHA mortgage. In compliance with paragraph 13 of the agreement, Mrs. Ledbetter, as evidence of her good faith, deposited $515 cash with the broker as earnest money.

Under the terms of the agreement, Mrs. Ledbetter took possession of the Barron home and was paying a monthly rental to the defendants. Everything went smoothly until it became apparent that Mrs. Ledbetter was having difficulty obtaining an FHA loan. Calvin Murphy, president of plaintiff corporation, assisted Mrs. Ledbetter in her three unsuccessful attempts to secure an FHA loan. This problem was compounded by the fact that the sale of the buyer's property to the City of Grand Rapids was delayed for several months and that Mrs. Ledbetter's eventual $1,700 condemnation payment from the city in March, 1971, was much less than she had expected.

This state of affairs continued until mid-1971, with several pieces of correspondence passing between Mrs. Ledbetter and the defendants. Finally, upon discovering that Mrs. Ledbetter's third application for an FHA loan had been rejected, defendants on May 22, 1971, wrote Mrs. Ledbetter a letter offering her another financing proposal. Mrs. Ledbetter and the defendants subsequently came to an agreement by which Mrs. Ledbetter would purchase the Barron home on land contract with terms similar to those in the original buy and sell agreement.

On July 15, 1971, Mrs. Ledbetter went to plaintiff's office and, without disclosing the existence of her new agreement with defendants, requested and received a refund of her earnest money deposit, stating that she needed the money for personal reasons. Murphy wrote across the front of the check "refund of earnest money 1609 Benj[amin], N.E.". Mrs. Ledbetter then took this money and applied it to the down payment on the land contract for the purchase of the Barron home which was signed that same afternoon, July 15, 1971.

Plaintiff, upon discovering the existence of the land contract, brought suit in district court to recover its commission under the buy and sell agreement. Defendants answered that the buy and sell agreement was terminated and never consummated according to its terms. A defense motion for summary judgment was denied and the case went to trial on May 8, 1972. At the conclusion of plaintiff's case, the district court granted the defendants' motion to dismiss because (1) the listing agreement had expired; (2) the buy and sell agreement was mutually terminated before the land contract was agreed upon; and (3) the land con-

tract was in no way a fulfillment of the buy and sell agreement.

Plaintiff appealed as of right to the Kent County Circuit Court on May 22, 1972. That court, by an opinion dated December 1, 1972, and order dated December 22, 1972, affirmed the judgment of the district court. Plaintiff now appeals by leave granted.

The sole issue before us on appeal is whether the buy and sell agreement terminated prior to July 15, 1971, the date Mrs. Ledbetter and the defendants entered into the land contract.

Plaintiff contends that the buy and sell agreement was still in effect and that it was still negotiating to complete the financing when defendants consummated the land contract without its knowledge. Defendants counter by arguing that the plaintiff failed to earn its commission since it failed to produce a buyer ready, willing and able to purchase their home during the listing period. Furthermore, defendants assert that the buy and sell agreement was mutually terminated and that it was their own efforts which produced the ultimate sale of their property by land contract.

The exclusive listing agreement dated April 6, 1970, provides the terms under which the parties agreed to the payment of a commission for the sale of defendants' property. Defendants gave plaintiff an exclusive right to sell their home for a period of six months ending on October 6, 1970. During this time their home was not sold nor did plaintiff produce a purchaser who was ready, willing and able to purchase the property on the terms stated. Also, the defendants' property was not sold within six months after the expiration of the listing agreement to a party who had been shown the property during the listing period.

Plaintiff maintains that it did produce a purchaser ready, willing and able to purchase the defendants' home, namely Mrs. Ledbetter. However, we are of the opinion that the only reasonable and proper interpretation of the "ready, willing and able" clause is that the purchaser must be ready, willing and able to purchase the property within the time limitations provided in the listing agreement. Here Mrs. Ledbetter was not "able" to purchase the property until July 15, 1971, some nine months after the expiration of the listing agreement. Since this listing agreement was on a form drawn up by the broker, any imperfections or ambiguities must be construed most strongly against it. *Hanley v Porter,* 238 Mich 617, 620; 214 NW 179 (1927). See also *Ladd v Teichman,* 359 Mich 587, 592; 103 NW2d 338 (1960). Under this construction of the listing agreement, it is clear to this Court that the plaintiff broker has failed to perform services within the time stated in the agreement entitling it to a commission. The lower court properly ruled that the agreement expired on its own terms on April 6, 1971, and that the plaintiff had not earned its commission as of that date.

Plaintiff also claims that it is entitled to its commission under clause 16 of the buy and sell agreement which provides as follows:

> "Seller also agrees to pay broker above named a commission equal to 6% of the sale price for negotiating this sale * * * ."

As mentioned earlier, under the terms of this agreement, Mrs. Ledbetter had the option to either buy the equity out or to obtain an FHA or VA mortgage. Unfortunately, she could do neither, as evidenced by her three unsuccessful attempts to

obtain an FHA mortgage. A sale was never consummated according to the terms of the agreement and, therefore, we feel that the plaintiff broker cannot recover a commission for negotiating a sale that never took place. Plaintiff thus cannot recover its commission under clause 16 of the agreement since no sale was ever negotiated under that agreement.

We are also not impressed with plaintiff's contention that the buy and sell agreement was still in effect when defendants consummated the land contract transaction with Mrs. Ledbetter. After reviewing the correspondence in this case, we are convinced that the parties mutually agreed to terminate the buy and sell agreement and to try to find another method of financing the transaction. Plaintiff refunded the earnest money deposit to Mrs. Ledbetter. While it is true that plaintiff was unaware of the fact that this money was to be used as part of the down payment on the land contract, the fact still remains that plaintiff wrote on the face of the refund check that it was a refund of earnest money on the property in question. The lower court found that this was an indication of plaintiff's feelings that due to Mrs. Ledbetter's inability to obtain an FHA mortgage, the deal was finished. Under the circumstances of this case, we feel that the lower court's conclusion was reasonable. Therefore, contrary to plaintiff's contention, the parties' intent to mutually terminate the contract, the broker's refunding of the earnest money, and the lapse of a considerable period of time without final action all combine to support our conclusion that the buy and sell agreement terminated prior to the land contract negotiations.

Plaintiff finally argues that it was entitled to a

commission because it was the procuring cause of the sale of defendants' property. However, in order to recover under this theory plaintiff must show that it was the procuring cause of the sale, that the purchaser learned of the property through plaintiff, and that through its efforts the sale was made. *Pittelkow v Jefferson Park Land Co,* 283 Mich 374, 378; 278 NW 102 (1938). Plaintiff in the case at bar has failed to meet the last of these listed criteria, for while it is true that the ultimate purchaser learned of the property through the plaintiff, it was not through plaintiff's efforts that the sale was made. Indeed, the sale in this case was a direct result of the efforts of the owners themselves to willingly accommodate a buyer who was experiencing financial difficulties. This is borne out by the various correspondence between defendants and the purchaser and by the actual terms of the land contract which differed somewhat from the terms of the buy and sell agreement. Since it was through the defendants' efforts that the ultimate sale was made, it cannot be said that plaintiff was the procuring cause of the sale.

Finally, we feel duty bound as an appellate court to clear up what appears to be a popular misconception as to the correct standard to be applied by the trial court when ruling upon a defendant's motion to dismiss, made at the close of plaintiff's proofs. The motion to dismiss in the instant case was filed in accordance with District Court Rule 504.2, which is based in part upon GCR 1963, 504.2. Plaintiff, in its brief, makes the following statement:

"The facts stated herein are either admitted or must be taken as the accepted facts of the case because of the rule that on a motion to dismiss made at the close of the plaintiff's proofs, the testimony and the inferences

to be drawn therefrom must be viewed in the light most favorable to the plaintiff."

Plaintiff's interpretation of GCR 1963, 504.2 is incorrect. The proper interpretation of the rule was given by this Court in *Illenden v Illenden,* 46 Mich App 710, 715–716; 208 NW2d 565 (1973), wherein we stated:

"In ruling upon a motion to dismiss, the trial court is not required to give the plaintiff the advantage of every inference and the most favorable interpretation of the evidence. Thus, the function of the trial court in ruling upon a motion to dismiss is very different from ruling upon a motion for a directed verdict. The difference is set forth in 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), pp 332–333:

" '6. Involuntary Dismissal for Failure to Establish Right to Relief

" 'The second sentence of a sub-rule 504.2 introduces an innovation in Michigan practice—a motion at the close of plaintiff's proof for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In time and purpose, this motion is similar to the motion for a directed verdict, but it differs in that it is available only in cases tried without a jury. Consequently the function of the judge in passing upon the motion is different from his function in passing upon the motion for a directed verdict. The judge is not limited to determining whether plaintiff's evidence is legally sufficient to go to the jury. *He may exercise his function as trier of facts, weighing the evidence, passing upon the credibility of witnesses, and selecting between conflicting inferences, and if his resulting findings of fact leave the plaintiff unqualified for relief, the action is to be dismissed.* In response to this motion, there is no application of the usual rule on a motion for a directed verdict that plaintiff is to be given the advantage of every inference and the most favorable interpretation of the evidence. If the court renders judgment against the plaintiff under this provision, the judge is specifically required to make findings of fact as

provided in Rule 517. The defendant can make a motion to dismiss under this provision without waiving his right to offer evidence of his own.' (Emphasis added.)"

Thus the trial court acted properly in this case when it made an independent determination of the facts.

Affirmed.

WILLIAMS v SLAZINSKI

1. ACCORD AND SATISFACTION—CONTRACTS—CONSIDERATION—EXTINGUISHMENT OF DEMAND—FOUNDATION OF FURTHER ACTION.

Acceptance of a promise or agreement in satisfaction of a demand where based upon sufficient consideration extinguishes the original demand, and the original demand cannot be the foundation of an action.

2. ACCORD AND SATISFACTION—CONTRACTS—CONSIDERATION—EXTINGUISHMENT OF DEMAND—TORTS—FOUNDATION OF FURTHER ACTION—AFFIRMATIVE DEFENSES—BREACH OF CONTRACT.

An agreement between parties which released and discharged defendant and her insurance company from tort liability in return for certain monies and the promise of future payments extinguished the original demand and eliminated it as the foundation of a tort action, where nothing on the record indicates that the parties to the contract intended it to operate in any other manner; the release agreement operated as a valid affirmative defense to plaintiff's action in tort, and plaintiff's remedy was in contract for breach of the settlement agreement, not in tort for the underlying claim.

Appeal from Wayne, Theodore R. Bohn, J. Submitted Division 1 May 15, 1974, at Detroit. (Docket No. 17298.) Decided August 27, 1974.

Complaint in the Common Pleas Court of Detroit by Naomi Williams against Rose Slazinski for damages for personal injuries received in a pedestrian-automobile accident. Verdict and judgment for plaintiff. Defendant appealed to circuit court.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 1 Am Jur 2d, Accord and Satisfaction §§ 51, 52.

[2] 1 Am Jur 2d, Accord and Satisfaction § 5.

74 Am Jur 2d, Torts §§ 69, 85 *et seq.*

Affirmed. Defendant appeals on leave granted. Reversed.

Kenneth M. Davies, P. C., for plaintiff.

Rouse, Selby, Dickinson, Pike & Mourad (by *David J. Lanctot),* for defendant.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

V. J. BRENNAN, P. J. On or about August 5, 1969, plaintiff, Naomi Williams, was injured when she was allegedly struck by an automobile driven by defendant, Rose Slazinski. According to plaintiff, defendant's automobile ran over her foot and knocked her down. Defendant denied liability, however, and maintained that her car did not even touch plaintiff. Approximately two weeks after the alleged accident occurred, defendant's insurer entered into a settlement agreement with plaintiff whereby plaintiff released and discharged defendant and her insurance company from all claims growing out of the accident in return for the payment of $50 for known medical expenses, $307.03 for lost wages and $300 for pain and suffering and for defendant's insurance company's promise to pay $20.24 for each day of "continuous and necessary confinement indoors due to injury" caused by the accident and its promise to pay all reasonable medical and hospital expenses, up to $5,000, incurred within one year of the settlement and caused by the accident. Plaintiff was given a check by defendant's insurer for $657.03 and this check was duly cashed.

In September, 1969, plaintiff submitted a hospi-

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

tal bill to defendant's insurer for $1,400. Plaintiff contended that the bills were for back injuries suffered as a result of the accident. Defendant's insurer, however, felt that most of the medical bills related to a previous accident and various pre-existing physical ailments and, therefore, refused to pay the bills until their relationship to the accident was verified.

Plaintiff never supplied the requested verification information, but, instead, instituted the present negligence action against defendant in the Common Pleas Court of the City of Detroit. Defendant answered plaintiff's complaint by way of general denial and set up the release as an affirmative defense. Plaintiff responded contending that the release was invalid because she did not, at the time of its execution, fully understand its terms. Defendant filed a motion for accelerated judgment based on the release but her motion in this regard was denied.

On the day trial was to begin defendant moved for separate trials on the questions of tort liability and validity of the release. Defendant's purpose in requesting separate trials on these issues was to prevent the mentioning of insurance in the tort action. See MCLA 500.3030; MSA 24.13030. This motion was also denied and the cause proceeded to trial.

In addition to claiming the release agreement to be invalid, plaintiff's position at trial was that the failure of defendant's insurer to pay the $1,400 upon presentation of the hospital bills constituted a breach of the terms of the release agreement thereby giving her the right to sue either on the contract or for the underlying liability. Specifically, plaintiff maintained that defendant's alleged breach was sufficient to permit her to sue defend-

ant in tort, despite the release agreement, for negligently running over her foot and knocking her down thereby causing injury. Defendant, on the other hand, maintained that if the release was valid, then plaintiff's sole remedy was to sue in contract for breach of the release agreement. In furtherance of this position, defendant requested the trial judge to instruct the jury that if they found the release to be valid, their verdict should be no cause for action. The trial court refused to give the requested instruction and instructed the jury, instead, that if they found the release valid, but subsequently breached, they could award plaintiff damages in tort.

The jury found the release valid, but breached, and awarded plaintiff $5,000.00 damages. Defendant filed a motion for new trial which was denied on March 29, 1972, and the judgment of the Common Pleas Court was affirmed by the Wayne County Circuit Court on January 9, 1973. It is from this decision that defendant now appeals upon leave granted.

Although several issues are presented by defendant for our consideration, we find it necessary to reach only one.

Defendant claims the trial court erred in failing to give his requested instruction. We agree. In *Henderson v McRae,* 148 Mich 324, 327–328; 111 NW 1057 (1907), our Supreme Court stated:

> "In matters of accord and satisfaction, there is a well defined and easily recognized distinction between two classes of agreements:
>
> "1. Where the agreement of the creditor is to accept the performance of the debtor's new promise or agreement in satisfaction of the demand.
>
> "2. Where such promise or agreement itself, based upon sufficient consideration, is accepted in satisfaction

of the demand. 2 Chitty on Contracts (11th Am Ed), p 1124.

"And in this class of cases it must clearly appear that the intention of the party was to accept such promise, and not the performance, in satisfaction of the original demand. In the first class of cases the accord must be fully executed to bar an action on the original demand. 1 Cyc p 312, and cases cited. In the second class the original demand is extinguished, and cannot be the foundation of an action."

See *Fricke v Forbes,* 294 Mich 375; 293 NW 686 (1940); *Belrose v Kanitz,* 284 Mich 497; 280 NW 33 (1938). See also *Hoffman v Burkhammer,* 373 Mich 187; 128 NW2d 503 (1964).

In the case at bar the agreement between the parties released and discharged Rose R. Slazinski and her insurance company "of and from all actions, causes of action, claims and demands on account of, or in any way growing out of" the alleged accident in consideration for the "payment" of $675 and for the "promise of payment" for days of continuous confinement and hospital and medical bills caused by the accident. The language of the contract is clear. In return for the *payment* of a certain sum of money *and* the *promise of future payments,* plaintiff released and discharged defendant from all claims or causes of action arising out of the alleged accident. This clearly brings the contract before us into the second class of agreements recognized in *Henderson v McRae, supra.* Here the payment of money and the promise of payment, by the terms of the contract, was accepted in satisfaction of the demand thereby extinguishing the original demand and eliminating it as the foundation of a tort action. Nothing on the record indicates that the parties to this contract intended it to operate in any other manner. This being the case, it is clear

that the release agreement operated as a valid affirmative defense to plaintiff's action in tort. See *Belrose v Kanitz, supra.* Plaintiff's remedy was in contract for breach of the settlement agreement, not in tort for the underlying claim. It is clear, therefore, that, under the facts of this case, the trial court erred in failing to give the instructions requested by defendant or instructions of similar import. We therefore reverse the decisions of the lower courts and order the entry of a judgment of no cause for action in favor of defendant, but without prejudice to plaintiff's right to maintain an action in contract.

Reversed.

All concurred.

HUEY v CAMPBELL, WYANT & CANNON FOUNDRY COMPANY

1. WORKMEN'S COMPENSATION—APPEAL AND ERROR—QUESTIONS REVIEWABLE—PRESERVING ISSUES.

An issue not raised before the Workmen's Compensation Appeal Board generally will not be considered on appeal, but where an issue was raised by the appeal board itself and discussed fully in several of the members' opinions, the issue will be allowed on appeal, especially where the question is solely one of law, and all the facts necessary for its resolution have been found by the appeal board; the rule preventing a party from raising an issue on appeal which was not raised below is not absolute.

2. APPEAL AND ERROR—QUESTIONS REVIEWABLE—PRESERVING ISSUES.

The general rule that a question may not be raised for the first time on appeal is not inflexible; when a consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied.

3. WORKMEN'S COMPENSATION—STATUTES—CONSTRUCTION—DATE OF INJURY.

The $10,500 limitation set forth in a former statute providing for workmen's compensation benefits for temporary or permanent total disability or death from silicosis or other dust disease applies only to those cases in which the "date of injury" was prior to May 2, 1966, and the phrase "date of injury" means the "last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death" (MCLA 417.4).

Appeal from the Workmen's Compensation Appeal Board. Submitted Division 3 June 4, 1974, at Grand Rapids. (Docket No. 17308.) Decided August 27, 1974. Leave to appeal granted, 393 Mich 757.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 527.
[2] 5 Am Jur 2d, Appeal and Error § 545 *et seq.*
[3] 58 Am Jur, Workmen's Compensation § 189.

Charles Huey presented his claim for workmen's compensation against the Campbell, Wyant & Cannon Foundry, Division of Textron, Inc., and Michigan Mutual Liability Company. Plaintiff died and Geneva B. Huey, his widow, was substituted as plaintiff. Compensation granted. Plaintiff appeals on leave granted. Affirmed.

McCroskey, Libner, Van Leuven, Kortering, Cochrane & Brock (by *Edward M. Welch, Jr.),* for plaintiff.

Ryan, Boerema, Jarosz, Kail & Gaskin, for defendants.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. The decedent, Charles Huey, had been employed in defendant's foundry for almost 15 years when on July 22, 1958, he suffered a back injury which arose out of and in the course of his employment. Although he attempted to work a few times in early 1959, decedent never worked again, and he was paid the statutory 500 weeks of compensation at the rate in effect at the time of his injury.

On February 23, 1968, only a few days after the 500 week period had expired, decedent filed a petition alleging disablement from an occupational disease occurring July 5, 1967. The nature of the disease was described as silicosis. Before a hearing could be held in regard to this disputed claim, Charles Huey died. In October, 1968, plaintiff

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

herein, the widow of the deceased, filed a suggestion of death and petitioned to be substituted as a party plaintiff seeking compensation as the dependent widow and/or the administratrix of the estate of her deceased husband.

A hearing on the matter was subsequently held before a referee. The referee found that the deceased suffered an occupational disease arising out of and in the course of his employment and that his last day worked in which he was subject to the disabling conditions was May 7, 1959. The referee also determined that Mr. Huey became disabled from that disease on October 15, 1966, and that the disease was the prime cause of his death on September 29, 1968. Furthermore, the referee found that compensation should have been paid to the deceased at the rate of $66 per week, beginning on October 15, 1966. The referee concluded that since the deceased had also suffered a totally disabling back injury for which 500 weeks of compensation had already been paid, concurrent total disability payments could have been made only after October 15, 1966. Therefore, the referee ordered that the defendant pay to plaintiff compensation at the rate of $64 per week up to a maximum of $10,500, less the amounts paid concurrently for the back injury subsequent to October 14, 1966. Defendant was also ordered to pay medical expenses in the amount of $17,531.22 and a funeral allowance of $750.

Defendant appealed to the Workmen's Compensation Appeal Board. Since a majority of that body was unable to agree on the issues involved, the referee's decision was affirmed. Plaintiff now appeals the decision of the board by leave granted.

Plaintiff claims that she is not limited to $10,500

compensation under MCLA 417.4; MSA 17.223.[1] Before proceeding to the merits of this claim, we must first determine whether this issue is properly before this Court. Defendant argues that it is not, because plaintiff never raised the issue before either the referee or the appeal board.

It is generally true that an issue not raised before the appeal board will not be considered by this Court on appeal. *Medacco v Campbell Foundry Co,* 48 Mich App 217, 228; 210 NW2d 360 (1973); *Turner v Consumers Power Co,* 376 Mich 188, 191; 136 NW2d 1 (1965). However, in the instant case, this issue was raised by the appeal board itself and discussed fully in several of the members' opinions. Therefore, the policy of remand set forth in *Medacco, supra,* is inapplicable. This is especially true where, as here, the question raised is solely one of law, and all the facts necessary for its resolution have been found by the appeal board.

We also must point out that the rule preventing a party from raising an issue on appeal which was not raised below is not absolute.

"In his first question appellant contends that the second injury fund did not argue before the appeal board that § 4 did not apply to plaintiff's claim and hence cannot now be heard to argue it. Whatever the technical correctness of appellant's argument, we perceive this issue to be one necessary to proper determination of this case and accordingly will consider it.

" 'The general rule that a question may not be raised for the first time on appeal to this Court is not inflexible. When a consideration of a claim sought to be raised

[1] This statute limits the amount of compensation payable to employees or their dependents in the event of temporary or permanent total disability or death from silicosis. We are aware that this statute was repealed and replaced by MCLA 418.101 *et seq.;* MSA 17.237(101) *et seq.* However, that legislative action occurred after this case arose and does not affect this case.

is necessary to a proper determination of a case, such rule will not be applied.' *(Dation v Ford Motor Co* [1946], 314 Mich 152 at 160, 161 [22 NW2d 252].)" *Felcoskie v Lakey Foundry Corp,* 382 Mich 438, 442; 170 NW2d 129 (1969).

Since this is the sole issue raised by plaintiff on appeal, and since this Court has already granted plaintiff leave to appeal on this issue, it would be incongruous for us to now hold that the issue is not properly before us. Moreover, we consider this issue to be necessary to a proper resolution of this case and, therefore, will consider it.

Turning our attention to the merits of this controversy, we must determine whether the $10,-500 limitation set forth in MCLA 417.4; MSA 17.223 refers to the date of injury or to the date of disablement. To answer this question, we must interpret MCLA 417.4(a); MSA 17.223(a) which provides in pertinent part:

> "(a) This section shall not apply in cases of all claims in which *the date of personal injury* occurs later than May 1, 1966, and all such claims shall be governed by other provisions of this act." (Emphasis added.)

Plaintiff contends that "the date of personal injury" means the date of disablement, which the referee found to be October 15, 1966. Thus, according to plaintiff, the $10,500 limitation doesn't apply. On the other hand, defendant asserts that "the date of personal injury" is not the date of disablement, but rather the last day the employee worked and was subject to disease-causing conditions, *i.e.* May 7, 1959. Thus, defendant's view is that the $10,500 limitation does apply to plaintiff's claim.

In our independent research, we were unable to uncover any decision dealing directly with the

question now before us. In *Welch v Westran Corp,* 45 Mich App 1, 3; 205 NW2d 828 (1973), this Court denied leave to appeal on the exact issue now raised by plaintiff. However, in an opinion written by Judge VAN VALKENBURG, in which Judge HOLBROOK and this writer concurred, the Court pointed out in footnote 2 that had leave to appeal been granted on the question of whether the date of injury was properly fixed as the day Mr. Welch retired rather than the date he discovered the disablement, an argument identical to the one presently urged by plaintiff would have failed:

"The reason plaintiff argued that the date of his injury was May 8, 1968, rather than January 31, 1966, was to avoid the $10,500 limitation on benefits which was placed on claims in which the date of personal injury occurred prior to May 1, 1966. *See* MCLA 417.4; MSA 17.223. The referee and appeal board were correct in fixing the date as January 31, 1966, since the 'date of injury' for an occupational disease is the 'last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death.' MCLA 412.1; MSA 17.151. *See, currently,* MCLA 418.301; MSA 17.237(301). *See also Sosnowski v Dandy Hamburger,* 384 Mich 221; 180 NW2d 761 (1970)."

We see no reason to now depart from the view expressed in the *Welch* decision. Consequently, we now hold that MCLA 417.4(a); MSA 17.223(a), which removed the $10,500 limitation on silicosis compensation was intended to apply only to those cases in which the "date of injury" was subsequent to May 1, 1966, and that the phrase "date of injury" means the "last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death". Accordingly, the referee's decision, affirmed by the split appeal board, limiting plaintiff to $10,500 compensation for silicosis, is affirmed.

Defendant argues on appeal that plaintiff is barred from recovering any compensation at all, citing *Tidey v Riverside Foundry & Galvanizing Co,* 381 Mich 551; 164 NW2d 3 (1969). However, we shall not consider defendant's contention, since this question is not properly before this Court due to the fact that defendant has not made a timely claim of cross-appeal pursuant to GCR 1963, 807.2. See *Therrian v General Laboratories, Inc,* 372 Mich 487, 490; 127 NW2d 319 (1964).

Affirmed.

All concurred.

PEOPLE v McBRIDE

1. CRIMINAL LAW—WITNESSES—EXPERT WITNESSES—TRIER OF FACT—ACCEPTANCE OF TESTIMONY.

   A trial court, as a trier of fact, is not bound to accept the testimony of a defendant's expert witnesses.

2. CRIMINAL LAW—INSANITY—BURDEN OF PROOF.

   A trial court did not improperly place upon a defendant the burden of proving that he was sane at the time of the offense charged by concluding that the testimony of defendant's expert witnesses did not constitute evidence of defendant's insanity where the opinions of the trial court show that he was well aware of the people's burden to prove the defendant sane at the time of the offense and that he did not shift the burden to the defendant.

3. CRIMINAL LAW—INSANITY—EVIDENCE—WITNESSES—LAY WITNESSES—WEIGHT OF EVIDENCE—ADMISSIBILITY OF EVIDENCE.

   Testimony of police officers regarding their observations of the behavior of a defendant who claimed insanity was properly admitted lay testimony on the basis of the opportunities which the officers had to observe the defendant, the extent of which was made known to the court; the matter involved a question of weight to be given their testimony rather than one of admissibility.

4. CRIMINAL LAW—PHOTOGRAPHIC IDENTIFICATION—ABSENCE OF COUNSEL—IN-COURT IDENTIFICATION—INDEPENDENT BASIS.

   A photographic showup conducted by police where defense counsel was not present was improper, but the witness's subsequent in-court identification of the defendant will not be deemed inadmissible where the in-court identification was based on the witness's memory and was therefore independent of the tainted photographic showup.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 834 *et seq.*
[2] 21 Am Jur 2d, Criminal Law §§ 50–53.
[3] 30 Am Jur 2d, Evidence § 1080 *et seq.*
[4, 5] 21 Am Jur 2d, Criminal Law §§ 368, 369.

5. CRIMINAL LAW—PHOTOGRAPHIC IDENTIFICATION—CASE LAW—RETROACTIVITY.

A Supreme Court decision which disallows identification by photograph when the accused is in custody is not retroactive and therefore this defense is not available to a defendant whose trial occurred prior to release of that decision.

Appeal from Kent, John T. Letts, J. Submitted Division 3 June 3, 1974, at Grand Rapids. (Docket No. 17499.) Decided August 27, 1974.

Donald G. McBride was convicted of armed robbery. 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 Prosecuting Attorney, for the people.

Loeks, Buth & Wood, for defendant on appeal.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. On October 12, 1971, a complaint and warrant were issued charging defendant with the October 9, 1971, armed robbery of a Grand Rapids motel.[1] Following his preliminary examination on October 18, 1971, defendant was bound over to circuit court. An information charging defendant with armed robbery was filed on October 21, 1971, and on the following day, defendant stood mute at his arraignment on the information.

Pursuant to defense counsel's petition and plaintiff's stipulation, on October 28, 1971, the trial

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

[1] MCLA 750.529; MSA 28.797

court ordered defendant committed to the Center for Forensic Psychiatry of the Department of Mental Health for a psychiatric evaluation concerning his competence to stand trial. On November 30, 1971, plaintiff moved for a hearing on the question of defendant's competence to stand trial, the motion stating that the Center for Forensic Psychiatry had found defendant incompetent. After a December 9, 1971, competency hearing, the trial court found defendant to be incompetent to stand trial and ordered him committed to a mental hospital.

Just over one year later, on December 12, 1972, plaintiff moved for another competency hearing on the ground that it had been notified by the Department of Mental Health that defendant was now mentally competent to stand trial. The trial court held another hearing on this matter and then issued an order finding defendant competent to stand trial. On January 11, 1973, defense counsel filed notice of an insanity defense and also moved for suppression of the identification of defendant by prosecution witness Anthony Zainea on the ground that it was tainted by a prior photographic showup where counsel was not present.

Trial began before the court, sitting without a jury, on January 17, 1973. The plaintiff's evidence showed that some time after 12 a.m. on October 9, 1971, two men entered the motel office of Anthony Zainea, owner of the Lazy-T Motel in Grand Rapids, Michigan. Mr. Zainea testified that after asking about a room, one of the men pulled a gun, aimed it at him, and demanded money. The men took approximately $65 or $70 from the cash drawer and some additional money from Zainea's wallet, and then tied him up with tape and fled the scene. Mr. Zainea identified defendant in court as the man who had pulled the gun.

On cross-examination, Mr. Zainea testified that he was shown photographs by police on October 11, 1971. He stated that he had not definitely identified a photograph of defendant at the police showup, but that he did identify defendant in a newspaper photograph which appeared on October 13, 1971. Subsequently Mr. Zainea modified his testimony somewhat when he said that prior to the October 13 newspaper photograph he had seen three or four pictures taken of defendant after his arrest on an unrelated charge on October 10. After defense counsel reminded him of his prior preliminary examination testimony, Mr. Zainea stated that he was "almost positive" of defendant's pictoral identification prior to the October 13, newspaper photo, but was "100 percent positive" after seeing the newspaper picture. Finally, on redirect examination, Mr. Zainea testified that his identification of defendant at the preliminary examination was based upon his observance of defendant at the time of the robbery and did not depend upon any photograph of defendant which he had observed.

Grand Rapids Police Officer Lee Brenner testified that in the early morning hours of October 10, 1971, he and his partner, Thomas Nicholson, investigated a disturbance outside a Grand Rapids bar involving a man with a gun. The man, later determined to be defendant, was arrested for violation of the city firearms law and his weapon, a .175-caliber air pistol, was confiscated. This pistol was identified at trial by Mr. Zainea as closely resembling the weapon used during the holdup of his motel. Policeman Nicholson's testimony corroborated what his partner, Lee Brenner, had said.

Grand Rapids Police Sergeant Jack Hawley testified that after investigating defendant's alleged

firearms violation, he suspected defendant might have been involved in the motel holdup and, therefore, contacted State Police Officer Melvin Hampton, who was investigating the motel robbery.

Officer Hampton testified that on October 11, he showed Mr. Zainea a mug shot of defendant and pictures of four other individuals. Although he could not reconstruct or reproduce that group of five photos, he stated that Mr. Zainea had positively identified defendant at that time.

After plaintiff rested its case, and the trial court denied defendant's motion to strike Mr. Zainea's identification testimony, the defense called Dr. Roger Olive, Director of Clinical Psychology at Ionia State Hospital, where defendant had been confined prior to being declared competent to stand trial. Dr. Olive, testifying as to the issue of defendant's sanity at the time the alleged offense was committed, stated on direct examination that in his opinion defendant wasn't capable of appreciating the seriousness of his acts, but admitted on cross-examination that defendant probably knew his acts were wrongful. Dr. Leonard Rosenzweig, a psychiatrist who had examined defendant on January 13, 1973, testified that he didn't believe defendant knew right from wrong but conceded on cross-examination that his diagnosis of defendant was based entirely on information that defendant chose to reveal to him during this one interview and admitted that it would have been to defendant's advantage not to relate to him facts concerning participation in the robbery.

After the defense rested, the trial court, over defense counsel's objection, allowed the plaintiff to recall officers Brenner and Nicholson as rebuttal witnesses on the issue of whether or not defendant appeared to act normally when the officers ar-

rested him in front of the Grand Rapids bar the day after the motel robbery. Both officers testified that they noticed nothing in defendant's conduct to indicate that he had a mental condition.

The trial was then adjourned until February 5, 1973, when the trial court rendered its verdict of guilty. On February 28, 1973, defendant was sentenced to a term of from 10 to 25 years in prison. A motion for a new trial was filed on March 20, 1973, and was denied by the trial court on June 1, 1973, for the reasons set forth in its May 30, 1973, opinion. Defendant now appeals his conviction and the denial of a new trial, assigning three allegations of error.

Defendant first contends that the trial court committed reversible error by improperly placing upon defendant the burden of proving that he was sane at the time of the alleged offense. Defendant claims that the testimony of the two doctors met the Michigan test for insanity as set forth in *People v Martin,* 386 Mich 407; 192 NW2d 215 (1971), and that the burden was, therefore, on the plaintiff to prove defendant was sane at the time of the offense.

Defendant presented this same argument to the trial court in his motion for a new trial. In denying the motion for a new trial and rejecting defendant's argument, the trial court stated:

"1. That it is well aware of the Michigan law that the people must prove beyond a reasonable doubt that the defendant was sane when he committed a crime, when the defendant introduces evidence of insanity at the time of the offense. The court finds that the people did prove beyond a reasonable doubt that the defendant was sane when he committed the crime.

"2. The court does not agree with the defendant that the testimony of Doctors Olive and Rosenzweig consti-

tuted evidence of defendant's insanity at the time of the offense.

"3. The court finds that the people did not fail to prove beyond a reasonable doubt that the defendant was sane at the time when the crime was committed."

We consider it necessary to point out to defendant that the trial court was not bound to accept the testimony of defendant's expert witnesses. In *People v Stoddard,* 48 Mich App 440, 447–448; 210 NW2d 470 (1973), we said:

"As trier of fact, the court was not bound to accept the opinion of defendant's expert. That this is the law in Michigan, even in a case where the people do not offer expert testimony, was decided in *People v English,* 29 Mich App 36, 51; 185 NW2d 139, 147 (1970):

" 'Triers of fact are not bound to accept opinion testimony, however expert and authoritative, because opinion testimony is not of the highest order. * * * If, under all the testimony in this case, the jury was compelled to accept questionable opinions of fact, then the doctors, not the jury, would have been determining the facts. We do not think the law of Michigan requires such a result, nor do we think that it should require such a result.' "

And in *People v Martin, supra,* our Supreme Court stated at p 422:

"It should never be forgotten that it is the jury (or the judge if a jury is waived) who is the ultimate trier of the fact of criminal insanity. In most cases, the expert knowledge of psychiatrists can be of assistance to the jury or judge in arriving at their determination, but under our system of justice that ultimate determination rests with the court or a defendant's jury of his peers."

In the case at bar the trial court heard the testimony of Doctors Olive and Rosenzweig and concluded that their testimony did not constitute

evidence of defendant's insanity at the time of the offense. We find no error in that conclusion. Furthermore, after a careful review of both the court's trial opinion and opinion denying defendant's motion for a new trial, we are convinced that the court was well aware of plaintiff's burden to prove defendant sane at the time of the offense and that at no time did the trial court improperly shift this burden upon defendant during trial.

Defendant next alleges that the trial court improperly admitted into evidence, over defense counsel's objection, lay testimony on the issue of defendant's sanity at the time of the alleged offense. The trial court allowed the plaintiff to question officers Brenner and Nicholson concerning their observations of defendant at the time of his arrest on October 10. Defendant argues that under the authority of *People v Cole,* 382 Mich 695; 172 NW2d 354 (1969), their testimony was inadmissible. The plaintiff, on the other hand, contends that these witnesses did not provide opinion testimony as to defendant's sanity, but merely testified as to their observations of defendant at the time they arrested him.

Defendant's reliance on *People v Cole, supra,* is misplaced. In *People v Alsteens,* 49 Mich App 467, 473–474; 212 NW2d 243 (1973), a case factually similar to the case at bar, our Court stated:

"We note at the outset that defendant's reliance upon *People v Cole, supra,* ignores the fact that no controlling majority opinion was rendered in that case. Justices KAVANAGH, DETHMERS, and BRENNAN concurred upon the necessity to lay a foundation for lay witnesses' opinion evidence of sanity or insanity, requiring that the witness have the opportunity to observe the speech, manner, habits, or conduct of the person in addition to establishing sufficient acquaintance with the defendant so as to be able to testify on a comparative basis.

Justice ADAMS concurred in the result, but relied upon the rule stated in *People v Zabijak,* 285 Mich 164, 185; 280 NW 149, 157 (1938), that '[a] nonexpert witness who has had ample means to observe and form conclusions as to the mental condition of a person and who testifies to pertinent facts on which his conclusions are based may state his conclusions as to the insanity of a person'. Justice KELLY concurred specially, stating that insufficient evidence was introduced to prove defendant's sanity. Reversal in *Cole,* then, was based upon either the lack of opportunity to compare the witness's conduct on different occasions, the lack of ample means to observe, form conclusions or testify to the facts upon which the conclusions were based, or the insufficiency of evidence to outweigh that which casts a reasonable doubt as to defendant's sanity. Failing to arrive at a majority opinion on this issue, *Cole* is of limited precedential value."

In holding the testimony of lay witnesses concerning the sanity of defendant admissible, the *Alsteens* Court went on to say at p 474:

"We are persuaded that the testimony adduced from lay witnesses on the basis of their opportunity to observe defendant is admissible. In *People v Hannum,* 362 Mich 660, 665; 107 NW2d 894, 896 (1961), the Court defined the question of admissibility of lay witness testimony regarding the sanity of defendant as being one of weight and not admissibility. There, objection was made to the testimony of three police officers who had observed the defendant for a short period of time prior to her arraignment in the shooting death of her husband. Each officer testified that defendant was sane. Defendant argued that the lack of proper foundation in addition to the lack of sufficient opportunity to observe the defendant rendered the testimony incompetent, citing *People v Zabijak, supra.* The *Hannum* court distinguished *Zabijak* in stating that the latter testimony did not consist of lay witnesses' opinions of defendant's insanity, but rather their conclusions as to what facts there were about defendant from which insanity might be inferred. The instant case does not

fall within either category. Each witness responded negatively when asked if defendant's conduct was unusual or any degree of intoxication existed. The nature of the testimony in each case confirmed defendant's sobriety and sanity rather than revealing any unnatural conduct or language. This distinction is made clear in *People v Hannum, supra,* at 663–664; 107 NW2d at 896 * * * ."

We are of the opinion that the trial court did not err in admitting the lay testimony on the basis of the opportunities the officers had to observe defendant, the extent of which was made known to the court. The matter involved a question of weight to be given their testimony rather than one of admissibility. *People v Hannum, supra* at 665; 107 NW2d at 896; *People v Alsteens, supra* at 475; 212 NW2d at 247. Furthermore, based on the fact that the trial court concluded that the evidence of the two expert witnesses, Doctors Olive and Rosenzweig, did not constitute evidence of defendant's insanity at the time of the offense, we are convinced that the trial court placed little reliance, if any, on the lay testimony of the officers. Therefore, even if we were to hold that the trial court erred in admitting their testimony, such error would be harmless and would not mandate reversal.

Defendant finally asserts that he was denied his constitutional right to counsel at a pretrial photographic showup and that, therefore, the identification testimony of Mr. Zainea was improperly admitted into evidence by the trial court.

In light of the legal principles recently enunciated by our Supreme Court in *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974), and *People v Anderson,* 391 Mich 419; 216 NW2d 778 (1974), the photographic showup conducted by police officers where defense counsel was not present, and now

challenged by defendant on appeal, was improper and constituted error. However, this does not mean that the trial court erred in admitting Mr. Zainea's identification testimony. The witness's subsequent in-court identification of defendant will not be deemed inadmissible if it had a source independent of the tainted identification procedure. *People v Duke,* 50 Mich App 714; 213 NW2d 769 (1973); *People v Potts,* 46 Mich App 538; 208 NW2d 583 (1973); *People v Harper,* 43 Mich App 500; 204 NW2d 263 (1972). The evidence indicates that the witness, Mr. Zainea, observed the defendant for an extended period of time during the course of the robbery. The trial transcript clearly supports the conclusion that Mr. Zainea's in-court identification was based on his memory of the incident and not upon the tainted photographic showup. We, therefore, find that this testimony was admissible since the identification of defendant was independent of the photographic identification.

Defendant's reliance on *People v Anderson,* 389 Mich 155; 205 NW2d 461 (1973), is misplaced. In that case the Supreme Court disallowed identification by photograph when the accused is in custody. Since this rule is not to be applied retroactively, *People v Duke, supra,* this defense is not available to defendant as his trial occurred prior to the release of the *Anderson* decision.

Affirmed.

All concurred.

AMERICAN BAKERY & PASTRY, INC. v CITY OF WARREN

1. ZONING—ORDINANCES—CONSTITUTIONALITY—PRESUMPTIONS.

Zoning ordinances are presumed to be constitutional, and that presumption is overcome only by a clear showing that their application is arbitrary and unreasonable, bearing no substantial relationship to the public health, safety, morals or general welfare.

2. ZONING—CONFISCATORY ZONING—CONSISTENT USE—MARKETABILITY.

Zoning of a parcel of land to permit construction of an office structure, where the owner sought light commercial zoning in order to construct and operate a bakery, was not confiscatory where the owner could feasibly develop the property for a use consistent with the zoning or find a reasonable ready market for it.

3. ZONING—HIGHEST USE—BEST USE—CONSISTENT USE.

Land need not be zoned for the highest and best use of the land provided it can feasibly be used as presently zoned.

4. ZONING—REASONABLENESS—DIFFERENCE OF OPINION.

The test of a zoning ordinance is reasonableness, and a showing of no more than a fair difference of opinion between a landowner and the zoning authorities does not demonstrate that existing zoning is unreasonable.

Appeal from Macomb, Edward J. Gallagher, J. Submitted Division 2 June 27, 1974, at Detroit. (Docket No. 17652.) Decided August 27, 1974.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning §§ 16, 21.
[2] 58 Am Jur, Zoning § 140.
[3] 58 Am Jur, Zoning § 178 *et seq.*
[4] 58 Am Jur, Zoning §§ 21, 22.

Zoning: creation by statute or ordinance of restricted residence districts from which business buildings or multiple residences are excluded. 117 ALR 1117.

Complaint by American Bakery & Pastry, Inc., against the City of Warren to declare a zoning ordinance void. Judgment for plaintiff. Defendant appeals. Reversed.

McAlpine & Cardamone, for plaintiff.

John J. Murray, Chief Assistant City Attorney, for defendant.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

BASHARA, P. J. Appellant, City of Warren, appeals from a decision of the Macomb Circuit Court which invalidated a zoning ordinance classifying plaintiff's property for office use.

Plaintiff purchased a parcel of real estate located 200 feet north of the intersection of 12 Mile and Ryan Road in the City of Warren. The Ryan Road frontage is 196 feet, with a depth of 332 feet. At the time of plaintiff's purchase in March 1969, the property was zoned single family residential. The property at the northeast corner of 12 Mile and Ryan Road is zoned for light commercial use. The parcel directly north of plaintiff's property is zoned single residential.

Plaintiff originally filed a petition before the defendant city to have the property rezoned as light commercial. The defendant city's legal department opined that in view of plans to build a wholesale and retail bakery with a relatively large storage area, the property would have to be rezoned for light manufacturing, to accomodate plaintiff's intentions. The city planning commission voted to deny rezoning to a light manufacturing classification. At the city council hearing,

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

plaintiff modified the petition from light manufacturing to light commercial. The city council also denied the amended petition.

Plaintiff initiated the present legal action. The city council then directed the city planning commission to conduct a public hearing to determine whether the single family residential zoning should be changed. After the public hearing, and over plaintiff's objections, the city planning commission recommended that the property be zoned for office use. The city council, following another public hearing, zoned the property for office use.

At trial, plaintiff presented testimony that there were vacant office buildings within the City of Warren and that rental prices had dropped from $8 to $6 per square foot. Plaintiff's witnesses also testified the land zoned office would be worth $1 to $1.25 per square foot, whereas if zoned light commercial it would be worth $1.50 per square foot. Testimony also showed that residential home sites abut to the rear of the property.

The trial court found that the zoning of the property as office rather than light commercial was arbitrary, confiscatory, discriminatory, and therefore void.

Plaintiff argues that because there is a glut of unused office space, and because the property is more valuable as zoned for light commercial activity, the zoning at bar is unconstitutional and the trial court should be affirmed. Defendant contends that the property can be used or sold as presently zoned. Further, that zoning need not present the highest and best use to be constitutional.

We must agree with defendant's contention in light of a recent holding of our Supreme Court. *Kropf v Sterling Heights,* 391 Mich 139; 215 NW2d 179 (1974), indicated that zoning ordinances are

presumed to be constitutional, and that the presumption is overcome only by a clear showing that their application is arbitrary and unreasonable in that they bear no substantial relationship to the public health, safety, morals or general welfare.

Plaintiff's short brief provides few citations to the issue of whether the zoning was arbitrary or unreasonable. Research of the many zoning cases which have paraded before this Court and the Supreme Court show that several zoning ordinances have been struck down as unconstitutional. Two factors intertwine throughout those cases. First, existing land use patterns rendered the property in question unsuitable for uses consistent with the allocated zoning. Second, there was no market for such permitted uses. Neither factor is present in the instant case.

Testimony established that an office structure could be constructed on the tract, which would be consistent with the commercial environment of the 12 Mile and Ryan Road area. Plaintiff's expert testified that the property as presently zoned was worth $1 to $1.25 per square foot. A realtor testifying for defendant city stated that its value as zoned was $1.30 per square foot. Both agreed that it could be sold for a fair value as presently zoned.

These facts demonstrate that the office zoning in the case at bar is not confiscatory. The plaintiff could develop his property for a consistent use or find a reasonable ready market for it. The argument reduces itself to claiming that office zoning is not the highest and best use of the land. But land need not be so zoned provided that it can be feasibly used as presently zoned. *Patchak v Lansing Twp,* 361 Mich 489; 105 NW2d 406 (1960); *Drummer Development Corp v Avon Twp,* 51 Mich App 21; 214 NW2d 60 (1973).

Chief Justice T. M. KAVANAGH, speaking for the majority in *Kropf, supra,* pp 160–161, addressed this proposition as follows:

"To these proofs plaintiffs' main, if not sole response, was that the instant land was more valuable when used for multiple residences and that this would constitute the 'highest use' of said property. While such arguments may be relevant in a Fifth Amendment attack on the ordinance, they do not rebut the showing of reasonableness on the part of the city, nor do they meet the burden plaintiffs have in showing that exclusion of other uses from this property was arbitrary and capricious. This Court and the Supreme Court in *Euclid, supra,*[1] has set forth several rational reasons a city may have in excluding other uses from a particular piece of property. It is presumed that the city acted for such reasons, or for any other valid reasons, in enacting a particular ordinance. To show arbitrariness and capriciousness on the part of the city, plaintiffs must show that it did not so act, or that no such grounds reasonably exist with respect to the instant parcel."

The plaintiff admits to buying this property without first checking to see if it was zoned to permit its intended construction and operation of a bakery. Plaintiff thus stands in the same shoes as the speculator whose development plans are thwarted by recalcitrant zoning authorities. As this court said in *Drummer Development Corp, supra,* p 24:

"The plaintiffs took a chance and must now bear the consequences of their unsuccessful gamble."

The test is reasonableness. When the plaintiff can show no more than a fair difference of opinion between himself and zoning authorities, he has not

[1] *Village of Euclid v Ambler Realty Co,* 272 US 365; 47 S Ct 114; 71 L Ed 303; 54 ALR 1016 (1926).

demonstrated that existing zoning is unreasonable. To further quote from *Kropf, supra:*

"In looking at this 'reasonableness' requirement for a zoning ordinance, this Court will bear in mind that a challenge on due process grounds contains a two-fold argument; first, that there is no reasonable governmental interest being advanced by the present zoning classification itself, here a single family residential classification, or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question." 391 Mich 158; 215 NW2d 186 (1974).

We find the ordinance in question bears a present relationship to the health, safety and general welfare and is therefore valid. Consequently we uphold the action of defendant city in its zoning of the subject property.

Reversed, no costs, a public question being involved.

All concurred.

PEOPLE v CONVILLE

1. CRIMINAL LAW—PLEA OF GUILTY—PLEA OF NOLO CONTENDERE—FACTUAL BASIS—PRELIMINARY EXAMINATION.

The court cannot rely solely upon the record of the preliminary examination to establish the factual basis for acceptance of a guilty plea; however, the court may rely solely upon the record of the preliminary examination to establish the factual basis for a plea of nolo contendere (GCR 1963, 785.7[3]).

2. CRIMINAL LAW—PLEA OF NOLO CONTENDERE—SUBSTANTIATION OF PLEA.

A plea of nolo contendere cannot be substantiated through direct questioning of the defendant concerning his participation in the crime (GCR 1963, 785.7[3][b][d]).

3. CRIMINAL LAW—CONSTITUTIONAL LAW—SODOMY—STANDING TO CHALLENGE—HUSBAND AND WIFE—STATUTES.

A defendant lacks standing to challenge the constitutionality of the sodomy statute on the grounds that the statute could be applied to acts engaged in by husband and wife in the privacy of their home where the defendant was not charged with committing acts of sodomy with his wife (MCLA 750.158).

Appeal from Lapeer, Norman A. Baguley, J. Submitted Division 2 June 11, 1974, at Detroit. (Docket No. 17685.) Decided August 27, 1974.

John P. Conville was convicted, on his plea of nolo contendere, of attempted sodomy. Defendant appeals. Affirmed.

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

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 497, 501, 502.

[3] 70 Am Jur 2d, Sodomy §§ 9, 24.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution. 11 ALR2d 646.

Derengoski, Solicitor General, and *Martin E. Clements,* Prosecuting Attorney, for the people.

Connolly, Simen, Figura & Zimmer, P. C., for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

J. H. GILLIS, P. J. On May 29, 1973, defendant pled nolo contendere to the charge of attempted sodomy. MCLA 750.92; MSA 28.287, MCLA 750.158; MSA 28.355. He was sentenced to three to five years in prison and appeals.

At the plea-taking proceedings the trial court, with defendant's consent, read the preliminary examination transcript and relied solely upon that transcript to determine a factual basis for defendant's plea. Defendant argues that this use of the transcript is reversible error.

The trial judge must establish a factual basis for a guilty plea prior to acceptance of that plea. *People v Carlisle,* 387 Mich 269; 195 NW2d 851 (1972). And, in establishing this factual basis, the court cannot rely solely upon the record of the preliminary examination. *People v Taylor,* 387 Mich 209; 195 NW2d 856 (1972); *People v Schneff,* 43 Mich App 413; 204 NW2d 244 (1972), 392 Mich 15; 219 NW2d 47 (1974); *People v Bratton,* 46 Mich App 1; 207 NW2d 437 (1973). The question we must answer is: Does this ban on the use of the preliminary examination transcript also apply to the acceptance of pleas of nolo contendere?

MCLA 767.37; MSA 28.977, provides in pertinent part:

"At the arraignment of any person upon an indict-

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

ment or upon the charge in a warrant, complaint or information the court may accept a plea of nolo contendere and if such a plea is accepted, the court shall proceed as if he had pleaded guilty."

This Court held in *People v Curry,* 48 Mich App 545, 550; 210 NW2d 791, 794 (1973), that,

"While *Carlisle* coupled with MCLA 767.37; MSA 28.977, would seem to require that the trial judge interrogate the defendant to establish the factual basis of the defendant's plea of nolo contendere, recently enacted GCR 1963, 785.7(3), effective June 1, 1973, reflects the Supreme Court's position that a plea of nolo contendere and plea of guilty are not to be treated exactly the same."

Under GCR 1963, 785.7(3) pleas of nolo contendere and pleas of guilty are treated differently with respect to the procedures to be followed by the court in establishing a factual basis for these pleas. GCR 1963, 785.7(3)(b) provides:

"The court shall not accept a plea of guilty until it is satisfied that a crime was committed and, through personal interrogation of the defendant, that defendant participated therein."

But GCR 1963, 785.7(3)(d) says:

"Where a plea of nolo contendere is made the court shall not interrogate the defendant regarding his or her participation in the crime. However, the court may not accept a plea of nolo contendere unless there has been or the judge thereupon conducts a hearing establishing substantial support for a finding that the defendant is in fact guilty of the charged offense or the offense to which he is offering the plea of nolo contendere and unless the judge first states reasons for believing that the interests of the defendant and the proper administration of justice do not require interrogation of the defendant regarding his participation in the crime."

Thus, unlike pleas of guilty, nolo pleas cannot be substantiated through direct questioning of the defendant concerning his participation in the crime.[1] But, according to GCR 1963, 785.7(3)(d), if *"there has been * * * a hearing establishing substantial support for a finding that the defendant is in fact guilty"* the judge may utilize the record of that hearing to establish a factual basis for the plea. The inescapable conclusion, therefore, is that the new court rule authorizes the plea-taking judge to rely upon the preliminary examination transcript to establish a factual basis for a nolo contendere plea.

Since the plea in this case was taken three days before the effective date of GCR 1963, 785.7(3), we are not bound to apply it here. However, we think we can properly look to this new rule for guidance because (1) there is no pre-GCR 1963, 785.7(3) authority concerning the use of preliminary examination records to establish a factual basis for nolo pleas and (2) while the rule was not effective until June 1, 1973, it was adopted March 16, 1973—before the plea in question here.

We hold, therefore, that it was not error for the trial judge to rely solely upon the preliminary examination transcript to establish the factual basis for defendant's nolo plea.

Defendant also argues that the sodomy statute, MCLA 750.158; MSA 28.355, is unconstitutional because it could be applied to acts engaged in by husband and wife in the privacy of their home. Since defendant was not charged with committing

[1] We do not think that this differentiated treatment of these pleas is contrary to the dictates of MCLA 767.37; MSA 28.977. The statute provides that *after* a plea of nolo contendere is accepted, the court shall proceed as if the person had pled guilty. GCR 1963, 785.7(3) sets forth procedures to be followed by the court *before* these pleas are accepted.

acts of sodomy with his wife, he lacks standing to challenge the statute's constitutionality. *Lovisi v Slayton,* 363 F Supp 620 (ED Va 1973).

Defendant's conviction is affirmed.

All concurred.

PEOPLE v EDWARDS

1. CRIMINAL LAW—DIRECTED VERDICT—EVIDENCE—ELEMENTS OF OFFENSE.

A motion for a directed verdict of acquittal may be granted only where there is no evidence at all, either direct or circumstantial, on each material element of the offense charged.

2. CRIMINAL LAW—EVIDENCE—IDENTIFICATION TESTIMONY—JURY.

The credibility of identification testimony is a matter left solely for the jury to determine.

3. CRIMINAL LAW—SPEEDY TRIAL—FACTORS.

Factors to be considered when determining whether a defendant was denied a speedy trial are: length of the delay, reason for the delay, defendant's demand for speedy trial, and the prejudice suffered by the defendant because of the delay.

4. CRIMINAL LAW—SPEEDY TRIAL—DEMAND—PREJUDICE.

A defendant was not denied a speedy trial where, although over two years elapsed between issuance of the warrant and the trial, the delay can not be attributed to any deliberate attempt by authorities to hamper the defense, the defendant has not made a sufficient showing of prejudice resulting from the delay, the defendant did not make a timely demand for a speedy trial, nor did he raise the issue when he made a motion for a new trial.

REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial §§ 302, 406 *et seq.*

[2] 53 Am Jur, Trial § 156 *et seq.*
58 Am Jur, Witnesses § 862.

[3, 4] 21 Am Jur 2d, Criminal Law § 241 *et seq.*

[5] 21 Am Jur 2d, Criminal Law §§ 368, 369.

[6] 20 Am Jur 2d, Courts §§ 233–236.
Prospective or retroactive operation of overruling decision. 10 ALR3d 1371.

[7] 47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 4, 8.

[8] 53 Am Jur, Trial § 480 *et seq.*

5. CRIMINAL LAW—IDENTIFICATION—PHOTOGRAPHIC IDENTIFICATION—INDEPENDENT BASIS.

The in-court identification of a defendant by a witness was proper, although the witness had previously made photographic identifications at which no counsel was present and where the defendant had not waived his right to counsel, where the witness testified that she was satisfied beyond reasonable doubt that the defendant was the man who robbed her, she had ample opportunity to observe the robber during the robbery, and she indicated that the photographs shown her earlier did not influence her identification in court; an in-court identification will not be deemed inadmissible if it has an independent basis.

6. CRIMINAL LAW—PHOTOGRAPHIC IDENTIFICATION—CUSTODY—CASE PRECEDENT—RETROACTIVITY.

A Supreme Court ruling that identification by photograph should not be used when a defendant is in custody is not to be applied retroactively.

7. CRIMINAL LAW—CROSS-EXAMINATION—PRIOR CONVICTIONS—JUVENILE RECORD—PRESERVING QUESTION.

Review by the Court of Appeals is limited to ascertaining whether or not a miscarriage of justice resulted where the defendant claims error because the prosecutor questioned him on cross-examination concerning a burglary conviction which allegedly occurred when the defendant was a juvenile, but the defendant did not object at trial.

8. CRIMINAL LAW—TRIAL—CLOSING ARGUMENTS.

A prosecutor properly objected to statements of the defense counsel during defense counsel's closing argument where the statements were not supported by the evidence produced at trial.

Appeal from Berrien, Julian E. Hughes, J. Submitted Division 3 June 3, 1974, at Grand Rapids. (Docket No. 17755.) Decided August 28, 1974.

Willie L. Edwards was convicted of armed robbery. Defendant appeals. Affirmed.

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.

Joseph N. Low, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. Defendant Willie Lee Edwards was charged with armed robbery, MCLA 750.529; MSA 28.797. On August 24, 1972, defendant filed a motion to suppress certain identification testimony unless it was shown to be independent of a photographic display shown the witness. A hearing on the motion was held with testimony being taken on September 26 and October 2, 1972. On October 5, 1972, the trial court denied defendant's motion, finding the identification to be independent of the photographic display.

Trial was held on November 16, 17 and 21, following which the jury returned a verdict against defendant of guilty as charged. On January 8, 1973, defendant was sentenced to a term of not less than 10 nor more than 25 years in prison, with appropriate credit for time already spent in jail. Defendant's motion for a new trial was denied on June 21, 1973. Defendant now appeals his conviction and the denial of a new trial as of right.

Evidence produced at trial discloses that Mrs. Elaine Noble, the victim of and only eyewitness to the robbery, testified that on February 21, 1970, she was working as a clerk in the Oak Dairy Store in Niles, Michigan. She stated that at some time between 4 and 4:30 p.m., a man entered the store and robbed her at gunpoint. She was subsequently knocked unconscious, and when she awoke, the

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

man was gone. She testified, however, that the man had worn no mask, and that he had stood in front of her for several minutes. Mrs. Noble concluded her testimony by identifying the defendant as the robber.

Defendant raises several allegations of error which we deem worthy of discussion. Other pertinent facts of this case are contained in our discussion of these issues.

Defendant first contends that his motion for a directed verdict, made on the basis that the identification testimony was insufficient to support his conviction, should have been granted by the trial court. We disagree.

As already mentioned, Mrs. Noble testified on direct examination that defendant was the man who robbed her. On cross-examination, defense counsel attempted to impeach Mrs. Noble by showing that her identification was made on the basis of photographic displays the police had shown her and by pointing out allegedly inconsistent descriptions of defendant made by her prior to trial.

In *People v Hodo,* 51 Mich App 628, 639; 215 NW2d 733 (1974), we set forth the standard to be followed in determining whether a motion for directed verdict should have been granted, when we said:

> "A motion for a directed verdict of acquittal may only be granted where there is no evidence at all, either direct or circumstantial, on each material element of the offense charged. In the event the requisite evidence is presented, it is submitted to the trier of fact for a determination of whether such evidence established guilt beyond a reasonable doubt. *People v Abernathy,* 253 Mich 583; 235 NW 261 (1931); *People v Garcia,* 33 Mich App 598; 190 NW2d 347 (1971)."

The credibility of identification testimony is a

matter left solely for the jury to determine. *People v Watson,* 52 Mich App 211, 214; 217 NW2d 121 (1974); *People v Goodwin,* 48 Mich App 692, 696; 211 NW2d 73 (1973); *People v Harper,* 43 Mich App 500, 507; 204 NW2d 263, 268 (1972), *lv den* 389 Mich 759 (1973). The jury in the case at bar had the opportunity to weigh Mrs. Noble's identification testimony in light of her alleged inconsistent descriptions and the circumstances of the identification. After listening to all the testimony, the jury chose to believe Mrs. Noble. We shall not substitute our judgment for theirs. *People v Watson, supra; People v Goodwin, supra; People v Harper, supra.* Therefore, since there was evidence presented on the material elements of armed robbery that defendant committed the offense, the trial court did not err by denying the motion for a directed verdict and submitting the case to the jury.

Defendant next argues that he was denied his constitutional right to a speedy trial. US Const, Am VI; Const 1963, art I, § 20.

The robbery occurred on February 21, 1970. On April 15, 1970, defendant was arrested on a fugitive warrant from Indiana, the warrant later being withdrawn. The Michigan authorities returned defendant to Indiana on or about the 15th of April. The warrant for defendant's arrest on the present charge was issued on April 16, 1970, but was not returned until June 14, 1972. A preliminary examination was held on July 12, 1972, with defendant being arraigned on the information two days later. As mentioned earlier, trial was held in mid-November, 1972.

Thus, although defendant argues that he was denied a speedy trial, his claim is primarily based upon the fact that there was an extended delay in

arresting him. Due to the fact that the defendant did not raise this issue before the trial court, there are few facts before this Court concerning the defendant's whereabouts during the two-year period of delay.

The factors to be considered in determining whether a criminal defendant was denied a speedy trial are: length of delay, reason for the delay, 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, 111; 211 NW2d 193 (1973); *People v Classen,* 50 Mich App 122; 212 NW2d 783 (1973).

As indicated earlier, more than two years elapsed between issuance of the warrant and trial. However, length of delay alone is not determinative. It must be balanced with the other factors. Long delays are not by themselves a denial of the constitutional right to a speedy trial. *People v Classen, supra.*

When we balance all the required factors, we find no denial of defendant's right to a speedy trial. The delay cannot be attributed to any deliberate attempt by the Michigan authorities to hamper the defense. Nor has defendant made a sufficient showing of prejudice resulting from the delay. Defendant's alibi witnesses were able to testify at some length as to the events on the day in question. If anything, the delay worked in defendant's favor since it lessened the ability of Mrs. Noble to identify him, thus increasing defendant's ability to attack the credibility of her identification testimony. Finally, defendant did not make a timely demand for a speedy trial nor did he raise this issue when he made a motion for a new trial. Balancing these factors, no denial of the right to a speedy trial has been established.

Defendant also asserts that the trial court erred in holding the sole identification witness's testimony admissible as independent of the photographic display.

At the hearing on defendant's motion to suppress the identification testimony, one officer Chute testified that he showed Mrs. Noble seven pictures from which she chose defendant as the robber. Mrs. Noble testified that only two pictures were shown her. This apparent discrepancy was resolved at trial when Mrs. Noble testified that she had been shown pictures on two occasions, once by officer Chute and once by another officer.

No counsel was present at either of these photo identifications nor was there any evidence that defendant had waived his right to counsel. Therefore, these photographic identifications were improperly conducted. *People v Anderson,* 389 Mich 155, 187; 205 NW2d 461 (1973); *People v Dates,* 52 Mich App 544; 218 NW2d 100 (1974). However, although the dictates of *Anderson* were not followed, the victim's subsequent in-court identification will not be deemed inadmissible if it had an independent basis. *People v Harper,* 43 Mich App 500; 204 NW2d 263 (1972); *People v Maniez,* 34 Mich App 55; 190 NW2d 682 (1971); *People v Anderson, supra.*

The evidence indicates that the robber was in the store for approximately 10 to 15 minutes and that Mrs. Noble saw the robber's face clearly for about half that time. Although two years had elapsed, she testified that she was satisfied beyond a reasonable doubt that defendant was the man who robbed her. She also testified that the photographs shown to her did not influence her identification, stating that her identification of defendant was based entirely on her memory of the incident.

On these facts, the trial court held that the identification of defendant was independent of the photographic identification. We agree.

In *People v Anderson, supra,* our Supreme Court held that identification by photograph should not be used where the accused is in custody. However, in *People v Duke,* 50 Mich App 714; 213 NW2d 769 (1973), we held that this rule was not to be applied retroactively. Therefore, since defendant's trial was in November of 1972, some four months prior to the *Anderson* decision, he cannot avail himself of the benefit of this rule.

Defendant next claims that the prosecutor improperly examined him concerning his juvenile record. On cross-examination, the prosecutor tried to impeach the defendant by showing that he had been convicted of other crimes, one of them being an alleged burglary which occurred in Indiana in 1961, when defendant was 15 years old. Defendant denied the existence of the conviction, claiming he neither went before a court nor was fingerprinted. However, while defendant did object to the prosecutor reading from the FBI rap sheet, he did not object to the questions concerning the alleged burglary conviction. Since defense counsel failed to object at trial, our review is limited to ascertaining whether or not a miscarriage of justice resulted. *People v Glover,* 47 Mich App 454; 209 NW2d 533 (1973); *People v Downs,* 45 Mich App 130; 206 NW2d 241 (1973); *People v Mitten,* 44 Mich App 64; 205 NW2d 47 (1972). On the contrary, the record clearly sustains defendant's conviction, and we find nothing to support defendant's claim that a miscarriage of justice resulted.

Finally, defendant maintains that the prosecutor's interruptions of defense counsel's closing argument prejudiced the defendant to such an extent

that a new trial is required. On the other hand, the prosecutor contends that it properly objected to defense counsel's closing argument since defense counsel was asserting facts not of record.

During closing argument, the prosecutor objected twice to statements made by the defense counsel. Our review of the trial transcript reveals that, as the prosecutor contends, neither statement by defense counsel was supported by the evidence produced at trial. The trial court has wide discretion in controlling and limiting the arguments of counsel. *People v Grace,* 50 Mich App 604; 213 NW2d 853 (1973); *People v Green,* 34 Mich App 149; 190 NW2d 686 (1971). Upon the present record, we find no abuse of that discretion.

Affirmed.

All concurred.

PEOPLE v FIELDS

1. CRIMINAL LAW—DEFENSES—INSANITY—EXPERT WITNESSES—PSYCHIATRISTS—CONTINUANCE—MISTRIAL.

A continuance or later a mistrial should have been granted a defendant to allow him to secure the services of another psychiatrist where the defense was insanity and it became apparent that the psychiatrist appointed by the trial court could not be produced through no fault of defendant or his counsel, the defense was timely raised by defendant, no undue delay was attributable to defendant, and defendant had no opportunity to present this defense without the benefit of expert assistance.

2. CRIMINAL LAW—DEFENSES—INSANITY—EVIDENCE—DEMEANOR OF DEFENDANT—TESTIMONY OF DEFENDANT—JURY QUESTION.

A trial court may not rely on a defendant's demeanor or his statements in determining whether or not the defendant will be allowed to present a defense of insanity; the defendant's demeanor and statements are for the jury on the question of sanity.

Appeal from Recorder's Court of Detroit, Robert J. Colombo, J. Submitted Division 1 March 5, 1974, at Lansing. (Docket No. 17791.) Decided August 28, 1974. Leave to appeal applied for.

Allen Fields was convicted of kidnapping and armed robbery. Defendant appeals. Reversed and remanded for a new trial.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,*

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 48, 53.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 ALR2d 434.

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: McGREGOR, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. Defendant was convicted by a jury of kidnapping and armed robbery. MCLA 750.349; MSA 28.581; MCLA 750.529; MSA 28.797. Trial was commenced March 22, 1973 and on April 18, 1973 the defendant was sentenced to a term of 7 to 20 years in prison. Defendant appeals as of right and we reverse and remand for a new trial.

Before his trial the defendant petitioned for forensic examination. A hearing was held on this petition on February 11, 1972 and the defendant was ordered committed to the Forensic Center for 60 days to determine whether or not he was competent to stand trial. On March 16, 1972, the trial court found that the defendant was not competent to stand trial and committed him to the Department of Mental Health. On December 14, 1972, the Ionia State Hospital reported to the trial court that the defendant was then competent to stand trial. However, the report also indicated that:

"Delay, length, or arduousness of a trial would be expected to significantly alter the mental capabilities of the defendant.

* * *

"It is considered essential that the patient continue

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

on his present medication consisting of Stelazine 10 mg. b.i.d. and Artane 2 mg. b.i.d. Without such medication, it is felt the patient would promptly show a level of decompensation to a point that he is incompetent. Further, excessive delays in bringing him to trial are likely to result in decompensation rendering a state of incompetency to stand trial."

On January 26, 1973, a sanity hearing was held and the defendant was found competent to stand trial. Defendant's appointed counsel filed a petition dated January 29, 1973 for the appointment of a psychiatrist. In this petition he indicated that he felt that defendant was mentally ill and was unable to assist in the preparation of his defense. On February 23, 1973, Dr. Clemens H. Fitzgerald was appointed in response to this petition. On February 23, 1973, defendant also filed a notice of his intent to use insanity as a defense.

At the outset of the trial on March 22, 1973, the defendant's counsel objected to proceeding to trial, indicating that in his opinion the defendant was not competent to stand trial for the reasons that the defendant could not discuss the matter with him or relate any of the facts of the case. Counsel also informed the court that Dr. Fitzgerald's office had informed him only two days before that the doctor could not be located and more time was needed to locate him. Motions for a new competency hearing and for a continuance were denied.

At the conclusion of the direct examination of the complaining witness, defendant's counsel again informed the court of his inability to conduct a cross-examination of the people's witnesses because of his inability to get any cooperation from his client. In response to counsel's statement, the court indicated that he was of the opinion that the defendant could cooperate if he chose to do so and

that he was familiar with these situations, having only the previous month experienced a similar performance. Thereupon, counsel indicated that he would have no cross-examination of the witnesses and the people proceeded to put in their case and rested.

Trial was adjourned to the following day to give counsel an opportunity to locate Dr. Fitzgerald. On the following day counsel informed the court that the doctor could not be located and asked for a mistrial. This motion was denied but the trial was adjourned to the following Monday to give counsel another chance to locate the doctor.

On Monday, March 26, 1973, defendant's counsel reported to the court that Dr. Fitzgerald could not be located and that he had been reported to the police department as a missing person. Counsel informed the court that in a telephone conversation with the doctor he had been informed that in the doctor's opinion the defendant was suffering from mental illness. Counsel further informed the court that defendant's only defense was his mental illness, that he could not put defendant on the stand under these circumstances, and that without the doctor's testimony he would have no argument to the jury. The trial court noted the defendant's continuing objection to proceeding with the trial. The verdict of the jury was guilty as charged.

At the sentencing proceedings the following appears in the record:

"*Mr. Townsend [defense counsel]:* Your Honor, under the circumstances I believe it would be in the defendant's best interests if no statements were made at this time.

"*The Court:* Actually I know it's a revelation to you and a startling one to you that he feigned his insanity defense but I mean that he—I always felt he was

feigning it and yet he saved himself, frankly, a lot of time. To me, that's a good indication that he is coming around. He took a calculated risk and he details it all in his probation statement, don't you, Mr. Fields?

"*The Defendant:* Yes, sir.

"*The Court:* And you are the third fellow this year, incidentally, that has appeared before me with the same type of defense and the same type of modis operendi *[sic]* trying to set up an insanity defense. However, whoever is encouraging this and teaching it over there is kind of clever because they can convince your lawyers and even other people that there can be something wrong but who was it, by the way, or do you want to say? Who was your tutor over in the jail as to how to set up the insanity defense?

"*The Defendant:* See, at first I didn't realize the crime that I had committed until I had got locked up and then people started telling me about how much time it carried.

"*The Court:* You mean you didn't realize how serious the crime was that you committed?

"*The Defendant:* Yes. I took it up on my own.

"*The Court:* All right. Well it is serious and it is the type of offense that, frankly, I originally planned on imposing a sentence here of twenty-five to fifty years on both counts. But you did come clean on the thing, that shows, in my judgment, a great step forward in your own rehabilitation and your lawyer who very ably defended you in this case, he has nothing, you took him in, you realize that?

"*The Defendant:* Yes.

"*The Court:* Even with all of that, he was a staunch believer in how ill you were. It was a farce, that's correct, isn't that right?

"*The Defendant:* Beg your pardon?

"*The Court:* The insanity defense was a farce?

"*The Defendant:* It was a put-on.

"*The Court:* Okay. You saved yourself a lot of time. I knew it all along and one other person, at least, did, too. There may have been others, too, but the probation officer was rather hep to you plus the fact that when you left the courtroom, you remember telling this police

officer here, 'Well it was a gamble and we lost?' Patrolman Delagado, do you remember that? Do you remember that?

"*The Defendant:* I may have, I don't know."

In view of our holding in this case we need not determine whether or not the trial court erred reversibly in refusing to hold a competency hearing when requested to by defendant's counsel. We state only that it certainly would have been better practice to have done so.

The second issue raised on this appeal presents the question of whether or not the trial court should have granted a continuance or as events developed a mistrial when it became apparent that the psychiatrist appointed by the court could not be produced through no fault of the defendant or his counsel. The defense of insanity was timely raised by defendant. His counsel noted on the record that this was the only defense he had because of the failure of defendant to cooperate with him. No undue delay can be attributed to the defendant. In our view defendant had no opportunity to present this defense without the benefit of expert assistance. We cannot say on this record that such assistance was available to him. A mistrial should have been granted, if need be, to allow him to secure the services of another psychiatrist.

The plaintiff argues that the defendant's insanity defense is a sham because he confessed to the sentencing court that this defense was a "put-on". We do not believe it appropriate for the trial court to rely on the defendant's demeanor or his statements in determining whether or not the defendant will be allowed to present a defense of insanity. The defendant's demeanor and statements are for the jury on the question of sanity. In *Pate v Robinson,* 383 US 375, 386; 86 S Ct 836, 842; 15 L

Ed 2d 815, 822 (1966), in speaking to a related issue the Court said:

"While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue. Cf. Bishop v United States, 350 US 961; 76 S Ct 440; 100 L Ed 835 (1956), reversing 96 App DC 117, 120; 223 F2d 582, 585 (1955)."

Reversed and remanded for a new trial.

All concurred.

PEOPLE v CULLENS

1. CRIMINAL LAW—PRELIMINARY EXAMINATION—CIRCUIT COURT—ARRAIGNMENT—PLEA OF GUILTY—PLEA OF NOT GUILTY—QUESTIONS REVIEWABLE.

   After proper arraignment in the circuit court and a plea of guilty or a plea of not guilty by defendant the prior proceedings had before an examining magistrate cannot be questioned.

2. CRIMINAL LAW—EVIDENCE—FINGERPRINTS—ADMISSIBILITY.

   Fingerprints found on a cash box at the scene of a crime were properly entered in evidence, even though the police destroyed the cash box after the fingerprints had been lifted, because the fingerprints were the evidence; they were lifted from the cash box and preserved, and defendant had an opportunity for experts to examine the prints and testify.

3. CRIMINAL LAW—EVIDENCE—FINGERPRINTS—SUFFICIENCY OF EVIDENCE.

   The criteria for a conviction based upon fingerprint evidence are that fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed.

Appeal from Oakland, Arthur E. Moore, J. Submitted Division 2 June 5, 1974, at Lansing. (Docket No. 18012.) Decided August 28, 1974.

Michael A. Cullens was convicted of breaking and entering with intent to commit larceny. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

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

[2, 3] 21 Am Jur 2d, Criminal Law §§ 341, 369.

Fingerprints, palm prints, or bare footprints as evidence. *28 ALR2d* 1115.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, and *Sandra M. Kabboush,* Assistant Prosecuting Attorney, for the people.

Sheldon G. Larky, for defendant on appeal.

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

R. B. BURNS, J. Defendant was found guilty by a jury of breaking and entering with intent to commit larceny in violation of MCLA 750.110; MSA 28.305.

The testimony showed that on March 1, 1972 the exterior door to the offices of the Pittsburgh Plate Glass Company at One Northland Plaza, Southfield, was locked at 6:30 p.m.

The next morning it was discovered that a receptionist desk in the lobby had been broken into and a key for the office had been taken. The office manager's desk had also been broken into and a cash box forced open. The cash box contained approximately $120.

The cash box was dusted for fingerprints and prints were "lifted"[1] from the box. Among the prints so lifted were some of the defendant's.

Defendant appeals on several grounds. The first claim of error we will discuss concerns the circuit court's remanding the case to the district court. Defendant claims the circuit court erred by re-

* 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 object thought to have fingerprints on it is dusted with carbon dust. The dust adheres to the oil left by the fingers touching the object, showing fingerprints. Then, a clear tape is placed over the prints. When removed, the prints stay on the tape and are actually lifted from the object.

manding the case to the district court for additional testimony.

Originally the district judge bound the defendant over to the circuit court on the charge of entering without breaking. MCLA 750.111; MSA 28.306. The prosecution was not satisfied and moved orally in the circuit court to have the cause remanded to the district court and the district court judge ordered to bind the defendant over to circuit court on the charge of breaking and entering. The prosecutor claimed the district judge had abused his discretion. After argument, the circuit judge remanded the case to the district court for additional testimony.

Defendant specifically claims the trial court erred: "First, it heard the motion to remand in violation of the general and local court rules, and secondly, it substituted its opinion for that of the examining magistrate".

We have carefully read the transcript of argument taken at the motion to remand the case to the district court. Defense counsel vigorously argued against the prosecutor's motion to remand the case and not once objected on the grounds now set forth on appeal.

As said in *People v Tate,* 315 Mich 76; 23 NW2d 211 (1946), and later in *People v Dobine,* 371 Mich 593; 124 NW2d 795 (1963), and *People v Robbins,* 6 Mich App 633; 150 NW2d 175 (1967):

> "The law has long been settled in this State that after proper arraignment in the circuit court and a plea of guilty or a plea of not guilty by defendant the prior proceedings had before an examining magistrate cannot be questioned * * * ." *Tate, supra,* pp 79–80.

Defendant also claims the trial court erred by admitting his fingerprints in evidence because the

police destroyed the cash box. Testimony showed that the police destroyed the cash box, for lack of sufficient storage space, after the fingerprints had been lifted.

Defendant claims he was denied effectual cross-examination because of such destruction. We do not agree. Defendant was convicted because his fingerprints were found on the cash box at the scene of the crime. The fingerprints were the evidence. They were lifted from the cash box and preserved. Defendant had an opportunity for experts to examine the prints and testify but failed to avail himself of the opportunity.

Defendant submitted several instructions concerning fingerprints which the trial court refused to give. *People v Ware,* 12 Mich App 512, 515; 163 NW2d 250, 252 (1968), sets forth as the criteria for a conviction based upon fingerprint evidence the following:

> "To warrant a conviction, the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed."

The trial court's instructions complied with the criteria.

Affirmed.

All concurred.

DETROIT FIRE FIGHTERS ASSOCIATION LOCAL NO. 344, IAFF v CITY OF DETROIT

MUNICIPAL CORPORATIONS—CHARTERS—DETROIT CHARTER—FIREMEN—RETIREMENT BENEFITS.

A Detroit fireman who leaves his employment after 40 years of age and after eight years of service is eligible to receive delayed retirement benefits on the date he would have been entitled to receive full retirement benefits had he continued in city service as a fireman; if he was a member of the system before January 1, 1969, this date will be when he would have had 25 years of service, or age 60, whichever occurs first; if he became a member on or after January 1, 1969, this date will be when he would have had 25 years of service and is age 55, or when he is age 60, whichever occurs first (Detroit Charter, Title 9, ch 7, Art 6, Pt A, § 4).

Appeal from Wayne, Thomas Roumell, J. Submitted Division 1 June 25, 1974, at Detroit. (Docket No. 18048.) Decided August 28, 1974. Leave to appeal denied, 393 Mich 755.

Complaint by the Detroit Fire Fighters Association, Earl J. Berry, and Coy Thompson against the City of Detroit and the Board of Trustees of the Policemen and Firemen Retirement System of Detroit for a declaratory judgment on rights to retirement benefits under the city charter. Judgment for defendants. Plaintiffs appeal. Reversed.

Marston, Sachs, O'Connell, Nunn & Freid, P. C., for plaintiffs.

REFERENCES FOR POINTS IN HEADNOTE

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 104, 133.

60 Am Jur 2d, Pensions and Retirement Systems §§ 44, 46, 55.

Robert Reese, Corporation Counsel, and *Nick Sacorafas, Ronald Zajac,* and *Michael A. Hurvitz,* Assistants Corporation Counsel, for defendants.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

CHURCHILL, J. Title 9, Chapter VII of the Charter of the City of Detroit created a retirement system for city policemen and firemen. In a November, 1968, election the people of the City of Detroit amended the City Charter. By these amendments, effective January 1, 1969, the retirement rights of firemen, including the right to receive delayed retirement benefits, were changed in several respects.[1] In this opinion we will refer to the rights of firemen, but it may be noted that the rights of policemen are the same.

In this appeal we are required to resolve a dispute as to the time when certain firemen who leave the employ of the Fire Department with sufficient service to be eligible to receive delayed retirement benefits are entitled to begin actually receiving those benefits.

It is not in dispute that the dollar amount of delayed retirement benefits will be substantially less than the amount due a fireman who had stayed with the Fire Department until he was entitled to ordinary retirement with immediate retirement benefits, and it is also undisputed that a fireman does not obtain a vested right to a delayed retirement unless he is at least 40 years old with 8 or more years of credited service when he leaves his employment as a fireman.

With sufficient service a fireman may retire and

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

[1] See *Detroit Police Officers Ass'n v City of Detroit,* 391 Mich 44; 214 NW2d 803 (1974).

be entitled to receive retirement benefits forthwith. Although the rights of such a retired fireman are not in dispute in this case, it will be helpful in understanding the controversy before us if the apparently undisputed rights of such a retiring fireman are outlined in this opinion. The 1968 Charter amendments affected those rights also.

If a fireman was a member of the retirement system before January 1, 1969, he will be eligible to retire and receive benefits forthwith when he has 25 years of service credit, or when he is 60 years old, whichever occurs first. If he becomes a member of the system on or after January 1, 1969, he will be eligible to retire and receive benefits forthwith when he has 25 years of credit and is 55 years old, or when he is 60 years old, whichever occurs first.

Alternatively, a fireman may leave his employment before he is entitled to ordinary retirement and the receipt of pension benefits forthwith, and instead be entitled to delayed benefits. This is the so-called "40 and 8" delayed retirement (age 40 and at least 8 years service). The eligibility to receive delayed benefits is governed by Title 9, Chapter VII, Art 6, Part A, § 4 of the City Charter. Section 4, which was amended in November of 1968, effective January 1, 1969, reads as follows (new language italicized; deletions shown by striking):

"Sec. 4. *Retirement allowance for certain persons leaving city employment after eight years service.*

"Should any member who (1) has attained age forty years, and (2) has acquired eight or more years of credited service, leave the employ of the Police Department or Fire Department of the City of Detroit prior to the date he would have first become eligible to retire as provided in this Part A, for any reason except his retirement or death, he shall be entitled to a retirement

allowance computed according to Section 2 *or 2.1* of this article, *whichever is applicable,* as said section was in force as of the date of his employment with the City last terminated; provided, that he does not withdraw his accumulated contributions from the Annuity Savings Fund. His retirement allowance shall begin the first day of the calendar month next following the month in which his application for same is filed with the Board of Trustees, on or after the date he would have been eligible to retire had he continued in City employment ~~or age sixty years, whichever is later~~. Unless otherwise provided in this Chapter such person shall not receive service credit for the period of his absence from the City Police Department and/or Fire Department employ, nor shall he or his beneficiary be entitled to any other benefit afforded in this Chapter except the benefits provided in Part A, Section 2 *or 2.1* or Part F of this Article VI, whichever is applicable, subject to the above provisions, notwithstanding, his membership has terminated."

It is undisputed that before the 1968 amendment took effect, no fireman would have been eligible to receive a delayed retirement pension benefit until he attained the age of 60 years.

Without reciting the entire trial court history, it is sufficient to state that on July 25, 1973 the last trial judge to whom the action was assigned signed a declaratory judgment that a pre-January 1, 1969 fireman is not eligible to receive § 4, "40 and 8" benefits until he has accumulated 25 years of actual service credit or has reached the age of 60 years, whichever occurs first. It is from this order the plaintiffs appeal.

The plaintiffs assert that by operation of the amendment a fireman who was a member of the retirement system before January 1, 1969, and who now leaves the Fire Department after satisfying the "40 and 8" requirement is entitled to begin receiving retirement benefit payments when he

would have had 25 years of creditable service had he stayed on continuously as a fireman, without regard to age. Plaintiff argues that this was clearly intended by deleting the age provision of § 4.

The city argues that the purpose of the Charter amendments was to restrict retirement benefits and therefore a restrictive construction of the meaning of the section, as amended, should be adopted. To accomplish this purpose the city asserts that the language in the last sentence of § 4, that, " * * * such person shall not receive service credit for the period of his absence from the * * * Fire Department employ, * * * " qualifies the timing of the right to start receiving delayed retirement benefits.

The city's position is that even after the deletion of the age-sixty phrase, the remainder of § 4 restricted the right to benefits until "on or after the date he would have been eligible to retire had he continued in city employment", which in turn is to be determined by § 1.

Section 1 is interpreted by the city in their brief as follows. If he was a member of the system before January 1, 1969 he would be eligible after earning 25 years of service credit or having reached age 60. If he became a member on or after January 1, 1969 he would be eligible after earning 25 years of service credit and having reached the age of 55 years, or having reached the age of 60.

Reading Chapter VII in its entirety, and looking at the apparently unambiguous language in § 4, we conclude that when the words, "or age sixty years, whichever is later" were deleted, the specific 60-year age requirement for the delayed pension benefits was deleted with it, and that the reference in the last sentence of § 4 referring to "above" is significant in computing the amount of benefits but not the time that they begin.

In arriving at this conclusion we are following the rule set forth in another case involving the Detroit City Charter and specifically the same pension chapter as is involved here, wherein the Supreme Court enforced a charter provision which stated that the medical findings of a so-called medical board of review were final and binding. Thus, said the Court in *Kelly v Detroit,* 358 Mich 290, 295–296; 100 NW2d 269, 272 (1960):

> "The language of the provision is not ambiguous, and, being specific, is controlling. The framers of the charter, and the people of the city in its adoption, must be presumed to have intended that the provision be construed as it reads."

It is the intention of the voters of the city to remove the restriction which must prevail. *Brady v Detroit,* 353 Mich 243, 91 NW2d 257 (1958).

If a fireman shall leave his employment after 40 years of age and after 8 years of service, the date he shall be eligible to begin receiving delayed retirement benefits shall be the same date he would have been entitled to receive full retirement benefits had he continued in city service as a fireman. If he was a member of the system before January 1, 1969 this date will be when he would have had 25 years of service, or age 60, whichever occurs first. If he became a member on or after January 1, 1969, this will be when he would have had 25 years of credit and is 55, or when he is 60, whichever occurs first.

The judgment is reversed.

All concurred.

HINTERMAN v STINE

1. BASTARDS—PATERNITY—UNMARRIED WOMEN.

The Paternity Act defines a child born out of wedlock as a child begotten and born to any woman who was unmarried from the conception to the date of birth of the child (MCLA 722.711).

2. DIVORCE—CHILDREN—LEGITIMACY—PRESUMPTIONS.

The legitimacy of all children begotten before commencement of any action under the divorce act is presumed until the contrary is shown (MCLA 552.29).

3. BASTARDS—PATERNITY—UNMARRIED WOMEN—DIVORCE.

Testimony by a plaintiff in a paternity action that she was menstruating at the time of her divorce was admissible because it was relevant to the question of whether she was unmarried at the time of conception, and coupled with her testimony that she had intercourse only with the defendant in the two months following her divorce, the coincidence of her last menstrual period before the birth of the child and her divorce was relevant to the question of whether he fathered a child born 9-1/2 calendar months, or 287 actual days, after her divorce.

4. BASTARDS—UNMARRIED WOMEN—PATERNITY—DIVORCE—LEGITIMACY—PRESUMPTIONS.

The admission of evidence of intercourse between the plaintiff and the defendant in a paternity case during the pendency of her divorce action was not reversible error where the trial court specifically found that the child was conceived after the judgment of divorce was entered, testimony concerning events before that date played no part in the court's decision, and there was sufficient other evidence to rebut the presumption of legitimacy.

REFERENCES FOR POINTS IN HEADNOTES

[1] 10 Am Jur 2d, Bastards § 1.

[2–4] 10 Am Jur 2d, Bastards §§ 14, 15.

24 Am Jur 2d, Divorce and Separation §§ 876, 877.

Determination of paternity, legitimacy, or legitimation in action for divorce, separation, or annulment. 65 ALR2d 1381.

Appeal from Lapeer, Norman A. Baguley, J. Submitted Division 2 June 11, 1974, at Detroit. (Docket No. 18308.) Decided August 28, 1974. Leave to appeal denied, 393 Mich 755.

Complaint by Terry Hinterman against Michael Stine charging him with paternity of her child. Order of filiation granted to plaintiff. Defendant appeals. Affirmed.

Martin E. Clements, Prosecuting Attorney, and *Charles Bird,* Assistant Prosecuting Attorney, for plaintiff.

Morrice & Lengemann, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ELLIOTT, J. Plaintiff was divorced on November 2, 1970. She gave birth to a child on August 16, 1971, which is 9-1/2 calendar months, or 287 actual days, after her divorce. She was menstruating on the day of her divorce. That period is the last menstrual period she had until after the birth of the baby. She brought this action under the Paternity Act against the defendant who was not her former husband. She had sexual intercourse with the defendant frequently in November and December of 1970 and she did not have sexual intercourse with anyone else in those months. The court ruled that the Lord Mansfield rule did not apply and allowed testimony from her that she may have had intercourse with the defendant, whom she began dating in October, in the late part of that month.

The court, sitting without a jury, found that she was divorced and, therefore, an unmarried woman

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

at the time of conception (as well as at the time of birth, an undisputed fact). The court further found that the defendant was the father of this child and has ordered support of $10 per week.

Two statutes should be noted. The Paternity Act defines a "child born out of wedlock" as "a child begotten and born to any woman who was unmarried from the conception to the date of birth of the child". MCLA 722.711; MSA 25.491. The act is limited to children born out of wedlock, so defined, and the action could not be maintained if the plaintiff had not been divorced at the time of conception of the child. The divorce act was amended after plaintiff's divorce but before commencement of this action, so that § 29, MCLA 552.29; MSA 25.107, provides: "The legitimacy of all children begotten before the *commencement* of any action under this act shall be presumed until the contrary be shown"; emphasis added. Prior to the amendment, a similar provision appears to be limited to a divorce for adultery and in such case, husband and wife were not competent to testify. MCLA 600.2162; MSA 27A.2162.

Defendant claims error in the admission of testimony by plaintiff that she was menstruating at the time of her divorce, without expert evidence concerning menstruation, pregnancy, and post-conception bleeding. Although not conclusive proof that conception followed the divorce, her testimony of the time of her last menstrual period was relevant to the question of whether she was unmarried at the time of conception; and, coupled with her testimony that she had intercourse with defendant and no one else in the two months following her divorce, the coincidence of her last menstrual period and her divorce was relevant to the question of whether he fathered the child.

Expert evidence would have been helpful, and could have been offered by either party, but it was not essential. Michigan's Standard Jury Instruction 1.04 says: "You have a right to consider all of 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"; and 1.03 says: "A fact may be proven indirectly by other facts or circumstances, from which it usually and reasonably follows according to the common experience and observation of mankind." These principles are no less applicable to a judge as trier of facts.

In *Magarell v Magarell,* 327 Mich 372; 41 NW2d 898 (1950), our Supreme Court took judicial notice of what was said by experts in *People v Case,* 171 Mich 282; 137 NW 55 (1912): "[T]he maximum period of gestation is 300 days, and the minimum 240 days, and the average 273 days". However, as pointed out in *Whitney v Whitney,* 169 Cal App 2d 209; 337 P2d 219 (1959), which reviews many medical treatises:

> "The length of most pregnancies is calculated from the first day of the last menstrual period, since normally, although not invariably menstruation does not occur during pregnancy. * * * [H]owever * * * , impregnation rarely, if ever, takes place at that time and the actual length of pregnancy from the time of coitus and subsequent fertilization of the ovum is for that reason a shorter period. Ovulation occurs about 14 days before the onset of the ensuing menstrual period, but it is subject to many influences, and there are cases in which it has seemingly occurred on almost any day in the intermenstrual cycle. Labor usually starts about 280 days from the first day of the last menstrual period, so that the actual period of gestation [from impregnation] is 270 days or less."

The last quotation leads us to defendant's claim that it was error when the trial judge permitted evidence of intercourse between plaintiff and defendant within the period of possible, but improbable, conception after the divorce action was commenced but before a judgment was entered on November 2, 1970. The Mansfield rule is ably discussed and criticized by Judge (now Justice) LEVIN in *Maxwell v Maxwell,* 15 Mich App 607; 167 NW2d 114 (1969), *lv den,* 381 Mich 815 (1969). The rule would bar testimony by the plaintiff concerning intercourse with defendant or the lack of intercourse with her husband up to the moment of divorce, *People v Bedell,* 342 Mich 398; 70 NW2d 808 (1955), unless the amendment to MCLA 552.29; MSA 25.107 enacted after *Maxwell, supra,* removes the presumption of legitimacy during the pendency of an action for divorce for any cause.

Without passing upon the possible effect of that recent enactment or its application to this case, we hold that, on the facts of this case, the admission of such evidence was not reversible error. The trial court specifically found that the child was conceived after November 2, 1970. Testimony concerning events before that date played no part in the court's decision.

There was sufficient other evidence to rebut the presumption of legitimacy; plaintiff had her last menstrual period when the divorce was obtained; thereafter, she had frequent intercourse for two months with the defendant and the child was born 287 days after the divorce. *Maxwell, supra,* reluctantly applied the Mansfield rule in a case where the child was unquestionably conceived before the divorce was granted. While the plaintiff was carrying this child, the Legislature amended § 29 of the divorce act to its present language. Perhaps the

intent of the Legislature was to correct the injustice recognized in *Maxwell, supra,* which said:

"Almost half their formal married life followed their separation. Yet, since neither blood tests nor physical impotency acquitted Truman Maxwell, he was, for all practical purposes, the guarantor of his wife's chastity during the period his complaint for divorce was pending even though his ability to supervise his wife's conduct was nil and, as the record suggests, her personal life was fully occupied although the bonds of matrimony remained unsevered."

Affirmed. Costs to appellee.

All concurred.

KITA v MATUSZAK

1. EQUITY—SCOPE OF REVIEW—PERJURY.

   Equity is precluded from serving as a reviewing court with broader powers of substitute judgment; therefore, mere perjured testimony is not sufficient to permit equitable intervention.

2. EQUITY—PROBATE ORDER—FRAUD—POSITIVE FRAUD—CONSTRUCTIVE FRAUD.

   Equity may interfere with a probate order obtained by positive fraud, but not for merely constructive fraud in obtaining the judgment.

3. EQUITY—WILLS—PROBATE ORDER—FRAUD—RES JUDICATA—ADEQUATE REMEDY.

   An order of a probate court, admitting a will to probate, is not res judicata in an equitable action to set aside the order because of fraud where the defendant beneficiary had procured and filed a false will and procured the heirs' consent in seemingly innocent fashion; the fraud thus perpetrated was positive and intentional, depriving the plaintiff heirs of an adversary trial, for which the probate court could provide no adequate remedy and an equity court had jurisdiction to exercise its inherent equity powers.

4. EQUITY—LACHES—FRAUD.

   Plaintiffs were not guilty of laches where there was no dilatory behavior on their part which operated to the defendant's preju-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 27 Am Jur 2d, Equity §§ 141, 142.

[2] 27 Am Jur 2d, Equity §§ 5, 69, 141.
37 Am Jur 2d, Fraud and Deceit §§ 4, 12.

[3] 27 Am Jur 2d, Equity § 126.
37 Am Jur 2d, Fraud and Deceit § 325.

[4] 27 Am Jur 2d, Equity § 163.
37 Am Jur 2d, Fraud and Deceit §§ 416–418.

[5] 57 Am Jur, Wills §§ 368, 403.
Presumption and burden of proof as to undue influence on testator. 154 ALR 583.

dice, and where the claim against the defendant arose from his own fraud and the success of that fraud placed the plaintiffs in temporary ignorance of their rights causing the lapse of time prior to the assertion of their claim.

5. FRAUD—WILLS—EVIDENCE.

The existence of a fraud on the part of a defendant beneficiary under a will who had filed the will for probate was shown by clear and convincing evidence where a preponderance of evidence indicated that the testator's signature was forged, the will was possibly misdated, hospital records indicated that the testator was in an oxygen tent and semi-comatose for much of the period during which the will was allegedly signed, testimony of the defendant and the attorney who drew up the will was inconsistent and contradictory, the testimony of a witness to the will was equivocal, and the defendant had also attempted to probate a forged will naming himself sole beneficiary of another estate.

Appeal from Wayne, William J. Giovan, J. Submitted Division 1 June 10, 1974, at Detroit. (Docket No. 18353.) Decided August 28, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Adolf Kita, Consul General of Poland and attorney-in-fact for certain Polish nationals, and Richard J. Michael, co-administrator of the estate of John Matuszak, deceased, against Michael Matuszak for the probating of a false will. Judgment for plaintiffs. Defendant appeals. Affirmed.

Goodman, Eden, Millender, Goodman & Bedrosian (Berry, Hopson, Francis & Mack, by *Robert W. Kefgen,* of counsel), for plaintiffs.

Riseman, Lemke & Piotrowski, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

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

J. H. GILLIS, P. J. Plaintiffs include certain Polish nationals, heirs-at-law of Lucya Remszel, represented by Consul General Adolf Kita, and the co-administrator of a deceased brother's estate. Defendant, Michael Matuszak, Lucya's brother, was the sole beneficiary of her estate, according to Lucya's alleged will. In 1966, plaintiffs complained that defendant had caused a false will to be probated through fraud and deceit. Defendant counterclaimed, charging libel because plaintiffs had alleged commission of criminal acts with no foundation. *Cf. Kita v Matuszak,* 21 Mich App 421; 175 NW2d 551 (1970), *lv to app den* 383 Mich 806 (1970). Jurisdiction did not arise in our courts to determine the counterclaim. *Kita, supra.* After lengthy delays, occasioned in part by appeals to this Court [see also *Lemke v Kita,* 17 Mich App 642; 170 NW2d 263 (1969), *lv to app den* 382 Mich 795 (1969)], trial to the court was had. Judgment was entered for plaintiffs, and damages approximating plaintiffs' intestate shares were awarded. Defendant appeals, alleging 57 grounds of reversible error.

The difficulties of reconstructing events occurring some 14 years earlier were evident throughout this trial. However, a brief recapitulation is essential to issue resolution. Lucya Remszel, nee Matuszak, emigrated from Poland in 1934. She married, remained childless, and worked in her brothers' Hamtramck bakery until her death. Mr. Remszel predeceased Lucya in 1957. Together they had accumulated assets of about $300,000; however, not well-schooled in the advantages of estate planning, neither apparently made any will before terminal illnesses beset them. Lucya Remszel died on July 3, 1959, at approximately 9:15 p.m., of heart failure and pneumonia.

On or about June 23, 1959, Lucya called her brothers' bakery to relate that she was too ill for work. A friend drove her to an appointment with a physician whom she had never before consulted. He ordered her hospitalized immediately. She entered Columbia Hospital, but was transferred to Lakeside General Hospital on June 30, 1959, because her condition had deteriorated. At the time of admission to Lakeside General she signed her name with an "X", a procedure followed when the patient is either physically incapacitated or ignorant of that skill. According to hospital records and the deceased physician's depositional testimony, her condition progressively worsened. She was placed in an oxygen tent "as needed", and was semi-comatose at death.

Plaintiffs claimed that the 1959 will was forged. The circumstances surrounding the will execution are as follows: Apparently defendant Michael Matuszak first visited his sister on July 2 or 3, 1959, several days after she contracted her illness. Attorney Frank Lemke and his secretary, Ann Perecky, also visited the hospital on that day, apparently to draw a will at Lucya's request communicated by Michael. At the time of trial, Frank Lemke was dead. Ann Perecky had suffered a memory lapse. Suffice it to say that critical factual inconsistencies about Mrs. Remszel's physical condition and behavior surrounded the will execution. After Mrs. Remszel's death, hospital personnel found a will bearing Mrs. Remszel's signature, attested by Lemke and Ms. Perecky. On July 7, 1959, the will, handwritten by Mr. Lemke, was filed in probate court. Again, equivocal acts surrounded the filing of the petition. On September 21, 1959, at the hearing defendant testified that decedent left a will. Mr. Lemke testified Mrs. Remszel had signed

the will in the presence of witnesses. Without contest, the will was admitted to probate. Defendant subsequently received assets of $315,000 from a gross estate of $391,000. However, he informed his relatives in Poland that 80% of the estate had been consumed in taxes and attorney fees.

In 1964, defendant falsified a will, naming him sole beneficiary of his brother John's $500,000 estate. He procured signatures of alleged attesting witnesses on a blank sheet of paper. He forged a will dated four days before John's death. While routinely investigating the matter for the Polish Consulate, an attorney discovered the fraud and procured sworn statements from the alleged attesting witnesses. On the date set for the probate hearing, defendant was confronted out of court with the sworn statement. In court, defendant admitted the will had been improperly executed. Suspicions aroused, the attorney investigated the earlier Remszel estate. He procured opinions of two handwriting experts finding the signature on the will a forgery. (One expert later retracted his opinion.) After interviewing Ann Perecky, Lemke's legal secretary, plaintiffs decided to file the instant lawsuit. Ms. Perecky had no recollection of the attestation, except a trip to a hospital on a warm day. Later, she recalled that she had properly attested the will in question, a recollection strangely devoid of further detail, especially when she had never left the office to attest a will nor seen a dying person. On this basis, and after weighing the conflicting testimony of several handwriting experts, the trial judge granted relief to plaintiffs.

On appeal, defendant claims that res judicata bars collateral attack on a probate order. He argues that when a court order is procured through

intrinsic rather than extrinsic fraud, the rule permitting attack on fraudulently procured equity judgments cannot be invoked. He claims that the necessarily perjured testimony of defendant and his attorney is intrinsic fraud not open to collateral attack. Defendant contends further that GCR 1963, 528.2, prevents equity intervention.

A conflicting line of cases expresses somewhat contradictory views of the problem. *Cf. Columbia Casualty Co v Klettke,* 259 Mich 564; 244 NW 164 (1932), *Fawcett v Atherton,* 298 Mich 362; 299 NW 108 (1941), and *Grigg v Hanna,* 283 Mich 443; 278 NW 125 (1938). Whatever the merits of the intrinsic and extrinsic fraud denominations, we think the underlying rationale retains some viability. The apparent distinction precludes equity from merely serving as a reviewing court with broader powers of substitute judgment; hence, mere perjured testimony is not sufficient to permit equitable intervention. *Ombrello v Duluth S S & A R Co,* 252 Mich 396; 233 NW 357 (1930);[1] *Beatty v Brooking,* 9 Mich App 579; 157 NW2d 793 (1968). If equity could be invoked in every case where perjury had been committed, there might be no end to litigation. *Beatty v Brooking, supra.* However, probate orders may be attacked for fraud. *Ewing v*

[1] The Court in *Ombrello v Duluth S S & A R Co,* 252 Mich 396, 403; 233 NW 357, 360 (1930), explains:

"It is said in 34 CJ 452:

" 'Equity will not enjoin the enforcement of a judgment at law either on the ground of the insufficiency of the evidence to support it, or the lack of evidence of essential facts, or because of erroneous action of the court in admitting or excluding particular evidence.'

"And in 3 Freeman on Judgments (5th ed), § 1184, with respect to relief in equity from orders and decrees of probate court:

" 'Equity may be resorted to only upon a sufficient showing of some ground for the exercise of equitable jurisdiction such as mistake or extrinsic fraud, and not merely to review the action of the probate court. * * * The fraud which will justify equitable relief against probate orders or judgments must, of course be extrinsic. Mere perjury or false testimony is not ground for relief.' "

Lamphere, 147 Mich 659; 111 NW 187 (1907); *Lewis v Poel,* 376 Mich 167; 136 NW2d 7 (1965). The fraud warranting equitable interference must be positive, not merely constructive fraud in obtaining the judgment. *Grigg v Hanna, supra.* In *Burnham v Kelley,* 299 Mich 452; 300 NW 127 (1941), defendant administrator filed fabricated, incorrect accounts in the probate court. The Supreme Court characterized that act as a fraud upon the court. The probate orders did not bar prosecution of the action. Similarly, defendant's action in procuring and filing a false will constitutes a fraud in obtaining the judgment. The probate court order is not res judicata. Like the administrator in *Burnham,* defendant herein continued his scheme, procuring the heirs' consent in seemingly innocent fashion. In both cases, after once becoming alerted to possible misconduct, the victims acted quickly to protect their rights. Since the fraud perpetrated was positive and intentional, effectively depriving plaintiffs of an adversary trial, for which the probate court could provide no adequate remedy,[2] the court had jurisdiction to exercise its inherent equity powers.

Similarly GCR 1963, 528.3,[3] does not preclude

[2] See *Grigg v Hanna,* 283 Mich 443, 455; 278 NW 125, 130 (1938), and cases cited therein, especially *Burgess v Jackson Circuit Judge,* 249 Mich 558; 229 NW 481 (1930); Const 1963, art 6, § 15; MCLA 701.19; MSA 27.3178(19).

[3] GCR 1963, 528.3 provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under sub-rule 527.2; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a

relief. That rule was not intended to limit equity jurisdiction to grant relief sought in an independent equitable action. 3 Honigman & Hawkins, Michigan Court Rules Annotated, p 191; *In re Lowerree,* 157 F2d 831 (CA 2, 1946).

Next, appellant contends that plaintiffs were guilty of laches. Defendant contends that the deaths of Frank Lemke, the attending physician, John Matuszak, and an alleged nurse witness (not attesting the will) are intervening circumstances aside from mere lapse of time, precluding relief. We find no dilatory behavior by plaintiffs which operated to defendant's prejudice. While the attorney and the doctor were deceased at the time of the trial, their depositional testimony was preserved and admitted. Both John's and the nurse's presence would have been valuable. Yet, absent John's death and the attempted fraud surrounding his will, plaintiffs would never have learned of the earlier fraud. We think the trial judge's analysis was correct:

"[A] defendant should not be heard to interpose the defense of laches where the claim against him arises from his own fraud and where * * * the very success of his fraud places the aggrieved parties in temporary ignorance of their rights and thus causes the lapse of time occurring prior to the assertion of the claim. *Chase v Boughton,* 93 Mich 285, 302; 54 NW 44, 50 (1892).

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reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment order or proceeding was entered or taken. A motion under sub-rule 528.3 does not affect the finality of a judgment or suspend its operation. *This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in subrule 528.2 above, or to set aside a judgment for fraud upon the court.* Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." (Emphasis supplied.)

And so, where the equitable claim arises from the fraud of the defendant the defense of laches must fall with the proof of the fraud since the defendant may not thereafter lift himself by his own bootstraps of wrongdoing."

Defendant claims the trial court erred reversibly in separating trial of the liability and damage issues. *Osgerby v Tuscola Circuit Judge,* 373 Mich 237; 128 NW2d 351 (1964), limited discretion to separate liability and damages over objection in a jury trial. The considerations attendant may well be distinct in a trial to the court. In any event, since defendant agreed to this procedure, he cannot now be heard to complain.

We turn to the principal issue: whether plaintiffs established by clear and convincing evidence the commission of forgery and perjury. To ascertain the standard of proof, defendant cites *Grigg v Hanna, supra,* 456–457:

" 'As against the living, proof of fraud must be clear and convincing. But when charges of corrupt, fraudulent, and criminal conduct are made against the dead, who have occupied positions of trust, and whose acts have been authorized and confirmed by a court of competent jurisdiction, *the proof must be so clear and convincing as to satisfy every reasonable mind.' Egan v Grece,* 79 Mich 629, 639; 45 NW 74, 77 (1890)."

Yet *Grigg* immediately juxtaposed:

"Though, as said in *Peoples v Evening News Ass'n,* 51 Mich 11; 16 NW 185 (1883):

" 'There are but two classes of cases recognized as requiring different rules of proof; *first,* criminal cases, and *second,* civil cases, or, to speak more accurately, cases not criminal. * * * In cases not criminal, and involving no criminal judgment and punishment, the court cannot require the jury to disregard any prepon-

derance of evidence which convinces them.'" *Grigg v Hanna, supra,* 457.

Since Frank Lemke was not a defendant in this suit, problem of proof as to Lemke is nonexistent. In equity cases, this Court considers the record *de novo,* but does not reverse unless we would have been bound to reach a different result as trier of fact. Applying that standard, we do not reverse. The plaintiffs showed by clear and convincing evidence the existence of a fraud. The possibly misdated will and hospital records indicating Mrs. Remszel was in an oxygen tent and semi-comatose for much of the period, clearly contradict defendant's and Lemke's inconsistent testimony. Further, the secretary's equivocal statements as to her memory, and defendant's conduct in attempting to probate his brother's will, when considered against the preponderating evidence that Lucya's signature was forged, satisfies the burden of proof that evidence of fraud be clear and convincing.

The remaining allegations of error do not merit a discussion and we find no reversible error.

Affirmed. Costs to appellees.

All concurred.

CORA v PATTERSON

1. INSURANCE—INTERPRETATION OF CONTRACT.

The terms of an insurance policy must be construed in accordance with the ordinary and popular sense of the language used, so as to avoid strained interpretations.

2. INSURANCE—AUTOMOBILES—DEFINITIONS.

An insurance policy which defines a "non-owned automobile" as a "private passenger, station wagon, or jeep type vehicle" refers solely to four-wheeled vehicles.

3. INSURANCE—AUTOMOBILES—MOTORCYCLES—DEFINITIONS—COMMON MEANING—NAMED INSURED.

The common meaning of "automobile" does not include "motorcycle"; thus an insurance policy providing liability coverage to a "non-owned automobile" did not provide coverage for a non-owned motorcycle operated by one who was not a named insured.

Appeal from Wayne, Victor J. Baum, J. Submitted Division 1 June 7, 1974, at Detroit. (Docket No. 19123.) Decided August 28, 1974.

Complaint by Dennis P. Cora against Betty Patterson and Allstate Insurance Company for a declaratory judgment that Allstate was obligated to defend a suit filed by defendant Betty Patterson against the present plaintiff. Judgment for defendant Allstate. Plaintiff appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur 2d, Insurance §§ 1–3.

[2] 7 Am Jur 2d, Automobile Insurance §§ 98, 99n.

[3] 7 Am Jur 2d, Automobile Insurance §§ 99, 103.

What is an "automobile" or a "car" within coverage of automobile liability policy. 74 ALR2d 1264.

Sommers, Schwartz, Silver, Schwartz, Tyler & Gordon, P. C., for plaintiff.

Liberson, Fink, Feiler, Crystal & Burdick, for defendant Betty Patterson.

Garan, Lucow, Miller, Lehman, Seward & Cooper, P. C., for defendant Allstate Insurance Company.

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

BRONSON, P. J. This is an appeal taken by plaintiff-appellant Cora from a summary judgment entered for defendant-appellee Allstate Insurance Company in a declaratory judgment action begun by Cora after Allstate refused to defend a suit filed against Cora by defendant-appellant Patterson. Patterson had been injured in an accident with Cora on April 17, 1970 while Cora was operating a friend's motorcycle.

Circuit Judge Victor Baum held that Allstate was not obligated to defend Cora in the damage action filed by Patterson, on the ground that the Allstate automobile liability insurance policy issued to Cora's father did not comprehend coverage for a non-owned motorcycle operated by one who was not a named insured.

Judge Baum asserts in his well reasoned opinion, and the briefs filed here appear to assume, that Cora was not a named insured. The record does not affirmatively disclose whether Cora was a named insured; pertinent declarations concerning the identity of the named insured were not included in the record.

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

We are constrained, for purposes of this appeal, to treat Cora as other than a named insured.[1]

The sole issue presented on this appeal is whether coverage under Allstate's policy, limited as it is to "non-owned private passenger automobile(s)", extends to a motorcycle. We hold that it does not.

Initially, we direct attention to the many cases which counsel that the terms of an insurance policy must be construed in accordance with the ordinary and popular sense of the language used, so as to avoid strained interpretations. *Edgar's Warehouse, Inc v United States Fidelity & Guaranty Co,* 375 Mich 598; 134 NW2d 746 (1965); *Economy Mills of Elwell, Inc v Motorists Mutual Ins Co,* 8 Mich App 451; 154 NW2d 659 (1967); *Huron Bowl, Inc v Security Ins Co of New Haven,* 14 Mich App 62; 165 NW2d 265 (1968); *Travelers Indemnity Co v Duffin,* 28 Mich App 142; 184 NW2d 229 (1970), *rev'd on other grounds* 384 Mich 812; 184 NW2d 739 (1971); *Weaver v Michigan Mutual Liability Co,* 32 Mich App 605; 189 NW2d 116 (1971).

Cora offers several dictionary definitions of "automobile" which arguably include "motorcycle". But contrary definitions are also available.[2]

Common usage is the touchstone. Cora argues that the word "automobile" is ambiguous and cites

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[1] Had Cora been a *named insured,* Allstate's policy could not have, consonant with statutory requirements, limited coverage to "automobiles". *Allstate Ins Co v Motor State Ins Co,* 33 Mich App 469; 190 NW2d 352 (1971). The statute, MCLA 257.520(c); MSA 9.2220(c), embraces non-owned *motor vehicles,* which includes motorcycles. *Great Lakes Motorcycle Dealers Association, Inc v Detroit,* 38 Mich App 564; 196 NW2d 787 (1972).

[2] *See, e.g.,* Webster's Seventh New Collegiate Dictionary (1965), p 60:

Automobile: "A usually 4 wheeled automotive vehicle designed for passenger transportation and commonly propelled by an internal combustion engine."

Travelers, supra, in support of that proposition. In such a case, so goes the argument, a policy must be strictly construed against the insurer. If there is doubt about whether "motorcycle" is included in the term "automobile", that doubt must be resolved against the insurer.

The argument has but transparent appeal. *Travelers* was directed to the question whether a non-operable, non-licensed automobile, which the owner claimed he did not intend to repair, was a "private passenger automobile" within the terms of the owner's insurance policy. As the Supreme Court later held, this was a question of *fact.* Even accepting Cora's claim that *Travelers* stands for the proposition that the term "automobile" is ambiguous, ambiguity is a relational term. The Court in *Travelers* was concerned with the apparent ambiguity of the term "automobile" as it related to a motor car whose engine was not in operable condition, *not* as it related to a motorcycle. Thus, the definition of "automobile" applied in *Travelers*[3] and relied on by Cora must be read in light of the unique facts of that case. It is also limited by a case which followed *Travelers—Weaver v Michigan Mutual Liability Co, supra.*

In *Weaver,* we held that, for purposes of the uninsured motorist provision of an insurance policy, a motorcycle is not an automobile. Cora seeks to explain this result by labeling *Weaver* an "exclusion" case; that in *Weaver* the clause being construed excluded coverage for any injury sustained while occupying an "owned automobile". Conversely, says Cora, the present case is one of

[3] "The term 'automobile' is applied generally to a self-moving vehicle designed to travel on common roads and, specifically, to a wheeled vehicle for use on roads without rails, which carries in itself a mechanical motor as its source of power. * * * " *Travelers, supra,* at 147.

inclusion, involving construction of one of the policy's main coverage clauses.

But the distinction, even if generally valid, does not make a difference in this context. *Weaver* was more than an exclusion case. It explored the scope of conversational language in comparing the meanings of "motorcycle" and "automobile": "We conclude that in its every day usage the term 'automobile' does not include a motorcycle". *Weaver, supra,* at 607.

It was further pointed out in *Weaver* that the insurance policy in that case did not disclose an intent to give an unusual meaning to the term "automobile". There "owned automobile" was defined (in pertinent part) as a "private passenger automobile", further defined as a "four wheel private passenger, station wagon or jeep type automobile". Here "non-owned automobile" is defined (in pertinent part) as "private passenger automobile", further defined as "private passenger, station wagon or jeep type vehicle".

Though Cora's affidavit indicates that the subject motorcycle had a passenger seat, the policy language unambiguously refers to four-wheeled passenger vehicles. Even though "four wheel" does not appear in the present policy, the conjunction of "private passenger" with "station wagon" and "jeep type" makes it clear that the phrase "private passenger automobile" is referring solely to four-wheeled vehicles.

Thus, the insurance policy involved in the present case does not disclose an intent to define "automobile" so as to alter its common meaning. "Automobile" does not commonly include "motorcycle", *Weaver, supra,* and in the present insurance policy, that result is, if anything, bolstered by use of the more descriptive and limited term "private passenger automobile".

Cases in other jurisdictions on this question are uniformly in accord.[4] The only case found involving construction of an insurance policy which disagrees is grounded in part on the presence of a representation by the insurer that the policy would cover motorcycles.[5]

It should be noted, moreover, that this result is in accord with the purposes of the Financial Responsibility Act, MCLA 257.501 *et seq.;* MSA 9.2201 *et seq.* That act mandates coverage for certain classes of persons and vehicles. For example, as was indicated above, coverage must be provided for named insureds for liability or damages arising out of the use of a non-owned motor vehicle. MCLA 257.520(c); MSA 9.2220(c). Similar coverage for owned vehicles and other insured persons, MCLA 257.520(b)(2); MSA 9.2220(b)(2), is also required. Public policy plainly requires that the statutorily mandated coverage be provided in every insurance policy. *Allstate, supra.* But public policy does not require that insurance companies provide coverage for persons or vehicles not included in the terms of the act.[6] Public policy is not

[4] *Laporte v North American Accident Ins Co,* 161 La 933; 109 So 767 (1926); *Salo v North American Accident Ins Co,* 257 Mass 303; 153 NE 557 (1926); *Perry v North American Accident Ins Co,* 104 NJL 117; 138 A 894 (1927); *Colyer v North American Accident Ins Co,* 132 Misc 701; 230 NYS 473 (1928); *Anderson v Life & Casualty Ins Co of Tennessee,* 197 NC 72; 147 SE 693 (1929); *Landwehr v Continental Life Ins Co,* 159 Md 207; 150 A 732 (1930); *Deardorff v Continental Life Ins Co,* 301 Pa 179; 151 A 814 (1930); *Beeler v Pennsylvania Threshermen & Farmers Ins Co,* 48 Tenn App 370; 346 SW2d 457 (1960); *Kershaw v Lumbermens Mutual Casualty Co,* 2 Conn Cir 164; 196 A2d 817 (1963); *Whiddon v Cotton States Mutual Ins Co,* 109 Ga App 137; 135 SE2d 521 (1964); *Westerhausen v Allied Mutual Ins Co,* 258 Iowa 969; 140 NW2d 719 (1966); *Valdes v Prudence Mutual Casualty Co,* 207 So 2d 312 (Fla App, 1968).

[5] *Bolt v Life & Casualty Ins Co of Tennessee,* 156 SC 117; 152 SE 766 (1930).

[6] It should be pointed out that plaintiff is not without protection here: the insurer of the motorcycle is obliged by statute to provide coverage for any person using the motorcycle with the named in-

offended when an insurance company does no more than comply with the terms of the statute. Allstate is not required by statute to provide coverage for non-owned vehicles driven by "other insureds". To do otherwise might well prevent insurance companies from efficiently assessing risks and spreading costs within the limits set by the act. Extending the scope of the act to require protection for persons not named in the insurance policy would fly in the face of the express language of the statute and constitute unwarranted judicial legislation.[7]

The order granting summary judgment for defendant-appellee Allstate is affirmed. No costs, a public question being involved.

All concurred.

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sured's permission. It appears from the record that Cora was using the motorcycle with the permission, MCLA 257.520(b)(2); MSA 9.2220(b)(2), of its owner.

[7] The cases relied on by Cora to support his claim that the act requires Allstate to provide coverage in the present case are not in point. Both *Woods v Progressive Mutual Ins Co,* 15 Mich App 335; 166 NW2d 613 (1968), and *American Mutual Liability Ins Co v Chaput,* 95 NH 200; 60 A2d 118 (1948), involved *named insureds.*

PEOPLE, *ex rel* ATTORNEY GENERAL, v FAIRFAX FAMILY FUND, INC.

1. LICENSES—SMALL LOAN BUSINESSES—CORPORATIONS—FOREIGN CORPORATIONS—CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATUTES.

   A foreign corporation conducting a loan-by-mail business with residents of Michigan is not required to obtain a license in the manner provided by the statutes regulating small loan businesses where the corporation is involved solely in interstate commerce, where the corporation is in compliance with the regulatory loan law of another state, and where licensing would result in a complete compulsory domestication of the corporation (MCLA 493.1 *et seq.*).

2. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—CORPORATIONS—FOREIGN CORPORATIONS—LOANS BY MAIL.

   A corporation conducting a loan-by-mail business in this state is involved solely in interstate commerce where the corporation solicits loans only by mail, is not admitted to do business in the state, owns no property in the state, maintains no employees in the state, executes no agreements in the state, and where default collections are made by a wholly independent collection agency.

3. LICENSES—SMALL LOAN BUSINESSES—CONSTRUCTION—OUT-OF-STATE COMPANIES—STATUTES.

   The phrase "except that loans made by mail to Michigan residents shall be subject to the provisions of this act", in an act regulating small loan businesses, does not require the general licensing of out-of-state small loan companies.

4. CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION.

   A statute shall be construed as constitutional if such a result can be reached.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 51 Am Jur 2d, Licences and Permits §§ 22, 23.

[4] 16 Am Jur 2d, Constitutional Law §§ 2–4.

Appeal from Ingham, Ray C. Hotchkiss, J. Submitted Division 2 June 7, 1974, at Lansing. (Docket No. 19149.) Decided August 28, 1974.

Complaint in *quo warranto* by the Attorney General against Fairfax Family Fund, Inc., and Spiegel, Inc., to enjoin the defendants from transacting business in Michigan without complying with licensing statutes. Judgment for defendants. Plaintiff appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Sally Lee Foley, J. Ronald Kaplansky,* and *Edwin M. Bladen,* Assistants Attorney General, for the plaintiff.

Hillman, Baxter & Hammond (by *Robert N. Hammond* and *Joel M. Boyden),* for the defendants.

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

O'HARA, J. The State of Michigan has an act which was amended by 1971 PA 168, effective March 30, 1972.[1] The act concerns the licensing and regulation of the small loan business.

It is a long and detailed statute. It provides for specified places of business in the nature of physical structures in Michigan,[2] the amount of reserve to be maintained at each,[3] the nature of the assets required,[4] and the rate of interest to the charged.[5]

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

[1] MCLA 493.1 *et seq;* MSA 23.667(1) *et seq.*

[2] This follows by reasonable implication from a reading of MCLA 493.2; MSA 23.667(2); MCLA 493.4; MSA 23.667(4); MCLA 493.7; MSA 23.667(7); MCLA 493.12; MSA 23.667(12).

[3] MCLA 493.2; MSA 23.667(2).

[4] MCLA 493.2, *supra* fn 3.

[5] MCLA 493.13; MSA 23.667(13).

It requires a pre-licensure investigation[6] and a fee of $150 to finance it.[7] It requires annual licensing at a fee of $250.[8] It may very well be that it is a perfectly valid exercise of the police power in Michigan over persons or corporations domiciled in Michigan, a question we are not called upon to decide.

Defendants have for sometime been conducting a loan by mail business with residents of Michigan. Defendant Fairfax Family Fund is a Kentucky corporation and is a totally owned subsidiary of defendant Spiegel which is a Delaware corporation. Fairfax does all the loaning to Michigan residents whose business it solicits only by mail. It is not admitted to do business in this state. It owns no property here. It maintains no employees here. The loan agreements are executed in Kentucky. On default, collection in Michigan is attempted by a wholly independent collection agency.

They are, defendants contend, involved solely in interstate commerce and thus protected by the commerce clause of the Federal constitution.[9]

We agree. Even under the minimum contacts doctrine and the rigorous test of *International Shoe Co v Washington,* 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945), defendants here under the record made do nothing except transact loan business by mail. Fairfax does not, as did International Shoe Company, have salesmen in the state; no samples were exhibited nor orders taken. In fact, no contacts with Michigan residents of any kind were had except by United States mail. It should

[6] MCLA 493.4; MSA 23.667(4).

[7] MCLA 493.2, *supra* fn 3.

[8] MCLA 493.2, *supra* fn 3.

[9] US Const, art 1, § 8.

be noted that the interest rate charged on the loans was substantially higher than permitted by the Michigan statute.

This aspect of the case is moot because defendants have conceded on the record and in their briefs that they are subject to the interest rate provisions of the Michigan act.[10] Presently they are complying with its provisions.

This left only the one question for the trial judge and the parties so stipulated. Can Michigan require defendants to obtain a license in the manner required by the act in order to continue their loan by mail business? The Attorney General says they must because of the following language in § 18 of the act: "except that loans made by mail to Michigan residents shall be subject to the provisions of this act".[11] His position is that this proviso amended the whole act to bring defendants within its terms with the consequent need to fulfill all of the licensing requirements thereof.

Not so, said the trial judge.

"It appears that this phrase ['except that loans made by mail to Michigan residents shall be subject to the provisions of this act'.] was added by the Legislature, for the limited purpose of concerning itself with the amount of interest which can be charged by lenders not licensed within the State of Michigan, and to the enforceability within Michigan of loans made by lenders not licensed within the state. The proviso in Section 18 relates only to the interest which may be charged and collected by persons who are licensed outside the State of Michigan, with respect to loans made by mail to Michigan residents. The Court has reached this conclusion through a careful examination of the entire act. To make the alleged licensing requirement clear and explicit would have been very easy for there are other

[10] MCLA 493.13, *supra* fn 5.

[11] MCLA 493.18; MSA 23.667(18).

sections in the act particularly devoted to the matter of licensing. It is only logical and reasonable for the Legislature to have included therein an explicit provision governing licensing of foreign lenders if its intention had been such. Leaving the licensing requirement to an implication to be drawn from an exception to a proviso in a section of the act dealing only with interest charges gives this Court the opinion that the Legislature had no intention of having this proviso govern the general licensing of out of state small loan companies or persons who are licensed under a similar regulatory loan law of another state or country."

The trial judge further noted that the act also includes the language "provided that the foregoing shall not apply to loans legally made in any state or country by a licensee under an existing regulatory loan law similar in principle to this act". As to this proviso he held:

"It is undisputed that the defendant, Fairfax Family Fund, Inc., is licensed under the Kentucky Petty Loan Companies Law and an examination of the Kentucky statutes, KRS 288.410 *et seq.,* reveals that it is basically similar to that of the State of Michigan, 1939 PA 21, as amended by 1971 PA 168.

"No other language in the act would appear to require the licensing of out of state lenders and since the defendant, Fairfax Family Fund, Inc., is in compliance with an existing regulatory loan law similar to the State of Michigan's as it must be in order to avoid the necessity of obtaining a license from the State of Michigan, this cause of action in *quo warranto* must be and is hereby dismissed."

We are in agreement with both conclusions. They are hereby affirmed.

Because of the position of the Attorney General and the possibility of further review of this case by our Supreme Court, and possibly the United States Supreme Court, we feel obligated to add that mere

non-discriminatory licensure by this state is not proscribed by the commerce clause. In a case involving the same defendants and the State of California a licensing requirement was imposed.[12] The California court held:

"The Small Loan Law of California is legislation designed for the public welfare. It is primarily to protect the citizens of this state from fraudulent and unconscionable conduct of those in the lending business *(In re Fuller,* 15 Cal 2d 425; 102 P2d 321 [1940]), and, as such, is a matter of local concern. Californians who deal or negotiate with, or obligate themselves to, appellant should have the same protection as afforded to Californians who deal with local small loan concerns. There is no question of discrimination in this case in that the statutes in question apply to both interstate and intrastate lending agencies alike. There is no barrier erected by the statutes in question to stop an interstate concern from doing its business in California. The licensing is not designed to protect local companies from outside competition. The purpose of the legislation is to protect the members of the public in California from the lenders who would otherwise take advantage of them. The degree of regulation contained in the laws of this state with reference to loan sharks is not disproportionate to the evils which exist if the lenders are left to their own devices without licensing and without any regulation by the state. The charges or expenses imposed by the licensing procedure are no larger in amount than is reasonably necessary to defray the administrative expenses involved and could not in any event be classed as being discriminatory or imposing undue restrictions on interstate commerce. The investigation which is made upon the filing of an application for a license is, on its face, designed to ascertain facts which are necessary and proper under the circumstances." *People v Fairfax Family Fund,* 235 Cal App 2d 881, 883–884; 47 Cal Rptr 812, 814 (1964).[13]

[12] Technically the California action was brought against Fairfax alone and did not name the parent corporation, Spiegel, as a party thereto.

[13] Appeal to the United States Supreme Court dismissed for lack of

We are in complete accord with the quoted excerpt, but our examination of the California statutes reveal many differences that render that decision inapposite to the case at bar. We are obligated to construe a statute as constitutional if such a result can be reached. 16 Am Jur 2d, Constitutional Law, § 146, pp 350–352. See also *State Highway Commission v Mobarak,* 49 Mich App 115; 211 NW2d 539 (1973). We must conclude that were the construction urged by the Attorney General adopted it would result in a complete compulsory domestication of defendants. Reasonable licensure is one thing. Domestication is quite another.

If § 18 were administratively construed to require only the payment of the $150 initial investigation fee and the $250 annual license fee called for in the act neither would constitute an unreasonable burden on interstate commerce and could be non-discriminatorily enforced.

According to what is designated as "Exhibit B" an application for a license was made and the requisite fees tendered. The administering agency, the Department of Commerce, rejected the application and returned the fees. We quote from the department's letter:

> "It is the administrative construction * * * that such act requires a license * * * with this license based on a finding of convenience and advantage to the community to be served.
>
> " * * * [T]he application * * * cannot be accepted."

Such construction presents some practical problems, to say the least, to a company which is

a substantial Federal question, 382 US 1; 86 S Ct 34; 15 L Ed 2d 6 (1965).

located in no Michigan community and conducts its entire operation by mail.

Great is the power of the sovereignty but it does not extend to this degree of regulation of interstate commerce, to say nothing of limiting the use of the United States mail.

For the reasons herein specified the trial judge is affirmed.

No costs, a public question.

All concurred.

HUBBERT v ACME EQUIPMENT COMPANY

1. INDEMNITY—CONTRACTS—CONSTRUCTION OF CLAUSES.

Indemnity clauses are construed most strictly against the party who drafts them and the party who is the indemnitee.

2. INDEMNITY—CONTRACTS—NEGLIGENCE—CONSTRUCTION OF CLAUSES —INTENTION OF PARTIES.

An indemnity contract will not be construed to indemnify an indemnitee against losses arising out of its own negligent acts unless such an intention is expressed in unequivocal terms.

3. INDEMNITY—CONTRACTS—NEGLIGENCE—LEASES—INTENTION OF PARTIES—CONSTRUCTION OF CLAUSES.

The language used in an indemnity clause in a leasing agreement is not sufficient to indemnify the indemnitee for claims arising out of its own acts of negligence, where the lessee-indemnitor agreed only to defend and hold the lessor harmless for claims arising out of lessee's use or handling of the equipment, *i.e.,* for lessee's acts of negligence, and the language used did not amount to a clear and unequivocal expression that the lessee would indemnify the lessor's negligent acts.

Appeal from Wayne, Charles Kaufman, J. Submitted Division 1 May 7, 1974, at Detroit. (Docket No. 16147.) Decided August 28, 1974.

Complaint by Sylvester Hubbert and Rose Lee Hubbert against Acme Equipment Company for damages for injuries Sylvester Hubbert received in a fall. Third-party complaint by Acme against Antonio Salvatore for indemnity. Plaintiffs and Acme settled. Acme's motion for summary judgment on its third-party complaint denied and Sal-

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 41 Am Jur 2d, Indemnity § 13 *et seq.*

vatore's motion to dismiss the third-party complaint granted. Acme appeals. Affirmed.

Sullivan, Sullivan, Ranger & Ward, for Acme Equipment Company.

Martin, Bohall, Joselyn, Halsey & Rowe, P. C., for Antonio Salvatore.

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

PER CURIAM. On or about February 21, 1967, defendant third-party plaintiff Acme Equipment Company leased a crane to third-party defendant Salvatore. The leasing agreement, a document drawn up by Acme, provided:

"TENANT agrees to defend ACME from and to save ACME safe and harmless from any and all claims that may rise from TENANTS use or handling of the above equipment.

* * *

"TENANT agrees to procure full insurance coverage and protection for property damage, public liability, workmen's compensation, fire and theft, and all other possible claims, risks or hazards incurred by reason of the possession or operation of said machine and equipment. Such insurance policies, or copies thereof, with a loss payable clause to ACME in the minimum sum of $5,000.00 shall be deposited with ACME within two (2) weeks from date and failure to do so or to effect such insurance shall entitle ACME to terminate this agreement and to repossess itself of said equipment forthwith."

On or about March 29, 1967, plaintiff Sylvester Hubbert was injured when the "bucket" of said

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

crane tipped as he rode it up out of an excavation causing him to fall some 20 feet to the bottom of the excavation. Hubbert and his wife commenced an action against Acme on a complaint alleging that the crane as supplied by Acme was unsafe and that Acme negligently failed to properly inspect, repair, or warn plaintiff's employer and/or plaintiff of the possibility of the "bucket" tipping and/or the crane's defective condition.

Acme, in turn, filed a third-party complaint against Salvatore, plaintiff's employer and lease-operator of the crane, claiming that Salvatore had negligently operated the crane, and further claiming that Salvatore was liable pursuant to the indemnity clause of the lease. Plaintiffs Hubbert and Acme reached a compromise settlement in the amount of $35,000, a settlement which third-party defendant Salvatore specifically did not agree to.

Acme thereafter moved for summary judgment on its third-party complaint asserting that Salvatore was liable for the settlement amount by virtue of the indemnity agreement. Salvatore moved to dismiss the third-party complaint. The trial court determined that the language in the lease agreement was not legally sufficient to create an indemnity agreement whereby Salvatore would be liable for Acme's negligence. Acme's motion for summary judgment was denied and Salvatore's motion to dismiss was granted. Acme appeals from the order of judgment dismissing its complaint.

It is well-settled law of this state that indemnity clauses are construed most strictly against the party who drafts them and the party who is the indemnitee. It is further well settled that an indemnity contract will not be construed to indemnify the indemnitee against losses arising out of its own negligent acts unless such an intention is

expressed in unequivocal terms. *Baker Contractor Inc v Chris Nelson & Son, Inc,* 1 Mich App 450; 136 NW2d 771 (1965); *Meadows v Depco Equipment Co,* 4 Mich App 370; 144 NW2d 844 (1966); *Geurink v Herlihy Mid-Continent Co,* 5 Mich App 154; 146 NW2d 111 (1966);. *Klann v Hess Cartage Co,* 50 Mich App 703; 214 NW2d 63 (1973).

Applying these rules of construction to the indemnity agreement contained in the lease, we find that the trial court properly held that the language used is not sufficient to indemnify the indemnitee for claims arising out of the indemnitee's own acts of negligence. Tenant Salvatore agreed only to defend and hold Acme harmless for claims arising out of Salvatore's use or handling of the equipment, *i.e.,* for Salvatore's acts of negligence. It cannot be said that the language used amounted to a clear and unequivocal expression that Salvatore would indemnify Acme's negligent acts; therefore the language is strictly construed against drafter-indemnitee Acme. Since the settlement by Acme was made with plaintiffs Hubbert on a complaint alleging a breach of warranty by and negligent acts on the part of Acme alone, and since the indemnity language is not sufficient to create an indemnity agreement binding the indemnitor to payment for the indemnitee's acts, Acme does not have a right to seek indemnity for the settlement made with the Hubberts. The trial court therefore properly dismissed Acme's third-party complaint.

In light of the above-noted disposition of this appeal, we specifically do not reach the question of whether MCLA 691.991; MSA 26.1146(1) is applicable to equipment lease contracts involving building contractors.

Affirmed. Costs to third-party defendant.

PEOPLE v ANDERSON

1. CRIMINAL LAW—RIGHT TO COUNSEL—RIGHT TO REPRESENT SELF—CONSTITUTIONAL LAW—STATUTES.

   One accused of a crime has a right to either represent himself or be represented by an attorney (Const 1963, art 1, § 13; MCLA 763.1).

2. CRIMINAL LAW—RIGHT TO REPRESENT SELF—DISCHARGE OF COUNSEL.

   The right to conduct one's defense personally in a criminal prosecution is absolute but the right to discharge counsel after commencement of the trial is qualified.

3. CRIMINAL LAW—RIGHT TO REPRESENT SELF—DISCHARGE OF COUNSEL—CONSTITUTIONAL LAW—STATUTES.

   A defendant's constitutional and statutory rights to represent himself were violated where, prior to the selection of the jury, he made a request to discharge his attorney accompanied by an unequivocal statement that he desired to represent himself, and the request was denied by the trial court (Const 1963, art 1, § 13; MCLA 763.1).

Appeal from Kent, George V. Boucher, J. Submitted Division 3 June 7, 1974, at Grand Rapids. (Docket No. 17272.) Decided August 28, 1974. Leave to appeal applied for.

Donny R. Anderson was convicted of armed robbery. Defendant appeals. Reversed and remanded for a new trial.

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

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 309, 310.
Self: right of defendant in criminal case to conduct defense in person, or to participate with counsel. 77 ALR2d 1233.

[2, 3] 7 Am Jur 2d, Attorneys at Law § 138.
21 Am Jur 2d, Criminal Law § 310.

Derengoski, Solicitor General, *James K. Miller,* Prosecuting Attorney and *Donald A. Johnston III,* Chief Appellate Attorney, for the people.

Joseph R. Gillard, III, for defendant on appeal.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

PER CURIAM. On November 9, 1972, defendant Donny Ray Anderson was charged with armed robbery contrary to MCLA 750.529; MSA 28.797. A preliminary examination was held in the 61st District Court on November 21, 1972, and defendant was bound over to circuit court for arraignment on the charge. On November 24, 1972, defendant was arraigned in Kent County Circuit Court and stood mute to the charges entered against him, whereupon a plea of not guilty was entered in his behalf. A pretrial conference was conducted on January 11, 1973, and the case was set for trial on January 30, 1973. Trial was held on January 30 and 31, following which the jury returned a verdict against defendant of guilty as charged. On March 19, 1973, defendant was sentenced to from 7 years and 6 months to 20 years in prison, with appropriate credit for time already spent in jail. Defendant now appeals his conviction as of right.

On the first day of defendant's trial, but prior to the selection of the jury, the following colloquy took place:

"*Defendant:* Your Honor, I would like to have Mr. Holst removed from this case for lack of evidence.

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

"*The Court:* Why?

"*Defendant:* I mean, I have my own personal feelings about Mr. Holst.

"*The Court:* What are those, sir?

"*Defendant:* I don't think he has put forth every effort that he has to see that justice is being done in this case.

"*The Court:* Are you prepared to hire your own attorney, sir?

"*Defendant:* No, I am not at this time.

"*The Court:* Are you prepared to represent yourself at this trial?

"*Defendant:* Yes, this is what I—

"*The Court:* I beg your pardon?

"*Defendant:* Yes.

"*The Court:* You wish to represent yourself?

"*Defendant:* Yes. Not at this moment. I wish to represent myself and have a little more time to get affiliated with the case.

* * *

"*The Court:* Why didn't you bring this motion to the attention of the court before the morning of trial, Mr. Anderson?

"*Defendant:* I just got aware of some evidence concerning this case and I can't—I really don't feel that justice can be held in this case.

* * *

"*The Court:* Have you talked to Mr. Holst about this case?

"*Defendant:* Yes.

"*The Court:* All right, sir. Thank you.

"It appearing that we are now at the morning of trial, that Mr. Holst is one of the most competent and experienced defense lawyers available in this part of the State, he is thoroughly prepared to try this case, that Mr. Anderson is not prepared to proceed to try the case alone this morning, and that no good reason has been shown for relieving him from his responsibility to the Court in this respect, the motion to remove Mr. Holst as defense counsel is denied."

The sole issue raised on appeal is whether it was reversible error for the trial court to refuse to permit the defendant to discharge his attorney and proceed with the trial representing himself.

One accused of a crime has a right to either represent himself or be represented by an attorney pursuant to Const 1963, art 1, § 13 and MCLA 763.1; MSA 28.854. The right to personally conduct one' defense in a criminal prosecution is absolute but the right to discharge counsel after commencement of the trial is qualified. *People v Henley,* 382 Mich 143, 148; 169 NW2d 299 (1969); *People v Armstrong,* 28 Mich App 387, 390; 184 NW2d 531 (1970).

In *People v Payne,* 27 Mich App 133, 183 NW2d 371 (1970), a case in which two members of this panel participated, we dealt with a factual situation similar to the present case. In *Payne,* the defendant had requested at the beginning of the trial that his court-appointed counsel be dismissed, and that he be allowed to conduct his own defense. As in this case, the jury in *Payne* had not yet been selected.

Relying on *United States ex rel Maldonado v Denno,* 348 F2d 12 (CA 2, 1965), *cert den* 384 US 1007; 86 S Ct 1950; 16 L Ed 2d 1020 (1966), we held in *Payne* that a defendant's constitutional right to defend himself is not violated where the accused's request that his attorney be discharged was not accompanied by an unequivocal request to defend himself. We, therefore, affirmed Payne's conviction since he did not unequivocally state that he wanted to represent himself. We emphasized, however, that absent this exception, defendant's right remained unqualified prior to the selection of the jury.

We are of the opinion that *Payne* mandates

reversal in this case. The jury had as yet not been selected. And, although the previously quoted transcript does show that defendant was not ready to try the case that day and was requesting an adjournment, this does not defeat the fact that defendant's statement, "I wish to represent myself", was unequivocal. We therefore hold that since the defendant's request to discharge his attorney was accompanied by an unequivocal statement that he desired to represent himself, his constitutional and statutory rights were violated.

Although we must reverse and remand this case for a new trial, we wish to point out that under the circumstances of this case, we do not fault the trial court for its action. We realize that the trial court's task in a situation such as was presented here is a difficult one. The court was faced with a dilemma. It had to choose between proceeding with the trial with counsel for defendant present and ready to defend the case or adjourning the case for two or three weeks to allow defendant time to prepare his own defense at which time the defendant would have been required to proceed with the trial in *propria persona.* Thus it appears that the trial court acted in a manner to prevent further delay in the administration of justice and to meet its responsibility to complete its cases and remove them from its docket expeditiously.

However, while we sympathize with the trial court, the fact that the task was difficult is not sufficient reason to vitiate defendant's absolute right to represent himself at trial and conduct his own defense, as guaranteed by our State Constitution. It appears that both the trial court and the prosecutor mistakenly considered this case to involve a discretionary denial of a motion for an adjournment. This is most unfortunate; for had

the court expressly addressed itself to the question of defendant's right to represent himself, we are confident that it would have resolved the matter in defendant's favor, as we have.

Reversed and remanded for a new trial.

JONES v DOUGLAS & LOMASON

1. WORKMEN'S COMPENSATION—NOTICE OF INJURY—TIMELINESS OF NOTICE—FINDINGS OF FACT—APPEAL BOARD—EVIDENCE—APPEAL AND ERROR.

   The determination whether notice of an injury was given to the employer by the injured employee within three months after the happening thereof as required by the Workmen's Compensation Act is a question of fact for the appeal board; where the board impliedly found that the notice provision had been complied with, the Court of Appeals must affirm such a finding if it is supported by any evidence (MCLA 412.15).

2. WORKMEN'S COMPENSATION—NOTICE OF INJURY—TIMELINESS OF NOTICE—NOTICE TO FOREMAN—NOTICE OF HOSPITALIZATION—EVIDENCE.

   An injured employee gave timely notice of his injury to his employer as required by the Workmen's Compensation Act where the employee's uncontradicted testimony indicates that he informed the company foreman of a back injury minutes after its occurrence, because notice to the foreman is notice to the employer and sufficient to meet the demands of the statute, and where the company received word within the statutory time limit that the injured employee had been treated and hospitalized for a back injury and that a hemilaminectomy had been performed (MCLA 412.15).

Appeal from the Workmen's Compensation Appeal Board. Submitted Division 1 June 5, 1974, at Detroit. (Docket No. 18177.) Decided August 28, 1974.

Claim by Joseph Jones against Douglas & Lomason and Michigan Mutual Liability Company for workmen's compensation benefits. Benefits

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation § 375 *et seq.*

granted. Defendants appeal on leave granted. Affirmed.

Seymour Beitner, for plaintiff.

LeVasseur, Werner, Mitseff & Brown (by *Lawrence D. Egan),* for defendants.

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

PER CURIAM. This is an appeal by defendant Douglas & Lomason from the Michigan Workmen's Compensation Appeal Board's affirmance of a referee's award of benefits to plaintiff-appellee Jones. The findings that Jones was injured and that his injury was compensable under the Workmen's Compensation Act are not contested here. The sole issue presented for review is whether "notice of the injury [was] given to the employer within 3 months after the happening thereof".[1]

The determination of that issue is a question of fact for the appeal board. *See Williams v Chrysler Corp,* 29 Mich App 398, 401; 185 NW2d 403, 404 (1971), and cases cited therein. The appeal board held that "[t]he defendant's defenses of failure of notice is *[sic]* not well taken". The board thus impliedly found that the notice provision had been complied with. Accordingly, we must affirm this finding if it is supported by any evidence. *Fergus v Chrysler Corp,* 45 Mich App 196, 199; 206 NW2d 521, 522 (1973), *rev'd on other grounds,* 389 Mich 811 (1973); *Williams v Chrysler Corp, supra.*

There is ample evidence in the record to satisfy

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

[1] MCLA 412.15; MSA 17.165, now identically MCLA 418.381; MSA 17.237(381).

this narrow standard of review. Jones' uncontradicted testimony indicates that he informed the company foreman of a back injury minutes after its occurrence. Notice to the foreman is notice to the employer and sufficient to meet the demands of MCLA 418.381; MSA 17.237(381). *Norris v Chrysler Corp,* 391 Mich 469, 476; 216 NW2d 783 (1974); *Banks v Packard Motor Car Co,* 328 Mich 513; 44 NW2d 166 (1950); *West v Northern Tree Co,* 365 Mich 402; 112 NW2d 423 (1961). Moreover, Douglas & Lomason received word within the statutory time limit that Jones had been treated and hospitalized for a back injury and that a hemilaminectomy had been performed. Such information, in addition to the notice given the foreman, was ample to make Douglas & Lomason "aware that an injury has been sustained". *Norris, supra,* at p 477.

The opinion of the appeal board is affirmed.

Affirmed. Costs to appellee.

PEOPLE v KOCHAN

1. VENUE—CHANGE OF VENUE—CRIMINAL LAW—DISCRETION—STATUTES.

A circuit judge may grant either party in a criminal proceeding a change of venue upon good cause shown or may deny the motion in his discretion; to set aside such a decision, there must be a clear showing of abuse on the part of the court (MCLA 762.7).

2. BURGLARY—BREAKING AND ENTERING—LARCENY—INTENT—INFERENCES—EVIDENCE—STATUTES.

The intent to permanently deprive the owner of his goods which is a key element of the crime of breaking and entering an occupied dwelling with intent to commit larceny can be inferred from the totality of facts and circumstances present in a case; if a defendant had the requisite intent at the time of the breaking and entering, an abandonment of the goods does not render him less culpable (MCLA 750.110).

3. BURGLARY—SUPPRESSION OF EVIDENCE—DUE PROCESS—EXPERT WITNESSES—CROSS-EXAMINATION.

Evidence on whether a defendant's screwdriver made the entry marks on the home of a burglary victim was not deliberately suppressed and kept from defendant's knowledge, there was no prejudice to defendant's substantial rights, and the constitutional guarantee of due process was not interdicted, where defendant sought discovery of the scientific information prior to the preliminary examination and the prosecutor answered that comparison tests with the screwdriver were incomplete, defendant's discovery motion at trial did not cover results of the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 417.
[2] 13 Am Jur 2d, Burglary § 24.
[3] 58 Am Jur, Witnesses § 844.
31 Am Jur 2d, Expert and Opinion Evidence § 45.
[4] 58 Am Jur, Witnesses §§ 821, 823.
29 Am Jur 2d, Evidence §§ 371, 372.
[5, 6] 21 Am Jur 2d, Criminal Law § 137.
[7] 68 Am Jur 2d, Searches and Seizures §§ 64–66.

scientific tests, the expert witness could not state unequivocally that the screwdriver made the entry marks, and defense counsel was afforded the opportunity to cross-examine the expert.

4. BURGLARY—WITNESSES—IDENTIFICATION—FALSE TESTIMONY—IMPEACHMENT—JURY QUESTION.

Identification testimony elicited by the prosecutor from the victim of a burglary in which the victim made no reference to the fact that he had previously described one of the burglars in a phone call to the police as having a beard did not deny defendant due process because of possible false testimony, where the defense was allowed to impeach the witness's testimony by playing the police tape recording in which he described the culprit as having a beard and the victim was recalled as a rebuttal witness and stated that he did not recall using the word "beard"; the discrepancy in the identification testimony raised a controverted question of fact for the jury under proper instructions.

5. APPEAL AND ERROR—DEFENSES—ALIBI DEFENSE—CONSTITUTIONAL LAW—PRESERVING ISSUES—STATUTES.

The Court of Appeals will not consider a challenge to the constitutionality of the alibi statute where the issue was not timely raised below and therefore not preserved for review (MCLA 768.20).

6. CRIMINAL LAW—DEFENSES—ALIBI DEFENSE—WITNESSES—CUMULATIVE EVIDENCE.

A defendant was not prejudiced where the trial court refused to allow alibi witnesses to be called at trial because the defendant failed to exercise due diligence in finding the witnesses, where defendant already had produced three witnesses who supported his alibi defense and a separate record made of the testimony concerning the additional alibi witnesses shows that the excluded evidence was largely cumulative.

7. SEARCHES AND SEIZURES—WARRANT—AFFIDAVIT—PERSONAL KNOWLEDGE OF AFFIANT—VALIDITY.

A search warrant was valid though the affidavit was not based on the police officer-affiant's personal knowledge, where the affidavit was supported by the knowledge of a fellow police officer.

Appeal from Oakland, William P. Hampton, J. Submitted Division 2 June 7, 1974, at Lansing. (Docket No. 18123.) Decided August 29, 1974. Leave to appeal applied for.

Stephen T. Kochan was convicted of breaking and entering an occupied dwelling with intent to commit larceny. Defendant appeals. Affirmed.

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.

Anthony Renne, for defendant on appeal.

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

PER CURIAM. The defendant was jury-convicted on a charge of breaking and entering an occupied dwelling with intent to commit larceny. MCLA 750.110; MSA 28.305. This appeal as of right followed.

There are ten assignments of error. We have examined them all. Those to which we do not specifically advert have not been disregarded. Rather we consider them to have raised issues not preserved on appeal or to have been of insufficient substance to merit decisional discussion.

Defendant first argues that the trial judge erred in denying defendant's motion for change of venue prior to trial. We do not agree with this contention. While a trial judge may grant either party a change of venue "upon good cause shown", MCLA 762.7; MSA 28.850, the denial of such motions rests in the circuit judge's discretion. To set aside such a decision there must be a clear showing of abuse on the part of the court. *People v Shugar,* 29 Mich App 139; 185 NW2d 178 (1970). There was no abuse of discretion in the instant case.

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

The next contention pertains to a claim that the prosecution did not adequately establish at the preliminary examination that the charged crime had been committed and probable cause to believe that defendant had committed it. More particularly, he asserts there was a failure of proof on one of the key elements of the charge, *i.e.* the intent to permanently deprive the owner of his goods. This assertion is based upon the fact that the chattels were found in a field sometime subsequent to the taking and that such action allegedly indicates an intention on his part to abandon them.

Intent can be inferred from the totality of facts and circumstances present in a case. *People v Butler,* 27 Mich App 404; 183 NW2d 595 (1970). If defendant had the requisite intent at the time of the breaking and entering, an abandonment of the goods does not render him less culpable. See generally, *People v Curley,* 99 Mich 238; 58 NW 68 (1894). In any event, our examination of the record made at the preliminary examination amply justifies the finding of the magistrate that the prosecutor had established all the elements of the charged crime.

The next issue presented is whether the prosecutor deliberately suppressed evidence vital to the defendant's case. Defendant contends that he was denied due process of law because the people suppressed evidence which was material to his defense. Per contra the prosecutor contends that there was no deception involved and that defendant was not entitled to discovery prior to the preliminary examination. The people further claim that defendant should have moved for the production of the materials in circuit court and that his failure to do so should preclude any claim of error.

A screwdriver was found in the defendant's car and the authorities were apparently trying to determine if the markings on the door of the burglarized premises had been made by this particular tool. The defendant sought discovery of the scientific information prior to the preliminary examination. The prosecutor responded to the defendant's request by stating that comparison tests with the screwdriver were incomplete. Nothing of record suggests the contrary. The defendant did make a discovery motion at trial but this motion did not cover results of the scientific tests. Nor could the police witness, who testified as an expert at trial, state unequivocally that the defendant's screwdriver made the entry marks on the home of the victim. Additionally, defense counsel was afforded the opportunity for a full and searching cross-examination of the people's expert. We conclude that there was no prejudice to defendant's substantial rights and that the constitutional guarantee of due process was not interdicted.

Defendant now claims that he was denied due process when the prosecutor elicited testimony from the victim of the crime, knowing that it was false as compared with an earlier taped statement of this witness and that the people immeasurably added to the prejudice by suppressing evidence containing the earlier inconsistent statement.

In his testimony at trial, the victim made no reference to the fact he had previously described one of the burglars in an initial phone call to the police as having a *beard.* The defendant had been apprehended shortly after this report was called in and was beardless at the time. The defense was then allowed to impeach the witness's testimony by playing the police tape recording in which he described the culprit as having a beard. The owner

of the burglarized premises was then recalled as a rebuttal witness and stated that he did not recall using the word "beard".

This was not a case of the prosecutor using false testimony, but rather a case of shifting memory under the stress of excitement. The discrepancy in the identification testimony raised a controverted question of fact for the jury. It resolved the credibility issue adversely to defendant. That is the way our system of jurisprudence has developed to deal with such disputed factual questions.

In like manner this was not a suppression of evidence case. Manifestly, the tape was played and the witness's testimony impeached. Purely and simply it was a question for the jury under proper instructions.

The defendant filed a notice of alibi which listed four witnesses and stated he was in the process of locating additional witnesses. The basis of the defendant's alibi was that on the night in question he was at a local tavern. During the trial the defendant produced three witnesses who reportedly saw him at the bar around the time in question. When he filed another list of alibi witnesses and sought to call them the court refused to allow these witnesses to be examined holding that the defendant failed to exercise due diligence in finding the other witnesses. A separate record was made to preserve this testimony.

Defendant argues that the trial court erred in finding a lack of due diligence on defendant's part. The further argument is made that the Michigan notice of alibi statute[1] is unconstitutional under *Wardius v Oregon,* 412 US 470; 93 S Ct 2208; 37 L Ed 2d 82 (1973).

First, we are not persuaded that the trial judge

[1] MCLA 768.20; MSA 28.1043.

erred in finding lack of sufficient diligence on the part of defendant to locate the other alibi witnesses. Nor do we find the challenge to the constitutionality of the alibi statute as well-founded. The issue was not timely raised below. Since no request for reciprocal discovery rights was advanced in the trial court and, furthermore, since the constitutionality of the involved statute was not questioned below, it necessarily follows that the issue was not preserved for review in the Court of Appeals. *People v Bennett,* 52 Mich App 742; 218 NW2d 407 (1974).

Furthermore, the separate record shows that the excluded evidence was largely cumulative. *Wardius* is also distinguishable because in that case the defendant was not allowed to personally testify in support of his alibi defense or to introduce the testimony of any witnesses on this issue. We see no manifest injustice or miscarriage of justice based on the record made in the instant case.[2]

As his next assignment of error defendant alleges that the trial judge's instructions with respect to intoxication as a defense to the specific intent crime charged were reversibly erroneous under *People v Crittle,* 390 Mich 367; 212 NW2d 196 (1973).

This allegation is not meritorious. Our close reading of the instruction in its entirety convinces us that the charge met the *Crittle* requirements which the Supreme Court stated was simply the long-standing rule in Michigan.

Finally, defendant claims that a search warrant should have been quashed since it was based on

[2] By virtue of 1974 PA 63 the Legislature has provided for reciprocal discovery rights in future cases with respect to the names of alibi witnesses and those witnesses the prosecutor plans to call in rebutting defendant's proposed defense. *See* MCLA 768.20; MSA 28.1043. The latter amendment took effect on May 1, 1974.

hearsay evidence and not on the personal knowledge of the police officer who was the affiant. In the case at bar the affidavit, though not based on the affiant's personal knowledge, was supported by the knowledge of a fellow officer. This brings the instant case within the ambit of *People v Iaconis,* 29 Mich App 443; 185 NW2d 609 (1971), *aff'd* 387 Mich 431; 196 NW2d 767 (1972).

For the reasons stated herein, we affirm.

PEOPLE v JOINES (ON REMAND)

RAPE—ASSAULT WITH INTENT TO RAPE—CONSTITUTIONAL LAW—DOUBLE JEOPARDY—KIDNAPPING—SAME TRANSACTION.

The prosecution of a defendant for assault with intent to rape after his acquittal on the charge of kidnapping violated the double jeopardy provisions of the state and federal constitutions where both crimes were part of a single criminal transaction, were committed in a continuous time sequence, and displayed a single intent and goal. (US Const, Am V; Const 1963, art 1, § 15).

Appeal from Livingston, Paul R. Mahinske, J. Remanded by the Supreme Court for reconsideration, June 27, 1974. (Docket No. 13232.) Decided September 10, 1974. Leave to appeal denied, 393 Mich —.

Robert Lee Joines was convicted of assault with intent to commit rape. Defendant appealed. Affirmed and remanded for resentencing, 46 Mich App 427. Leave to appeal granted and remanded for reconsideration 392 Mich 764. On remand, reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward R. Wilson* and *William P. Weiner,* Special Assistants Attorney General, and *Thomas Kizer, Jr.,* Prosecuting Attorney, for the people.

Robert Lee Joines, *in propria persona.*

Before: LESINSKI, C. J., and MCGREGOR and T. M. BURNS, JJ.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 166, 183.

ON REMAND

McGREGOR, J. On June 27, 1974, the Michigan Supreme Court remanded this case for our reconsideration in light of *People v White,* 390 Mich 245; 212 NW2d 222 (1973).

In our original opinion, reported at 46 Mich App 427; 208 NW2d 193 (1973), we rejected the "same transaction" test for determining the applicability of the constitutional prohibitions against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. In so doing, we expressly declined to adopt the reasoning of the majority of another panel of this Court, in *People v White,* 41 Mich App 370; 200 NW2d 326 (1972). Since that time, our Supreme Court has affirmed the decision in *White* and embraced the "same transaction" test. *People v White,* 390 Mich 245; 212 NW2d 222 (1973). Our original opinion is, therefore, erroneous to the extent that it failed to analyze defendant's double jeopardy argument in terms of the more expansive "same transaction" rule.

Having carefully reviewed the facts, we must conclude that, under the "same transaction" test, the prosecution of the defendant in Livingston County for assault with intent to rape after his acquittal in Genesee County on the charge of kidnapping violated the double jeopardy provisions of the state and Federal constitutions. As in *White, supra,* 259, there can be no doubt that both crimes were "part of a single criminal transaction". Further, "the crimes were committed in a continuous time sequence and display a single intent and goal—sexual intercourse with the complainant".

Conviction reversed.

All concurred.

THE COOKE CONTRACTING COMPANY v DEPARTMENT OF STATE HIGHWAYS #1 (ON REHEARING)

1. LIMITATION OF ACTIONS—ADMINISTRATIVE LAW—EXHAUSTION OF REMEDIES—ACCRUAL OF CLAIM.

   A construction contractor's claim against the State Highway Commission did not accrue and further action could not be commenced until after the final denial of an appeal to the Central Office Adjusting Board because only at that time could the plaintiff calculate the extent of damages with certainty.

2. ADMINISTRATIVE LAW—CLAIMS AGAINST STATE—DEPARTMENTAL PROCEDURE—NONCOMPLIANCE.

   Noncompliance with its procedure is more properly charged to the state where both the state and a claimant strayed from the departmental procedure for presenting and appealing claims against the State Highway Commission.

Appeal from Court of Claims, Ross W. Campbell, J. Submitted Division 2 June 12, 1974, at Detroit. (Docket No. 13465.) Decided September 10, 1974.

Complaint by the Cooke Contracting Company against the State of Michigan and its Department of State Highways for compensation for extra work completed in the performance of a highway construction contract. Accelerated judgment for defendant. Plaintiff appeals. Affirmed, 50 Mich App 253. Upon rehearing, reversed and remanded.

Doyle, Smith, Whitmer & Carruthers, P. C., for plaintiff.

REFERENCES FOR POINTS IN HEADNOTES

[1] 2 Am Jur 2d, Administrative Law §§ 595–609.

[2] 2 Am Jur 2d, Administrative Law § 309.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Louis J. Caruso* and *Curtis G. Beck,* Assistants Attorney General, for defendants.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

J. H. GILLIS, P. J. We granted application for rehearing to attempt resolution of facts and issues causing a three-way split of opinion in *Cooke Contracting Co v Department of State Highways,* 50 Mich App 253; 213 NW2d 262 (1973).[1] The facts are fully set out in that opinion; a detailed reiteration is unnecessary to consider the sole issue meriting discussion.

Cooke Contracting I unanimously found substantial compliance with the statute requiring notice of the time when the claim arose. MCLA 600.6431(1); MSA 27A.6431(1). That holding remains undisturbed.

The crucial, divisive issue is whether plaintiff's claim was filed within one year after it accrued in compliance with MCLA 600.6431(1); MSA 27A.6431(1). That statute provides:

"No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths."

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

[1] Hereafter referred to as *Cooke Contracting I.*

We think *Oak Construction Co v Department of State Highways,* 33 Mich App 561; 190 NW2d 296 (1971), was properly decided and states the law applicable to this case. *Oak* held that a claim accrues only when suit may be maintained thereon. Here, no lawsuit can be maintained "until the administrative remedies *provided for in the contract* have been exhausted". (Emphasis supplied.) *Cooke Contracting I, supra,* 268. The administrative procedure requires an appeal from denial of final estimates to the Central Office Adjustment Board. Only after its final denial can plaintiff calculate with certainty the extent of damages. *Cf. Terry Contracting Inc v State,* 27 AD2d 499; 280 NYS2d 450 (1967).

Plaintiff claims a letter from Lyle Lipp, a member of the Central Office Adjustment Board, dated August 6, 1969 triggers accrual:

> "I understand Mr. MacCreery has notified you of our inability to process the final by including a recommendation for bridges over pavement and traffic regulators and maintaining traffic at 17 Mile Road."

Apparently, both Lipp and MacCreery represent the Central Office Adjustment Board. The first time plaintiff could have calculated damages with certainty would have been the notification from MacCreery. That date is not known, but must have occurred sometime between March 17, 1969 and August 6, 1969. *Cf. Cooke Contracting I, supra.* Both sides apparently strayed from the departmental procedure set out in *Cooke Contracting I, supra,* 267. Plaintiff's appeal apparently reached the Central Office Adjustment Board in some manner; however, they never rendered a formal written decision, but acquiesced in the variation.

We think that the noncompliance with its proce-

dure is more properly charged to the state. *Mount Vernon Contracting Corp v State,* 52 Misc 2d 781, 784; 276 NYS2d 1009, 1012 (1967), provides a rationale:

> "[T]he Court finds it necessary to again remind the State that motions of this nature, which seek the dismissal before trial of substantial claims, should rest securely upon a foundation of compliance by it with the requisites and formalities of a final estimate as mandated in the public works specifications and the standard public works agreement, which we find to be the only provisions which would apply in this controversy."

Under *Oak,* claim accrual is capable of manipulation by either side. Yet, the state can prevent presentation of a claim to a contractor's prejudice by administrative delay. We think that requiring strict compliance by the state with its own designated procedures is the only way to avoid the pitfalls which Judge ADAMS describes so aptly in *Cooke Contracting I, supra.* See also *Terry Contracting Corp v State, supra.*

We have been advised that procedural reforms have been implemented, providing with certainty a time for accrual, so that this issue should not recur. Compliance with a simplified procedure earlier might well have prevented the costs of two appeals preceding this and the one sure to follow, which must have consumed several times over the slight sum plaintiff claims.

Reversed and remanded for proceedings consistent with this opinion. Costs to appellants.

All concurred.

ARLEE v WAYNE COUNTY SHERIFF

(ARLEE v LUCAS)

1. CONSTITUTIONAL LAW—ELECTIONS—RIGHT TO VOTE—PRETRIAL DETAINEES—MOOTNESS—DECLARATORY JUDGMENT.

Plaintiffs, who as pretrial detainees in a county jail raise a constitutional challenge to the denial of their right of franchise in the November 1972 elections, are entitled to a determination of that challenge on the merits in view of the grave importance of the question, even though the adjudication may come too late to allow them to vote in the November 1972 elections, the plaintiffs are probably no longer pretrial detainees, and the opinion may be construed to be in the form of a declaratory judgment.

2. ELECTIONS—CONSTITUTIONAL LAW—ABSENTEE BALLOTS.

Michigan citizens have a constitutional right to vote by an absentee ballot (Const 1963, art 2 § 4).

3. CONSTITUTIONAL LAW—EQUAL PROTECTION—ELECTIONS—ABSENTEE BALLOTS—PRISONERS—PRETRIAL DETAINEES.

A statute is unconstitutional because it fails to give equal protection of the laws where it would allow a person, even though confined in a prison or jail, to obtain an absentee ballot because of some physical disability, religious tenet, or because of being 65 years of age or more, yet prohibits the distribution of absentee ballots to detainees who cannot qualify on such grounds.

4. CONSTITUTIONAL LAW—EQUAL PROTECTION—ELECTIONS—RIGHT TO VOTE—FUNDAMENTAL RIGHTS—WEALTH.

The right to vote is a fundamental right that cannot be prohibited in such a manner as will give rise to a situation whereby

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REFERENCES FOR POINTS IN HEADNOTES

[1, 5] 25 Am Jur 2d, Elections § 53 *et seq.*

[2, 3, 6] 26 Am Jur 2d, Elections § 243 *et seq.*

[3] 25 Am Jur 2d, Elections § 94.

60 Am Jur 2d, Penal and Correctional Institutions § 41.

[4] 25 Am Jur 2d, Elections §§ 7, 53.

wealth will be a substantial factor in determining who shall have the right to vote.

5. CONSTITUTIONAL LAW—DUE PROCESS—ELECTIONS—RIGHT TO VOTE—PRETRIAL DETAINEES—ADJUDICATION OF GUILT.

Due process demands an adjudication of guilt of those charged with crimes before a prohibition as grave as disfranchisement may be imposed; therefore, a statutory scheme which prohibits pretrial detainees from voting cannot stand (MCLA 168.758).

6. ELECTIONS—ABSENTEE BALLOTS—PRETRIAL DETAINEES—RIGHT TO VOTE.

Pretrial detainees who are otherwise qualified and registered are entitled to vote by absentee ballot.

Appeal from Wayne, George E. Bowles, J. Submitted Division 1 June 7, 1974, at Detroit. (Docket No. 15572.) Decided September 10, 1974.

Complaint for mandamus by Bennie D. Arlee, Joseph Watkins, Michael M. Robinson, Michael White, Joseph L. Triplett, and Johnny Cureton, pre-trial detainees in the Wayne County Jail, for themselves and others similarly situated, against William Lucas, Wayne County Sheriff, Frank Wilkerson, Administrator of the Wayne County Jail, and George Edwards, City Clerk and Chairman of the Detroit Election Commission, to compel granting an opportunity to vote in the November 1972 election by absentee ballot. Judgment for defendants. Plaintiffs appeal. Reversed.

Colista, Baum & Domonkos, for plaintiffs.

Terrance K. Boyle, Legal Counsel to the Wayne County Sheriff, for defendants Lucas and Wilkerson.

Michael M. Glusac, Corporation Counsel, and *John E. Cross,* Assistant Corporation Counsel, for defendant Edwards.

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

VAN VALKENBURG, J. Plaintiffs, who at the time they brought this class action were pre-trial detainees in the Wayne County Jail, brought this action for mandamus alleging that they were unconstitutionally denied the opportunity to exercise their right of franchise in the November 1972 election. The matter was heard on October 31, 1972 and on November 2, 1972 the circuit court denied plaintiff's writ. The court held:

1. Plaintiffs were guilty of laches.

2. MCLA 168.758; MSA 6.1758 is constitutional, and, since plaintiffs are "confined in a prison", they have no right to vote. The statute and conditions it creates are not discriminatory, do not violate the equal protection clause or due process. *McDonald v Board of Election Commissioners of Chicago,* 394 US 802; 89 S Ct 1404; 22 L Ed 2d 739 (1969).

3. Plaintiffs failed to set forth methods by which the voting could be accomplished.

4. Voter influence by inmates and officials would not meet constitutional safeguards.

Initially we would note that since the plaintiffs raised a constitutional challenge to the denial of their right to exercise their right of franchise, we think that they were entitled to a determination of that challenge on the merits. The fact that the adjudication of that challenge may have come too late to allow them to exercise that right, if any, in the November 1972 election should not act to deny them the opportunity to have the question decided. Neither does the fact that the named plaintiffs are

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

in all probability no longer pre-trial detainees serve to defeat appellate scrutiny on the ground of mootness. Given the grave importance of the question, particularly in light of the coming elections, we feel constrained to render an opinion on the merits, even though such an opinion may be construed to be in the form of a declaratory judgment. See *Rome v Walker,* 38 Mich App 458; 196 NW2d 850 (1972).

The crux of this appeal centers on whether plaintiffs are entitled to exercise their right of franchise by absentee ballot. MCLA 168.758; MSA 6.1758 provides in pertinent part:

"(1) For the purposes of this act, the term 'absent voter' shall be construed to mean any qualified and registered elector;

"(a) Who, on account of physical disability, cannot without another's assistance attend the polls on the day of any election.

"(b) Who, on account of physical disability, cannot attend the polls on the day of election.

"(c) Who cannot attend the polls on the day of any election in the precinct in which he resides because of being an election precinct inspector in another precinct.

"(d) Who is 65 years of age or more.

"(e) Who, unless confined in a prison or jail, is absent or expects to be absent from the township or city in which he or she resides during the entire period the polls are open for voting on the day of any election."

Before discussing the provisions of this statute, it is necessary to look at the provisions of the Michigan Constitution relating to the right to vote. Const 1963, art 2, § 1 provides that every citizen of the United States who has attained the age of 21 years,[1] who has resided in this state six months

[1] Under the 26th Amendment to the United States Constitution, this has been changed to 18 years.

and who meets local residence requirements as provided by law is an elector and qualified to vote except as otherwise provided in the constitution. Const 1963, art 2, § 2, however, provides that:

"The legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution."

It appears that Const 1963, art 2, § 2, which was new to the 1963 Constitution, was included for the avowed purpose of giving constitutional authorization for the statutory provision prohibiting the distributing of absentee ballots to those "confined in prison or jail" as found in subsection (1)(e) of MCLA 168.758, *supra.*[2] Const 1963, art 2, § 4 provides that "[t]he legislature *shall* enact laws * * * " to provide for a system of voter registration and absentee voting; thus, Michigan citizens have a constitutional right to vote by an absentee ballot.

The question here presented thus becomes whether the present statutory scheme is such that it does not run afoul of the basic rights guaranteed by both the Michigan and Federal Constitutions. The Legislature, in MCLA 168.758, *supra,* provided that one is entitled to exercise his right of franchise by absentee ballot if, being a qualified and registered elector, he has a physical disability such

[2] The committee comment as to the reason they included this section in the 1963 constitution was because:

"Inmates of jails and prisons are presently effectively excluded from voting simply because, while they are not disqualified, there is no way in which they can vote. The present absent voting law provides that jail and prison inmates are not eligible for absentee ballots. The proposed provision, therefore, gives the legislature specific authority to do directly what has long been accomplished in an indirect fashion." Official Record of the 1961 Michigan Constitutional Convention, Vol II, pp 2214.

It must be noted that the Legislature has not yet attempted to do other than continue this indirect disenfranchisement.

that he cannot attend the polls on election day without another's assistance, he cannot attend the polls on election day on account of the tenets of his religion, he is an election precinct inspector in a precinct other than the one in which he resides, he is 65 years of age or more, or he expects to be absent from the township or city in which he resides for the entire day of the election unless he is absent because of the fact that he is confined in a jail or prison.

The prohibition with respect to those confined in a prison or jail applies only to those who seek an absentee ballot because they will be absent from the township or city in which they reside on election day. No similar prohibition attaches to a person who, though confined in a prison or jail, seeks an absentee ballot because of some "physical disability" which prevents him from attending the polling place,[3] because of a religious tenet or because of being 65 years of age or more. Because of this we find that the present statutory scheme is so unequal in application that it cannot stand on equal protection grounds.

Even were we to assume that the State can deny the right to vote to those confined in a prison or jail, such a prohibition must be such as would deny that right to all who reasonably fall into that classification. While there may be some reason to deny persons confined in a prison or jail the right to exercise their franchise, we can find no reason to deny such a basic right to those who are claiming the right because of being absent from their city or township and yet afford such a right to a fellow prisoner because of the fact that he is

[3] One might well argue that one who is unable to attend his polling place because of his incarceration is, in fact, unable to attend because of a "physical disability" within the meaning of subsection (1)(a) of MCLA 168.758, *supra.*

otherwise "physically disabled", cannot vote on that day because of a religious tenet, or is 65 years of age or more. Since whatever state interest is served by the prohibition found in subsection (1)(e) would be equally applicable to these other prisoners, to unequally apply it to only the one class of prisoners or detainees is violative of the constitutionally protected right of equal protection of the laws. Accordingly, the statutory provision must fall. *O'Brien v Skinner,* 414 US 524; 94 S Ct 740; 38 L Ed 2d 702 (1974).

Further, since we are here concerned with pre-trial detainees, we are impressed with the argument that they are denied their right to vote because of their inability to make bail. Clearly a right as fundamental as that of voting cannot and must not be prohibited in such a manner as will give rise to a situation whereby wealth will be a substantial factor in determining who shall have the right to vote. *San Antonio School District v Rodriguez,* 411 US 1; 93 S Ct 1278; 36 L Ed 2d 16 (1973). There is also a question of whether the present statutory scheme, or in fact any statutory scheme which effectively prohibits pre-trial detainees from exercising their right of franchise, can stand on due process grounds. Since these pre-trial detainees are presumed in the eyes of the law to be innocent of the crimes of which they are charged until convicted, due process would seem to demand an adjudication of guilt of those charged with crimes before a prohibition as grave as disenfranchisement may be imposed.

As to the argument that there is a sufficient state interest in protecting the purity of the election process to justify this prohibition, we quote from Justice Marshall's concurring opinion in *O'Brien, supra,* 534–535:

"In light of these extensive provisions for participa-

tion in the electoral process through the mail by others, New York's exclusion of pretrial detainees and convicted misdemeanants confined in the county of their residence cannot withstand analysis. The only basis even suggested for this discrimination is the possibility recognized by the Court in *McDonald* 'that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates.' 394 US, at 810; 89 S Ct at 1409; 22 L Ed 2d at 746. Though protection of the integrity of the ballot box is surely a legitimate state concern, I frankly find something a bit disturbing about this approach to the problem. It is hard to conceive how the State can possibly justify denying any person his right to vote on the ground that his vote might afford a state official the opportunity to abuse his position of authority. If New York truly has so little confidence in the integrity of its state officers, the time has come for the State to adopt stringent measures to prevent official misconduct, not to further penalize its citizens by depriving them of their right to vote. There are surely less burdensome means to protect inmate voters against attempts to influence their votes—the alternatives suggested by the Court in *McDonald,* for example.

"I thus have little difficulty in concluding that the asserted state interest is insufficient to justify the statutes' discrimination against pretrial detainees and convicted misdemeanants under the compelling-state-interest test. I think it is clear that the State's denial of all opportunity for appellants to register and vote deprives them of the right to vote on an equal basis with other citizens guaranteed under the Equal Protection Clause."

We are constrained to hold that the present statutory scheme whereby pre-trial detainees are precluded from exercising their right of franchise cannot stand in light of the discrimination it promotes. We hold that pre-trial detainees who are otherwise qualified and registered are entitled to vote by absentee ballot.

The circuit court is reversed. No costs, a public question being involved.

All concurred.

HEAD v BENJAMIN RICH REALTY COMPANY

1. VENDOR AND PURCHASER—LAND CONTRACTS—RESCISSION—JURY.

   Rescission is an equitable action that should not be tried before a jury; however, an action to recover money paid on a land contract was properly tried before a jury where, prior to trial, rescission was a *fait accompli.*

2. EQUITY—DEFENSES—LACHES.

   Laches is an equitable defense and is inapplicable to a suit at law.

3. PRINCIPAL AND AGENT—VENDOR AND PURCHASER—REALTORS—LISTING AGREEMENTS—QUESTION OF FACT.

   In a dispute as to agency, a question of fact is present for the jury if there is any testimony tending to establish agency; therefore, where alleged misrepresentations were made by a realtor, the jury could properly find that the vendors were liable where the vendors had entered into a listing agreement with the realtor, the vendors had engaged the realtor to find a buyer, and the record showed that the realtor was acting on behalf of the vendors both prior to and at the time of purchase, even though the realtor had made a management agreement with the vendees after the vendees acquired possession of the property.

4. FRAUD—ACTIONABLE FRAUD—ELEMENTS.

   The general rule is that to constitute actionable fraud, it must

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REFERENCES FOR POINTS IN HEADNOTES

[1] 55 Am Jur, Vendor and Purchaser §§ 584, 593.

[2] 27 Am Jur 2d, Equity § 152.

Laches as precluding cancelation of or other relief against release for personal injuries. 34 ALR2d 1314.

[3] 3 Am Jur 2d, Agency § 17 *et seq.*

[4] 37 Am Jur 2d, Fraud and Deceit § 12.

[5] 4 Am Jur 2d, Appeal and Error § 252.

[6] 5 Am Jur 2d, Appeal and Error §§ 624–627.

Counsel's appeal in civil case to self-interest of jurors as taxpayers, as ground for mistrial, new trial, or reversal. 33 ALR2d 442.

[7] 55 Am Jur, Vendor and Purchaser §§ 593, 595.

[8] 55 Am Jur, Vendor and Purchaser § 57 *et seq.*

appear that defendant made a material representation; that it was false; that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; that he made it with the intention that it should be acted upon by plaintiff; that plaintiff acted in reliance upon it; and that he thereby suffered injury.

5. APPEAL AND ERROR—DEFENSES—RES JUDICATA—WAIVER—PRESERVING QUESTION.

The defense of res judicata is waived where defendants neither pled this defense in a timely fashion nor filed a motion for accelerated judgment on this ground; an assertion of this defense in a motion for judgment notwithstanding the verdict comes too late to preserve this issue for appellate review.

6. APPEAL AND ERROR—FINAL ARGUMENT—PRESERVING QUESTION.

Alleged denial of a fair trial because plaintiffs' counsel referred in his final argument to facts not in evidence and made other remarks that were prejudicial is an issue that has not been preserved for appeal where no objection was articulated, no request was made for a curative instruction, and the argument was not so prejudicial as to render a curative instruction ineffective.

7. VENDOR AND PURCHASER—LAND CONTRACTS—RESCISSION—FRAUD—DAMAGES.

A vendee may elect to rescind a transaction because of the vendor's fraud, and he will be entitled to recover the purchase price with interest and such additional damages suffered by reason of losses and expenses incurred which were the natural and reasonable consequences of the fraud.

8. FRAUD—VENDOR AND PURCHASER—MISREPRESENTATION—CODE VIOLATIONS—INCOME.

The plaintiff met his burden of proof in an action for fraudulent misrepresentation in the sale of property where the record showed that the defendants had made material misrepresentations as to the lack of city and health code violations, and as to the amount of income the plaintiffs would realize, and where plaintiffs relied upon defendants' representations and suffered injury thereby.

Appeal from Wayne, George E. Bowles, J. Submitted Division 1 June 10, 1974, at Detroit. (Docket No. 16045.) Decided September 10, 1974. Leave to appeal applied for.

Complaint by James W. Head and Sarita C. Head against Benjamin Rich Realty Company, Leander R. Rivard and Ada M. Rivard to recover money paid on a land contract. Judgment for plaintiffs. Defendants Leander R. Rivard and Ada M. Rivard appeal. Affirmed.

Eli Friedman, for plaintiffs.

Yoe, Casey & Moore, for defendants Leander R. Rivard and Ada M. Rivard.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ALLEN, J. On July 26, 1972, a jury awarded plaintiffs $20,000, and found for defendants on their counterclaim in the amount of $400. Defendants appeal from the judgment entered pursuant to the jury's verdict, and no cross-appeal has been made on the award to defendants.

Before discussing the numerous allegations of error raised by defendants, it will be necessary to examine the facts out of which the instant suit arose. Some time previous to September 20, 1969, plaintiffs responded to a newspaper advertisement of the Benjamin Rich Realty Company, seeking to invest some money in an apartment building. The plaintiffs visited 3 or 4 buildings, and were then shown a brochure advertising the 50-unit apartment building located at 8620 Epworth in the city of Detroit. Plaintiffs visited the above premises twice, and on September 20, 1969, offered to purchase this building for $115,000. Defendants accepted this offer on September 21, 1969, and the closing was held at the Benjamin Rich office on

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

October 7, 1969, at which time the parties executed a land contract.

In the brochure advertising the apartment building, the monthly income was set forth as approximately $3,900. The gross annual income was listed as $46,800, with total expenses listed at $19,077. Thus, the net annual income was represented as $27,723, a figure which plaintiffs repeatedly stated they relied upon in their decision to purchase the above property. The brochure stated, "the above information was furnished us by the vendor of the property. We believe it to be correct. We do not warrant it."

In the purchase agreement, it was stated, "seller guarantees against city and health violations of record as of date of acceptance". On the day of closing, plaintiffs once again visited the premises, and were shown some apartments which were in need of some serious repairs. Some of the rooms needed painting, new flooring and plastering, and plaintiffs were told, "now that you bought it you might as well see it all and become familiar with it".

Plaintiffs made their last monthly payments to defendants in May of 1970. On July 8, 1970, plaintiffs' attorney wrote to defendants, and referred to the portion of the purchase agreement in which the seller guaranteed against city and health violations as of the date of purchase. On that date, there were supposedly a number of electrical violations, and counsel said that there had been a breach of contract. The letter further stated "by means of this letter Mr. and Mrs. Head are rescinding the contract and requesting back any and all monies paid you".

July 13, 1970, defendants wrote plaintiffs' attorney expressing their surprise at the tone in the

above letter. Defendants indicated that on June 15, 1970, Dr. Head had called defendants and advised them of the electrical violations. In their letter, defendants stated that Klein Electric Company had been retained on July 6, 1970, that a permit had been issued by the city of Detroit on July 10, and that the work had been performed. Testimony was presented by Mr. Rivard and by the electrician that this work was performed. The cost of the permit was $60, and the cost of the specific electrical repairs was $55. Defendants offered to plaintiff a six-month moratorium on the principal but insisted upon prompt payment of the interest and taxes.

July 17, 1970, plaintiffs' counsel replied to defendants. He explored the possibility of defendants discounting their land contract and plaintiffs paying defendants in cash pursuant to that discount.

July 21, 1970, defendants replied to plaintiffs' attorney, stating that they had no desire to have their equity in cash. However, they stated that if plaintiffs wanted to liquidate, they would accept a total of $98,147.44.

July 27, 1970, plaintiffs' attorney wrote to defendants, stating that they had misunderstood his previous letter. Stating that defendants were not responsive to plaintiffs' offer, the attorney indicated that a rescission suit would be started within ten days. On September 1, 1970, plaintiffs filed their first complaint. After Benjamin Rich Realty Company was named a party, plaintiffs filed an amended complaint February 2, 1971. In the course of trial, plaintiffs settled their claim against Rich for $3,000.

During the period in which the above correspondence was being exchanged, the tenants who resided within the apartment building participated

in a rent strike on the grounds that their living conditions were such as to justify the nonpayment of rent. Some of the tenants testified at trial as to these conditions. They included the presence of mice, rats, and roaches, the failure of the management to provide heat, dirty hallways, the lack of sufficient water pressure and hot water for bathing, sagging floors, and a general state of disrepair, especially as far as the plaster was concerned. While no specific "electrical violations" were enumerated, some testimony was presented as to the lack of sufficient lighting, particularly in the hallways and near the outside entrance. This rent strike was mentioned in the July 8, 1970 letter to defendants. During the course of this strike, Benjamin Rich Realty Company, which had agreed to manage the premises for plaintiffs, advised plaintiffs that it would no longer be able to continue management of the property as of August 17, 1970.

On August 5, 1970, defendants filed and presented plaintiffs with a "notice of intention to forfeit a land contract". Subsequent thereto, plaintiffs received a "notice of forefeiture of land contract", and on September 22, 1970, the Rivards filed a complaint in the Detroit Common Pleas Court to recover possession under the land contract. The Heads replied that they owed no money to Rivard, and as an affirmative defense alleged that the cost of repairing the electrical violations exceeded the amount of money the Heads allegedly owed to the Rivards. In any event, on October 13, 1970, the Rivards were granted relief, and plaintiffs were given 90 days in which to redeem their interest in the land contract. Plaintiffs chose not to exercise their rights of redemption, and on December 22, 1970, executed a quit-

claim deed to defendants, and advised the tenants of 8620 Epworth to pay their rent to the Rivards. The Rivards subsequently sold the building to another purchaser for $100,000, although as of the date of the instant trial that purchaser was in default.

Defendants first argue that the instant suit was an equitable action that had to be decided by the trial court without a jury. While defense counsel stated both before and after the jury instructions that this action was one for the court to decide, we note that defendants had demanded a jury trial. While plaintiffs paid the jury trial fee, defendants voiced no objection to this matter being tried by a jury at either the pre-trial conference or the first day of trial.

Defendants' argument is premised on the idea that plaintiff, by instituting the instant action, sought to rescind the land contract, and that an action for rescission is purely equitable in nature. We acknowledge the general rule that matters which are purely equitable in nature should not be tried before a jury. *Farwell v Neal,* 40 Mich App 351, 353–354; 198 NW2d 801 (1972). Matters which have been traditionally equitable in nature are generally tried before the court without a jury. See *Fredal v Forster,* 9 Mich App 215, 227–228; 156 NW2d 606 (1967), and cases cited therein. However, this general rule has no application to the instant case since, prior to trial, rescission was a *fait accompli.*

During the course of trial, a question arose as to whether counsel for the plaintiffs had rescinded the contract on July 8, 1970. Defendants' counsel stated:

"Your honor, I would go along with stating that the plaintiff attempted to rescind, gave notice of this intent

to rescind and there was, in fact, a rescission at that time."

Thereafter, the letter of July 8, 1970, was read into the record. Also, defendants had obtained in October of 1970, a judgment in the common pleas court, entitling defendants to possession of the property. In fact, on December 20, 1970, plaintiffs, by means of a quitclaim deed, returned possession of the property to defendants. Plaintiffs' amended complaint, filed in February of 1971, prayed for $25,000 in damages, and alleged that plaintiffs had previously rescinded the contract and that by means of that complaint plaintiffs were rescinding the contract.

According to 55 Am Jur, Vendor and Purchaser, § 546, p 941:

"[E]quity will not take jurisdiction of an action to recover money paid on a contract and to obtain rescission or cancellation, or both, where it appears that neither rescission nor cancellation by the court is necessary, as *where there has been rescission by act of the parties and there is no instrument which needs to be surrendered up for cancellation."* (Emphasis supplied.)

Admittedly, plaintiffs' amended complaint confused the issue by stating both that the contract had previously been rescinded and that by means of the amended complaint it was being rescinded. However, the facts are that defendants had, previous to the filing of plaintiffs' amended complaint, obtained possession of the property. Plaintiffs, seeking to recover what they had paid to defendants, maintained an action at law. See *Barke v Grand Mobile Homes Sales,* 6 Mich App 386, 390–391; 149 NW2d 236 (1967), and cases cited therein. See also *Mock v Duke,* 20 Mich App 453, 455; 174 NW2d 161 (1969). In view of the circumstances

present in this case, and in light of the principles discussed in the above authorities, we find that the instant suit was properly tried before a jury.

Defendants' argument that plaintiffs' recovery should have been barred by laches is without merit. As noted in *Tray v Whitney,* 35 Mich App 529, 533; 192 NW2d 628 (1971), "laches is an equitable defense". The instant suit was one at law, and thus the defense of laches would be inapplicable. For one to successfully assert the defense of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches. 35 Mich App 529, 534–536. See also *Detroit v General Food Corp,* 39 Mich App 180, 188; 197 NW2d 315 (1972). One attempting to avoid the application of laches must "promptly disaffirm" the contract and "seasonably assert" his rights upon discovery of the alleged fraud. *Livingston v Krown Chemical,* 50 Mich App 153, 158–159; 212 NW2d 775 (1973).

Testimony was presented that indicated that plaintiffs first learned of the electrical violations during the summer of 1970. Apparently, plaintiffs attempted to recover some rent owed by the tenants in the building, and as a defense the tenants alleged that the conditions of the building were such as to excuse the payment of rent. It was at this time that the tenants were on a rent strike. While much of the testimony of the tenants in the instant case related to conditions other than electrical problems, the record does show that the plaintiffs asserted their rights promptly after becoming aware of said violations. Plaintiffs, through counsel, notified defendants on July 8, 1970. We also find that defendants were not prejudiced by the actions of plaintiffs. Defendants had purchased the property for $100,000, and after obtaining

possession from plaintiffs, resold the property for $100,000. Defendants' assertion that the building was worth $180,000 must be viewed in light of the above prices and the fact that plaintiffs purchased the property for $115,000.

Defendants further argue that an agency relationship had been established between plaintiffs and the Benjamin Rich Company, and that Rivard should not be held responsible for any alleged misrepresentations made by the realtor. Generally, in a dispute as to the question of agency, if there is any testimony tending to establish agency, a question of fact is present for the jury to determine. *Kwasny v Driessen,* 42 Mich App 442, 446–447; 202 NW2d 443 (1972), and cases cited therein. See also *Van Pelt v Paull,* 6 Mich App 618, 623–624; 150 NW2d 185 (1967), in which the court referred to 3 Am Jur 2d, Agency, § 21, p 430, in which it is stated, among other things, "the question is to be determined by the fact that one represents and is acting for another * * * ".

An examination of the record reveals that Benjamin Rich Realty Company was acting on behalf of the Rivards both prior to and at the time of purchase. In its pleadings, the real estate company stated that it was Rivards' agent, and the pre-trial statement of January 28, 1972, contains the admission that the realtor was acting as Rivards' agent. While plaintiffs and Rich had an agreement by which Rich was to manage the apartment buildings, plaintiffs and Rich did not effectively begin their association until after plaintiffs had acquired possession of the property. Previous to the purchase of the property, one of Rich's employees had entered into a "listing agreement" with Leander Rivard. Rivard, owner and seller of the property, engaged Rich as Rivard's broker to find a buyer.

This case focused upon defendants-sellers' alleged fraudulent inducement of plaintiffs to purchase the property. During the course of these negotiations, Rich represented the sellers, and defendants' argument is without merit.

Defendants next argue that the existence of various electrical problems was insignificant, that plaintiffs failed to prove that they suffered any loss as a result of such problems, that plaintiffs had failed to present evidence to justify their reliance upon defendants, and that in fact plaintiffs had failed to present evidence of any fraudulent misrepresentation on the part of defendants.

The question in this case is whether or not plaintiffs were induced to purchase the property by reason of defendants' fraudulent representations. Plaintiffs had the burden of proof to establish the essential elements of their cause of action. *Farida v Zahar,* 50 Mich App 137, 142; 212 NW2d 739 (1973), quoting from *Papin v Demski,* 17 Mich App 151, 154–155; 169 NW2d 351, 353 (1969), said:

> "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."

See also *Mesh v Citrin,* 299 Mich 527, 537; 300 NW 870 (1941). Testimony was presented to support plaintiffs' contention that they suffered a loss as a result of defendants' representations. Plaintiffs failed to realize the income represented in the seller's brochure, and plaintiffs stated repeatedly that they relied upon this brochure and the repre-

sentations contained therein in the course of deciding to purchase the property. Mr. Rivard testified that he knew of the electrical violations, but chose to enter into a purchase agreement which stipulated that the seller had guaranteed against such violations. We have viewed the evidence in a light most suitable to the plaintiff, the party against whom defendants' motion for directed verdict was made (assuming *arguendo,* in light of the ambiguous record, that such a motion was made). *Kupkowski v Avis Ford, Inc,* 51 Mich App 668, 670; 215 NW2d 767 (1974). There was evidence sufficient to uphold the jury's findings, and our Court will not disturb that determination.

Defendants have argued that the October, 1970 judgment in common pleas court, in which it was determined that defendants were entitled to possession of the property, is res judicata as far as the instant suit is concerned, and that plaintiffs' cause of action should have been barred thereby. Defendants failed to plead this defense in a timely fashion, and defendants did not file a motion for accelerated judgment on this ground. GCR 1963, 116.1(5). We find that the defense of res judicata has been waived by defendants. *Hudson v Lindsay,* 13 Mich App 671, 676; 164 NW2d 731 (1968), *reversed on other grounds,* 383 Mich 126; 174 NW2d 822 (1970). Defendants' belated assertion of this defense in paragraph 1(j) of their motion for judgment notwithstanding the verdict came too late to preserve this issue for appellate review.

Likewise, the argument that plaintiffs' counsel referred in his final argument to facts not in evidence and made other remarks that were so prejudicial as to deny defendants a fair trial has not been preserved for appellate review. Before presenting his argument on defendants' counter-

claim, counsel stated, "I am reluctant to interrupt Mr. Friedman (plaintiffs' counsel), but I think I should be entitled—". The trial court said "Can't do it". We do not view this as an articulated objection to plaintiffs' allegedly prejudicial argument. Even if that statement could be viewed as an objection, defense counsel made no request for a curative instruction. Thus, this issue is not properly before our Court. *State Highway Comm v Westerman,* 52 Mich App 623, 627; 217 NW2d 907 (1974). We have examined the closing argument at issue, and have determined that it "was not so prejudicial as to render a curative instruction ineffective". 52 Mich App 623, 627.

Again misconstruing the nature of plaintiffs' complaint, defendants argue that plaintiffs only requested rescission and that the trial court committed reversible error in admitting evidence of plaintiffs' expenses incurred in the operation of the apartment building. Defendants have also argued that the trial court erred in instructing the jury on this point.

As indicated earlier, plaintiffs' complaint prayed for damages. As indicated in 7 Callaghan's Michigan Civil Jurisprudence, Damages, § 38, p 277, a vendee may elect to rescind a transaction because of the vendor's fraud, and will be:

> "entitled to what he paid as the purchase price, with interest and such additional damages as he may have suffered by reason of losses and expense incurred in that connection which were the natural and reasonable consequences of the fraud perpetrated."

See also *Mock v Duke,* 20 Mich App 453, 455–456; 174 NW2d 161 (1969). No error was committed in allowing the introduction of evidence of plaintiffs' repair expenses, and the trial court's instructions

on this point were correct. The jury awarded plaintiffs $20,000, although plaintiffs had paid defendants a net down payment of $14,248.16 plus $9,919 in monthly payments for a total of $24,167.16 and, in addition, had incurred substantial repair obligations. In view of the jury's award, it is clear that defendants were not prejudiced by the introduction into evidence of expenses totaling $12,121.83. GCR 1963, 529.1.

Finally defendants argue that the jury's verdict was against the great weight of evidence. At the outset, we note that defendants made a motion for new trial, and thus this issue is properly before our Court. *Arnsteen v US Equipment Co,* 52 Mich App 177, 179; 217 NW2d 61, 62 (1974).

Farida v Zahar, supra, and *Mesh v Citrin, supra,* contain a discussion of the elements comprising an action for fraudulent misrepresentation. We have examined the record, and have determined that defendants made material representations as to both the lack of city and health violations and as to the amount of income which plaintiffs would realize. Testimony was presented which indicated that defendants knew of violations, and that defendants had never enjoyed the amount of income as represented in the brochure shown plaintiffs. While Mr. Rivard said that he had never told the Benjamin Rich Company that the figures in the brochure were correct, he stated that they were "approximately" correct, and must have known that this brochure would be shown to plaintiffs. Plaintiffs repeatedly testified that they acted in reliance upon these figures and upon the assertion that there were no city and health violations. It is clear that plaintiffs suffered injury, and we find that the verdict was not against the great weight of evidence. Appellate courts are generally reluc-

tant to substitute their judgment for that of the jury. *Mesh v Citrin,* 299 Mich 527, 538–539; 300 NW 870 (1941). We decline to do so here, and find that there is sufficient evidence from which the jury could determine that plaintiff had met his burden of proof. It has been noted " * * * that some lawsuits are filed without any clear theory of liability and arrive in the appellate courts with muddled records". Glavin, *Business Associations,* 20 Wayne L Rev 261 (1974). Despite the somewhat confused and "muddled" atmosphere which seemed to characterize the proceedings below, we find that the trial court was correct in denying defendants' motion for a new trial and in upholding the award in favor of plaintiffs.

Affirmed, costs to appellees.

All concurred.

PEOPLE v MADDEN

1. WITNESSES—CROSS-EXAMINATION—SCOPE—JUDICIAL DISCRETION—STATUTES.

A trial court properly limited a defendant's cross-examination of a prosecution witness where the witness had confessed to the commission of the crime with the defendant, and upon cross-examination the defense attorney interrogated him about prior arraignments and arrests, about a plea agreement which had been made in an unrelated offense, and other matters which the judge deemed inadmissible; the trial judge was performing his duty to control the receipt of evidence at trial (MCLA 768.29).

2. WITNESSES—CROSS-EXAMINATION—SCOPE—JUDICIAL DISCRETION.

The permissible scope of cross-examination is in the sound discretion of the trial judge and is not to be disturbed unless a clear abuse of that discretion is shown, and there was no such clear abuse shown where a defendant was not foreclosed from showing bias or interest on the part of a prosecution witness, but was merely precluded from going into the details of confessions the witness had made to other crimes.

Appeal from Calhoun, Creighton R. Coleman, J. Submitted Division 3 March 7, 1974, at Grand Rapids. (Docket No. 16249.) Decided September 10, 1974.

Daniel Madden was convicted of breaking and entering with intent to commit larceny. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Stanley Everett,*

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Witnesses § 620 *et seq.*

Prosecuting Attorney, and *Noel G. Peterson,* Chief Assistant Prosecuting Attorney, for the people.

Wilcox, Robinson, Dandenault & Magnotta, for defendant on appeal.

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

V. J. BRENNAN, J. Defendant was convicted by a jury of breaking and entering with intent to commit larceny contrary to MCLA 750.110; MSA 28.305. He was sentenced to 2 years probation with 60 days to be served in the county jail. He appeals raising four issues of error for this Court's review.

The first allegation charges error by the trial court in limiting the cross-examination of the prosecution's chief witness, Carl Ebert. Ebert testified on direct examination that he and defendant had committed the crime charged. He also testified that he had decided to make a new life for himself and had confessed to the police of having committed crimes in the past. Although he had recently pled guilty to an unrelated breaking and entering charge, he had not been sentenced. On cross-examination by defense counsel, Ebert acknowledged conviction of crimes in both California and Missouri for which he was on parole at the time of arrest for the instant crime.

During this cross-examination the trial court, on two separate occasions *sua sponte* admonished defense counsel for interrogating Ebert about arraignments and arrests. Subsequent to these warnings, a few questions were asked of the witness about his confession in the instant crime which prompted the trial judge to order a recess. The apparent purpose was to discuss the use of wit-

ness's confession in the absence of the jury. In response to the objection of the court and prosecutor to use of the confessions for impeachment, defense counsel stated his intention in questioning the witness:

> "It will be time and place of confession, whether he was offered any promises, if any promises were made concerning confessions, and what he remembers about giving the confession, what he said about the incident that took place."

After examining the transcript in the case at bar, we are convinced that this defendant was given a full opportunity on cross-examination to explore any promises of leniency, immunity or other agreements regarding the testimony of Carl Ebert and that the trial judge properly performed the duty imposed upon him by MCLA 768.29; MSA 28.1052 when he limited defendant's wide-ranging cross-examination of the main prosecution witness.

Prior to the ruling of the trial judge, defendant's counsel forcefully cross-examined this witness and fully brought to the attention of the jury, perhaps even more so than would otherwise be permissible, the character of this witness. During this part of the cross-examination the witness admitted, upon questioning by defendant's attorney, that he participated in the crime charged against defendant, that he was dishonorably discharged from the navy, that he was arraigned in California for breaking and entering an automobile and placed on probation, that he was convicted of possessing narcotics in Missouri and on parole from that offense when, in July of 1971, he was arrested in Calhoun County, that he made a confession to the police about his participation in this offense and that he was presently out on bond.

After the ruling was made, defense counsel questioned the witness regarding promises of leniency with respect to this confession and also went into the witness's plea the day earlier to an unrelated offense. In his questioning about the plea, defendant's attorney brought out the facts that the plea was the result of a plea agreement, that other outstanding charges against the witness were dropped and that the witness had never been convicted for his participation in this crime, a crime to which he had confessed.

In this case, by the ruling made, the trial judge was performing his duty to control the receipt of evidence at trial. MCLA 768.29; MSA 28.1052. He was faced with an attorney who, despite being twice admonished, persisted in questioning the witness about matters which the trial judge deemed inadmissible. By his ruling he precluded defendant's attorney from going into arrests of the witness but did allow him to question the witness about his confession to this particular offense.

The permissible scope of cross-examination during a trial is vested in the sound discretion of the trial judge and is not to be disturbed unless a clear abuse of that discretion is shown. *People v Taylor,* 386 Mich 204; 191 NW2d 310 (1971); *People v Glover,* 47 Mich App 454; 209 NW2d 533 (1973); *People v Osgood,* 24 Mich App 705; 180 NW2d 640 (1970). We find no such clear abuse in this case. Indeed, we would affirm this case on the authority of *People v Glover, supra.* Here, as in *Glover,* defendant was not forclosed from showing bias or interest on the part of the witness. He was merely precluded from going into the details of other confessions the witness made. The details of such confessions, like the reasons for non-waiver in *Glover,* were obviously extraneous to the issue of

the witness's bias or interest. The jury was made well aware of the witness's background and, more importantly, the fact that other charges were dropped in return of his plea to an unrelated offense. Under these circumstances we find no error.

We find the remaining allegations of error to be without merit.

Affirmed.

All concurred.

PEOPLE v THOMAS

1. WITNESSES—CRIMINAL LAW—ACCOMPLICES—PRIVILEGE AGAINST SELF-INCRIMINATION—CROSS-EXAMINATION.

An accomplice, on cross-examination, may not invoke the privilege against self-incrimination about his involvement in the crime where on direct examination he has given testimony incriminating the defendant in a common criminal enterprise.

2. WITNESSES—CRIMINAL LAW—ACCOMPLICES—PRIVILEGE AGAINST SELF-INCRIMINATION—EXAMINATION—CROSS-EXAMINATION.

An accomplice was properly allowed to assert the privilege against self-incrimination when questioned on cross-examination about her involvement in other criminal activity not related to the defendant's prosecution where no information concerning these other alleged criminal activities had been previously elicited on direct examination.

3. CRIMINAL LAW—WITNESSES—RIGHT TO CROSS-EXAMINE—IMPEACHMENT—PRIOR STATEMENTS—CREDIBILITY.

A defendant was not denied the right to cross-examine a witness who was allowed to assert her privilege against self-incrimination at a retrial where at the first trial she had testified to her involvement in other criminal activity; her statements from the first trial could have been used at the second trial to impeach her credibility had the defendant chosen to do so.

4. CRIMINAL LAW—WITNESSES—ACCOMPLICES—INSTRUCTIONS TO JURY—PRESERVING QUESTION—CASE PRECEDENT—RETROACTIVITY.

The failure of a trial court to instruct a jury that an accomplice who testified against the defendant had pled guilty to a lesser included offense, where the defendant did not request such an instruction, cannot be considered on appeal where there is no showing of manifest injustice; a recent Supreme Court decision that in certain circumstances a trial judge may *sua sponte* give

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 21 Am Jur 2d, Criminal Law § 11.
29 Am Jur 2d, Evidence §§ 189, 638, 640.
[4] 53 Am Jur, Trial § 824.
[5] 46 Am Jur 2d, Judges §§ 169, 170, 203.

such instructions is not applicable to a case tried before that decision.

5. JUDGES—DISQUALIFICATION—BIAS—PREJUDICE—PRESERVING QUESTION.

A challenge to the qualifications of a judge to preside at a trial because of claimed bias or prejudice must initially be raised prior to trial and will not be considered for the first time on appeal.

Appeal from Recorder's Court of Detroit, George T. Ryan, J. Submitted Division 1 June 24, 1974, at Detroit. (Docket No. 16319.) Decided September 10, 1974.

Herman Thomas was convicted of armed robbery and first-degree murder. Defendant appeals. Affirmed.

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

Gerald M. Lorence, for defendant on appeal.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

BASHARA, P. J. Defendant was found guilty by a jury of armed robbery, MCLA 750.529; MSA 28.797; and of first-degree murder, MCLA 750.316; MSA 28.548. He appeals his conviction which arose from a retrial after initial litigation on the same charges resulted in a hung jury.

The controversy in this appeal stems mainly from the testimony of a prosecution witness, Bev-

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

erly Crawford, who was defendant's accomplice. Miss Crawford, prior to her testimony in both the first and second trials, pled guilty to attempted armed robbery. MCLA 750.529, MSA 28.797; MCLA 750.92; MSA 28.287. At defendant's first trial Miss Crawford allegedly admitted on cross-examination that she was a narcotics user and had participated in the "murphy game"[1]. At the second trial Miss Crawford refused to answer these same questions on cross-examination, standing on her right against self-incrimination.

It should be noted Miss Crawford did not waive her right to take the Fifth Amendment in the second trial after she testified in the first trial that she was a narcotics user and a "murphy game player". *People v DenUyl,* 318 Mich 645; 29 NW2d 284 (1947); *In re Neff,* 206 F2d 149 (CA 3, 1953).

Defendant asserts he was denied his right to cross-examine Miss Crawford as to her credibility, when the judge allowed her to assert the privilege against self-incrimination.

On cross-examination an accomplice cannot invoke the privilege against self-incrimination about her involvement in the crime where on direct examination she has given testimony incriminating defendant in a common criminal enterprise. *People v Mobley,* 390 Mich 57; 210 NW2d 327 (1973); *Foster v People,* 18 Mich 266 (1869). That principal however, is distinguishable from the case at bar. Miss Crawford did not invoke the privilege against self-incrimination in response to cross-examination concerning her involvement in the same criminal activity for which defendant was tried and convicted. Rather, she invoked the privi-

[1] For those who are uninformed, the "murphy game" is operated by an apparent prostitute who invites a prospective client to a room to engage in the prostitute's services. An accomplice then robs the client.

lege only in response to cross-examination concerning her involvement in other criminal activity not related to defendant's prosecution.

In these circumstances the privilege against self-incrimination was meaningfully asserted. The witness may have been forced to make incriminating admissions which could have been used against her in future prosecutions. No information concerning these other alleged criminal activities had been previously elicited on direct examination in this trial.

Although Miss Crawford properly invoked her Fifth Amendment rights at the retrial, her credibility could have been impeached by the use of prior statements made at the first trial. *Brown v United States,* 356 US 148; 78 S Ct 622; 2 L Ed 2d 589 (1958). The trial court expressly informed defense counsel he could impeach Miss Crawford's testimony concerning her narcotics use and the "murphy game" by reading her testimony in the first trial to the jury. Defense counsel declined to do this.

Defendant was therefore, not denied his right to cross-examine Miss Crawford when she was allowed to assert her privilege against self-incrimination.

Defendant also contends the trial court failed to instruct the jury to consider that Miss Crawford had been allowed to plead guilty to a lesser included offense. Defendant overlooks the fact that no request for any such instruction or objection to the trial court's instructions was made by defendant at trial. This assignment of error cannot be considered on appeal where there is no showing of manifest injustice. We find none here. *People v McPherson,* 38 Mich App 534; 197 NW2d 173 (1972).

It should be noted that the recent Michigan Supreme Court decision of *People v McCoy,* 392 Mich 231; 220 NW2d 456 (1974), held that in certain circumstances a trial judge *may sua sponte* give instructions of the type defendant would have liked. However, *McCoy, supra,* does not apply to cases tried before the release of that opinion.

The third issue is whether defendant was denied a fair trial by his counsel's failure to obtain a transcript of the previous trial in order to impeach Miss Crawford. It is alleged that Miss Crawford at first trial made inconsistent statements with those made at the second trial. Her statements from the first trial have not been submitted to this Court on appeal. Defendant's counsel merely asserts these inconsistencies. The only fact this Court is presented with is Miss Crawford testified on two separate occasions. This Court will not presume her testimony was inconsistent.

Defendant further alleges that the trial judge should have disqualified himself since he was prejudiced against defendant's cause, as he presided at the first trial. The rule is well established that in order to challenge the qualifications of a judge to preside at a trial, the claim of bias or prejudice must initially be raised prior to trial and will not be considered for the first time on appeal. *People v Miller,* 217 Mich 635; 187 NW 366 (1922); *People v Shanks,* 21 Mich App 227; 175 NW2d 331 (1970). Since the defendant did not make the objection at the proper time, he is precluded from doing so on appeal.

Defendant finally contends that he was denied a fair trial because of the acrimony that developed among defense counsel, the prosecutor, and the trial court. A review of the record indicates that the trial court showed admirable restraint and

does not indicate judicial or prosecutorial conduct which denied defendant a fair trial.

Affirmed.

All concurred.

MICHAELS v MELLISH

1. VENDOR AND PURCHASER—LAND CONTRACTS—REPUDIATION—INTEREST.

A seller's repudiation of a contract for the sale of land stops the running of interest under the contract as of the date the repudiation was communicated to the purchaser, and the seller is not entitled to interest from that date until the date on which the existence and validity of the contract were acknowledged by the seller.

2. VENDOR AND PURCHASER—LAND CONTRACTS—INSTALLMENTS—INTEREST.

The "whole amount due" on an installment land contract, necessary to be tendered to stop the running of interest when the tender was refused, was the amount due at the termination of the period at which an individual and separate installment was due, not the entire balance, where before the installment became due the vendor wrongfully repudiated the contract, and where before the repudiation the purchaser had paid installments properly.

3. VENDOR AND PURCHASER—LAND CONTRACTS—TENDER.

A formal tender under a land contract is not necessary where a party has shown by act or deed that it would not be accepted if it were made.

4. INTEREST—DEBTS—CREDITORS—PREVENTION OF PAYMENT.

The accrual of interest on an obligation is suspended where a debtor is willing and ready to make payment but is prevented from doing so by the act or omission of his creditor.

5. VENDOR AND PURCHASER—LAND CONTRACTS—REPUDIATION—INTEREST.

Interest need not be paid for the time a repudiation of a land

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REFERENCES FOR POINTS IN HEADNOTES

[1, 5] 55 Am Jur, Vendor and Purchaser § 617.
45 Am Jur 2d, Interest and Usury § 348.
[2] 55 Am Jur, Vendor and Purchaser § 350.
[3] 55 Am Jur, Vendor and Purchaser § 343.
[4] 45 Am Jur 2d, Interest and Usury §§ 87, 93.

contract was in effect where the land contract purchaser was willing and ready to make payment of an obligation and was prevented from doing so by the wrongful act of the seller who repudiated the contract.

Appeal from Gogebic, William F. Hood, J. Submitted Division 3 June 3, 1974, at Grand Rapids. (Docket No. 16515.) Decided September 10, 1974.

Complaint by Richard C. Michaels, Russell Nelson and Tena Nelson against Frederick E. Mellish and Barbara Mellish for foreclosure of a land contract. Amended complaint by plaintiffs for reformation of the contract, and complaint for foreclosure withdrawn. Reformation denied. Plaintiffs appeal. Affirmed.

Allen R. Briggs, for plaintiffs.

William G. Cloon, Jr., for defendants.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

HOLBROOK, P. J. The facts of this case are adequately set forth in the following excerpts from the trial court's fine and detailed opinion.

"1. On the 15th day of August, 1970, the parties signed a written contract for the sale by plaintiffs and the purchase by defendants of the property known as Royal Motel, situate in the City of Ironwood, Gogebic County. This contract was made on a Doubleday-Hunt-Dolan Company form #15. It described the real estate involved as the East 360 feet of the West 40 rods of the North 40 rods of Lot Two of the Northwest Quarter of the Northeast Quarter of Section 21, Town 47 North, Range 47 West, City of Ironwood, Gogebic County,

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

Michigan. No specific mention was made in the contract of the motel furniture, furnishings, and equipment, but all parties assumed and intended that such items were included with the real estate as a package transaction. The contract provided for a total purchase price of $150,000.00, reciting a down payment of $27,000.00 with the unpaid balance to bear interest at the rate of 8% per annum and to be paid in monthly installments of $1,000.00 on the principal plus interest on the 15th day of each month commencing September 1970. Such contract provided that in the event the defendants desired to re-sell the property covered by the contract the plaintiffs were to have the first right of purchase. The land covered by the contract was part of a 40 rod square parcel owned, subject to a highway right of way, by one or more of the plaintiffs; and said contract further provided that if the plaintiffs should desire to sell any remaining part of said 40 rod square parcel, the defendants were to have the first right of purchase of the same. The precise wording of the option provision of the contract is not now known by any of the parties nor by the scrivener.

"2. The contract was prepared by Attorney Robert A. Burns on instructions by the plaintiffs. He acted solely as attorney for the plaintiffs and had no contact whatever with the defendants until some weeks after the contract had been executed. Said attorney was instructed by plaintiff Michaels to prepare the contract to cover the East Half of the 40 rod parcel. Both Mr. Michaels and Mr. Burns assumed this meant the width of the property would be one-half of 40 rods. Mr. Burns computed this width to be 330 feet, but through his error in typing, the description appeared in the contract as the East 360 feet of said 40 rod parcel. The entire contract including the description with the 360 foot dimension was read aloud by Mr. Michaels in the presence of all the parties, and then executed by all the parties without change.

"3. In the preliminary discussions of the parties, mention was made that the real estate would comprise one-half of the entire parcel, which was assumed to be ten acres. At that time no survey was available and neither party was aware of the precise location of the

center line of the tract. Two separate surveys made in December 1971 show that if the width of the motel property is established at 330 feet, the west line will be eight and a fraction feet west of the west wall of the motel. At the time of the preliminary discussions, the grass by the motel was being mowed to a point more than 40 feet west of the motel building. Defendants assumed the motel property extended to the point where the grass was mowed. A space substantially greater than eight feet in width to the west of the motel is reasonably needed for the operation of the motel, not only to provide space for vehicle access to the rear of the motel via the west side, but more importantly in the wintertime to provide a storage space for snow cleared from the front of the motel's westerly units. The survey map submitted by plaintiffs shows that because of a curve in the highway which crosses the northerly part of the 40 rod tract, the distance between said highway and the south boundary of the tract is only 535 feet along the east line, and 599.4 feet along the west line. This means that if such tract is divided in half according to usable area, the 330 feet line would not be a proper division; the east half should be wider than 330 feet.

* * *

"5. The September, October, and November 1970 payments, each in the amount of $1,000.00 plus interest, were paid by the defendants on or before the respective due dates, reducing the unpaid balance to $120,000.00 on November 15th with interest paid to that date.

"6. Some time in October or November, 1970, plaintiff Tena Nelson came to the motel and obtained defendants' copy of the contract from defendant Barbara Mellish on the pretext that there was an error in describing the state highway property which adjoined. Plaintiff Tena Nelson then asked Attorney Burns to prepare a new contract form to alter the width of the property description from 360 feet to 330 feet, and also to delete the name of Richard C. Michaels as a seller. This request was made despite the fact that record title to the property was at that time and still is in plaintiff

Richard C. Michaels, and no request was made to Mr. Burns to prepare a deed from Richard C. Michaels to the Nelsons. Plaintiff Tena Nelson never submitted the new form of contract to defendants for execution nor did she return the old contract to defendants, despite defendants' demands for return of same. Instead, plaintiff Tena Nelson intentionally destroyed both copies of the old signed contract and the new unsigned one. Plaintiff Tena Nelson informed the defendants that a mistake had been made in the 'appraisal' of the motel property and that if they still desired to purchase the same they would have to enter into a new contract at a $25,000 increase in price, with the monthly payments increased to $2,000.00 plus interest.

"7. Under date of November 30, 1970, plaintiff Richard C. Michaels wrote a letter to defendants in which he stated that 'in view of your accusations against me * * * ' he was declaring the land contract void as of that date for the reasons that defendants had failed to carry liability insurance on the premises and failed to keep buildings and premises 'in the excellent condition as they were when you moved in'. The letter requested that the defendants vacate the premises immediately. On or before December 10, 1970, plaintiff Michaels engaged a new attorney, Mr. Wisti, who on that date wrote to attorney William G. Cloon, Jr., who had just recently been retained by defendants. Mr. Wisti's letter stated that he had been retained by Mr. Michaels 'in regard to a breach of land contract'; that he understood there was another payment due on December 15th, and he had advised Mr. Michaels not to accept the payment as the contract had been breached. On December 15, 1970, defendants tendered the installment of principal and interest due on that date. The tender was rejected by plaintiffs. On January 20, 1971, plaintiffs filed this suit claiming the contract had been forfeited and breached and should be foreclosed. This position of the plaintiffs persisted until the pre-trial conference held on January 21, 1972, at which time plaintiffs, with new counsel, filed an amended complaint in which plaintiffs abandoned all claim for forfeiture of the contract. The only relief requested by the amended complaint was a reformation of the contract to provide for 330 feet of

frontage rather than 360 feet; determination of the wording of the reciprocal options or right of first refusal; determination of the defendants' pro rata share of the taxes paid by the plaintiffs, and determination of the amount due on the contract. In the meantime, defendants had filed a counter claim requesting approximately the same relief except for the reformation, and also requesting damages to compensate for the failure of the plaintiffs to fulfill their obligations under the contract. Defendants have denied that plaintiffs were entitled to reformation; and in the alternative claimed defendants were entitled to reformation of the width of the description to give them sufficient property to permit the proper running of the motel."

The trial court concluded that plaintiffs had not sustained their burden of proving mutual mistake. The court found a further reason that reformation should be denied, *viz.,* unclean hands. Thereafter the court stated, which is pertinent to this appeal, the following:

"13. The repudiation of the contract communicated to defendants by plaintiff Michaels' letter of November 30, 1970 stopped the running of interest as of that date and plaintiffs are not entitled to interest from that date until January 21, 1972, the date on which the existence and validity of the contract were acknowledged.

"14. The unpaid balance on the contract now stands in the amount of $120,000.00 on the principal plus simple interest on that sum for the periods from November 15, 1970 to November 30, 1970, and from January 21, 1972 to date."

Subsequently, plaintiffs filed a motion for alteration or amendment of the judgment. In a written opinion, the trial court denied this motion and said:

"Plaintiffs' motion is based upon the claim that the court erred in deciding that plaintiffs are not entitled to interest on the contract for the period from November

30, 1970 to January 21, 1972. The former date is the date of plaintiff Michaels' letter to the defendants' declaring the contract void and forfeited and requesting defendants' immediate removal from the premises; and the latter date is the date of the pretrial conference and of the filing of an amended complaint wherein all claim for forfeiture or foreclosure of the contract was withdrawn."

In support of its determination, the court cited the case of *Marion v Detroit,* 284 Mich 476; 280 NW 26 (1938).

Plaintiffs have here appealed asserting that the trial court erred in determining that no interest should be paid from November 30, 1970, until January 21, 1972.

As this is an action in equity, we review the case *de novo,* but we give considerable weight to the findings of the trial judge. We do not ordinarily disturb the trial judge's findings unless after an examination of the entire record we conclude that we would have been required to have reached a different result had we been sitting as the trial chancellor. See *In re Hartman Estate,* 51 Mich App 192; 215 NW2d 202 (1974). We do not find that we would have been required to have reached a different result had we been sitting as trial chancellor.

Plaintiffs have asserted in this appeal that: "It is the universal rule that the amount tendered must be sufficient to include the whole amount due from the debtor, in order for a lawful, bona fide tender of the amount due to stop the accrual of further interest". At the outset, we find that the whole amount due, upon this installment land contract, was the amount due at the termination of the period at which the individual and separate installment was due, with accrual of the interest

thereupon. See 1 CJS, Actions, § 124e, p 1388 and 54 CJS, Limitations of Actions, § 156, p 97. *Cf.* 14 Michigan Law & Practice, Interest, § 11, p 452; and, *Harris v Axline,* 323 Mich 585, 590; 36 NW2d 154, 156 (1949).

By letter dated November 30, 1970, plaintiff Richard C. Michaels wrote the defendants the following:

"Dear Mr & Mrs Mellish:

"I have gone against all odds in giving you every chance there is in our business transaction. I have helped you in every way possible in making your move to Ironwood a pleasant one. I even stood to loose *[sic]* as your investment was so small and have helped teach you the motel business, infact *[sic]* working there salary free to help you. What else can I do . . . ?

"In view of your accusations against me, *I am declaring the Land Contract,* as of this date, November 30, 1970, *void and forfeited* for the following reasons:

"1 —You have failed to keep the buildings on said premises, namely the Royal Motel. *[sic]* properly insured. You have failed to carry Liability insurance on said premises. I have brought this to your attention many times and you have promised to take care of this but never have.

"2 —You have failed to keep said buildings and premises in the excellent condition as they were when you moved in. . . . this I have brought to your attention many times.

"I therefore request that you vacate the premises, the Royal Motel, immedialely *[sic].*" (Emphasis supplied.)

Further, on December 10, 1970, plaintiffs' then attorney wrote defendants' attorney as follows:

"Dear Mr. Cloon:

"Please be advised that I have been retained by Mr. Michaels in *regard to the breach of land contract* and I do understand that you represent the other party involved in this matter.

"I intend to be in Ironwood next week and will discuss the matter with you and I will also discuss the matter further with Mr. Michaels.

"I understand that there is another payment due under the land contract on December 15, and *I have advised Mr. Michaels not to accept the payment as the contract has been breached as of this date."* (Emphasis supplied.)

Thus, it can readily be seen that plaintiffs had informed defendants that they found them to be in breach of contract and that as such, they had forfeited their rights thereunder; and, further, any tender of installments due and forthcoming would not be accepted.

Weinburgh v Saier, 303 Mich 640, 645; 6 NW2d 921, 923 (1942), was a suit for reformation of a land contract. That contract provided for payments to be made in installments. The Court wrote:

"Appellant argues that plaintiffs should not be excused from the payment of interest after January 1, 1937, as ordered by the circuit judge, because no tender was made, or, if made, was not of the proper amount. The trial court found that tender, if made, would have been refused, and there is ample evidence to support this finding. This being so, tender was excused, and the payment of interest thereafter, suspended.

" 'The law does not require a useless formality. A formal tender is not necessary where a party has shown by act or word that it would not be accepted, if made.' *Mahnk v Blanchard,* 233 App Div 555; 253 NYS 307 (1931)."

See also *Keller v Paulos Land Co,* 5 Mich App 246, 255; 146 NW2d 93, 98 (1966), *aff'd,* 381 Mich 355; 161 NW2d 569 (1968); *Rothenberg v Follman,* 19 Mich App 383, 390; 172 NW2d 845, 849 (1969); and *Swain v Kayko,* 44 Mich App 496, 501; 205 NW2d 621, 624 (1973).

Where a debtor is willing and ready to make payment of an obligation but is prevented from doing so by the act or omission of his creditor, the accrual of the interest on the obligation is suspended. 45 Am Jur 2d, Interest and Usury, § 102, p 90. See also 47 CJS, Interest, § 50, pp 61–62; and 33 CJ, Interest, § 139, p 239. We find here the trial court to have been correct in determining that the repudiation of the contract by the plaintiffs was an unconscionable act and, thus, the defendants were prevented from making tender of payment by a wrongful act of plaintiffs. *Cf. Wilcox v Commonwealth Realty & Trust Co,* 248 Mich 527, 530–531; 227 NW 678, 680 (1929).

We find the trial court to have been correct in its determination that interest was not to be paid throughout the stated period. The court correctly found that the plaintiffs' repudiation of the contract was improper and, therefore, interest should not be paid for the stated period.

Affirmed. Costs to defendants.

All concurred.

YOAKUM v PRACTICAL HOME BUILDERS, INC.

1. NEGLIGENCE—GENERAL CONTRACTORS—OWNERS OF PROPERTY—LIABILITY—PUBLIC POLICY.

Public policy demands that a general contractor be charged with the responsibility of insuring that adequate safety measures be implemented on a construction site, and the liability of the owner of the property to an injured employee of a subcontractor is based on the same standard to the extent that the property owner retains control of the work.

2. NEGLIGENCE—INSTRUCTIONS TO JURY—GENERAL CONTRACTORS—SUBCONTRACTORS—CASE PRECEDENT.

An instruction to the jury which based liability of a general contractor and a property owner upon the negligent failure to take reasonable precautions against a danger which resulted in injury to an employee of a subcontractor was not reversibly erroneous, even though the language of the instructions was couched in terms of an activity which is inherently dangerous, where the ultimate question presented to the jury required them to determine whether the defendants had failed to implement reasonable safety measures, as required by the most recent case law.

Appeal from Wayne, Horace W. Gilmore, J. Submitted Division 1 May 7, 1974, at Detroit. (Docket No. 16621.) Decided September 10, 1974.

Complaint by John Yoakum and Dinah Yoakum against Practical Home Builders, Inc., and Southpointe Square Apartments for negligence. Judgment for plaintiffs. Defendants appeal. Affirmed.

Sommers, Schwartz, Silver, Schwartz, Tyler &

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 57 Am Jur 2d, Negligence § 50.

Gordon, P. C. (by *Donald J. Morbach),* for plaintiffs.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pederson (by *Jeannette A. Paskin* and *Thomas P. Bingman, Jr.),* for defendants.

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

VAN VALKENBURG, J. The facts germane to the resolution of this appeal are not in dispute. Defendant Southpointe Square Apartments engaged defendant Practical Home Builders, Inc., as the general contractor for the purpose of building a multi-unit apartment complex. Practical Home Builders, Inc., in turn engaged one E. M. Nolan Contracting Company as a subcontractor to do the rough carpentry work. Plaintiff John Yoakum worked for Nolan as a journeyman rough carpenter.

On March 17, 1969 plaintiff was working on the roof of one of the buildings. While he was working near the edge of the roof he was struck in the back of the neck or head by a sheet of plywood which the wind had blown from a stack of plywood which had been placed on the roof. As a result of this event plaintiff dropped the portable electric saw he was using, causing said saw, which had an unguarded blade, to cut into his left leg to the extent that 80 to 100 stitches were needed. As a result of the blow to his head or neck and the injury to his leg, plaintiff now suffers from several permanent injuries.

Plaintiff commenced this action against defendants on the theory that since he was engaged in

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

an "inherently dangerous" activity, both defendant owner and defendant general contractor owed a non-delegable duty to plaintiff to provide him with a safe working environment. Defendants argued basically that plaintiff failed to prove that the work was "inherently dangerous" and that the failure to provide necessary safety equipment rested solely with plaintiff's employer, the subcontractor.

After extensive discussion between the trial court and counsel with respect to the meaning and effect of *McDonough v General Motors Corp,* 388 Mich 430; 201 NW2d 609 (1972). the trial court charged the jury in pertinent part, as follows:

"Those are the four elements, and I will develop them more.

"First, that the work that he was engaged in was inherently dangerous for a carpenter;

"Second, that the defendants, Practical Homes and the South Pointe Square Apartments, were negligent;

"Third, that that negligence was a proximate cause;

"And, fourth, that he received injuries flowing from that.

"Now, it is the law in this State that one who employs an independent contractor to do work involving special danger to others, which the employer knows or has reason to know to be inherently *[sic]* or normal or which he contemplates or has reason to contemplate when making this contract, is subject to liability for physical harm caused to such others by the contractor's failure to make reasonable precautions against such danger.

* * *

"You will recall that I said the first thing the plaintiff must establish—has the burden of proof of establishing —and I will define burden of proof for you shortly—is that this activity was inherently dangerous for a carpenter. Now, in defining and determining whether this

is inherently dangerous is the job of you ladies and gentlemen of the jury under all the facts and circumstances.

"The danger to which the doctrine has reference to here is one that is incidental to and characteristic of the stipulated work itself.

"Now, you must first determine whether the work that the plaintiff was doing was inherently dangerous to him as a carpenter. This is the first determination you make.

"If you determine the work was not inherently dangerous, that is the end of the case. You go no further in your deliberations and would return a verdict for no cause for action.

"But if you do determine that the work was inherently dangerous, then you go to the second thing, which is negligence, because as I said, if the defendants are negligent, then the plaintiff has the burden of proof of showing that the defendants were negligent.

"Now, what do I mean when I say negligence? When I use negligence with respect to the defendants' conduct, I mean the failure to do something which a reasonably careful builder would do or the doing of something which a reasonably careful builder would not do under the circumstances which you find existed in this case. It is for you to decide what a reasonably careful builder would do or would not do under the circumstances here.

"When I use the words 'ordinary care', I mean the care which a reasonably careful or prudent builder would use under the circumstances which you find in this case.

"Now, one other point, the law says that the violation of any building code is evidence of negligence. The violation of the building code is evidence of negligence.

"Now, what do I mean when I talk about negligence? Negligence is really the failure to use due care. Did the defendant use that degree of care which a reasonably prudent person or a reasonably prudent builder would use under the same or similar circumstances for the protection of the plaintiff? That is all we're talking about. Negligence is not a complicated thing. It is the

failure to use due care under the circumstances then and there existing."

The court thereafter proceeded to instruct the jury as to proximate causation and damages.

At the close of the charge to the jury the court asked defense counsel if he had any objections, to which counsel replied that he did not think *McDonough* was applicable.[1]

On appeal defendants would have this Court undertake an examination of the meaning and mandate of the *McDonough* decision. We find this to be unnecessary in light of the Court's recent opinion in *Funk v General Motors Corporation,* 392 Mich 91; 220 NW2d 641 (1974). It is clear that the majority in *Funk* was beating a hasty, if *sub silentio,* retreat from the "inherently dangerous" "strict liability" positions which pervaded the various opinions in *McDonough.* The *Funk* Court rather bottomed liability in the general contractor on the basis that public policy demands that the general contractor be charged with the responsibility of insuring that adequate safety measures be implemented. The liability of the owner of the property is based on the same standard to the extent that said property owner retains control of the work.[2]

There can be no question that the trial court

[1] The jury thereafter returned a verdict of $474,000 in favor of plaintiff husband and $10,000 in favor of plaintiff wife.

[2] It should be noted that in the instant case defendants have argued that their freedom from liability is co-extensive with one another. At no time, either here or below, has defendant property owner argued that the liability, if any, rested solely with the general contractor; on the contrary, both defendants argued that the sole responsibility rested with the subcontractor. In light of the failure of the property owner to plead the possible defense of delegation to the general contractor, we will treat the owner's liability as being co-extensive with that of the general contractor.

fashioned its instruction on its conception of the holding in *McDonough*. The question now is whether the charge can stand the test formulated in *Funk*. We think it can. While the charge was couched in the *McDonough* terms of an activity that is inherently dangerous, the trial court fortunately did not bottom liability upon some form of strict liability as *McDonough* would seem to mandate, but rather based liability upon the negligent failure of defendants to take reasonable precautions against the danger. In doing so the trial court, while not following what *McDonough* would seem to mandate, arrived at what *Funk* now mandates.

The fact that the instruction used the "inherently dangerous activity" terminology in no way prejudiced defendants, since clearly if the jury found that the activity was "inherently dangerous for a carpenter" and that defendants failed "to do something which a reasonably careful builder would do", the end result would be to find that defendants had failed to implement reasonable safety measures. While such language is probably not the best way to explain the *Funk* standard, since the ultimate question presented to the jury required the jury to determine that which *Funk* requires, we find no reversible error, particularly in light of the fact that defendants' contention was that they had no liability rather than that the instruction as given was not as clear as it might be.

In light of this disposition, we find it unnecessary to address ourselves to the question raised by plaintiffs on cross-appeal.

Affirmed. Costs to the plaintiffs.

All concurred.

WERNER v THE TRAVELERS INDEMNITY COMPANY

OPINION OF THE COURT

1. ARBITRATION AND AWARD—APPEAL AND ERROR—SCOPE OF REVIEW.

   Appellate courts accord judgments confirming or vacating arbitration awards a limited scope of review; and award will not be held invalid merely because it is unjust, inadequate, excessive, or contrary to law.

2. ARBITRATION AND AWARD—APPEAL AND ERROR—COURT RULES.

   A court's power to vacate an arbitration award is limited by court rule (GCR 1963, 769.9[1]).

3. ARBITRATION AND AWARD—APPEAL AND ERROR—COURT RULES.

   The manner in which an appeal from an arbitration award shall be taken is specified by court rule and a defendant is not properly before an appellate court where he failed to pursue his rights according to the terms of the rule (GCR 1963, 769.9).

4. AUTOMOBILES—INSURANCE—PRIMARY INSURANCE—EXCESS INSURANCE—APPORTIONMENT.

   An insurance policy issued to the owner of a vehicle involved in an accident with an uninsured vehicle is the primary policy, and the company which issued that policy is liable to a passenger in the insured vehicle to the limits of the policy without apportionment despite the presence of a pro rata clause in the policy, and a policy issued to another party by another company providing uninsured motorist coverage, which covers the injured passenger, is a secondary policy under which that company will be responsible only for the amount of damages which exceed the primary insurer's policy limits.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 4 Am Jur 2d, Appeal and Error §§ 156–158.
5 Am Jur 2d, Arbitration and Award § 145.

[4] 7 Am Jur 2d, Automobile Insurance § 202.
Apportionment of liability between automobile liability insurers where one of the policies has an "excess insurance" clause and the other a "proportionate" or "prorata" clause. 76 ALR2d 502.

[5] 44 Am Jur 2d, Insurance § 1417.

5. INSURANCE—APPEAL AND ERROR—DAMAGES—PAYMENT PENDING APPEAL.

Appeal should not be allowed in a dispute between two insurance companies about coverage where both acknowledge liability to the plaintiff unless the plaintiff has been paid the damages determined by the tribunal below, subject to one insurer's recovery from the other, if successful on appeal.

Appeal from Wayne, John M. Wise, J. Submitted Division 1 June 10, 1974, at Detroit. (Docket No. 17015.) Decided September 10, 1974.

Complaint by Richard Werner, administrator of the estate of Mary Ellen Werner, deceased, against The Travelers Indemnity Company and The American Fellowship Mutual Insurance Company for payment of an arbitration award. Summary judgment for plaintiff. The American Fellowship Mutual Insurance Company appeals. Affirmed.

Dice, Sweeney & Sullivan, P. C. (by *Altero J. Alteri),* for plaintiff.

Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P. C. (by *James A. Sullivan),* for defendant The Travelers Indemnity Company.

Willans, Frisbee & Ryal (by *Daniel Zolkower),* for defendant The American Fellowship Mutual Insurance Company.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ALLEN, J. Defendant American Fellowship Mutual Insurance Company has appealed from the March 29, 1973 order granting plaintiff's motion

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

for summary judgment. GCR 1963, 117.2(3). The trial court ordered Travelers Indemnity Company to pay $652 to plaintiff and ordered defendant to pay $10,000 to plaintiff, contrary to defendant's position that the total award of $10,652 should have been equally prorated between the two insurance companies.

This case arises out of an automobile accident which occurred on December 10, 1966. An automobile owned and operated by Thomas C. Hendren collided with an automobile driven by an uninsured motorist. Plaintiff's decedent, Mary Alice Werner, was a passenger in Hendren's vehicle and was killed as a result of the accident. The Hendren vehicle was insured by American Fellowship Mutual Insurance Company, and that policy provided uninsured motorist coverage pursuant to MCLA 500.3010; MSA 24.13010. Plaintiff was insured by Travelers Indemnity Company, and plaintiff's decedent was an insured party under the uninsured motorist coverage provided in that policy. Each policy had a $10,000 liability limit, the statutorily required minimum amount of coverage. MCLA 500.3010; MSA 24.13010 and MCLA 257.504; MSA 9.2204.

This dispute is based upon the meaning and effect to be given to the applicable portions of the "other insurance" clauses contained in both insurance policies. American Fellowship's clause states:

"Other insurance.

* * *

"With respect to bodily injury to an insured while occupying or through being struck by an uninsured automobile, if such insured is a named insured under other similar insurance available to him then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such

other insurance, and the company shall not be liable under this policy for a greater proportion of the applicable limit of liability of this policy than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance."

The relevant portion of the Travelers' policy is as follows:

"*Other insurance.* With respect to bodily injury to the insured while occupying an automobile not owned by the named insured, the insurance under Part III shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance."

Both policies contained provisions to submit disputed claims to arbitration, and pursuant thereto plaintiff filed a demand for arbitration with the American Arbitration Association against both insurance companies. In the course of the arbitration proceedings, the arbitrator expressed his desire to have the circuit court determine the respective liability of each insurance company. On August 20, 1971, the trial court determined that the first $10,000 of any award should be paid by American Fellowship, and that Travelers would be liable for the excess.

On August 30, 1971, the arbitrator awarded plaintiff $10,000 from American Fellowship, and $652.08 from Travelers. Although the trial court apparently entered a judgment affirming the arbitration award on October 29, 1971, plaintiff filed the instant action in October of 1972, and on March 29, 1973, the trial court granted plaintiff's motion for summary judgment and confirmed the arbitration award. GCR 1963, 117.2(3) and 769.11.

Our Court has noted that there is a "limited scope of review which appellate courts accord judgments confirming or vacating arbitration awards". *Detroit Demolition Corp v Burroughs Corp,* 45 Mich App 72, 79; 205 NW2d 856 (1973). According to 5 Am Jur 2d, Arbitration and Award, § 167, p 643, "An award will not be held invalid under the common law merely because [it is] unjust, inadequate, excessive, or contrary to law". It is further stated that:

"[t]he general rule is that except under power conferred by statute or by the parties, the courts will not correct errors in awards, either directly or through the arbitrators, but will either set the award aside or enforce it." 5 Am Jur 2d, Arbitration and Award, § 188, p 659.

In Michigan, GCR 1963, 769.9(1)(a–d) limits a court's power to vacate an arbitration award. Such an award may only be vacated where:

"(a) The award was procured by corruption, fraud, or other undue means;

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(c) The arbitrators exceeded their powers; or

(d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing as to prejudice substantially the rights of a party.

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."

GCR 1963, 769.9(2) provides that an aggrieved party may apply to vacate the arbitration award within 20 days after delivery of a copy of the

award to the applicant or within 20 days after the alleged "corruption, fraud or other undue means" are known or should have been known by the applicant.

Defendant failed to enforce its rights pursuant to the above court rule. Although defendant apparently filed a motion to quash the October 29, 1971 judgment of the circuit court, that motion came more than 60 days after the rendering of the arbitration award. Also, defendant failed to assert that the arbitration award should be vacated pursuant to the grounds set forth above.

5 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 462, noted "[t]he reviewing court is bound by those restrictions of rule 769 which limit the authority of the circuit courts". The above was a comment to GCR 1963, 769.15, which provides that "[a]ppeals shall be taken in the manner and to the same extent as from orders or judgments in civil actions". We do not read this as an expansion of the limited nature of a court's authority to order the vacation of an arbitration award. In light of an appellate court's limited function in a case such as the one at hand, and in conjunction with defendant's failure to pursue its rights according to the terms of GCR 1963, 769.9, we find that defendant's argument is not properly before our Court.

If defendant's argument were properly before us, we would find the trial court correct in ruling that American Fellowship, insurer of the Hendren vehicle, was primarily responsible, up to its statutorily mandated $10,000 policy limit, MCLA 500.3010; MSA 24.13010 and MCLA 257.504; MSA 9.2204, and that Travelers, providing coverage for plaintiff's decedent, was responsible for the amount of plaintiff's damages which exceeded the $10,000

limit. At issue is one of the most frequently occurring conflicts in automobile insurance, namely, the effect to be given to the "pro rata" clause in American Fellowship's policy and the "excess insurance" clause in the Traveler's policy. 28 ALR3d 551, § 6, p 566. In such a situation, it is generally held that the policy issued to the owner of the vehicle (Hendren) involved in the particular accident at hand is the "primary" policy, and the company which issued that policy (American Fellowship) is liable to the limits of the policy without apportionment, despite the presence of a "pro rata" clause contained in that policy. 28 ALR3d 551, § 6, p 567, fn 12. Thus, the policy providing "nonownership coverage" (Travelers) is the secondary policy, and that company will be responsible only for the amount of damages which exceed the primary insurer's policy limits. 7 Am Jur 2d, Automobile Insurance, § 200, pp 542–543. See also 16 Couch, Insurance (2d Ed), § 62.72, p 519. In finding that there should be no apportionment of plaintiff's damages, the trial court followed the majority rule as expressed in the above authorities and in 76 ALR2d 502, § 2, p 505.

Relying upon *Blakeslee v Farm Bureau,* 388 Mich 464; 201 NW2d 786 (1972), defendant has argued that the "other insurance" clauses contained in the two policies at hand are contrary to the legislative policy of MCLA 500.3010; MSA 24.13010, and that each company should bear an equal share of plaintiff's damages. Defendant argues that its "pro rata" clause conflicts with Travelers' "excess" clause and that in such a situation liability should be apportioned as an equitable solution to the problem. This has been noted as the minority rule in 76 ALR2d 502, § 3, p 512; 7 Am Jur 2d, Automobile Insurance, § 202, p 544–

545; and 16 Couch, Insurance (2d Ed), § 62.74, p 520. This is also known as the *"Lamb-Weston"* rule, based upon the decision of *Lamb-Weston Inc v Oregon Auto Ins Co,* 219 Or 110; 341 P2d 110; 76 ALR2d 485 (1959). In effect, defendant argues that the ruling in *Blakeslee, supra,* necessarily forces Michigan to adopt the minority *"Lamb-Weston"* rule.

In the course of its decision, *Blakeslee, supra,* noted that Virginia was one of the jurisdictions in which the "other insurance" clause of an automobile policy was found to be contrary to Virginia's uninsured motorist statute. *Bryant v State Farm Mutual Auto Ins Co,* 205 Va 897; 140 SE2d 817 (1965) was cited for this proposition. 388 Mich 464, 471–472, fn 5. In a case very similar to the one at hand, *Bryant* was distinguished on the grounds that the *Bryant* court was concerned with an insurance company attempting to limit one's recovery to the limit of liability expressed in one policy. It was noted that *Bryant* involved a situation in which the plaintiff had recovered a judgment of $85,000 against the uninsured motorist, and the insurance company had attempted to limit recovery to $10,000. However, in a situation such as the one at hand, where plaintiff's damages do not exceed the total of the limits of the two policies, the excess insurance clause is given effect, and the policy which covers the owner of the vehicle involved in the accident was held to be primarily responsible, and its policy limits had to be exhausted before the excess insurance of the policy covering the passenger "comes into play." *State Farm Mutual Auto Ins Co v United Services Auto Ass'n,* 211 Va 133, 136; 176 SE2d 327, 330–331 (1970). Relying upon the above, we find that it is unnecessary to state that *Blakeslee, supra,* requires the invalidation of the two clauses at issue.

Many of the cases which comprise the minority rule have rejected the contention that a plaintiff may "stack" insurance benefits of two or more policies to satisfy the damage claim. Relying upon the *"Lamb-Weston"* rule, *Thurman v Signal Ins Co,* 260 Or 524, 528; 491 P2d 1002, 1004–1006 (1971), held that a plaintiff-passenger was limited to a total recovery of $10,000, and that each company was to pay $5,000. A similar result was reached in *Russell v Paulson,* 18 Utah 2d 157, 162; 417 P2d 658, 661–662 (1972), *Protective Fire & Casualty Co v Woten,* 186 Neb 212, 217; 181 NW2d 835, 836–838 (1970), and *McCarthy v Preferred Risk Mutual Ins Co,* 454 F2d 393, 395–396 (CA 9, 1972) (interpreting Arizona law). Those decisions, not allowing stacking, were identical to *Horr v Detroit Auto Inter-Ins Exchange,* 379 Mich 562; 153 NW2d 655 (1967). *Blakeslee* distinguished *Horr* on the grounds that it arose previous to the requirements of MCLA 500.3010; MSA 24.13010. 388 Mich 464, 469–470.

Blakeslee held that one may stack or "pyramid" recovery until his loss has been satisfied. 388 Mich 464, 475. Relying upon *Blakeslee* and *Boettner v State Farm Mutual Ins,* 388 Mich 482; 201 NW2d 795 (1972), the recent case of *Citizens Mutual Ins Co v Turner,* 53 Mich App 616; 220 NW2d 203 (1974), held that the uninsured motorist coverage found in two insurance policies, both of which contained the $10,000 limit, could be stacked for the injured party's benefit so that she could satisfy her award of $15,500. *Turner* involved two policies issued by the same company, and consequently the court was not called upon to decide how much of the total award was to be paid by each company. However, in view of Michigan's policy favoring the stacking of benefits, we find those cases disallowing stacking unpersuasive.

Lamb-Weston, Inc, supra, felt that it was absurd to determine which company should be held to be the primary or secondary insurer, and rejected what it considered to be the "circular reasoning" of the decisions which did so. 219 Or 110, 128; 341 P2d 110, 118–119. Thus, based upon general "equitable principles" the court determined that each company should bear a proportionate share of the loss. 219 Or 110, 129; 341 P2d 110, 119. A similar conclusion was held in *Truck Ins Exchange v Torres,* 193 Cal App 2d 483, 488; 14 Cal Rptr 408, 411 (1961).

Many cases have noted that the company which insured the owner of the vehicle involved in the accident should be the primary insurer. *Certified Indemnity Co v Thompson,* — Colo —; 505 P2d 962, 963 (1973). See also *Eggleston v Townsend,* 336 F Supp 1212, 1218–1219 (D Md, 1972) (construing Virginia law), and *Curran v State Auto Mutual Ins Co,* 25 Ohio St 2d 33, 39; 266 NE2d 566, 568–569 (1971), which held, pursuant to Ohio's uninsured motorist statute, which is practically identical to Michigan's, that the company which insured the host-driver was the primary insurer, and that the plaintiff-passenger's insurance company was responsible for the excess amount of loss.

While recognizing that many courts often find that the company insuring the owner of the vehicle involved is primarily responsible, *Continental National American Group v Burleson,* 283 Ala 671, 674; 220 So 2d 611, 614–615 (1969), referred to a previous decision which had indicated that the basic theory of the cases comprising the majority rule:

"is simply that by virtue of the 'excess insurance' clause there is no other 'valid and collectible' insurance

within the meaning of that phrase as used in the 'pro rata' clause."

In the instant case, the phrase "other similar insurance available to him" is used rather than "valid and collectible" insurance in American Fellowship's pro rata clause, but the meaning is the same. Applying the above theory to our problem, we find that the trial court was correct in its determination that American Fellowship would be primarily responsible until its policy limits were exhausted, and that Travelers would be liable for the excess.

While limiting one's recovery to a total of $10,000, *Russell v Paulson,* 18 Utah 2d 157, 161; 417 P2d 658, 661 (1966), referred to an Iowa decision, *Burcham v Farmers Ins Exchange,* 255 Iowa 69, 73; 121 NW2d 500, 502 (1963), which discussed the majority rule that the excess clause is generally given effect and the company with the pro rata clause in its policy is the primary insurer. *Burcham* stated:

> "The basis for so holding is not always clear. It may, however, be justified on what is a rational basis of the intent of the insurance industry in its uses of such clauses to set up order of payment and limit amounts payable to prevent double recovery." 255 Iowa 69, 73; 121 NW2d 500, 502, reprinted at 18 Utah 2d 157, 161; 417 P2d 658, 661.

Russell, supra, and *Burcham, supra,* were both concerned with avoiding "double recovery," *i.e.,* they come within that group of cases which adhere to the "anti-stacking" doctrine. While their "anti-stacking" discussion is inapplicable in a jurisdiction committed to the contrary, we feel that the "order of payment" rationale furnishes the Court with another reason for affirming the trial court's

decision. As noted in *Lamb-Weston, Inc, supra,* cases which underlie the majority rule often reached the "primary-secondary" result without clearly stating a reason for such a finding. We find that the "order of payment" theory adds support to the conclusion that the Hendren insurer, American Fellowship, whose policy contained the "pro rata" clause, is primarily responsible, while the "excess" insurer, Travelers, only had to pay plaintiff after American Fellowship had paid $10,000.

Affirmed, costs to appellees.

J. H. GILLIS, P. J., concurred.

ELLIOTT, J. *(concurring).* I concur and join in Judge ALLEN'S opinion. My remarks are on a subject that was not briefed or argued.

This appeal involves only a dispute between two insurance companies who disagree about whether the coverage of one is "excess" or "pro-rata". The dispute delayed a determination by an arbitrator, finally made on August 30, 1971, that plaintiff sustained damage of $10,652.08 on December 10, 1966, when his daughter was killed by an uninsured motorist. American Fellowship appeals from a circuit court decision and confirmation of the award, requiring it to pay its limits, plus interest, instead of the one-half that it has claimed it owes. Travelers does not dispute that it owes $652.08 "excess" plus interest at the legal rate.

Although American Fellowship acknowledges liability for $5,325.04, and Travelers admits that it owes $652.08, plaintiff has not received even these amounts nearly eight years after the death of his daughter and fully three years after delayed liquidation of his claim. Interest on the award, at the legal rate of six percent per annum, will be a

fraction of actual interest the plaintiff would pay on borrowed money.

Appeal should not be allowed in a case like this unless the plaintiff has been paid the damages determined by the tribunal below, subject to appellant's recovery from the other insurer if successful on appeal.

An analogous situation occurs when a disabled workman is determined to be entitled to compensation but a dispute exists as to which of his employer's compensation carriers is obliged to pay it.

These situations are the opposite of "interpleader" provided by GCR 1963, 210. I hope our Supreme Court will adopt a just rule that would govern cases of this nature.

PEOPLE v DUNCAN
PEOPLE v McINTOSH

1. CRIMINAL LAW—EVIDENCE—PRIOR CRIMINAL ACTS—ADMISSIBILITY—PROBATIVE VALUE—PREJUDICE—STATUTES.

Evidence of a defendant's prior criminal acts may be admissible where defendant's motive, intent, the absence of mistake or accident on his part, or defendant's scheme, plan, or system of doing the act is material; however, it is within the discretion of the trial court to determine whether the probative value of the evidence is outweighed by the risk of prejudice to the defendant (MCLA 768.27).

2. BRIBERY—INTENT—EVIDENCE—COURSE OF CONDUCT.

Intent is an essential element of the crime of bribery and may be proved by reference to a definite and continual course of conduct.

3. CRIMINAL LAW—CONSPIRACY—BRIBERY—EVIDENCE—PRIOR CRIMINAL ACTS—ADMISSIBILITY—INSTRUCTIONS TO JURY.

In a prosecution of two policemen for conspiracy and solicitation of a bribe, the trial court did not abuse its discretion by admitting evidence that defendants previously obtained payments from local narcotics dealers in exchange for information on police activities and for protection where the evidence was relevant to show a continuing course of conduct on the part of defendants and where the trial judge gave very explicit limiting instructions on the admissibility of the evidence.

4. CRIMINAL LAW—APPEAL AND ERROR—PROSECUTOR'S ARGUMENT—PRESERVING QUESTION.

Claimed error in the prosecutor's closing argument will not be considered on appeal if the argument's prejudicial effect could

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 29 Am Jur 2d, Evidence § 320 *et seq.*

[2, 3] 12 Am Jur 2d, Bribery §§ 6, 23, 27.

[3] Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe. 20 ALR2d 1012.

[4] 5 Am Jur 2d, Appeal and Error § 545 *et seq.*

have been curtailed by a curative instruction and no objection was made, and no miscarriage of justice occurred.

Appeal from Wayne, Joseph G. Rashid, J. Submitted Division 1 June 7, 1974, at Detroit. (Docket No. 17197.) Decided September 10, 1974. Leave to appeal granted, 393 Mich —.

Albert Duncan and Leon McIntosh were convicted of conspiracy to do a legal act in an illegal manner and solicitation of a bribe. Defendants appeal. Affirmed.

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

Freatman, Barr & Anhut, for defendant.

Before: LESINSKI, C. J., and BRONSON and VAN VALKENBURG,* JJ.

LESINSKI, C. J. Defendants Albert Duncan and Leon McIntosh were convicted by a jury of conspiracy to do a legal act in an illegal manner, MCLA 750.157a; MSA 28.354(1), and solicitation of a bribe, MCLA 750.505; MSA 28.773. They appeal as of right.

At the time of their arrest, both defendants were police officers with the city of Inkster. The information alleged defendants offered to return certain property of complainant Irving Broadnax, which was then being held in the property room of the Inkster Police Department pursuant to a bur-

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

glary investigation, upon the payment of $800. The main witness for the prosecution was Betty Harris, an admitted heroin addict, convicted felon, and occasional police informant. She testified that the defendants had approached her and had her solicit the payment from Broadnax on their behalf. Following the making of a separate record out of the presence of the jury, the trial court allowed the prosecution to question Mrs. Harris on similar acts and solicitations by defendants. She testified that the defendants had previously used her as a conduit to obtain payments from local narcotics dealers in exchange for information on police activities and for protection. Defendants contend that the trial court committed reversible error in admitting this testimony of other criminal acts into evidence.

The general rule in this State is that in a criminal prosecution no reference may be made to the fact that defendant has committed other similar offenses. *People v Hatt,* 384 Mich 302; 181 NW2d 912 (1970). However, a statutory exception allowing the proof of similar acts has been provided when defendant's motive, intent, the absence of mistake, or defendant's scheme, plan or system of doing the act is material. MCLA 768.27; MSA 28.1050 states:

> "In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

In the case at bar, the trial court after hearing the testimony of similar acts out of the presence of the jury, held that this testimony was material and therefore admissible for these limited statutory purposes. Following the direct and cross-examination of Mrs. Harris, the trial court gave an extensive cautionary instruction as to the limited admissibility of the evidence of similar acts. The court stated in part:

"Now, I think I should just spell out to you in simple words, these similar acts are shown by the prosecutor on the theory that they tend to show or may tend to show on the part of these defendants either intent, scheme, plan, design, motive, that and that alone. You are to pass upon the guilt or innocence of these defendants, however only on the charge set forth in the information, namely the counts which I have indicated to you."

The entire limiting instruction was again repeated by the trial court in its final charge to the jury.

As the Michigan Supreme Court recently stated in *People v Chism,* 390 Mich 104, 119; 211 NW2d 193, 199 (1973):

"The general proposition that the motive or intent of the defendant may be shown by prior acts, even though these acts would constitute commission of another crime is supported by numerous cases."

In *People v Johnston,* 328 Mich 213; 43 NW2d 334 (1950), the Michigan Supreme Court recognized that intent is an essential element of the crime of bribery and that a defendant's intent may be proved by reference to a definite and continual course of conduct.

In *People v Ferguson,* 45 Mich App 697; 206 NW2d 812 (1973), this Court stated that evidence

of prior acts is admissible by statute, MCLA 768.27; MSA 28.1050, to show motive, intent, scheme or plan on the part of defendant. This statute, however, does not provide carte blanche admissibility of evidence of prior acts, even when relevant to a showing of motive, intent, scheme or plan, when the "probative value is outweighed by attendant prejudice to the defendant. The assessment of the relative weight of these two factors is within the discretion of the court." *People v Shaw,* 9 Mich App 558, 566; 157 NW2d 811 (1968).

In *People v DerMartzex,* 390 Mich 410; 213 NW2d 97 (1973), the Michigan Supreme Court again reiterated the rule that it is within the trial court's discretion to determine whether evidence of prior acts should be admitted for this limited statutory purpose or whether its probative value is outweighed by the risk of unfair prejudice, confusion of issues, or where it would have the effect of misleading the jury.

Our extensive examination of the transcript in this case discloses that the alleged narcotic-related activities of defendants became a prominent issue at trial. Mrs. Harris was extensively examined and cross-examined on this matter.[1] The defendants each took the stand to deny such activity and were accordingly cross-examined by the prosecutor on their alleged narcotics involvement.

We recognize that in this day and age any discussion that the police are in league with known narcotics dealers raises a substantial risk of being highly inflammatory and completely obscuring the real issue at trial. This Court, however, also recognizes the relevancy of this evidence which would tend to show a continuing course of

[1] Defendants also attempted to impeach Mrs. Harris on the basis of her previous heroin addiction.

conduct on the part of the defendants to use Mrs. Harris to secure alleged payoffs. We then have what we believe is a classic case for the exercise of the trial court's judicial discretion. In this context we believe the trial court successfully walked this statutorily created tightrope by giving two limiting instructions on the admissibility of this evidence and by maintaining firm control over the proceedings. Judge Rashid could not have been more explicit in instructing the jury that the guilt or the innocence of the defendants was to be determined solely on the charge established in the information:

"You are to deliberate with regard to the guilt or innocence upon the charge as established in the information, as claimed in the information, you are not to deliberate upon the guilt or innocence of the defendants in connection with these other offenses which were permitted to be shown you. I say to you that this testimony is offered not as to guilt or innocence, in this case per se and in and of itself, but merely to show the existence of plan, scheme, or design. As far as this case is concerned, you are to consider the charge in the information here alone, but you may consider these other similar acts in determining whether or not there was scheme, plan, intent, motive, you understand. All right. Again not bearing upon guilt or innocence here in this information but for the purposes I have indicated to you."

The totality of the actions of the trial court establish that there was no abuse of discretion in the admissibility of this evidence.

Defendants next contend that certain remarks made by the prosecutor during closing argument were so prejudicial as to deny them their right to a fair trial. We cannot agree. Initially it should be pointed out that defendants totally failed to object to any of the challenged remarks. In the absence

of an objection in the trial court, appellate review is precluded unless this Court's failure to consider the issue would result in a miscarriage of justice. *People v Pacely,* 51 Mich App 67; 214 NW2d 561 (1974).

While we find the prosecutor's comments concerning the evils of narcotics to be improper, in spite of the fact that he had himself informed the jury of the limited use of this evidence, we do not believe that it was so prejudicial that it could not have been rectified by a curative instruction. This Court has repeatedly stated that a claimed error in closing argument will not be considered on appeal if its prejudicial propensity could have been curtailed by a curative instruction. *People v Sesson,* 45 Mich App 288; 206 NW2d 495 (1973). Moreover, we are of the opinion that the trial court's instruction on the limited use of the evidence of other offenses was itself curative of any misleading propensity in the prosecutor's remarks concerning narcotics. The other challenged remarks of the prosecutor were all proper comments on the evidence presented and the facts that this evidence proved defendants guilty. *People v Cowell,* 44 Mich App 623; 205 NW2d 600 (1973). We therefore rule that the remarks complained of by defendants did not deprive them of a fair trial.

Affirmed.

All concurred.

INSURANCE COMPANY OF NORTH AMERICA v RADIANT ELECTRIC COMPANY

1. PRODUCTS LIABILITY—IMPLIED WARRANTY—SALE OF SERVICES.
Implied warranties, apart from those imposed by statute, may apply to the sale of services as well as to the sale of goods.

2. PRODUCTS LIABILITY—IMPLIED WARRANTY—SALE OF SERVICES.
There was an implied warranty of fitness and merchantability with respect to the manner in which a contractor installed electrical cable in a building where the cable was to be used for handling electricity, a dangerous force.

Appeal from Macomb, Alton H. Noe, J. Submitted Division 2 June 26, 1974, at Detroit. (Docket No. 17520.) Decided September 10, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Insurance Company of North America, as subrogee of Golcheff Brothers Investment Company, against Radiant Electric Company for negligence and breach of implied warranty. Judgment for plaintiff. Defendant appeals. Affirmed.

Harvey, Kruse & Westen, P. C. (by *John F. Milan),* for plaintiff.

Smith, Shampo & Gaber (Norman L. Zemke, of counsel), for defendant.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

REFERENCE FOR POINTS IN HEADNOTES
[1, 2] 63 Am Jur 2d, Products Liability § 7.

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

CHURCHILL, J. Golcheff Brothers Investment Company was the owner of an apartment building under construction in Harrison Township, Macomb County. Radiant Electric Company, the defendant, contracted to install the electrical wiring and proceeded to do so. On March 4, 1971, before construction was complete, a major fire occurred in the building. The plaintiff insurance company paid the fire loss and brought this action, as subrogee, to recover their loss. The jury returned a verdict in the sum of $45,650.

The court submitted the case to the jury on the following theories:

1. Negligent installation of a clamp or clamps around a main electrical feeder cable.

2. Negligent inspection or failure to inspect the manner in which the clamps were installed.

3. That the defendant impliedly warranted that it would use proper materials, that the defendant impliedly warranted that such materials would be installed in a proper manner and that the defendant breached such warranties, either because the cables were improperly installed or because the cables were internally defective.

On appeal the defendant claims that the pleadings did not sufficiently inform the defendant of the plaintiff's theories of implied warranty. The plaintiff's pleadings in this case fall short of the ideal but it is clear from the record that the defendant was well prepared to try and to argue all issues actually presented to the jury, and that no miscarriage of justice resulted from deficiencies in the pleadings.[1]

The defendant also attacks the sufficiency of the evidence. Our review of the record discloses that there was sufficient evidence to support the jury's

[1] See *McKinch v Dixon,* 391 Mich 282; 215 NW2d 689 (1974).

general verdict under each of the alternative theories of recovery.

The defendant expressed his final issue on appeal as follows:

"Does the Uniform Commercial Code apply to services as well as goods?"

To frame the question in this manner is to misconceive the legal theory that supported the court's instruction to the jury on implied warranty. Apart from statute, implied warranties may apply.[2] They may apply to the sale of services as well as to the sale of goods. *Buckeye Union v Detroit Edison,* 38 Mich App 325; 196 NW2d 316 (1972). In *Buckeye,* the limits of the doctrine are not defined. Here we have a combination of factors. The services involved the installation of goods supplied by the supplier. The statutory implied warranty applies to the goods being installed.[3] As in *Buckeye,* the goods being installed were to be used for handling electricity, a dangerous force. We do not hesitate to rule that under such circumstances there is an implied warranty of fitness and merchantability with respect to the manner in which the goods were installed.

For these reasons the judgment in favor of the plaintiff is affirmed.

All concurred.

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[2] *Piercefield v Remington Arms Co,* 375 Mich 85; 133 NW2d 129 (1965).

[3] MCLA 440.2314; MSA 19.2314.

PEOPLE v ROBERSON

OPINION OF THE COURT

1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—HARMLESS ERROR—CONSTITUTIONAL LAW—CONSTITUTIONAL-NONCONSTITUTIONAL DICHOTOMY.

   The question of harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the context of a particular case, and there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission; therefore, there is no rational basis for the constitutional-nonconstitutional dichotomy resulting in two standards for testing harmless error.

2. CRIMINAL LAW—IDENTIFICATION—PHOTOGRAPHS—LINEUP—RIGHT TO COUNSEL.

   Both before and after commencement of the judicial phase of a prosecution a suspect is entitled to be represented by counsel at a corporeal identification or a photographic identification unless the circumstances justify the conduct of an identification procedure before the suspect can be given an opportunity to request and obtain counsel, and, except in exigent circumstances, photographs of a suspect known to be in custody or who can readily be produced for a lineup may not be displayed to witnesses.

3. CRIMINAL LAW—CONSTITUTIONAL LAW—RIGHT TO COUNSEL—IDENTIFICATION—PHOTOGRAPHS—HARMLESS ERROR.

   The right to counsel guaranteed by the Sixth Amendment does not extend to photographic displays; therefore, the denial of a defendant's right to counsel at a photographic display is not error of constitutional magnitude (US Const, Am VI).

REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 8] 5 Am Jur 2d, Appeal and Error § 776 *et seq.*

[2–7] 21 Am Jur 2d, Criminal Law §§ 313, 314.

Accused's right to counsel under the Federal Constitution—Supreme Court cases. 9 L Ed 2d 1260.

[3–7] 21 Am Jur 2d, Criminal Law §§ 368, 369.

4. CRIMINAL LAW—RIGHT TO COUNSEL—IDENTIFICATION—PHOTOGRAPHS—APPEAL AND ERROR—HARMLESS ERROR—MISCARRIAGE OF JUSTICE—STATUTES.

A denial of a defendant's right to counsel at a photographic display is not covered by the statutory "miscarriage of justice" standard for determining harmless error (MCLA 769.26).

5. CRIMINAL LAW—RIGHT TO COUNSEL—IDENTIFICATION—PHOTOGRAPHS—HARMLESS ERROR—REASONABLE DOUBT.

A denial of a defendant's right to counsel at a photographic display is not harmless error unless the court is able to declare that it was harmless beyond a reasonable doubt.

6. CRIMINAL LAW—IDENTIFICATION—PHOTOGRAPHS—RIGHT TO COUNSEL—HARMLESS ERROR—REASONABLE DOUBT.

Conducting three photographic identification proceedings in the absence of defendant's counsel was harmless error beyond a reasonable doubt where the proofs were so overwhelming that, even if there had been no identification testimony from the witnesses participating in the prior proceedings, all reasonable jurors would have found guilt beyond a reasonable doubt.

CONCURRENCE BY ELLIOTT, J.

7. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—IDENTIFICATION—PHOTOGRAPHS—RIGHT TO COUNSEL.

The admission of the identification testimony of eyewitnesses who had previously identified the defendant at a pretrial photographic display, after defendant's arrest, in which the defendant was not represented by counsel was proper where a physical lineup was impossible, the photographic lineup was fairly presented, defense counsel did not move to suppress the in-court identification until the first day of trial although he had known of the photographic display for two months, no attorney had been appointed for the defendant before the time of the photographic display, and a post-trial evidentiary hearing established that the identifications at trial were independent of the photographic display.

8. CRIMINAL LAW—APPEAL AND ERROR—MISCARRIAGE OF JUSTICE—CONSTITUTIONAL LAW—CONSTITUTIONAL RIGHTS.

A conviction should be upheld where an error was not a violation of a constitutional right and did not deprive the defendant of a substantial right or result in a miscarriage of justice.

Appeal from Genesee, Thomas C. Yeotis, J. Submitted Division 2 June 12, 1974, at Detroit. (Docket No. 17775.) Decided September 11, 1974.

James E. Roberson was convicted of armed robbery and assault with intent to murder. Defendant appeals. Affirmed.

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

Smith, Cassell, Mattice & Rodriguez, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

J. H. GILLIS, P. J. On March 28, 1973 defendant was found guilty by a jury of armed robbery, MCLA 750.529; MSA 28.797, and assault with intent to murder, MCLA 750.83; MSA 28.278. He was sentenced to 25 to 50 years in prison and appeals as of right.

Beecher's Ladies Apparel store in Genesee Township was the scene of a December 13, 1972 armed robbery. At trial the three persons in the store at the time—two sales clerks, Judy Rose and Myrtle Hougland, and Miss Rose's boyfriend, James Powell—identified defendant as the robber. Each of these eyewitnesses had previously identified defendant at a post-custodial, pretrial photographic display. Roberson argues that his armed robbery conviction must be reversed because he

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

was not represented by counsel at these displays.[1] See *People v Franklin Anderson,* 389 Mich 155; 205 NW2d 461 (1973); *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974); *People v James Anderson,* 391 Mich 419; 216 NW2d 780 (1974). The prosecution argues that, even if it was error to conduct the photographic identification proceeding in the absence of defendant's attorney, the error was harmless.

I

"Harmless error" is one of the more frequently utilized bases for appellate court affirmance of criminal convictions. Unfortunately, there is a considerable lack of understanding by the judiciary as to what constitutes "harmless error".

First, it must be understood that presently there are two separate standards in Michigan for determining what is harmless error, one for nonconstitutional errors and another for Federal constitutional errors. If the error is nonconstitutional, *i.e.,* merely an error in the application of a rule of evidence or procedure, we do not reverse unless the error "deprived the defendant of substantial rights or resulted in a miscarriage of justice".[2] *People v Reed,* 17 Mich App 696, 698; 170 NW2d 303, 304 (1969); see MCLA 769.26; MSA 28.1096,[3]

[1] Defendant has raised no allegation of error with respect to his conviction of assault with intent to murder.

[2] Many cases talk of prejudicial error. See, for example, *People v Robinson,* 386 Mich 551; 194 NW2d 709 (1972); *People v Wahl,* 7 Mich App 314; 151 NW2d 894 (1967). This term is usually used synonymously with reversible error and is not a meaningful standard for determining harmless error.

[3] "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of

GCR 1963, 529.1; *People v Ritholz,* 359 Mich 539; 103 NW2d 481 (1960); *People v Ogg,* 26 Mich App 372; 182 NW2d 570 (1970). However, if the error alleged to be harmless is of constitutional magnitude, we must ask two questions. "First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless?" *People v Wichman,* 15 Mich App 110, 116; 166 NW2d 298, 302 (1968).[4] Second, if not so offensive, can the court "declare a belief that it was harmless beyond a reasonable doubt". *Chapman v California,* 386 US 18, 24; 87 S Ct 824, 828; 17 L Ed 2d 705 711 (1967). We think it fair to say that the standard for reviewing nonconstitutional errors is less demanding than the standard for reviewing constitutional errors, in the sense that the "miscarriage of justice" test will tolerate more serious errors. Is there a rational basis for the constitutional-nonconstitutional dichotomy? We think not.

Dissenting in *Fahy v Connecticut,* 375 US 85, 94; 84 S Ct 229, 234; 11 L Ed 2d 171, 177 (1963), Mr. Justice Harlan said:

> "It is obvious that there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission. The question of harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the context of a particular case." See Saltzburg, *The Harm of Harmless Error,* 59 Va L R 988, 1025 (1973).

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the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

[4] Errors that have been held to be never harmless are: 1) errors resulting from deliberate prosecution misconduct. *People v Robinson,* 386 Mich 551; 194 NW2d 709 (1972); and 2) denial of a defendant's right of cross-examination. *People v Mobley,* 390 Mich 57; 210 NW2d 327 (1973); *People v Paduchoski,* 50 Mich App 434; 213 NW2d 602 (1973).

Erroneously admitted nonconstitutional evidence may often be more prejudicial than erroneously admitted constitutional evidence.

The alleged error here—denial of defendant's right to counsel at a photographic identification proceeding—is not error of constitutional magnitude. In *United States v Ash,* 413 US 300; 93 S Ct 2568; 37 L Ed 2d 619 (1973), the Supreme Court held that the right-to-counsel guarantee of the Sixth Amendment does not extend to photographic displays. Subsequently, in *People v Jackson,* 391 Mich 323, 338–339; 217 NW2d 22, 27–28 (1974), the Michigan Supreme Court ruled that:

"[B]oth before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal identification or a photographic identification unless the circumstances justify the conduct of an identification procedure before the suspect can be given an opportunity to request and obtain counsel and that, except in exigent circumstances, photographs of a suspect known to be in custody or who can readily be produced for a lineup may not be displayed to witnesses. After due consideration of * * * *Ash* * * * we adhere to this view because we are of the opinion that generally the best evidence of whether an eyewitness can identify a suspect is his response at a fairly conducted lineup unaffected by an earlier showing of photographs of the suspect.

"Accordingly, *in the exercise of our constitutional power to establish rules of evidence applicable to judicial proceedings in Michigan courts* and to preserve best evidence eyewitness testimony from unnecessary alteration by unfair identification procedures, the principles developed in and following the announcement of *Wade,* as to corporeal identifications, and *Anderson,* as to photo showings, shall govern the receipt in evidence of identification testimony where the witness has viewed or seen photographs of the suspect without regard to when the judicial phase of the prosecution is commenced." (Emphasis supplied.)

The *Anderson* case referred to in, and affirmed by, *Jackson* is *People v Franklin Anderson, supra.* A pre-*Ash* decision, *People v Franklin Anderson* represents the conclusion of our Supreme Court, as expressed by Justice WILLIAMS, that the United States Constitution gives an accused a right to counsel at photographic displays.[5] Thus, in 1973 our photographic identification rule was of constitutional magnitude and now, in 1974, it is not. But the fact remains, the rule is the same. Obviously, *United States v Ash, supra,* has not made a 1974 violation of this rule per se any less serious than a 1973 violation. Equally obvious, the harmless error standard to be utilized in the review of these violations should not be automatically determined by United States Supreme Court decisions.

We think there should be one harmless error standard applicable to all errors in criminal cases, regardless of their classification. And of the two standards discussed herein, we think the *Wichman-Chapman* standard is the better. It seems to us that in its practical application, the "miscarriage of justice" standard permits appellate courts to "sweep under the carpet" errors which may well have played a significant role in the fact trier's decision to convict. The "miscarriage of

[5] Justice LEVIN, writing for the Court in *People v Jackson,* 391 Mich 323, 338; 217 NW2d 22, 27 (1974), said that *People v Franklin Anderson,* 389 Mich 155; 205 NW2d 461 (1973), represents "the conclusion of this Court, independent of any Federal Constitutional mandate". We agree that *Anderson* was not mandated by the Constitution, since there was no United States Supreme Court decision extending the Sixth Amendment to photographic displays. Nevertheless, Justice WILLIAMS relied primarily upon *United States v Wade,* 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). Moreover, by saying that "[b]ecause we find there was an independent basis" for the in-court identification, there is no need "to determine whether the victim's identification testimony was 'harmless' constitutional error", Justice WILLIAMS clearly indicates that he thought the rules he was enunciating were of constitutional dimension. *Franklin Anderson,* 389 Mich 190; 205 NW2d 477–478.

justice" standard sounds very much like a "shocks the judicial conscience" type standard. A criminal defendant on appeal should not have to shock our conscience in order to secure for himself those rights which the Legislature and courts of this state have determined that he should have. However, the "miscarriage of justice" standard is statutory. MCLA 769.26; MSA 28.1096.[6] If it is applicable to the facts of this case, we are bound to apply it.

"Miscarriage of justice" is applicable to "misdirection of the jury, improper admission or rejection of evidence", and errors in "pleading or procedure". MCLA 769.26; MSA 28.1096. Is the rule that a defendant has a right to counsel at a photographic identification proceeding the type of evidentiary or procedural rule contemplated by the legislature when they adopted "miscarriage of justice"? We do not think so. This rule is designed to preserve "eyewitness testimony from unnecessary alteration by unfair identification procedures". *Jackson, supra,* 391 Mich 338–339; 217 NW2d 27. Its violation is error with an inherent tendency to undermine the reliability and detract from the integrity of the guilt determination process. It seems to us that a conviction which is tainted with such a violation is highly suspect and should be reviewed by a standard more demanding than "miscarriage of justice". Accordingly, we hold that where the error is a denial of defendant's right to counsel at a photographic display, that error shall not be held harmless, unless the court is able to declare that it was "harmless beyond a reasonable doubt".[7]

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[6] See fn 3.

[7] We do not think this error is "so offensive * * * that it can never be regarded as harmless". *People v Wichman,* 15 Mich App 110, 116; 166 NW2d 298, 302 (1968). See fn 4. It is not the result of deliberate

II

Thus, our question becomes: Assuming it was error to conduct the three photographic identification proceedings in the absence of defendant's counsel,[8] was the error harmless beyond a reasonable doubt, *i.e.,* were the proofs, aside from the taint of the error, so overwhelming that all reasonable jurors would find guilt beyond a reasonable doubt?[9] We hold that if this was error, it was harmless.

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prosecution misconduct. And it is different in nature from a denial of cross-examination. When a court does not permit a defendant to cross-examine a witness, we have no way of knowing what testimony would have been elicited from that witness. Thus, an unknown body of evidence is withheld from the jury. It is impossible for us to say what effect this evidence would have had on the jury had it not been withheld. Consequently, it is impossible for us to say that denial of a defendant's right of cross-examination is "harmless beyond a reasonable doubt". However, where the error is a denial of a defendant's right to counsel at a photographic display, the tainted identification evidence is presented to the jury. Therefore, since the result of this error is known to us, we can isolate it and determine if it is "harmless beyond a reasonable doubt".

[8] There are important questions raised in this appeal concerning the *Anderson-Jackson* rules and their application to this case. However, because of our disposition of this case we take no position on: (1) Whether exigent circumstances existed justifying the use of photographs? See *Anderson, supra,* 389 Mich 155, 186–187, fn 22; 205 NW2d 461, 475, fn 22. (2) Whether *Anderson* should be applied retroactively in Genesee County? See *Jackson, supra,* 391 Mich 340; 217 NW2d 28. (3) Whether an independent basis for the in-court identification can be established at a post-trial evidentiary hearing conducted by the trial judge? See *People v Young,* 21 Mich App 684; 176 NW2d 420 (1970); *Jackson, supra.*

[9] *Chapman v California,* 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967), indicates that the court's inquiry into what is harmless beyond a reasonable doubt should focus on the effect of the tainted evidence on the jury. Quoting from its decision in *Fahy v Connecticut,* 375 US 85; 84 S Ct 229; 11 L Ed 2d 171 (1963), the Court said: "The question is whether there is a reasonable possibility that the *evidence complained of* might have contributed to the conviction". (Emphasis supplied.) *Chapman, supra,* 386 US 23; 87 S Ct 827; 17 L Ed 2d 710.

On the other hand, *Harrington v California,* 395 US 250; 89 S Ct 1726; 23 L Ed 2d 284 (1969), while purporting to follow *Chapman,* focused its inquiry on the untainted evidence, holding that constitutional error could be considered harmless if there was "overwhelming

Uncontroverted and untainted evidence indicates the following: Early in the evening of December 13, 1972, Deputy Sheriff Harry Kerlin was parked in an unmarked squad car in the vicinity of Beecher's Ladies Apparel and other stores. Deputy Kerlin was on surveillance assignment in regard to a number of recent holdups in the area. At approximately 6:45 p.m. Kerlin observed defendant[10] drive up and park his car on the street. Defendant got out of the vehicle, and flipped down his rear license plate. He was apparently trying to hold it down, but it kept coming back up. Defendant then walked out of Kerlin's view.

Miss Rose, one of the store clerks, testified that the robber came into the store and placed a woman's coat on layaway. She wrote up a layaway ticket, giving one-half the ticket to the robber and retaining the other half. The robber then started to leave the store. But he stopped, pulled a gun, took money from the cash register and fled. The three persons inside the store all testified that the robbery occurred between 6:45 and 7 p.m.

Deputy Kerlin testified that he became suspicious when, at about 6:55 p.m., he observed defendant run toward his car, get in and speed away. With Kerlin following in his unmarked car, defendant ran several stop signs and a red light, finally driving his automobile into a ditch. After Kerlin identified himself as a police officer, defendant fired two shots. An exchange of gunfire followed, defendant finally being wounded and captured.

Police searched Roberson and found $246 and a layaway card from Beecher's Ladies Apparel. Miss

untainted evidence to support the conviction". We think *Harrington* offers the better approach.

[10] Deputy Kerlin's identification testimony is untainted; he did not participate in any photographic identification proceedings.

Rose identified the layaway card as the one she had given the robber. The store owner, Mr. Rosenfelt, testified that he went to his store shortly after the robbery and computed that $246.25 had been stolen. In addition, Myrtle Hougland identified one of the $5 bills found on defendant as a bill that had been in the store's cash register. She testified that she recognized the bill because someone had colored Abraham Lincoln's shirt pink.

We think this evidence is so overwhelming that, even if there had been no identification testimony from the three robbery eyewitnesses, all reasonable jurors would have found guilt beyond a reasonable doubt. Defendant's convictions are affirmed.

ALLEN, J., concurred.

ELLIOTT, J. *(concurring).* I agree with Judge GILLIS that the conviction should be affirmed. For the reasons he states eloquently, I further agree that any error was harmless, by any test. However, in my opinion no error occurred.

After he first fired at a deputy, the defendant was shot twice and arrested, ending a chase that began at the store robbed. Because of his gunshot wounds he was in a hospital and later in a cast. A physical lineup was impossible. His wounds delayed his arraignment and a determination that counsel would be appointed.

A few days after the robbery, seven strikingly similar photographs were displayed separately to each eyewitness. The photographic "lineup" was fair and not the least suggestive either in the composition of the display or in the manner it was presented. Each witness decisively picked out the defendant's photograph.

Following local practice, defense counsel was given a copy of the summary of evidence prepared

by the police detective in charge. One reason for this is to give counsel an opportunity to present motions before the day of trial. By that written summary, defense counsel knew of the photographic display for more than two months before the trial. Defense counsel also knew that the court scheduled requested suppression hearings after the hours devoted to trials, so that trial time would not be lost.

On the day of trial, witnesses and jurors are present and waiting. Participants in other criminal trials may also be present and waiting. Motions to suppress evidence should be brought before that date. They may require considerable testimony. The court should have time for thought and research and to state his findings. If the motion is granted, and the suppressed evidence is crucial (as in a possession case), the case may be dismissed; the witnesses need not be subpoenaed; and another case can be tried. If suppression is erroneously ordered, the prosecution has a chance to appeal the ruling. Other cases, all entitled to a speedy resolution, cannot be disposed of by trial or plea if another case takes up the court's limited trial time.

When this trial was to begin at 8:30 a.m., defense counsel, for the first time, moved to suppress in-court identification of defendant by the eyewitnesses. He did not contend that a physical lineup should have been held. The basis of the motion was the absence of counsel at the photographic lineup, although no attorney had been appointed. By coincidence, the day of the trial was the same day on which the Michigan Supreme Court decided *People v Franklin Anderson,* 389 Mich 155; 205 NW2d 461 (1973).

The trial judge ruled that the motion to sup-

press was not timely and proceeded with the trial. I think his ruling should be upheld.

It is desirable that the time for such motions be clarified by rule or case decision. Federal Rule 12 of Criminal Procedure, to be effective August 1, 1975, provides that such motions (and other motions, requests, defenses and objections specified in Rule 12) must be made before trial and are waived if not raised by a time set by the court. It serves a good purpose, as does proposed Rule 11(e)(5) concerning the time for plea agreements. The uncertainty of whether, on the day set for trial, the defendant will go to trial, plead guilty, make motions, waive a jury or claim that he (or his lawyer) are incompetent creates delay and docket difficulties.

In this case, the photographic lineup was not mentioned at the trial. Defendant did not testify and offered no evidence in his defense. He was positively identified by the witnesses, including the deputy—who did not view any photographs—who had pursued him from the store and who defendant tried to kill.

A motion for a new trial on the armed robbery count (defendant was also convicted of assault with intent to murder the deputy) was made after the conviction when the *Franklin Anderson* case, *supra,* was published. That motion prompted the trial judge to conduct an evidentiary hearing. The testimony of the eyewitnesses and the detective at that hearing clearly and convincingly proved that the trial identification was independent of the photographic lineup and not in the least tainted by it. The presence of counsel could not have made the photographic lineup more fair.

I think the identification testimony was admissible. It would have been error to exclude it. More-

over, the motion to suppress the evidence came too late.

I do not think we must decide what standard of review should be applied when there has been a post-custody photographic showing without counsel. Any standard should take into account the good faith and fairness of the police procedure involved. This includes some consideration of the time period since new police procedures have been required by a court.

Any suppression rule must recognize that truth and accuracy depend upon the jury knowing all relevant, reliable evidence—the information that human logic and insight need to function. If no one asks the victims and witnesses whether defendant was the person whose conduct they observed and have described, jurors will surely wonder why. I have no confidence that suppression of such testimony will produce a more accurate verdict than searching examinations into perceptions before, during and after a crime that bear upon the reliability of an identification. The interest of a victim in the enforcement of laws that his government has enacted for his protection is not to be ignored. I would allow the victim and other eyewitnesses in this case to submit to the jury their identification of the person responsible.

A recent opinion speaks on these concepts in another context; *Michigan v Tucker,* 417 US 433, 446, 447, 450–451; 94 S Ct 2357, 2365, 2367; 41 L Ed 2d 182, 194, 196–197 (1974):

"Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature

would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose. * * *

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. * * *

"For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also 'must consider society's interest in the effective prosecution of criminals * * * '. These interests may be outweighed by the need to provide an effective sanction to a constitutional right * * * but they must in any event be valued."

There is room for these and other practical considerations in the statutory "miscarriage of justice" test of harmless error. The "miscarriage of justice" test does not permit, as suggested, appellate courts to sweep errors "under the carpet", nor prevent them from acting unless their conscience is shocked. I disagree with the proposition advanced by Judge GILLIS that every error in a trial should cause reversal unless it passes the *Wichman-Chapman* test. If the error was not a violation of a constitutional right and did not deprive the defendant of a substantial right or result in a miscarriage of justice, I am in favor of upholding the conviction.

ANCHOR BAY CONCERNED CITIZENS v ANCHOR BAY BOARD OF EDUCATION

1. APPEAL AND ERROR—ATTORNEY GENERAL—INTERVENTION—FAILURE TO FILE BRIEF—COURT RULES.

   The rights of the Attorney General, once he has intervened in a case, are no greater than those of any other party to the lawsuit, and the failure to file a brief within the time prescribed by court rule is a waiver of his right to participate in the appeal (GCR 1963, 815.1[1]).

2. SCHOOLS AND SCHOOL DISTRICTS—RECALL PETITIONS—VALIDITY—RE-ELECTION.

   Recall petitions which were circulated and filed prior to a board of education member's re-election to a succeeding term of office are void by virtue of the re-election.

3. SCHOOLS AND SCHOOL DISTRICTS—RECALL PETITIONS—STATUTES—CONSTITUTIONAL LAW.

   A statute providing for recall of elected officials which requires signature on petitions in a fractional school district equal in number to 25 per cent of the number of qualified electors assessed for school taxes does not comply with the constitutional formula which requires 25 per cent of the number of persons voting in the last preceding election for the office of governor in the district involved (Const 1963, art II, § 8; MCLA 168.956).

4. OFFICERS—RECALL PETITIONS—STATUTES—CONSTITUTIONAL LAW.

   A statute which does not comply with the constitutional formula for ascertaining the necessary number of signatures on a recall petition is unconstitutional because the Legislature cannot adopt a statutory standard which conflicts with a constitutional standard (Const 1963, art II, § 8; MCLA 168.956).

Appeal from Macomb, Hunter D. Stair, J. Sub-

REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d, Attorney General § 16.

[2–4] 63 Am Jur 2d, Public Officers and Employees § 238 *et seq.*

mitted Division 2 June 26, 1974, at Detroit. (Docket No. 17800.) Decided September 11, 1974. Leave to appeal applied for.

Complaint for mandamus by Anchor Bay Concerned Citizens against the Anchor Bay Board of Education and its individual officers to compel defendants to call an election. The Attorney General intervened as a party defendant. Summary judgment for defendants. Plaintiffs appeal. Reversed and remanded.

Jack C. Chilingirian, for plaintiffs.

Daner, Freeman, McKenzie & Matthews, P. C. (by *Kenneth E. Sherer),* for defendants.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Charles D. Hackney,* Assistant Attorney General, for intervenor State of Michigan.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

BASHARA, P. J. This case arises out of plaintiffs' efforts to recall four members of the Anchor Bay Board of Education. When plaintiffs filed the recall petitions with defendant board in January, 1973, requesting that a recall election be held, they were advised by the board that the petitions did not contain the number of signatures required by statute. Defendants contended that since Anchor Bay was a fractional school district,[1] MCLA 168.956; MSA 6.1956 was the applicable statute:

"*The petitions shall be signed* by registered and

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

[1] A fractional school district is a district whose boundaries do not coincide with the boundaries of the municipalities within its borders.

qualified electors of the village equal in number to 25% of the votes cast for all candidates for village president at the last election, and *in case of officials of fractional school districts, by 25% of the number of qualified electors assessed for school taxes."* (Emphasis added.)

Relying on this statute, defendants claimed that 1,040 signatures were required. Plaintiffs argued that MCLA 168.956; MSA 6.1956 violates art II, § 8 of the Michigan Constitution and that, therefore, MCLA 168.955; 6.1955 must apply:

"The petitions shall be signed by registered and qualified electors *equal to at least 25% of the number of votes cast for candidates for the office of governor at the last preceding general election* in the electoral district of the official sought to be recalled. Any signatures obtained more than 90 days before the filing of such petition shall not be counted." (Emphasis added.)

Plaintiffs claimed that under this statute their 900 signatures were sufficient.

Unable to resolve the dispute, plaintiffs commenced this action seeking a writ of mandamus to compel defendants to call an election. Defendants responded with a motion for summary judgment alleging the constitutionality and applicability of MCLA 168.956; MSA 6.1956. The trial court granted this motion[2] and plaintiffs appeal.

The Attorney General intervened on August 20, 1973, but he has not yet filed a brief. Once the Attorney General has intervened his rights are no greater than those of any other party to the lawsuit. *Gremore v Peoples Community Hospital Authority, Appeal of Attorney General, Intervenor,* 8 Mich App 56; 153 NW2d 377 (1967). GCR 1963, 815.1(1) requires that briefs be filed "within 60

[2] Defendants made a second motion for summary judgment alleging that laches barred plaintiffs' action. The trial court is awaiting the outcome of this appeal before ruling on that motion.

days after the filing of the claim of appeal, or 60 days after filing in court of the stenographer's transcript, whichever date shall be later". Moreover, an issue on appeal is abandoned if the party does not brief that issue. *Mitcham v Detroit,* 355 Mich 182; 94 NW2d 388 (1959). Therefore, the Attorney General's failure to file a brief in this case is a waiver of his right to participate in this appeal. We, therefore, hold that the Attorney General of the State of Michigan is no longer a party in this action.

Next, it was conceded by all parties at oral argument that two of the defendants were re-elected to the Anchor Bay Board of Education subsequent to the filing of the recall petitions. We find that the recall petitions are void as to these two board members, since re-election voids recall petitions which were circulated and filed prior to re-election to a succeeding term. To seek the recall of these two board members, new petitions will have to be filed.

We now come to the primary question raised in this appeal: Does MCLA 168.956; MSA 6.1956, *supra,* violate art II, § 8 of the Michigan Constitution? That article provides:

> "Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors *equal in number to 25 percent of the number of persons voting in the last preceding election for the office of governor* in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question." (Emphasis added.)

Thus, the constitutional formula for ascertaining the number of signatures needed on recall petitions is based on the number of votes cast for

governor "at the last preceding general election". MCLA 168.955; MSA 6.1955, *supra,* complies with this formula; MCLA 168.956; MSA 6.1956, *supra,* which is based on "the number of qualified electors assessed for school taxes" does not comply. The Legislature cannot adopt a statutory standard which conflicts with a constitutional standard. *Hamilton v Secretary of State,* 227 Mich 111; 198 NW 843 (1924); *Wolverine Golf Club v Secretary of State,* 384 Mich 461; 185 NW2d 392 (1971). We reject defendants' argument that the words "equal in number to", which were inserted in art II, § 8 of the 1963 constitution as an amendment to the 1908 version of the same section,[3] are sufficient to validate MCLA 168.956; MSA 6.1956, even though this was the admitted purpose of the amendment.[4] Therefore, we hold that MCLA 168.956; MSA 6.1956 is unconstitutional.

We reverse and remand this case to the trial court for further proceedings consistent with our decision. Costs to appellants.

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[3] Const 1908, art III, § 8 provided:

"Laws shall be passed to preserve the purity of elections and guard against abuses of the elective franchise, and to provide for the recall of all elective officers, except judges of courts of record and courts of like jurisdiction upon petition of 25 per centum of the number of electors who voted at the preceding election for the office of governor in their respective electoral districts."

[4] The delegates to the 1961 Constitutional Convention tentatively adopted an amendment inserting *"comparable* in number to" (emphasis added) into art II, § 8. These words were inserted expressly for the purpose of validating MCLA 168.956; MSA 6.1956, which had been previously enacted by the Legislature. However, prior to final passage of this article "comparable" was changed to "equal". There is no explanation in the convention record of why this change was made. But one fact is clear—"comparable" and "equal" are not synonymous. And, while "comparable in number to" might have validated MCLA 168.956; MSA 6.1956, "equal in number to" does not. *See* 2 Official Record, Constitutional Convention 1961, pp 2263, 2266–2267, 3077–3087.

GEORGE v CITY OF PETOSKEY

1. JUDGMENT—ACCELERATED JUDGMENT—COMPLAINT—ALLEGATIONS.

   The allegations of the complaint and amendments must be taken at face value when determining whether or not an accelerated judgment was proper.

2. LIMITATION OF ACTIONS—CONTINUING WRONGFUL ACTS.

   Recovery is not barred by the statute of limitations where there are continuing wrongful acts within the period limited by statute.

3. LIMITATION OF ACTIONS—INTERFERENCE WITH ENJOYMENT OF PROPERTY—HARASSMENT—NEW ACTS.

   In an action to recover damages based upon a defendant city's improper interference with plaintiffs' enjoyment of their property and defendant's intentional discrimination and harassment of plaintiffs, the statute of limitations began to run when the defendant city dropped the legal proceedings it had brought against plaintiffs and their tenants where it was alleged that the suit constituted another act of harassment and an attempt to deprive plaintiffs of their rightful enjoyment of their property.

4. LIMITATION OF ACTIONS—FINANCIAL EXPECTATIONS—OWNERSHIP OF PROPERTY—INJURIES TO PERSONS OR PROPERTY—EXPRESS OR IMPLIED CONTRACT.

   An action is governed by the general six-year statute of limitations where plaintiffs are seeking damages to their financial expectations and economic benefit which they had a right to expect from the ownership of their property, and not for injuries to persons or property or upon an express or implied contract (MCLA 600.5805[7], 600.5807[8], 600.5813).

Appeal from Emmett, R. Stuart Hoffius, J. Sub-

REFERENCES FOR POINTS IN HEADNOTES

[1] 47 Am Jur 2d, Judgments §§ 1080–1213.

[2] 51 Am Jur 2d, Limitation of Actions §§ 121, 138 *et seq.*

[3, 4] 51 Am Jur 2d, Limitation of Actions § 84 *et seq.*

mitted Division 3 June 7, 1974, at Grand Rapids. (Docket No. 17833.) Decided September 11, 1974.

Complaint by Arthur D. George and Margaret L. George against the City of Petoskey for damages from defendant's interference with plaintiffs' enjoyment of their property. Accelerated judgment for defendant. Plaintiffs appeal. Reversed and remanded.

Richard H. Scholl, for plaintiffs.

Nathaniel W. Stroup, City Attorney, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. On October 12, 1972, plaintiffs commenced suit by filing a two-count complaint against defendant. Count I alleged the defendant and its agents improperly interfered with plaintiffs' enjoyment of their property, in that various city officials threatened potential renters of plaintiffs' property that their use of the property would be in violation of zoning regulations, and that suit would be (and in fact was) instituted against them if they rented from plaintiffs. Plaintiffs allege special damages.

Count II repeated the allegations of Count I and added that defendant's agents and officials had intentionally discriminated against and harassed plaintiffs.

On motion for accelerated judgment on the ground that the statute of limitations had run, the trial court dismissed both counts. For the purpose

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

of determining whether or not accelerated judgment was proper under the circumstances, the allegations of the complaint and amendments thereto must be taken at face value. *Janiszewski v Behrmann,* 345 Mich 8; 75 NW2d 77 (1956).

Plaintiffs allege in Count I that commencing in 1962 defendant's city manager and city attorney threatened suit against their prospective tenants, enumerating five instances of such intimidations, two of which resulted in loss of tenants, one in which there was a compromise worked out between attorneys representing these parties, and two instances where suit was commenced. Suit was commenced by defendant city on January 9, 1968, against plaintiffs and their tenant Smutz, as a result of which Smutz moved out. A subsequent tenant, Bourrie, was added as a party defendant in February, 1970. This suit resulted in a judgment for the Georges, an appeal by the city to the Court of Appeals, and a dismissal for lack of progress of the appeal on October 6, 1971, six days previous to the filing of this suit. In addition to these allegations plaintiffs assert in a bill of particulars to Count II that the building involved in this litigation was sold on May 2, 1973, for delinquency in a sewer assessment which plaintiffs claim had been levied against them as part of the harassment, and further that the city attorney allowed a falsification of council minutes in July, 1971, involving plaintiffs' request for lost rentals.

In the face of these allegations the trial court stated:

"It is clear that the statute of limitations has run on whatever type of action might be claimed that Mr. George was instituting. A libel and slander action is one year under the statute of limitations, a malicious prosecution action has a statute of limitations of two years,

and a tort action three years. There is no way in which this could be termed anything in the contract line, which would have a statute of limitations of six years. It is apparent from all of the allegations that all of the actions are barred by the statute of limitations, whether it be one year, two years, or three years, since the date of the starting of the suit was October 13, 1971, and none of the details of the bill of particulars relate to any action, anything between October 13, 1968 and October 13, 1971."

Three sections of the Michigan statutes are relevant to the issue before us. They are:

MCLA 600.5805(7); MSA 27A.5805(7):

"The period of limitations is 3 years for all other actions to recover damages for injuries to persons and property."

MCLA 600.5807(8); MSA 27A.5807(8):

"The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract."

MCLA 600.5813; MSA 27A.5813:

"All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."

Plaintiffs contend that defendant city pursued their course of conduct against them and their tenants from 1962 until it abandoned its appeal on October 6, 1971, and that the addition of their tenant Bourrie as a defendant in that suit constituted another act of harassment and attempt to deprive them of their rightful enjoyment of their property. A reading of both Counts I and II leads us to the conclusion that the trial judge erred in determining that there was an absence of any alleged wrongful act within the period limited by

the statute, assuming that the trial court was right in holding that no more than the three-year statute of limitations was applicable.

"Where there are continuing wrongful acts within the period limited by the statute * * * recovery is not barred." *Defnet v Detroit,* 327 Mich 254, 258; 41 NW2d 539, 541 (1950).

Applied to the situation before us, that would mean the statute of limitations, whether three years (§ 5805[7]) or six years (§ 5807[8], § 5813), began to run when defendant city dropped the legal proceedings it had brought against plaintiffs and their tenants on October 6, 1971.

We proceed to discuss which of the above statutes is applicable to the pleadings in this case. Neither Count I or Count II seek damages for injuries to persons or property. Neither count is based upon a contractual agreement, express or implied. It is clear that the damages which plaintiffs are seeking are for damages to their financial expectations and economic benefit which they had a right to expect from the ownership of their property. *Schenburn v Lehner Associates, Inc,* 22 Mich App 534; 177 NW2d 699 (1970); *Case v Goren,* 43 Mich App 673; 204 NW2d 767 (1972), and *Sweet v Shreve,* 262 Mich 432; 247 NW 711 (1933).

The process of elimination leads us to the conclusion that the general statute of limitations (§ 5813) applies to the allegations in the complaint before us. We express no opinion as to whether plaintiffs have alleged valid causes of action or whether defendant is entitled to any defenses thereto.

Accelerated judgment for defendant reversed. Remanded to the trial court for further proceedings. Costs to plaintiffs.

All concurred.

LAND DEVELOPMENT CORPORATION v TOWNSHIP OF BLOOMFIELD

1. APPEAL AND ERROR—EQUITY—DE NOVO REVIEW—FINDINGS OF FACT.

   The Court of Appeals reviews equity cases *de novo* but hesitates to overturn the trial court's findings of fact unless convinced that it would have reached a different result.

2. ZONING—ORDINANCES—RATIONALITY—REASONABLE USE—CONFISCATION.

   An application of a zoning ordinance to particular property, even though rational, may prevent any reasonable use of the property and, hence, be invalid or confiscatory.

3. ZONING—RESTRICTIONS—REASONABLE USE—CONFISCATION—FEASIBILITY—USABLE VALUE.

   A zoning restriction deprives the zoned property of any reasonable use and is, therefore, confiscatory if all permitted uses are so devoid of feasibility that the restriction has accomplished the destruction of all usable value.

4. ZONING—ORDINANCES—PROOFS—REASONABLE USE.

   An aggrieved property owner, in order to sustain an attack on a zoning ordinance, must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.

5. ZONING—ORDINANCES—SINGLE-FAMILY RESIDENCE—CONFISCATION—PROOFS.

   A single-family residence classification in a zoning ordinance, as applied to a plaintiff's property, is confiscatory and void where the plaintiff introduced credible expert testimony which was not adequately challenged that, if the land was subdivided and sold as single-family residential lots in accordance with the present zoning classification, the cost of development would exceed the sales price; the plaintiff succeeded in demonstrating

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 822.

[2–5] 58 Am Jur, Zoning § 141.

that the restriction has accomplished the destruction of all usable value and precludes the use of the property for any purposes to which it is reasonably adapted.

Appeal from Oakland, Arthur E. Moore, J. Submitted Division 2 June 4, 1974, at Lansing. (Docket No. 17910.) Decided September 11, 1974.

Complaint by Land Development Corporation against Bloomfield Township to have the township's zoning ordinance declared unconstitutional as it applied to plaintiff's property. Judgment for plaintiff. Defendant appeals. Affirmed.

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

Dillon & Lang, for defendant.

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

MCGREGOR, P. J. On July 25, 1973, a judgment was entered in Oakland County Circuit Court declaring the zoning ordinance of the Township of Bloomfield unconstitutional as applied to plaintiff's property. From that judgment the defendant township appeals.

Plaintiff Land Development Corporation[1] is the land contract purchaser of a parcel of land located in Bloomfield Township. The land was purchased in November, 1972, for $130,000 and contains 6.597 net acres. It is located on the north side of West Maple Road, approximately 400 feet east of Inkster Road, and has a frontage of 473.75 feet on Maple Road and a north-south depth of 710 feet.

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

[1] Since merged with Binder and Lark Building Company.

The northeast corner of the Maple-Inkster Road intersection is zoned B-2 (community business district) and is occupied by a gas station. The land next easterly is zoned O-1 (office-building district) and is occupied by a branch bank. Plaintiff's property is bounded on the south by Maple Road, a 120-foot right-of-way; on the west by the branch bank and vacant property, approximately two acres in size, zoned to office use; on the north by a school; and on the east by a single residential site.

Plaintiff sought to have its property, which is zoned R-3 (one-family residential) under the Bloomfield Township zoning ordinance, zoned to R-M (multiple-family residential district). This request was denied by the township, the reason given being that the property could be used under the "cluster" option available to the plaintiff. This option is set forth in Ordinance No. 209.[2] Plaintiff's proposal to the township was to construct 26 multiple units on the west 319.75 feet of the subject land and 7 "cluster" units on the east 154 feet; this proposed use, as presented to the trial court, would have placed 42 multiple units on the site. Under defendant's zoning ordinance, multiple dwellings are expressly suggested to serve as a transition between single-residential and nonresidential uses.

The trial court found that plaintiff's property cannot be reasonably, economically, or practically used for single-residential purposes under its zoned R-3 classification. The court also concluded that the plaintiff had proven that its loss was so great as to amount to unconstitutional confiscation of property without compensation.

[2] This "cluster option" would allow plaintiff to construct, with the permission of the planning commission, 11 units in the first 360 feet of the property. These units could be built in groups of four, attached through a common party wall, at a density of three units per acre.

The sole issue before us is whether the trial court erred in determining that the zoning ordinance is unconstitutional, as applied to plaintiff's property, as being confiscatory, arbitrary and capricious.

Any extended or detailed review of the conflicting testimony adduced at trial would serve no useful purpose here. It is sufficient to note that plaintiff introduced expert testimony to the effect that, if the land was subdivided and sold as single-family residential lots in accordance with its present zoning classification, the cost of development would exceed the sales price, *i.e.,* plaintiff would lose money on the sale of the lots. This expert opinion was premised on a number of factors. First, the property is located on a heavily-travelled thoroughfare and is adjoined by properties zoned for commercial and office use, thus rendering it less attractive to prospective home buyers. Second, the rear portion of the parcel is traversed by a deep ravine which renders between one-fourth and one-third of the land unsuitable for building. Third, the township zoning ordinance imposes minimum floor space requirements which would necessitate the construction of large and relatively expensive homes.[3] On the basis of these and other considerations, the plaintiff's witness concluded that the property cannot be practically, economically or reasonably used as presently zoned.

An expert witness, testifying on behalf of defendant, stated that the property was worth $96,000 as presently zoned. However, he admitted that he knew nothing about development costs, he did not incorporate the cost of a sanitary sewer, and

[3] The R-3 classification of plaintiff's property requires 1850 square feet in a one-story home; 2075 square feet in a one-and-one-half-story home, and 2200 in a two-story home. Under the "cluster option", the respective figures are 1450, 1600 and 1650.

he did not take into account the topography or the commercial properties in the vicinity of the parcel in question. In later testimony, he indicated that one-third of the property was not usable for any purpose and that his opinion as to the previous values he had quoted should be reduced by one-third.

Although this Court reviews equity cases *de novo,* it has often been noted that we hesitate to overturn the trial court's findings of fact unless convinced that we would have reached a different result. *Kropf v Sterling Heights,* 391 Mich 139, 162–163; 215 NW2d 179 (1974). In the present case the trial court has favored us with an incisive and well-written opinion. In that opinion, the trial court adopts the testimony of plaintiff's expert witness in the following terms:

"Mr. Gerald Anderson, a well-qualified and competent real estate appraiser, whose testimony this court believes, testified that he had given consideration to several methods of developing the subject property under its present zoning classification. Based on Mr. Anderson's analysis, it appears and the court finds that the required development costs, including utilities, grading, engineering, costs of sales, and other normal expenses, would exceed what could be realized from this property if it were subdivided under the R-3 zoning classification; further, that if the property were divided into eight sites (exhibit 16), the cost of development would exceed the retail sales price of the individual lots by more than $2,000 and that if the site were divided into four single-family residential sites (exhibit 17), the cost of development would exceed the retail sales price of the resulting lots by $292. Mr. Anderson's testimony was that the property cannot be practically, economically and reasonably used under the R-3 Zone District. It is adopted by the court. The court further finds that plaintiff's property would be worth $168,000 for multiple dwelling purposes."

Noting that "[g]ross disparity in value alone is not *necessarily* sufficient to make a zoning ordinance unconstitutional [but is] one of the factors which is to be considered" the trial court concluded that:

"Plaintiff's property cannot be reasonably, economically or practically used for single residential purposes under its zoned R-3 classification. The abutting commercial, school and office uses, as well as the high volume of traffic, make the site impractical and undesirable for conventional single detached dwellings. The size of the parcel does not permit developing the property in any manner so as to screen out these undesirable amenities and the topography is such that to create single family residential sites would require desecration of the natural beauty which the land presently enjoys."

Having carefully reviewed the record in its entirety, we cannot say that the conclusions of the trial court are wrong or differ from those we would have reached, had we been in his position. The courts of this state have long recognized that the application of a zoning ordinance to particular property, though rational, may prevent any reasonable use of the property and, hence, be invalid as confiscatory. *Smith v Village of Wood Creek Farms,* 371 Mich 127; 123 NW2d 210 (1963); *Reibel v Birmingham,* 23 Mich App 732; 179 NW2d 243 (1970); *Trever v Sterling Heights,* 53 Mich App 144; 218 NW2d 810 (1974). In *Reibel, supra,* then Judge LEVIN stated (p 739):

"A zoning restriction deprives the zoned property of any reasonable use and is, therefore, confiscatory if all permitted uses are so devoid of feasibility that the restriction has accomplished the destruction of all usable value."

Speaking to the same point, our Supreme Court,

in *Kropf v Sterling Heights, supra,* most recently noted that (pp 162–163):

"Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted."

In our judgment, plaintiff in this case has succeeded in demonstrating that "the restriction has accomplished the destruction of all usable value" and precludes the use of the property "for any purposes to which it is reasonably adapted". We therefore hold that the trial court did not err in determining that the zoning ordinance, as applied to plaintiff's property, is confiscatory, and for that reason, void.

Affirmed.

All concurred.

PEOPLE v ALEMAN

1. CRIMINAL LAW—PLEA OF GUILTY—AGREEMENTS—AFFIRMATIVE ACKNOWLEDGMENT—COURT RULES.

A general court rule requires that the agreement be stated on the record and affirmatively acknowledged by the defendant, his lawyer, and the prosecutor, whenever a guilty plea was the result of an agreement (GCR 1963, 785.7[2]).

2. CRIMINAL LAW—PLEA OF GUILTY—AGREEMENTS—AFFIRMATIVE ACKNOWLEDGMENT—PROSECUTOR—DEFENSE COUNSEL—DEFENDANT.

In a prosecution for breaking and entering and injury to a safe, the prosecutor's statement that the people intend to add a new count of larceny in a building and that the addition was the result of discussions and negotiations, constitutes an affirmative acknowledgment by the prosecutor of his willingness to accept a plea to that count, particularly where no objection was made to the court's taking and receiving the guilty plea and where the prosecutor would be bound by the accepted plea and could not thereafter prosecute on the greater offenses; defense counsel's affirmative indication that he had no objection to adding the new count, coupled with the indication that he discussed the disposition of the matter with defendant and that defendant wished to offer a plea of guilty to the added count, constitutes an affirmative acknowledgment on the part of defense counsel to the agreement to add the extra count in exchange for the plea; defendant's act of offering his plea of guilty after being fully informed of his rights with respect to the nature and effect of his guilty plea is sufficient to constitute an affirmative acknowledgment of the agreement.

3. CRIMINAL LAW—PLEA OF GUILTY—COURT RULES—AGREEMENTS—AFFIRMATIVE ACKNOWLEDGMENT—PROSECUTOR—DEFENSE COUNSEL—DEFENDANT.

The Michigan Supreme Court when it promulgated a court rule that agreements between the prosecutor and the defendant or

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REFERENCE FOR POINTS IN HEADNOTES

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

his lawyer regarding the entry of a plea shall be stated on the record and affirmatively acknowledged by the defendant, his lawyer and the prosecutor, did not intend to require some ritualized incantation by the parties but rather intended that the rule be applied in such a manner as would effectuate the underlying purpose of apprising the trial court of the nature of the plea agreement (GCR 1963, 785.7[2]).

Appeal from Macomb, Alton H. Noe, J. Submitted Division 2 June 5, 1974, at Detroit. (Docket No. 17964.) Decided September 11, 1974.

Richard Earl Aleman was convicted, on his plea of guilty, of larceny in a building. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Thaddeus F. Hamera,* Chief Appellate Prosecuting Attorney, and *Stephen F. Osinski,* Assistant Prosecuting Attorney, for the people.

Begole, Lukomski, Maddock & MacDonald, for defendant.

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

VAN VALKENBURG, J. Defendant was originally charged with breaking and entering of an occupied dwelling with intent to commit a larceny[1] and injury to a safe.[2] On the date set for trial the prosecutor indicated to the trial court that as a result of discussions with all the parties concerned the people intended to add a count of larceny in a

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

[1] MCLA 750.110; MSA 28.305.

[2] MCLA 750.531; MSA 28.799.

building.[3] Defendant thereafter pled guilty to this added count and was sentenced to two to four years in prison. Defendant now appeals as of right.

On appeal defendant raises a number of alleged infirmities with respect to the plea, all of which have been considered, but only one of which merits discussion. Defendant through appellate counsel, who was also counsel for defendant at the plea, alleges that since the plea was the result of an agreement, and GCR 1963, 785.7(2) requires that the agreement be stated on the record and affirmatively acknowledged by defendant, his lawyer and the prosecutor, the failure to do so in the present case mandates reversal pursuant to the provisions of GCR 1963, 785.7(5).

Since defendant's plea was entered subsequent to the adoption of the general revision of GCR 1963, 785, the provisions of the new rule control. GCR 1963, 785.7(2) provides:

> "The Court shall not accept a plea of guilty or nolo contendere without personally addressing the defendant and determining that the plea is freely, understandingly and voluntarily made. If the tendered plea is the result of an agreement between the prosecutor and the defendant or his lawyer regarding the entry of a plea, the agreement shall be stated on the record and affirmatively acknowledged by the defendant, his lawyer and the prosecutor."

It should first be noted that the rule does not require the trial court to inquire whether there was an agreement, although it is suggested that such an inquiry by the trial court would be wise, but rather the rule mandates that if there was an agreement it shall be stated and acknowledged on the record. It is clear that in the instant case the

[3] MCLA 750.360; MSA 28.592.

added count was the result of plea negotiations that resulted in an agreement, as illustrated by the opening remarks by the prosecutor, wherein he advised the court:

"The people have discussed this case with all parties concerned and the People at this time would make a motion to the court to add a second count of larceny in a building, this being a violation of Michigan Statutes Annotated 28.592, a four-year felony.

"Because of the negotiations up until the last minute here I have not prepared the formal information and therefore cannot even formally read it, but I could advise Mr. Aleman of what the charge would be, and it would be larceny in a building, which would be 1211 Balmoral located in the City of Mount Clemens, and ask the defense counsel if he waives both the formal presentation and the formal reading of the information at this time."

Defendant does not assert that the agreement that resulted from the plea negotiations was anything more than what was, in fact, stated by the prosecutor: that being that the prosecutor would add the count of larceny in a building. Thus, we find that the "agreement" was stated on the record within the meaning of GCR 1963, 785.7(2).[4]

GCR 1963, 785.7(2) also requires that the agreement be "affirmatively acknowledged by defendant, his lawyer and the prosecutor". The rule itself offers no indication what constitutes affirmative acknowledgment. It would however appear that the purpose and intent of this portion of the rule was to insure that the trial court, along with all of

[4] To the extent that a defendant seeks to assert that there was an "agreement" which is not stated upon the record, we feel that such a claim should, like a claim of involuntariness, be first raised before the trial court. It is only in this fashion that this Court will have a proper record upon which to evaluate the legitimacy of the claim.

the parties, is apprised of any concessions given by either side to secure the guilty plea. Clearly the rule would appear to be primarily directed to those situations where the agreement involves matters which are not otherwise apparent from the record of the plea itself, *i.e.* dismissal of charges against defendant which are unrelated to the charge pled to, dismissal of charges against other persons, a prosecutor's recommendation of probation or leniency, etc. It is thus against this underlying purpose of the rule that the meaning of what constitutes affirmative acknowledgment must be measured.

Clearly the statement by the prosecutor that the people intended to add the new count and that said addition was the result of discussions and negotiations constitutes an affirmative acknowledgment by the prosecutor of his willingness to accept a plea to that count, particularly in light of the absence of any objection to the court's taking and receiving the guilty plea to that count. Since the prosecutor affirmatively added the new count, would be bound by the accepted plea in the absence of an objection to the proffered plea, and could not thereafter prosecute on the greater offenses arising out of the same transaction, we do not feel that affirmative acknowledgment under the rule requires that the prosecutor mouth some pointless phrase to the effect that he acknowledges that what he has said is what he intended to say.

As to defense counsel, we hold that counsel's affirmative indication that he has no objection to adding the new count, coupled with the indication that he discussed the disposition of the matter with defendant and that defendant now wished to offer a plea of guilty to the added count, constitutes an affirmative acknowledgment on the part

of defense counsel to the agreement to add the extra count in exchange for the plea.

As to defendant, we hold that the mere act of offering his plea of guilty after being fully informed of his rights with respect to the nature and effect of his guilty plea is sufficient to constitute an affirmative acknowledgment of the agreement to add the extra count in exchange for the plea.

We do not believe that in situations such as that found in the instant case wherein it appears that the only "agreement" was that a count would be added to which defendant would be willing to plead guilty necessitates some particular vocalization in order to be "affirmatively acknowledged" on the record. Since it is patently clear from the record before us what the agreement was, and it is further patently clear that the prosecutor, defense counsel and defendant by their respective actions indicated their willingness to undertake this "compromise" whereby the prosecutor would add the new count in exchange for defendant's guilty plea, we hold that the underlying purpose and intent of the rule has been complied with. We do not believe that the Supreme Court intended when they promulgated GCR 1963, 785.7(2) to require some ritualized incantation by the parties for the benefit of the trial court, but rather we feel they intended that the rule be applied in such a manner as would effectuate the underlying purpose of apprising the trial court of the nature of the plea agreement. Since that end was met, we hold that no error resulted.

Affirmed.

All concurred.

EAST DETROIT FEDERATION OF TEACHERS, AFT LOCAL 698 v EAST DETROIT BOARD OF EDUCATION

SCHOOLS AND SCHOOL DISTRICTS—STATUTES—PROBATIONARY TEACHERS —TERMINATION OF SERVICES.

A school board properly terminated the services of probationary teachers where it complied with the statute when notifying the teachers of the termination, and the number of teachers whose services were terminated was not arbitrary and capricious where the record indicates that it was based upon extensive study of projected needs (MCLA 38.83).

Appeal from Macomb, Walter P. Cynar, J. Submitted Division 1 June 25, 1974, at Detroit. (Docket No. 18019.) Decided September 11, 1974.

Complaint by the East Detroit Federation of Teachers, AFT Local 698, against the Board of Education of the City of East Detroit for an injunction and a determination of arbitrariness in terminating teachers' services. Judgment for defendants. Plaintiff appeals. Affirmed.

Fieger, Golden & Cousens, for plaintiff.

Martin J. Smith, for defendant.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

BASHARA, P. J. Plaintiff, East Detroit Federation

REFERENCES FOR POINTS IN HEADNOTE

68 Am Jur 2d, Schools §§ 152, 161.

Notice of intention to discharge teacher, or not to renew contract, sufficiency under statutes requiring such notice. 92 ALR2d 751.

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

of Teachers, has initiated this appeal seeking reversal of the trial court's determination of no cause for action.

The sole issue on appeal is whether defendant, Board of Education, on April 12, 1973, acted arbitrarily and capriciously in notifying 65 probationary teachers that their services would be terminated at the end of the 1972–1973 school year.

MCLA 38.83; MSA 15.1983 provides:

> "At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued."

Weckerly v Mona Shores Board of Education, 388 Mich 731; 202 NW2d 777 (1972), interpreting the above statute, held that probationary teachers must be given 60 days notice of termination, and if such notice is not given the school board must retain those teachers for the coming school year.

Defendant, on April 12, 1973, 60 days prior to the completion of the school year gave notice of termination to 65 probationary teachers. Plaintiff argues, among other things, that the discharging of 65 teachers, as opposed to a lesser number, was arbitrary and capricious. The record indicates the plaintiff's argument is without merit.

Mr. Michael O. Emlaw, superintendent of schools for East Detroit, testified that due to the projected decline of student enrollment in the upcoming 1973–74 school year the services of 43.4 teachers would no longer be necessary. This esti-

mate was based upon the present student enrollment, along with contemplated moves out of the district, by discussions between teachers and students, by notices in the school newspaper, by checking with local parochial schools to determine if any of their students would be attending East Detroit public schools, and by the school census from previous years to determine the number of students enrolling in kindergarten. We must further note that in previous years the school board's estimate proved to be extremely accurate.

In addition to the 43.4 teachers, there were 24 tenure teachers who were on leave who could have possibly returned the next fall. These 24 tenure teachers would have precedence over non-tenured teachers.

We, therefore, find defendant's actions were not unreasonable in complying with the statute in question.

Plaintiff also contends that MCLA 38.83; MSA 15.1983 is not applicable, and in support of its position argues that *Steeby v Highland Park School Dist* (Leave to appeal granted by this Court, Docket #17336), is controlling. We find that *Steeby* is not applicable since the subject matter of this case concerns only non-tenured probationary teachers, whereas *Steeby, supra,* dealt with tenured teachers.

We, therefore, hold that MCLA 38.83; MSA 15.1983, is clearly applicable to the present matter. We conclude that defendant did not act arbitrarily and capriciously when it gave 65 probationary teachers notice that their services would not be needed for the 1973–74 school year.

Affirmed, no costs, a public question being involved.

All concurred.

PEOPLE v CLYBURN

1. CRIMINAL LAW—APPEAL AND ERROR—JURORS—DISMISSAL—PREJUDICE.

A defendant who cannot show that he was prejudiced by the trial court's dismissal of a juror, even though the dismissal may have been improper because the grounds for a challenge for cause were insufficient, by having agreed to the procedure followed by the trial court may be held on the record to have consented to the dismissal of the juror and therefore will not be heard in contention of error.

2. CRIMINAL LAW—FAIR TRIAL—JUDICIAL IMPARTIALITY.

A trial court did not depart from that standard of judicial impartiality which protects a defendant's right to a fair trial by assisting defense counsel while seeking to examine the defendant witness concerning his prior criminal convictions in formulating a question which elicited a prior adult conviction, but avoided references to defendant's transgressions as a minor, where no compulsion was exerted, and the court merely protected the record while aiding defense counsel.

3. CRIMINAL LAW—TRIAL—PRESENCE OF JUDGE—PRESERVING QUESTION.

The presence of the judge in the courtroom while a trial is in progress is to be expected, but his absence during noncritical stages of the trial will not constitute reversible error unless it clearly appears that prejudice has resulted to the defendant; there was no prejudice where the trial judge was once absent while testimony of witnesses was being read to the jury in response to their request and was again absent during a day of jury deliberations to attend a funeral after arranging for an-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 508.
5 Am Jur 2d, Appeal and Error § 789.
[2] 53 Am Jur, Trial § 540.
[3] 53 Am Jur, Trial § 637.
5 Am Jur 2d, Appeal and Error § 545 *et seq.*
[4] 53 Am Jur, Trial §§ 21, 23.
[5] 53 Am Jur, Trial § 1009.

other judge to take the verdict if one was reached in his absence, and in both cases defendant and his attorney stated they had no objections and agreed to proceed.

4. CRIMINAL LAW—TRIAL—CONFERENCES—PRESENCE OF DEFENDANT.

An in-chambers conference to discuss matters of procedure or law attended by defendant's counsel, to which the defendant raises no objection, does not violate the defendant's right to be present during his trial; a defendant's presence at conference is required only where his substantial rights may be affected.

5. CRIMINAL LAW—VERDICT—FORM OF VERDICT.

A jury is not required to restate all of the statutory language defining the offense when rendering a verdict; therefore, where defendant was charged with breaking and entering a business place with intent to commit larceny and the jury found him guilty "as charged" and upon being polled each juror responded affirmatively when asked if he found the defendant guilty "of the charge of breaking and entering a business place, as the people have charged", there is no basis for the claim that the verdict was for breaking and entering a business place, a misdemeanor, under another statute.

Appeal from Wayne, James Montante, J. Submitted Division 1 June 28, 1974, at Detroit. (Docket No. 18347.) Decided September 11, 1974.

Joseph W. Clyburn was convicted of breaking and entering with intent to commit larceny. Defendant appeals. Affirmed.

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

Kratchman & Kratchman, P. C., for defendant.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

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

DANHOF, J. Defendant was tried jointly with a codefendant before a jury. He was convicted of breaking and entering with intent to commit larceny, MCLA 750.110; MSA 28.305, and sentenced to five to ten years in prison. He appeals raising a number of issues which relate primarily to certain procedural aspects of his trial. We affirm.

I

On the second day of trial, one of the jurors informed the court that he was acquainted with defendant Clyburn's father. The juror explained that he was not made aware of this association until he got a telephone call from the defendant's uncle on the preceding evening. The court suggested to the juror that it might be best if he were removed from the jury, and the juror replied, "I would rather be off of it". Defendant's trial counsel and the defendant himself affirmatively stated on the record that they had no objection to the juror's removal. The juror was discharged and the defendant expressed his gratitude that this action had been taken. Now, defendant's appellate counsel contends that the trial court erred by excluding this juror because the information revealed by him did not constitute sufficient grounds for a successful challenge for cause.

An appellate court will hesitate to interfere with the trial court's exercise of its discretion in dismissing a juror when the reason for doing so is discovered after the jury is impaneled. The trial court is in a better position to investigate and pass upon the juror's qualifications. *People v Anglin,* 6 Mich App 666, 674; 150 NW2d 532, 536 (1967), *lv den* 379 Mich 780 (1967). The trial court's discretion is not unlimited; "But error does not necessarily follow when the court through abundance of

caution to secure an impartial jury excuses a juror on ground not technically sufficient to support a challenge for cause, as it would in retaining one who is challenged and ought to have been rejected". *Church v Stoldt,* 215 Mich 469, 475; 184 NW 469, 471 (1921).

If it is assumed that even under this standard the dismissal was improper because the grounds for a challenge for cause were insufficient, defendant's conviction will not be reversed unless it can be shown that he was prejudiced thereby. *People v Fowler,* 104 Mich 449, 451; 62 NW 572, 573 (1895); *Lee v Misfeldt,* 1 Mich App 675, 679; 137 NW2d 753, 755 (1965), *lv den* 377 Mich 702 (1966). Defendant in the case at bar cannot show that he was prejudiced; he agreed to the procedure followed by the trial court. "On this record it is held that defendant consented to dismissal of the juror, and therefore will not be heard in contention of error". *Brandt v Munz,* 250 Mich 172, 175; 229 NW 463, 464 (1930).

II

Following dismissal of the juror, the prosecution presented the rest of its case which included substantial evidence of the defendant's guilt and about which no issue is directly raised on this appeal. The defense opened with the testimony of defendant Clyburn. His counsel sought to examine defendant concerning his prior criminal convictions, a trial strategy often followed by defense attorneys who believe it less damaging to present this information to the jury before the prosecution does so in cross-examination. Defendant's responses to these questions made reference to prior juvenile offenses. The trial judge prevented further testimony concerning defendant's juvenile record,

and later he assisted defense counsel in formulating a question which elicited information about a second adult conviction but which avoided discussion of any of defendant's transgressions as a minor.

On appeal, defendant contends that the court compelled his trial counsel to reveal the second conviction to the jury thereby depriving him of a fair trial. The record does not support the defendant's contention. The trial judge exerted no compulsion, he merely protected the record while aiding defense counsel in an attempt to clarify matters previously disclosed to the jury. The trial court did not depart from that standard of judicial impartiality which protects a defendant's right to a fair trial. *People v Watson,* 52 Mich App 211, 215; 217 NW2d 121, 123 (1974).

III

Twice during the proceedings the trial judge absented himself from the courtroom. Defendant argues that reversible error was committed on both occasions. We do not agree.

The first absence occurred while the testimony of three witnesses was being read to the jury in response to their request made after they had begun deliberations. The trial judge asked the defendant and his counsel whether or not they had any objection to his remaining in chambers to attend to other court business while the reporter read the testimony. Defendant and his lawyer positively stated that they had no objection.

The trial judge also absented himself during the second day of jury deliberations to attend a funeral. He explained to all parties that he had arranged for another judge to take the verdict if

one was reached during his absence. Again, the defendant and his attorney agreed to proceed under these circumstances. During the trial judge's absence, the jury did in fact reach a verdict which was taken by a substitute circuit court judge.

Despite express agreement to both absences, defendant now alleges error constituting grounds for reversing his conviction. These absences did not occur during the taking of evidence or the arguments of counsel. Although the presence of the judge in the courtroom while the trial is in progress is to be expected, his absence, even during more critical stages of the trial than those under consideration here, will not constitute reversible error unless it clearly appears that prejudice to the defendant has resulted. *People v Morehouse,* 328 Mich 689, 692; 44 NW2d 830, 832 (1950), *cert den,* 341 US 922; 71 S Ct 739; 95 L Ed 1355; *People v Margelis,* 246 Mich 459; 224 NW 605 (1929); *People v Kimbrough,* 193 Mich 330; 159 NW 533 (1916). Under the facts of this case, we do not find prejudice to the defendant; rather, we find waiver of any objection. *State Highway Commissioner v Gulf Oil Corp,* 377 Mich 309, 314; 140 NW2d 500, 502–503 (1966).

IV

In response to a note from the jury indicating that they had reached a verdict as to defendant Clyburn, but not as to his codefendant, a meeting was held in the chambers of the substitute circuit judge. The attorneys agreed to accept the verdict as to defendant Clyburn and then to allow the jury to continue its deliberations. Defendant now claims that it was reversible error to hold this in-chambers meeting when he was not present.

An argument similar to that raised by defendant

here was refuted in *People v Plozai,* 50 Mich App 131, 134; 212 NW2d 721, 723 (1973). Even though a timely objection had been raised, it was held "that defendant's presence at conference is required only where his substanital rights may be affected". In the case at bar, not only were defendant's substantial rights unaffected by the conference, but no objection to the conference was made. An in-chambers conference to discuss matters of procedure or law attended by his counsel to which the defendant raises no objection, does not violate defendant's right to be present during his trial and does not constitute reversible error. *People v Bowman,* 36 Mich App 502; 194 NW2d 36 (1971), *lv den* 386 Mich 783 (1972); *People v Carroll,* 49 Mich App 44; 211 NW2d 233 (1973).

V

Defendant's final assertion is that the jury's verdict was void because, although he was charged with breaking and entering a business place with intent to commit larceny, MCLA 750.110; MSA 28.305, the jury found him guilty of breaking and entering a business place, MCLA 750.115; MSA 28.310, a misdemeanor. Examination of the trial transcript discloses that the jury found the defendant guilty "as charged". In order to clarify the verdict, the jury was polled and each juror responded affirmatively when asked if he found "the defendant Joseph Clyburn guilty of the charge of breaking and entering a business place, as the people have charged?" The defendant was not charged with the misdemeanor, the judge did not instruct as to it, nor was such an instruction requested by the defense counsel who argued that the only possible verdicts were guilty or not guilty of the felony.

The language used by the jury can only be interpreted to mean that they found the defendant guilty of breaking and entering with intent to commit larceny as charged. The jury was not required to restate all of the statutory language when rendering the verdict. *People v Levey,* 206 Mich 129; 172 NW 427 (1919). Although given an opportunity, defendant did not question the nature or the form of the verdict at trial. He cannot do so now.

Affirmed.

All concurred.

PEOPLE v MORDELL

1. SEARCHES AND SEIZURES—EVIDENCE—SUPPRESSION OF EVIDENCE—PURPOSE.

The purpose of the rule which requires the suppression of evidence which was improperly seized is to protect the public from impermissible police practices.

2. SEARCHES AND SEIZURES—EVIDENCE—SUPPRESSION OF EVIDENCE—CONSTITUTIONAL LAW—WARRANT.

The rule which requires the suppression of evidence which was improperly seized is a guarantee against unreasonable searches and seizures where the court has reason to believe the search involves unreasonable police methods, but it is not invoked to suppress evidence, even though error is found in the issuing of a warrant, where the facts indicate that the arresting officers acted reasonably on the evidence before them and the court finds no threat to Fourth Amendment values (US Const, Am IV).

3. SEARCHES AND SEIZURES—WARRANT—EVIDENCE—SUPPRESSION OF EVIDENCE—LOCAL COURT RULES—VIOLATION.

A warrant issued by a judge other than an examining magistrate in violation of a local court rule which requires that a warrant be issued by an examining magistrate unless he is unavailable, is not thereby rendered so improper as to be grounds for suppressing the evidence seized pursuant to the warrant and dismissing the case, where the police officer's affidavit, the preparation of the warrant, and the reasonableness or propriety of the search are not challenged; the public should not be penalized for the breach of an in-house court rule.

Appeal from Recorder's Court of Detroit, James Del Rio, J. Submitted Division 1 June 14, 1974, at Detroit. (Docket No. 18541.) Decided September 11, 1974. Leave to appeal denied, 393 Mich —.

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 29 Am Jur 2d, Evidence §§ 425–427.

Anthony Mordell was charged with possession of heroin. Defendant's motion to suppress the evidence was granted and the charge dismissed. The people appeal by leave granted. 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 *Robert A. Reuther,* Assistant Prosecuting Attorney, for the people.

Begole, Lukomski, Maddock & MacDonald, for defendant.

Before: BRONSON, P. J., and ALLEN and ELLIOTT,* JJ.

ALLEN, J. This case comes to us on a concise statement of facts which focus the single issue of whether an alleged violation of Rule 9, § 1 of the rules of the Recorder's Court for the City of Detroit is grounds for granting defendant's motion to suppress the evidence and dismissal of the charge against defendant of knowingly or intentionally possessing heroin contrary to MCLA 335.341(4)a; MSA 18.1070(41)(4)(a).

Section 1 of Rule 9 of the Recorder's Court Rules, approved by the Supreme Court July 20, 1970, provides:

"RULE 9

"Felony Warrants, Arrests and Arraignments

"*Section 1. Issuance of Warrants.* Requests for arrest

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

warrants, and search warrants in cases of alleged felonies and high misdemeanors shall be presented to, and the warrant shall issue in the name of the Examining Magistrate. In his absence such warrants may be issued and signed by any available regular Judge of this Court."

Defendant was arrested June 19, 1973 after a search warrant was issued earlier that day by Recorder's Court Judge Joseph A. Gillis. The record of the preliminary examination held June 28, 1973 before Recorder's Court Judge Donald S. Leonard, contains the only sworn testimony relating to the issue before us.

"*Q.* You obtained that search warrant from Judge Gillis?

"*A.* Yes.

"*Q.* Did you obtain that search warrant during the month of June?

"*A.* Yes, sir.

"*Q.* Did you obtain it in this court?

"*A.* Yes.

"*Q.* What time did you obtain that search warrant, day or night?

"*A.* I believe it was late a.m.

"*Q.* Late a.m.?

"*A.* Yes sir.

"*Q.* And was that a weekday or during the week?

"*A.* During the week.

"*Q.* Do you recall?

"*A.* 19th.

"*Q.* What efforts, if any, did you make to find Judge Leonard or Judge Ford of this bench were available?

"*A.* We were informed by the prosecutor—

"*Q.* I'm not asking you that

* * *

"*The Court:* I'm trying to find out—you are trying to find out why a judge didn't sign it. Let him answer it.

"*A.* On order of the assistant prosecuting attorney, I went to Judge Gillis's courtroom.

"*Q.* Somebody told you to go there?

"*A.* Yes.

"*Q.* So then I take it you made no effort to find out either if Judge Ford or Judge Leonard?

"*A.* No, sir.

* * *

"*The Court:* Well, the point we are leading to one thing alone. The rules of our Court you are required to come before the judge who is responsible for the examinations, get a search warrant from him. If the judges are not available any other judge of the court under our court rules may sign the search warrant or any other complaint. There is no legal impediment to this.

"*Mr. MacDonald:* I think the rules of the court, sir, are to be followed, are they not?

"*The Court:* This does not mean there is anything involved to suggest the invalidity of the search warrant. Let us proceed, please.

"*Mr. MacDonald:* I was hoping the court would feel differently."

Following the preliminary examination, defendant was bound over for trial and the case assigned to Recorder's Court Judge Del Rio for trial September 6. Defendant then filed a motion to suppress the evidence and, on August 28, 1973, Judge Del Rio conducted a hearing on the motion, at the conclusion of which the court ruled that Rule 9, § 1 was violated and the court would not allow judge-shopping. The motion to suppress was granted and the case dismissed. Plaintiff appeals.

We initially observe the record is not clear as to whether Rule 9 was violated. While the officer seeking the warrant frankly admitted that he did not first present the warrant to either Judge Leonard or Judge Ford, the examining magistrates, neither does the record disclose one way or the

other whether, at the late a.m. hour, either assigned magistrate was in his office or, if so, whether either had not in fact informed the prosecutor's office of their respective unavailability. If so, no violation of Rule 9 would occur. We need not decide the issue on this narrow ground. For decision purposes, we will assume, *arguendo,* Rule 9 was breached.

By statute, all judges of the Recorder's Court are empowered to sign search warrants. MCLA 764.1; MSA 28.860. If the judge is satisfied there is reasonable cause for the warrant's issuance, the statute provides he "*shall* issue a warrant". MCLA 780.651; MSA 28.1259(1) (emphasis supplied). Rule 9 obviously diminishes the statutory power since the rule precludes issuance if the Recorder's Judge is not the then-designated presiding magistrate, and available. This conflict between the statute and the rule raises the question of the extent to which a local court rule, approved by the Supreme Court, may abrogate or qualify an existing statute.

On this issue the people argue that a local court rule, as distinguished from a rule announced by the Supreme Court, cannot modify the provisions of a legislative enactment. *People v Williams,* 45 Mich App 630, 642; 207 NW2d 180 (1973). Defendant contends that *Williams* is inapplicable because in the present case the rule was expressly approved by the Supreme Court and this action raises the rule to the dignity of a rule proposed in the first instance by the Supreme Court. Relying upon *Ray Jewelry Co v Darling,* 251 Mich 157; 231 NW 101 (1930), the people contend that a court rule may not alter a court's subject matter jurisdiction. Defendant counters claiming that violation of Rule 9 does not affect the trial court's jurisdiction but only the admissibility of evidence. In

support of this claim, defendant refers to *Perin v Peuler,* 373 Mich 531, 541; 130 NW2d 4 (1964), and *Buscaino v Rhodes,* 385 Mich 474, 483; 189 NW2d 202 (1971), where the court sustained a rule of the Supreme Court affecting the admissibility of evidence even though the rule conflicted with a statute. Be this as it may, we need not and do not decide in this instance whether Rule 9 prevails over the statute, MCLA 764.1; MSA 28.860. For the purposes of our decision, we will assume that Rule 9 prevails and base our opinion on more substantial grounds.

Violation of Rule 9 does not necessarily require a suppression of the evidence. In suppressing the evidence, the trial court judicially applied the exclusionary rule as the penalty. Nothing in the rule provides a penalty, much less so severe a penalty. For decision purposes it is important to state the basic reasons for the exclusionary rule. Its purpose is to protect the citizen from impermissible police methods resulting in unreasonable searches and seizures. While recognizing that the purpose of the exclusionary rule is "to discourage unlawful police practices", *People v Roderick Walker,* 27 Mich App 609, 616; 183 NW2d 871 (1970), noted that the rule has its "limitations as a tool of judicial control", and that in some instances "the rule is ineffective as a deterrent". *Walker, supra,* referred to a statement in *Terry v Ohio,* 392 US 1, 15; 88 S Ct 1868, 1876; 20 L Ed 2d 889, 902 (1968), that:

> "[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." 27 Mich App 609, 616–617.

It has also been said that:

"The exclusionary rule is neither a statutory enactment nor an express provision of the fourth amendment to the United States Constitution. It is rather a command, judicially implied, intended to impose restraints upon law enforcement officers and to discourage abuse of authority when constitutional immunity from unreasonable search is involved. * * * In each case the rights of the accused must be balanced against the rights of the public." *State v O'Bremski,* 70 Wash 2d 425, 429; 423 P2d 530, 532–533 (1967).

The rule becomes a Fourth Amendment guarantee where the court has reason to believe the search involves unreasonable police methods. It is not invoked, even though error is found in the issuance of the warrant, where the facts indicate the arresting officers acted reasonably on the evidence before them and the court finds no threat to Fourth Amendment values. *State v Bisaccia,* 58 NJ 586; 279 A2d 675 (1971). Being strong medicine, the rule should not casually be employed lest the protection of the public be discouraged.

"The exclusionary rule must be recognized as strong medicine which improperly employed may have highly undesirable side effects." *People v Superior Court,* 5 Cal App 3d 109, 115; 84 Cal Rptr 778, 782 (1970).

"The Supreme Court has warned that 'the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. * * * A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting'. *United States v Ventresca,* 380 US 102, 109; 85 S Ct 741, 746; 13 L Ed 2d 684, 689 (1965)." *United States v Ravich,* 421 F2d 1196, 1202 (CA 2, 1970), *cert den* 400 US 834; 91 S Ct 69; 27 L Ed 2d 66 (1970), cited in *People v Moore,* 31 Cal App 3d 919, 925; 107 Cal Rptr 590, 594 (1973).

In *Moore, supra,* a search warrant properly sought for a quantity of dangerous drugs was issued on a printed warrant for narcotics. Following seizure of the drugs, defendant moved to quash the evidence. The trial court applied the exclusionary rule and granted the motion. Upon appeal, the appellate court reversed the trial court saying:

"In upholding an order denying defendant's motion to suppress evidence seized under the authority of an allegedly defective search warrant, Justice Compton * * * made certain observations which we feel have application to the instant case: 'The entire thrust of the exclusionary rule and the cases which have applied it is to encourage the use of search warrants by law enforcement officials. * * * The speed with which law enforcement is often required to act, especially when dealing with the furtive and transitory activities of persons who traffic in narcotics, demands that the courts make every effort to assist law enforcement in complying with the edicts that courts themselves have issued.' *Alvidres v Superior Court,* 12 Cal App 3d 575, 581; 90 Cal Rptr 682, 685, 686 (1970)." 31 Cal App 3d 919, 927; 107 Cal Rptr 590, 595–596.

Balancing the interests of defendant against the interest of protection of the public leads us to conclude that in the present case no Fourth Amendment rights of the defendant were involved. The officer's affidavit and the preparation of the warrant is unchallenged. No claim is made nor issue raised as to the reasonableness or propriety of the search. As to the public, it is incumbent upon courts to provide a speedy method of obtaining warrants so that delay on the part of the court does not defeat the objective of the warrant application which is frequently issued only after extensive police investigation and surveillance. Such efforts, and the police waiting in the wings to take a warrant and properly execute it—perhaps at

considerable personal risk—should not be frustrated by local rule, probably designed for the convenience of judges, requiring them to sit in wait on a judge who may be occupied for hours with a preliminary examination, or other matters, while other judges could attend to the search warrant immediately. Public policy, especially the sound policy of quick and expeditious apprehension of those who allegedly traffic in hard drugs, dictates against the trial court's action. It is not the public who should be penalized for the breach of an in-house court rule. The responsibility for breach must be borne by the offending judge—if, in fact, the violation occurred. The Recorder's Court itself should assume the responsibility of policing its own rules—rules which we hasten to add are proper and necessary for the sound administration of justice.

Given the foregoing policy considerations and because we find no Fourth Amendment right of defendant violated, we conclude the trial court was in error in suppressing the evidence and dismissing the case.

Reversed and remanded for further proceedings consistent with this opinion.

All concurred.

PEOPLE v 7th DISTRICT JUDGE

1. SEARCHES AND SEIZURES—AUTOMOBILES—TRAFFIC OFFENSES—GENERAL SEARCH.

   Police do not have the right to make a general search of an automobile as an incident to an arrest for a traffic offense.

2. CRIMINAL LAW—AUTOMOBILES—NONPRODUCTION OF REGISTRATION—AUTOMOBILE THEFT—PROBABLE CAUSE.

   An automobile driver's inability to produce evidence of the vehicle's registration does not standing by itself provide a basis for a reasonable belief that the automobile is stolen.

3. CRIMINAL LAW—AUTOMOBILES—NONPRODUCTION OF REGISTRATION—AUTOMOBILE THEFT—PROBABLE CAUSE.

   An automobile driver's inability to produce a registration certificate can be held to provide a reasonable basis for believing the automobile to be stolen in cases where there are other factors which in cumulative effect justified that conclusion, *e.g.*, inability to identify the owner of the vehicle, contradictory or improbable exculpatory statements, and noncompliance with other registration or licensing requirements.

4. CRIMINAL LAW—AUTOMOBILE THEFT—MERE SUSPICION—PROBABLE CAUSE—ARREST.

   A police officer's mere suspicion that an automobile is stolen is not probable cause and this without sufficient fact or foundation cannot support a reasonable or probable cause to conclude that the vehicle was stolen and to follow this with an arrest.

5. SEARCHES AND SEIZURES—WITHOUT WARRANT—REASONABLENESS—PROBABLE CAUSE—APPEAL AND ERROR.

   The legality of a search conducted without a warrant depends upon the law's appraisal of its reasonableness and probable cause is the test; it is not suspicion but rather stems from some fact, circumstance, or information which would create an hon-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4–6] 5 Am Jur 2d, Arrest §§ 26, 28.

[2, 3] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 26, 27.
8 Am Jur 2d, Automobiles and Highway Traffic § 960.

est belief in the mind of a reasonably prudent man; and, in determining probable cause, the Court of Appeals is limited to the facts, circumstances, and information known to the officer at the time of the arrest and seizure.

6. SEARCHES AND SEIZURES—WITHOUT WARRANT—AUTOMOBILE THEFT—PROBABLE CAUSE—LICENSE PLATES—NONPRODUCTION OF REGISTRATION—CONSENT TO SEARCH.

A police officer who lawfully stopped an automobile and ticketed the driver for speeding made an illegal search and seizure when he removed a pistol from the glove box after arresting the driver for possession of a stolen automobile, where the only facts that made the police officer suspicious were that there was a beat-up, bent, out-of-state, rear license plate on a new-looking car, the driver was not able to produce a registration for the vehicle, and the driver consented to a search of the car except for the glove box; license plates go with the owner, not the car, the driver stated that he borrowed the car from his brother and the officer could have easily checked out the story with a phone call, and the driver's exercise of his constitutional right in refusing to let the officer search the glove box was proper and cannot be the basis for the violation of that same constitutional right (US Const, Am IV).

Appeal from Van Buren, David Anderson, Jr., J. Submitted Division 3 June 5, 1974, at Grand Rapids. (Docket No. 18631.) Decided September 11, 1974.

Complaint by William C. Buhl, Van Buren County Prosecuting Attorney, against Luther I. Daines, 7th District Judge, and Daniel Soto seeking an order of superintending control to require the district judge to reinstate a criminal case. Judgment for defendants and complaint dismissed. Plaintiff appeals on leave granted. Affirmed.

William C. Buhl, Van Buren County Prosecuting Attorney, *in propria persona.*

Locke & Parish, for defendant Soto.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

HOLBROOK, P. J. This appeal presents questions of the validity of an arrest and the admissibility of a pistol acquired as a result of a search and seizure from an automobile.

Defendant, Daniel Soto, was stopped for speeding (82 miles per hour in a 70-mile zone). He was alone. The vehicle was a clean 1971 Chevrolet Camaro with a bent, dirty Illinois license plate on the rear. A traffic summons was issued for speeding. He was unable to produce a vehicle registration certificate. He told the police the car belonged to his brother who lived in Coloma, Michigan, and that his brother had removed all vehicle identifying papers before loaning him the car.

The police asked to search the car and were told they could, all except the glove box. The police were unable to run a LEIN computer check on the license plates because of computer failure at the station.

The police advised Soto that unless he could produce some sort of identification or proof of right to possession such as a vehicle warranty card, he would be placed under arrest for possession of a stolen automobile. Soto could produce no such proof and was arrested, without warrant, for possession of a stolen vehicle.

The police then opened the glove box and discovered a loaded .22-caliber pistol in a holster. He was arrested for carrying a concealed weapon in an automobile. MCLA 750.227; MSA 28.424.

Following Soto's arrest it was established that

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

the car was not stolen, the license plates were proper and that he had permission to use the car.

At Soto's preliminary examination, a motion was made to suppress the pistol evidence and to dismiss the complaint and warrant on the ground of illegal search and seizure. The district court granted Soto's motion and discharged him.

The circuit court of the county under an action brought by plaintiff for superintending control upheld the district court decision and also dismissed the people's complaint.

The district judge held that merely because the driver of an automobile cannot produce evidence of its registration standing by itself does not provide a basis for a reasonable belief that it is stolen. *People v Marshall,* 25 Mich App 376; 181 NW2d 578 (1970). The circuit judge concurred, "Failure to produce a registration certificate does not support a reasonable belief that the vehicle was stolen".

Both judges concluded that Soto's refusal to permit a search of the glove box was the only additional factor which prompted the search. The district court concluded: "To classify the search in this case as reasonable because the officer was challenged by defendant's refusal to consent to the search would make every search reasonable where consent was not forthcoming".

The circuit judge stated: "The exercise of a constitutional right cannot be the basis for the violation of that same constitutional right".

Plaintiff appeals these decisions.

Was the district court's ruling excluding the admission of a gun into evidence based upon People v Marshall, *25 Mich App 376; 181 NW2d 578 (1970), clearly erroneous and an abuse of discretion?*

In the *Marshall* case, 25 Mich App 379; 181 NW2d 579, it is stated:

"Marshall and his companions were stopped by police officers when the automobile in which they were riding ran a stop sign. The automobile was licensed in Ohio. The driver had an Ohio driver's license with him but could not produce a certificate of registration for the vehicle. He said it belonged to his brother, Marshall's father. (This was verified some time later.)"

The instant facts are very similar. The *Marshall* officers testified they thought the car was stolen, informed the occupants they were being arrested for auto theft, patted them down, found no weapons, asked permission to open the vehicle trunk, opened it and found a briefcase containing marijuana.

The Court stated, 25 Mich App 379–380; 181 NW2d 579–580:

"We have concluded that the police did not have probable cause to arrest the occupants of the automobile. Merely because the driver of an automobile cannot produce evidence of its registration does not, standing by itself, provide a basis for a reasonable belief that it is stolen. Although the law requires a registration certificate to be carried in Michigan-licensed vehicles and a failure to do so is a misdemeanor, and authorizes nonresidents to operate foreign-registered vehicles on a like condition, noncompliance by honest citizens occurs with such frequency that it is not reasonable to believe an automobile to be stolen from that alone.

* * *

"[I]nability to produce a registration certificate has been held to provide a reasonable basis for believing an automobile to be stolen in cases where there were other factors which in cumulative effect justified that conclusion, *e.g.,* inability to identify the owner of the vehicle, contradictory or improbable exculpatory statements and

noncompliance as well with other registration or licensing requirements.

"Since the officers did not have probable cause to arrest for auto theft, the search of the trunk cannot be justified as an incident to an arrest on that charge. Even if, in appraising the validity of the search of the trunk, we treat this case as if the driver had been arrested for the motor vehicle violation or nonpossession of a registration certificate, that would not validate the search. The police do not have the right to make a general search of an automobile as an incident to an arrest for a traffic offense. There are no fruits of a traffic offense to be found in the trunk of an automobile."

Two basic rules evolve from *Marshall* which are undisputed and admittedly binding:

1. Police do not have the right to make a general search of an automobile as an incident to an arrest for a traffic offense. *People v Gonzales,* 356 Mich 247; 97 NW2d 16 (1959); *People v Peck,* 31 Mich App 667, 670; 188 NW2d 28, 29 (1971); *People v Iverson,* 34 Mich App 519, 525; 191 NW2d 745, 748 (1971).

2. Merely because the driver of an automobile cannot produce evidence of its registration does not standing by itself provide a basis for a reasonable belief that it is stolen.

Defendants-appellees contend that just because the driver was unable to produce a vehicle registration there was no reason to believe the car was stolen and the only reason the officer looked into the glove box was because he was told not to. He met the *Marshall* tests since he identified the vehicle owner, made no contradictory or improbable exculpatory statements concerning ownership and permission to use and there was compliance with other registration and licensing require-

ments. *Marshall,* 25 Mich App 380; 181 NW2d 580. Mere suspicion is not probable cause and this without sufficient fact or foundation cannot support a reasonable or probable cause to conclude that the vehicle was stolen and to follow this with an arrest.

The legality of a search conducted without a warrant depends upon the law's appraisal of its reasonableness. Probable cause is the test. It is not suspicion but rather stems from some fact, circumstance, or information which would create an honest belief in the mind of a reasonably prudent man. In determining probable cause, this Court is limited to the facts, circumstances, and information known to the officer at the time of the arrest and seizure. *People v Gwinn,* 47 Mich App 134, 140; 209 NW2d 297, 301 (1973).

Cases and factual situations differ and each case becomes unique. In assessing reasonableness we are required to consider the pertinent facts known by the officer. What is reasonable under the circumstances results in a subjective evaluation. Does the search, in this case, meet the standard of reasonableness established by the US Const, Am IV, unreasonable searches and seizures? The facts are as follows:

1. A lawful stop and ticket for speeding.

2. A beat-up bent rear license plate on a new-looking car. This looks suspicious but certainly does not support a conclusion that the car was stolen. License plates go with the owner, not the car, small tabs make them legal for two years, license bolts become rusty and stick.

3. The driver produced a license, but no registration. Under *Marshall* this does not support a reasonable conclusion that the car is stolen.

4. The driver stated that he borrowed the car

from his brother who removed all identifying papers from it.

5. The brother was a Coloma, Michigan, resident while his car had Illinois plates.

These statements which are not conflicting provide a plausible reason for the lack of vehicle identification and the fact of Illinois plates. To this point, it would seem that the officer did not have sufficient reason, without other proof, to conclude that the car was stolen.

6. The driver consented to a search of the car except for the glove box.

We conclude that the facts in the instant case and those in *Marshall* are nearly identical. Herein the police officers were unable to run a computer check on the license plates because of a computer failure at the station. However, Coloma, the residence of the owner of the automobile and brother of defendant Soto, was only a short distance away. The officer could have, but did not attempt to contact the defendant's brother by telephone or through the state police post to ascertain the ownership status of the vehicle. We further conclude that the officer was without sufficient reason to make a personal exploratory search of the vehicle to see why permission to search was not granted. The officer's action in this regard resulted in an unreasonable search under the US Const, Am IV. The pistol was inadmissible. This was the finding of the district and the circuit court judges who heard the testimony of the officer. The ruling of the district and the circuit court was not clearly erroneous. Also, the ruling of both judges was discretionary and is not reversible, unless an abuse has been demonstrated. The plaintiff has failed to show that abuse of discretion was practiced by either judge.

Affirmed.

All concurred.

THE COOKE CONTRACTING COMPANY v DEPARTMENT OF STATE HIGHWAYS #2

1. MOTIONS—SUMMARY JUDGMENT—CAUSE OF ACTION—PLEADING—COURT RULES.

   A motion for summary judgment on the ground that the opposing party has failed to state a claim is to be tested by the pleadings (GCR 1963, 117.2[1]).

2. JUDGMENT—SUMMARY JUDGMENT—CAUSE OF ACTION—PLEADING—COURT RULES.

   The test to determine if a summary judgment should be granted a defendant is whether the plaintiff's claim, on the pleadings, is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery (GCR 1963, 117.2[1]).

3. CONTRACTS—HIGHWAYS—CONSTRUCTION—COORDINATING CLAUSES—THIRD-PARTY CONTRACTS—LIABILITY FOR DELAY.

   A coordinating clause included in the highway department's bid proposal for a highway construction project which specifically exempted the state from liability for delay caused by the actions of third parties working on certain specified segments of the project clearly indicated the state's intent to exclude itself from any claim for added compensation if for some reason delay in the construction job were to occur on any of the specifically designated projects being performed by others; the clause's unambiguous wording and logical position in the contract was clear notice to the bidder that any delay on a third-party contract would not be chargeable on the state contract.

4. CONTRACTS—INTENT—CONSTRUCTION.

   The language used in a contract, if unambiguous, must be held to

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5] 73 Am Jur 2d, Summary Judgment §§ 12–19.

[3, 7, 8] 40 Am Jur 2d, Highway, Streets, and Bridges §§ 96, 98.

[4] 17 Am Jur 2d, Contracts §§ 244–248.

[6] 65 Am Jur 2d, Public Works and Contracts § 165.

Right of building or construction contractor to recover damages resulting from delay caused by default of contractee. 115 ALR 65.

express the intention of the parties; where there is no ambiguity, the language used will be confined to its usual and ordinary meaning.

5. FRAUD—ELEMENTS—MISREPRESENTATION—KNOWLEDGE.

A party making a misrepresentation must either know it was false when made or make it recklessly without any knowledge of its truth and as a positive assertion in order for the misrepresentation to constitute fraud.

6. DAMAGES—PUBLIC WORK PROJECTS—THIRD-PARTY CONTRACTS—LIABILITY OF DELAY.

The prevailing rule is that a contractor on public work projects is not entitled to damages resulting from delay caused by other contractors.

7. JUDGMENT—SUMMARY JUDGMENT—CONTRACTS—BID PROPOSALS—CONSTRUCTION CONTRACTS—LIABILITY FOR DELAY—FRAUD—MISREPRESENTATION—THIRD-PARTY CONTRACTS.

Summary judgment was properly granted to the defendant state highway department in an action by contractors for damages arising out of delay in the scheduled date for the start of construction of a bridge, where there was no fraud or misrepresentation by the state in regard to when the bridge construction would start, the state's bid proposal did not say positively when the bridge construction could begin but used qualifying language as to the starting date, called attention to a third-party contract for the work which had to be finished before the bridge construction could begin, and suggested that the bidder cooperate with the contractors on the third-party job, and all details were fully made known to plaintiffs before they voluntarily signed the contract.

8. HIGHWAYS—CONSTRUCTION CONTRACTS—SPECIAL PROVISIONS—COORDINATING CLAUSES—STANDARD SPECIFICATIONS.

A coordinating clause of a highway construction contract controls over the standard specifications; standard specifications deal with the generality of construction contracts whereas special provisions, whether they be termed special requirements, supplemental specifications or coordinating clauses, refer to the unique problems of any construction project, and they are used to individualize the contract.

Appeal from Court of Claims, Richard E. Robin-

son, J. Submitted Division 2 June 12, 1974, at Detroit. (Docket No. 19114.) Decided September 11, 1974. Leave to appeal applied for.

Complaint by The Cooke Contracting Company and A. J. Williams Construction Company against the Department of State Highways for damages arising out of delay in the scheduled start of a bridge construction. Summary judgment for defendant. Plaintiffs appeal. Affirmed.

Doyle, Smith, Whitmer & Carruthers, P. C., for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Louis J. Caruso* and *Curtis G. Beck,* Assistants Attorney General, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ALLEN, J. The question we are to decide on this appeal is whether the Court of Claims properly granted defendants' motion for summary judgment in regard to plaintiffs' claim for damages of $18,920.36 arising out of delay in the scheduled date for the start of construction of a bridge over the Clinton River. Summary judgment was made under GCR 1963, 117.2(1) on the ground that plaintiffs failed to state a claim upon which relief could be granted.

On March 7, 1966, plaintiff Cooke Contracting Company, low bidder on highway project U6 3043A-C1, contracted with defendants for 1.7 miles of grading and pavement including the construction of a bridge over the Clinton River in Oakland

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

County. The total contract price was $2,492,775.78, some 10.44% over the state's engineering estimate of project costs. Shortly thereafter, Cooke Contracting Company subcontracted the bridge work to plaintiff A. J. Williams Construction Company for $287,707.66. Accompanying and made a part of the bid proposal prepared by the state and upon which plaintiffs' bid was based, was a "coordinating clause" which called attention to other engineering construction projects, one of which was for relocating and deepening a portion of the Clinton River. As to this project, the bid proposal provided:

> "According to the terms of the County's contract for the river and sewer relocation, (such work is) to be completed by April 30, 1966."

Unfortunately, as it developed, the river relocation work was first deferred six weeks until June 15. By letter under date of May 27, defendants wrote plaintiff "you can schedule construction to start June 16, 1966 unless a strike occurs". A strike by the reinforcing steel workers union did occur further delaying commencement of the bridge work seven weeks to August 8. After August 8, additional delays occurred as a result of the rising river level. Plaintiffs' expenses necessitated by the post-August 8 delays became Count II of the suit as originally filed but prior to appeal were settled. At issue in this appeal is only Count I which sets forth the claim of damages of $18,920.36 for the 13 weeks delay between April 30, 1966 and August 8, 1966.

Plaintiffs' carefully prepared brief sets forth three arguments in support of reversal of the decision of the Court of Claims. *Seriatim,* we list the arguments presented and our responses thereto. In responding we must accept the rule

that a motion for summary judgment, granted under GCR 1963, 117.2(1) on the ground that the opposing party has failed to state a claim, is to be tested by the pleadings. *Todd v Biglow,* 51 Mich App 346, 349; 214 NW2d 733 (1974), said:

> "A motion based solely on GCR 1963, 117.2(1) or 117.2(2) * * * is to be tested by the pleadings alone. (Omitted citations.) Interrogatories and depositions are relevant only if the ground stated for summary judgment is that there is no genuine issue of material fact—not if it is asserted that the pleading fails to state a claim or defense."

Crowther v Ross Chemical Co, 42 Mich App 426, 431; 202 NW2d 577 (1972), states the test as being,

> "whether plaintiff's claim, on the pleadings, is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery."

I

Plaintiffs argue that under well-established case law a warranty of accuracy attaches to the representations contained in a bid proposal and that where a proposal contains material inaccuracies either by a false statement of fact or the omission of a material fact, the party making the bid proposal is liable in damages. *Hersey Gravel Co v State Highway Department,* 305 Mich 333; 9 NW2d 567 (1943); *W H Knapp Co v State Highway Department,* 311 Mich 186, 199–200; 18 NW2d 421 (1945); *Holloway Construction Co v Michigan,* 44 Mich App 508, 523; 205 NW2d 575 (1973). Plaintiffs contend that nothing in the bid proposal itself expressly prohibited start of construction simultaneously with the other construction projects mentioned in the forepart of the coordinating clause

and in fact the coordinating clause suggests simultaneous construction.[1] Plaintiffs further assert that they were misled because the bid proposal contained a starting date reading "start work within ten (10) days after receiving notice of award of contract". Notice of award of the contract was given on March 7, 1966—this being the same date as the signing of the contract—and thus plaintiffs contend it was wrongly represented that construction could commence March 17, 1966. Plaintiffs pursue the argument by asserting that the period of construction delay was initiated by defendants at a meeting February 28 (seven days before the signing of the contract) when defendants for the first time notified plaintiffs that the bridge work could not begin until all drain sewage work was completed by the Oakland County Drain Commission.

The foregoing argument would be persuasive were it not for the inclusion in the bid proposal of a clause specifically exempting defendants from liability for delay caused by the actions of third parties. Plaintiffs' pleadings include by reference the bid proposal and contract and this clause becomes a part of the pleadings upon which the motion for summary judgment is judged. Page 32 of the bid proposal contains what is entitled the "Coordinating Clause". It consists of two pages, the first page of which calls the bidder's attention to the fact that certain delineated construction projects are or will be in force during the life of the

[1] The second from the last paragraph of the coordinating clause reads as follows:

"The Contractor shall take due account of all such work and shall arrange his construction plant layout and equipment and his methods of operation so as to cause a minimum of interference with work to be performed by others. The Contractor's attention is called to the requirement of cooperation with others as covered in Article 1.05.06 of the Standard Specifications."

proposed contract. One of the specifically designated projects is the river relocation and sewer work. The clause then lists the progress schedule for all of the related work and indicates that the completion date for the Oakland County Drain Commission project (river relocation and sanitary sewers) was April 30, 1966. Importantly, the completion date was not represented as a warranty by defendants. The words used were: "According to the terms of the County's contract for the river and sewer relocation (the work is) to be completed by April 30, 1966". The concluding paragraph of the coordinating clause then reads:

> "No claims for extra compensation or adjustments in contract unit prices will be allowed on account of deletions of work items or delay or failure of others to complete work units as scheduled."

Clearly the concluding paragraph indicates State of Michigan's intent to exclude itself from any claim for added compensation if for some reason delay in the State of Michigan job were to occur by the contractor on any of the specifically designated projects being performed by others. Obviously the paragraph refers to these other jobs listed on page one of the coordinating clause. Only one of the so designated projects was under the control of state highway authorities and it was only prudent that the state protect itself by inserting the quoted clause. Further, it is not a clause usually appearing in highway projects. Its unambiguous wording and logical position in the contract immediately following the listing of the river and sewer contract of the Oakland County Drain Commission was clear notice to the bidder that any delay on the third-party contract would not be chargeable on the state contract.

"The language used in a contract, if unambiguous, must be held to express the intention of the parties. *Plano Manf'g v Ellis,* 68 Mich 101 [35 NW 841 (1888)]. Where there is no ambiguity, the language used will be confined to its usual and ordinary meaning." *Ginsberg v Reliable Linen Service Co,* 292 Mich 70, 75; 290 NW 331 (1940).

Hersey Gravel Co v State Highway Department, supra, W H Knapp, and *Holloway Construction Co, supra,* cited by plaintiffs, all become inapplicable by reason of the coordinating clause. Each of the cited cases involved delay caused by the failure of the state to fully disclose facts dealing with present working conditions. In the instant case, the bid proposal specifically directed attention to the third-party construction contracts and then specifically added an exclusion clause to protect the state against delay caused by the third party. While it is true that the bid proposal failed to state that bridge construction was not to commence until completion of the river relocation sewer contract, notice thereof was given plaintiffs seven days before the contract was signed. Plaintiffs were fully aware of the problem seven days before entering into the contract. In the cases relied upon by plaintiffs the omission was not discovered until well after construction work began.

II

Plaintiffs' second argument is that assuming the appellate court finds there is no judicially implied warranty, plaintiffs are still entitled to recover on the general theory of fraud and misrepresentation as set forth in *A & A Asphalt Paving Co v Pontiac Speedway, Inc,* 363 Mich 634, 639; 110 NW2d 601, 604 (1961). Again the point is made by plaintiffs that the bid proposal totally omitted mention of

the fact that the bridge construction could not commence until completion of the river relocation sewage job. In addition, that appellees unambiguously and without qualification indicated in their bid proposal that construction could commence within ten days from the award of contract. Further, appellants assert that in view of the 13-week delay between April 30 and August 8 the "positive assertions" in the bid proposal were made either recklessly or knowing they were false. We are not persuaded by this argument. To begin with, the completion date assertions were in no manner "positive". Rather, they were couched in qualifying language that "[a]ccording to the terms of the County's contract" the work is to be (not will be) completed by April 30. This probably was the only language defendants could have used at the time. Further, we fail to see how there can be fraud or misrepresentation when two full pages were devoted to calling attention to the Oakland County contract and further suggesting that the bidder cooperate with the contractors on the third-party job. Apparently plaintiffs failed to do so before bidding. Finally, we observe that had plaintiffs been misled, the alleged omission was fully made known to them seven days before they voluntarily signed the contract. *A & A Asphalt Paving Co, supra,* holds that in order to constitute fraud, the party making the misrepresentation must either know it was false when made or make it recklessly without any knowledge of its truth and as a positive assertion, 363 Mich 634, 639.

The prevailing rule is that a contractor on public work projects is not entitled to damages resulting from delay caused by other contractors. *Crook Co v United States,* 270 US 4; 46 S Ct 184; 70 L Ed 438 (1926); *United States v Blair,* 321 US 730; 64 S

Ct 820; 88 L Ed 1039 (1944), *reh den,* 322 US 768; 64 S Ct 1052; 88 L Ed 1594 (1944). In the absence of a clear provision in the contract expressly excepting the rule—a provision which does not even remotely appear in the instant case—summary judgment for defendant was properly granted.

III

Recognizing that the coordinating clause is the stumbling block to their recovery, plaintiffs' third argument is an attempt to construe the contract so as to allow a hearing on the merits. For this purpose, plaintiffs offer two separate claims. First, the coordinating clause excludes claims for damages for delay "by others" and would not apply in the instant case because the delay was initiated by the state itself at the meeting February 28. According to plaintiffs it was defendants' insistence and not any inherent or insurmountable work incompatibility with the drain project which prevented plaintiffs from starting construction anytime between March 17 and August 8. Our response is that defendants' refusal on February 28 was only an affirmation of the refusal previously spelled out in the coordinating clause. The purpose of indicating an estimated completion date for the county contract was to put the bidder on notice that until that work was completed construction would not begin. Though plaintiffs contend they were willing to proceed on the job as early as March 17, exhibit B which was attached to plaintiffs' petition (and hence a part of the pleadings) indicates otherwise. Exhibit B is a letter dated June 10, 1966 from A. J. Williams Construction Company to Cooke Contracting Company stating that after reviewing the site,

"it would not be possible for the O'Laughlin Com-

pany[2] to have it in shape by June 15, 1966. As of June 10th the new sanitary sewer has not been put in service, the water in the Clinton River has not been lowered and none of the channel excavation in our job site area has been done."

The letter then concluded that the Williams Company would move in June 16 provided the state would agree to pay over and above the contract price for either standby time or increased units. Obviously there was some work incompatibility or plaintiff would not have sought extra compensation.

Plaintiffs' second claim proceeds on the theory that there is a conflict between the coordinating clause (which disallows any claim for delay by others) and section 1.05.06 of the Standard Specifications which allows such claims if the delay is unreasonable. Section 1.05.06 provides:

"No additional compensation will be paid to the Contractor for any delay or inconvenience due to material shortages or reasonable delays due to the operations of such other parties doing the work indicated or shown on the plans or in the proposal, * * * ."

Because of this incompatibility between the two clauses defendants conclude that the Standard Specifications clause 1.05.06 prevails over the coordinating clause. Plaintiffs justify their conclusion by referring to the primacy clause of the contract[3] and then concluding that since nowhere in the primacy clause is reference made to an entire bid

[2] The O'Laughlin Company was the contractor on the river relocation and sanitary sewer project for the Oakland County Drain Commission mentioned in the coordinating clause.

[3] "In case of discrepancy, figured dimensions shall govern over scaled dimensions, plans shall govern over Standard Specifications, supplemental specifications shall govern over Standard Specifications and plans and special provisions shall govern over supplemental specifications, Standard Specifications and plans."

proposal controlling over standard specifications, it "is clearly specious to assert that the bid proposal, and all portions thereof, govern over any standard specification deemed contradictory".

In our opinion such reasoning is inverse. It makes the general (standard specifications) prevail over the particular (coordinating clause). In our opinion, standard specifications deal with the generality of construction contracts whereas special provisions, whether they be termed special requirements, supplemental specifications or coordinating clauses, refer to the unique problems of any construction project. The very fact, previously mentioned, that the coordinating clause does not appear in the usual construction job should make it clear that it refers to a special and unique situation. It was defendants' method of individualizing the contract. The standard specifications merely supplement the individualized terms of the bid proposal. For these reasons, we agree with the opinion of the trial court that the coordinating clause controls over the standard specifications.

Based upon the pleadings, the exhibits attached thereto, and the bid proposal, we find that plaintiffs would be unable to present facts sufficient to justify a recovery of the requested damages. Plaintiffs' claim is clearly unenforceable as a matter of law, and the trial court properly granted defendants' motion for summary judgment. GCR 1963, 117.2(1).

Affirmed, costs to defendants.

All concurred.

PEOPLE v ROGERS

1. CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL OF PLEA—JUVENILES.

   A rule which allows a defendant to withdraw a plea of guilty and proceed to trial if a statement of a judge or prosecutor may be fairly interpreted as a promise of leniency and the promise is unfulfilled, should apply as well to promises alleged to have been made by a juvenile officer to a juvenile defendant.

2. CRIMINAL LAW—APPEAL AND ERROR—PLEA OF GUILTY—PROMISE OF LENIENCY—PRESERVING QUESTION.

   A claim by a defendant who has pleaded guilty that he had been promised leniency and that such promise was unfulfilled, where such a claim is not supported by the plea-taking proceedings, requires action in the trial court by a motion to withdraw his plea of guilty, in order to establish a testimonial record and findings by a judge upon which an appeal may be taken.

3. CRIMINAL LAW—PLEA OF GUILTY—CONFESSION—COUNSEL—COMPETENCE—EFFECTIVENESS.

   A plea of guilty induced by an arguably coerced confession is still a voluntary act if made with the advice of counsel and such advice does not justify a conclusion that the attorney was incompetent or ineffective.

4. CRIMINAL LAW—SENTENCING—PENDING CHARGES—PRESENTENCE REPORT—PRESERVING QUESTION.

   A defendant's allegation that the trial court considered a pending charge when sentencing the defendant is not justified where the record does not support such an interpretation of the remarks of the trial court on which such an allegation was based and the defendant has not complained that he was deprived of the opportunity to explain or challenge anything in the presentence report.

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law §§ 491, 503–506.
[2] 21 Am Jur 2d, Criminal Law §§ 485, 493, 494.
[3] 21 Am Jur 2d, Criminal Law § 495.
[4] 21 Am Jur 2d, Criminal Law §§ 495, 496.

Appeal from Berrien, Julian E. Hughes, J. Submitted Division 3 June 6, 1974, at Grand Rapids. (Docket No. 17046.) Decided September 11, 1974.

Robert Rogers 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, *John A. Smietanka,* Prosecuting Attorney, and *John Jeffrey Long,* Assistant Prosecuting Attorney, for the people.

Norris J. Thomas, Jr., Assistant State Appellate Defender, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

PER CURIAM. On January 8, 1973, after being advised of his rights, the defendant pled guilty to a charge of assault with intent to rob being armed. MCLA 750.89; MSA 28.284. At the same time he stood mute to a charge of rape. Defendant was 15 years old when apprehended by Michigan authorities in Florida. The Michigan officers questioned him at the time in Florida after informing him of his *Miranda*[1] rights. The defendant signed a statement and waived extradition to Michigan.

On February 6, 1973, the defendant was sentenced to 15 to 45 years in prison. Without seeking any type of relief in the trial court defendant filed a claim of appeal in this Court.

The defendant contends that his plea of guilty should be set aside because it was induced by an

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

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

unfulfilled promise of leniency by a juvenile court officer. It is his claim that the juvenile officer told him he would not receive a sentence longer than 5 years. In *In re Valle,* 364 Mich 471, 477–478; 110 NW2d 673 (1961) the Supreme Court stated:

"If the evidence establishes that the prosecutor or the judge has made a statement which fairly interpreted by the defendant * * * is a promise of leniency, and the assurance is unfulfilled, the plea may be withdrawn and the case proceed to trial."

We see no reason why this rule should not apply to promises alleged to have been made by a juvenile officer, especially when it has been given to a 15-year-old juvenile. In *People v Morrison,* 46 Mich App 138, 139; 207 NW2d 411 (1973), the allegation was made that the promise of leniency was made by a police officer. We expect juvenile officers to counsel and advise juveniles and expect juveniles to look upon such officers and their counseling with respect. However, the question of whether or not there was a promise of leniency is not properly before the Court. In *Morrison* this Court stated:

"Morrison further asserts that he is entitled to have his plea set aside because it was induced by a promise made by the police officers in charge of his case that he would receive probation. Such a claim must be advanced by a motion to withdraw guilty plea since the claim depends upon facts *dehors* the record; without a testimonial record and findings by a judge, this Court has nothing before it to review."

During the plea-taking proceedings the defendant was asked if he had been promised leniency and he replied in the negative. His unsupported allegations require action in the trial court to establish a record for appeal. *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

The defendant also argues that he was induced to enter a plea of guilty on advice of counsel who advised him that if he stood trial his statement given to the Michigan officers while being questioned in Florida would be used against him. Defendant claims the confession is clearly inadmissible and he was deprived of adequate counsel by the giving of such advice. *People v Johnson,* 386 Mich 305; 192 NW2d 482 (1971), adopted the United States Supreme Court's holding in *McMann v Richardson,* 397 US 759; 90 S Ct 1441; 25 L Ed 2d 763 (1970), that a plea of guilty induced by an arguably coerced confession is still a voluntary act if made with the advice of counsel. In *McMann* the Court said:

"Courts continue to have serious differences among themselves on the admissibility of evidence * * * . That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty." 397 US 770; 90 S Ct 1448, 25 L Ed 2d 773.

The defendant contends that the trial court committed error by considering the pending charge in fixing the sentence. The trial court stated in commenting on information in the presentence report:

"In my opinion, in reading this, this is one of the most serious crimes that's ever come before me. You are young, it is true. This was an adult-type crime of the most vicious nature directed against an 80-year-old woman in her own home."

The defendant interprets this statement as meaning that the trial court was referring to the

rape charge. It may be noted that the trial judge never mentioned the rape charge specifically. Defendant's reliance on *People v Grimmett,* 388 Mich 590; 202 NW2d 278 (1972), and *People v Zachery Davis,* 41 Mich App 683; 200 NW2d 779 (1972), is misplaced for the reason that in both of these cases the sentencing judge made open reference to other offenses which the defendants denied and which offenses had not yet been proven.

As Justice WILLIAMS recently wrote in *People v Lee,* 391 Mich 618, 636; 218 NW2d 655 (1974):

> "The realistic and honest policy is to recognize that the judges will have this information in one way or another and to provide the defendant the opportunity at his instance to challenge or explain such pending charges as best he can, if he deems it advisable."

The defendant does not complain that he was deprived of the opportunity to explain or challenge anything contained in the presentence report. He merely contends that the quoted statement of the sentencing judge means that the pending charge was weighed against him in his sentence. We find such an interpretation to be unjustified.

Remanded to the trial court for the purpose of permitting defendant to make a motion to withdraw his guilty plea. As to all other issues, the case is affirmed. We do not retain jurisdiction.

ROMISCH v FEDER

EQUITY—LACHES—ESTOPPEL—TAXATION—SPECIAL ASSESSMENTS—VALIDITY—EVIDENCE—STATUTES.

Plaintiff property owners were barred by laches and estoppel from prevailing in an action for a determination that a special assessment as applied to them was void and to recover all special assessment taxes paid, where credible evidence showed that the special assessment roll was confirmed without plaintiffs making an objection thereto at or prior to the hearing on confirmation, where no notice of intent to commence suit was filed within 30 days after confirmation as required by the city charter and code, where payments were made on the assessments without protest, and where the project was completed and the contract price fully paid by the city approximately three years before plaintiffs commenced their action (MCLA 211.53; Southfield City Charter, § 9.26[c]; Southfield City Code, title I, ch 6, § 1.241).

Appeal from Oakland, Robert L. Templin, J. Submitted Division 2 June 26, 1974, at Detroit. (Docket No. 18208.) Decided September 11, 1974.

Complaint by Max L. Romisch and Claire J. Romisch against Norman W. Feder and others to have a special assessment declared void and to recover all special assessment taxes paid. Summary judgment for defendants. Plaintiffs appeal. Affirmed.

Gage, Brukoff, Dubin & Siudara, for plaintiffs.

Sigmund A. Beras, Southfield City Attorney, for defendants.

REFERENCE FOR POINTS IN HEADNOTE

70 Am Jur 2d, Special or Local Assessments §§ 231, 233, 234.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

PER CURIAM. To pay the cost of improving Bell Road in the City of Southfield, properties fronting thereon were subject to a special assessment. The plaintiffs, who owned two lots on Bell Road, claim that their lots were improperly assessed at 100% of the front footage on Bell Road rather than at 50% thereof as used on certain other corner lots in the same district. By this action, commenced July 23, 1971, they seek a determination that the assessment was void and other appropriate relief.

The defendants' answer denys that the plaintiffs' lots were improperly assessed and asserts as affirmative defenses: (1) that the plaintiffs were barred from objecting to the assessment because they failed to make timely objection as required by the applicable Southfield ordinance,[1] thus depriving the city council of an opportunity to view the alleged invalidity; (2) because they failed to object for approximately three years after the making of the improvement; (3) that plaintiffs were guilty of laches and estoppel; (4) that they failed to give written notice of intention to file a suit within 30 days of confirmation of the assessment role as required by the city charter[2] and code;[3] and (5) that payments made by the plaintiffs were not made under protest as required by statute.[4]

The defendants' "Motion for Summary Judgment" was supported by an affidavit of the city attorney that the special assessment role was confirmed by the city council on May 5, 1969; that

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

[1] Title I, ch 6, §§ 1.233 and 1.234.

[2] Sec. 9.26(c).

[3] Title I, ch 6, § 1.241.

[4] MCLA 211.53; MSA 7.97.

plaintiffs made no objection thereto at or prior to the hearing on confirmation; that no notice of intent to commence suit was filed within 30 days after confirmation; that payment in full for the assessment on one lot in the amount of $2,226.90 was made on July 6, 1969 and that four installment payments were made on the other lot on July 7, 1969, August 21, 1970, August 30, 1971, and August 20, 1972; that none of these payments were made under protest; and that the project was completed and the contract price fully paid by the city in 1969.

None of these facts are contested.

The trial judge granted the motion, saying:

"Plaintiffs did, evidently, obtain notice at some time because they paid one assessment completely and made partial payments on the second now contested parcel without protest. The Court in no way finds how the plaintiffs can be heard to complain of the assessments. The court finds that the procedures were regular and *it is now just too late for plaintiffs to complain.*" (Emphasis added.)

We are not concerned whether a motion for summary judgment or a motion for accelerated judgment was the proper remedy.[5] The plaintiffs were informed of, were prepared to, and did meet the issue. The trial judge in effect ruled that plaintiffs were barred by laches and estoppel and we agree.

No costs, a public question being involved.

Affirmed.

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[5] *See* GCR 1963, 117.2 and 116.1; *Cibor v Oakwood Hospital,* 14 Mich App 1; 165 NW2d 326 (1968), n 1; and *Birch Run Nursery v Jemal,* 52 Mich App 23; 216 NW2d 488 (1974), n 1.

DETROIT BOARD OF EDUCATION v DETROIT FEDERATION OF TEACHERS

1. LABOR RELATIONS—PUBLIC EMPLOYEES—UNFAIR LABOR PRACTICES—EMPLOYMENT RELATIONS COMMISSION—JURISDICTION—STATUTES.

   Exclusive jurisdiction over all unfair labor practices under a statute regulating strikes by public employees has been given to the Michigan Employment Relations Commission (MCLA 423.216).

2. LABOR RELATIONS—PUBLIC EMPLOYEES—STRIKES—UNFAIR LABOR PRACTICES—EMPLOYMENT RELATIONS COMMISSION—JURISDICTION—STATUTES.

   A "strike" as defined in the statute regulating strikes by public employees is not necessarily an unfair labor practice, and thus a strike by public employees is not subject to the exclusive jurisdiction of the Michigan Employment Relations Commission; extending jurisdiction by implication is appropriate only when absolutely necessary (MCLA 423.201, 423.210).

3. COURTS—STATUTES—PUBLIC EMPLOYEES—STRIKES—CONSTRUCTION—INJUNCTION.

   The Court of Appeals must strive to construe statutes consistently and will uphold the historic power of courts to enjoin strikes by public employees in the absence of specific language to the contrary.

4. CONTEMPT—BURDEN OF PROOF—STANDARD OF PROOF.

   The burden of proof in a civil contempt proceeding for violation of an injunction rests upon the party charging the violation, and the standard of proof is more stringent than the usual preponderance test applied in other civil actions; the power to punish is to be applied only when the contempt is clearly and unequivocally shown.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 48 Am Jur 2d, Labor and Labor Relations §§ 1191, 1196.
Public employees labor law: right of public employees to strike or engage in work stoppage. 37 ALR3d 1147.
[3] 48 Am Jur 2d, Labor and Labor Relations §§ 1197, 1407, 1471.
[4, 5] 48 Am Jur 2d, Labor and Labor Relations §§ 1525 *et seq.*, 1535.

5. CONTEMPT—EVIDENCE—SUFFICIENCY OF EVIDENCE.

A trial court's finding that the officers of a striking teachers union were in contempt of an injunction which required them to hold a meeting and to there recommend and actively urge the members to return to work, was not supported by sufficient evidence where such a meeting was in fact held and the uncontroverted evidence presented was that at that meeting the union president told the members to return to work; she was not required to be enthusiastic about it, she was not required to persist in the face of shouts and threats, and she was not required to succeed in ending the strike.

Appeal from Wayne, Thomas J. Foley, J. Submitted Division 1 June 6, 1974, at Detroit. (Docket No. 18675.) Decided September 12, 1974.

Complaint by the Detroit Board of Education against the Detroit Federation of Teachers, Local 231 of the American Federation of Teachers and AFL-CIO, and its officers, for an injunction. The injunction was granted, and subsequently the defendant Detroit Federation of Teachers and three of its officers were found guilty of contempt. Defendants appeal. Reversed.

Riley & Roumell, for plaintiff.

Marston, Sachs, O'Connell, Nunn & Freid, P. C., for defendants.

Before: BRONSON, P. J., and V. J. BRENNAN and VAN VALKENBURG,* JJ.

BRONSON, P. J. A teachers' strike began in the City of Detroit on September 4, 1973, the day the school year was to commence. That same day plaintiff-appellee, Detroit Board of Education (hereinafter DBE), applied to the Wayne County

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

Circuit Court to have the strike enjoined. On September 7, 1973, this request was dropped voluntarily by the DBE. On September 18, 1973, a petition for writ of mandamus was filed by interested parties seeking to force the DBE to reactivate its injunction suit.

Upon issuance of the writ, the DBE requested that its suit be reinstituted. On September 21, 1973, Circuit Judge Thomas J. Foley issued a show-cause order to defendant-appellant Detroit Federation of Teachers (hereinafter DFT) and certain named union officers. After a lengthy hearing, Judge Foley signed an order for a mandatory injunction on September 25, 1973. He found that the teachers were public employees within the meaning of MCLA 423.201 *et seq.;* MSA 17.455(1) *et seq.,* and further found that the teachers were on strike in violation of MCLA 423.201; MSA 17.455(1) and MCLA 423.202; MSA 17.455(2).

The injunction provided, in pertinent part, as follows:

"(1) That the officers of the Detroit Federation of Teachers Local 231 of the American Federation of Teachers and AFL-CIO, a voluntary unincorporated association, shall call a membership meeting of local 231 of the American Federation of Teachers and AFL-CIO forthwith.

"(2) That the officers of said federation and all the defendants shall at such meeting recommend and actively urge that the members of the Detroit Federation of Teachers Local 231 of the American Federation of Teachers and AFL-CIO return to their employment forthwith.

"(3) That the members of the Detroit Federation of Teachers Local 231 of the American Federation of Teachers and AFL-CIO return to their employment in the Detroit school system forthwith."

On September 27, 1973, the judge issued an

order for posting the injunction on the main school doors of each school in the system to effectuate service of process on the individual union members. Service had been made on the defendant union officials on September 26, 1973.

On September 28, 1973, the trial judge issued, at the request of the DBE, an order requiring the DFT and its officers to show cause why they should not be held in contempt of court for failure to obey the injunction. The alleged violations of the injunction were stated in the prayer for relief as follows:

"5. That defendants herein well knowing the premises but wholly disregarding the said injunction order of this court in that:

"(a) The Detroit Federation of Teachers and its officers have failed to call a membership meeting of said federation;

"(b) The Detroit Federation of Teachers and its officers have failed to recommend and actively urge said federation's members to return to their employment forthwith,

"in contempt of the aforementioned injunctive order of this honorable court."

Fines were sought as sanctions to compel obedience. Service was made on the named defendants on September 29, 1973.

Hearings lasted from October 1 to October 4, 1973. The trial judge found that defendant DFT and three defendant officers had failed to recommend and actively urge that members return to work. He specifically did not find that the defendants had violated that portion of the order requiring them to call a membership meeting. Fines and damages were imposed on each defendant found guilty of contempt in amounts and under conditions not relevant to the present case.

In post-judgment proceedings, defendants-appellants moved, *inter alia,* for a new trial. The motion was denied by an order dated October 31, 1973. This appeal followed.

It is important at the outset to recognize that we are here not deciding whether the teachers' strike was illegal. Nor are we deciding whether the injunction was proper.

We reach and decide only two issues, which may be stated as follows:

I. Was the injunction, and the findings of contempt resulting from its violation, void for lack of subject-matter jurisdiction?

II. Was there sufficient evidence to support the findings of contempt?

I.

The Michigan Employment Relations Commission (MERC) has been given exclusive jurisdiction over all unfair labor practices. MCLA 423.216; MSA 17.455(16). See *Labor Mediation Board v Jackson County Road Commissioners,* 365 Mich 645; 114 NW2d 183 (1962).

DFT asserts that, by virtue of a recent amendment,[1] a strike is now to be considered an unfair labor practice. If that claim is valid, the conclusion sought—that MERC has exclusive jurisdiction—follows inexorably.

Reliance for the minor premise is placed on MCLA 423.210(3)(c); MSA 17.455(10)(3)(c), which now provides in pertinent part:

"(3) It shall be unlawful for a labor organization or its agents * * * (c) to refuse to bargain collectively with a public employer * * * ."

[1] *See* 1973 PA 25 amending MCLA 423.210; MSA 17.455(10).

A "strike" is defined in MCLA 423.201; MSA 17.455(1) as "the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment".

This broad definition of "strike" is said to include failure to bargain in good faith, since good faith bargaining is one of the "duties of employment". Therefore, concludes DFT, a strike is an unfair labor practice, furnishing MERC with exclusive jurisdiction.

This reasoning is faulty on both logical and policy grounds. First, to say that a failure to bargain in good faith might constitute a strike for purposes of the definition of the latter term in MCLA 423.201; MSA 17.455(1) is *not* to say that every strike is an unfair labor practice. It is surely possible that a union could both bargain in good faith and still strike.

Moreover, the term "strike" is conspicuously absent from the list of those labor practices defined in MCLA 423.210; MSA 17.455(10) as unfair. Extending jurisdiction, particularly exclusive jurisdiction, by implication is appropriate only when absolutely necessary. *Holland School District v Holland Education Association,* 380 Mich 314, 325; 157 NW2d 206 (1968).[2]

Finally, acceptance of appellant DFT's argument would render redundant the provisions of MCLA 423.202; MSA 17.455(2) which make public strikes

[2] *Compare Labor Mediation Board v Jackson County Road Commission, supra; Gaidamavice v Newago Board of County Road Commissioners,* 341 Mich 280; 67 NW2d 178 (1954); *Royal Oak School District v State Tenure Commission,* 367 Mich 689; 117 NW2d 181 (1962).

illegal. For if—as DFT claims—all strikes are unfair labor practices and thereby illegal anyway, a law making it illegal to strike would be unnecessary. We cannot ascribe such an anomalous result to the Legislature but must strive to construe statutes consistently. See *In re State Highway Commission,* 383 Mich 709; 178 NW2d 923 (1970).

For the above reasons, in the absence of specific language to the contrary, we uphold the historic power of courts to enjoin strikes by public employees. See *Holland, supra.* We hold that MERC does not have exclusive jurisdiction to resolve this labor dispute.

II.

We now proceed to consider whether there was sufficient evidence to support the findings of contempt.

The burden of proof was on the appellee DBE to prove that the named defendants-appellants violated the injunction in the manner alleged. See *Thorlakson v Wells,* 207 NW2d 326, 329 (ND 1973); *Colley v Tatum,* 227 Ga 294; 180 SE2d 346 (1971); *United States Time Corp v GEM of Boston, Inc,* 345 Mass 279; 186 NE2d 920 (1963). The rule is particularly well stated in *Cohn v Kramer,* 136 F2d 293 (CA 6, 1943), as follows:

"In a civil contempt proceeding for violation of a decree, the respondent is entitled to opportunity to controvert the charges against him; and, when he denies the charges, the burden rests upon the petitioner to prove by evidence that the decree has been violated. If the facts alleged as violation are neither admitted nor proven, the respondent may not be adjudged in contempt. This is elementary law." (Citations omitted.) *Id.* at 295.

In addition, the standard of proof in contempt cases is more stringent than the usual preponderance test applied in other civil actions. The proper standard was enunciated in *People v Matish,* 384 Mich 568; 184 NW2d 915 (1971), as follows:

"The power to punish for contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when the contempt is *clearly and unequivocally shown."* (Emphasis supplied.) *Id.,* at 572.

The trial judge found that the DFT and three officers had failed to "recommend and actively urge" that union members return to work. The injunction required them to (1) call a meeting and (2) *at that meeting* "recommend and actively urge" members to return to work. The trial judge did not find that the defendants-appellants failed to call a meeting. He therefore must have concluded that the September 30, 1973 meeting satisfied the requirement that a "meeting" be called.[3] The scope of our review is thus narrowed to a consideration of whether there was sufficient evidence to find that the DFT and three officers failed at the September 30, 1973 meeting to recommend and actively urge that members return to work.

The only evidence of what occurred during that meeting came from the testimony of Mary Ellen Riordan, president of DFT and a named defendant. On direct examination she testified as follows:

"*Q.* What if anything did you say to the membership with respect to the court's orders?

* * *

"*A.* I said that the judge stated in his order that

[3] Such a finding, when necessary to the decision, may be implied. *Cf. Clark v Apex Foundry,* 7 Mich App 684, 688; 153 NW2d 182 (1967).

there was irreparable injury that may have been done or may have been threatened by the strike; that there was reason to believe that it might continue, that I had been ordered to call a membership meeting, and that this was the first place and time that I could arrange for it; that I was ordered to tell to the members that all of them must return to work, and that I was so doing.

"*Q.* What next happened?

* * *

"*A.* I was unable to continue at that point for some time because of the shouting from the people who were in the assembly. * * * I stated that we were told that we could not be absent from the negotiating table, and that again I was ordered by the judge, and was complying with his orders, to tell them to go back to work. Again I was interrupted and could not continue talking."

She did not use the words "urge" or "recommend". As she explained on redirect:

"*A.* I told them that they were ordered by the court's order, and that I was instructed to order them, and was so doing, to go back to work. I didn't use the word order. I used some other word, I don't remember which one, because I don't order members to do things. I tell them what I think they should do upon occasion, but I don't use the word order, I order you to do anything."

And further:

"*Q.* Did you tell them they should go back to work?
"*A.* Yes, sir."

This testimony was uncontradicted.

There was no evidence whatsoever as to what anyone else said or did at the meeting. In particular the only witness to testify on that issue, Mrs. Riordan, said she couldn't recall what defendant Elliott or defendant Bannan had said to the group. Neither of the latter two defendants testified.

The only other evidence suggesting that anyone failed to recommend and actively urge members to return to work also came from Mrs. Riordan. There were "several thousand" banners and signs, of various sizes, shapes and colors affixed to the walls and rafters of the building in which the meeting was being held. These banners proclaimed the merits of the strike and attacked the DBE. They were prepared and affixed without the knowledge or the approval of Mrs. Riordan or the DFT officers. Mrs. Riordan admitted that she did not order them removed or taken down.

If the trial judge believed Mrs. Riordan's testimony, then there was no basis whatsoever for his finding. She testified that she told the members to return to work. She was required by the injunction to "recommend and actively urge" them to do so. She was not required to be enthusiastic about it. She was not required to persist in the face of shouts and threats. She was not required to succeed in ending the strike. Her testimony stands uncontradicted. It cannot support a clear and unequivocal finding that she did not urge members to return to work.

On the other hand, if her testimony was not believed, the only other evidence offered was the failure to order the banners removed. That fact, standing alone, cannot support a contempt citation. No matter how the credibility of Mrs. Riordan was resolved by the trial judge, the record fails to support the finding of contempt against her. This conclusion is even more compelling with respect to appellants Bannan, Elliott, and DFT, as to whom no relevant evidence at all was introduced.[4]

[4] Any suggestion that other evidence introduced by DBE—consisting of proof that defendants-appellants failed to use other means to carry out their duty to "recommend and actively urge" members to

Careful scrutiny of the record fails to reveal any other possible basis for the trial judge's finding that the defendants-appellants violated the injunction. Accordingly, the findings of contempt as to all defendants are reversed, and the trial court is directed to enter an order dismissing this action with prejudice.

Reversed. Costs to appellants.

All concurred.

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return to work—demonstrates a violation of the injunction must be rejected. The injunction ordered that "urging" to take place at a meeting called for that purpose, not in any "hot-line" publication, over television or radio, or via posted signs or telephone relay.

PEOPLE v GANT

1. CRIMINAL LAW—CONSTITUTIONAL LAW—INTERROGATION—RIGHT TO REMAIN SILENT.

   A defendant's silence in the face of interrogation or accusational remarks may not be used against him at trial, nor may the defendant's silence be used to impeach the defendant who testifies for himself at trial.

2. CRIMINAL LAW—CONSTITUTIONAL LAW—RIGHT TO REMAIN SILENT—INVESTIGATORY QUESTIONING—VOLUNTARY STATEMENTS—WAIVER OF RIGHTS.

   The rule against using silence as evidence is designed to protect a defendant's Fifth Amendment right to remain silent; however, where the defendant has made a statement voluntarily, or in response to police investigatory questioning, he has waived his right to remain silent (US Const, Am V).

Appeal from Kent, Roman J. Snow, J. Submitted Division 3 June 3, 1974, at Grand Rapids. (Docket No. 17209.) Decided September 12, 1974.

Leonard Gant was convicted of larceny from the person. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James K. Miller,* Prosecuting Attorney, and *Donald A. Johnston, III,* Chief Appellate Attorney, for the people.

James S. Brady, for defendant on appeal.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 218 *et seq.*

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

PER CURIAM. On March 8, 1973, defendant was convicted of larceny from a person, MCLA 750.357; MSA 28.589, in a jury trial. On April 12, 1973, the court sentenced defendant to imprisonment for 2 to 10 years, with appropriate jail time credit. Defendant appeals his conviction as of right.

On September 2, 1972, one Harry Ignatowski was eating in a restaurant in Grand Rapids. When he went to pay his bill, he felt a tug at his back pocket and was robbed of some papers and money. Harry was unable to identify the thief.

Grand Rapids police officer Frederick LaMaire was parked near the restaurant. While there he observed a man he identified as the defendant hurriedly leave the restaurant. The officer then heard a commotion at the restaurant. Officer LaMaire thereupon followed defendant. At one point he saw something drop from defendant's hand. LaMaire stopped defendant and asked what happened at the restaurant. The defendant replied "nothing I know of". Defendant was then placed in the police cruiser, and both defendant and the officer returned to the restaurant, where the victim and a waitress told LaMaire what had happened. Officer LaMaire then returned to the spot at which he had seen something fall from defendant's hands and found papers belonging to Mr. Ignatowski as well as some money which also belonged to him. LaMaire testified that he had seen no one besides defendant at that location at that time. Defendant was thereupon arrested.

Defendant testified that he was in the restaurant and saw Harry attacked. He offered aid to Harry but was refused, so he went back and ate several hamburgers. On his way home after leaving the restaurant, Officer LaMaire stopped him and asked what had happened and defendant

"talked about it" and they went back to the restaurant. On cross-examination the following occurred:

"*Q. [Mr. Kamm, assistant prosecuting attorney]:* You had some conversation with Officer LaMaire?

"*A.* Yes.

"*Q.* What was that conversation?

"*A.* Concerning where I was going and everything like that.

"*Q.* You said you were going home?

"*A.* Yes.

"*Q.* Was there any conversation about Chris's Restaurant?

"*A.* Yes.

"*Q.* What was it?

"*A.* He related there was some kind of disturbance as far as he could tell and had I had any part in it or what happened.

"*Q.* What did you say?

"*A.* I told him nothing as far as I know.

"*Q.* You did not, at that time, tell him a man had been rolled before your very eyes?

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

"*Q.* Why?

"*A.* Because the man and waitress didn't seem very concerned so I wasn't."

Defendant raises one issue on appeal: Did defendant express a desire to remain silent during interrogation by Officer LaMaire, and was this silence improperly testified to at trial?

Defendant asserts that his silence following the officer's question, "What happened at the restaurant?", was improperly testified to, citing *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973).

A defendant's silence in the face of interrogation or accusatorial remarks may not be used against

him at trial. Furthermore, it matters not whether the defendant objects to testimony concerning his silence or not. *People v Dunn,* 46 Mich App 226; 208 NW2d 239 (1973); *People v Miller,* 49 Mich App 53; 211 NW2d 242 (1973). Nor may the defendant's silence be used to impeach the defendant who testifies for himself at trial. *Bobo, supra.*

In the present case, however, no testimony concerning defendant's silence was offered. Instead, both the officer on direct and defendant on cross-examination testified that defendant stated nothing had happened at the restuarant. This is not silence, but rather a statement. The rule against using silence as evidence is designed to protect a defendant's Fifth Amendment right to remain silent. Where, however, he makes a statement voluntarily, or in response to police investigatory questioning, he has essentially waived his right to remain silent. Since defendant was not under arrest when he made the statement "nothing happened" (indeed, it is unlikely that he could have been arrested at that time), *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), is inapplicable. The statement was therefore properly testified to as non-custodial investigatory questioning. *People v Herman Jackson,* 37 Mich App 664; 195 NW2d 312 (1972). Nor is the prosecutor's question that defendant didn't tell the officer what defendant told on the stand improper, since such a question is always applicable where a defendant's testimony conflicts with prior out-of-court statements. *Harris v New York,* 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971).

We conclude that *Bobo* and the other cases cited for defendant's position are inapplicable.

Affirmed.

PEOPLE v SERRA

1. DRUGS AND NARCOTICS—CONSTITUTIONAL LAW—MARIJUANA—POSSESSION—PRESUMPTIONS—INTENT—SELF-INCRIMINATION.

The statutory presumption that possession of marijuana in an amount in excess of two ounces constitutes possession with intent to deliver is unconstitutional as a violation of the privilege against self-incrimination (US Const Am V, XIV; Const 1963, art 1, § 17; MCLA 335.341[2]).

2. DRUGS AND NARCOTICS—CONSTITUTIONAL LAW—MARIJUANA—PRESUMPTIONS—INTENT—DEFENSES—RIGHT TO REMAIN SILENT.

The statutory presumption that possession of over two ounces of marijuana constitutes possession with intent to deliver involves an inference from the fact of possession to the possessor's intent and the only evidence which can effectively rebut such an inference is the testimony of the defendant as to his intent, and thereby his choice of exercising his constitutional right to remain silent is nullified (MCLA 335.341[2]).

3. DRUGS AND NARCOTICS—MARIJUANA—INTENT—PRESUMPTIONS—INFERENCES—JURY—COERCION.

The statutory presumption that possession of more than two ounces of marijuana constitutes possession with intent to deliver, by raising an inference from the fact of possession to the possessor's intent, while not technically a conclusive presumption, coerces the jury to draw the inference of intent to deliver, and the presumption becomes conclusive (MCLA 335.341[2]).

4. CRIMINAL LAW—PRESUMPTIONS—CONCLUSIVE PRESUMPTIONS—CONSTITUTIONAL LAW.

Conclusive presumptions are absolutely forbidden in criminal prosecutions and the presumption need not be labeled conclusive to run afoul of constitutional protections.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 16, 47.
[2] 29 Am Jur 2d, Evidence § 638 *et seq.*
[4] 29 Am Jur 2d, Evidence §§ 11, 164, 165.
[5] 73 Am Jur 2d, Statutes § 254.
[6] 25 Am Jur 2d, Drugs, Narcotics, and Poisons § 37 (supp).

5. STATUTES—CONSTITUTIONAL LAW—CONFLICTS—COURTS.

The conflict between a statute and constitutional provisions must be clear and inevitable before the courts will strike down a statute as unconstitutional.

6. CONSTITUTIONAL LAW—STATUTES—CONTROLLED SUBSTANCES ACT—CRIMINAL INTENT—PRESUMPTIONS—DEFENSES—SELF-INCRIMINATION—DUE PROCESS.

The statutory presumption section of the Controlled Substances Act of 1971 which provides that possession of more than two ounces of marijuana is prima facie evidence of possession with intent to deliver is constitutionally infirm because there is no rational connection between the proven fact of possession of two ounces or more of marijuana and the presumed fact of intent to deliver, and such a statutory presumption impermissibly compels a defendant to take the stand in violation of his right against self-incrimination and violates the due process clause of the Fourteenth Amendment (US Const, Am V, XIV; Const 1963, art 1, § 17; MCLA 335.341[2]).

Appeal from Macomb, Howard R. Carroll, J. Submitted Division 2 April 3, 1974, at Detroit. (Docket Nos. 17390, 17391.) Decided September 17, 1974.

Jacob Serra and Helen Serra were charged with possession of marijuana with intent to deliver. The complaints and warrants were quashed in circuit court and the defendants were released. The people appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Thaddeus F. Hamera,* Chief Appellate Lawyer, and *Donald C. Roberge,* Assistant Prosecuting Attorney, for the people.

Stephen M. Losh, P. C., for defendant Jacob Serra.

Bruce A. Karash, for defendant Helen Serra.

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

BRONSON, J. We are called upon to determine the constitutionality of a provision of the recently enacted "Controlled Substances Act of 1971".[1] The challenged section provides, in pertinent part:

"(2) Possession of more than 2 ounces of marihuana is prima facie evidence of possession with intent to deliver." MCLA 335.341(2); MSA 18.1070(41)(2).

There are other appeals pending before this Court which present the same issues raised here. Not all trial judges are in agreement concerning the provision in question.

Michigan's Controlled Substances Act of 1971 is principally a reenactment of the Uniform Controlled Substances Act approved by the National Commissioners on Uniform State Laws in 1970.[2] The commissioners, in a prefatory note to the Uniform Act, relate the following objectives and purposes, *inter alia:*

"A main objective of this Uniform Act is to create a coordinated and codified system of drug control, similar to that utilized at the Federal level, which classifies all narcotics, marihuana, and dangerous drugs subject to control into five schedules, with each schedule having its own criteria for drug placement. This classification system will enable the agency charged with implementing it to add, delete, or reschedule substances based upon new scientific findings and the abuse potential of the substance.

* * *

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

[1] MCLA 335.301 *et seq.;* MSA 18.1070(1).

[2] *See, generally:* 9 ULA Matrimonial, Family & Health Laws, p 145 *et seq.*

"The Act sets out the prohibited activities in detail, but does not prescribe specific fines or sentences, this being left to the discretion of the individual States. It further provides innovative law enforcement tools to improve investigative efforts and provides for interim education and training programs relating to the drug abuse problem." 9 ULA, *supra,* pp 146–147.

The commissioners and drafters of the Uniform Act intended that the act be an effective law enforcement tool, as written, with the states free to prescribe the specific fines and penalties for the delineated statutory offenses.

The presumption presently under constitutional attack is not found in the Uniform Act. The Michigan Legislature added it when the Uniform Act was adopted in 1971. The origin of this added presumption is unclear. It has no direct antecedent in prior Michigan laws promulgated to control abuse and trafficking in illegal narcotics.[3]

The Uniform Act creates the substantive statutory offense of "possession with intent" in section 401(a), using the following language:

"(a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or *possess with intent* to manufacture or deliver, a controlled substance." § 401(a), Uniform Controlled Substances Act, 9 ULA, p 266.

The Michigan analogue (MCLA 335.341[1]; MSA 18.1070[4][1]) is identical.

In 1973 the Commissioners on Uniform Laws recommended the decriminalization of possession

[3] *See: Uniform Narcotic Drug Act,* 1937 PA 343 (MCLA 335.51 *et seq.;* MSA 18.1071 *et seq.)* repealed by 1971 PA No 196, eff. April 1, 1972; *hypnotic drugs,* 1943 PA 204 (MCLA 335.101 *et seq.;* MSA 18.1101 *et seq.)* repealed by 1971 PA No 196, eff. April 1, 1972; *suppression of illegitimate traffic in narcotic drugs,* 1952 PA 266 (MCLA 335.151 *et seq.;* MSA 18.1121 *et seq.),* repealed by 1971 PA No 196, eff. April 1, 1972.

and distribution of small quantities of marijuana.[4] The newly recommended section 409,[5] after withdrawing completely the criminal sanction from certain marijuana-related activities, sets forth a

[4] The conclusions of the commissioners are expressed in their comment published in the 1973 supplement to 9 ULA § 409 on page 29. The comments provide:

"These [1973] amendments [sections 401(a) and 401(c) and new section 409] implement the recommendations of the National Commission on Marihuana and Drug Abuse by withdrawing the criminal sanction from certain marihuana-related activities. For a full discussion of the Commission's rationale, see Marihuana: A Signal of Misunderstanding, and Drug Use in America: Problem in Perspective, the first and final Reports of the National Commission on Marihuana and Drug Abuse.

* * *

"Subsection (a) of new Section 409 establishes two general classes of activity from which existing criminal sanctions are withdrawn: 1) possession for personal use; and 2) small-scale casual distribution for no remuneration or no profit."

[5] § 409. [Possession and Distribution of Marihuana]

"(a) Section 401(a) and (c) do not apply to the following acts which, except as provided in subsection (c), are not unlawful:

"(1) possession of marihuana by an individual for personal use; and

"(2) distribution of small amounts of marihuana by an individual for no remuneration or insignificant remuneration not involving a profit.

"(b) Possession by an individual of not more than one ounce of marihuana is presumed to be for personal use under subsection (a).

"(c) Notwithstanding subsection (a), it is unlawful for any individual knowingly or intentionally to:

"(1) possess in public more than one ounce of marihuana;

"(2) distributed marihuana in public; or

"(3) smoke or otherwise ingest marihuana in public.

A person who violates this subsection is guilty of a misdemeanor and upon conviction may be fined not more than [ ].

"(d) Any amount of marihuana possessed or distributed in public is subject to summary seizure under Section 505(f).

"(e) The use of a conveyance to facilitate the acts described in subsection (a) does not subject the conveyance to forfeiture under Section 505(a)(4)."

See, also, Advisory Task Force; Victimless Crime Study, Michigan Department of Public Health Office of Substance Abuse Services (1973) (recommending decriminalization of possession of marijuana).

Those interested in a discussion of the historical underpinnings of society's attempts to regulate marijuana use can profitably consult Richard J. Bonnie and Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition,* 56 Va L Rev 971 (1970).

new rule of evidence. This new evidentiary rule creates a presumption which is the converse of the presumption we are presently considering. The section now reads:

"(b) Possession by an individual of not more than one ounce of marihuana is presumed to be for personal use under subsection (a)." (See footnote 5.) 9 ULA, § 409, p 28 of supplement.

While Michigan has adopted the substantive offense of possession with intent to deliver (which could be charged and established independently of the presumption of MCLA 335.341[1][c]), the Legislature apparently felt it necessary to deviate from the Uniform Act by adding the presumption in question.

With the origin and context of the presumption in proper perspective, we now direct our attention to the facts and contentions of the defendants-appellees in the instant case.

Pursuant to warrant, a search was conducted during July, 1972 of the residence of defendants Jacob and Helen Serra. As a consequence, marijuana plants in the yard and various containers of marijuana in the house were seized. It was the conclusion of the police officers conducting the search that the quantity of marijuana seized was in excess of two ounces.

Each of the defendants was charged with possession of a controlled substance (marijuana) with intent to deliver. MCLA 335.341(1)(c); MSA 18.1070(41)(1)(c). The charged offense is a four-year felony providing in addition a maximum fine of $2,000.

Probable cause for the charged crime was based solely on MCLA 335.341(2); MSA 18.1070(41)(2)—

the two-ounce presumption section.[6]

After arraignment in the Macomb County Circuit Court defendants filed motions to declare the two-ounce presumption unconstitutional and to quash the complaints and warrants and additionally to release defendants from custody.

Defendants there asserted that MCLA 335.341(2); MSA 18.1070(41)(2), *supra,* violates both the Fifth and Fourteenth Amendments to the United States Constitution[7] and article 1, § 17 of the Michigan Constitution.[8]

On March 28, 1973, the Honorable Howard R. Carroll, Circuit Judge, held the presumption in question unconstitutional as a violation of the defendants' privilege against self-incrimination. We agree.

Both the Michigan and United States Constitutions provide that "a person shall not be compelled in a criminal case to be a witness against himself".

Statutory presumptions are merely aids to expedite prosecution. Possession of large amounts of a controlled substance will give rise, without the artificial boost of a presumption, to an inference that the person possessing it intended to deliver it. A presumption is created when the Legislature decides that a given amount (here two ounces) should, in its judgment, give rise to the inference. The presumption gives force of law to an otherwise ordinary inference. In enacting such a statute, the Legislature seeks to convince the jury that it should make such an inference when presented

[6] This conclusion is in plaintiff-appellant's statement of facts which was stipulated to by appellees in their brief. While we do not understand appellees to be conceding probable cause, we accept the statement for purposes of analysis.

[7] US Const, Am V and XIV.

[8] Const 1963, art 1, § 17.

with the appropriate facts. If the jury is forced to draw the inference, the presumption is deemed conclusive. The presumption in this case is rebuttable; *i.e.,* defendants can avoid its force by introducing evidence that they did not possess the marijuana with intent to deliver. The jury is not compelled to draw the inference but is merely encouraged to do so.

But the presumption in this case is unique in that the actual state of mind of the accused is involved.

Most presumptions which have been considered by courts have involved inferences from one fact about a certain object or relation to another, more remote, fact *about that same object or relation.* For example, in *People v Kayne,* 286 Mich 571; 282 NW 248 (1938), the Supreme Court sustained a presumption written into a local ordinance. It provided that display of a registration plate on a motor vehicle parked illegally constituted prima facie evidence that the owner of the vehicle parked it. The Court held that such a presumption did not violate the defendant's privilege against self-incrimination. The presumption in *Kayne* involved an inference from one fact about the car (that it had a certain registration number) to another fact about the car (that its owner parked it illegally). Significantly, the presumption in *Kayne* did *not* involve an inference from a fact about the car to a fact about the owner's *intent (e.g.,* that he intended to park it illegally).

It is this feature of the presumption in question which requires us to give it different treatment. It involves an inference from the fact of possession to the fact of the possessors' *intent,* rather than some fact which can be shown independent of the de-

fendants' state of mind.[9] The only evidence which can effectively rebut such an inference, supported and enhanced by the presumption, is the defendants' own testimony as to their intent. Any other evidence, even expert testimony, is mere speculation about that intent. Probabilities established by an expert are only suggestions.

We are not persuaded by the argument that the defendants can choose not to take the stand to testify. The choice offered defendants is an empty one. It has been nullified by the heavy hand of a Legislature which imposes a penalty, in the form of a statutory presumption, on those who decide to exercise their constitutional right to remain silent.

Nor is it an answer to say that the presumption is not conclusive and that defendants can still get to the jury and avoid a directed verdict by arguing that the inference, even though sanctioned by the Legislature, is not compelling. While it is true that the presumption in question is not technically a conclusive presumption, since the jury might disregard the trial judge's authoritative instruction and the Legislature's stern advice, labels alone cannot alter the real and intended impact of the presumption. It seems to us that the jury's choice is as illusory as defendants'. A jury cannot realistically be expected to ignore the presumption. The inference that defendants intended to deliver the con-

[9] We do not purport to reach in this decision other types of presumptions, *e.g.,* MCLA 257.625a; MSA 9.2325(1) (presumptions regarding sobriety drawn from alcohol content in blood); MCLA 752.903; MSA 28.603(3) (presumption that owner of vehicle was driver and that driver was responsible for litter); MCLA 750.535; MSA 28.803 (presumption that one who acquires stolen goods for less than 50% of value knew them to be stolen); MCLA 750.36; MSA 28.225 (presumption of holding oneself out as specialist in diseases of sexual organs by use of words "lost manhood" or "lost vitality or vigor" in advertisement); MCLA 312.13; MSA 13.1343 (possession of carcass of protected animal prima facie evidence that animal killed illegally); MCLA 750.306; MSA 28.538 (possession of gambling slips prima facie evidence of their use in gambling).

trolled substance *is* compelling in a way that is crucial for Fifth Amendment purposes: in practical effect, the presumption will coerce the jury into drawing the inference. The presumption will have become conclusive.

Conclusive presumptions are absolutely forbidden in criminal prosecutions.[10] In the words of Justice NORTH, dissenting in *People v Licavoli:*

"It must be conceded that if the statute 'prescribes a rule of conclusive evidence' in criminal cases, it is invalid * * * . If the words *'prima facie* evidence,' as used in the statutory provision involved in the instant prosecution were to be so construed, I would be disposed to agree that it violated defendants' constitutional right to a trial by jury, and that they were thus deprived of liberty without due process of law." *People v Licavoli,* 264 Mich 643, 660–661; 250 NW 520 (1933).

The presumption need not be labeled "conclusive" to run afoul of constitutional principles:

" 'A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law.' " *Board of Commissioners of Excise of the City*

[10] *See United States v Gainey,* 380 US 63, 70; 85 S Ct 754, 759; 13 L Ed 2d 658, 664 (1965); *Manley v Georgia,* 279 US 1; 49 S Ct 215; 73 L Ed 575 (1929); *Luria v United States,* 231 US 9, 25; 34 S Ct 10, 14; 58 L Ed 101, 106 (1913). *See, also,* McCormick, Evidence, § 346, p 831; FR Ev (RD 1971), 303, Advisory Committee's Note; Case Notes, 2 St Mary's LJ 115–118 (1970) (author lists state cases involving rulings on the validity of presumptions. In no case was the presumption given more than a permissive effect).

Recent United States Supreme Court decisions have uniformly condemned the use of conclusive presumptions in varying contexts. *See Cleveland Board of Education v LaFleur,* 414 US 632; 94 S Ct 791; 39 L Ed 2d 52 (1974); *Vlandis v Kline,* 412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973); *US Department of Agriculture v Murry,* 413 US 508; 93 S Ct 2832; 37 L Ed 2d 767 (1973); *Stanley v Illinois,* 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1971); *Bell v Burson,* 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971); *Carrington v Rash,* 380 US 89; 85 S Ct 775; 13 L Ed 2d 675 (1965).

of Auburn v Merchant, 103 NY 143; 8 NE 484; 57 Am Rep 705 (1886), quoted in *People v Kayne, supra,* at 583–584. (Emphasis supplied.)

We remain unconvinced by the contention that in facing a presumption of the type under consideration defendants are no more compelled to testify than they are when confronted with overwhelming prosecution evidence. Admittedly, the force of circumstances often constrains a defendant to testify in order to avoid adverse inferences. And when a defendant is forced to testify because of a strong prosecution case, his Fifth Amendment rights are not violated. However, here the Legislature has inserted itself into the inference-drawing process. The presumption applies regardless of the persuasive force of the natural facts and circumstances. A very real danger exists that an inference, wholly unjustified by the natural facts, will be forced upon the jury by the strength of the presumption alone. It is in this way that prosecutions based on legislatively-enacted presumptions differ from prosecutions based on natural inferences. The quite unobjectionable compulsion to testify arising from natural facts and inferences becomes objectionable when created by a presumption because in creating the presumption the state interferes, in a potentially misleading and unfair manner, with the jury's role as trier of fact. The state compels defendants to testify by telling them, in effect, that if they don't the jury will be told to convict them, even if conviction would be totally unwarranted without the presumption.

The defendants need not risk conviction on the basis of an inference which has been statutorily inflated. Their right to remain silent cannot be burdened by a statute which tells the jury something it already should know and in so doing

indirectly comments on the defendants' failure to testify.[11] The only way for defendants to avoid the risk of conviction by presumption is to testify. The jury, though not straight-jacketed by a conclusive presumption, is nevertheless forcefully propelled to the conclusion urged on it by the Legislature, as implemented in the solemn instructions of the trial judge. Such devices cannot be condoned if the privilege against self-incrimination is to remain meaningful.

Denying the prosecutor the use of this evidentiary crutch should not impede appropriate prosecutions. The substantive crime remains available. Prosecutions involving large amounts of marijuana will not require a presumption to convince a jury that the possessor intended something other than personal use; the inference may follow of its own force. When smaller amounts are at issue, the prosecutor can introduce evidence of the kind he suggests the defendant should be forced to use: expert witnesses and acquaintances of the defendant. The jury will then be left, unfettered by presumptions of any kind, to weigh the evidence on both sides and resolve the question before it.

The judiciary gives great deference to enactments of the state Legislature. In reference to the responsibility of the courts to declare a statute unconstitutional, Judge, now Justice, FITZGERALD of this Court wrote:

"In forming our judgment, we bear in mind the norms governing the review of legislative enactments, norms expressed well by Justice BUTZEL in *Township of Dearborn v Dearborn Township Clerk,* 334 Mich 673; 55 NW2d 201 (1952).

" 'We are mindful of the restrictions upon the power of this Court to declare a challenged statute in conflict

[11] *Cf. Griffin v California,* 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

with our Constitution. It is too well settled to require citation that a statute must be treated with the deference due to a deliberate action of a co-ordinate branch of our State government. If the legislature enacted a statute which does not violate the provisions of the Constitution, this Court may not inquire into the wisdom of the legislation or substitute its judgment for that of the legislature. *The conflict between the statute and constitutional provisions must be clear and inevitable before we strike down a statute as unconstitutional.'* 334 Mich 673, 680." *People v Barber,* 14 Mich App 395, 400; 165 NW2d 608 (1968). (Emphasis added.)

We are constrained to conclude that the statutory provision in question is in clear conflict with the constitutional protection against self-incrimination. We recognize and support the Legislature's legitimate concern with the control of harmful drugs. However, constitutional rights cannot take a back seat to legislative programs. Our role as guardians of the Constitution requires us to prevent the erosion of constitutional rights. Our part in the constitutional system of checks and balances would be undermined if we were to ignore the destructive effect this provision has on Fifth Amendment rights.

In this connection the following warning from the late Justice Hugo L. Black of the United States Supreme Court should be heeded. Dissenting in *Turner v United States,* 396 US 398; 90 S Ct 642; 24 L Ed 2d 610 (1970), that eminent jurist wrote:

"Commercial traffic in deadly mind-, soul-, and body-destroying drugs is beyond doubt one of the greatest evils of our time. It cripples intellects, dwarfs bodies, paralyzes the progress of a substantial segment of our society, and frequently makes hopeless and sometimes violent and murderous criminals of persons of all ages who become its victims. Such consequences call for the

most vigorous laws to suppress the traffic as well as the most powerful efforts to put these vigorous laws into effect. Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct." *Turner, supra,* at 426–427.

There is another, equally persuasive, reason for concluding that MCLA 335.341(2); MSA 18.1070(41)(2) (the two-ounce presumption rule) is unconstitutional.[12] The statute violates the due process clause of the Fourteenth Amendment.

The United States Supreme Court in *United States v Romano,* 382 US 136, 139; 86 S Ct 279; 15 L Ed 2d 210 (1956), announced the test to be applied where statutory presumptions are at issue. The Court stated:

"The test to be applied to the kind of statutory inference involved in this criminal case is not in dispute. In *Tot v United States,* 319 US 463, 63 S Ct 1241, 87 L Ed 1519 [1943], the Court, relying on a line of cases dating from 1910, reaffirmed the limits which the Fifth and Fourteenth Amendments place 'upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.' Id., at 467; 63 S Ct, at 1245; 87 L Ed, at 1524. Such a legislative determination would not be sustained if there was 'no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. * * * [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the

[12] It is not uncommon for our courts to base a decision on more than one ground. *See, e.g., People v Atley,* 392 Mich 298; 220 NW2d 465 (1974); *Stanley v Illinois, supra.*

legislature to create it as a rule governing the procedure of courts.' " 382 US at 139; 86 S Ct at 281; 5 L Ed 2d at 213.

The degree of certainty necessary to sustain the presumed fact based on a statutory presumption has not been firmly settled by the United States or Michigan Supreme Courts. However, in the instant case, whether the presumption is judged by the "more-likely-than-not standard" applied in *Leary v United States,*[13] or by the "beyond a reasonable doubt" standard applied in *Turner v United States, supra,* the two-ounce rule does not pass muster.

Judged by the above standards, the statutory presumption that possession of more than two ounces of marijuana creates a prima facie case of possession with intent to deliver is constitutionally infirm.

Following the reasoning in *Turner, supra, Leary, supra,* and *Romano, supra,* MCLA 335.341(2); MSA 18.1070(41)(2), is infirm in that there is no rational connection between the proven fact (possession of two ounces of marijuana) and the presumed fact (intent to deliver) in light of today's "common experience".

The learned trial judge overturned the statute in question only reluctantly, after careful deliberation. Our treatment of the issue has been as cautious and exacting as his.

However, lest we be misunderstood, we emphasize that we are not here passing on the constitutionality of any other presumption. We expressly limit our holding to the instant facts. Whether the foregoing analysis will find application elsewhere must abide a case-by-case approach.

[13] 395 US 6; 89 S Ct 1532; 23 L Ed 2d 57 (1969).

For the above-stated reasons, we conclude that 1) the two-ounce presumption section of the Controlled Substances Act of 1971 (MCLA 335.341[2]; MSA 18.1070[41][2]) impermissibly compels a defendant to take the stand in violation of his right against self-incrimination granted by both the Fifth Amendment of the United States Constitution and article 1, § 17 of the Michigan Constitution of 1963 and 2) the two-ounce presumption section violates the due process clause of the Fourteenth Amendment of the United States Constitution.

The decision of the Circuit Court for the County of Macomb is hereby affirmed.

All concurred.

SINCLAIR v MANUFACTURERS NATIONAL BANK OF DETROIT

1. EXECUTORS AND ADMINISTRATORS—SALE OF STOCK—FRAUD—PROBATE COURT—APPROVAL OF SALE—WILLS—POWER OF SALE—CONFLICT OF INTEREST.

   A bank and the president of a corporation, who were co-executors of an estate which was composed mainly of shares of stock in the corporation, committed a fraud on the probate court where the bank petitioned the court for authority to sell a large block of the shares to one of the members of a stockholders' group in which the co-executor president was interested and obtained the court's approval of the sale, and where it was later discovered that a competing group of stockholders had offered to buy all the stock at a higher price, and that this information had not been given to the probate court; a claim that the sale was proper under a broad power of sale in the will has no support because the bank failed to exercise the power of sale and instead sought the authority of the probate court to sell the stock, and the co-executor president did not properly exercise his power of sale over the stock because of his conflict of interest (MCLA 704.37).

2. EXECUTORS AND ADMINISTRATORS—ACCOUNTS—RES JUDICATA—PROBATE COURT—FRAUD ON THE COURT.

   The approval by a probate court of co-executors' second account, which included the sale of stock to one of the members of a stockholders' group in which one of the co-executors was interested, where the co-executors perpetrated a fraud on the court by not informing the court that more money had been offered for the stock by a competing stockholder group, did not bar a subsequent action by a beneficiary of the estate against one of the co-executors because of the fraud (MCLA 704.39).

3. LIMITATION OF ACTIONS—EXECUTORS AND ADMINISTRATORS—FRAUD ON THE COURT—SALE OF STOCK—LACHES.

   A beneficiary of an estate in which a fraud had been perpetrated on the probate court by the co-executors in the matter of the

REFERENCE FOR POINTS IN HEADNOTES

[1–3] 31 Am Jur 2d, Executors and Administrators § 227 *et seq.*

sale of stock is not barred by the statute of limitations or the doctrine of laches where he has brought an action against one of the co-executors for damages for selling the stock for less than could have been obtained less than two years after he discovered the alleged fraud and concealments (MCLA 700.5855).

Appeal from Wayne, George N. Bashara, Jr., J. Submitted Division 1 May 14, 1974, at Detroit. (Docket No. 14120.) Decided September 24, 1974.

Complaint by David Sinclair against Manufacturers National Bank of Detroit for monies lost in a stock sale. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded for trial.

Dice, Sweeney & Sullivan, P. C. (by *Joseph Levin),* for plaintiff.

Bodman, Longley, Bogle, Armstrong & Dahling (by *James T. Heimbuch),* and *Wurzer, Higgins & Starrs* (by *Robert A. Macdonell),* for defendant.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. This is an appeal from a summary judgment dismissing plaintiff David Sinclair's complaint against defendant Manufacturers National Bank of Detroit for failure to state a claim upon which relief can be granted. GCR 1963, 117.2(1). We reverse and remand.

The plaintiff is the sole beneficiary of the estate of his father, Wayne Sinclair, who died in 1961. The bank and one Douglas T. Moore were co-executors of the estate. The principal asset of the estate was 55,905 shares of stock in LeMaire Ma-

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

chine Tool Company, a company which the deceased had developed and managed prior to his death. In 1963, Moore was president of LeMaire and a member of a group of stockholders in the company who sought to gain a controlling interest or at least to prevent a competing group of stockholders from gaining a controlling interest. The estate's 55,905 shares provided effective working control of the corporation. If sold as a block the estate's shares had a premium value per share above the value of other shares which were not part of a controlling block.

In 1963, the bank as one of the co-executors of this estate petitioned the probate court for authority to sell, at $2.50 per share, 20,000 shares of LeMaire stock to one of the members of the stockholders' group in which Moore was interested. The petition recited that Moore was president of LeMaire and a minority stockholder. On June 5, 1963, the probate court approved the sale and the sale was subsequently made. On June 19, 1963, in a petition for confirmation of the sale of the 20,000 shares at $2.50 per share the bank represented that:

"* * * your petitioners do not have any offer for said 20,000 shares or for any other number of shares of said stock in an amount greater than that heretofore made by said Carl K. Miller and remain in their belief that the same is the best price obtainable therefore."

In February 1965, LeMaire filed for Chapter XI bankruptcy. On October 27, 1965, the bank's petition to the probate court for authorization to sell the remaining 35,905 shares was granted and the stock was sold for 50¢ a share. On December 6, 1966, the plaintiff, then a minor, by his next friend, filed a complaint in the United States

District Court against the bank, alleging that the bank had negligently sold the stock for less than its alleged market value of $5 per share. In January 1967, the defendant bank and Moore as co-executors petitioned the probate court for approval of their second account which included both the 1963 and 1965 sales of the LeMaire stock. Plaintiff Sinclair filed written objections to this petition alleging as grounds the allegation as set forth in the Federal suit. In September 1967, the probate court approved the second account. It is plaintiff's claim that in so doing the probate court expressly noted on the record that the court was not adjudicating the merits of Sinclair's pending claims against the bank in the Federal action.

In a discovery proceeding in October 1969, in the Federal suit, the plaintiff claims he first learned of an offer made to the bank prior to June 1963 by the competing group of stockholders in which the group offered to purchase all of the 55,905 shares for $3.50 a share. As a result of this newly-discovered evidence plaintiff, following dismissal of the Federal suit on jurisdictional grounds[1], filed the instant suit against the bank alleging that the bank fraudulently concealed and recklessly, with gross negligence, and negligence failed to disclose to the beneficiary and to the probate court the existence of the $3.50 offer with resulting damage to the beneficiary of the difference of the selling price and the larger offer.

The trial court, on April 6, 1972, granted defendant bank a summary judgment on the ground that the plaintiff had failed to state a claim upon which relief could be granted. In its opinion the trial court referred to the will of Wayne Sinclair which conferred "[u]pon my co-executors or any adminis-

[1] *Starr v Rupp,* 421 F2d 999 (CA 6, 1970).

trator with the will annexed all of the powers and authority herein given and conferred upon my trustee" and which conferred upon the trustee the power to sell trust property and any part thereof "[u]pon such terms as in the absolute and uncontrolled discretion of said trustee may seem expedient and proper". The trial court stated in its opinion "[t]herefore the trustee clearly had the power and authority to sell any asset of the estate even without court authority".

To this finding by the trial court plaintiff responds by claiming that the bank and Moore as co-executors did not in fact exercise their power of sale over the assets of the estate but for obvious reasons, Moore's conflict of interest, sought the permission of the probate court to make the sale to Moore's group but without full disclosure of all pertinent facts. It is apparent that the bank sought to protect itself from surcharge or a claim of fraud by petitioning the probate court for authority to sell. MCLA 704.37; MSA 27.3178(288). *In re Tolfree Estate,* 347 Mich 272; 79 NW2d 629 (1956). We agree with the plaintiff's contention that the bank failed to exercise any power of sale bestowed on it by the will but instead sought the authority of the probate court to sell the stock to Moore's group. In so doing the bank failed in its duty to the court to disclose all the information at hand pertaining to the sale and its effect on the estate and right to the beneficiary.[2] This was fraud

[2] 1 Restatement Trusts 2d, § 170, p 364.

"§ 170. Duty of Loyalty

"(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.

"(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know."

Under the above statements we find the following comments by the authors:

on the probate court. We can only speculate what that court would have done with the bank's petition had it knowledge of all the facts. Plaintiff is entitled to an adjudication on the merits of this question. *Green v Old Kent Bank & Trust Co,* 3 Mich App 654; 143 NW2d 581 (1966).

We find no bar to this action in the approval of the second account by the probate court in view of the allegations of the complaint before us. MCLA 704.39; MSA 27.3178(290); *Green v Old Kent Bank & Trust Co, supra.*

We find no bar to this action in the statute of limitations or the doctrine of laches in view of the above factual situation. Plaintiff brought this ac-

"b. *Sale of trust property to the trustee individually.* A trustee with power to sell trust property is under a duty not to sell to himself either by private sale or at auction, whether the property has a market price or not, and whether or not the trustee makes a profit thereby. It is immaterial that the trustee acts in good faith in purchasing trust property for himself, and that he pays a fair consideration.

"The trustee cannot properly purchase trust property for himself even though he does not make the sale.

* * *

"Where there are several trustees, one of them cannot properly purchase trust property for himself, although his co-trustees are not personally interested in the purchase and consent to the sale.

* * *

"c. *Where trustee has a personal interest in the purchase.* The trustee violates his duty to the beneficiary not only where he purchases trust property for himself individually, but also where he has a personal interest in the purchase of such a substantial nature that it might affect his judgment in making the sale. Thus, a trustee violates his duty if he sells trust property to a firm of which he is a member or to a corporation in which he has a controlling or substantial interest.

* * *

"f. *Purchase by trustee with approval of court.* The trustee can properly purchase trust property for himself with the approval of the court. The court will permit a trustee to purchase trust property only if in its opinion such purchase is for the best interest of the beneficiary. Ordinarily the court will not permit a trustee to purchase trust property if there are other available purchasers willing to pay the same price that the trustee is willing to pay."

tion on July 30, 1971, having discovered the alleged fraud and concealments in October 1969, less than two years having transpired. MCLA 600.5855; MSA 27A.5855.

We find no election of remedies, splitting of a cause of action, or incapacity to sue that would bar this action. *Green v Old Kent Bank & Trust Co, supra; MacKenzie v Union Guardian Trust Co,* 262 Mich 563; 247 NW 914 (1933).

Reversed and remanded for trial. Costs to the plaintiff.

All concurred.

PEOPLE v TOOKS

1. APPEAL AND ERROR—INSTRUCTIONS TO JURY—PRESERVING QUESTION—DISCRETION—MANIFEST INJUSTICE.

Failure to object to jury instructions bars consideration of error on appeal unless a clear abuse of discretion resulting in manifest injustice is apparent (GCR 1963, 516.2).

2. CRIMINAL LAW—APPEAL AND ERROR—INSTRUCTIONS TO JURY—VERDICT—DISCRETION.

An instruction designed to facilitate the reaching of a verdict was not erroneous where the jury had deliberated for seven hours, the case was not complex, yet the jury requested a large portion of the transcript to be reread, and the foreman informed the court that if it were not read, a verdict would not be forthcoming; in these circumstances the use of such an instruction was not an abuse of discretion.

3. CRIMINAL LAW—APPEAL AND ERROR—INSTRUCTIONS TO JURY—VERDICT—COERCION.

A jury instruction must be read as a whole, and where review of an instruction as a whole which was designed to facilitate the jury's arrival at a verdict does not reveal that the jury was coerced, and where, moreover, the jury deliberated for an additional two hours after receiving the instruction, there is indication that any coercive import had been effectively ignored.

4. ROBBERY—ARMED ROBBERY—UNARMED ROBBERY—INSTRUCTIONS TO JURY—MISSTATEMENT—HARMLESS ERROR.

An unintentional slip of the tongue by the trial judge in an unarmed robbery case in referring at one point in his instructions to the jury to armed robbery did not result in manifest injustice where it was made clear many times during the

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 4 Am Jur 2d, Appeal and Error § 533 *et seq.*

[4, 5] 67 Am Jur 2d, Robbery §§ 68–73.

[6] 58 Am Jur, Witnesses §§ 625, 630, 716.

[7] 5 Am Jur 2d, Appeal and Error §§ 750, 821.

[8] 58 Am Jur, Witnesses § 754 *et seq.*

proceedings that the only charge involved was unarmed robbery and the defendant was found guilty of the crime charged (MCLA 750.530).

5. ROBBERY—ARMED ROBBERY—UNARMED ROBBERY—INSTRUCTIONS TO JURY—ILLUSTRATIONS.

The use of an illustration to explain one of the elements of the crime of unarmed robbery was proper and did not impermissibly suggest that the case involved armed robbery where there was uncontroverted testimony to support the illustration given and the judge was merely fulfilling his obligation to fashion instructions which meet the factual demands of the particular case by language which is comprehensible by the jury and directly relevant to facts in evidence (MCLA 750.530).

6. WITNESSES—CROSS-EXAMINATION—CREDIBILITY—BIAS—PROSECUTORS—TRIER OF FACT.

A prosecutor may properly explore the possibility of bias when cross-examining defense witnesses and such cross-examination does not impugn their reputations as truthtellers; the trier of fact may properly consider the interest or lack of interest on the part of a witness in evaluating the testimony of that witness.

7. APPEAL AND ERROR—DEFENDANTS—CROSS-EXAMINATION—ARRESTS—CONVICTIONS—PRESERVING QUESTION.

A defendant who was questioned on cross-examination about an arrest which did not result in a conviction but who failed to object to this questioning is not entitled to a reversal of his conviction where manifest injustice has not been demonstrated.

8. WITNESSES—IMPEACHMENT—ARRESTS—CONVICTIONS—CASE PRECEDENT—RETROACTIVITY.

A Supreme Court decision which makes impeachment of any witness by use of arrests not resulting in convictions *per se* reversible error, even where there is a failure to object, is not given retroactive effect absent a clear showing by the Supreme Court that retroactivity is intended.

Appeal from Recorder's Court of Detroit, Donald C. Neitzel, J. Submitted Division 1 June 4, 1974, at Detroit. (Docket No. 15983.) Decided September 24, 1974.

Levester J. Tooks was convicted of unarmed robbery. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Patricia Boyle,* Principal Attorney, Research, Training and Appeals, and *Thomas A. Ziolkowski,* Assistant Prosecuting Attorney, for the people.

Theodore B. Sallen (Carl Ziemba, of counsel), for defendant on appeal.

Before: BRONSON, P. J., and QUINN and VAN VALKENBURG,* JJ.

BRONSON, P. J. Defendant was charged with unarmed robbery. MCLA 750.530; MSA 28.798. The case was tried to a jury and defendant was found guilty and sentenced on November 30, 1972 to serve 4 to 15 years. He appeals as of right. His four assignments of error will be discussed *seriatim.*

I.

The trial judge felt constrained to invoke the so-called *Allen* charge[1] in this case. Defendant insists that the charge was prematurely given because the jury was not "hopelessly deadlocked". The jury deliberated for nearly seven hours before the foreman requested that certain testimony be read again. The judge satisfied himself that the jury would not be able to reach a verdict without that

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

[1] *See Allen v United States,* 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

request being honored. The following colloquy occurred:

"*Court:* Do you feel that without this that you can reach a verdict?

"*Foreman:* At this point we are at a stalemate.

"*The Court:* Is that what the resistance is, that someone wants to hear that, or is there a dispute as to what was heard?

"*Foreman:* I know I myself would like to hear it.

"*The Court:* Without it do you feel that you are just not going to be able to reach a verdict?

"*Foreman:* At this point it appears that way.

"*The Court:* Gentlemen (to counsel), both—will both of you approach the bench?"

The judge then conducted an unrecorded sidebar conference. The *Allen* charge followed.

No objection was made either to the decision to give the charge at that time or to the form of the charge when given. Opportunity to object was afforded counsel both times. Failure to object to jury instructions bars consideration of error on appeal, GCR 1963, 516.2, unless a clear abuse of discretion resulting in manifest injustice is apparent. *People v McClure,* 29 Mich App 361; 185 NW2d 426 (1971).

No abuse of discretion is shown. The jury had been unable, despite seven hours of deliberation, to reach a verdict. The case was not unduly complex, yet the foreman represented that a verdict would not be forthcoming unless certain testimony, representing fully three-fourths of the trial transcript, was repeated. Under these circumstances, it cannot be said that the judge committed reversible error in resorting to the *Allen* charge.

In like manner, defendant's dissatisfaction with a portion of the language employed by the judge in his *Allen* charge is misplaced. The charge must be

read as a whole. *People v Thomas,* 49 Mich App 682; 212 NW2d 728 (1973). Defendant focuses on one paragraph[2] of a rather lengthy instruction and suggests that this portion, out of context, demonstrates that the jury was coerced into rendering a verdict.

The quoted language is substantially similar to that approved in *People v Chivas,* 322 Mich 384; 34 NW2d 22 (1948). The *Chivas* Court concluded that there was no coercion in the language used. Moreover, the jury in the present case deliberated for an additional two hours after receiving the *Allen* charge, indicating that any coercive import had been effectively ignored.

We conclude that neither the timing nor the content of the *Allen* charge resulted in manifest injustice to the defendant.[3]

II.

Defendant also urges reversal on the ground that the trial judge erroneously instructed the jury by saying, in this, an unarmed robbery prosecution:

"In other words, to recap, either guilty of robbery armed may be expressed 'guilty as charged' or 'not guilty'."

That the judge made a mistake cannot be denied. However, we do not agree that it requires reversal, because the jury could not reasonably have been misled by it.

[2] "And, with this view, I specifically instruct you to do your duty to decide whether the evidence is more clear as produced by one side than the other, and with this in view, it is your duty to make the conscientious decision."

[3] We are confident that the charge given here is in accordance with *People v Sullivan,* 392 Mich 324; 220 NW2d 441 (1974).

Defense counsel was given ample opportunity, both before and after delivery of the final instructions, to register an objection. None was made. Therefore, our review is limited to a determination of whether there is any showing of manifest injustice or clear abuse of discretion. *McClure, supra.*

In his opening remarks to the newly-empaneled jurors, the judge twice clearly stated that the case involved "unarmed robbery". All of the proof introduced at trial disclosed that the crime had been perpetrated without weapons. In his final instructions to the jury, the judge carefully explained *only* the elements of unarmed robbery. There were no instructions given for lesser included offenses.

In his final charge the judge on four different occasions repeated that the one and only subject of the inquiry was unarmed robbery. He then, in the recapitulation quoted above, misspoke. It is sufficiently clear from the record that the jury found the defendant guilty of the crime charged. *People v Fleish,* 306 Mich 8; 9 NW2d 905 (1943); *People v Jenkins,* 23 Mich App 39; 178 NW2d 103 (1970). This unintentional slip of the tongue must be distinguished from the kind of error involved in *People v Neumann,* 35 Mich App 193; 192 NW2d 345 (1971). The record does not support a claim of manifest injustice.

Defendant further asserts that the following portion of the final charge also impermissibly suggested that the case involved armed robbery:

"The matter of putting him in fear oftentimes necessitates the use of another instrument. In this particular matter the use of another instrument is not alleged. But the prospect of another instrument may be sufficient to constitute that sort of fear that would be putting a person in fear."

Defendant misconstrues the purpose of this portion of the charge. It is a perfectly proper use of an illustration to explain one of the elements of the crime in question. And there was uncontroverted testimony by the victim that her assailant threatened to cut her finger off to get the ring which was taken from her. The judge was here merely fulfilling his obligation to fashion instructions which meet the factual demands of the particular case by language which is comprehensible by the jury and directly relevant to facts in evidence. *Cf.: Hill v Harbor Steel & Supply Corp,* 374 Mich 194; 132 NW2d 54 (1965); *Hansen v Batchelder,* 14 Mich App 627; 165 NW2d 886 (1968). The judge did not abuse his discretion. The final instructions given in this case were not erroneous.

III.

Defendant maintains that the cross-examination of several defense witnesses improperly impugned their reputations as truth tellers. We disagree.

Defendant chooses several examples, out of context, from an extensive cross-examination. No objection was made to this alleged prosecutorial misconduct. At most gratuitous and argumentative, it did not amount to a denial of a fair trial or a miscarriage of justice, MCLA 769.26; MSA 28.1096, as a brief examination of the circumstances will reveal.

Each one of the witnesses admitted being at the scene of the crime and witnessing its commission. Their testimonial purpose was to exculpate the defendant. The prosecutor had every right to explore any possibility of bias. *Geary v People,* 22 Mich 220 (1871). And the trier of fact may properly consider the interest or lack of interest on the part of a witness in evaluating the testimony of

that witness. *People v Hughes,* 20 Mich App 294; 174 NW2d 81 (1969); *People v Sesson,* 45 Mich App 288, 302; 206 NW2d 495 (1973).

IV.

Defendant's final claim is that he was subjected to improper cross-examination when he was questioned about arrests which did not lead to convictions. A portion of the cross-examination was arguably improper. The record suggests, not without some confusion,[4] that defendant was questioned about an arrest which did not result in a conviction.

Defense counsel failed to object to this cross-examination.[5] Nevertheless, we are requested to reverse by giving retroactive effect to *People v Falkner,* 389 Mich 682; 209 NW2d 193 (1973). That case apparently makes impeachment of *any* witness by use of arrests not resulting in convictions *per se* reversible error, even where there is a failure to object. We decline to make *Falkner* retroactive absent a clear showing by the Supreme Court that retroactivity is intended.[6]

Defendant testified in this case to other arrests and convictions in a manner which met the *Falkner* requirements. The isolated reference to an arrest not leading to a conviction did not result in

[4] "*Q.* What were you picked up for on that night when this robbery took place?

"*A.* I was picked up—they was holding me for suspicion of B & E.

"*Q.* Was it this B & E? That is in question today?

"*A.* I wouldn't know.

"*Q.* Or was it another one?

"*A.* I still wouldn't know.

"*Q.* Didn't they ask you what it was?"

[5] *Compare People v Brocato,* 17 Mich App 277; 169 NW2d 483 (1969).

[6] That clear showing is conspicuously absent in the recent case of *People v Renno,* 392 Mich 45; 219 NW2d 422 (1974).

prejudice to the defendant. Given the absence of an objection, we cannot say that manifest injustice has been demonstrated. *See People v Peay,* 37 Mich App 414; 195 NW2d 75 (1971), *leave to appeal den,* 388 Mich 795 (1972); *People v Sanders* (concurring opinion), 43 Mich App 698; 204 NW2d 706 (1972).

Affirmed.

All concurred.

KUNDE v TEESDALE LUMBER COMPANY (AMENDED OPINION)

1. WORKMEN'S COMPENSATION—APPEAL BOARD—FINDINGS OF FACT.

Absent fraud, the Court of Appeals may not disturb findings of fact made by the Workmen's Compensation Appeal Board (Const 1963, art 6, § 28; MCLA 418.861).

2. WORKMEN'S COMPENSATION—APPEAL BOARD—FINDINGS OF FACT—PART-TIME EMPLOYEES—AVERAGE WEEKLY WAGE.

The Workmen's Compensation Appeal Board could properly find that an injured employee was not a part-time employee where he was employed on a work-available basis with no agreement to limit the hours he was expected to work, and a determination of the average weekly wage based upon such a finding is proper.

3. WORKMEN'S COMPENSATION—LOSS OF VISION—LENS—SCARRING—SURGICAL REMOVAL.

Surgical removal of the natural lens of an injured eye is not a prerequisite to a finding of loss of vision of the eye where there is permanent corneal scarring closely equivalent in effect to the removal of the lens (MCLA 418.361).

4. WORKMEN'S COMPENSATION—LOSS OF VISION—MEASUREMENT—STATUTES.

A finding of the specific loss of an eye is based upon the measurement of the vision loss under natural conditions, rather than after correction; the statutory requirement of 80% loss of vision for a finding of specific loss is satisfied where a plaintiff lost 85% of the vision of an eye even though the loss was correctable to 35% through use of a contact lens (MCLA 418.361).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 58 Am Jur, Workmen's Compensation § 530.
[3, 4] 58 Am Jur, Workmen's Compensation § 290.
[5] 4 Am Jur 2d, Appeal and Error § 309.
[6] 58 Am Jur, Workmen's Compensation § 296.
[7] 16 Am Jur 2d, Constitutional Law §§ 506, 514, 518.
[8] 58 Am Jur, Workmen's Compensation § 334 *et seq.*

5. APPEAL AND ERROR—LEAVE TO APPEAL—APPLICATION—ISSUES CONSIDERED.

Consideration by the Court of Appeals of an issue not raised in an application for leave to appeal is normally precluded, but a constitutional question of first impression not so raised may be decided in the discretion of the Court to settle the issue for future cases.

6. WORKMEN'S COMPENSATION—STATUTES—SECOND INJURY FUND—DISPARITY OF BENEFITS—CONSTITUTIONAL LAW—EQUAL PROTECTION.

A statutory amendment which effected a change in benefits payable to injured employees from the Second Injury Fund is not violative of the constitutional guarantee of equal protection of the laws even though it results in disparate treatment of those injured prior to the effective date of the amendment as opposed to those injured after that date (1968 PA 227).

7. CONSTITUTIONAL LAW—EQUAL PROTECTION—SOCIAL WELFARE—LEGISLATIVE CLASSIFICATION.

There is no violation of constitutional principles of equal protection of the law in the area of social welfare legislation as long as the legislative classification is reasonably related to the purpose of the statute enacted.

8. WORKMEN'S COMPENSATION—RIGHT TO BENEFITS.

Rights to benefits under the Workmen's Compensation Act are purely statutory, and the Legislature has the prerogative to redefine the extent of those benefits.

Appeal from Workmen's Compensation Appeal Board. Submitted Division 3 January 2, 1974, at Lansing. (Docket Nos. 16178, 16179.) Decided March 28, 1974. (52 Mich App 360.) Leave to appeal denied, 391 Mich 841 (1974). Amended opinion filed September 24, 1974.

Claim by Gerhard Kunde against Teesdale Lumber Company, Employers Mutual Liability Company, and the Second Injury Fund for workmen's compensation. Compensation granted. Plaintiff and defendants Teesdale Lumber Company and Employers Mutual Liability Company appeal by leave

granted. Reversed and remanded with instructions.

Reamon, Williams, Klukowski & Craft, P. C.; for plaintiff.

Hillman, Baxter & Hammond (by *Albert J. Russell* and *Robert N. Hammond),* for defendants Teesdale Lumber Company and Employers Mutual Liability Company.

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: LESINSKI, C. J., and HOLBROOK and BASHARA, JJ.

AMENDED OPINION

HOLBROOK, J. On January 6, 1969, plaintiff was struck in the right eye by an object while he was cutting through rough lumber with a power saw in the defendant Teesdale Lumber Company's sawmill. In 1926 plaintiff had lost practically all the vision of his left eye as a result of an automobile accident. Owing to the work-related injury in January 1969, plaintiff lost approximately 85% of the visual capacity of his right eye. Plaintiff has, however, been fitted with a contact lens in the right eye and with it the loss of vision is only 35%. According to plaintiff's treating physician, the contact lens has been irritating plaintiff's eye, and consequently plaintiff has only been able to wear the lens two hours out of every day. Plaintiff filed a claim for workmen's compensation benefits, and after a hearing the hearing referee found that

plaintiff's average weekly wage was $80 per week, that he had suffered the specific loss of his right eye, that he was not a part-time employee within the meaning of the compensation act, and that since he had already lost the specific use of one of his eyes the subsequent injury to his right eye qualified him for coverage by the Second Injury Fund under MCLA 418.521(2); MSA 17.237(521)(2).[1] Defendant Employers Mutual Liability Company appealed the finding of the average weekly wage and the finding that plaintiff was not a part-time employee, and urged the affirmance of the finding that plaintiff suffered the specific loss of his right eye. Defendant Second Injury Fund appealed the finding that plaintiff was not a part-time employee, the finding of his average weekly wage, and the finding that plaintiff had lost the use of his right eye. The Workmen's Compensation Appeal Board (hereafter WCAB) affirmed the referee's finding with regard to the average weekly wage and plaintiff's status as a non-part-time employee. However, the WCAB reversed the referee's finding that plaintiff had lost the use of his right eye within the meaning of the compensation act. Plaintiff then filed an application for leave to appeal with this Court. The defendant insurer also sought leave to appeal raising the issue of whether plaintiff should properly be viewed as a part-time employee and also raising the issue of the specific loss of plaintiff's use of his right eye. We granted leave to appeal and now proceed to decide the issues raised.

I

Did the WCAB correctly construe MCLA

[1] Formerly MCLA 417.53; MSA 17.230(103).

418.371; MSA 17.237(371)[2] pertaining to part-time employment in its determination of plaintiff's average weekly wage?

The portions of MCLA 418.371; MSA 17.237(371) pertinent to this appeal read as follows:

"(2) Average weekly wage means the weekly wage earned by the employee at the time of his injury, inclusive of overtime, premium pay, and cost of living adjustment, and exclusive of any fringe or other benefits which continue during disability, but in no case less than 40 times his hourly rate of wage or earning. When it is found that the established normal work week for the employee's classification of employment in the establishment of the employer where the employee suffered a personal injury is less than 40 hours, then the average weekly wage shall be established by multiplying the employee's hourly rate or earning by the number of hours customarily worked in the employee's classification or employment in that place of employment or his actual earned wages, whichever is greater.

"(3) When a hearing referee finds that the employee was employed specifically and not temporarily on a part-time basis, the average weekly wage shall be determined by multiplying the hourly rate or earning by the average number of hours worked in the part-time employment. When it is found that the employee has worked an average of 25 hours or more per week in all of his current employments, he shall not be considered a part-time employee."

The hearing referee and the WCAB both agreed that plaintiff was not employed "specifically and not temporarily on a part-time basis" within the meaning of (3) above. Plaintiff was employed on a work-available basis and there was no evidence of an agreement to limit the hours plaintiff was expected to work. Therefore, the WCAB could properly have found that (3) was inapplicable and

[2] Formerly MCLA 412.11; MSA 17.161.

that plaintiff was not a part-time employee. Absent fraud this Court may not disturb findings of fact made by the WCAB. *Carter v Kelsey-Hayes Co,* 386 Mich 610; 194 NW2d 326 (1972); Const 1963, art 6, § 28; MCLA 418.861; MSA 17.237(861).[3]

Having concluded that plaintiff was not a part-time employee, the WCAB applied the first sentence of (2) in MCLA 418.371; MSA 17.237(371) quoted above to determine plaintiff's average weekly wage. The WCAB apparently found the second sentence of (2) inapplicable in the determination of plaintiff's average weekly wage because there was no argument made by the defendants that plaintiff belonged to an "employee's *classification* of employment" which was less than 40 hours. We find no error in the WCAB's factual determination of the average weekly wage of the plaintiff under these circumstances.

II

Was the WCAB correct in determining that plaintiff had not sustained a specific loss of his right eye as a result of his accident by judging his loss on the basis of his corrected vision rather than natural vision?

The WCAB claims that Michigan case law establishes that the loss of vision in plaintiff's right eye should be determined upon the basis of his vision as corrected through the use of a contact lens. The WCAB asserts that the plaintiff can compute his loss of vision upon the basis of his eyes in their natural state only if the lens in the injured eye has been surgically removed. The board cited *Lindsay v Glennie Industries, Inc,* 379 Mich 573; 153 NW2d 642 (1967), for this rule and then distin-

[3] Formerly MCLA 413.12; MSA 17.186.

guished the facts of this case from *Lindsay*. We disagree with the ruling of the WCAB. In *Lindsay* the Supreme Court rejected *Cline v Studebaker Corp,* 189 Mich 514; 155 NW 519 (1915), wherein the majority held that in an application for the determination of the specific loss of an eye under the Workmen's Compensation Act the proper test was to measure the degree of vision and coordination *after* the application of the prosthesis. The *Lindsay* Court went on to say at 379 Mich 578; 153 NW2d 644:

"We treat this case as one of first impression. We hold the surgical removal of the natural lens made necessary by an injury arising out of and in the course of claimant's employment is loss of an eye within the meaning of the amended statute.

"We recognize that substituting an artificial lens has 'restored' vision to the otherwise sightless eye. We point out that a specific loss award is not made as compensation for diminution of use of the involved organ or member. It is not awarded to compensate for loss of earnings or earning capacity. It is awarded irrespective of either fact or both. If ophthalmological advances and refinements in the use of contact lens has in fact rendered the amended statute inconsonant with its original legislative intent, it is the province of the Legislature to say so. We construe the statute in the plain meaning of its wording."

The WCAB mistakenly construed *Lindsay* to mean that there could be no finding of specific loss of an eye unless surgical removal of the natural lens of the eye had occurred. This construction of *Lindsay* is much too narrow. In *Hutsko v Chrysler Corp,* 381 Mich 99, 102–103; 158 NW2d 874, 876 (1968), the Supreme Court in dicta clearly outlined what proofs were needed to show a specific loss of a body member for compensation purposes:

"However, in order to qualify for the specific loss payment where there has not been the actual physical loss of the member as by amputation, there must be that total incapacitating loss of use which renders the organ or member industrially useless for any type of work, skilled or unskilled. To hold otherwise we think would be a logical contradiction. Plaintiff's injury has not amounted to the actual physical loss tantamount to destruction or amputation contemplated by the specific loss schedule. The test is not the degree of loss measured by the requirements of the skill of the injured workman. The test is the degree of loss as compared with the actual physical loss by destruction or amputation. *We hardly need add that where the specific loss schedule makes an exception as in the case of an eye, the percentage of loss legislatively specified obtains.*" (Emphasis supplied.)

Nothing in MCLA 418.361; MSA 17.237(361),[4] requiring 80% loss of vision for a finding of the specific loss of an eye, says that the vision loss is measured under corrected, rather than natural, conditions. Recently in *Hilton v Oldsmobile Division of General Motors Corp,* 390 Mich 43; 210 NW2d 316 (1973), the Supreme Court reaffirmed its ruling in *Lindsay* quoted above. In *Hilton* Justice COLEMAN dissented on the grounds that *Lindsay* ignored established precedent and that the focus of the inquiry should be on the injured employee's *loss of vision as corrected.* Under this standard since plaintiff's loss of sight when corrected by a contact lens is only 35% there would be no specific loss of an eye within the terms of MCLA 418.361; MSA 17.237(361), requiring 80% loss of vision. Justice COLEMAN'S view did not prevail, however. The mere fact that both *Hilton* and *Lindsay* dealt with surgical removal of the natural lens of the eye does not require a different result than we reach in this case where there was

[4] Formerly MCLA 412.10; MSA 17.160.

permanent corneal scarring to such an extent that 85% of the vision of plaintiff's right eye was lost. The scarring is so closely equivalent in effect to the removal of a lens it would be unreal to distinguish them for compensation purposes. For substantial support of this holding in many cases from other jurisdictions, see 2 Larson's Workmen's Compensation Law, § 58.10, pp 88.50–88.51, and the 1973 cumulative supplement thereto.

III

Is the July 1, 1968 amendment of MCLA 412.9; MSA 17.159[5] unconstitutional as violative of plaintiff's right to equal protection of the laws?

Plaintiff did not raise this issue on his application for leave to appeal. Normally this would preclude our consideration of the question. *Louagie v Merritt, Chapman & Scott,* 382 Mich 274; 170 NW2d 13 (1969). Since, however, it is a constitutional question apparently of first impression in this state we have exercised our discretion and proceed to analyze the problem with a desire of settling the issue for future cases.

Prior to July 1, 1968, MCLA 412.9; MSA 17.159 read in pertinent part as follows:

"Any permanently and totally disabled person as defined in this act who, on or after June 25, 1955, is entitled to receive payments of workmen's compensation under this act in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability and for a lesser number of weeks than the duration of such permanent and total disability shall after the effective date of any amendatory act, by which his disability is defined as permanent and total disability or

[5] Now MCLA 418.351, 418.353, 418.355, 418.357, 418.359; MSA 17.237(351), 17.237(353), 17.237(355), 17.237(357), 17.237(359).

by which the weekly benefit for permanent and total disability is increased, receive weekly, without application, from the second injury fund, an amount equal to the difference between what he is now or shall hereafter be entitled to receive from his employer under the provisions of this act as the same was in effect at the time of his injury and the amount now provided for his permanent and total disability by this or any other amendatory act with appropriate application of the provisions of paragraphs (b), (c), (d) and (e) of this section since the date of injury. Payments from this second injury fund shall continue after the period for which any such person is otherwise entitled to compensation under this act for the duration of such permanent and total disability *according to the full rate provided in the schedule of benefits."* (Emphasis supplied.)

The statute was amended by 1968 PA 227, effective July 1, 1968, and by virtue of the amendment was altered and placed in a new section of the Workmen's Compensation Act, to become MCLA 417.53; MSA 17.230(103).[6] For the purposes of this case the material change made by the 1968 amendment was that the phrase "according to the full rate provided in the schedule of benefits" was deleted from the statute.

In *King v Second Injury Fund,* 382 Mich 480; 170 NW2d 1 (1969), the Supreme Court held that the "full rate" contemplated in MCLA 412.9(a); MSA 17.159(a), prior to the 1968 amendment meant that the limitation of weekly benefits to 66-2/3% of the employee's average weekly wage at the time of the injury applied only to the employer and not to the Second Injury Fund, since to retain the 66-2/3% limitation in such cases would defeat the theory underlying the creation of the Second Injury Fund. The alleged effect of the 1968 amend-

[6] *See* footnote 1.

ment is that those employees totally and permanently disabled prior to July 1, 1968, are, in accordance with *King,* paid at the full rate as provided in the schedule of benefits, but those injured after July 1, 1968, are paid only 66-2/3% of their average weekly wages. This is the interpretation given the statute by the Attorney General and the Second Injury Fund. OAG, 1969–1970, No. 4711, p 187 (November 9, 1970). Apparently, it is also the view of the WCAB, which stated in its opinion:

"The above being our finding, we shall not here act upon the referee's awarding of maximum rates payable by the Second Injury Fund for an injury which occurred after 1968 PA 227 which amendment would appear to bar such awards."

The effect on the plaintiff of the above statutory interpretation is that his total benefits to be received from the Second Injury Fund will be limited to 66-2/3% multiplied by his average weekly wages of $80 per week, or $53.33 per week. Had he been injured prior to July 1, 1968, he would have been entitled to the "full rate" from the Second Injury Fund, without regard to the 66-2/3% limitation, as was mandated by *King, supra.* Plaintiff claims such disparate treatment accorded employees injured *after* July 1, 1968, as opposed to that awarded those injured *before* July 1, 1968, violates his constitutional guarantees to equal protection of the laws.

In the area of social welfare legislation as long as the legislative classification is reasonably related to the purpose of the statute enacted, there is no violation of constitutional principles of equal protection of the laws. *Richardson v Belcher,* 404 US 78; 92 S Ct 254; 30 L Ed 2d 231 (1971); *Pusquilian v Cedar Point, Inc,* 41 Mich App 399;

200 NW2d 489 (1972); *Verberg v Simplicity Pattern Co,* 357 Mich 636; 99 NW2d 508 (1959). In *Verberg* the Supreme Court held that differential benefits from the Second Injury Fund payable only to those totally and permanently disabled within the section of the Workmen's Compensation Act defining total and permanent disability to mean only specific losses or injuries, and not to others permanently and totally disabled as a matter of fact, did not establish an unreasonable classification in the constitutional sense. As in *Verberg,* we see nothing so palpably arbitrary and unreasonable as to be constitutionally defective in the legislative classification drawn here which results in different compensation treatment accorded employees injured *before* as opposed to those injured *after* July 1, 1968. There are potentially many rational reasons why the Legislature constructed the classification it did. It may have anticipated the *King, supra,* ruling and its effects, and thus sought to equalize the compensation responsibility owed by employers and the Second Injury Fund. It may have felt that any added burden placed on the Second Injury Fund by requiring it to pay the full rate as set out in the schedule of benefits might damage the fund, and thus destroy its effectiveness. The existence of any state of facts that can be reasonably conceived must be assumed in order to sustain a legislative classification as constitutional. *Verberg, supra; People v Raub,* 9 Mich App 114; 155 NW2d 878 (1967); *Alexander v Detroit,* 45 Mich App 7; 205 NW2d 819 (1973). To suggest, as plaintiff implicitly does here, that those injured after July 1, 1968, must always receive identical compensation benefits as those injured before that date ignores the possibility that compensation needs may change over time. Rights to benefits under the Workmen's Compensation Act

are purely statutory. Thus, the Legislature has the prerogative to redefine the extent of those benefits. We do not view *Gallegos v Glaser Crandell Co,* 388 Mich 654; 202 NW2d 786 (1972), cited by plaintiff on appeal, as sufficiently analogous either in its facts or law to require a result different than the one we reach. We find nothing constitutionally deficient in the legislative classification in issue here.

The ruling in this case is without prejudice to plaintiff's rights under MCLA 418.355; MSA 17.237(355).

Reversed with instructions to reinstate the hearing referee's finding that the plaintiff has suffered the specific loss of his right eye and to make an appropriate compensation award consistent with this opinion. Costs to plaintiff.

All concurred.

PEOPLE v WHEAT

1. CRIMINAL LAW—INDECENT LIBERTIES—CONSTITUTIONAL LAW—STATUTES.

   The indecent liberties statute is not unduly vague and unconstitutional (MCLA 750.336).

2. CRIMINAL LAW—INSTRUCTIONS TO JURY—INFORMATION—STATUTES.

   A charge to the jury which includes a reading of the information and the applicable statutes will generally be found to be sufficiently comprehensive.

3. CRIMINAL LAW—INSTRUCTIONS TO JURY—APPEAL AND ERROR—MISCARRIAGE OF JUSTICE—OBJECTIONS.

   Error relating to jury instructions has not been preserved for review where defense counsel not only failed to object, but affirmatively expressed satisfaction with the charge, and where no miscarriage of justice occurred.

4. CRIMINAL LAW—OFFENSES—LESSER INCLUDED OFFENSES.

   An offense to be a lesser included offense must contain some, but not all, of the elements of the higher offense and there must be no additional elements in the included offense which are not a part of the higher offense.

5. CRIMINAL LAW—INDECENT LIBERTIES—ACCOSTING—INSTRUCTIONS TO JURY—LESSER INCLUDED OFFENSES—STATUTES.

   The crime of accosting a child for immoral purposes is not a lesser included offense of the crime of taking indecent liberties with a child; therefore, in a prosecution for attempting to take indecent liberties with a child, it was not error for the court to

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REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur 2d, Constitutional Law § 309.
50 Am Jur 2d, Lewdness, Indecency and Obscenity § 2.
[2] 75 Am Jur 2d, Trial § 575.
[3] 53 Am Jur, Trial § 906.
[4, 5] 21 Am Jur 2d, Criminal Law § 494.
[6, 7] 58 Am Jur 2d, New Trial § 56 *et seq.*
75 Am Jur 2d, Trial §§ 192, 202.

refuse to instruct the jury on accosting a child for immoral purposes (MCLA 750.145a, 750.336).

6. CRIMINAL LAW—PROSECUTOR'S REMARKS—PREJUDICE—OBJECTIONS —NEW TRIAL.

Comments made by a prosecutor during his opening argument do not require a new trial where the comments were not so manifestly prejudicial as to have tainted the entire proceedings and where a timely objection was not made.

7. CRIMINAL LAW—PROSECUTOR'S REMARKS—GOOD FAITH—JURY—EVIDENCE—INSTRUCTIONS TO JURY—CURATIVE INSTRUCTIONS—MISCARRIAGE OF JUSTICE.

A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence of the case; however, a verdict in a criminal case will not be set aside because of a prosecutor's unsupported statement where no miscarriage of justice occurred, the statement was made in good faith, an extensive curative instruction was given, and the statement was not so inherently prejudicial that a curative instruction could not compensate for its effect on the jury.

Appeal from Recorder's Court of Detroit, Robert E. DeMascio, J. Submitted Division 1 June 24, 1974, at Detroit. (Docket No. 16357.) Decided September 24, 1974.

Luddie Wheat was convicted of attempting to take indecent liberties with a child. Defendant appeals. Affirmed.

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

Larry R. Farmer, Deputy State Appellate Defender, for defendant.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

DANHOF, J. Defendant was convicted by a jury of attempting to take indecent liberties with a child, MCLA 750.336; MSA 28.568. He was sentenced to a term of from four years, nine months to five years in prison, and he appeals. We affirm.

On April 9, 1969, the complaining witness, an eight-year-old boy, together with a ten-year-old friend, went to a party store on Harper near Connor Street in the City of Detroit. While they were in the store, the defendant entered and purchased a bottle of liquor. He engaged the boys in a very brief conversation, the nature of which no one at trial could recall. Having paid the store's owner, a man known as Frank, for their purchases, the boys and the defendant left the store at approximately the same time.

Once outside the store, the defendant expressed a desire to effectuate mutual genital contact with the younger boy. Defendant took him by the hand and led him into an alley where he began to remove the boy's pants. With assistance of his older friend, the boy was able to break and run away before the defendant could achieve his purpose.

At trial, the defendant testified that he had been drinking heavily on the day in question. Although he was aware of being in the store, he could remember very little else of what happened that day. He attributed the boys' accusations to mistaken identity. The jury determined that he had "attempted to take indecent liberties".

Defendant's application for leave to file a delayed appeal was granted. He attacks the constitu-

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

tionality of the indecent liberties statute, MCLA 750.336; MSA 28.568, contending that it is impermissibly vague. Defendant's appellate counsel recognizes the significance of the decision in *Armstrong v Bannan,* 272 F2d 577 (CA 6, 1959). In that case, the statute was held to sufficiently define the crime to inform defendant of the nature of the charge against him.

Nevertheless, defendant argues that *Armstrong* no longer reflects current concepts concerning vagueness of criminal statutory language as constituting a denial of due process. This argument is refuted by the decisions in *People v Payne,* 37 Mich App 442, 445; 194 NW2d 906, 908 (1971); *People v Kranz,* 39 Mich App 69, 71; 197 NW2d 276, 277 (1972); *People v Bennett,* 45 Mich App 127, 128; 205 NW2d 831, 832–833 (1973). These cases have rejected the contention that the statute is unduly vague and unconstitutional, citing *Armstrong.* We agree.

Closely related to his first issue is defendant's argument that the trial court's charge to the jury was erroneous because it did not sufficiently define the crime. The trial judge read the information which was drawn from the language of the statute, he read the statute itself, and he gave a detailed explanation complete with examples illustrating the elements of the offense.

A charge which includes a reading of the information and the applicable statutes will generally be found to be "sufficiently comprehensive". *People v Kruper,* 340 Mich 114, 122–123; 64 NW2d 629, 633 (1954). An instruction on this offense, indecent liberties with a child, which consisted of a reading of the statute and an elaboration less thorough than that given in the present case was upheld against the allegation that it was incom-

plete in *People v Noyes,* 328 Mich 207, 210–212; 43 NW2d 331, 333 (1950).

Further, the alleged error relating to the instruction is not before this Court. Defense counsel not only failed to object to the instruction in the lower court, but he affirmatively expressed satisfaction with the charge. *People v Cardenas,* 21 Mich App 636, 639; 176 NW2d 447, 448 (1970), *lv den* 383 Mich 820 (1970). No miscarriage of justice has occurred in the present case; therefore, in the absence of an objection, the claimed error has not been preserved for review. *People v Bodley,* 38 Mich App 27, 32; 195 NW2d 803, 805–806 (1972), *lv den* 387 Mich 777 (1972). *People v Gould,* 40 Mich App 689, 696; 199 NW2d 573, 576–577 (1972), *lv den* 388 Mich 767 (1972).

The trial court refused defendant's request that he instruct the jury on accosting a child for immoral purposes, MCLA 750.145a; MSA 28.341. It is defendant's position that this was error because accosting a child for immoral purposes is a lesser offense included in taking indecent liberties with a child. This contention cannot be accepted.

A test by which it may be determined whether or not a lesser offense is included within a greater offense was formulated in *Genesee Prosecutor v Genesee Circuit Judge,* 386 Mich 672, 684; 194 NW2d 693, 699 (1972):

> "For an offense to be lesser included it must contain some, but not all of the elements of the higher offense and there must be no additional elements in the 'included' offense which are not a part of the 'higher' offense."

The offense which the defendant contends is lesser included, MCLA 750.145a, includes as an essential element the act of urging or entreating,

referred to in *People v Riddle,* 322 Mich 199; 33 NW2d 759 (1948), as "suggesting" that a child commit an immoral act. The offense of which the defendant was convicted, MCLA 750.336, does not include as an essential element any of these acts. The element of communication is not absolutely necessary. It appears that it is possible to commit this offense on an unconscious victim. *People v Verburg,* 44 Mich App 320; 205 NW2d 315 (1973). Therefore, the crime of accosting a child is not a lesser included offense in taking indecent liberties, and the trial court did not err by refusing to give the requested instruction.

Defendant objects for the first time on appeal to certain of the prosecutor's statements during his opening argument. These comments were not so manifestly prejudicial as to have tainted the entire proceedings, and, in the absence of a timely objection, they do not require a new trial. *People v Vail,* 49 Mich App 578, 596–597; 212 NW2d 268, 276–277 (1973).

The last issue to be raised in this appeal involves a statement by the prosecutor during defense counsel's closing argument to the jury. Defense counsel had indicated that the prosecution's case was deficient because the owner of the market in which the defendant and the boys first came into contact had not been called as a witness. At that point, the prosecutor objected by stating that defense counsel knew through the testimony of a previous witness that the store owner, Frank, was dead. Apparently, the prosecutor believed that the witness had so testified. Subsequent investigation of the record disclosed that the witness had not given such testimony. The trial court determined that the prosecutor had acted in good faith, and a cautionary instruction was given to the jury.

It is well settled that a prosecutor may not make a statement of fact to the jury which is unsupported by the evidence in the case. However, it is equally well settled that a verdict in a criminal case cannot be set aside unless it affirmatively appears that the error complained of has resulted in a miscarriage of justice. MCLA 769.26; MSA 28.1096; *People v Green,* 7 Mich App 346, 354; 151 NW2d 834, 838 (1967).

A prosecuting attorney is properly held to a very high standard of performance. Nevertheless, the courts have recognized that infallibility will never be achieved:

> "Great care should be taken by prosecuting officers and trial courts that no statement be made in the presence of jurors which would jeopardize a defendant's right to a fair trial. But in the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are to be held prejudicial. Statements should not be held prejudicial if they are made in good faith, and, when fairly construed, they do not appear to have been such as influenced the jury adversely to the rights of the accused." *People v Burnstein,* 261 Mich 534, 538; 246 NW 217, 218 (1933).

Also see *People v DeLano,* 318 Mich 557, 569; 28 NW2d 909, 913–914 (1947). This language has been interpreted as establishing that "the test to be applied is not whether there were some irregularities but instead did the defendant have a fair and impartial trial". *People v Williams,* 11 Mich App 62, 66; 160 NW2d 599, 601 (1968).

It has been held that even though it was error for the prosecutor to make a statement of fact to the jury, a prompt objection and an instruction to disregard the statement precludes reversal. *People*

v Hill, 28 Mich App 502; 184 NW2d 572 (1970). Such a curative instruction is especially effective where the comment imparts no significant new information to the jury. *People v Badge,* 15 Mich App 29; 165 NW2d 901 (1968).

In the present case, had Frank testified, he would have been able to reveal nothing that was not already known to the jury. The defendant himself testified that he was in the store at the time in question. It is undisputed that the prosecutor's statement was made in good faith. The defendant does not suggest that Frank is not in fact dead.

The statement of the prosecutor was not so inherently prejudicial that a curative instruction could not compensate for its effect on the jury. In *People v Flatt,* 44 Mich App 452, 455; 205 NW2d 303, 305 (1973), the prosecutor interjected an answer, followed by an expletive, to a question put to a prosecution witness by defense counsel on cross-examination. Conceding the impropriety of the exclamation, a panel of this Court concluded that a cautionary instruction was sufficient to eliminate any prejudice. Similarly in *People v Foster,* 51 Mich App 213; 214 NW2d 723 (1974), the defendant was unable to prevail on any of four assignments of error involving improper statements by the prosecutor. The giving of a curative instruction prevented the finding of reversible error. The extensive curative instruction given in the present case eliminates any possibility of prejudice to the defendant.

Affirmed.

All concurred.

KOEHLER v DRT SPORTSERVICE, INC.
BEALL v DRT SPORTSERVICE, INC.
HOTTON v DRT SPORTSERVICE, INC.
WICHTMAN v DRT SPORTSERVICE, INC.
SIELOFF v DRT SPORTSERVICE, INC.

1. CONSTITUTIONAL LAW—DUE PROCESS—ACCRUED RIGHT—COMMON LAW—STATUTES.

A right which has accrued, whether given by statute or by common law, may not be taken away without due process of law.

2. STATUTES—CONSTRUCTION—RETROACTIVE APPLICATION—PRESUMPTIONS.

A substantive statute is presumed not to be retroactive, and it will not be applied retroactively unless the language of the statute absolutely requires such application.

3. STATUTES—AMENDMENTS—PROSPECTIVE APPLICATION—LIMITS OF RECOVERY—BURDEN OF PROOF.

A statutory amendment is to be given prospective effect where it contains both a change in the monetary limits of recovery and imposes a higher burden of proof.

4. INTOXICATING LIQUORS—DRAMSHOP ACT—AMENDMENTS—PROSPECTIVE APPLICATION—NAME AND RETAIN PROVISION—LIMITS OF RECOVERY—BURDEN OF PROOF—ACCRUED RIGHT.

An amendment to the dramshop act providing that no action against a retailer or wholesaler shall be commenced unless the alleged intoxicated person is named and retained as a defendant, containing a change in the monetary limits of recovery, and imposing a higher burden of proof, is to be given prospective effect; it applies only to the wrongful furnishing of intoxicants occuring after June 29, 1972, and does not apply to claims for damages against dramshop owners accruing prior to

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REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur 2d, Constitutional Law § 542 *et seq.*

[2] 73 Am Jur 2d, Statutes § 347 *et seq.*

[3, 4] 73 Am Jur 2d, Statutes § 342 *et seq.*

such date even though the dates of trials are subsequent thereto (MCLA 436.22).

Appeal from Wayne, George T. Martin, J. Submitted Division 1 June 13, 1974, at Detroit. (Docket Nos. 16601, 16881–16883, 18600.) Decided September 24, 1974. Leave to appeal denied, 393 Mich —.

Complaints by Kenneth Koehler, Louis M. Beall, for himself and as executor of the estate of Margaret M. Beall, deceased, Elizabeth Ann Hotton, Clayton G. Wichtman, and Barbara W. Wichtman, against DRT Sportservice, Inc., Dearborn Townehouse, Inc., and Sol Milan and John Bidwell, doing business as La Chambre; and complaint by Dorothy Sieloff and Kenneth A. Sieloff against the same defendants and against Charles R. Belton, administrator of the estate of Harry D. Rutherford, deceased, for damages arising out of an automobile accident. Summary judgments for defendants. Plaintiffs appeal. Cases consolidated for appeal. Reversed and remanded for trial.

Kelman, Loria, Downing & Schneider, for plaintiffs.

Plunkett, Cooney, Rutt & Peacock (by *Charles T. McGorisk* and *John P. Jacobs),* for defendant DRT Sportservice, Inc.

Finch & Finch, for defendant Dearborn Townehouse, Inc.

Baun & Van Tiem (D. James Barton, of counsel), for defendants John Bidwell and Sol Milan.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

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

ALLEN, J. Five separate cases arising out of a single automobile accident are consolidated in this appeal. Each suit was filed against three named tavern establishments under the dramshop act, MCLA 436.22; MSA 18.993, and all were heard by the same trial judge who in each case granted defendant tavern operators' motion for summary judgment.

Succinctly stated, the facts alleged in the respective bills of complaint and as they appear in the settled record on appeal, are as follows: On the evening of July 16, 1971, Harry D. Rutherford visited the DRT Sportservice, Inc., establishment where he consumed quantities of intoxicating liquors and was sold further spirits after he became intoxicated. He then visited La Chambre, operated by defendants Bidwell and Milan, and the Side Door premises operated by defendant Dearborn Townehouse, Inc., where he purchased further alcoholic beverages even though intoxicated to the point that his ability to operate a motor vehicle had become seriously impaired. He then proceeded to drive his automobile out onto Interstate Highway 75 in the wrong direction where he collided with a vehicle occupied by five young people. Four of the five young adults were killed—Louis M. Beall, Jr., age 22; Elizabeth A. Hotton, age 19; Gary C. Wichtman, age 20; and Kenneth Sieloff, age 21. The fifth occupant, Kenneth Koehler, age 19, survived but became a paraplegic. In addition, Margaret M. Beall, mother of Louis M. Beall, Jr., committed suicide, allegedly as a result of grief from her son's death. Also killed in the accident was Harry D. Rutherford.

The Koehler case was filed June 30, 1972, one day after the dramshop act was amended as hereinafter recited. Subsequent to the accident but prior to June 30, 1972, Koehler entered into an

agreement to settle his cause of action against the estate of Harry D. Rutherford, for $10,000, but the agreement was not formally executed until July 5, 1972.[1] The Beall, Hotton and Wichtman cases were all filed February 7, 1973, and, prior to filing suit, final settlement for $1,250 each was signed with the estate of Harry D. Rutherford. All settlements were approved by the probate court for Oakland County, August 16, 1972. The fifth and last case, Sieloff, was commenced March 7, 1973, but no settlement has ever been made with the estate of Harry D. Rutherford and no releases have been signed.

In each case, defendants moved for summary judgment in their favor on the grounds that at the time of filing suit, plaintiffs had not complied with the June 29, 1972 amendment to the dramshop act providing as follows:

"No action against a retailer and wholesaler or anyone covered by this act or his surety, shall be commenced unless the minor or the alleged intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement." 1972 PA 196.

Defendants also argue that the respective releases and settlements with the estate of Harry D. Rutherford were formally signed after the effective date of the amendment. Defendants' motion for summary judgment was first considered by the trial court in the Koehler case where, in a carefully written opinion dated January 24, 1974, defend-

[1] The settled record of appeal in Koehler states that "subsequent to the settlement agreement, the dramshop act was amended" but gives no date for the settlement agreement. Defendants' briefs allege that the covenant not to sue was not formally signed until July 5, 1972. Apparently, agreement between the parties was reached prior to the dramshop amendment but was not reduced to writing until six days after the amendment.

ants' motion was granted. The court held that the remedy provided under the dramshop act was purely statutory; that the June 29, 1972 "name and retain" provision was procedural and, under *Cichecki v Hamtramck,* 382 Mich 428; 170 NW2d 58 (1969), and cases cited therein, no vested right exists to maintain a statutory procedural law and therefore the failure of defendants to join the estate of Harry D. Rutherford as a defendant was noncompliance with the statute.

On appeal before us, plaintiffs raise a number of issues footnoted below.[2] We find it necessary to discuss only one, namely, whether the trial court was in error in holding that the amendment of June 29, 1972, was procedural and did not divest plaintiffs of a vested right. As to this issue, the factual situations differ among the five consolidated cases. In Koehler, the covenant not to sue was made prior to the amendment. In Wichtman, Beall and Hotton, the releases were signed six days, four weeks, and six weeks, respectively, after the amendment. In Sieloff, no releases have been given at all. It will be helpful to first observe that

[2] a. The amendment is unconstitutional in that it is a usurpation by the Legislature of the Supreme Court's rule-making power concerning rules of practice and procedure.

b. The amendment violates the equal protection of the laws provision of both the State and Federal Constitutions. US Const, Am XIV; Const 1963, art 1, § 2.

c. The amendment violates the due process of law provision of both the State and Federal Constitutions. US Const, Am XIV; Const 1963, art 1, § 17.

d. Properly construed, the amendment does not require joining the *person* of the alleged intoxicated driver if (a) the intoxicated driver is killed in the accident and therefore unavailable, or (b) if a settlement has been made with the estate of the alleged intoxicated person. (This argument made only in the Koehler case and was not contained in appellants' briefs in the remaining cases.)

e. The amendment is not procedural but substantive and may not divest plaintiffs of a right which accrued before the date of the amendment, but only may be applied in cases involving injury after June 29, 1972.

joinder of a party to whom a release has already been made and who must under the statute be "retained in the action until the litigation is concluded by trial or settlement" is a practical impossibility. Even if plaintiffs were to join the estate of the alleged intoxicated driver, a motion to dismiss could be granted on the grounds that prior releases had been given. It is for this obvious reason that plaintiffs argue that in the four cases where releases have been signed, the provision, which in this opinion we refer to as the "name and retain" provision, works to divest plaintiffs of a substantive right. Defendants, whose position was adopted by the trial court, argue that the "name and retain" provision of the amendment is procedural only. Defendants further argue that in Sieloff no release has been given and that in four cases the releases were signed after the effective date of the amendment and thus, in effect, it was not the statute but plaintiffs' action which created the legal impossibility of joinder. Because of the differences in dates of the releases we, separately by cases, will discuss the issue involved. The "name and retain" provision is only a portion of the amendatory act. As will appear later in this opinion, 1972 PA 196 also deals with damages and the burden of proof.

1. *Kenneth Koehler v DRT Sportservice, Inc.*

Dramshop actions are statutory creations and a departure from common law. 15 Michigan Law & Practice, Liquor, § 61, p 543. If not exclusively statutory, recovery is at least primarily statutory. *Hollerud v Malamis,* 20 Mich App 748, 754; 174 NW2d 626 (1969). Where a procedural amendment is made to remedial legislation the amendment is presumed to be retrospective and will apply to suits commenced after the date of the statute even

though the tort or injury was incurred prior to the amendment.

"[T]he statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending. * * * No vested right can exist to keep statutory procedural law unchanged and free from amendment." *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480, 485; 124 NW2d 286 (1963).

This line of authority also appears in *Cichecki v Hamtramck,* 382 Mich 428, 436; 170 NW2d 58 (1969), *Lahti v Fosterling,* 357 Mich 578, 589; 99 NW2d 490 (1959), and *Bejger v Zawadzki,* 252 Mich 14; 232 NW 746 (1930), and is the authority upon which the trial court relied in its opinion.

Reaching a contrary result are decisions cited by plaintiffs, holding that where a right has accrued, even though it is by statute rather than under common law, it may not be taken away without due process of law.

" 'All authorities agree that the repeal of a statute does not take away the plaintiff's cause of action under it for damages for an injury to person or property. They rest on the sound doctrine, expressed in *Menges v Dentler,* 33 Pa 495 (75 Am Dec 616) [1859], * * * that the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated.'

"The above case is cited to the text of 25 RCL 938.

" 'The repeal of a statute does not take away a right of action for damages which have already accrued'." *Minty v Board of State Auditors,* 336 Mich 370, 390; 58 NW2d 106 (1953).

See also *Cusick v Feldpausch,* 259 Mich 349, 353; 243 NW 226 (1932), and *Campbell v Detroit,* 51 Mich App 34, 37–38; 214 NW2d 337 (1973). In our opinion, Koehler clearly falls within the latter line of cited cases. Superficially, the "name and retain" requirement appears to be only procedural. Pragmatically, in situations where a release has been agreed upon, the amendment destroys a right which existed previously. Where, as in Koehler, the release agreement *precedes* the amendatory act, plaintiff is clearly divested of a right of action without due process of law. The situation is similar to *Cusick, supra,* where plaintiff, a guest passenger of defendant driver, was injured February 3, 1929. The guest passenger statute was amended March 27, 1929, to bar recovery unless the accident was caused by gross negligence or willful and wanton misconduct. Suit was filed in November 1929, plaintiff contending that the law on the date of the accident applied. Defendant asserted that the amendment was only a change in remedy and procedure. The court held for plaintiff, saying:

> "The effect of the change, if given retrospective effect, would be to deprive plaintiff and others similarly situated of a right of action. This court has recognized that a common-law right of action is property and entitled to protection. *Dunlap v Toledo, A A & G T R Co,* 50 Mich 470; 15 NW 555 (1883); *Devlin v Morse,* 254 Mich 113; 235 NW 812 (1931). By the weight of authority, a statutory right of action for damage to person or property, which has accrued, is a vested right and likewise to be protected.
>
> "The rule is otherwise in respect of remedy, of mere penalties, of procedure, and of rights merely inchoate or expectant." 259 Mich 349, 353–354.

In *Campbell v Detroit, supra,* a decision rendered by this Court after briefs were submitted in

the cases now before us, plaintiff sued for injuries sustained in a fall on a defective sidewalk. The fall occurred in July 1969 but suit was not commenced until July 1972. At the time of the accident, suit was permitted against the city because the applicable immunity statute, 1964 PA 170, § 7, was unconstitutional. This statute was amended August 1, 1970 by 1970 PA 155 (MCLA 691.1401 *et seq.;* MSA 3.996[101] *et seq.),* and, if applied retroactively, would have nullified plaintiff's cause of action. The Court held that the date of injury was controlling, saying:

"Tort actions accrue at the time when all elements of a cause of action have occurred and can be alleged in a proper complaint. *Connelly v Paul Ruddy's Co,* 388 Mich 146; 200 NW2d 70 (1972). Plaintiff's action thus accrued before the later statute was effective and any effect that the statute could have upon it must be measured by the requirements of equal protection and due process. * * *

"Although the present facts involve the reenactment of a statute rather than a repeal, the *Minty* case is persuasive. Invalidating the plaintiff's present cause of action would also abrogate vested rights by a change in substantive law. Such is not permissible under the limitations of due process and equal protection. The date of the injury is therefore controlling and 1970 PA 155, § 7 cannot be raised to defeat the present cause of action." 51 Mich App 34, 37–39.

Defendants attempt to distinguish *Cusick, supra,* and *Minty, supra,* on the grounds that in those cases the subsequent legislation was truly substantive, having the effect of directly depriving plaintiffs of their cause of action, whereas in the present cases the cause of action against the dramshop operators is not taken away, and plaintiffs' inability to proceed is due only to plaintiffs' failure to comply with a procedural amendment. We do not

agree with this distinction. The law in effect at the time of the injury did not require "naming and retaining" and allowed separate settlements with the alleged intoxicated driver or his estate. Indeed, this was the then common practice. Koehler's counsel proceeded to act accordingly and, as stated in the settled record, made a settlement agreement *before* the date of the amendatory legislation. The effect of the amendment is to deprive plaintiff Koehler of a right which existed prior to the amendment. Whether the act is procedural or substantive, the fact remains that plaintiff will have no other effective remedy against the tavern establishments if retroactive application is given the joinder amendment. The amendment is just as effective a deprivation of Koehler's right as though the entire right of recovery had been taken away. This is a far different result than the situation in the cases cited by the trial court. In *Cichecki, supra,* the amendatory act increased rather than decreased the employee's right to recovery. In *Lahti, supra,* the amendatory statute restored a common-law right which had previously been removed by a statute. In *Bejger, supra,* the repeal of the dog-bite statute which was in effect at the time of the injury still left plaintiff with a common-law right of recovery.

2. *Louis M. Beall v DRT Sportservice, Inc.*
Elizabeth Ann Hotton, v DRT Sportservice, Inc.
Clayton and Barbara Wichtman v DRT Sportservice, Inc.

Our conclusion in Koehler would be conclusive in these appeals but for the point made by defendants that in these cases, releases were both agreed upon and signed after the effective date of the

amendment.[3] The time lag between the effective date of the statute and the signing of the agreement is approximately four weeks, six weeks and six days, respectively.[4] We note that the amendment seriously changes plaintiffs' rights in two respects other than naming and retaining. The word "visibly" was inserted preceding "intoxicated". As amended, liability attaches only if the bar patron when served is visibly intoxicated. The words "actual damages" are substituted for "actual and exemplary damages", thus reducing the damages potentially recoverable by plaintiffs.[5] The combined effect of the two changes, each being in addition to the "name and retain" requirement, is a major substantive change in plaintiffs' cause of action under the statute at the time of the injury. Obviously plaintiffs' burden of proof, at least against a tavern establishment which first served

[3]

Case	Agreement Signed	Approved By Probate Court
Louis M. Beall, et al	Aug. 2, 1972	Aug. 16, 1972
Elizabeth Ann Hotton	Aug. 14, 1972	Aug. 16, 1972
Clayton & Barbara Wichtman	July 5, 1972	Aug. 16, 1972

[4] Due process would require some reasonable notice to plaintiffs or their counsel. The publishers of Michigan Statutes Annotated inform us they first published the amended statute July 31, 1972, and no reference to the amendment was contained in the June 19 or July 10 supplements. Publishers of Michigan Compiled Laws Annotated state they first published and mailed the amendment August 23. A few additional days would be required for receipt thereof by members of the bar. Accordingly, we doubt that plaintiffs' counsel were aware of the amendment until sometime after August 14. However, we do not base our decision on this somewhat speculative point.

[5] The amendment also added the words "and the sale is proven to be a proximate cause of the injury or death", and apparently the bar owner is entitled to assert all of the factual defenses available to the "allegedly intoxicated person". While SJI 27.00, p 4, noted that 1972 PA 196 "added the express requirement" of proof regarding proximate cause, this change does not necessarily impose an added element of proof since our Court has held that under the dramshop act, plaintiff must establish "there is a causal connection between the unlawful sale and the injuries". *Durbin v K-K-M Corp,* 54 Mich App 38, 58; 220 NW2d 110, 121 (1974).

the deceased driver, is rendered more difficult. For this reason it makes no difference that the releases were signed after the effective date of the amendment and are—as claimed by defendants—to be attributable to the action of the plaintiffs rather than to the joinder provision itself.

Where a dramshop act amendment reducing the amount of damages is enacted after the alleged illegal sale occurred but prior to trial, the courts have split on whether the amendment is to be applied retroactively.[6] But where a single amendment both contains a change in the monetary limits of recovery and imposes a higher burden of proof, then the court does not hesitate in holding the statute is to be given prospective effect. Such a case is *Smith v Clackamas County,* 252 Or 230; 448 P2d 512 (1968). Plaintiff sued defendant county for damages caused by defective roads. At the time of the accident, counties were strictly liable, without proof of negligence, for damages caused by defective roads and recovery was limited to $2,000. Prior to plaintiff's filing suit but after the accident occurred, the statute was amended to require proof of negligence and the limits of liability were raised to $10,000. Plaintiff claimed the statute was retroactive and that she was entitled to recovery up to $10,000. Defendant county contended the old statute governed. The court found plaintiff should have been required to plead under the old statute, saying:

"Numerous wrongful-death cases hold that when the limits of recovery are changed by legislation, any cause

[6] Holding that the statute should not be given retroactive effect are *Zucker v Vogt,* 200 F Supp 340 (D Conn, 1961), and *Lavieri v Ulysses,* 149 Conn 396; 180 A2d 632 (1962). Holding that retroactive effect should be accorded are *Lichter v Scher,* 11 Ill App 2d 441; 138 NE2d 66 (1956) and *Flores v Jack Spot Inn, Inc,* 17 Ill App 2d 1; 149 NE2d 498 (1958). See 98 ALR2d 1113 for analysis of these cases.

of action existing prior to the change in the law is governed by the old limit of recovery. See *Wiebe v Seely, Administrator,* 215 Or 331; 335 P2d 379 (1959), and cases elsewhere collected in the Annotation, 98 ALR2d 1105, 1110-1113 (1964). We believe the limits of recovery in the case at bar to be analogous to the limits in wrongful-death cases.

"In the present case, moreover, the increase in the amount of damages recoverable was not the important substantive change in the statute. The purpose of the amendment was to change the basis of recovery from strict liability to liability based on negligence. The increase in the limits of recovery was an incidental change. * * *

"The plaintiff relies upon *Spicer v Benefit Assn of Ry Emp,* 142 Or 574; 17 P2d 1107; 21 P2d 187; 90 ALR 517 (1933); for the proposition that Section 3 of the amending act was intended to make the act retroactive in this case. * * * However, the statute involved in that case was a procedural statute, while the present statute makes important changes in substantive rights. Procedural statutes are presumed to apply to all actions accrued or pending. 2 Sutherland, Statutory Construction § 2212 (3d ed 1943). Without the statutory language quoted in the *Spicer* case, the statute in that case would have applied to all rights accrued whether in litigation or yet to be litigated. In the present case, with a substantive statute before us, the rules of construction require the converse of the rule used in the *Spicer* case. *A substantive statute is presumed not to be retroactive, and such a statute will not be applied retroactively unless the language of the statute absolutely requires such application.* The *Spicer* case, accordingly, must be considered as limited to procedural statutes. 252 Or 230, 233–235; 448 P2d 512, 514." (Emphasis supplied.)

In view of the substantive changes made in the amendment we conclude the Sieloff cause of action is governed by the decisions in *Cusick, supra; Minty, supra; Campbell, supra;* and *Smith, supra.*

Further, we find nothing in the amendment which suggests that the Legislature intended the

new rules of proof and damages to apply to sales occurring prior to the amendment.

"The general rule is that a statute is to be construed as having a prospective operation only, unless its terms show clearly a legislative intention that its terms should operate retrospectively." *Angell v West Bay City,* 117 Mich 685, 688; 76 NW 128 (1898).

"The amendment here in question may not be regarded as wholly procedural in character, as defendant contends. Obviously its effect, if so applied under the facts before us in this case, would result in taking from the plaintiff a right which the statute, in force at the time of his injury, granted to him. There is nothing in the amendment in question here indicating that the legislature intended any such possible result. In other words, there is nothing to overcome the presumption that prospective operation only was intended." *Tarnow v Railway Express Agency,* 331 Mich 558, 565–566; 50 NW2d 318 (1951).

The name and retain provision and the provisions limiting damages and requiring proof of visible intoxication are all part of a single amendment. Obviously, the Legislature did not intend to make part of the amendment ("name and retain") retroactive and the balance prospective. Accordingly, we interpret that part of the amendment which reads "No action against a retailer or wholesaler * * * shall be commenced unless" joinder is made, to, in effect, read that no action against a retailer or wholesaler *for sales occurring after the effective date of this act* shall be commenced unless joinder is made.

3. *Dorothy and Kenneth Sieloff v DRT Sportservice, Inc.*

In this case, releases have not been executed relieving the estate of Harry D. Rutherford from liability. Consequently, plaintiffs are in no way

prejudiced by the joinder provision. The Rutherford estate could easily be added as a party defendant. However, to do so would either require giving retroactive effect to the entire amendment, including the visibly intoxicated and restricted damage provisions, or would require us to construe the amendment to find that the joinder provisions were retroactive but the damages and visibly intoxicated proof provisions were prospective. The first interpretation would impair plaintiff rights already vested in Sieloff and, for the reasons set forth in the discussion of *Beall, Hotton and Wichtman, supra,* would deprive plaintiffs of due process. The second interpretation would lead to the absurd result that Sieloff could proceed with his cause of action against the three liquor establishment operators but other plaintiffs could not recover. Thus, the Sieloff appeal is, in itself, an excellent illustration of the inequitable consequences which would result unless the amendment in its entirety is found to apply to suits commenced for wrongful sales occurring after June 29, 1972. The Legislature did not intend that in cases arising out of the same wrongful furnishing of intoxicants, all culminating in a common accident, some of the parties injured could recover but others could not. Therefore, we conclude that the trial court was in error and that, in this case, as in the four cases previously discussed, the orders of summary judgment should be set aside and the case remanded for trial.

Our disposition of the five consolidated cases and decision that the amendatory act applies only to wrongful furnishing of intoxicants occurring after June 29, 1972, makes it unnecessary to decide the constitutional issues and related claims of error raised by plaintiffs in this appeal. We specifically

express no opinion on the constitutionality of 1972 PA 196, and leave this task for future panels. The orders of summary judgment in favor of defendants and of no cause for action in favor of defendants in all of the five cases in this consolidated appeal are set aside and all cases remanded for trial consonant with this opinion.

Reversed, costs to plaintiffs.

All concurred.

PEOPLE v BEASLEY

1. CRIMINAL LAW—IDENTIFICATION—PHOTOGRAPHS—LINEUP—RIGHT TO COUNSEL.

   Photographs of a suspect known to be in custody or who can readily be produced for a lineup, except in exigent circumstances, may not be displayed to witnesses and a lineup cannot be conducted in the absence of counsel.

2. CRIMINAL LAW—IDENTIFICATION—PHOTOGRAPHS—LINEUP—CASE PRECEDENT—RETROACTIVE APPLICATION.

   Language in the Michigan Supreme Court case setting forth the rules for photographic lineups, which states that it "appears" that at least as to appeals from Wayne County, the decision "ought to be" retroactive is suggestive rather than directory.

3. CRIMINAL LAW—JURY—REMOVAL OF JUROR—DISCRETION—STATUTES.

   A trial judge properly used his discretion when he excused a juror after the juror disclosed during the trial that he was acquainted with one of the witnesses, where the full basis of the juror's relationship to the witness was disclosed to both parties, where the judge made clear his reason for excusing the juror, and where after excluding the juror in question, 12 jurors remained as triers of fact (MCLA 768.18).

4. CRIMINAL LAW—TRIAL—JUDGE'S REMARKS—PREJUDICE—ACCURATE STATEMENT OF LAW.

   A remark by a trial judge in an uttering and publishing case that there was no law requiring a bank to immediately report the crimes alleged to have been committed by the defendant did not prejudice the defendant and was not error, although the remark, a response to a statement made by defense counsel while objecting to the prosecution's direct examination of the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law §§ 309 *et seq.*, 368, 369.
[3] 47 Am Jur 2d, Jury § 285.
[4] 75 Am Jur 2d, Trial § 91 *et seq.*
[5] 75 Am Jur 2d, Trial § 61 *et seq.*
[6, 7] 58 Am Jur, Witnesses § 111.

bank's security officer, was made in the jury's presence; it was an accurate statement of the law.

5. CRIMINAL LAW—WITNESSES—EXPERT WITNESSES—EXCLUSION FROM COURTROOM—CROSS-EXAMINATION—SEQUESTRATION OF WITNESSES—PREJUDICE.

A judge's exclusion, over objection, of a defendant's handwriting expert from the courtroom was not an abuse of discretion, although defendant wanted his expert, after hearing the prosecution's rebuttal handwriting expert, to assist in cross-examination, where defendant had excused his expert witness, where defendant had himself requested that all witnesses be sequestered, and where the exclusion did not prejudice defendant because the rebuttal witness's testimony was not damaging.

6. CRIMINAL LAW—WITNESSES—REBUTTAL WITNESSES—INDORSEMENT—DISCRETION.

The decision to allow rebuttal testimony and to indorse witnesses is within the discretion of the trial judge.

7. CRIMINAL LAW—WITNESSES—INDORSEMENT—REBUTTAL WITNESSES—EVIDENCE—DISCRETION.

A trial judge did not abuse his discretion in allowing two unindorsed prosecution witnesses to testify in rebuttal where the witnesses were called only to rebut evidence introduced by the defendant, not to introduce new evidence which belonged in the prosecution's case in chief.

Appeal from Wayne, Joseph G. Rashid, J. Submitted Division 1 June 4, 1974, at Detroit. (Docket No. 16721.) Decided September 24, 1974. Leave to appeal applied for.

Juanita Beasley was convicted of uttering and publishing forged instruments. Defendant appeals. Affirmed.

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

Philip A. Gillis, for defendant on appeal.

Before: BRONSON, P. J., and QUINN and VAN VALKENBURG,* JJ.

BRONSON, P. J. Defendant was convicted after jury trial on two counts of uttering and publishing a forged instrument in violation of MCLA 750.249; MSA 28.446. She was sentenced on March 20, 1973 to serve from 2 years and 8 months to 14 years in state prison. She appeals as of right. We affirm.

Defendant's most substantial claim is that testimony regarding a preindictment photographic showup was improperly introduced at her trial. Two prosecution witnesses testified that they were shown a series of photographs by Allen Park police officers on October 13 and 17, 1972, respectively. Both said they picked out defendant's picture from the array. Defendant was not arraigned until November 14, 1972. However, she had been arrested on September 21, 1972, in Royal Oak on a different charge and at the time of the photographic showup was free on bond. The Allen Park police knew that defendant was scheduled to be arraigned in Oakland County on October 26, 1972, but held the showups without counsel for defendant being present.

The controlling rules in Michigan are that 1) except in exigent circumstances, photographs of a suspect "known to be in custody or who can readily be produced for a lineup" may not be displayed to witnesses and 2) a lineup cannot be conducted in the absence of counsel. *People v Jackson,* 391 Mich 323, 338–339; 217 NW2d 22 (1974); *People v Franklin Anderson,* 389 Mich 155; 205 NW2d 461 (1973).

Defendant here was not represented by counsel at the photographic showup. She could readily

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

have been produced for a lineup.[1] The police had her address, knew she was out on bond, and had been apprised of her arraignment date. In this pre-*Anderson* case the rules announced in *Anderson* were violated, both because a photographic showup was conducted whose subject was a suspect readily available for a corporeal lineup and because counsel was not present.[2] Because defendant's trial was held prior to the *Anderson* decision, a retroactivity problem is presented.

This problem was recognized by the *Jackson* Court where the Supreme Court said:

> "It, therefore, *appears* that at least as to appeals from Wayne County, *Anderson ought to be* retroactive to at least June 11, 1969, the date on which the *Adams* case was submitted." *Jackson, supra,* at 340. (Emphasis supplied.)

Defendant Beasley was tried in Recorder's Court of Detroit beginning on January 29, 1973. *Jackson* would thus apparently require us to apply *Anderson* retroactively and order reversal of defendant's conviction.

We fail to find such an anomalous result in the language quoted above. The Court used the words "appears" and "ought to be". The language is suggestive rather than directory. We think the Supreme Court anticipated the serious due process

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[1] *See People v Cotton,* 38 Mich App 763; 197 NW2d 90 (1972), cited in *Jackson, supra,* at 338, n 13, as an example of a case where defendant could readily be produced for a lineup. There defendant was released and his car was impounded. A photographic showup was held without counsel present. *Compare People v Lee,* 391 Mich 618; 218 NW2d 655 (1974).

The fact that defendant had been arrested on a different charge is irrelevant. *People v James Anderson,* 391 Mich 419; 216 NW2d 780 (1974).

[2] *See Jackson, supra,* n 16 at 339.

and equal protection problems inherent in the use of different rules for different counties.[3]

The *Jackson* Court relies on *People v Adams,* 19 Mich App 131; 172 NW2d 547 (1969), in support of limited retroactivity. Citing a prosecutor's concession that "where the defendant is in custody, identification by means of a police lineup should be attempted", *Adams, supra,* at 133, fn 1, and that "the pretrial photographic identification stage is as critical as the lineup stage"—thus requiring presence of counsel—the Supreme Court concludes that the Wayne County prosecutor's office should be held to a higher standard. However, the concession made by the prosecutor in *Adams* was gratuitous, since *Adams* involved a photo identification under "exigent circumstances"[4] such that presence of counsel was *not* required. The concession made in *Adams* was unnecessary to the decision in that case and we cannot believe the Supreme Court intended to rely on it as the sole justification for such a unique retroactivity rule.

We pause briefly over defendant's other assignments of error. Defendant argues that the photographic showup procedures were impermissibly suggestive. The record of the pretrial hearing held on that question adequately supports the trial judge's finding that the procedures used satisfied due process standards.

Defendant complains that the trial judge erred in excusing a juror who disclosed during trial that he was acquainted with one of the witnesses. The full basis of the juror's relationship to the witness was disclosed to both parties. The judge made clear his reason for excusing the juror. After ex-

[3] *Jackson, supra,* at 357 (dissenting opinion).

[4] Photos were shown to the victims, seriously wounded and hospitalized, immediately after the defendant's arrest.

cluding the juror in question, 12 remained as triers of fact. Under these circumstances, the decision to excuse the juror, which by statute[5] is left to the discretion of the trial judge, was not error.

Defendant also asserts that a remark by the trial judge that there was no law requiring the bank to immediately report the crimes alleged to have been committed by defendant requires reversal. Although the remark—a response to a statement made by defense counsel while objecting to the prosecution's direct examination of the bank's security officer—was made in the jury's presence, it was an accurate statement of the law. *People v Lefkovitz,* 294 Mich 263, 270; 293 NW 642 (1940). It did not prejudice defendant and was not error.

The exclusion, over objection, of the defendant's handwriting expert from the courtroom is assigned as error. She wanted her expert, after hearing the prosecution's rebuttal handwriting expert, to assist in cross-examination. Defendant had excused her expert witness. And she had herself requested that all witnesses be sequestered. The exclusion did not prejudice her because the rebuttal witness's testimony was not damaging.[6] Exclusion of the witness, under these circumstances, was not an abuse of discretion. See *People v Erb,* 48 Mich App 622; 211 NW2d 51 (1973).

Defendant maintains that the trial judge improperly allowed two unendorsed prosecution witnesses to testify in rebuttal. The prosecutor used a handwriting expert to challenge the testimony of the defendant's expert and called a Royal Oak police officer to testify about the Royal Oak arrest which defendant introduced in her direct examina-

[5] MCLA 768.18; MSA 28.1041.

[6] The people's expert testified that it was impossible to tell whether defendant wrote the disputed documents.

tion.[7] The trial judge concluded that these witnesses were called only to rebut evidence introduced by defendant, not to introduce new evidence which belonged in the prosecution's case in chief. The decision to allow rebuttal testimony is for the trial judge. *People v Moore,* 51 Mich App 48, 58; 214 NW2d 548 (1974); *People v Daleo,* 43 Mich App 386; 204 NW2d 315 (1972). Endorsement of witnesses is also within the discretion of the trial judge. *People v Bennett,* 46 Mich App 598, 616; 208 NW2d 624 (1973). Close scrutiny of the record reveals that the trial judge did not abuse his discretion in allowing rebuttal here.

We have given careful consideration to defendant's other assignments of error. None require or justify reversal and all are of insufficient precedential significance to warrant extended discussion here.

Affirmed.

All concurred.

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[7] *See, e.g., People v Curry,* 49 Mich App 64, 67; 211 NW2d 254 (1973).

PEOPLE v GRAHAM

1. CRIMINAL LAW—PLEA OF NOLO CONTENDERE—FACTUAL BASIS—COURT RULES.

   A trial judge was not required to ascertain whether a factual basis existed for a plea of nolo contendere offered before June 1, 1973, the effective date of the general court rule which governs such pleas (GCR 1963, 785.7[3][d]).

2. CRIMINAL LAW—PLEA OF NOLO CONTENDERE—VOLUNTARINESS.

   An inquiry by the trial judge as to whether a defendant's plea of nolo contendere was freely, intelligently and voluntarily made was sufficient to assure that the defendant's rights were safeguarded and was all that was required with respect to pleas of nolo contendere offered before June 1, 1973 (GCR 1963, 785.7[3][d]).

3. HOMICIDE—PLEA OF NOLO CONTENDERE—COERCION—FIRST-DEGREE MURDER—SECOND-DEGREE MURDER—PRELIMINARY EXAMINATION—EVIDENCE.

   A defendant's contention that his plea of nolo contendere to a charge of second-degree murder was coerced by the effect of being bound over for trial on a charge of first-degree murder was without merit where the preliminary examination reveals sufficient evidence upon which the district court could base its decision to bind defendant over for trial on the first-degree murder charge.

Appeal from Berrien, Julian E. Hughes, J. Submitted Division 3 March 6, 1974, at Grand Rapids. (Docket No. 16725.) Decided September 24, 1974.

Willie Lee Graham was convicted, on his plea of nolo contendere, of second-degree murder. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 29 Am Jur 2d, Evidence § 702.

Plea of nolo contendere or non vult contendere. 89 ALR2d 540.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Ronald J. Taylor,* Prosecuting Attorney, and *Sally M. Zack,* Assistant Prosecuting Attorney (Prosecuting Attorneys Appellate Service, *Donald Ubell,* Director, and *Howard C. Marderosian,* Special Assistant Attorney General, of counsel), for the people.

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

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

V. J. BRENNAN, J. Defendant, Willie Lee Graham, appeals from his September 11, 1972 plea-based second-degree murder conviction. MCLA 750.317; MSA 28.549. He was originally charged with first-degree murder (MCLA 750.316; MSA 28.548), but pled nolo contendere to the added count of second-degree murder after the information had been amended. The trial judge, after examining the pre-sentence investigation report, sentenced defendant to from 20 to 40 years in prison and credited him for the time spent in jail prior to the disposition of the case.

In the course of accepting defendant's plea of nolo contendere, the trial court read the amended information to the defendant and defined the elements of second-degree murder. The defendant was told that the people would have to prove guilt beyond a reasonable doubt if the defendant chose to go to trial. Defendant was advised of the nature of a jury trial and a bench trial and he stated he did not want to go to trial. The defendant was advised of his right to confrontation, his right to call witnesses in his own behalf, and his privilege against self-incrimination. Defendant stated he

understood the charge and that he had no questions to the court regarding the plea. Defendant further stated that no promises or threats had been made to him to force him to plead guilty.

Defendant contends that the case of *People v Curry,* 48 Mich App 545; 210 NW2d 791 (1973), is directly on point and that the Court herein should grant his motion for peremptory reversal because of the mandate of that case. Defendant's contention is that the trial court here failed to ascertain whether a factual basis for a plea to second-degree murder existed before accepting his plea.

It is our belief, however, that *Curry* does not properly reflect the law applicable to the acceptance of pleas of nolo contendere made prior to the effective date of GCR 1963, 785.7(3)(d).

While it is true that *People v Carlisle,* 387 Mich 269; 195 NW2d 851 (1972), requires a trial judge, preferably by direct questioning of the defendant, to ascertain whether a factual basis exists for a guilty plea before it can validly be accepted, there is nothing in *Carlisle,* MCLA 767.37; MSA 28.977 or the court rules which required a trial judge to make a similar determination with respect to pleas of nolo contendere offered before June 1, 1973, the effective date of GCR 1963, 785.7(3)(d).

Pleas of nolo contendere are now, and were at the time of defendant's plea, authorized by MCLA 767.37; MSA 28.977 which, in addition to permitting the acceptance of such pleas, provides:

> "and if such a plea is accepted, the court shall proceed as if he had pleaded guilty."

This language does not require the convoluted result reached in *Curry.* It merely states what is to occur *after* a plea of nolo contendere is accepted. It does not, in any way, mandate or affect the proce-

dure to be followed in accepting such pleas. We simply cannot understand how the semi-*Carlisle* determination required by *Curry* can be found to stem from this language and a court rule that wasn't even in effect at the time of this plea.

In the case at bar the trial judge, after extensive questioning of defendant, determined defendant's plea to have been freely, understandingly, and voluntarily made. The record amply supports such a determination and defendant's plea should not now be disturbed on the basis here urged. Despite the fact that a plea of nolo contendere subjects a defendant to all the consequences of a conviction, a defendant, by so pleading, does not admit the facts constituting the crime charged. This is the nature of the plea of nolo contendere and is why the trial judge here did not personally question defendant to determine whether there was a factual basis for his plea. Amended rule 785.7(3)(d) was not in effect at the time of this plea and the trial judge should not be held to a standard of anticipating future procedural rules promulgated by our Supreme Court. The inquiry by the trial judge as to whether defendant's plea was freely, intelligently, and voluntarily made was sufficient to assure that defendant's rights were safeguarded and was all that was required at the time of this plea.

Even if we were to accept the decisional validity of *Curry* we would not disturb this plea. The record of the plea proceeding in the instant case is more than sufficient to satisfy the requirements of *Curry*. The record shows that defendant's attorney explained the charge of second-degree murder to the defendant and that they discussed his plea thereto. The trial judge also explained second-degree murder to defendant after reading the infor-

mation to him. Defendant stated that he understood the charge and that he had no questions about what the crime of second-degree murder was. After defendant was informed of and waived his rights the following occurred:

"*The Court:* All right. This is your attorney here that's with you?

"*Defendant:* Yes.

"*The Court:* And was he appointed to represent you, or did you hire him?

"*Defendant:* Appointed.

"*The Court:* He was appointed. All right. Now, how do you plead to count two of this information, second degree murder; do you plead nolo contendere, or no contest, or do you wish to stand silent or mute, in which case I will enter a plea of not guilty for you, or do you wish to plead not guilty?

"*Defendant:* I will plead no contest.

"*The Court:* All right. Then do I understand that you are telling me that you do not wish to contest the fact that the People could present evidence that you intentionally and with malice killed, murdered Lenny Sakovski on or about July the 13th, 1972, at 379 Territorial Street in the City of Benton Harbor, but you did it without premeditation?

"*Defendant:* Yes, sir.

"*The Court:* You don't wish to contest this? Pardon?

"*Defendant:* Yes, sir.

"*The Court:* Pardon?

"*Defendant:* Yes, sir.

"*The Court:* 'Yes, sir', you do?

"*Defendant:* I do not wish to contest it.

"*The Court:* You do not wish to contest it. All right. Now, let me ask you some other questions. One, have the police, the prosecutor, your own attorney or anybody else promised you anything such as light punishment or no punishment at all for pleading nole *[sic]* contendere or no contest?

"*Defendant:* No, sir, they never promised me anything.

"*The Court:* You understand that nolo contendere and no contest means the same thing?

"*Defendant:* Yes, sir."

Given the special nature of a plea of nolo contendere, this was clearly sufficient to satisfy the "investigation" requirement of *Curry.* Defendant clearly understood what constituted second-degree murder and stated that he did not wish to contest the fact that the prosecution could present evidence which would show that he was in fact guilty of such offense.

Defendant's second and final contention is that his plea of nolo contendere to second-degree murder was coerced by the effect of being bound over for trial on the charge of first-degree murder. Defendant claims there were no facts supporting the charge of first-degree murder, and that by charging defendant with first-degree murder, the prosecutor coerced defendant to plead nolo contendere to second-degree murder.

Defendant's contention is without merit. A thorough examination of the evidence presented in the course of the preliminary examination reveals that there was in fact sufficient evidence upon which the district court could base its decision to bind defendant over for trial on the first-degree murder charge.

For the foregoing reasons, we affirm defendant's conviction.

All concurred.

ROBERT J. ELIASSEN & SONS v CITY OF LIVONIA

1. ZONING—SUPERINTENDING CONTROL—ZONING APPEALS BOARDS—EVIDENCE

A circuit court is confined to the record below and additional evidence cannot be offered to support a plaintiff's request for superintending control to compel waiver use approval of property where, in a zoning matter, waiver use approval was sought from a municipal planning commission, and denied, and the planning commission's findings were adopted by the city council; the circuit court may not consider evidence not heard by a zoning appeals board (MCLA 125.585).

2. APPEAL AND ERROR—ZONING—GRANTS OF WAIVER USE—PROPER RESULTS.

The Court of Appeals does not reverse where independent grounds exist to support the result reached by the trial court even though the trial court did not identify and apply the appropriate test for granting a waiver use in a zoning case.

3. ZONING—CONSTITUTIONAL LAW—APPEAL AND ERROR—ADMINISTRATIVE LAW—EVIDENCE—SCOPE OF REVIEW.

The Constitution requires in a zoning case that the Court of Appeals determine whether the action of a planning commission and a city council were authorized by law and whether their action was supported by competent, material and substantial evidence on the whole record (Const 1963, art 6, § 28).

4. ZONING—WAIVER USE—BURDEN OF PROOF—EVIDENCE.

The denial of a plaintiff's application for waiver use of property in a zoning case was proper because where plaintiff failed to carry the burden of proof to support his application, and where plaintiff failed to adduce affirmative evidence of compliance, the planning commission and city council were bound to deny

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REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur 2d, Courts § 111 *et seq.*
Superintending control over inferior tribunals. 112 ALR 1351.
[1–3] 58 Am Jur, Zoning § 229 *et seq.*
[4] 58 Am Jur, Zoning § 223.

the application according to the mandate of the ordinance (Livonia City Ordinance § 11.03).

Appeal from Wayne, Roland L. Olzark, J. Submitted Division 1 June 27, 1974, at Detroit. (Docket No. 17051.) Decided September 24, 1974.

Complaint by Robert J. Eliassen & Sons, a partnership, against the City of Livonia, the City Planning Commission, and the City Council, seeking an order of superintending control compelling approval of waiver use of property for a restaurant. Judgment for defendants. Plaintiff appeals. Affirmed.

Cross, Wrock, Miller & Vieson (by *Jonathan P. Macks),* for plaintiff.

Harry C. Tatigian, City Attorney, for defendants.

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

BASHARA, P. J. Plaintiff co-partnership appeals the denial of an order of superintending control compelling waiver use approval for plaintiff's proposed restaurant. On appeal, we affirm.

Plaintiff is a land contract vendee of a parcel of land zoned "C-2", permitting a variety of commercial uses. Restaurants are not included in that classification; they are permitted only if specifically recommended by the Planning Commission and approved by the Council, upon a showing of compliance with Livonia City Ordinance § 11.03.

Plaintiff filed a petition for waiver use approval indicating the ordinance requirements had been

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

met. At a meeting of the Planning Commission, plaintiff's petition was presented and certain questions were asked. Thereafter, the commission voted to deny approval, finding that the proposed use would adversely affect the residential character of the surrounding area, generate traffic problems, and possibly create a nuisance.

Plaintiff appealed to the City Council. Its presentation consisted of a description of commercial uses and blight in the surrounding area, followed by slides of other Livonia restaurants which demonstrated their parking and landscaping deficiencies. After brief comments and questions, the council voted to deny the proposed use, adopting the Planning Commission's findings.

Plaintiff sought an order of superintending control, or, in the alternative, a writ of mandamus compelling the waiver use approval of the property as a restaurant site. After taking testimony, the trial court recognized it was confined to the record below. *Quigley v Dexter Twp,* 390 Mich 707; 213 NW2d 166 (1973); *Lorland Civic Association v DiMatteo,* 10 Mich App 129; 157 NW2d 1 (1968). MCLA 125.585; MSA 5.2935. Additional evidence cannot be offered to support plaintiff's requested order for superintending control:

> " * * * However, while parties may enter into a stipulation concerning the record on appeal, they may not, by agreement or silence, add to the record something not considered by the trier of fact or change the nature of the inquiry on appeal. The circuit court can no more consider evidence not heard by the zoning appeals board than this Court could allow appealing parties to add evidence not considered by the trier of fact to a trial court record on appeal, whether in a civil or criminal case, and whether for support or opposition to a finding of fact." *Lorland Civic Association v DiMatteo, supra,* 137–138.

Plaintiff claims that the trial court misconstrued the test required for waiver use. The court's opinion referred to the test to be applied in seeking a variance, *i.e.,* showing of hardship. Upon being informed of the mistake, the court simply substituted the words "waiver use" for "variance". Clearly, the court did not identify and apply the appropriate test for granting a waiver use. *Mitchell v Grewal,* 338 Mich 81, 88; 61 NW2d 3 (1953). *Farah v Sachs,* 10 Mich App 198; 157 NW2d 9 (1968).

However, where independent grounds exist to support the result reached by the trial court, we do not reverse. *Fessenden v Roadway Express,* 46 Mich App 276; 208 NW2d 78 (1973); *Buckeye Union Fire Insurance Co v Detroit Edison Co,* 38 Mich App 325; 196 NW2d 316 (1972). The constitution requires us to determine whether the actions of the Planning Commission and the City Council were authorized by law, and whether their action was supported by competent, material, and substantial evidence on the whole record. *Lorland, supra,* 135; *Puritan-Greenfield Improvement Association v Leo,* 7 Mich App 659, 665; 153 NW2d 162 (1967). Const 1963, art 6, § 28. We turn to plaintiff's claim that the decision was arbitrary, capricious and unreasonable because no evidence supported the denial. The ordinance required compliance with conditions described therein. Under this ordinance the burden is on the petitioner to show compliance therewith. Unless plaintiff adduced affirmative evidence of compliance, the Planning Commission and the Council were bound to deny the application according to the mandate of the ordinance. *Tireman-Joy-Chicago Improvement Association v Chernick,* 361 Mich 211; 105 NW2d 57 (1960).

Plaintiff failed to carry the burden of proof.

Mobil Oil Corp v City of Clawson, 36 Mich App 46; 193 NW2d 346 (1971); *Lafayette Market & Sales Co v Detroit,* 43 Mich App 129, 133; 203 NW2d 745 (1972). Here, the reasons for initial denial of the permit can be linked to the Planning Commission's perception of deficiencies in compliance. Upon appeal to the council, plaintiff had every opportunity to rebut those findings. The minutes reflect no attempt at rebuttal, nor proofs that plaintiff's assertion in the application for waiver use had any greater stature than mere allegations. No proof was offered to show traffic problems would be avoided, nor that the neighborhood's residential character would not be affected. Instead, plaintiff concentrated on disadvantages of other restaurants. On this record, we must conclude that the denial of plaintiff's application for waiver use was proper, since plaintiff failed to produce sufficient evidence.

Affirmed, no costs, a public question being involved.

All concurred.

DOYLE VACUUM CLEANER COMPANY v F. J. SILLER & COMPANY

1. EVIDENCE—REBUTTAL—SCOPE.

A plaintiff's rebuttal evidence is limited to testimony which tends to contradict evidence already introduced by the defendant, and evidence which tended to substantiate a plaintiff's case was properly excluded on rebuttal.

2. EVIDENCE—REBUTTAL—ADMISSIBILITY—JUDICIAL DISCRETION.

The admission of rebuttal evidence rests in the sound discretion of the court.

3. TRIAL—COMMENTS BY COURT—PREJUDICE—FAIR TRIAL—APPEAL AND ERROR.

Comments made by the trial judge, asserted to have been prejudicial, do not warrant reversal and a new trial where a review of the record as a whole leads to a finding that the appellant had a fair trial.

4. DAMAGES—INSTRUCTIONS TO JURY—THIRD PARTY ACTS—HARMLESS ERROR.

Failure to give a requested instruction as to the intervening acts of third parties in a case where a plaintiff's building was alleged to have been damaged by defendants while installing a sewer and may have been further damaged during the course of repair, was at the most harmless error where the jury reached a verdict of no cause of action, thus finding no liability and not reaching the question of damages, and the verdict would not have been different had the instruction been given, and where the instructions given adequately informed the jury of the issues, the parties' positions, and the applicable law.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial §§ 115, 116.
29 Am Jur 2d, Evidence §§ 250, 269.
[3] 53 Am Jur, Trial § 540.
[4] 53 Am Jur, Trial § 508 *et seq.*
[5, 6] 22 Am Jur 2d, Damages § 172 *et seq.*
[7] 58 Am Jur 2d, New Trial §§ 212, 213.
[8] 53 Am Jur, Trial § 181.

5. DAMAGES—LOSS OF PROFITS—REASONABLE CERTAINTY.

Damages for loss of profits may be recovered when those damages are proved with a reasonable degree of certainty.

6. DAMAGES—SPECULATIVE DAMAGES—LOSS OF PROFITS.

Claimed damages for loss of profits were too speculative where the products for which the lost profits were alleged were not in production, nor had any been marketed at the time a plaintiff's factory was damaged.

7. NEW TRIAL—JUDICIAL DISCRETION.

The grant or denial of a new trial lies within the discretion of the trial judge.

8. APPEAL AND ERROR—VERDICT—WEIGHT OF EVIDENCE—JURY QUESTION.

The test for granting appellate relief because a jury verdict is contrary to law and against the great weight of the evidence is that the verdict is against the overwhelming weight of the evidence, and this test was not met where the record shows that, at most, the evidence presented was a question of fact for the jury to decide.

Appeal from Kent, John H. Vander Wal, J. Submitted Division 3 June 4, 1974, at Grand Rapids. (Docket No. 17075.) Decided September 25, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Doyle Vacuum Cleaner Company against F. J. Siller & Company and the City of Grand Rapids for negligence. Judgment for defendants. Plaintiff appeals. Affirmed.

Warner, Norcross & Judd (by *Harold S. Sawyer* and *Robert H. Skilton),* for plaintiff.

Allaben, Massie, Vander Weyden & Timmer, for defendant F. J. Siller & Company.

George A. Weible, City Attorney, and *G. Douglas Walton,* Deputy City Attorney, for defendant City of Grand Rapids.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

HOLBROOK, P. J. Plaintiff, Doyle Vacuum Cleaner Company, brought an action against defendants herein claiming that they were responsible for damage to plaintiff's building. In December 1972 a ten-day jury trial was had. The jury returned a verdict of no cause of action in favor of defendants. Thereafter, plaintiff moved for a new trial claiming errors had occurred in the instructions, the disallowance of certain rebuttal testimony, and by comments of the trial court which were prejudicial to plaintiff, and that the verdict was contrary to the great weight of the evidence. By written opinion, the trial court denied plaintiff's motion.

In late 1967 or early 1968, defendant City of Grand Rapids determined a need for a sanitary relief sewer to run in Stevens Street from Ionia Avenue to the west. Plans for such sewer were prepared by the city and, pursuant to requirements of the Grand Rapids City Charter and City Code, the bid was let to the lowest (and only) bidder. In April 1968 a contract was made between defendant city and defendant F. J. Siller to construct the sewer line.

The route of the sewer line was along the north side of Stevens Street, within a few feet of the south wall of plaintiff's building. Plaintiff is in the business of manufacturing commercial and industrial vacuum cleaners. Its factory building is approximately 262 feet in length and occupies a substantial portion of the block along Stevens Street between Wallen Avenue and Phillips Avenue. The building is one structure; however, it is

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

made of separate structures built at different times.

In the original plans, it was designated by the city that the contractor should use the "tight sheeting" method in supporting walls of the trench to be dug. The sewer pipe itself was some 36 inches in width. In order to lay that pipe, the contractor dug trenches approximately 5 feet in width and 14 feet in depth. For various reasons, the method of digging a trench was temporarily abandoned in favor of a tunneling method. The tunneling method proved inadequate and the sewer line was finished by use of the trench and tight sheeting method.

It appears that as the construction of the sewer line approached the southwestern portion of the Doyle building, Mr. Dewey I. Doyle, Sr., chief executive of the corporation, became concerned as to whether the construction would cause damage to the building and contacted a Grand Rapids engineering firm for advice. Prior to the time that the trench passed adjacent to plaintiff's building and during that time, elevations were taken by the engineering firm. The firm advised the use of steel sheeting rather than wooden planks in support of the walls of the trench. In the alternative, they proposed the use of the soil stabilization method, which is the injection of certain chemicals into the soil which cause soil particles to bind together.

By complaint, filed January 27, 1971, plaintiff alleged that defendant had been negligent in the construction of the sewer line and that as a result thereof plaintiff's building had subsided, cracked, settled, and sustained permanent structural damage. Damages claimed in the complaint were for repair and rebuilding of a wall, the loss of employee efficiency, cost of time of executive manage-

ment and supervisory personnel, loss in value of plaintiff's building, and curtailment of manufacturing operations. By amended complaint, filed in May 1972, plaintiff asserted that it was a third-party beneficiary under the contract entered into between the defendant city and the defendant Siller. This was based upon provisions in the contract that the contractor should: safely guard adjacent property from damage; replace or make good any damage, loss or injury; take precaution against injuries to persons or damaged property; and restore, at its own expense, any public or private property damaged or injured as a result of any act or omission on its part, its employees or agents. Plaintiff alleged breach of these provisions.

Plaintiff has appealed and set out a number of issues, which we consider in the following sequence.

I

Plaintiff asserts that the trial court committed reversible error by excluding certain evidence which plaintiff sought to introduce in rebuttal.

Mr. Rupert McGinn was an assistant city engineer involved with the construction which led to this law suit. Plaintiff has asserted that during the two-and-a-half-week trial, Mr. McGinn was with counsel for the city and was acting in an advisory capacity and that, as a function thereof, plaintiff's counsel assumed that he was to testify during the city's case in chief. When he did not, plaintiff called Mr. McGinn as a rebuttal witness. The court, over strenuous objection of both defendants, allowed this, but limited the rebuttal to testimony which tended to contradict evidence already introduced by the defense, rather than testimony which would merely confirm or corroborate evidence of-

fered by plaintiff in its case in chief. Plaintiff asserts that reversible error was committed when plaintiff was prohibited from introducing evidence which it says would have tended to contradict evidence of the defendants. Plaintiff says that certain testimony of Mr. McGinn would have contradicted testimony by Mr. F. J. Siller as to the length of tunneling. Apparently dissatisfied with the elicited testimony of Mr. McGinn, plaintiff attempted to introduce a city record which included information as to time consumed in the project and total figures of the footage which had been completed. Plaintiff asserted that this record would have shown the length of pipe that had been tunneled and contradict the testimony of Mr. Siller. The court excluded this record as being improper rebuttal.

Plaintiff had originally introduced evidence of the tunneling operation in its case in chief. Certainly, plaintiff had the opportunity to submit the business record at that time. Thus, it is readily apparent that the attempted admission of this record in rebuttal was improper in that it tended to substantiate plaintiff's case. See McCormick, Evidence (2d ed), § 4, p 6.

The second ruling of which plaintiff complains is the disallowance of certain testimony of Mr. McGinn as to a conversation had with members of the Doyle family. Presumably, the probity of this conversation would have related to knowledge by defendant city of its duty towards plaintiff and as a preliminary fact in the proof of negligence. Plaintiff says the testimony would have contradicted the city's testimony that the plans were adequate. The following colloquy occurred:

"*Q. [Mr. Skilton, plaintiff's attorney]:* In fact, didn't

you tell the Doyles you were going to find a construction method that would be safe for the building?

"*A. [Mr. McGinn]:* The method that we were using was a suitable method to protect the building, right from the beginning as it was stipulated in the contract.

"*Q.* Did you tell the Doyles that you were concerned with preventing damage to the building?

"*A.* Again, we wanted to make sure that no damage was done to public or private property.

"*Q.* Did you tell the Doyles that?

"*A.* Yes.

"*Q.* Did you tell them you would find a method of construction that would insure it wouldn't cause damage to the building?

"*Mr. Massie [defense attorney]:* I am going to object to this. This is repetitious. He has already testified to the conversations."

In *Arnold v Ellis,* 5 Mich App 101, 114; 145 NW2d 822, 829 (1966), it was held that the admission of rebuttal evidence rests in the sound discretion of the court. See also *Barrows v Grand Rapids Real Estate Board,* 51 Mich App 75, 97, 214 NW2d 532, 543–544 (1974), and cases cited therein. The record discloses that the trial court actually showed liberality in allowing the proffered testimony. No abuse of discretion is present.

II

Plaintiff asserts that the trial court made two improper comments which greatly prejudiced its case.

Plaintiff sought the introduction of certain notes made by Mr. McGinn. These notes were made during the course of construction of the sewer and related to the propriety of the use of the chemical stabilization method. The court said: "Let it go in. It won't make any difference anyway. I have ruled

he can read it." Some moments later, the trial court said: "This isn't rebuttal. This is rebuttal to Mr. Doyle, part of the plaintiff's case. I will sustain the objection." Plaintiff asserts that this latter statement was unnecessary and erroneous.

A fair reading of this transcript, which runs some 1,008 pages, reveals that these two statements taken out of context given an unwarranted implication of prejudice to plaintiff.

As to this assertion of error, the Supreme Court has said:

> "The test to determine error in this respect is not whether there occurred certain unfortunate incidents during the trial. Few trials are without such instances. Our job is to determine whether or not the parties had a fair trial. We cannot screen every word dropped by the harried trial judge; for in spite of his robe and respectability, he is still a human being, subject to the usual human frailties, including sometimes an unintended expression of emotion. Thus, so long as we continue to have men on our benches, and not computing machines, we must overlook occasional remarks such as the ones expressed here, else the wheels of justice would grind to a permanent halt." *Patrick v Carrier-Stevens Co,* 358 Mich 94, 97; 99 NW2d 518, 520 (1959).

We find that plaintiff had a fair trial; that in viewing the entire trial, the comments were not so prejudicial as to warrant reversal and a new trial.

III

Next, plaintiff asserts that reversible error was committed when the trial court failed to give plaintiff's requested instruction on intervening negligence of the third parties.

After construction of the sewer was completed

by defendant Siller, plaintiff hired a Grand Rapids construction firm to repair its building. In coordination with the work of the construction company, the previously retained engineering firm assisted in the repair work. During the course of this repair, certain "bow-string trusses" were cracked. These trusses were the supporting structure of the roof of that certain portion of plaintiff's building which was being repaired. In its brief, plaintiff has said that it is evident that the jury must have by necessity found, before returning the verdict of no cause of action, that the cracking of the bow-string trusses was the sole responsibility of the plaintiff because of the negligence of the engineering firm and the construction company.

As the actions of the third parties did not occur until after the work of the defendant Siller had been completed, we find it difficult to understand how the intervening acts of these third parties could properly relate to the question of causation and liability. Evidence was presented at trial of damage precedent thereto and the cause of action per se was based upon actions of the defendants prior to any possible negligence of third parties. While the third-party actions could have conceivably exacerbated the damage, such actions do not properly relate to the primary issue of causation. A proper instruction proffered to the court as to the intervening acts of third parties on the issue of damages, under this record, would seem to have been merited. However, as the jury reached a verdict of no cause of action, it is apparent that they found no liability, not reaching the question of damages. As such, the failure to give an instruction on the intervening acts of third parties, at most, was harmless error as the verdict would not have been different had the instruction been given. *Cf. Knoper v Burton,* 383 Mich 62; 173 NW2d 202

(1970). Moreover, we must view the instructions as a whole. *Reynolds v Majewski,* 351 Mich 492; 88 NW2d 405 (1958); *Cooper v Tranter Mfg, Inc,* 4 Mich App 71; 143 NW2d 772 (1966). The instructions in the instant case adequately informed the jury of the issues, the parties' respective positions, and the applicable law.

IV

Plaintiff asserts that the trial court erred in denying admission of testimony as to loss of future profits.

Plaintiff presented testimony as to three new vacuum cleaner models whose introduction was allegedly delayed because of the damage to the building. Plaintiff thereafter attempted to give testimony of an accountant as to the amount of damages suffered because of the inability to introduce the new models. The trial court refused to allow evidence of damages for loss of profits resulting from lost sales of the new models as being too speculative.

"There may be a recovery for loss of profits shown to be the natural and probable consequence of the act or omission complained of, provided the amount thereof is shown with sufficient certainty." 25 CJS, Damages, § 41, p 734. Michigan follows what has been described as the "reasonable certainty" test, *i.e.,* damages for loss of profits may be recovered where those damages are proved with a reasonable degree of certainty. See *Valley Die Cast Corp v A C W, Inc,* 25 Mich App 321, 334–336; 181 NW2d 303, 310 (1970), and *H M Seldon Co v Carson,* 29 Mich App 643, 649; 185 NW2d 842, 845 (1971).

The products for which loss of profits were al-

leged were not in production, nor had any been marketed. The resulting claimed damage was speculative. *Cf. Fera v Village Plaza, Inc,* 52 Mich App 532; 218 NW2d 155 (1974).

V

Lastly, plaintiff asserts that the jury verdict was contrary to the great weight of evidence, and, effectively, the trial court's denial of plaintiff's motion for a new trial was erroneous.

The grant or denial of a new trial lies within the discretion of the trial judge. *Termaat v Bohn Aluminum & Brass Co,* 362 Mich 598, 602; 107 NW2d 783, 785 (1961); *Carpenter v Cleveland,* 32 Mich App 213, 215; 188 NW2d 248, 250 (1971).

> "The test for granting appellate relief because a jury verdict is contrary to law and against the great weight of the evidence is that the verdict is against the overwhelming weight of the evidence. *Lake Oakland Heights Park Association v Township of Waterford,* 6 Mich App 29; 148 NW2d 248 (1967). The record before us fails to meet that test." *Newton v Huddle,* 22 Mich App 314, 316; 177 NW2d 222, 224 (1970).

Likewise, the record before us does not meet the test.

The greater portion of plaintiff's presentation revolved around proof of damages. Proof of causation and liability, to no small extent, was based upon the evidence of the engineering firm's elevations. Much of this evidence was put into question as to its reliability by defendants in that it showed that certain errors had been made in the process of taking elevations and that a number of changes had been made by the engineering firm at its offices at a later time. By implication, it was also shown that the engineering firm had a possible

interest in the case in that there was an assertion of negligence against it for its part in the repair of the building. Further, defendants introduced evidence of an earthquake tremor which occurred during the period of construction. Defendants introduced testimony as to the number of large punch presses owned and operated by the plaintiff. There was also evidence which indicated the settlement occurred and existed before the construction began and that the weight of the building itself could have caused the settlement. Expert testimony, introduced by defendants, stated that the method chosen was commonly accepted and proper, and that the use of steel sheeting, as proposed by plaintiff, would certainly have caused damage due to the greater force necessary to be used with vibrations resulting. There was also testimony showing that the contractor had used soil stabilization near or under a portion of the building but was not allowed by the plaintiff to do so where the damaged portion was located.

Without further discussion of the extensive proofs, we conclude that the record shows that, at most, the evidence presented was a question of fact for the jury to decide. Under these facts, we cannot say that the verdict was against the overwhelming weight of the evidence nor, consequently, that the trial court's denial of the motion for a new trial was erroneous.

Affirmed. Costs to defendants.

All concurred.

PEOPLE v GALLAGHER

1. SEARCHES AND SEIZURES—SEARCH WITHOUT WARRANT—CONSENT.

A search of a defendant's premises, made without a warrant, is proper where the defendant voluntarily has consented to the search; the people are not required to show that a defendant knew or was told that he did not have to consent to a search.

2. SEARCHES AND SEIZURES—SEARCH WITHOUT WARRANT—CONSENT—SEARCH AFTER ARREST.

A limited search made without a warrant after a defendant had been placed under arrest, which consisted mainly of photographing and examining evidence already seen, was proper where an initial search of the defendant's premises, voluntarily consented to by the defendant, uncovered evidence which provided probable cause to arrest him and to seize that evidence.

3. CRIMINAL LAW—STATUTES—PROBATION—RESTITUTION—JUDICIAL DISCRETION—STATUTES.

Payment of restitution as a condition of probation is authorized by statute, and the amount and manner of payment is a matter for the judgment of the sentencing judge (MCLA 771.3).

4. CRIMINAL LAW—PROBATION—RESTITUTION—CONSTITUTIONAL LAW—JUDICIAL DISCRETION—STATUTES.

A requirement that a defendant pay restitution as a condition of probation in the amount of the value of a stolen car, the cowl section of which was found in the defendant's collision shop, although the cowl section's value was less than that of the entire car, is not in violation of the probation statute nor of any constitutional right of the defendant, and is not an abuse of the judge's discretion (MCLA 771.3).

Appeal from Wayne, John R. Kirwan, J. Submitted Division 1 June 10, 1974, at Detroit. (Docket

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 5 Am Jur 2d, Arrest §§ 26, 28.

[3, 4] 21 Am Jur 2d, Criminal Law § 565.

No. 17188.) Decided September 25, 1974. Leave to appeal denied, 393 Mich —.

Raymond Gallagher was convicted of receiving stolen property over the value of $100. Defendant appeals. Affirmed and remanded for execution of sentence.

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.

Towner, Rosin, York & McNamara, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ELLIOTT, J. Defendant owns and operates an auto-collision repair shop in Lincoln Park, Michigan. He would buy, fix and sell wrecked cars as a part of that business.

On September 30, 1971, a doctor's 1971 green Cadillac sedan was stolen from a hospital parking lot in Lincoln Park. The next day a Lincoln Park detective got an anonymous telephone tip that two stolen Cadillacs were at defendant's shop. He notified the lieutenant and together they went to investigate. The lieutenant was formerly defendant's brother-in-law, but their relationship remained cordial.

The detective and the lieutenant entered defendant's shop about three o'clock by way of one of the

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

large, open, overhead doors. Other persons were present. Defendant greeted them and they told him about the telephone report that he had two stolen cars. They asked: "Do you mind if we look around?" He replied that he did not mind.

They saw a 1971 Cadillac cowl without a vehicle identification plate. The "cowl" is the front windshield, distributor, steering wheel, dashboard, foot pedals and firewall. It had been cut from a chassis with a torch and painted yellow, but the original green was not fully covered. It was in excellent condition and had only 3392 miles on the odometer. The police asked defendant where the cowl came from and where the plate for it was. Defendant said it came from a yellow Cadillac convertible chassis nearby and went to the office for the plate. The chassis he indicated was rusting and fire-damaged with very worn tires. Its cowl had been cut off by a saw. The plate produced by defendant was inconsistent with the cowl observed, so the detective telephoned the National Auto Theft Bureau for information and an agent said he would come to the shop. A police photographer was also called.

At this point, defendant was told that he was under arrest. He was not handcuffed. He remained at his shop and was cooperative. He drank a beer provided by one of his friends while they waited for the Bureau's agent and to lock up the shop. Soon after defendant was advised of his arrest, a policeman found an identification plate for the cowl under a rag. The photographer came and took pictures of the cowl and of the chassis which were too big and heavy to remove without special equipment. The Theft Bureau agent found that the plate, discovered under a rag, identified the cowl as belonging to the green hardtop Cadillac stolen on the previous day. He also learned that the plate

produced by defendant actually came from the yellow Cadillac convertible.

On the way to jail, defendant was permitted to stop at his home and obtain his title to the yellow convertible. He was released on bail two hours later. The next morning, the mileage on the cowl's odometer had been raised to more than 10,000 by the time police arrived with a search warrant at defendant's shop to remove the cowl.

The jury must have disbelieved defendant's efforts to prove that he had purchased the cowl from a parts dealer near Chicago. Defendant was convicted of receiving stolen property, over $100, MCLA 750.535; MSA 28.803.

He was placed on five years probation with five months jail-time and with a condition requiring him to pay restitution of $6,277.84, which is what an insurer had paid for the car theft loss. There was testimony that the cowl was worth $400 to $1,500.

We have considered the totality of the circumstances, and we hold that the search was with voluntary consent of the defendant. There is no requirement that the people prove that defendant knew or was told that he did not have to consent. *Schneckloth v Bustamonte,* 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973). His consent was not coerced, although probably given in the hope that suspicions would be allayed by an unproductive search. *Schneckloth, supra,* reserved the question of whether a defendant must be informed of the right to refuse consent if he is arrested. It was held in *United States v Heimforth,* 493 F2d 970 (CA 9, 1974), *cert den,* 416 US 908; 94 S Ct 1615; 40 L Ed 2d 113 (1974), that a search is valid if consent is voluntarily given after an arrest. In the case at hand, defendant voluntarily consented to the

search before his arrest. The search uncovered evidence which provided probable cause to arrest him and to seize the cowl and chassis. We think the limited search that followed his arrest continued to be valid by reason of the consent that he could have revoked but did not revoke.

If the police had waited until they had finished the search before arresting defendant there would be no problem. If a voluntary consent search must be terminated by the police as soon as they arrest the defendant, that will discourage prompt arrest. We see no purpose in that. Defense counsel argues that when defendant was arrested the search had to stop, the shop be placed under guard, and a warrant obtained. Such an effort is not required of police in these circumstances. The police remained after arrest mainly to photograph and examine evidence already seen. They did not search defendant's office or any area that he had not consented to be searched.

The search warrant obtained on the next day would not validate a prior illegal search, but the earlier search was not illegal. No evidence seized under the warrant was presented at the trial, so we need not consider the sufficiency of the affidavit.

RESTITUTION

Defendant was convicted of receiving the cowl worth at most $1,500 from a stolen car worth at least $6,277.84. He was required to make restitution of $6,277.84. He claims the judge could not do that and cites *People v Becker,* 349 Mich 476, 486; 84 NW2d 833 (1957), to wit:

"[E]ven where imposition of the restitution requirement is held to be proper under the circumstances of

the particular case before the court, it can be imposed only as to loss caused by the very offense for which defendant was tried and convicted."

In *Becker,* four of the eight justices concurred only in the result and the language relied on by defendant was unnecessary. Mr. Becker, an uninsured teen, denied fault, and only admitted illegally leaving the accident scene. If what he said was true, he would not owe the money he was required to pay. That case is very different from ours.

In *People v Nawrocki,* 8 Mich App 225; 154 NW2d 45 (1967), defendant was convicted of uttering and publishing a specific forged check. He was ordered to pay for other forged checks he had passed, as well. The Court of Appeals said our statute authorized such restitution. We agree.

The statute reads in pertinent part:

"The court may impose such other lawful conditions of probation, including restitution in whole or in part to the person or persons injured or defrauded, as the circumstances of the case may require or warrant, or as in its judgment may be meet and proper." MCLA 771.3; MSA 28.1133.

Michigan, therefore, did not choose to follow the Federal approach; see 18 USC 3651 and *United States v Hoffman,* 415 F2d 14 (CA 7, 1969). Statutes similar to ours in other states have been held to permit restitution of the whole loss caused by a course of criminal conduct upon conviction of a crime arising out of that conduct. *People v Dawes,* 132 Ill App 2d 435; 270 NE2d 214 (1971), *aff'd* 52 Ill 2d 121; 284 NE2d 629 (1972), upheld an order for restitution not only to the original complainants against a realtor who pled guilty to obtaining money by means of a confidence game, but also to

those subsequently discovered. *State v Foltz,* 14 Or App 582, 585; 513 P2d 1208, 1210 (1973), held:

"[T]he fact that defendant's conviction is for an attempt to commit theft would not preclude the court from conditioning probation upon restitution of the amount actually taken, even though a larger amount."

Every trial judge accepts plea-agreement convictions to lesser offenses, often "attempts", and hears defendants admit the greater or completed criminal conduct. Crime should not be profitable. An attempt connotes no loss. If a judge cannot require restitution of a loss he knows has occurred, he may decide against probation.

People v Miller, 256 Cal App 2d 348, 356; 64 Cal Rptr 20, 25 (1967), supports our conclusion and said in part:

"Probation is granted in hope of rehabilitating the defendant and must be conditioned on the realities of the situation, without all of the technical limitations determining the scope of the offense of which defendant was convicted."

Nevertheless, restitution and the procedure to determine it should be fair. The amount of restitution or reparation should be reasonable. See ABA Standards for the Administration of Criminal Justice, Probation, § 3.2(b), and Model Penal Code, §§ 301.1 and 301.2; 24 CJS, Criminal Law, § 1571(8), p 475. In Vermont a statute similar to ours adds that the restitution or reparation "shall not exceed an amount the defendant can or will be able to pay". See *State v Benoit,* 131 Vt 631, 635; 313 A2d 387 (1973), which involved restitution of the full amount of welfare fraud. In deciding what is reasonable, the court should be optimistic that probation and the defendant will both work.

If restitution ordered is not paid because the defendant has been unable to pay it, he should not have probation revoked or be imprisoned. The principle involved is the same as that involved in imprisonment for failure to pay a fine that cannot be paid. See *People v Kay,* 36 Cal App 3d 759; 111 Cal Rptr 894 (1973); *Tate v Short,* 401 US 395; 91 S Ct 668; 28 L Ed 2d 130 (1971).

It seems desirable to have the defendant and his lawyer participate in the restitution decision. The matter might be discussed at the time of a plea of guilty. The recommended amount of restitution or reparation and the manner of its payment should be included in the presentence report and disclosed. The court might tell the defendant at the time of conviction that if probation is granted, restitution may be required, and suggest that he and his lawyer propose a plan for restitution to the presentence investigator. In any event, the court could invite comment from defendant about the restitution the court is considering before it is imposed as a part of the sentence.

The amount and manner of payment of reasonable restitution is a matter for the judgment of the sentencing judge, as to him "may be meet and proper".

"The legislatively announced state policy with respect to probation is that it is a matter of grace. MCLA 771.4; MSA 28.1134. The statutory authority of a sentencing judge granting probation is broad, as is his authority to alter and amend the probationary order. MCLA 771.1, 771.2, 771.3; MSA 28.1131, 28.1132, 28.1133. Probation is peculiarly within the province of the sentencing judge, and an appellate court should not interfere in probation matters absent a showing of a violation or abuse of statutory authority or violation of some constitutional right of the defendant." *People v Sattler,* 20 Mich App 665, 669–670; 174 NW2d 605, 607 (1969).

The justice of restitution is deeply rooted in human nature and history. Proverbs, 6:30–31; 4 Blackstone, Commentaries, pp 429–430. Compensation of victims of crime has been enacted in England and is popularly advocated here. Who better to compensate the victims to the extent he or they can do so than the criminal or criminals causing the harm?

The trial judge's requirement that defendant pay the value of the stolen car from which the cowl was found in his collision shop is not in violation of the probation statute nor is it a violation of any constitutional right of the defendant. We do not find it to be an abuse of the judge's discretion.

Conviction affirmed. Remanded for execution of the sentence imposed.

All concurred.

PEOPLE v POTTS

OPINION OF THE COURT

1. WITNESSES—CRIMINAL LAW—ACCOMPLICES—INDORSED WITNESSES—CALLING WITNESSES.

The prosecution is not required to call accomplices, even though indorsed upon the information (MCLA 767.40).

2. CRIMINAL LAW—EVIDENCE—JUDGE'S COMMENTS—ACCURATE REPRESENTATION.

A trial judge, if he elects to comment on the evidence, must take great pains to make sure his comment is at least an accurate representation of the subject; the review should be fair and impartial.

3. ESCAPE—AIDING ESCAPE FROM PRISON—GENERAL INTENT—STATUTES.

A general intent is required by a section of the statute which provides that it shall be a crime for any person to aid or assist another in his escape from any jail or prison; general intent in

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REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur 2d, Indictments and Informations §§ 55, 56, 60.

[2] 53 Am Jur, Trial §§ 78, 587.

Scope and application of rule which permits judge in criminal case to comment on weight or significance of evidence. 95 ALR 785, s. 113 ALR 1308.

[3] 27 Am Jur 2d, Escape, Prison Breaking, and Rescue §§ 3, 5.

[4] 27 Am Jur 2d, Escape, Prison Breaking, and Rescue § 18 *et seq.*

[5] 21 Am Jur 2d, Criminal Law §§ 349–354, 356, 360.

58 Am Jur, Witnesses § 36 *et seq.*

[6] 20 Am Jur 2d, Courts §§ 233–236.

[7] 41 Am Jur 2d, Indictments and Informations § 171 *et seq.*

Power of court to make or permit amendment of indictment. 17 ALR3d 1181.

[8] 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.

[9] 21 Am Jur 2d, Criminal Law § 484 *et seq.*

this context refers to the doing of a voluntary act which in fact aids or assists in the escape of another (MCLA 750.183).

4. ESCAPE—AIDING ESCAPE FROM PRISON—INSTRUCTIONS TO JURY—INTENT—GENERAL INTENT.

Sufficient instructions were given to the jury as to the intent required for conviction of aiding or assisting a prisoner to escape where the court stated that it was sufficient if defendant acted knowingly and intentionally and his act did in fact aid or assist the prisoner in his attempt to escape, and that if the jury found that defendant assaulted the jail turnkey and that the natural and ordinary consequence of his assault would be to assist the prisoner in an attempted escape, the jury could presume that the assault was made with the intent to aid or assist the prisoner's attempt to escape (MCLA 750.183).

5. CRIMINAL LAW—PRIVILEGE—SELF-INCRIMINATION—INSTRUCTIONS TO JURY—REQUESTED INSTRUCTIONS.

It was proper for the trial judge to give the usual charge relating to a defendant who has not taken the stand where he was requested to give the instruction by counsel for the defense and did not give it *sua sponte;* had the court not given the instruction when requested it would have been reversible error.

6. CRIMINAL LAW—PLEA OF GUILTY—CASE PRECEDENT—RETROACTIVITY.

There was no error in accepting a criminal defendant's plea of guilty to a charge of a lesser offense in a supplemental information after an agreement to drop a more serious charge in an earlier information where the plea was accepted before the decision in a case on which defendant relies and that case would seem to be in point except that it is not retroactive.

7. CRIMINAL LAW—REPEATING OFFENDER—SUPPLEMENTAL INFORMATION—STATUTES—POLICE POWER—ADDITIONAL CRIMINAL ACTIVITY.

The statutes providing for prosecution of a repeating offender by supplemental information are constitutional and are not cruel and unusual; the state has a right to protect its citizens from persons who continue to engage in criminal activities, and the statutes are based upon additional particular acts of criminal activity and, thus, are not directed toward the status of being an habitual criminal (MCLA 769.10; 769.13).

8. CRIMINAL LAW—SENTENCING—PRESENTENCE REPORT—PENDING CHARGES.

A sentencing judge is entitled to review a presentence report

giving the defendant's background concerning his antecedents, character and circumstances, and where the judge had knowledge of a pending trial and a pending charge against the defendant in other courts and the defendant admitted that both the trial and the charge were indeed pending, an assertion that the trial judge relied upon improper criteria must fail; the sentence need not be vacated when there is no showing that the trial judge relied upon the pending charges when sentencing.

DISSENT BY T. M. BURNS, J.

9. CRIMINAL LAW—PLEA OF GUILTY—ADDITIONAL CHARGES—COERCION.

A criminal defendant could have been improperly coerced and induced to plead guilty to a supplemental information as a second offender where, after his guilty plea was set aside, the defendant was not only recharged with the original offenses but where the prosecutor also brought additional charges against the defendant in the form of an amended supplemental information; thus, upon remand from his successful appeal, defendant was faced with an additional charge that had never been presented at the original proceedings.

Appeal from Van Buren, David Anderson, Jr., J. Submitted Division 3 June 6, 1974, at Grand Rapids. (Docket No. 17275.) Decided September 25, 1974.

Louis C. Potts was convicted of aiding a prisoner to escape from a county jail and, on his plea of guilty, of being a second offender. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William C. Buhl,* Prosecuting Attorney, and *Richard L. Halpert,* Chief Assistant Prosecutor, for the people.

Francis Zebot, Assistant State Appellate Defender, for defendant.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

HOLBROOK, P. J. On February 3, 1971, the defendant was charged with aiding a prisoner, namely one Weldon Fossey, to escape from the Van Buren County Jail. MCLA 750.183; MSA 28.380. On February 9, the defendant was charged as a second offender in a supplemental information. MCLA 769.10; MSA 28.1082 and MCLA 769.13; MSA 28.1085. Defendant pled guilty to both charges and was sentenced to 7 to 10-1/2 years in prison.

Thereafter, appeal was had. This Court affirmed, 39 Mich App 104; 197 NW2d 139 (1972). However, the Supreme Court, by order, granted leave, vacated the judgment, and remanded to the circuit court for further proceedings "consonant with *People v Jaworski*", 387 Mich 21; 194 NW2d 868 (1972). Upon remand, at arraignment, the defendant stood mute and a plea of not guilty was entered. An amended supplemental information was filed on August 7, 1972, which charged defendant as a fourth felony offender. MCLA 769.12; MSA 28.1084.

On August 9, the people filed a motion to strike the name of Weldon Fossey from the list of witnesses indorsed on the information. The people alleged that Fossey was an accomplice and was outside of the state. The motion was granted and an order in accord was entered striking the name on September 8, 1972.

Trial proceeded on December 6, and defendant was convicted by a jury of aiding an escape. On December 21, another supplemental information was filed which recited that the recent conviction

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

was defendant's second. Defendant pled guilty to this charge and the previous amended supplemental information charging him as a fourth offender was dismissed. Defendant was sentenced to 7 to 10-1/2 years in prison.

Defendant here appeals as of right and sets out a number of issues which will be dealt with in proper order.

I

Defendant asserts that the trial court erred in granting the prosecution's motion to strike the witness Fossey from the information on the basis that there is not an absolute accomplice exception to MCLA 767.40; MSA 28.980, and that under the circumstances of this case the interests of justice would have been served by the production of the witness. Further, defendant asserts that an accomplice that has been voluntarily indorsed cannot be striken solely on the basis of the so-called accomplice exception. The statute provides:

"All informations shall be filed in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining magistrate, by the prosecuting attorney of the county as informant; he shall indorse thereon the names of the witnesses known to him at the time of filing the same. The information shall be subscribed by the prosecuting attorney or in his name by an assistant prosecuting attorney. Names of additional witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine."

It is a settled rule of law that the prosecution is not required to call accomplices, even though indorsed upon the information. See *People v Virgil Brown,* 15 Mich App 600, 603; 167 NW2d 107, 108

(1969), and cases cited therein; and *People v Margaret Jones,* 48 Mich App 334, 339–340; 210 NW2d 396, 398–399 (1973), wherein Judge BRONSON wrote:

"We find no need for the accomplice to be formally charged before the accomplice exception is applicable. *Cf. People v Raider,* 256 Mich 131; 239 NW 387 (1931); *People v Moore,* 29 Mich App 597; 185 NW2d 834 (1971); *People v Peck,* 39 Mich App 150; 197 NW2d 346 (1972)." [See also *People v Threlkeld,* 47 Mich App 691, 696; 209 NW2d 852, 855 (1973).]

and

"After reviewing the cited authorities, we recognize the persuasive appeal of defendant's argument. Due to the duration of controlling precedents we decline defendant's invitation to establish a new rule of law. This argument is more properly addressed to our Supreme Court. See, *e.g., People v Henderson,* 47 Mich App 53; 209 NW2d 326 (1973)."

We agree that defendant's argument is more properly directed to the Supreme Court, rather than our Court. See also *People v Mitchell,* 48 Mich App 361, 363; 210 NW2d 509, 510 (1973); and *People v Irwin,* 47 Mich App 608, 610; 209 NW2d 718, 720 (1973). As an intermediate court we are constrained to follow precedent. As to this issue the precedent is clear, namely, that the prosecution was under no duty to call the witness Fossey, notwithstanding having indorsed him on the information.

II

The defendant next asserts that the trial court erred in its comments on the evidence to the jury in that it failed to point out conflicting prosecution

evidence and misrepresented the defendant's position.

"The people claim that about 2:30 in the afternoon Mr. Vorpagel was taken to the visitors' room by David McGuire, the turnkey; that after visiting with his relatives, Mr. Vorpagel was returned to cell block 9 by Mr. McGuire, and that as Mr. McGuire opened the door to return Mr. Vorpagel to the cell, defendant and Mr. Fossey assaulted and beat Mr. McGuire, rendering him unconscious, and that defendant and Mr. Fossey then went to the visitors' room and escaped through the window. It is the claim of the people that defendant by joining in an assault on the turnkey assisted in rendering the turnkey unconscious and thereby assisted and aided Mr. Fossey in his escape as well as procuring his own escape from the jail.

"The defendant denies his guilt and asserts his innocence. He says that on the day in question he was confined in the jail and that he saw an opportunity to escape from jail and availed himself of that opportunity. He says that he did not aid or assist Mr. Fossey in any way, nor did he intend to aid or assist Mr. Fossey to escape, and that whatever he did was done solely to effect his own escape from jail, and did not in fact assist in Mr. Fossey's escape or his attempt to escape."

If a judge elects to comment on the evidence, "he must take great pains to make sure his comment is at least an accurate representation of the subject". *People v King,* 384 Mich 310, 315; 181 NW2d 916, 918 (1970). The review should be fair and impartial. *People v Wichman,* 15 Mich App 110, 115; 166 NW2d 298, 301 (1968). We find the trial court's comments to be fair, impartial and accurate.

III

The defendant asserts that the instructions as to

the required intent were insufficient. The jury was instructed:

"It is not necessary to show that there was a prior agreement or conspiracy between Mr. Fossey and the defendant, nor is it necessary to show that defendant's acts were done for the express and sole purpose of aiding Mr. Fossey in his attempt to escape.

"It is sufficient if defendant acted knowingly and intentionally, and if his act did in fact aid or assist Mr. Fossey in his attempt to escape.

"In determining intent, you may determine the intent with which an act was done by any evidence in the case which fairly establishes its existence. In the absence of any reasonable explanation to the contrary, a person is considered to intend the natural and ordinary consequences of his act. Thus, in this case, if you find that defendant assaulted David McGuire, and that the natural and ordinary consequences of his assault on McGuire would be to assist Mr. Fossey in an attempted escape, you may presume that the assault was made with the intent to aid or assist Mr. Fossey's attempt to escape."

The statute provides:

"Any person who shall convey into any jail, prison, or other like place of confinement, any disguise or any instrument, tool, weapon or other thing, adapted or useful to aid any prisoner in making his escape, with intent to facilitate the escape of any prisoner there lawfully committed or detained, *or shall by any means whatever, aid or assist any such prisoner in his endeavor to make his escape therefrom,* whether such escape be affected or attempted, or not, and every person who shall forcibly rescue any prisoner, held in custody upon any conviction or charge of an offense, shall be guilty of a felony, * * * ." (Emphasis supplied.) MCLA 750.183, *supra.*

In *People v Vraniak,* 5 Ill 2d 384, 390–391; 125

NE2d 513, 517 (1955), the Illinois Supreme Court was faced with a similar issue. The Court wrote:

"When the rule of the cited cases is applied to the statute under consideration, it is clear that it was the legislative purpose and intent that the crime defined would be committed in any one of three ways: (1) by conveying an instrument into a place of confinement *with the intent* to facilitate a prisoner's escape; (2) by aiding a prisoner to escape or attempt to escape; or (3) by concealing or assisting a prisoner after he has so escaped. Intent is an element of only the first. Since the defendant was here indicted and tried for 'aiding, abetting, and assisting' in an attempted escape, intent was not a material element of the crime and need not have been alleged.

"Next, defendant argues in several different ways that the 'Aiding Escape Statute' is unconstitutional because it punishes only the aider, and not the escapee. It is urged that this creates an arbitrary and unreasonable classification. Although arbitrary and capricious legislation is prohibited, a reasonable classification based upon some natural principle of public policy will be sustained. *People v Gordon,* 274 Ill 462; 113 NE 864 (1916). An equally familiar point of decision is that it is strictly within the province of the legislature to declare what conduct shall or shall not be punished. *People v Nicholson,* 401 Ill 546; 82 NE2d 656 (1948); *People v Hawkinson,* 324 Ill 285; 155 NE 318 (1927). By the statute under which defendant was charged, the legislature saw fit to provide punishment for the person aiding an escape, but not the one aided. When it is considered that the danger of escape is considerably increased by outside intervention or internal collusion by persons other than the prisoner, thus rendering inadequate protective measures which would otherwise be sufficient, we think it only natural and reasonable that the legislature made the classification it did in seeking to combat the increased dangers of escape. There being a substantial rather than a fancied difference between the policy to be subserved in punishing those aiding an escape, as distinguished from those who were aided, we must conclude that the classification is

neither arbitrary, discriminatory nor unreasonable." (Emphasis in original.)

In *State v Cooper,* 113 NJ Super 34, 38; 272 A2d 557, 559 (1971), the defendant had been convicted of aiding and assisting escape. Upon appeal, his conviction was affirmed. The Court wrote:

"NJSA 2A:104-7 provides in part:

" 'Any person who aids or assists a prisoner in any jail * * * to make or attempt to make his escape from any such institution * * * is guilty of a misdemeanor.'

"To be guilty of this provision it is not necessary to show that a defendant actually participated in an escape or that he intended to aid an escape. *The state need not allege or prove a specific intent.*

"In *People v Vraniak,* 5 Ill2d 384; 125 NE2d 513 (1955), *cert den* 349 US 963; 75 S Ct 895; 99 L Ed 1285 (1955), the Court in construing a similar statute held that 'intent was not a material element of the crime and need not have been alleged.' 125 NE2d at 517. In a later *habeas corpus* proceeding, *United States ex rel Vraniak v Randolph,* 261 F2d 234 (CA 7, 1958), *cert den* 359 US 949; 79 S Ct 733; 3 L Ed 2d 681 (1959), the Circuit Court of Appeals agreed with the Illinois Supreme Court's analysis of the statute there involved, * * * ." (Emphasis supplied.)

General intent in this context refers to the doing of a voluntary act which in fact aids or assists the escape of another. Here, the defendant, whether attacking the guard first or later, was doing a voluntary act with what must have been a known, substantial, and unjustifiable risk that another would escape.

We find this section of the statutory crime to demand a general intent and, thus, our finding gives effect to what we perceive the legislative intent to be. See *Aikens v Dept of Conservation,* 387 Mich 495, 499; 198 NW2d 304, 306 (1972);

Magnuson v Kent County Board of Canvassers, 370 Mich 649, 657; 122 NW2d 808, 812 (1963); *Kizer v Livingston County Board of Commissioners,* 38 Mich App 239, 246; 195 NW2d 884, 887 (1972). *Cf. Papachristou v Jacksonville,* 405 US 156, 162; 92 S Ct 839, 843; 31 L Ed 2d 110, 115 (1972).

IV

The defendant next asserts that the trial court committed reversible error by *sua sponte* instructing the jury as to defendant's failure to testify.

In the record the following appears:

"I wish the record also to show that prior to instructions I inquired of counsel for the defendant if he wished me to give the usual charge relating to a defendant who has not taken the stand and testified in his own behalf. And Mr. Smith advised me that he did request that instruction be given, and it was so given.

"Mr. Smith: Thank you, your Honor."

This passage readily reveals that not only did the court not make the instruction *sua sponte,* but it was requested. In light of these facts, had the court not given the instruction, it would have been reversible error. See *People v Moore,* 39 Mich App 329, 333–335; 197 NW2d 533, 535–536 (1972). Thus, there has been no derogation of the mandate of *Griffin v California,* 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

V

Fifthly, the defendant asserts that the addition of the amended supplemental information charging the defendant as a fourth offender improperly coerced and induced defendant to plead guilty to

the supplemental information charging him as a second offender.

In *People v McMiller,* 389 Mich 425; 208 NW2d 451 (1973), the Supreme Court granted leave "to consider the implications of the setting aside of a plea of guilty to a lesser offense and putting the defendant on trial for a higher offense". The Court found that the doctrine of double jeopardy has proper application where the people attempt to retry a defendant for the same offense, and said that:

"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 noncompliance with the guilty plea procedure established by the statute and the court rule.

* * *

"We balance these considerations against the danger that reprosecuting on higher charges those who successfully appeal from plea-based convictions and imposition of sentence based on the higher charge, will cause convicted persons to forego legitimate appeals and thereby encourage a return to practices which the carefully worked out guilty-plea procedures are designed to obviate." 389 Mich 432, 433; 208 NW2d 453.

Pro forma, McMiller would seem in point except that it has been found to be not retroactive. *People v McGreevy,* 52 Mich App 52; 216 NW2d 623 (1974).[1] *McMiller* was decided June 18, 1973. De-

[1] We are mindful of *People v Goins,* 54 Mich App 456; 221 NW2d 187 (1974), in which *People v McGreevy,* 52 Mich App 52; 216 NW2d 623 (1974), was held to be distinguishable and not controlling. We, however, feel that *Goins* is distinguishable on its facts and that the proper determination in this case rests in *McGreevy.*

We note that in *People v McMiller,* 389 Mich 425, 431; 208 NW2d 451, 453 (1973), the Court said:

"[F]or *policy reasons* we forbid adversary procedure to expose a

fendant was convicted on December 6, 1972. Thus, we perceive no reversible error here present.

VI

Next the appellant asserts that the Michigan supplemental information statutes, MCLA 769.10; MSA 28.1082; MCLA 769.13; MSA 28.1085, are unconstitutional as violations of equal protection and double jeopardy, and are cruel and unusual punishment. The statutes in question provide that:

"A person, who after having been convicted within this state of a felony, or an attempt to commit a felony, or, under the laws of any other state, government or country, of a crime which if committed within this state, would be a felony, commits any felony within this state, is punishable upon conviction as follows: If the subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person may be placed on probation or sentenced to imprisonment for a term not more than 1-1/2 times the longest term prescribed for a first conviction of such offense or for any lesser term in the discretion of the court; if the subsequent felony is such that, upon a first conviction the offender might be punished by imprisonment for life then such person may be placed on probation or sentenced to imprisonment for life or for any lesser term in the discretion of the court." MCLA 769.10, *supra.*

"If at any time after conviction and either before or after sentence it shall appear that a person convicted of a felony has previously been convicted of crimes as set

person to conviction for a higher offense when the independent fact finder has chosen to find him guilty of a lesser offense. We express this policy in terms of 'double jeopardy' although strictly speaking this is an extension of the doctrine of *autrefois acquit.*" (Emphasis in original.) We find that, as based upon *policy* considerations, it should be applied prospectively. Moreover, to apply *McMiller* retroactively would have a detrimental effect on the administration of justice, which is one of the criteria in determining retroactivity. See *People v Gaines,* 53 Mich App 443, 450–451; 220 NW2d 76 (1974), and cases cited therein.

forth in any of the 3 foregoing sections, the prosecuting attorney of the county in which such conviction was had, in his discretion, may file a separate or supplemental information in such cause accusing the said person of such previous convictions. Whereupon the court in which such conviction was had shall cause the said person whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information, and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. If he says he is not the same person, or remains silent, the court shall enter a plea of not guilty, and a jury of 12 jurors shall be empanelled from the petit jurors serving at the then or a following term of said court to determine the issues raised by such information and plea. The accused may waive trial by jury in the manner provided by this act. The usual practice in the trial of criminal cases shall be followed in the empanelling of such jury and the trial of said issue and the prosecuting officer and the accused shall each be allowed 5 peremptory challenges. If the accused shall plead guilty to such information or if the jury shall return a verdict of guilty, the court may sentence him to the punishment prescribed in the 3 preceding sections, as the case may be, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated if required. Whenever it shall become known to any warden, or prison, probation, parole, or other peace officer that any person charged with or convicted of a felony has been previously convicted within the meaning of the 3 preceding sections, it shall become his duty forthwith to report the facts to the prosecuting attorney of the county in which such person is charged or was sentenced." MCLA 769.13, *supra.*

In *In re Pardee,* 327 Mich 13, 18; 41 NW2d 466, 468 (1950), the Supreme Court said:

"Petitioner also urged that the information charging him as a third offender violates the Federal and State

Constitutions in that it charged him with an offense for which he had paid with time served on the other 2 charges. Petitioner was sentenced under and by virtue of the habitual criminal act. The constitutionality of such act was upheld in *People v Palm,* 245 Mich 396; 223 NW 67 (1929)."

In *People v Birmingham,* 13 Mich App 402, 407–410; 164 NW2d 561, 563–565 (1968), this writer said:

"We find that under the general rule just stated and under the laws of our state, a prosecuting attorney is required to exercise proper discretion in his duties, and this precludes his acting by reason of caprice or in such a manner as to result in invidious discrimination against persons or groups.

"The defendant cites the cases of *Griffin v Illinois,* 351 US 12; 76 S Ct 585; 100 L Ed 891; 55 ALR2d 1055 (1956); *Cox v Louisiana,* 379 US 536; 85 S Ct 453; 13 L Ed 2d 471 (1965); and *McLaughlin v Florida,* 379 US 184; 85 S Ct 283; 13 L Ed 2d 222 (1964) as authority for the position that the constitutional guarantee of due process and equal protection requires procedures in criminal trials which allow no invidious discrimination. We agree with these cases but fail to find them applicable to the case at hand.

"There have been several cases more directly in point from other jurisdictions that indicate to the Court the constitutionality of the habitual criminal act. In *People v Johnson,* 412 Ill 109, 114; 105 NE2d 766, 768 (1952), it is stated:

" 'Defendant lastly contends that the act violates constitutional requirements of due process and equal protection of the law by leaving it within the discretion of the state's attorney whether to allege the prior convictions in the indictments. He refers to several purported instances of second or third offenders who were not sentenced under the habitual criminal act, and argues that the act illegally delegates to a public official the power to decide which of the repeating offenders shall be subject to the heavier punishment

under the act. We considered a similar contention in *People v Hanke,* 389 Ill 602; 60 NE2d 395 (1945), and found it to be clearly without merit. It need not be further discussed here.'

In *Sanders v Waters,* 199 F2d 317, 318 (CA 10, 1952), it is stated:

" 'Further contention is made that the statute violates the equal protection clause of the Fourteenth Amendment to the Constitution because some defendants with prior convictions are prosecuted under the statute and some are not. The contention is without merit. The statute applies equally and impartially to all persons who are charged under it. The fact that indictments or informations do not always charge a violation of the habitual criminal statute where the accused has had prior felony convictions, does not affect the validity of the statute. *Saunders v Lowry,* 58 F2d 158 (CA 5, 1932).'

In 116 ALR 209, annotation Constitutionality and construction of statute enhancing penalty for second or subsequent offense, p 214, it is stated in part as follows:

" 'The contention that the Kansas statute permitted arbitrary and unreasonable discriminations in its enforcement was also overruled in *Levell v Simpson,* 142 Kan 892; 52 P2d 372 (1935) (appeal dismissed for want of a substantial Federal question in 297 US 695; 56 S Ct 503; 80 L Ed 986 [1936]), rehearing denied in 297 US 728; 56 S Ct 592; 80 L Ed 1011 (1936), and also in *Glover v Simpson,* 144 Kan 153; 58 P2d 73 (1936) (appeal dismissed in 299 US 506; 57 S Ct 34; 81 L Ed 375 [1936]).'

In 58 ALR 20, annotation Constitutionality and construction of statute enhancing penalty for second or subsequent offense, it is stated (p 29) as follows:

" 'Only one case has been found in which a statute of the character considered herein was attacked as a delegation of legislative power to the prosecutor, and in that case the statute was held to be valid. In *People v Mock Don Yuen,* 67 Cal App 597; 227 P 948 (1924), it appeared that the section of the act under consideration, or under which the defendant was prosecuted, provided that, upon the first conviction of the offense of

unlawful possession of forbidden narcotic drugs, the defendant should be deemed guilty of a misdemeanor, and that, "for the second and each subsequent offense of which said person so convicted shall be found guilty, said person shall be deemed guilty of a felony." The contention was that, since the second offense could not be punished as a felony unless the prior conviction was alleged in the indictment or information, then the prosecutor would have it arbitrarily within his discretion to punish the prisoner for a felony or misdemeanor by merely inserting or leaving out the fact of a prior conviction; and that therefore the statute was unconstitutional. The court held that such contention was so patently untenable as to merit no further discussion.'
In *Rockower v Sullivan,* 50 NYS2d 858 (NY Sup Ct, 1944), in the first headnote it states as follows:

" 'Where defendant has been convicted under indictment charging two prior offenses, statutes authorizing district attorney to file an information charging an additional prior offense, and thereby to seek to have defendant sentenced as a fourth offender rather than as a third offender, are not arbitrary or unreasonable, or violative of due process as giving district attorney power to arbitrarily exercise discretion, or a denial of equal protection of the law as discriminating against defendant. Penal Law, §§ 1941–1943; NY Const, art 1, § 6; USCA Const Amends 5, 14.'

"We conclude that the discretion granted the prosecuting attorney, a *quasi*-judicial officer, under the Michigan habitual criminal act is not unconstitutional under the Fourteenth Amendment to the United States Constitution or the Michigan Constitution, 1963, art 1, § 2."

For the assertion that the statutes are cruel and unusual, the defendant has relied on *Robinson v California,* 370 US 660; 82 S Ct 1417; 8 L Ed 2d 758 (1962). This reliance is misplaced. See *People v Hendrick,* 52 Mich App 201, 209; 217 NW2d 112, 116 (1974), wherein Judge T. M. BURNS, as concurred in by this writer, said:

"Thus, the habitual criminal statute merely makes

more severe the punishment of a felon after conviction and does not come within the purview of *Robinson v California, supra.* Cases in virtually all jurisdictions have consistently upheld the constitutionality of such statutes. Defendant's argument is without merit."

See also *Powell v Texas,* 392 US 514, 531–532; 88 S Ct 2145, 2153–2154; 20 L Ed 2d 1254, 1267 (1968).

We here find that the Michigan statutes in question are constitutional and are not cruel and unusual in that the state has a right to protect its citizens from individuals who continue to engage in criminal activities. Moreover, the statutes are based upon additional particular acts of criminal activity and, thus, are not directed toward the status of being an habitual criminal.

VII

Lastly, the defendant asserts that the trial court used improper criteria in sentencing him. The trial court referred to a trial pending in Benton Harbor, Michigan, and a charge of armed robbery pending in South Bend, Indiana. In *People v Grimmett,* 388 Mich 590, 608; 202 NW2d 278, 287 (1972), the Supreme Court said:

"The trial court, of course, has wide latitude in sentencing a defendant. The court may consider a defendant's previous convictions, public records concerning the defendant, or even defendant's admissions to the court. *People v Losinger,* 331 Mich 490; 50 NW2d 137 (1951); *cert den* 343 US 911; 72 S Ct 644; 96 L Ed 1327 (1952)."

Due process requires that a sentence be based upon accurate information. *People v Hildabridle,* 45 Mich App 93, 95; 206 NW2d 216, 217 (1973), wherein Judge R. B. BURNS wrote:

"When imposing sentence a judge may consider alleged criminal conduct which has not resulted in conviction. However, once a defendant has denied such allegations, the sentencing judge may consider such other criminal conduct only if presented with information establishing the validity of the other charges. *People v Zachery Davis,* 41 Mich App 683; 200 NW2d 779 (1972)."

In the present case the defendant responded that both the trial and the charge were indeed pending; that is to say that no denial was made. Therefore, the assertion that the trial court relied upon improper criteria must fail.

A sentencing judge is entitled to review a presentence report giving the defendant's background concerning his antecedents, character and circumstances. *People v LaPine,* 47 Mich App 553, 556; 209 NW2d 726, 727–728 (1973). This writer there wrote:

"Presentence reports have been held to be inaccurate where (1) a conviction was referred to which was later found to be constitutionally infirm, *United States v Tucker,* 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); (2) a trial court referred to and considered pending charges against a defendant in passing sentence. *People v Zachery Davis,* 41 Mich App 683; 200 NW2d 779 (1972); *People v Dorsey,* 45 Mich App 230; 206 NW2d 459 (1973); and (3) other offenses were considered and denied by the defendant without proof that defendant had in fact committed such offenses, *People v Davis, supra; People v Hildabridle,* 45 Mich App 93; 206 NW2d 216 (1973)."

* * *

"Accuracy of information in the presentence report is the test. *United States v Tucker, supra; People v Malkowski,* 385 Mich 244; 188 NW2d 559 (1971); and *People v Zachery Davis, supra.* Where there is no denial of criminal involvement, as contained in the presentence report, and no contention that the report is inaccurate

or unreliable or proof of any other infirmity, the report is subject to inquiry, review and consideration by the sentencing judge."

See, generally, *People v Lee,* 391 Mich 618, 631–639; 218 NW2d 655, 661–665 (1974).

In order to properly designate punishment for an individual, which should indeed be individualized, we feel that the trial judge should have at hand the broadest possible accurate information. In the present case no denial was made of the pending charges, and there is no showing that the trial court relied upon them. Therefore, as no error has been presented, there is no merit in defendant's assertion that the sentence should be vacated.

Affirmed.

R. L. SMITH, J., concurred.

T. M. BURNS, J. *(dissenting).* I cannot agree with my colleagues that the addition of the amended supplemental information charging defendant as a fourth offender did not improperly coerce or induce him to plead guilty to the supplemental information charging him as a second offender.

The majority admits that *"Pro forma, McMiller* would seem in point", but then concludes that the holding in *McMiller* is not to be applied retroactively, citing *People v McGreevy,* 52 Mich App 52; 216 NW2d 623 (1974).

In my opinion, *McGreevy* is distinguishable on its facts and is thus inapplicable. In *McGreevy,* a guilty plea to a lesser offense had been set aside, the defendant was recharged with the greater offense and again pled guilty to the lesser offense. In the instant case, after his guilty plea was set aside, not only was defendant recharged with the

original offense and its corresponding supplemental information, but the prosecutor also brought additional charges against the defendant in the form of an amended supplemental information. Thus, upon remand from his successful appeal, defendant was faced with an additional charge that had never been presented at the original proceedings.

I believe that the holding in *McGreevy* should be confined to its facts. In support of this position, see my opinion in *People v Goins,* 54 Mich App 456; 221 NW2d 187 (1974), in which the Court distinguished *McGreevy* and concluded that *McMiller* applied retroactively to the defendant's case. I would likewise apply *McMiller* here.

I would reverse defendant's conviction on the supplemental information and remand for a new trial.

GEHRKE v JANOWITZ

1. MORTGAGES—FORECLOSURE—POWER OF SALE—NOTICE—PUBLICATION—STATUTES.

A provision in a mortgage that on foreclosure the mortgagee may without notice to any persons take possession and sell the property is directly contrary to the statute requiring publication and posting by way of notice to the mortgagor that the foreclosure is under way and is invalid (MCLA 600.3201, 600.3208).

2. LIBEL AND SLANDER—SLANDER OF TITLE—MALICE—EVIDENCE.

The crucial element of slander of title is malice; whenever a man claims a right or title in himself, in possession or in remainder, it is not enough for the plaintiff to prove that he had no such right, he must also give evidence of express malice.

3. LIBEL AND SLANDER—SLANDER OF TITLE—MORTGAGES—POWER OF SALE—MALICE—SUMMARY JUDGMENT.

Summary judgment for defendant on plaintiffs' damage claim against a builder for slander of title was properly granted where the claim rested on an invalid power of sale in a mortgage on plaintiffs' house, and where the mortgage had been foreclosed, because it was necessary to show real malice on the builder's part to establish a slander of title, and where reasonable men could well differ over whether or not the subject mortgage contained the power of sale within the contemplation of the mortgage statutes, there was no real malice established (MCLA 600.3201, 600.3208).

4. LIBEL AND SLANDER—SLANDER OF TITLE—MALICE—MORTGAGES—FORECLOSURE—NOTICE—STATUTES.

The fact that a mortgagee knew that notice had to be given a

REFERENCES FOR POINTS IN HEADNOTES

[1] 55 Am Jur 2d, Mortgages §§ 637–644.

[2–4] 50 Am Jur 2d, Libel and Slander §§ 556, 557.

Malice as element of action for slander of title. 129 ALR 179.

Recording of instrument purporting to affect title as slander of title. 39 ALR2d 840.

[5] 1 Am Jur 2d, Abuse of Process § 2.

mortgagor that a foreclosure was under way in order for the foreclosure to be valid serves as no basis for finding express malice, the crucial element the mortgagor needs to prove in a slander of title case, where the mortgage foreclosed contained language that notice need not be given (MCLA 600.3201, 600.3208).

5. PROCESS—ABUSE OF PROCESS—INTENTIONS.

A regular use of process with bad intentions is not a malicious abuse of that process.

Appeal from Macomb, Hunter D. Stair, J. Submitted Division 2 May 15, 1974, at Detroit. (Docket No. 17637.) Decided September 25, 1974.

Complaint by Questin M. Gehrke and Susan J. Gehrke against Maurice Janowitz and others for damages for slander of title and for injunctive relief. Summary judgment for plaintiffs in part and for defendants in part. Defendants appeal. Plaintiffs cross-appeal. Affirmed and remanded with instructions.

William A. O'Brien, Jr., for plaintiffs.

Nelson, Gracey, Turner & Turner, for defendants.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

R. L. SMITH, J. On March 14, 1970, defendant Crown Garage Builders & Modernization Co., Inc., entered into a home-improvement contract with plaintiffs Questin and Susan Gehrke under the terms of which Crown was to install certain home improvements to plaintiffs' residence. Plaintiffs were to pay Crown the sum of $7,400 in the

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

following manner, $2,000 upon signing the contract, $2300 upon completion of the rough carpentry, $2300 upon rough inspection, and $800 upon completion.

It is the contention of Crown that on the same date the plaintiffs signed a mortgage to secure payment of the final $800. The plaintiffs insist that they never signed a mortgage and that the signatures purported to be theirs on the mortgage were forgeries. It is the further contention of Crown that they completed their work under the contract and that they are entitled to the final payment of $800 while plaintiffs contend that the work is incomplete.

On December 2, 1970, Crown recorded the alleged mortgage and in January, 1971, commenced foreclosure by advertisement. On March 12, 1971, plaintiffs' counsel wrote to Crown that the alleged mortgage did not contain a valid power of sale and that the signatures thereon were forgeries. Crown thereafter continued with the foreclosure and on April 2, 1971, bid in the property at the sheriff's sale for $939.90.

When summary proceedings were initiated by Crown to obtain possession plaintiffs filed a complaint on October 1, 1971, seeking $10,000 actual damages and $100,000 punitive damages. The complaint alleged a slander of title based upon an allegedly invalid power of sale and forgery. A jury trial was demanded. On May 18, 1973, the trial court granted summary judgment and in a bench opinion found the alleged mortgage did not contain a valid power of sale. The court also found that the foreclosure of the mortgage by advertisement was invalid because of this. The court set aside the sheriff's deed, restrained further summary proceedings to obtain possession, and stated

that the complaint failed to state a cause of action for damages based on the invalid power of sale. The court entered judgment accordingly. The trial court failed to pass on the allegations of forgery. Both parties appeal, Crown claiming that the mortgage did contain a valid power of sale and the plaintiffs claiming that they were denied a trial under their complaint.

The first question presented is whether the trial court erred in finding that there was no valid power of sale in the mortgage. The trial court based its findings on this issue on public policy declaring that "no court would grant the power of sale on the basis of a future mortgage for less than $1000 * * * . This is unfair to the plaintiffs in this case".

The mortgage in question contained the following language:

" * * * then the entire unpaid balance shall immediately become due and payable at the option of the mortgagee and the mortgagee, without notice to any persons may take possession of said property and proceed to grant, bargain and sell, release and convey the said property and appurtenances at public vendue and to execute and deliver to the purchasers at such sale good and sufficient deeds of convenance *[sic]* in law, pursuant to the statute in such case made and provided and * * * ."

MCLA 600.3201; MSA 27A.3201 reads as follows:

"Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner hereinafter specified."

The forementioned provision in the mortgage that the mortgagee may without notice to any

persons take possession and sell the property is directly contrary to MCLA 600.3208; MSA 27A.3208, which provides for publication and posting by way of notice to the mortgagor that the foreclosure is under way. While this power of sale may be valid in some other states,[1] under statutes which do not contain the notice provisions that we have in Michigan, such a power of sale, expressly providing that there is no notice, is not the power of sale contemplated by § 3201. A power of sale such as the one in the mortgage is foreign to our jurisprudence and ineffectual as a basis for foreclosure by advertisement.

The trial court did not err in granting summary judgment regarding plaintiffs' damage claims insofar as they purport to rest on the invalid power of sale. Under facts such as in this case it is necessary to show real malice. See 1 Harper & James, Torts, §§ 6.1 and 6.2, pp 474–485 *Glieberman v Fine,* 248 Mich 8; 226 NW 669 (1929), seems to be the last word on the subject of slander of title by

[1] "There are four principal methods by which mortgages may be foreclosed in the United States, all depending upon equitable principles in their origin and proceeding upon equitable principles in their practice. 1. *Foreclosure by entry and possession* originally required the actual entry upon and possession of the mortgaged premises; this procedure has been greatly assisted by the writ of entry, which is much in the nature of an equitable action, though nominally an action at law. Foreclosure by entry, however, is mainly confined to the New England and a few of the southern states. 2. *Strict foreclosure,* or foreclosure without a sale, was a procedure greatly used in England at one time, and its purpose was to perfect in the mortgagee an absolute title, instead of to obtain a decree of sale; the courts in most states recognize this method, but allow its use only in exceptional cases, owing to its severity upon the rights of the owner of the equity of redemption. 3. *Statutory foreclosure, or foreclosure by advertisement,* is a procedure provided in nearly every state by its legislature, all the steps in which are specifically prescribed by statute. Owing to its extreme technicality and insufficiency of remedy, it is seldom practiced where an equitable action is allowed. 4. *An equitable action* is now the almost universal procedure among the English-speaking races, for the foreclosure of a mortgage." Wiltsie, Mortgage Foreclosure (4th ed, 1927), § 24, pp 31–32. *See also, op. cit.,* § 31.

our Supreme Court. In *Glieberman* we learn that the crucial element is malice. The Court said citing, *Harrison v Howe,* 109 Mich 476; 67 NW 527 (1896), "[w]henever a man claims a right or title in himself, in possession or in remainder, it is not enough for the plaintiff to prove that he had no such right; he must also give evidence of express malice".

The trial court held that reasonable men could well differ over whether or not the subject mortgage contained the power of sale within the contemplation of the Michigan statutes and therefore there was no malice. We concur. See *Glieberman, supra,* at p 13, and cases there cited for the proposition that the presumption that Crown knew the law serves as no basis for finding express malice.

The trial court failed to pass on the allegations regarding forgery and thus we do not have a reviewable record before us. The alleged forgery might well serve to prove express malice.

The plaintiffs' allegations regarding the invalid power of sale do not sustain a cause of action for abuse of process. In *McKay Machine Co v Bosway Corp,* 24 Mich App 276; 180 NW2d 96 (1970), the Court cited *Spear v Pendill,* 164 Mich 620; 130 NW 343 (1911), and said "[t]he proper issuance of process may become tainted by its subsequent use, but a regular use of process with bad intentions is not a malicious abuse of that process. *Spear v Pendill, supra.* The manner of use of the process, not the intention, is what is evaluated".

We remand for further proceedings not inconsistent with this opinion. Costs to the plaintiffs.

All concurred.

PEOPLE v BURNETT

CRIMINAL LAW—CONSTITUTIONAL LAW—ORDINANCES—VIOLATION—JURY TRIAL.

A defendant charged with violating a municipal ordinance covering a crime which in terms is identical to a section of the general criminal legislation of the state or charged with violating an ordinance which authorizes incarceration as a permissible sentencing alternative is entitled to a jury trial as guaranteed by the state constitution (Const 1963, art 1, § 20).

Appeal from Calhoun, Creighton R. Coleman, J. Submitted Division 3 June 6, 1974, at Grand Rapids. (Docket No. 17641.) Decided September 25, 1974. Leave to appeal denied, 393 Mich —.

Peggy Burnett was charged in the district court with furnishing alcohol to a minor, a misdemeanor under a municipal ordinance. Defendant's written request for a jury trial denied. Defendant appealed to circuit court. Affirmed and remanded for bench trial. Defendant appeals on leave granted. Reversed and remanded for jury trial.

Ralph W. Harbert, Jr., Battle Creek City Attorney, for the people.

William L. Coash, Legal Aid Society of Calhoun County, *Richard M. Skutt* and *Alan W. Houseman,* Michigan Legal Services Assistance Program, and *John L. Barkai,* Wayne State University Law School, for defendant.

REFERENCE FOR POINTS IN HEADNOTE

47 Am Jur 2d, Jury §§ 7–89.

Amici Curiae: Sigmund A. Beras, Southfield City Attorney, *Sherwin M. Birnkrant,* City of Pontiac—Director of Law, *George B. Catlin,* Grosse Point Woods City Attorney, *Phillip L. Poole,* Southfield Assistant City Attorney, *Frederick R. Felix,* Pontiac Deputy City Attorney, and *Donald H. Hann* and *John R. Marquis,* Holland Deputy City Attorneys, for Michigan Association of Municipal Attorneys.

Sheldon M. Meizlish, for American Civil Liberties Union of Michigan.

Before: HOLBROOK, P. J., and T. M. BURNS and R. L. SMITH,* JJ.

T. M. BURNS, J. Defendant Peggy Burnett is charged with furnishing alcohol to a minor, a misdemeanor pursuant to § 9.155 of the Battle Creek Code. Upon conviction of that offense, an accused may be incarcerated in the county jail for 90 days, fined not more than $500, or both.[1]

Defendant filed a timely written request for a jury trial in the district court. The district court, by order entered July 15, 1972, denied that request. The matter was then appealed to the Calhoun Circuit Court, which affirmed the district court and remanded the case for a bench trial.

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

[1] Section 9.155 of the Battle Creek Code is similar in content to MCLA 750.141a; MSA 28.366(1). Contrary to the assertion of the Michigan Association of Municipal Attorneys at page 2 of its amicus curiae brief, the maximum punishment which may be imposed for conviction of violating MCLA 750.141a; MSA 28.336(1) is 90 days or a fine of $100—*see* MCLA 750.504; MSA 28.772—unless the furnishing of such alcoholic beverages involved consideration. Only in that event, *i.e.,* where consideration is involved, is the maximum penalty imprisonment for not more than 1 year or a fine of not more than $1,000 or both.

Leave to appeal was subsequently granted by this Court on September 20, 1973.

The sole meritorious issue raised on appeal is whether a person charged with violating a municipal ordinance providing for incarceration in the county jail for up to 90 days is guaranteed a right to trial by jury under article 1, § 20 of the Michigan Constitution of 1963.

Defendant contends that the framers of our constitution intended to extend the right to a jury trial to all persons accused of a crime. Defendant, therefore, argues that where imprisonment is a permissible sentencing alternative authorized by a municipal ordinance, a violation of that ordinance must be considered a crime giving rise to the right to a jury trial.

On the other hand, plaintiff asserts that a jury trial is not required for a petty offense and that since the municipal ordinance violation in the case at bar is a petty offense punishable by a maximum of only 90 days in jail, defendant is not entitled to a trial by jury.

Const 1963, art 1, § 20[2] provides in pertinent part:

> "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 prosecutions for misdemeanors punishable by imprisonment for not more than 1 year."

Since our constitution grants the right to a trial by jury to an accused in every criminal prosecu-

[2] A 1972 amendment ratified at a special election August 8, 1972, substituted the words "in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year" for the words "in all courts not of record". Before this amendment, this provision appeared without significant change in Const 1850, art 6, § 28 and Const 1908, art 2, § 19.

tion, the controlling question to be decided is whether a proceeding to enforce a violation of a municipal ordinance is a criminal prosecution, where possible punishment in that proceeding involves incarceration. If such proceeding is a criminal prosecution, then the accused is entitled to a jury trial.

In *In re Cox,* 129 Mich 635; 89 NW 440 (1902), the Michigan Supreme Court considered the issue of the right to a jury trial in an ordinance violation case. In *Cox* the defendant was convicted of violating a Detroit city ordinance at a trial without a jury and sentenced to a fine of $15 or 12 days in jail. On appeal, the Supreme Court ruled against her contention that she was entitled to a jury trial, when it stated at page 636:

> "[T]rial by jury was not included in due process of law as applicable to violations of municipal by-laws, proper, which relate to acts and omissions that are not embraced in the general criminal legislation of the State, and punishable by fine."

Defendant maintains that the logic of *Cox* supports her position and should be given controlling weight in this case. We agree.

The *Cox* decision dealt only with ordinances not embraced within the general criminal legislation of the state. However, *Cox* also impliedly holds that the right to trial by jury does exist where the charge is one which is embraced in the general criminal legislation of the state, regardless of whether the prosecution is under a state law or a village ordinance. In the case at bar, defendant is charged with violating an ordinance which closely parallels a section of the general criminal legislation of the state.[3] Possible punishment includes

[3] Battle Creek Ordinance 9.155 provides in pertinent part:

"No person, either directly or indirectly, by himself, clerk, agent,

incarceration. We read *Cox* to support our holding that since this particular ordinance has a counterpart in the general criminal legislation of the state, the right to a jury trial extends to it.

We do not rely solely on *Cox* to support our position. In *People v Goldman,* 221 Mich 646; 192 NW 546 (1923), the Supreme Court held that the violation of a Detroit city ordinance was a crime. In reaching its ultimate conclusion that the word "crime" as used in the probation act, MCLA 771.1; MSA 28.1131, embraces prosecutions for acts or omissions under the state law and also constitutes violations of local ordinances, the *Goldman* Court quoted with approval *People v Hanrahan,* 75 Mich 611; 42 NW 1124 (1889), where it was said on pages 649–650 that:

> " 'Whenever a person does an act which is prohibited by law, which act is punishable by fine, penalty, forfeiture, or imprisonment, he commits a crime—
> "and, further, that an ordinance validly enacted is—
> " 'as much the law of the land for that locality as a law enacted by the legislature; and a person violating it commits an offense, and in one sense a crime, for which he may be sentenced.' "

In *Stewart v Hart,* 196 Mich 137; 162 NW 1028 (1917), the question considered was whether a woman could be lawfully imprisoned upon convic-

servant, or employee shall at any time furnish, give or deliver any alcoholic liquor to any person, which person shall not have attained the age of twenty-one (21) years, provided, however that nothing contained herein shall prohibit sale of alcoholic beverage to a minor upon the authority and pursuant to a prescription of a duly-licensed physician."

MCLA 750.141a; MSA 28.336(1) provides in pertinent part:

"Any person, who knowingly gives or furnishes any alcoholic beverage to a minor except upon authority of and pursuant to a prescription of a duly licensed physician, shall be guilty of a misdemeanor * * * ."

tion of an ordinance violation in view of a statute then in force which exempted females from imprisonment under civil process except in certain cases. The Court there stated at page 140:

"[W]e are of the opinion that, where the act complained of is an offense against the statute as well as against the ordinance, and the proceedings are commenced by complaint and warrant and disposed of according to the rules of criminal procedure, they are not civil proceedings within the meaning and intent of the immunity statute relied upon."

See also *Delta County v Gladstone,* 305 Mich 50, 53; 8 NW2d 908 (1943); *People v Riksen,* 284 Mich 284; 279 NW 513 (1938); *Detroit v Wayne Circuit Judge,* 233 Mich 356; 206 NW 582 (1925); *Village of Northville v Westfall,* 75 Mich 603, 607–608; 42 NW 1068 (1889).

The act here complained of is a violation of MCLA 750.141a; MSA 28.336(1) as well as of the ordinance. The complaint made against defendant charges her with a crime, and upon her conviction the trial court has the power to incarcerate her in the county jail for up to 90 days. The deprivation of liberty is the same regardless of whether a piece of legislation is termed a statute or a municipal ordinance.

"[N]o resort to subtlety can refute the fact that the power to imprison is a criminal sanction. To view otherwise is self-delusion. Courts should not, ostrich-like, bury their heads in the sand." *Canon City v Merris,* 137 Colo 169, 170, 174; 323 P2d 614, 617 (1958).

We are, therefore, of the opinion that the defendant has a right to a jury trial in this criminal prosecution.

We, therefore, hold that where, as here, a de-

fendant is charged with violating a municipal ordinance which is in terms identical to a section of the general criminal legislation of the state or where the ordinance authorizes incarceration as a permissible sentencing alternative, said violation of such ordinance is a crime and, therefore, the defendant in such criminal prosecution is entitled to a jury trial as guaranteed by our state constitution.

Having resolved this issue in defendant's favor, we find it unnecessary to consider defendant's equal protection argument.

Reversed and remanded for proceedings consistent with this opinion.

All concurred.

MAXMAN v GOLDSMITH

1. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATES—TIMELINESS OF CLAIM.

   A claim against an estate is statutorily barred where the claim was made more than three months after the estate has been closed (MCLA 701.19, 708.18).

2. COURTS—PERSONAL JURISDICTION—DEFENSES—WAIVER—COURT RULES.

   A defense of lack of personal jurisdiction must be made in the responsive pleading or motion first filed, or it is waived (GCR 1963, 116.2).

3. COURTS—PERSONAL JURISDICTION—DEFENSES—WAIVER—APPEARANCE.

   A defendant did not waive the defense of lack of personal jurisdiction by filing a general appearance because an appearance is neither a motion nor a responsive pleading (GCR 1963, 116.2).

4. COURTS—PERSONAL JURISDICTION—DEFENSES—APPEARANCE—MOTIONS.

   A defense of lack of personal jurisdiction was timely raised by a motion filed after a general appearance had been entered.

Appeal from Wayne, Thomas J. Brennan, J. Submitted Division 1 May 16, 1974, at Detroit. (Docket No. 17839.) Decided September 25, 1974. Leave to appeal applied for.

Complaint by Ida Maxman and Sydney Maxman against Ralph Goldsmith, special administrator of the estate of James Lihov, deceased, for negli-

REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur 2d, Executors and Administrators §§ 292, 293.
Exclusiveness of grounds enumerated in statute providing, under specified circumstances, extension of time for filing claims against decedent's estate. 57 ALR2d 1304.

[2–4] 20 Am Jur 2d, Courts § 95.

gence. Order entered quashing service of process and striking complaint. Plaintiffs appeal. Affirmed.

Milan & Miller, P. C. (Hayim I. Gross, of counsel on appeal), for plaintiffs.

Harvey, Kruse & Westen, P. C. (by *James N. Martin),* for defendant.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

R. B. BURNS, J. On February 10, 1969, plaintiff Ida Maxman was injured in an automobile accident allegedly caused by the deceased defendant James Lihov. Six days later, on February 16, 1969, James Lihov died.

On April 15, 1969, an administratrix was appointed for the Lihov estate. She conducted the affairs of the estate for the next ten months. On October 21, 1969, she filed a petition for allowance of her final account, for her fees, for a determination of heirs, and for an assignment of the residue. Finally, on February 9, 1970, the administratrix was discharged and the estate closed.

Plaintiffs were unsuccessful in negotiating a settlement with Lihov's insurance company and filed suit on January 28, 1972. Plaintiffs gave the summons and complaint to the sheriff for service and mailed copies to the insurance company.

The insurance company had an attorney file a general appearance for the defendant.

In the meantime plaintiffs discovered that Lihov had died and petitioned the probate court for a special administrator for his estate. Ralph Goldsmith was appointed special administrator of the

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

estate. Plaintiffs then filed an amended complaint that reflected the substitution of the special administrator as the defendant.

Evidently the insurance company had not been aware that Lihov had died when they entered a general appearance for him because its next move was to file motions to quash service of process and strike both complaints, claiming an absence of personal jurisdiction.

The motions were granted. Plaintiffs appeal and we affirm.

The case is controlled by MCLA 701.19; MSA 27.3178(19) and MCLA 708.18; MSA 27.3178(428). They have the effect of barring claims, such as plaintiffs', made against an estate more than three months after it has been closed. *Young v Moore,* 127 F Supp 265 (ED Mich, 1954), *Melvin v Reading,* 346 Mich 348; 78 NW2d 181 (1956), *In re Curzenski Estate,* 384 Mich 334; 183 NW2d 220 (1971), and *Wright v Estate of Treichel,* 47 Mich App 626; 209 NW2d 806 (1973).

Plaintiffs claim that defendant by filing a general appearance waived any defense of lack of personal jurisdiction. GCR 1963, 116.2 requires that a defense of lack of jurisdiction over the person be made in the responsive pleading or motion first filed, or it will be waived.

An appearance is neither a motion nor a responsive pleading; the question was timely raised by the defendant. *Continental Ins v B & B Sales,* 34 Mich App 499; 192 NW2d 126 (1971), and *Manufacturers Construction Co v Covenant Investment Co,* 43 Mich App 123; 204 NW2d 54 (1972).

Affirmed. Costs to defendant.

All concurred.

McKINSTRIE v HENRY FORD HOSPITAL

1. STATUTES—BLOOD BANKING AND TRANSFUSION ACT—DELEGATION OF LEGISLATIVE POWER—CONSTITUTIONAL LAW.

The blood banking and transfusion act does not involve an unconstitutional delegation of legislative power because there is no delegation of power in the statute (Const 1963, art 3, § 2, art 4, § 1; MCLA 691.1511).

2. STATUTES—BLOOD BANKING AND TRANSFUSION ACT—CONSTITUTIONAL LAW.

The blood banking and transfusion act is constitutional (MCLA 691.1511).

3. APPEAL AND ERROR—ISSUES—STATEMENT OF POSITION—SUFFICIENCY.

A statement of position alone, without argument or citation of authority, is insufficient to bring an issue before the Court of Appeals.

Appeal from Wayne, James Montante, J. Submitted Division 1 June 12, 1974, at Detroit. (Docket No. 17974.) Decided September 25, 1974. Leave to appeal denied, 393 Mich —.

Complaint by Betty McKinstrie and Malcolm McKinstrie against Henry Ford Hospital and Midwest Blood Service, Inc., for damages resulting from serum hepatitis allegedly contracted from a blood transfusion. Plaintiffs' motion to have the blood banking and transfusion act declared unconstitutional denied. Plaintiffs appeal on leave granted. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur 2d, Constitutional Law §§ 211, 240-244.

[2] 16 Am Jur 2d, Constitutional Law §§ 179, 180.

[3] No Reference.

Charfoos & Charfoos, P. C., for plaintiffs.

Kitch, Suhrheinrich & Getto, P. C. (by *Gregory G. Drutchas),* for defendant Henry Ford Hospital.

Richard H. Scholl, for defendant Midwest Blood Services, Inc.

Amicus Curiae: Dingell, Hylton & Zemmol, for American National Red Cross.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

J. H. GILLIS, P. J. On November 11, 1970, plaintiff Betty McKinstrie was operated on at Henry Ford Hospital. During the operation she received two units of blood, which was supplied to the hospital by defendant Midwest Blood Service, Inc. Mrs. McKinstrie was released, but readmitted on January 1, 1971 with serum hepatitis. Plaintiffs then brought this action claiming that serum hepatitis is a disease which comes from blood and that the blood transfusion given by defendant hospital was the proximate cause of Mrs. McKinstrie's illness. Defendants contend that because of the blood banking and transfusion act, MCLA 691.1511; MSA 14.528(1), they are not liable to plaintiffs absent a showing of negligence. This act provides:

"The procurement, processing, storage, distribution or use of whole blood, plasma, blood products, and blood derivatives, for the purpose of injecting or transfusing them, or any of them, into the human body for any purposes whatsoever where there is no medical test to determine the fitness of such whole blood, plasma, blood products, or blood derivatives, is the rendering of a

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

service and does not constitute a sale by any person participating therein, whether or not any remuneration is paid therefor."[1]

The effect of this statute is to make what would otherwise be a sale—and, therefore, subject to the implied warranty provisions of the Uniform Commercial Code[2]—a service, and, therefore, exempt from those provisions. Plaintiffs moved to have this act declared unconstitutional. This Court granted plaintiffs leave to appeal from the trial court's order denying the motion.

First, plaintiffs contend that the blood banking and transfusion act is an unconstitutional delegation of legislative power. Const 1963, art 3, § 2; art 4, § 1. They argue that the language delegates to unknown persons the power to determine whether or not there exists a "medical test to determine the fitness" of blood. We think this position is without merit.

There is no delegation of power in this statute. It simply provides that if "there is no medical test to determine the fitness of * * * blood", the transfusion of that blood will be considered a service, not a sale. We recognize that in a suit such as this, the fact finder must take the facts, apply them to the statute and decide whether such a test of

[1] This statute was amended in 1973 and now provides:

"The procurement, processing, distribution, or use of whole blood, plasma, blood products, blood derivatives, and other human or artificial tissues such as corneas, bones, or organs for the purpose of injecting, transfusing, or transplanting any of them into the human body, is declared to be, for all purposes, the rendition of a service by every person, firm, or corporation participating therein and, whether or not any remuneration is paid therefor, is declared not to be a sale of whole blood, plasma, blood products, blood derivatives, or other tissues, for any purpose. A warranty, express, implied, or otherwise, shall not attach to the activity, transaction, or occurrence. A person, firm, or corporation involved in the rendition of any such service shall not be liable as a result of any such activity, transaction, or occurrence, except for his or its own negligence or wilful misconduct."

[2] MCLA 440.1101 *et seq.;* MSA 19.1101 *et seq.*

"fitness" exists. But is this a delegation of legislative power to the fact finder? We think not. In every suit, criminal or civil, which involves a statute, the fact finder is called upon to apply the facts to the statute and determine whether or not the statute has been violated—or in a case like this, determine the applicability of the statute. And, while the court may have to interpret what the Legislature meant by "fitness", and, in a jury case instruct the jury as to its interpretation, this is simply a matter of statutory construction, not of delegation of such power. See, *Lewis v Yund,* 339 Mich 441; 64 NW2d 696 (1954); *Hackley Union National Bank & Trust Co v Warren Radio Co,* 5 Mich App 64; 145 NW2d 831 (1966).

Secondly, plaintiffs contend the act is unconstitutionally vague; however, they cite no authority or offer no argument in support of this position. A statement of position alone is insufficient to bring an issue before this Court.

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388, 399 (1959); see *Kucken v Hygrade Food Products Corp,* 51 Mich App 471; 215 NW2d 772 (1974).

The blood banking and transfusion act is not unconstitutional.[3] We affirm the order of the trial court. Costs to appellees.

All concurred.

[3] Because of our disposition of the matter, we do not reach plaintiffs' other allegations.

SHIPPEY v MADISON DISTRICT PUBLIC SCHOOLS

1. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—TEACHERS' TENURE ACT—DISCHARGE—APPEAL—ADMINISTRATIVE LAW.

   Failure of a discharged school teacher to perfect a timely appeal to the State Tenure Commission is excusable where the school board failed to afford the teacher the procedural safeguards of the teachers' tenure act and the teacher was thereby likely to be unaware of her right to appeal.

2. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS' TENURE ACT—STATE TENURE COMMISSION—APPEAL—COURTS—JURISDICTION—ADMINISTRATIVE LAW.

   Appeal to the circuit court of a decision by the State Tenure Commission was not timely where over seven months elapsed between the commission's decision and the filing of the appeal, and the circuit court was without jurisdiction to determine a terminated teacher's rights under the teachers' tenure act (MCLA 24.108[2], 600.631; GCR 1963, 705).

3. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS' TENURE ACT—BREACH OF CONTRACT—COURTS—JURISDICTION—REMEDIES.

   The teachers' tenure act does not deprive the circuit court of jurisdiction to decide common-law breach of contract disputes, nor does it limit aggrieved teachers to any particular remedy; teachers are not required to resort to appeal to the State Tenure Commission and a request for reinstatement.

Appeal from Oakland, Farrell E. Roberts, J. Submitted Division 2 June 6, 1974, at Detroit. (Docket No. 18750.) Decided September 25, 1974.

Complaint by Mary E. Shippey against the Madison District Public Schools for breach of contract and for wrongful termination of employment. Ac-

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 68 Am Jur 2d, Schools §§ 204, 207.

Teachers' tenure statutes. 127 ALR 1298.

celerated judgment for defendant. Plaintiff appeals. Reversed and remanded.

Levin, Levin, Garvett & Dill (by *Daniel J. Hoekenga),* for plaintiff.

Dell, Shantz, Booker & Schulte, for defendant.

Before: BRONSON, P. J., and V. J. BRENNAN and VAN VALKENBURG,* JJ.

BRONSON, P. J. Plaintiff-appellant, Mary Evans Shippey, signed a contract with defendant-appellee, Madison District Public Schools, as a tenured elementary school teacher for the 1968–1969 school year. She claims breach of that contract, alleging that Madison wrongfully terminated her employment by discharging her on March 3, 1969. She also claims that the alleged discharge was not in accordance with the applicable provisions of the teachers' tenure act, MCLA 38.71 *et seq.;* MSA 15.1971 *et seq.* Appellee's motion for accelerated judgment, granted below, is the subject of this appeal.

Madison School District argued, and the trial judge agreed, that this action is governed by the teachers' tenure act. Because of a failure to exhaust administrative remedies, in that Mrs. Shippey failed to take a timely appeal to the State Tenure Commission, the trial judge ruled that the circuit court was deprived of subject matter jurisdiction. Accordingly, the motion for accelerated judgment was granted. GCR 1963, 116.1(2).

Mrs. Shippey urges on appeal that her admitted failure to exhaust her administrative remedies under the teachers' tenure act was excused by the

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

school district's noncompliance with statutory procedural requirements in terminating her employment. Alternatively, she maintains that her breach of contract claim may be asserted apart from any remedy she may have under the tenure act.

To resolve this controversy, we must address the facts as alleged in the complaint.[1]

Mrs. Shippey alleges in her complaint that in December 1968 she informed Lawrence E. Decker, then assistant superintendent in charge of personnel of appellee Madison District Public Schools, that she required a leave of absence for health reasons. She alleges further that Mr. Decker stated that it would be necessary to obtain a letter from her doctor, together with a letter from her personally, requesting a leave of absence. She was further assured by Mr. Decker, it is alleged, that there would be "no problem" in obtaining the leave of absence.

Mrs. Shippey submitted to Mr. Decker a letter from a Dr. Joseph A. Walker, who recommended that she be granted a three-month leave of absence. Included was a personal letter from Mrs. Shippey addressed to Mr. Decker which informed him that she was leaving for the rest recommended by her doctor. Mr. Decker responded by arranging for a replacement, who Mrs. Shippey assisted in getting adjusted to the students. Mrs. Shippey left soon thereafter on what she considered to be a leave of absence.

On March 3, 1969, just prior to Mrs. Shippey's return, the Madison school board held a meeting. Mrs. Shippey's, but not Dr. Walker's, letter was introduced and considered by the board. It voted to

[1] The facts must be interpreted most favorably to Shippey, the nonmovant. *Williams v Polgar,* 391 Mich 6, 11; 215 NW2d 149 (1974).

treat her letter as an offer of resignation. The offer was duly accepted and Mrs. Shippey's employment officially terminated.

She appealed to the State Tenure Commission, but it was dismissed by written opinion on May 10, 1971 as untimely because Mrs. Shippey had filed her appeal more than 30 days after the board's decision, in violation of MCLA 38.121; MSA 15.2021.

The present action was filed in Oakland Circuit Court on December 15, 1971, over seven months after the State Tenure Commission dismissal. The accelerated judgment appealed from was entered on November 9, 1973.

The trial judge stated, in granting the motion for accelerated judgment, that the circuit court was deprived of subject matter jurisdiction in this case due to Mrs. Shippey's failure to exhaust her administrative remedies. That statement is partially correct.

Mrs. Shippey's appeal to the State Tenure Commission was not timely.[2] Accordingly, the commission dismissed her claim with prejudice. Her failure to perfect a timely appeal with the Tenure Commission might well be excused. If the school board's action on March 3, 1969 amounted to a *discharge,* failure by the board to afford Mrs. Shippey the procedural safeguards of the tenure act[3] would toll the 30-day time limit for appeals to the Tenure Commission because it is likely that

[2] An appeal must be taken within 30 days from the date of the board decision. MCLA 38.121; MSA 15.2021. Shippey did not file an appeal with the Tenure Commission until September 4, 1970, over 18 months after the board decision.

[3] *E.g.,* notice in writing of charges and right to appeal. MCLA 38.102; MSA 15.2002; right to a hearing, MCLA 38.104; MSA 15.2004; right to be discharged only for reasonable and just cause, MCLA 38.101; MSA 15.2001.

she was unaware of her right to appeal. *Biberstine v Port Austin Public School District No. 9,* 51 Mich App 274, 278; 214 NW2d 729 (1974).

However, Mrs. Shippey's failure to perfect a timely appeal of the commission's dismissal in the circuit court cannot be similarly excused. Whether operating under the administrative procedures act[4] or the alternative RJA section 631,[5] Mrs. Shippey's late filing in the circuit court is fatal to her assertion of rights under the tenure act. Timely perfection of an appeal is a jurisdictional prerequisite.[6] Mrs. Shippey's rights against the Madison School District under the tenure act have been waived. That is not the end of the matter, however.

This Court recently held, in *Bruinsma v Wyoming Public Schools,* 38 Mich App 745; 197 NW2d 95 (1972), that the tenure act must be construed to provide permanent tenure teachers with contractual safeguards on a par with probationary teachers. In that case tenure teachers were allowed to sue the Wyoming School District for breach of their employment contract. The teachers in *Bruinsma* were not seeking a review of the school board's actions but were seeking damages for wrongful discharge. The claim that the tenure act

[4] *See* MCLA 24.108(2); MSA 3.560(21.8)(2), requiring filing a "petition in the circuit court * * * within 30 days after personal service of the final decision of the agency or within 30 days after the mailing thereof, if notice is given by mail".

[5] MCLA 600.631; MSA 27A.631. This section requires compliance with GCR 1963, 705.3. GCR 1963, 705.3 states that an appeal must be taken "within 20 days after the entry of the order * * * appealed from * * * ". For a lucid account of the proper manner for obtaining review of Tenure Commission decisions, consult *Beebee v Haslett Public Schools,* 40 Mich App 296; 198 NW2d 860 (1972).

[6] Such is the plain import of GCR 1963, 705.3, 705.5, 705.18(2). *Cf. Royal Oak Trucking Co v Keller,* 17 Mich App 532, 534; 170 NW2d 160 (1969) (municipal court); *In re Schultz Estate,* 349 Mich 577, 579; 84 NW2d 878 (1957) (probate court); *Franks v Smith,* 45 Mich 326; 7 NW 906 (1881) (justice court); GCR 1963, 803.1 (Court of Appeals).

provided the sole remedy was answered in the following manner:

> "The act was passed for the protection of teachers, not to take away rights. * * * [The act] does not excuse a school district from honoring a valid contract." *Id.* at 749.

This Court concluded that the trial judge had jurisdiction to consider a breach of contract claim.

The same result is required here. The tenure act does not expressly deprive the circuit courts of jurisdiction to decide common-law breach of contract disputes. Nor does it limit aggrieved teachers to any particular remedy. Teachers are not required to resort to appeal to the State Tenure Commission and a request for reinstatement. We are not here passing on the merits of Mrs. Shippey's breach of contract claim. She must still establish all of the elements of that cause of action, including breach and damages. Quite possibly her own actions will properly be considered a breach of the employment contract, justifying the board action of March 3, 1969. Those are questions to be resolved at a later stage in these proceedings. We hold only that, though the circuit judge properly concluded that he lacked jurisdiction to consider any claim under the teachers' tenure act, he incorrectly granted the motion for accelerated judgment, because the trial court has jurisdiction to pass on Shippey's breach of contract claim.[7]

Reversed and remanded for proceedings not inconsistent with this opinion. Costs to appellant.

All concurred.

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[7] Madison's assertion that Shippey's complaint does not state a cause of action, GCR 1963, 117.2(1), was not dealt with in Judge Roberts' opinion. Since we do not reach issues not decided below, *Tray v Whitney,* 35 Mich App 529, 533; 192 NW2d 628 (1971), we expressly leave open that question.

FLYNN v McLOUTH STEEL CORPORATION

OPINION OF THE COURT

1. JUDGMENT—ACCELERATED JUDGMENT—LIMITATION OF ACTIONS—COURT RULES—QUESTION OF FACT.

The procedure to be followed in considering a motion for accelerated judgment when a statute of limitations defense has been raised is governed by court rule and is dependent upon whether a disputed question of fact on that issue has been presented and whether a jury trial has been demanded (GCR 1963, 116.3).

2. LIMITATION OF ACTIONS—ACCRUAL OF CLAIM—QUESTION OF FACT.

The question of the governing date of accrual of a cause of action for statute of limitations purposes was a disputed question of fact where a claimant alleged in his complaint that his injury occurred on a specific date, and in a later deposition gave another date, which brought into play a statute of limitations defense.

3. JUDGMENT—ACCELERATED JUDGMENT—LIMITATION OF ACTIONS—COURT RULE.

A trial court could properly consider a defendant's motion for accelerated judgment which was brought after the filing of the first responsive pleading, although such a delay would ordinarily violate the court rule, where the defendant could not be expected to anticipate from the plaintiff's complaint that a statute of limitations defense would become apparent, and where the plaintiff did not object to the timing of the motion but rather filed an answer and supporting affidavit and participated in the hearing on the motion (GCR 1963, 116.1).

4. PLEADINGS—MOTIONS—AMENDED PLEADINGS—ACCELERATED JUDGMENT—COURT RULE.

A request for permission to file an amended answer raising a newly discovered defense is to be preferred over filing a motion

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4] 47 Am Jur 2d, Judgments § 1158.
73 Am Jur 2d, Summary Judgment § 26.
[2, 5] 51 Am Jur 2d, Limitation of Actions §§ 107, 488.

for accelerated judgment without amending the answer, where discovery of the new defense comes too late for the defendant to comply with the court rule requirement that a motion for accelerated judgment be filed not later than the first responsive pleading (GCR 1963, 116).

DISSENT BY V. J. BRENNAN, J.

5. LIMITATION OF ACTIONS—QUESTION OF FACT.

The deposition testimony of a plaintiff which clearly, unequivocally, and persuasively relates the date of his injury to the death of another employee, which is a known date, leads to the conclusion that the date of the injury is not a disputed fact and that the statute of limitations applies.

Appeal from Wayne, Joseph A. Moynihan, Jr., J. Submitted Division 1 June 6, 1974, at Detroit. (Docket No. 15655.) Decided October 7, 1974.

Complaint by David A. Flynn against McLouth Steel Corporation for negligence. Accelerated judgment for defendant. Plaintiff appeals. Reversed.

Ripple & Chambers, P. C. (by *Sanford L. Steiner),* for plaintiff.

Martin, Bohall, Joselyn, Halsey & Rowe, P. C., for defendant.

Before: BRONSON, P. J., and V. J. BRENNAN and VAN VALKENBURG,* JJ.

BRONSON, P. J. This case presents for decision the following important issue:

Will the authority of a trial judge to rule on a motion for accelerated judgment be eliminated by the mere demand for a trial by jury, even when no disputed issues of fact are presented by the motion?

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

GCR 116.3 provides, in pertinent part, as follows:

"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 shall postpone the hearing if a jury trial has been demanded pursuant to right on or before the day of the hearing." (Emphasis supplied.)

Defendant-appellee McLouth Steel filed a motion for accelerated judgment in this case, citing the expiration of the limitations period. Since the defense of statute of limitations is listed in rule 116.1(5), the motion was properly considered by the trial judge under that part of rule 116 quoted above. GCR 1963, 116.1(5).[1] Plaintiff-appellant Flynn made a timely demand for jury trial in accordance with rule 116.3.

Flynn argues that the mandatory language of rule 116.3 *(shall* postpone the hearing) requires the trial judge to refuse to consider the motion for accelerated judgment, given the jury trial demand. In his view, whenever a jury trial is demanded the judge is powerless to pass on a motion for accelerated judgment. We disagree.

The language of rule 116.3 quoted above is specifically addressed to *disputed* questions of fact, and prescribes the procedure to follow when such questions are presented in a motion for accelerated judgment on a ground listed in 116.1(5). Necessar-

[1] We do not decide whether a statute of limitations defense could be properly raised by a motion for summary judgment. *Compare Cibor v Oakwood Hospital,* 14 Mich App 1, 10; 165 NW2d 326, 331 (1968) (concurring opinion of Judge, now Justice, LEVIN).

ily implied by such language is a preliminary issue: whether there is a disputed question of fact presented. This is a question of law, properly addressed to and determined by the trial judge. If he decides that a disputed question of fact is *not* presented, the procedural alternatives, including the required postponement of the hearing when a demand for jury trial is made, do not apply. *Mills v Stankiewicz,* 27 Mich App 483; 183 NW2d 602 (1970). The judge may properly go on to determine questions of law based on undisputed questions of fact himself. *Id.* at 485.

Such a construction is consistent with the fair meaning of the rule. It also provides adequate protection for the right to jury trial. Since there is no right to jury trial on issues which are not actually in dispute, the procedure contemplated in rule 116.3 will allow the trial judge to isolate just those issues appropriate for jury deliberation.

Moreover, this construction avoids the absurd result entailed by a wooden application of Flynn's interpretation. A mere demand for jury trial, even in the face of an obviously meritorious rule 116.1(5) defense, would—under Flynn's interpretation—force the judge to "postpone the hearing * * * until trial". Such a needless waste of time and resources cannot be countenanced and is avoided by allowing the judge to decide at the outset whether disputed questions of fact are presented. If so, and if a jury trial has been demanded,[2] the judge must postpone the hearing until trial on the merits.[3] If disputed questions of fact are *not* presented, the judge must consider the

[2] If no jury trial has been demanded, then the hearing may be held immediately or may be postponed, at the judge's option. GCR 1963, 116.3.

[3] *See VanBuren v B & J Moving and Storage, Inc,* 54 Mich App 266; 220 NW2d 746 (1974).

merits of the motion himself, after hearing. The hearing may be held immediately or may be postponed, in the judge's discretion.

Applying these principles to the case at bar, we conclude that the trial judge, in granting the motion for accelerated judgment in the face of Flynn's demand for jury trial, must have decided that the questions of fact presented by McLouth's motion were undisputed. Otherwise, he would have been bound by rule 116.3 to postpone a hearing on the motion until trial.

However, a review of the facts underlying the motion, in light of the recent pronouncements in *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973), indicate that the facts may well be disputed and require that the case be remanded for further proceedings.

On September 15, 1971, Flynn filed an action seeking damages for an injury resulting from an alleged slip and fall caused by a foreign substance on a stairway owned and maintained by McLouth Steel. The complaint sets the date of injury as October 10, 1968, while Flynn was working for Hall Engineering—a subcontractor of McLouth—on McLouth's premises.

Flynn was deposed on January 19, 1972. His testimony disclosed for the first time a possible statute of limitations defense. At least three times he clearly stated that the injury complained of occurred *prior to* the accidental death of a fellow worker.[4] It is undisputed that the date of Flynn's injury is to be measured in relation to this other incident. It is also clear that the fatality to which Flynn referred and which he vividly remembers occurred on a Sunday.

[4] It is not clear whether the victim of this fatality was a co-employee (of Hall Engineering) or an employee of another subcontractor.

Over eight months later, on September 29, 1972, McLouth filed a motion for accelerated judgment, supplemented by affidavits. Included was the affidavit of Mr. Hall, the president of Hall Engineering, in which it was alleged 1) that the only fatal accidents involving a Hall employee during 1968 happened on Sunday, June 30, 1968, in a manner strikingly similar to that testified to by Flynn in the latter's deposition and 2) that Flynn did not work for Hall on October 10, 1968, though he was working for Hall on McLouth's premises on June 30, 1968. Employment records were attached in support of the latter allegation.

In response, Flynn submitted a "verified affidavit" stating that he believed the accident occurred on October 10, 1968. This was based on a review of his union records, which were also submitted but which reveal only that Flynn worked for Hall between October 3 and October 12, 1968.

Two other items lend rather limited support to Flynn's claim. He testified in the deposition that he left work "right after the accident". Since his employment with Hall during October, 1968 is undisputed, such testimony supports the October, rather than June, injury date. Further, three coworkers who were said (by Flynn) to have been present on the day of his injury were not all present on June 30, but were present on October 10, 1968.

Rizzo, supra, in the analogous summary judgment setting, provides an appropriate standard[5] for resolving the question of disputability:

"The court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome." *Id.* at 372.

[5] A directed verdict standard is rejected for the reasons stated in *Rizzo, supra,* at 379.

The question of the governing date of accrual of a cause of action for statute of limitations purposes is a question of fact. *Tumey v City of Detroit,* 316 Mich 400, 411; 25 NW2d 571 (1947); *Ames v MacPhail,* 289 Mich 185; 286 NW 206 (1939).

We are not unmindful of the proposition advanced by McLouth that general allegations of fact, without explanation, are not enough to rebut strong inferences raised by affidavits submitted in connection with pretrial motions. This is especially true when the nonmovant has made statements of fact which can arguably be considered binding on him. See *Gamet v Jenks,* 38 Mich App 719, 726; 197 NW2d 160, 164 (1972). We point out, however, that *Gamet* is a pre-*Rizzo* case. Moreover, it is for the trial court, on remand, to decide whether Flynn has done enough to escape the force of *Gamet* and merits the protection *Rizzo* seeks to provide.[6]

One other issue raised by Flynn must be discussed in order to guide the trial court on remand.

Flynn maintains that the motion for accelerated judgment was improperly considered by the trial court because untimely in that it was neither filed in McLouth's first responsive pleading nor by motion not later than that first responsive pleading. GCR 1963, 116.1.

Under most circumstances, an eight-month delay would plainly violate the rule. But McLouth could not have been expected to anticipate the statute of limitations defense, given Flynn's well-pleaded complaint. Moreover, Flynn made no objection to the timing of the motion but rather filed an answer, an affidavit in support, and partici-

[6] Fears that the standard adopted here is too weak to prevent sham claims from being properly screened are unfounded. *See* GCR 1963, 116.5.

pated fully in the hearing on the motion. He was neither misled nor prejudiced.

However, the better practice is to request permission to file an amended answer, raising the newly discovered defense. The matter should then be noticed for hearing under GCR 1963, 116.3. See 1 Honigman & Hawkins, Michigan Court Rules Annotated (Supp, 1974), p 87. This procedure is to be preferred over filing a motion for accelerated judgment without amending the answer because it focuses attention on possible prejudice to the nonmovant, see GCR 1963, 118.1, and also avoids problems of waiver. See *Manufacturers Construction Co v Covenant Investment Co,* 43 Mich App 123; 204 NW2d 54 (1972); *Great Lakes Restaurants, Inc v Rumery Construction Co, Inc,* 23 Mich App 501; 179 NW2d 36 (1970).

In the present case McLouth did not seek to file an amended answer, but rather moved for accelerated judgment. Upon remand, we urge that the procedure outlined above be followed.

Reversed and remanded for proceedings not inconsistent with this opinion. Costs to appellant.

VAN VALKENBURG, J., concurred.

V. J. BRENNAN, J. *(dissenting).* This appeal stems from plaintiff's claim of injury and damages resulting from a slip and fall allegedly caused by a foreign substance on a stairway owned and maintained by defendant.

On September 15, 1971, plaintiff filed his action and demand for jury trial. The complaint sets the date of injury as October 10, 1968.

Defendant's answer, shortly thereafter, denied negligence and claimed contributory negligence as an affirmative defense.

Plaintiff was deposed on January 19, 1972. The

deposition testimony indicated that the injury occurred on June 30, 1968, which raised a statute of limitations defense.

On September 29, 1972, defendant filed a motion for accelerated judgment on the ground of the limitations defense as a bar to plaintiff's action.

The motion was heard on October 27, 1972. Accelerated judgment was granted by the trial court. Plaintiff appeals this decision.

On the first issue presented I concur with my colleagues. I find it unnecessary to consider the propriety or timeliness of defendant's motion for accelerated judgment. In certain situations this type of motion may be filed after the first responsive pleading (GCR 1963, 116), "to secure the just, speedy, and inexpensive determination of every action". *Manufacturer's Construction Co v Covenant Investment Co,* 43 Mich App 123, 128; 204 NW2d 54, 56 (1972). This is such a case. The trial court has that discretion where he feels there are no disputed questions of fact.

My review of the record and transcript on the motion hearing for accelerated judgment leads to the conclusion that June 30, 1968, was the date of plaintiff's injury and that the statute of limitations bar applies. Plaintiff's deposition testimony clearly, unequivocally and persuasively relates the date of his injury to the death of an apprentice on the job. The apprentice was killed on June 30, 1968. Nothing in the record controverts this finding. My fellow judges on this panel have determined that the date of the accident is still a disputed fact. For it to become a disputed question of fact at trial, the plaintiff is going to have to perjure himself—that is if the deposition was taken under oath.

The granting of defendant's motion for accelerated judgment should be affirmed.

PEOPLE v TERRY MOORE

PEOPLE v McFARLAND

OPINION OF THE COURT

1. CRIMINAL LAW—CONSTITUTIONAL LAW—ARREST—RIGHT TO REMAIN SILENT.

The use against a defendant at trial of his exercise of his constitutional right to remain silent at the time of arrest constitutes prejudicial error.

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

2. WITNESSES—DEFENDANTS—CROSS-EXAMINATION—DIRECT EXAMINATION—EVIDENCE—ADMISSIBILITY.

A prosecutor has the right to cross-examine a defendant in those areas covered on direct examination, even though the testimony may not otherwise have been admissible.

3. CRIMINAL LAW—CONSTITUTIONAL LAW—ARREST—RIGHT TO REMAIN SILENT—WITNESSES—DEFENDANTS—IMPEACHMENT.

The use against a defendant at trial of his exercise of his constitutional right to remain silent at the time of arrest constitutes prejudicial error only where the defendant has made no allegations on direct examination as to what was said or not said at the time of arrest.

4. BURGLARY—EVIDENCE—DEMONSTRATION—ADMISSIBILITY.

A prosecutor's demonstration of how a door was opened, in a trial for breaking and entering, is admissible as part of the explanation of his theory of entry.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 29 Am Jur 2d, Evidence § 638 *et seq.*

[2] 58 Am Jur, Witnesses §§ 627, 629.

[4] 58 Am Jur, Witnesses § 61.

21 Am Jur 2d, Criminal Law § 362.

Requiring defendant in criminal case to exhibit self, or perform physical acts, during trial and in presence of jury. 171 ALR 1144.

Appeal from Wayne, Michael L. Stacey, J. Submitted Division 1 May 5, 1974, at Detroit. (Docket Nos. 16298, 16945.) Decided October 7, 1974.

Terry L. Moore and Dennis N. McFarland were convicted of breaking and entering an occupied dwelling with intent to commit larceny. Defendants appeal. Reversed and remanded for new trial.

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 Khalil,* Assistant Prosecuting Attorney, for the people.

Colista & Baum, for defendant Moore.

Ingle & Burke, for defendant McFarland.

Before: V. J. BRENNAN, P. J., and R. B. BURNS and R. L. SMITH,* JJ.

R. B. BURNS, J. Defendants were tried and convicted, jointly, of breaking and entering an occupied dwelling with intent to commit larceny. MCLA 750.110; MSA 28.305.

They appeal and we reverse.

The prosecutor, while cross-examining defendant McFarland, adduced the following testimony:

"*Q.* Were you arrested for breaking and entering?

"*A.* The sergeant said, 'these are the boys that did the breaking and entering and you're under arrest'.

"*Q.* What did you say?

"*A.* Nothing.

"*Q.* Nothing?

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

"*A.* I was flabbergasted.

"*Q.* Did you ever tell the police about Earl?

"*A.* What do you mean, sir, about Earl?

"*Q.* Did you ever mention Earl to the police?

"*A.* I never had a chance. I went directly to the police station.

"*Q.* Did the police officer talk to you at the police station?

"*A.* Yes.

"*Q.* What did you tell him?

"*A.* He started asking if I was a heroin addict.

"*Q.* What did you tell him?

"*A.* After they were talking to me about the heroin, they said I had the right to be quiet and to get an attorney. I said I guess I should.

"*Q.* You didn't tell them anything else?

"*A.* Outside of my name and stuff. I mean—I was trying to cooperate.

"*Q.* Did you tell them about a broken windshield?

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

"*Q.* Did you tell them about a fight?

"*A.* No, I did not.

"*Q.* Were you perspiring or a little sweaty when the police arrested you, if you remember?

"*A.* I imagine I was. I'd walked quite far."

We think this testimony is the exact type of testimony prohibited in *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973).

Also, the trial court should not have allowed the prosecutor to conduct the irrelevant demonstration of opening a door with a credit card.

In addition, when instructing the jury, the trial court should keep in mind the distinction between inferring intent from an unlawful act and presuming intent from an unlawful act.

Reversed and remanded for a new trial.

R. L. SMITH, J., concurred.

V. J. BRENNAN, P. J. *(dissenting).* In this matter, the defendants were tried jointly and convicted of breaking and entering an occupied dwelling with intent to commit larceny. MCLA 750.110; MSA 28.305.

My colleagues have reversed this conviction by opinion.

I must respectfully dissent from my fellow judges in this case. My review of the record presents a different picture to me than that reached by my colleagues. Consequently a different application of the cited authority is, in my opinion, required.

My colleagues quote the prosecutor's cross-examination of defendant McFarland and use it as the main reason for the reversal, citing *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973), as authority. I too would concur if that testimony had been initiated by the prosecution. A careful review of the transcript, however, shows very clearly that this entire testimony was first brought out on direct examination by the defendant and his counsel, a practice frequently used as a matter of strategy so that the defendant rather than somebody else tells the story.

This gave the prosecutor the *right* to cross-examine in the same areas. I feel it is academic in trial practice that once the door is opened on direct examination those areas may be examined on cross, even though they may not otherwise have been admissible. *People v Roger Johnson,* 382 Mich 632; 172 NW2d 369 (1969); *People v Markham,* 19 Mich App 616; 173 NW2d 307 (1969), *lv den* 383 Mich 804 (1970). *Cf. LaForest v Grunow,* 43 Mich App 254; 204 NW2d 355 (1972).

On direct examination the defendant testified about the heroin question, about whether he had

killed anybody, about the broken windshield, about the fight, about Earl, about the police reading him his rights, about them telling him of his right to a lawyer, about his stating "no" as to whether he wanted to make a statement, and about his telling the police that he wanted a lawyer.

These are the exact areas upon which the prosecution examined him.

Supreme Court Justice THOMAS GILES KAVANAGH, in his well-written opinion in *Bobo, supra,* said on p 359: "In the present case on direct examination defendant gave no testimony whatsoever regarding any statement made to the police or anyone else."

The qualification clearly shows that had he given any testimony on direct examination regarding a statement, cross-examination in that area would have been admissible. Also, at the beginning of the opinion, Justice KAVANAGH framed the question as follows:

> "Where an accused exercises his constitutional right to remain silent at the time of the arrest, does the use of such silence against him at trial under the doctrine of impeachment by prior inconsistent statement constitute prejudicial error where he made no allegations on direct examination as to what was said or not said at the time of arrest?"

I point out again the qualification and restate the last part of that question: " * * * where he made no allegations on direct examination as to what was said or not said at the time of arrest?"

My colleagues have misapplied the mandate in *Bobo.*

As to the other issues, I have examined the instructions in their entirety and find that they fairly charge the jury on the law.

The demonstration of how the door was opened is permissible as being part of the prosecutor's explanation of his theory of entry. This is admissible testimony to a jury who must then determine what weight or credibility it shall give to it.

I find no error in this case. It should be affirmed.

PEOPLE v LEBLANC

1. TREATIES—INDIANS—CONSTRUCTION.

The language used in treaties with the Indians should never be construed to their prejudice; how the words of a treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

2. TREATIES—INDIANS—CHIPPEWA INDIANS—FISHING RIGHTS.

The Treaty of 1836 gave the Chippewa Indians unlimited fishing rights in all the waters adjoining those lands which were ceded by the treaty, and such rights were not relinquished by the Treaty of 1855 (7 Stat 491 [1836], 11 Stat 621 [1856]).

3. TREATIES—FISHING RIGHTS—STATES—STATE LAW—CONSTITUTIONAL LAW—REGULATIONS.

State law cannot qualify or condition fishing rights under a Federal treaty; however, the state can, consistent with the mandates of the Constitution, regulate the time and manner in which such rights are exercised provided the regulations are nondiscriminatory and necessary for the conservation of fish.

4. CRIMINAL LAW—FISHING WITHOUT A LICENSE—TREATIES—FEDERAL TREATY RIGHT—STATUTES.

A defendant Chippewa Indian's conviction of fishing without a commercial license is reversed because the application of the state statute to such a defendant conflicts with the exercise of a federal treaty right (7 Stat 491 [1836]; MCLA 308.22).

5. CRIMINAL LAW—USE OF GILL NETS—TREATIES—FISHING RIGHTS—STATUTES.

A statute which outlaws the use of gill nets may properly be applied to a defendant Chippewa Indian, who was given fishing rights pursuant to a Federal treaty, if the state can show that the statute is necessary to prevent a substantial depletion of the fish supply (MCLA 302.1).

REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur 2d, Indians § 12.

[2–5] 41 Am Jur 2d, Indians § 19.

Appeal from Chippewa, William F. Hood, J. Submitted Division 3 February 11, 1974, at Detroit. (Docket No. 16394.) Decided October 7, 1974. Leave to appeal applied for.

Albert B. LeBlanc was convicted in district court of fishing without a commercial license and fishing with a gill net. Defendant appealed to circuit court. Affirmed. Defendant appeals. Conviction of fishing without a commercial license reversed; conviction of fishing with a gill net remanded for further proceedings.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Farrell E. Elliott,* Prosecuting Attorney, for the people.

Upper Peninsula Legal Services, Inc., by *William J. James,* Director (Michigan Legal Services Assistance Program, *Alan W. Houseman,* Director, and *Jeanne F. Franklin,* Staff Attorney, of counsel), for defendant.

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

V. J. BRENNAN, P. J. On September 28, 1971, Albert B. LeBlanc, the defendant herein and a full-blooded Chippewa Indian, was arrested by an officer of the Michigan Department of Natural Resources and charged with fishing without a commercial license in violation of MCLA 308.22; MSA 13.1513 and with fishing with a gill net contrary to the provisions of MCLA 302.1; MSA 13.1602. He was tried before District Court Judge Nicholas J. Lambros on October 5, 1971, and found guilty on both counts. His conviction was affirmed by the Chippewa County Circuit Court and he now appeals to this Court upon leave granted.

At trial defendant admitted the acts complained

of but asserted that he could not be convicted of the crimes charged because to do so would conflict with a Federal treaty guaranteeing to all Chippewa Indians living on the Bay Mills Indian Reservation the right to fish in the Whitefish Bay area of Lake Superior, including Pendill's Bay—the area in which defendant was fishing at the time of his arrest.

The treaty relied on by defendant is the Treaty of 1836[1], Article XIII of which provides:

"The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."

Judge Lambros found that the clause "other usual privileges of occupancy" embraced the right of unlimited fishing in "all the waters adjoining those lands ceded by the treaty until required for settlement". This finding is entirely consistent with the rules governing interpretation of Indian treaties and is not challenged by the prosecution on this appeal. Judge Lambros also found, however, that by the Treaty of 1855[2] the Chippewa Indians gave up these fishing rights. This treaty provides, in relevant part:

"ARTICLE 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability of account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims; legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however, the

[1] 7 Stat 491 (1836).

[2] 11 Stat 621 (1856).

right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 16, 1820."

Judge Lambros held that by this language "the Chippewa Indians released and relinquished forever all right to unlimited fishing in the off-shore waters of Bay Mills no matter how such rights were secured to them". Judge Hood of the Chippewa County Circuit Court upheld this determination also concluding that the Treaty of 1855 served to eliminate the Chippewas' fishing rights under the Treaty of 1836. It is from this decision that defendant now appeals.

In *People v Jondreau,* 384 Mich 539, 544; 185 NW2d 375, 377–378 (1971), our Supreme Court laid down certain rules which were to be followed in the interpretation of Indian treaties. Our Supreme Court there said:

"Although there is no legislative history available on the making of this treaty, we are aided by the fact that the United States Supreme Court has laid down general rules of construction in cases involving Indian treaties. In *Worcester v Georgia,* 31 US (6 Peters) 515 (8 L Ed 483) (1832), Justice McLean stated (p 582):

" 'The language used in treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"In *Choctaw Nation v United States,* 119 US 1 (7 S Ct 75, 30 L Ed 306) (1886), after quoting the above statement, the court said (p 28):

" 'The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the *substance of the right,* without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws. (Emphasis added.)' "

It appears to us that the construction given the Treaty of 1855 by the lower courts is inconsistent with the rules governing the interpretation of Indian treaties stated above and ignores the central role fishing has historically played in the lives of the Chippewa Indians.

The provision of the 1855 treaty relied upon to show that the fishing rights secured by the 1836 treaty were subsequently relinquished is Article 3. A close reading of that section shows, however, that in order for us to uphold the lower courts' determinations we would be required to say that the Chippewas' fishing rights constituted a "liability" or a claim, legal or equitable, for "land, money or other thing" guaranteed to the Chippewas by former treaty stipulations and that this reading of the treaty comports with how it was understood by the Chippewa Indians. *Worcester v Georgia,* 31 US (6 Pet) 515; 8 L Ed 483 (1832); *People v Jondreau, supra.* This we are unable to do. The fishing rights reserved to the Chippewa Indians by the Treaty of 1836 are precisely that—rights. They do not constitute a claim against the United States, as that term is generally understood, nor do they constitute a liability. To hold that they do is to give such words a meaning wholly at odds with what appears to have been intended by the parties to be encompassed within the terms of this provision.

By the Treaty of 1836 the Chippewas ceded certain lands to the United States, reserved parts thereof for their own use and retained to themselves the right to hunt and fish on the ceded lands. In return for this cession of land the United States agreed to pay the Chippewas certain amounts of money for various purposes, to provide

them with various goods and services, and to furnish them a new home in an area southwest of the Missouri River. Furthermore, the Ottawa Indians, also parties to the Treaty of 1836, and the Treaty of 1855, were entitled to receive an annual payment from the Federal government as their share of permanent annuities guaranteed them by earlier treaties.[3] Article 3 of the 1855 treaty was intended to eliminate these types of claims—claims arising from earlier treaty provisions securing land, money, goods and services to the Indians. The Treaty of 1855 was designed to consolidate the Federal government's obligations to the Indians and provide mutually agreeable substituted forms of performance. Nothing on the record indicates that the parties ever intended to eliminate the Chippewas' fishing rights by this clause. In reaching the conclusion that the issue of fishing rights was considered by the parties to this treaty, the district court placed much reliance on the fact that Article 3 specifically excepted from its application the fishing rights at Sault Ste. Marie, secured to the Chippewas by the Treaty of 1820.[4] Such a conclusion, however, ignores the special circumstances surrounding that particular grant of fishing rights.

A perpetual right of fishing and encampment at Sault Ste. Marie was secured by the Treaty of 1820 to the Chippewas who, by this same treaty, ceded certain lands at Sault Ste. Marie to the United States. Although the right to fish at this particular

[3] The treaties guaranteeing such annuities were the treaties of August 3, 1795, November 17, 1807, September 17, 1818, and August 29, 1829. See Letter from George H. Manypenny and Henry C. Gilbert, Commissioners, to the Department of the Interior, Office of Indian Affairs, dated August 7, 1855.

[4] 7 Stat 206 (1821).

site was highly prized by the Chippewas,[5] the construction of a canal on the ceded lands virtually destroyed the grounds for encampment and severely injured the fishing. The Chippewas were, at the time the 1855 treaty was signed, demanding large sums of money from the Federal government as compensation for the destruction of their rights under the 1820 treaty. It was to preserve this claim against the United States that Article 3 contained the exception referred to above. To read any more into this "exception" clause is to give effect to a technical interpretation of the treaty rather than to interpret it as it would have been understood by the Chippewas—the method of interpretation we are bound to follow. *Worcester v Georgia, supra; People v Jondreau, supra.*

The controversy surrounding the destruction of the Chippewas' fishing rights at Sault Ste. Marie is instructive from another point of view also, for it illustrates how highly such rights were valued by the Chippewas. The destruction of their fishing grounds at Sault Ste. Marie led the Chippewas to demand compensation far above that which such rights could be supposed to have been worth by Commissioners of the Office of Indian Affairs.[6] Indeed a separate treaty[7] was entered into between the United States and the Chippewa Indians to settle the dispute surrounding the destruction of these rights. It would be anomalous for this Court now to say that the Chippewas relinquished their fishing rights under the 1836 treaty by the broadly phrased Article 3 of the 1855 treaty without making similar demands.

[5] See Letter from George H. Manypenny and Henry C. Gilbert, Commissioners, to the Department of the Interior, Office of Indian Affairs, dated August 7, 1855.

[6] *Id.*

[7] Treaty of August 2, 1855 (11 Stat 631 [1856]).

For all the foregoing reasons we hold that the Chippewa Indians did not, by the 1855 treaty, relinquish the fishing rights they retained on the ceded lands under the 1836 treaty. This being the case, then it is clear that defendant is exempt from the provisions of the statutes under which he was charged to the extent that they conflict with the Federal treaty rights. *People v Jondreau, supra;* US Const, art VI; MCLA 305.1a; MSA 13.1623(1).

In determining whether the statutes here involved conflict with the Chippewas' fishing rights under the treaty much guidance is provided by the recent decision of the United States Supreme Court in *Puyallup Tribe v Department of Game,* 391 US 392; 88 S Ct 1725; 20 L Ed 2d 689 (1968). The Supreme Court there held that, although such rights cannot be qualified or conditioned by state law, the state can, consistent with the mandates of the Constitution, regulate the time and manner in which such rights are exercised provided the regulations are nondiscriminatory and necessary for the conservation of fish. See also *Tulee v State of Washington,* 315 US 681; 62 S Ct 862; 86 L Ed 1115 (1942).

In *Tulee v State of Washington, supra,* the United States Supreme Court reversed the conviction of a member of the Yakima tribe of Indians for fishing with a net without first having obtained a license so to do. The Supreme Court there held that, although the State could regulate the time and manner of fishing outside a reservation as would be necessary for the conservation of fish, the State could not require the Indians to purchase a license before allowing them to exercise their fishing rights under a Federal treaty. Although we are here concerned with a different treaty, we can see

no other difference between *Tulee* and the case presently before us which would require a different result. We, therefore, reverse defendant's conviction for fishing without a commercial license on the basis of the decision in *Tulee,* since such a law conditions the exercise of a Federal treaty right.

The statute under which defendant was convicted for fishing with a gill net, however, does not qualify or condition the exercise of a Federal treaty right but, rather, regulates the manner in which such right can be exercised. We are unable to determine from the present record, though, whether the statute which is sought to be enforced against this defendant, MCLA 302.1; MSA 13.1602, insofar as it outlaws the use of gill nets, is necessary for the conservation of fish. We, therefore, remand this part of the case to the district court for such a determination. At this hearing the state shall be required to "show that the [statutes] which it seeks to enforce against the Chippewa are reasonable and necessary to prevent a substantial depletion of the fish supply". *State v Gurnoe,* 53 Wis 2d 390, 410; 192 NW2d 892 (1972). If a showing is made that MCLA 302.1; MSA 13.1602, insofar as it outlaws the use of gill nets, is necessary to prevent a substantial depletion of the fish supply then defendant's conviction for fishing with a gill net should be affirmed; if not, then his conviction for fishing with a gill net should be reversed.

In summary, then, we hold that by the Treaty of 1836 the Chippewa Indians were given fishing rights in all the waters adjoining those lands ceded by the treaty and that such rights were not relinquished by any provision of the Treaty of 1855. We further hold that defendant's conviction for fishing without a commercial license in violation of MCLA 308.22; MSA 13.1513 is hereby reversed since its

application to this defendant conflicts with a Federal treaty right. Finally, with respect to defendant's conviction for fishing with a gill net in violation of MCLA 302.1; MSA 13.1602, the case is remanded to the district court for a determination as to whether MCLA 302.1; MSA 13.1602, insofar as it outlaws the use of gill nets, is necessary to prevent a substantial depletion of the fish supply. If such a showing is made by the state then defendant's conviction for violation of MCLA 302.1; MSA 13.1602 should be affirmed; if not, then his conviction should be reversed.

Conviction for violation of MCLA 308.22; MSA 13.1513 reversed; case remanded to the district court for further proceedings not inconsistent with this opinion.

All concurred.

PEOPLE v PAUL MATHIS

1. CRIMINAL LAW—INSTRUCTIONS TO JURY—EVIDENCE—ADMISSIBILITY—WITNESSES—IMPEACHMENT—PRIOR INCONSISTENT TESTIMONY—LIMITING INSTRUCTIONS—PREJUDICE.

   Failure to give an instruction *sua sponte* that prior inconsistent testimony was admitted solely for impeachment purposes is not reversible error where there is no request for a limiting instruction, there is no demonstration or likelihood of prejudice, and neither the court nor the prosecutor has suggested to the jury that the prior inconsistent statement could be used as substantive evidence.

2. WITNESSES—CHARACTER WITNESSES—CROSS-EXAMINATION—PROSECUTOR'S QUESTIONS—PRIOR CONVICTIONS—OBJECTIONS.

   Allowing a prosecutor to ask a character witness whether she had considered the fact that defendant had previously been convicted of an attempted breaking and entering was not reversible error where no objection was made, where the defendant had previously admitted the conviction on cross-examination without objection to the question, and where the defendant testified on redirect examination that he had been convicted of the offense some 16 years before.

Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted Division 1 June 25, 1974, at Detroit. (Docket No. 16762.) Decided October 7, 1974.

Paul C. Mathis was convicted of second-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,*

REFERENCES FOR POINTS IN HEADNOTES

[1] 75 Am Jur 2d, Trial § 601.

[2] 75 Am Jur 2d, Trial § 194.

Prosecuting Attorney, *Dominick R. Carnovale,* Chief, Appellate Department, and *James M. Wouczyna,* Assistant Prosecuting Attorney, for the people.

Paul C. Mathis, *in propria persona.*

Before: BASHARA, P. J., and DANHOF and CHURCHILL,* JJ.

CHURCHILL, J. The defendant was charged with first-degree murder. MCLA 750.316; MSA 28.548. After trial in which the jury was unable to agree he was retried and convicted of second-degree murder by another jury on November 4, 1971. MCLA 750.317; MSA 28.549. He was sentenced to a prison term of 14 to 30 years.

Defendant appeals as of right. He makes several claims of error but only two of them merit discussion.

The defendant sought to impeach a witness called by the prosecutor by introduction of the witness's prior inconsistent testimony given at the preliminary examination. He claims as error on appeal the trial judge's failure to give an instruction that the prior inconsistent testimony was admitted solely for impeachment purposes, notwithstanding the lack of request for such an instruction.

In *People v Eagger,* 4 Mich App 449; 145 NW2d 221 (1966), and in *People v Lamson,* 22 Mich App 365; 177 NW2d 204 (1970), this Court, relying on *People v Durkee,* 369 Mich 618; 120 NW2d 729 (1963), ruled that the failure of the trial court to give such an instruction *sua sponte* is reversible error.

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

A rule which makes an error of omission by the trial judge an automatic ground for a new trial notwithstanding approval of the omission by defense counsel and without any showing of a likelihood that the defendant was prejudiced by the omission, not only takes away the initiative to make a proper request, but may actually encourage a contrary practice.[1] Such a rule puts a heavy and unrealistic burden on the trial judge to immediately recognize a few words of testimony as deserving of special comment to the jury, then or later, and to remember to do so, even though the prior inconsistent testimony or statement may seem of little significance at the time.

In this case we could simply determine that the rule does not apply because the defendant and not the prosecutor introduced the prior inconsistent testimony—but to delineate an exception to the rule is to recognize its validity. We believe the rule announced in *Eagger* and *Lamson* deserves reexamination.

In *People v Nemeth,* 258 Mich 682; 242 NW 808 (1932), it was held that the trial court's failure to give a requested instruction limiting the use of evidence of the prior inconsistent statement was reversible error. In *People v Durkee,* 369 Mich 618; 120 NW2d 729 (1963), the trial judge made a remark in front of the jury which indicated support of the theory that the jury could consider the prior inconsistent statement as substantive evidence. The Supreme Court observed that under the circumstances of the trial it was not only

[1] "Counsel cannot sit back and harbor error to be used as an appellate parachute in the event of a jury failure." *People v Brocato,* 17 Mich App 277, 305; 169 NW2d 483, 497 (1969).

"As this Court has stated before, counsel may not sit back in ambush, later to entrap the opposite party on a procedure to which he previously agreed." *People v Johnson,* 53 Mich App 329, 336; 220 NW2d 65, 69 (1974).

possible but probable that the jury considered the evidence of the prior inconsistent statement as substantive evidence of guilt or innocence.

Neither *Nemeth* nor *Durkee* requires the automatic reversal rule announced in *Eagger* and *Lamson*. Where, as in the case at bar, there is no request for a limiting instruction, where there is no demonstration or likelihood of prejudice and where neither the court nor the prosecutor has suggested to the jury that the prior inconsistent statement could be used as substantive evidence, the trial judge's omission does not require a reversal.

The defendant also claims reversible error was committed when the prosecutor asked a character witness whether she had considered the fact that defendant had previously been convicted of an attempted breaking and entering.

The defendant testified. On cross-examination, and without objection to the question, he admitted the prior conviction. On redirect examination the defendant testified that he had been convicted of the offense some 16 years before, when he was 17 or 18 years old. Thereafter, the defendant called a character witness to the defendant's reputation. On cross-examination, the following questions and answers appear on the record:

"*Q.* Did you include within your opinion the fact that he had been convicted of attempted B & E?

"*A.* I knew the time that he was convicted of that *[sic].*

"*Q.* And that did not affect your opinion of him?

"*A.* No, it didn't."

Again, no objection was made by defendant.

We find no error here. See *People v Huff,* 173 Mich 620; 139 NW 1033 (1913); *People v Rosa,*

268 Mich 462; 256 NW 483 (1934); *People v Dorrikas,* 354 Mich 303; 92 NW2d 305 (1958); and *People v Basemore,* 36 Mich App 256; 193 NW2d 335 (1971).

We do not determine whether the *Brocato-Peabody-James-Falkner*[2] line of cases culminating in *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974), holding that the trial court has discretion concerning the admission of evidence of prior convictions applies in this situation, because the trial court here was not called upon to exercise discretion.

Finally, we note that the trial court gave a careful instruction limiting consideration of the prior conviction to the defendant's credibility as a witness.

We have considered the other allegations of error raised by defendant and find no reversible error.

Affirmed.

BASHARA, P. J., concurred.

DANHOF, J., concurred in the result only.

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[2] *People v Brocato, supra,* fn 1, *People v Peabody,* 37 Mich App 87; 194 NW2d 532 (1971), *People v James,* 36 Mich App 550; 194 NW2d 57 (1971), *People v Falkner,* 389 Mich 682; 209 NW2d 193 (1973).

PEOPLE v THOMAS MATHIS

OPINION OF THE COURT

1. CRIMINAL LAW—PLEA OF GUILTY—RIGHT OF CONFRONTATION—SUFFICIENCY OF APPRISAL.

A trial judge's statement to a defendant at a plea-taking proceeding that at a trial he could have a lawyer with him to assist him and to question witnesses for him, subpoena witnesses on his behalf, make legal arguments for him, argue his case to the jury, and help in other ways, is not sufficient to inform the defendant of his right to confront his accusers.

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

2. CRIMINAL LAW—PLEA OF GUILTY—RIGHT OF CONFRONTATION—SUFFICIENCY OF APPRISAL.

A trial judge's language, when accepting a plea of guilty, which clearly pointed out to a defendant that at a trial he could bring witnesses in and that the witnesses presented could be examined, fulfills the requirement of advising the defendant of his right to confront his accusers.

Appeal from Recorder's Court of Detroit, John R. Murphy, J. Submitted Division 1 February 12, 1974, at Detroit. (Docket No. 16795.) Decided October 7, 1974.

Thomas Mathis was convicted, on his plea of guilty, of assault with intent to commit rape. Defendant appeals. Reversed and remanded.

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

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jur 2d, Criminal Law § 333 *et seq.*

Chief, Appellate Department, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Francis Zebot, Assistant State Appellate Defender, for defendant.

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

MCGREGOR, J. Defendant was arraigned and charged, on March 16, 1972, with rape and armed robbery, MCLA 750.520; MSA 28.788, MCLA 750.529; MSA 28.797, he pleaded guilty to a charge of assault with intent to rape, MCLA 750.85; MSA 28.280, on April 6, 1972, and was sentenced on April 20, 1972, to a term of 5 to 10 years.

On appeal, defendant raises five issues, four of which deal with the acceptance of defendant's plea; the final issue concerns the sentence. Defendant maintains that his guilty plea should not have been accepted because the trial court did not adequately advise him of his right to confront his accusers and of his right to a trial without jury.

The statement which most closely approximates an attempt to advise the defendant of his right to confront his accusers was as follows:

"*The Court:* Do you also understand that if you had a trial you would have certain rights at that trial. For instance you have a right to have your lawyer with you. He could assist you throughout the trial and he could question witnesses for you. He could subpoena witnesses in your behalf.

"He could make legal arguments for you and argue your case to the jury and give you advice and help in a lot of other ways. Do you understand that?

"*Defendant:* Yes, sir."

This language is comparable to advice given by the same judge which was held to be insufficient in *People v Purdy,* 46 Mich App 630, 632; 208 NW2d 581 (1973).

This Court has held the above language insufficient to inform a defendant of his right to confront his accusers. *People v D'Argis,* 44 Mich App 186; 205 NW2d 19 (1972).

Because of our decision, a new trial will be required in this case. We feel assured that, if any of the other alleged errors were committed in the previous trial, they will not be repeated upon retrial of the case.

Reversed and remanded for new trial.

T. M. BURNS, J., concurred.

V. J. BRENNAN, P. J. *(dissenting).* I respectfully disagree with my colleagues. I do not concur in the mandates of *People v Purdy,* 46 Mich App 630; 208 NW2d 581 (1973), or *People v D'Argis,* 44 Mich App 186; 205 NW2d 19 (1972).

The use of the magic words is not the only way to impart to a defendant the realization of his right to call witnesses and examine them and to cross-examine the witnesses that have been called against him. The trial court said:

"*The Court:* Do you understand if you had a trial you would have certain rights at that trial. For instance, you have a right to have your lawyer with you; he could assist you throughout the trial and he could question witnesses for you; he could subpoena witnesses in your behalf.

"He could make legal arguments for you and argue your case to the jury and give you advice and help in a lot of other ways. Do you understand that?

"*Defendant:* Yes, sir."

That language seems awfully clear to me; the court has clearly pointed out to the defendant that he could bring witnesses in, that the witnesses presented could be examined. I feel that more than covers the requirement of confrontation advice.

The entire plea in this case was very clear and thorough. It was obvious the defendant wanted to plead guilty and during the plea all his rights were clearly explained. Now we are nit-picking and trying to bend over backwards to find a way to set aside a perfectly good plea.

I would affirm.

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC. v CITY OF RIVERVIEW

1. PRINCIPAL AND AGENT—MUNICIPAL CORPORATIONS—BUILDING AUTHORITIES.

A city building authority was properly found to be an agent of the city where the city directly contracted for a planner's services, made change orders and approvals, and then transferred control of a project to the authority, reserving rights of approval of future planning, and subsequently withdrew from the arrangement, effectively terminating the agency.

2. PRINCIPAL AND AGENT—MUNICIPAL CORPORATIONS—BUILDING AUTHORITIES—SCOPE OF AUTHORITY—SETTLEMENT OF ACCOUNTS.

An agent has the implied power to carry out all acts necessary in execution of the principal's expressly conferred authority; thus the settlement of accounts for professional planning services is within the scope of authority of a building authority where a city has broadly granted it the authority for all future planning of a civic center project.

3. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—PURPOSE OF AGENCY.

Whether an act of an agent is within the authority granted depends upon the act's usual or necessary connection to accomplishing the purpose of the agency, and payment for professional services rendered is usually, if not necessarily, so connected.

4. MUNICIPAL CORPORATIONS—OFFICIAL RECORDS—PAYMENT FOR PROFESSIONAL SERVICES.

The failure of a defendant city to record officially changes made in the plans for a proposed civic center during study sessions held prior to or after the regular council meetings does not bar a plaintiff planner from recovery of payment for its professional services; the city cannot escape the consequences of its acts.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur 2d, Agency § 21.

[2, 3] 3 Am Jur 2d, Agency § 68 *et seq.*

[4] 3 Am Jur 2d, Agency § 247 *et seq.*

Appeal from Wayne, William F. Hood, J. Submitted Division 1 June 11, 1974, at Detroit. (Docket No. 17148.) Decided October 7, 1974. Leave to appeal applied for.

Complaint by Smith, Hinchman & Grylls Associates, Inc., against the City of Riverview for recovery of fees for professional services rendered. Judgment for plaintiff. Defendant appeals. Affirmed.

Beaumont, Smith & Harris (by *Alfred E. Lindbloom),* for plaintiff.

Logan & Huchla, for defendant.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

J. H. GILLIS, P. J. Defendant City of Riverview appeals the trial court's judgment finding it liable for plaintiff's services in planning a civic center complex. After plaintiff had completed the vast portion of its contracted-for services, defendant abandoned the civic center project. On appeal, we affirm.

In a contract, dated January 16, 1967, defendant engaged plaintiff to plan the construction of defendant's proposed civic center. Plaintiff became obligated to determine functional requirements and prepare schematic designs and cost estimates. After the plans were finalized, defendant intended to transfer control of the project to the Building Authority. The Authority would construct the center and lease it to defendant. The executed lease provided that the Authority would issue bonds for $4,115,000 to finance the project.

Negotiations began in 1967; late that year it

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

became clear that costs would exceed the proposed bond issue by approximately $400,000. The contract required council's approval of various phases. The approvals for phases I and II were given formally at regular council meetings; later approvals came informally. From 1967 through late 1968, informal "study sessions" were held before and after regular meetings involving plaintiff and the council. During these meetings changes were made in the scope of the project which delayed the target date for bid letting, and escalated the project's cost. By July 1, 1968 cost estimates exceeded $5,400,000. Confronted with the cost problem, testimony reveals that council contemplated additional financing from a revenue-generating golf course, ski hill, and senior citizens housing project, aptly denominated the "pie-in-the-sky" plan. Predictably, the plan never materialized. Meanwhile, council's fluctuation and delay together with skyrocketing construction costs generated ballooning project costs.

At a meeting attended by plaintiff, defendant, and the Building Authority, in late 1968, project control was transferred to the Authority with unanimous consent. Subsequently, the Building Authority agreed to pay plaintiff $224,000 for its services on the project, and $6,000 for services rendered in constructing the DPW building. The Building Authority had earlier decided to erect a more modest structure, and to relieve plaintiff of any further obligation concerning the proposed civic center complex. Plaintiff agreed to condition receipt of payment on the sale of the bonds, subject to unconditional payment by June 1, 1969. Thereafter, defendant notified the Authority it would not perform its lease, thus causing abandonment of the civic center project. Absent a revenue

source, the Authority could not reimburse plaintiff for its services.

Defendant claims that the trial court erred in finding the Authority was defendant's agent. It claims the Authority was a separate and distinct corporation, whose acceptance of plaintiff's proposed settlement of accounts is not binding. Defendant attempted to distinguish the agency relationship in *Smith, Hinchman & Grylls v River Rouge,* 374 Mich 514; 132 NW2d 682 (1965). Defendant did not succeed. If anything, the instant case makes a more persuasive case for the imposition of liability. Here, defendant directly made the contract for plaintiff's services; it made the change orders and approvals; it transferred project control to the Authority. Council conferred on the Authority all responsibility for future planning, subject to Riverview's rights of approval reserved under the lease. Indeed, defendant's withdrawal from the lease effectively terminated the agency.

Defendant's alternative theory, that the Building Authority exceeded its powers in accepting plaintiff's proposed settlement, is lacking in merit. Having broadly granted the authority for all future planning of the civic center project, defendant cannot claim that settlement of accounts for professional planning services lies outside the scope of that authority. Agents have the implied power to carry out all acts necessary in executing defendant's expressly conferred authority. 1 Michigan Law & Practice, Agency, § 33, p 325. *Emery v Ford,* 234 Mich 11; 207 NW 856 (1926); *Mossman v Millenbach Motor Sales,* 284 Mich 562; 280 NW 50 (1938); 2A CJS, Agency, § 154, p 779. Whether the act in question is within the authority granted depends upon the act's usual or necessary connection to accomplishing the purpose of the agency.

CJS, *supra; cf. Park v Moorman Mfg Co,* 121 Utah 339; 241 P2d 914 (1952). Clearly, payment for professional services rendered is usually, if not necessarily, connected to accomplishing the agency's purpose, *i.e.,* the planning and development of a civic center complex. Defendant's *ultra vires* contention is erroneous.

Next, defendant contends that the failure of its minutes to contain official recording of the changes made during the study sessions should bar recovery. That the meetings were held is uncontroverted. The failure to record cannot permit defendant to escape the consequences of its acts, especially when plaintiff sought only to supplement rather than change the official records. *McGaughan v West Bloomfield Twp,* 268 Mich 553; 256 NW 545 (1934); *American LaFrance & Foamite Industries, Inc v Village of Clifford,* 267 Mich 326; 255 NW 596 (1934).

Finally, we do not think the trial court erred in finding that plaintiff did not breach the contract by "over-designing" the civic center project. Testimony reveals that the responsibility for the gap between the proposed bond issue and project cost lies indubitably with defendant.

Affirmed. Costs to plaintiff.

All concurred.

BRAXTON v LITCHALK

1. JUDGMENT—COLLATERAL ESTOPPEL—RES JUDICATA—COMMON PLEAS COURT.

The common pleas court may enter a judgment to which the doctrines of collateral estoppel and res judicata apply in a second action.

2. JUDGMENT—COLLATERAL ESTOPPEL—RES JUDICATA—DEFAULT JUDGMENT—QUESTIONS LITIGATED.

The doctrine of res judicata applies to a default judgment and a default judgment has the effect of collateral estoppel in a subsequent action between the parties arising out of the same transaction or occurrence; the important factor is not whether the prior case has been formally tried as distinguished from judgment taken by default, but whether the question of fact was actually litigated and determined in the prior action.

3. JUDGMENT—COLLATERAL ESTOPPEL—PARTIES—SUBSEQUENT ACTIONS—DIFFERENT CAUSES OF ACTION—ISSUES LITIGATED.

Collateral estoppel bars the relitigation of issues previously decided in a first action when the parties to a second action are the same; where the second action is a different cause of action, the bar is conclusive only as to issues actually litigated in the first action.

REFERENCES FOR POINTS IN HEADNOTES

[1] 46 Am Jur 2d, Judgments § 539.

[2] 47 Am Jur 2d, Judgments § 1198.

Doctrine of res judicata as applied to default judgments. 77 ALR2d 1410.

[3, 4, 11] 46 Am Jur 2d, Judgments §§ 524–528.

[5] 46 Am Jur 2d, Judgments §§ 524–528, 531, 577.

[6] 8 Am Jur 2d, Automobiles and Highway Traffic § 603.

Validity, construction, and effect of statutes which make owner responsible or create a lien for injury or death inflicted by another operating an automobile. 135 ALR 481.

[7] 46 Am Jur 2d, Judgments § 498.

[8] 46 Am Jur 2d, Judgments § 628.

[9, 10] 46 Am Jur 2d, Judgments §§ 521–523.

4. JUDGMENT—COLLATERAL ESTOPPEL—PARTIES—SUBSEQUENT ACTIONS—DIFFERENT CAUSES OF ACTION.

A subsequent action involved the doctrine of collateral estoppel and whether it could be properly invoked by each of three named defendants as a bar to plaintiffs' claims where in the subsequent action plaintiffs alleged defendants were negligent and that their negligence was a proximate cause of plaintiffs' loss, and claimed compensation for property damage and personal injury, and these claims were not pled in the previous action, wherein it was claimed that one of the present plaintiffs was negligent and that this negligence caused the collision between two vehicles.

5. JUDGMENT—COLLATERAL ESTOPPEL—PARTIES—IDENTITY.

Collateral estoppel applies only if the litigants were parties or privy to a party to the previous action; substantial identity of the parties, rather than precise identity, is sufficient for application of the doctrine.

6. AUTOMOBILES—MOTOR VEHICLES—OWNERS—LESSEES—STATUTES.

A defendant lessee's interest in a leased motor vehicle is substantially identical, if not precisely identical, with that of another defendant holder of legal title of the leased motor vehicle where the statute defines the word "owner" as a person, including a corporation, which has exclusive use of a vehicle, "under a lease or otherwise", for more than 30 days (MCLA 257.37[a]).

7. JUDGMENT—COLLATERAL ESTOPPEL—MOTOR VEHICLES—OWNERS—LESSEES.

A defendant record title owner of a motor vehicle may assert collateral estoppel "defensively" in a subsequent action where its lessee of the motor vehicle has established its right to recover in a previous action.

8. JUDGMENT—COLLATERAL ESTOPPEL—PARTIES—PRIVITY.

A defendant in a subsequent action is not in privity with the parties to a previous action where he was not a party to the previous action and he has not acquired an interest in the subject matter of that action through inheritance, succession, or purchase.

9. JUDGMENT—COLLATERAL ESTOPPEL—MUTUALITY OF ESTOPPEL—SUBSEQUENT ACTIONS.

Collateral estoppel generally applies only when there is a mutuality of estoppel; a party cannot rely upon a previous judgment

unless the other party could have pled it against him had the judgment gone the other way.

10. JUDGMENT—COLLATERAL ESTOPPEL—MUTUALITY OF ESTOPPEL—SUBSEQUENT ACTIONS—PRINCIPAL AND AGENT—MASTER AND SERVANT—INDEMNITOR AND INDEMNITEE.

A well-recognized exception to the requirement of mutuality of estoppel in a subsequent action exists in cases involving a relationship such as a principal and agent, master and servant, or indemnitor and indemnitee.

11. JUDGMENT—COLLATERAL ESTOPPEL—SUBSEQUENT ACTIONS—ISSUES LITIGATED.

A servant-agent-employee driver, defendant in a second action, who was not a party to a first action in which the principal-employer prevailed on the ground that the defendant in the first action, plaintiff in the second action, was negligent and that his negligence was a proximate cause of the accident, may apply the doctrine of collateral estoppel defensively because the plaintiff in the second action against whom collateral estoppel is asserted had an opportunity to litigate the issue in the first action.

Appeal from Wayne, Thomas J. Roumell, J. Submitted Division 1 June 11, 1974, at Detroit. (Docket No. 17181.) Decided October 7, 1974. Leave to appeal applied for.

Complaint by Robert L. Braxton, Sr., Thelma Braxton, Robert L. Braxton, Jr., and Delores Braxton against John W. Litchalk, Bendix Corporation, and D. L. Peterson Trust, for damages for injuries received as a result of an automobile accident. Accelerated judgment for Litchalk and Bendix Corporation as to plaintiffs Robert L. Braxton, Sr., and Thelma Braxton, and motion for accelerated judgment denied as to plaintiffs Robert L. Braxton, Jr., and Delores Braxton. Motion for accelerated judgment by defendant D. L. Peterson Trust denied as to all plaintiffs. Plaintiffs Robert L. Braxton, Sr., and Thelma Braxton appeal. Defendant Trust cross-appeals. Affirmed as to defendants Bendix and Litchalk, and reversed as to the motion of

D. L. Peterson Trust against Robert L. Braxton, Sr., and Thelma Braxton.

Sanford N. Lakin, P. C. (by *Richard B. Worsham),* for plaintiffs.

Garan, Lucow, Miller, Lehman, Seward & Cooper, P. C. (by *Millard Becker, Jr.),* for defendants.

Before: J. H. GILLIS, P. J., and ALLEN and ELLIOTT,* JJ.

ALLEN, J. Plaintiffs-appellants have appealed from the April 20, 1973 order of the trial court granting defendants-appellees' motion for accelerated judgment. GCR 1963, 116.1(5). D. L. Peterson Trust, defendant-cross-appellant, has filed a cross-appeal from the trial court's denial of its motion for accelerated judgment.

This case comes before us on an agreed statement of facts. GCR 1963, 812.10. On September 12, 1969, Robert Lee Braxton, Sr., was the operator and owner of a motor vehicle which was involved in an automobile accident with a vehicle owned by the D. L. Peterson Trust, leased to Bendix Corporation and driven by John William Litchalk, a Bendix employee. Robert L. Braxton, Jr., was a passenger in his father's vehicle at this time and place.

In February of 1971, Bendix Corporation filed a lawsuit, case number 4-088-657, in the Common Pleas Court for the City of Detroit against Robert L. Braxton, alleging that he was negligent in the operation of his vehicle and sought $205.76, the amount it cost to repair the damage to the Bendix vehicle. Braxton failed to answer this complaint,

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

and on April 8, 1971, an affidavit was filed in support of the default. On that same day, a judgment of default was entered in the common pleas court, and on April 21, 1972, satisfaction of judgment was entered in the common pleas court after Robert Lee Braxton, Sr., had paid such judgment.[1]

On July 18, 1972, Robert L. Braxton, Sr., his wife Thelma, Robert Braxton, Jr., and his wife Delores filed suit in the Wayne County Circuit Court against John William Litchalk, and D. L. Peterson Trust, of Bendix Research Lab. At a subsequent hearing in this case, it was agreed that the latter-named party did not exist, and that the proper defendants should be known as the D. L. Peterson Trust and Bendix Corporation.

Robert L. Braxton, Sr., the named defendant in the common pleas action, is one of the named plaintiffs in the instant suit. His wife Thelma has maintained a derivative claim for loss of consortium, services and companionship. Delores Braxton, wife of Robert Braxton, Jr., maintains a similar claim.

On August 17, 1972, defendants filed a motion for accelerated judgment. Hearing was had on that motion on September 29, 1972, and on January 4, 1973, the trial court rendered its opinion. The trial court held that Mr. Litchalk, driver of the Bendix vehicle, could rely upon the doctrine of collateral estoppel, that Robert Braxton, Sr., and his wife were barred from maintaining an action against the driver of the vehicle, and were barred from maintaining an action against the Bendix Corpora-

[1] This Court has examined the file of case number 4-088-657 of the common pleas court and finds that Robert Lee Braxton, Sr., did appear by his attorney after default was taken and, as hereinafter recited in this opinion, moved to have the default judgment set aside. Following consideration by the court, the default was first set aside and later reinstated.

tion. The court held that Robert L. Braxton, Sr., and his wife were not barred from maintaining an action against the trust company. Also, it was ordered that Robert L. Braxton, Jr., and his wife could maintain an action against the three named defendants, and these defendants have agreed that Robert L. Braxton, Jr., and his wife are not barred by the previous common pleas court judgment entered against Robert L. Braxton, Sr.

On appeal, plaintiffs argue that the common pleas default judgment rendered against plaintiffs is not res judicata to the instant suit, nor does it collaterally estop plaintiffs from maintaining this suit, because: (1) the common pleas court allegedly lacks the stature of a circuit court, (2) a default judgment is not a decision on the merits, (3) Bendix Corporation's property damage claim was a cause of action different than plaintiffs' instant claim for personal injuries and property damages (4) and the instant suit involves different litigants, and consequently there is a lack of privity and/or mutuality among the various litigants. Cross-appellant D. L. Peterson Trust, legal titleholder to the Bendix vehicle involved in the accident, contends that it would be precluded from relitigating the claim which Bendix Corporation had filed in the common pleas court, and that according to the doctrine of mutuality, the plaintiffs are collaterally estopped from maintaining this suit against it.

The common pleas court may enter a judgment to which the doctrines of collateral estoppel and res judicata apply, and plaintiffs' argument to the contrary is without merit. *Chunko v LeMaitre,* 10 Mich App 490, 495; 159 NW2d 876 (1968). As stated in 50 CJS, Judgments, § 689, p 146:

"A sentence, judgment, or decree of a court acting within its jurisdiction is res judicata, preventing the

fact or matter adjudicated from being relitigated in the same or any other court between the parties and privies, whether the court rendering it had general, inferior, special, limited, concurrent, or exclusive jurisdiction * * * . [T]he relative rank of the courts involved is immaterial; if the judgment is one which in its nature operates as res judicata it is binding on all other courts, even the highest, although rendered by the lowest court in the judicial system." (Footnotes omitted.)

MCLA 728.1, MSA 27.3651 states that the common pleas court is a court of record, that it has concurrent jurisdiction with the circuit court in all civil actions where damages do not exceed $10,000, and has exclusive jurisdiction where the damages do not exceed $5,000. Without specifically addressing the instant question, our Court has applied the defense of collateral estoppel to a circuit court case filed subsequent to a common pleas proceeding, *Jones v Slaughter,* 54 Mich App 120; 220 NW2d 63 (1974), and it is clear that plaintiffs' first argument is without merit.

Contrary to plaintiffs' second argument, the doctrine of res judicata applies to a default judgment. *Perry & Derrick Co, Inc v King,* 24 Mich App 616, 620; 180 NW2d 483 (1970), said:

"A default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest."

See also 47 Am Jur 2d, Judgments, § 1197, p 213. A default judgment will also "be given collateral estoppel effect in a subsequent suit between the parties arising out of the same transaction or occurrence". *Sahn v Brisson,* 43 Mich App 666, 670–671; 204 NW2d 692 (1972).

There is authority that where the issues are not

actually litigated in the prior action but are determined by default judgment only, the prior action is not conclusive as to those issues in the subsequent cause of action. *Petrucci v Landon,* 48 Del 491; 107 A2d 236, 239 (1954). *Petrucci, supra,* based its conclusion upon the rules in Restatement, Judgments, § 68 (1942). The case of *Lovejoy v Ashworth,* 94 NH 8; 45 A2d 218, 219 (1946), also referred to Restatement, *supra,* as authority for holding a prior default judgment did "not bar the defendant from raising [the] issue in a later suit upon a different cause of action". See also *Developments in the Law—Res Judicata,* 65 Harv L Rev 818, 840–841 (1952).

These cases appear to represent the minority view. 77 ALR2d 1410, § 3(a), p 1419 states:

> "[The] general rule is that a default judgment is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one entered after answer and contest."

The above annotation recognizes the rule set forth in § 68 of the Restatement, supra, but then proceeds to note that it is "supported by but a few of the cases discussed in [the] annotation", one of which is *Lovejoy, supra.* The annotation then proceeds to comment "there are a great number of cases" in which the courts have applied collateral estoppel to a default judgment. See also 47 Am Jur 2d, Judgments, § 1198, p 214. Among the cases supporting the majority rule are *Laughlin v Lumbert,* 68 NM 351; 362 P2d 507 (1961), and *Gwynn v Wilhelm,* 226 Or 606; 360 P2d 312 (1961). In *Gwynn* the Court observed that the important factor was not whether the prior case had been formally tried as distinguished from judgment taken by default, but whether the question of fact

was "actually litigated and determined" in the prior action. The "actually litigated" test is the same rule employed in *Sahn v Brisson, supra.* This Court held that even though judgment in the prior suit was by default it was actually litigated by the pleadings and introduction of competent testimony.

"A question has not been actually litigated until put in issue by the pleadings, submitted to the trier of fact for a determination and thereafter determined. (Citation omitted.)

"In the prior * * * suit, the question of whether repairs to the bulldozer were authorized by the defendant herein was put in issue by the pleadings. The trial court in that case had competent testimony before it upon which to grant a default judgment. The court, based upon the testimony and exhibits presented, determined all of the issues posed by the pleadings. Thus the issues presented by plaintiff's complaint (defendant herein) were actually litigated and we so hold." 43 Mich App 670.

In the case before us the issues were more litigated than in *Sahn.* Bendix Corporation's declaration, filed in the common pleas court, set forth the time, place and occurrence of the accident, alleged Litchalk was a Bendix employee, asserted that defendant Robert Braxton, Sr., (plaintiff in the case before us) negligently turned his vehicle in front of the Litchalk vehicle, alleged the vehicle was owned by the trust company, had been leased to Bendix, and that pursuant to the lease Bendix was responsible for repairing the vehicle. Testimony was then presented by affidavit of plaintiff's attorney to sustain each allegation and default was entered. Defendant Robert Braxton then appeared by his attorney who, on May 11, 1972, moved to set the default aside. Default was set

aside by the trial court May 19, whereupon, on May 26, counsel for Bendix moved to reinstate the default. On June 7, the trial judge wrote counsel for both parties the court was holding the default in abeyance to enable the court to read Bendix's response to defendant's motion. On June 17, the court wrote counsel that Braxton had not given good cause to set the judgment aside. No appeal was taken from the trial court's ruling. In view of the extensive attention given this matter by the trial court, the final entry of a default judgment and failure of defendant to appeal therefrom, we must accept as true the matters pleaded in the Bendix complaint and must examine the merits of the case before us. Our conclusion in this regard should not be construed as going so far as to hold that every default judgment, no matter under what circumstances it is taken, may result in collateral estoppel, but only that in the instant case the issues were sufficiently litigated to make the doctrine of collateral estoppel apply.

Our examination commences by focusing on the difference between res judicata and collateral estoppel. According to the general rules discussed in *Howell v Vito's Trucking & Excavating Co,* 386 Mich 37, 41–42; 191 NW2d 313 (1971), and *Jones v Chambers,* 353 Mich 674, 680–681; 91 NW2d 889 (1958), the doctrine of res judicata is applicable to a second suit involving the same cause of action as that raised in the first suit, and will bar the relitigation of issues which actually were or might have been presented before the court in the first action. As noted in *Topps-Toeller, Inc v Lansing,* 47 Mich App 720, 726–727; 209 NW2d 843 (1973), *lv den,* 390 Mich 788 (1973), res judicata bars a subsequent suit between the same parties or their privies when the same cause of action is raised in a subsequent suit, and when the facts or evidence

essential to the maintenance of both actions are identical. On the other hand, collateral estoppel will bar the relitigation of issues previously decided in the first action when the parties to the second action are the same; where the second suit is a different cause of action, the bar is conclusive only as to issues actually litigated in the first suit.

In the common pleas suit, Bendix alleged that Braxton was negligent and that this negligence caused the collision between the 2 vehicles. Bendix claimed $205.76 in property damages. In the subsequent suit, Braxton has alleged that defendants were negligent, that their negligence was the proximate cause of plaintiffs' loss, and has claimed compensation for property damage and personal injury. These claims were not pleaded in the previous suit, and according to *Jones v Chambers,* 353 Mich 674, 679; 91 NW2d 889 (1958), the instant suit involves a different cause of action from that decided in the common pleas court. Therefore, this case involved the doctrine of collateral estoppel and whether or not it may be properly invoked by each of the three named defendants as a bar to plaintiffs-appellants' claim.

Robert Braxton, Sr., and Bendix Corporation were parties to the common pleas suit, and the judgment therein determined that Braxton was negligent and that his negligence was a proximate cause of the collision. Braxton has been found to be negligent and a proximate cause of the collision and would therefore be precluded from recovering from Bendix Corporation. The trial court was correct when it found that Braxton was barred from maintaining his circuit court suit against Bendix Corporation.

Neither Litchalk nor the D. L. Peterson Trust were named defendants in the common-pleas suit.

As noted in *Howell v Vito's Trucking Co, supra,* collateral estoppel only applies if the respective litigants were parties or privy to a party to the previous action. There must also be a mutuality of estoppel. 386 Mich 37, 42–43.

Local 98 v Flamegas Detroit Corp, 52 Mich App 297, 302; 217 NW2d 131 (1974), *lv granted,* 392 Mich 793 (1974), noted that "substantial identity" of the parties, rather than precise identity, is sufficient for application of the doctrine of collateral estoppel. Contrary to Bendix's assertion that it, as owner of the vehicle, had sued Braxton, the pleadings in the common pleas court clearly indicate that Bendix represented itself to be the lessee of the vehicle and responsible for repairs pursuant to the terms of the lease. However, MCLA 257.37(a); MSA 9.1837(a) defines the word "owner" as a person, including a corporation, which has the exclusive use of a vehicle, "under a lease or otherwise", for more than 30 days. Bendix comes within this definition, and thus it seems that its interest is "substantially identical", if not precisely identical, with that of the trust company, holder of legal title of the leased vehicle.

The trial court relied upon *Halloran v Knoph,* 243 Minn 120; 66 NW2d 551 (1954), to support its conclusion that the trust company was not party or privy to the common pleas suit. That case involved the "offensive" use of res judicata by plaintiffs who had been unable to satisfy a judgment previously rendered against a taxicab company. In the second suit, plaintiffs sought recovery from the individual person doing business as the taxicab company, and the person who drove the cab in question. On the grounds that the defendants were not named defendants in the first suit, the court referred to the "party or privy" rule and

held that plaintiffs were unable to assert res judicata as a means of establishing a right to recovery in the second suit. 243 Minn 120, 122; 66 NW2d 551, 553. That case did not involve the application of an "ownership" statute, and our Court has held that both the lessee and the lessor-legal titleholder may be owners for the purpose of establishing liability. *Mathews v Wosek,* 44 Mich App 706, 714; 205 NW2d 813 (1973).

The instant case involves the "defensive" assertion of collateral estoppel by a record title owner after the lessee owner had established its right to recover in a previous suit. The interests of both owners are "substantially identical", and we find that the D. L. Peterson Trust may assert the defense of collateral estoppel, and that the trial court erred when it held that Braxton was not barred from maintaining his suit against the trust company.

Litchalk, the employee-driver of the Bendix vehicle, was not a party to the common pleas suit. He has not acquired an interest in the subject matter of that suit through inheritance, succession, or purchase, and thus is not in privity with the parties to that suit. See 386 Mich 37, 43. *Howell, supra,* adhered to the requirement of mutuality, and said it exists if a person attempting to take advantage of the earlier judgment would have been bound by it if it had gone against him. 386 Mich 37, 43. Stated in another way, mutuality of estoppel is present if both litigants in the second suit are bound by the judgment rendered in the first suit, "and that otherwise it binds neither". Thus, Litchalk could not rely upon the previous judgment unless Braxton could have pleaded it against him had the judgment gone the other way. *Comment Note.—Mutuality of Estoppel as Prere-*

quisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment, 31 ALR3d 1044, § 3(a), p 1060. It has been further noted that "for all practical purposes * * * " the "mutuality requirement" is " * * * coextensive with the requirement of identity of parties or privity". 31 ALR3d 1044, §§ 2(a) and 3(a), pp 1051, 1060. Consequently, the plea of collateral estoppel would not seem to be available to Litchalk, since he was neither a party nor in privity with the parties to the common pleas suit.

However, there is a well-recognized exception to the mutuality requirement. This exception applies in cases involving a relationship such as a principal and agent, master and servant, or indemnitor and indemnitee. *Bigelow v Old Dominion Copper Mining & Smelting Co,* 225 US 111, 128; 32 S Ct 641, 642; 56 L Ed 1009 (1912). See also *DePolo v Greig,* 338 Mich 703, 709–711; 62 NW2d 441 (1954), and *Schimmer v Wolverine Insurance Co,* 54 Mich App 291; 220 NW2d 772 (1974). Without citing any authorities, plaintiffs assert that this exception should not apply to this case, and that it only applies where defendants are so named in successive suits brought by the same plaintiff.

Howell, supra, noted that the exceptions to the mutuality rule are generally confined to the defensive pleading of collateral estoppel. 386 Mich 37, 46, footnote 7. Litchalk is asserting collateral estoppel in a defensive manner. *Mackris v Murray,* 397 F2d 74, 77 (CA 6, 1968), in the course of disallowing one to offensively plead collateral estoppel, noted that it may be pled defensively in situations involving an exception to the general rule requiring mutuality.

Generally, courts follow the rule that:

"The liability in actions growing out of an accident is

claimed because of the alleged negligence of a servant or agent, a judgment in favor of either the master or principal on the one hand, or the servant or agent on the other, sued alone, is *res judicata,* or conclusive, as to such issue of negligence in a subsequent action against the other, a derivative responsibility being present." 23 ALR2d 710, § 16, p 731.

It has also been noted that generally, the presence of derivative responsibility will apply to bar the relitigation of the issues of negligence and contributory negligence in a subsequent suit "regardless of the sequence of the suits". 23 ALR2d 710, § 7, p 719. However, the annotator pointed out that this rule is often not followed. 23 ALR2d 710, § 9, p 722.

Relying upon the general rule discussed in 31 ALR3d 1044–1099, the Iowa Supreme Court in *Goolsby v Derby,* 189 NW2d 909 (Iowa, 1971), chose to follow the rule discussed above. In the first suit, Goolsby, passenger in a vehicle driven by Swan, filed an action against the administrator of the estate of Derby, the owner and operator of the other vehicle involved in the accident. As an affirmative defense, Derby alleged that Goolsby was contributorily negligent, and also alleged that Swan was negligent and that this negligence was the sole proximate cause of the accident. 189 NW2d 909, 910–911. A jury returned a verdict for Goolsby in the first suit.

The Court considered Derby's counterclaim against Goolsby, Swan and Staats, Swan's employer, to be a second suit. Staats, the employer, asserted that the jury's decision in favor of Goolsby barred Derby from maintaining the instant suit. 189 NW2d 909, 911. The trial court agreed, and the Supreme Court affirmed that determination. 189 NW2d 909, 912, 917. Referring to

31 ALR3d 1044, § 2(a), p 1052, the Court noted two factors which should be considered in the course of deciding whether or not to apply collateral estoppel where there is no mutuality. First, it must be determined whether or not the party seeking to assert that claim is doing so offensively or defensively. Litchalk is asserting it defensively. Second, the court must determine whether or not the one against whom collateral estoppel is asserted had an opportunity to litigate the issue in the previous suit. 189 NW2d 909, 916. We have seen earlier that although Braxton defaulted, and a judgment was entered pursuant thereto, this judgment was just as conclusive and binding as to whatever was essential to support the judgment in favor of Bendix as if it had been rendered following an answer and trial. Thus, the two criteria would seem to be met.

Goolsby noted the general reluctance of courts to allow the master-servant exception to the mutuality requirement to be used in an offensive manner, but are more willing to allow it to be asserted defensively. 189 NW2d 909, 916. The principal-master-employer, while not a party to the first suit, was able to use collateral estoppel defensively in the second suit, and was able to rely upon the jury's finding in the first suit that the agent-servant-employee was not negligent. In the instant case, Litchalk is the servant-agent-employee who was not a party to the first suit in which the principal-employer prevailed on the grounds that Braxton was negligent and that his negligence was a proximate cause of the accident. Applying the rule set forth in *Bigelow, supra,* 23 ALR2d 710, § 16, p 731 and *Goolsby, supra,* we find that the trial court was correct in holding that Braxton may not maintain his action against Litchalk.

Further support for the above conclusions can be found in the application of the factors discussed in 31 ALR3d 1044, § 2(a), p 1052. Litchalk is using the doctrine defensively, Braxton had an opportunity to litigate the question of negligence and proximate cause, and allowing Litchalk to use collateral estoppel will be consistent with finding that the owners of the vehicle were not responsible in view of the "derivative responsibility" rule discussed above. We find that it is not generally unfair for Litchalk, driver of the Bendix vehicle, to use the result of the common pleas suit in the subsequent suit.

Affirmed as to Bendix and to Litchalk, reversed as to the D. L. Peterson Trust. Costs assessed against plaintiffs-appellants.

J. H. GILLIS, P. J., concurred.

ELLIOTT, J. *(concurring).* Judge ALLEN has followed a prior decision of this Court. I reluctantly concur, but I hope the Supreme Court will reverse us.

Probably, Mr. Braxton or his insurance company could not see the profit in paying a lawyer more than $205.76 to defend against that small claim. The default judgment, we hold, "actually litigates" and conclusively determines that the collision was caused by his negligence, so he cannot sue for his personal injuries.

It's not right.

MICHIGAN BAPTIST HOMES & DEVELOPMENT COMPANY v CITY OF ANN ARBOR

1. TAXATION—PROPERTY TAX—EXEMPTION—HOMES FOR THE AGED—STATUTES.

A nonprofit corporation which owns and operates a home for the aged will not receive an exemption from property taxation unless the housing facility or project is qualified, built or financed under § 202 of the National Housing Act of 1959, as amended, and unless the home may properly be categorized as a charitable or benevolent institution (MCLA 211.7d, 211.9; 12 USC 1701q).

2. TAXATION—PROPERTY TAX—EXEMPTION—HOMES FOR THE AGED.

A home for the housing and care of the aged, where the applicants for residence must be at least 65 years old and physically able to maintain themselves in a room without the aid of nursing personnel, and where each resident must pay two charges, a life-lease fee and a monthly service charge, and the ability to pay both charges is a factor which is considered in determining whether an applicant will be admitted, does not qualify as a housing facility or project built or financed under the housing act, and is not a charitable or benevolent institution where it appears to be more of a cooperative housing facility for elderly people in good financial and physical health than a charitable institution (MCLA 211.7d, 211.9; 12 USC 1701q).

3. TAXATION—PROPERTY TAX—EXEMPTION—HOMES FOR THE AGED—EQUAL PROTECTION—CLASSIFICATION.

There was no denial of equal protection to a plaintiff home for the aged because it was not granted exemption from taxation while the property of another home for elderly women was granted an exemption, where the differences between the two homes were of sufficient magnitude so as to preclude any

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4] 71 Am Jur 2d, State and Local Taxation §§ 387, 388.

Homes for the aged as exempt from property taxation. 37 ALR3d 565.

[3, 4] 71 Am Jur 2d, State and Local Taxation § 175 *et seq.*

argument that they were of the same class; the equal protection claim is meritorious only when something in the nature of a benefit is simultaneously granted and denied to different members of the same class.

4. TAXATION—PROPERTY TAX—EXEMPTION—HOMES FOR THE AGED—EQUAL PROTECTION—DUE PROCESS.

The Legislature by limiting the exemption provided by a section of the General Property Tax Act to nonprofit corporations which have obtained financing under a section of the National Housing Act of 1959, as amended, has not denied anyone the equal protection of the laws and due process of law; it intended that the tax exempt status be extended to the lowest income type of housing and has merely created a special category of low income housing for the elderly which is to be granted tax exempt status (MCLA 211.7d; 12 USC 1701q).

Appeal from State Tax Commission. Submitted Division 2 May 14, 1974, at Lansing. (Docket No. 17211.) Decided October 7, 1974. Leave to appeal applied for.

Michigan Baptist Homes & Development Company sought a property tax exemption for a home in the City of Ann Arbor used for the housing and care of the aged. The State Tax Commission affirmed the decisions of the Ann Arbor City Assessor and Board of Review denying the exemption. Plaintiff appeals on leave granted. Affirmed.

Foster, Lindemer, Swift & Collins, P. C., for plaintiff.

R. Bruce Laidlaw, Chief Assistant City Attorney, for the City of Ann Arbor.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard R. Roesch,* Assistant Attorney General, for the State Tax Commission.

Amicus Curiae: DeVine & DeVine (by *Allyn D.*

Kantor), for Public Schools of the City of Ann Arbor.

Before: DANHOF, P. J., and T. M. BURNS and CARLAND,* JJ.

T. M. BURNS, J. Plaintiff is a Michigan nonprofit corporation organized and operated exclusively for the purpose of acquiring or erecting and maintaining nursing and convalescent homes, and homes for the aged or other institutions for the care of the mentally and physically handicapped, the sick, the disabled, aged or destitute.

Plaintiff has established and is presently operating four homes for the housing and care of the aged, these homes being located in Detroit, Grand Rapids, St. Joseph, and Ann Arbor. The Grand Rapids and Detroit assessors have granted exemptions for the property used in operating the homes in their respective cities. Plaintiff contends that its home in Ann Arbor, Hillside Terrace, is also entitled to an exemption from taxation pursuant to §§ 7 and 9 of the General Property Tax Act[1] for the real and personal property owned and used by plaintiff in operating the home in Ann Arbor.

The Ann Arbor City Assessor denied a property tax exemption for Hillside Terrace pursuant to the aforementioned sections of the General Property Tax Act for the tax years 1971 and 1972. The exemption was denied on the ground that the home was not operated for "charitable" purposes. The Ann Arbor Board of Review affirmed the assessor's action.

On April 27, 1973, the State Tax Commission affirmed the decisions of the Ann Arbor City As-

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

[1] MCLA 211.7; MSA 7.7 and MCLA 211.9; MSA 7.9.

sessor and Board of Review. Plaintiff now appeals that decision by leave granted by this Court on October 15, 1973.

The purposes for which plaintiff was formed are described in Article I of its articles of incorporation as follows:

"To acquire or erect, and to equip, conduct and maintain on the broadest christian principles of service to humanity, nursing and convalescent homes, and homes for the aged, or other institutions for the care of mentally and physically handicapped, the sick, disabled, aged or destitute persons.

"The purpose of the organization of this corporation is for the general welfare and not for profit and any income derived therefrom shall not be paid out in dividends to any person or corporation but shall be used for benevolent charitable and general welfare purposes, and only for the purposes of such institution organized hereunder. Any receipts of this organization in excess of the expenses of purchase or erection and maintenance of said institution or institutions provided for herein shall be applied to the care of charity patients and to the equipment and enlargement of said institutions."

In order to fulfill the objectives set forth in its articles of incorporation, plaintiff, as mentioned previously, has established and is currently operating four homes for the housing and care of the aged in various parts of the State of Michigan.

Plaintiff claims that since the Grand Rapids and Detroit homes have already received exemptions for the property they use in operating their facilities, Hillside Terrace in Ann Arbor is also entitled to an exemption since it is operated in the same manner as the other two homes.

However, it is important to note that the actual organization and operation of Hillside Terrace in Ann Arbor is significantly different from the "be-

nevolent, charitable and general welfare purposes" described in Article I of its articles of incorporation.

The Hillside Terrace facilities were constructed between June, 1968 and October, 1969, at a total cost of almost $3,000,000. The facility is licensed by the State Department of Health as a home for the aged and a nursing home.

Applicants for residence must be at least 65 years old. Although admission is without regard to race or religious affiliation, an applicant must be physically able to maintain himself in his room without the aid of nursing personnel. Each applicant is required to submit to a physical examination to determine if he is ambulatory in that sense.

Residents of Hillside Terrace have either a one- or two-bedroom apartment with a private bath, heating and air conditioning, safety features and wall-to-wall carpeting. The types of apartments are differentiated according to size.

Each resident at Hillside Terrace must pay two types of charges, a life-lease fee and a monthly service charge. Both of these charges are based upon the number of square feet in the room or rooms taken. The payment of the life-lease fee, which can range anywhere from $8,000 to $20,000, entitles the resident to use of the room accommodations for his or her life. The monthly service charge, which ranged from between $245 and $490, covers daily meals and weekly maid and linen services. The average life-lease fee paid per resident by the 72 residents as of December 31, 1970, was just under $11,000. The average monthly service charge was approximately $283.

Prior to admission, applicants for residence at Hillside Terrace must submit an application form

that requires disclosure of their assets and income. The ability to pay both the life-lease fee and the monthly service charge is a factor which is considered in determining whether an applicant will be admitted. Plaintiff claims, however, that no resident will be asked to leave if he or she exhausts his or her financial resources and is unable to pay the monthly fee. It is important to note in this regard that, based on the information available to plaintiff from its application forms, the average net worth of Hillside Terrace residents as of December 31, 1971, was $74,274.19, and the average yearly income of the residents as of that date was $6,811.08.

There is no dispute between the parties as to plaintiff's status as a nonprofit corporation. Plaintiff's nonprofit status is borne out by operating losses of $148,460.39 for the year ending September 30, 1970, and $191,332 for the year ending September 30, 1971.

It is against this background of factual information that we must evaluate and resolve the issues presented on this appeal.

1. *Is the real and personal property owned by a nonprofit corporation exempt from real and personal property taxation pursuant to sections 7 and 9 of the General Property Tax Act, 1893 PA 206, as amended, when the property is used exclusively for operating a nonprofit home for the aged which is self-supporting and self-liquidating on the basis of payments by the residents?*

In evaluating the merits of this appeal, and for the sake of simplicity, we feel that this issue should be formulated to read as follows:

"Is a nonprofit corporation operating a residence facility for older people entitled to a property tax exemption when it charges entrance fees from $8,000 to

$20,000 and a monthly rental charge of from $245 to $490, when it appears that nearly all of the expenses involved in operating the facility are met from these fees?"

A thorough research of Michigan case law indicates that there is no Michigan case directly in point which deals with this particular issue. However, there is a considerable amount of authority from other jurisdictions that have dealt with this question. The relevant cases and statutory provisions have been collected in an annotation entitled, *Homes for the Aged as Exempt from Property Taxation,* in 37 ALR3d, pp 565–604.[2] A summary and statement of general principles is set forth at page 570 of the annotation as follows:

"[a] Generally

"Exemptions from taxation extended in favor of homes for the aged are the result of constitutional provision or statutory enactment.

"The question whether a particular home for the aged is exempt from taxation has been decided on a case-by-case basis, with inquiries being made into the specific phraseology of the constitutional or statutory tax exemption provision applicable, the character and purpose of the home, and the facts surrounding its use.

* * *

"In their determinations of the exemption issues, the courts have often been influenced by certain persuasive factors, although no single factor has been found to be universally decisive. * * * For example, cases were found to turn upon the imposition of substantial fees or stringent health requirements upon applicants for admission to the institutions under review, or upon the type of accommodations and services provided the residents thereof. Other cases have turned upon the factor, among others, that the institution restricted admission

[2] *See also* 71 Am Jur 2d, State and Local Taxation, §§ 387–388, pp 697–700.

to members of a particular class, or that the property for which exemption was sought was leased out rather than used in the operation of the institution as such, or, in some of the cases wherein the home was operated by an incorporated organization, upon provisions enumerating the corporate powers as found in the corporate charters."

The annotation continues with a discussion of the particular factors affecting exemptions: (1) imposition of fees, (2) imposition of health requirements, (3) quality of accommodations and services, (4) restrictions limiting admission to a particular class, (5) property leased to third parties, and (6) purposes of institution as designated in its charter. The annotation also emphasizes, however, that analysis of a particular case depends upon the fact situation presented and the provisions of the applicable constitution or statute.

Michigan has no statutory provision which unqualifiedly exempts a home for the aged from property taxation. However, two provisions of the General Property Tax Law are pertinent. MCLA 211.7d; MSA 7.7(4a) provides that:

"(1) Housing owned and operated by a nonprofit corporation or association or by the state, any political subdivision thereof or instrumentality, for occupancy or use by elderly persons shall be exempt from all general property taxation by the state, city, village or county, or by any public body or agency.

* * *

"(4) 'Nonprofit corporation or association' means any corporation or association incorporated under the laws of this state not otherwise exempt from general ad valorem real and personal property taxes operating a housing facility or project qualified, built or financed under section 202 of the national housing act of 1959, as amended."

As the statute indicates, a nonprofit corporation which owns and operates a home for the aged will not receive an exemption from property taxation unless the housing facility or project is "qualified, built or financed under section 202 of the national housing act of 1959, as amended". While we shall shortly discuss this limiting qualification in more detail, suffice it to say for the purpose of this issue that Hillside Terrace obviously does not qualify as a housing facility or project built or financed under § 202 of the National Housing Act of 1959, as amended.[3]

The second relevant statutory provision is § 9 of the General Property Tax Law which exempts from taxation the personal property of charitable, educational or scientific institutions incorporated under the laws of the State of Michigan. The pertinent provision, MCLA 211.9; MSA 7.9 provides:

"The following personal property shall be exempt from taxation, to wit:

"First, the personal property of charitable, educational and scientific institutions, incorporated under the laws of this state: Provided, That such exemptions shall not apply to secret or fraternal societies, but the personal property of all charitable homes of such societies shall be exempt."

Although, as we have stated, Hillside Terrace does not fall within the purview of § 7d of the General Property Tax Law, the question still remains as to whether Hillside Terrace may properly be categorized as a "charitable" institution under § 9. An analysis in terms of the six factors set forth earlier is necessary in order to resolve this question.

[3] 12 USC 1701q.

(1) *Imposition of fees.* As previously indicated, applicants to Hillside Terrace must possess sufficient funds to be able to pay both the life-lease fee and the monthly service charge. Plaintiff concedes that an applicant's ability to pay is very much a determining factor with respect to whether he will be admitted to Hillside Terrace. Although plaintiff states that a resident would not be required to leave if he became unable to pay the monthly service charge, it appears quite clear to this Court that the corporation tries to avoid such a situation by requiring all applicants to make a detailed disclosure of their financial condition. In short, we feel that the fee structure of Hillside Terrace indicates that its objectives were more commercial than charitable or benevolent.

(2) *Imposition of health requirements.* The health requirements imposed on applicants for residence at Hillside Terrace are even more strict than the financial requirements. Each applicant must undergo a complete physical examination to insure that he is in good health and that he will be able to care for himself in his room without the aid of nursing personnel. The admission requirements do not allow for the sick, the disabled and the destitute; quite the contrary, the requirements are designed to assure that such persons are not admitted. From the standpoint of its strict health requirements, Hillside Terrace cannot be regarded as a "charitable" institution since it does not benefit the general public without restriction.

(3) *Quality of accommodations and services.* The evidence presented in this case reveals that the standard of care, the quality of the accomodations, and the mode of life afforded the residents of Hillside Terrace made the quality of this housing facility higher than that ordinarily associated with a "charitable" institution.

(4) *Restrictions limiting admission to a particular class.* Admission to Hillside Terrace is without regard to either race or religious affiliation. However, due to the rather strict financial requirements, those of low income would not be able to qualify for admittance to Hillside Terrace.

(5) *Property leased to third parties.* This factor is not relevant to the present case since none of the property of Hillside Terrace is leased or rented to any third party for the purpose of obtaining revenue.

(6) *Purposes of institution as designated in its charter.* The articles of incorporation for Hillside Terrace indicate that the corporation was formed to provide "other institutions for the care of the mentally and physically handicapped, the sick, disabled, aged or destitute persons" as well as homes for the aged. The articles further state that the corporation's purpose is to use income for "benevolent, charitable and general welfare purposes". Despite these statements, it is clear to this Court that Hillside Terrace cannot properly be considered a charitable or benevolent institution. Rather, it appears to be more of a cooperative housing facility for elderly people in good financial and physical health than a charitable institution.

Const 1963, art VI, § 28 provides that final decisions, findings, rulings and orders of an administrative agency such as the tax commission are reviewable by the courts in terms of whether such decisions, etc., are supported by "competent, material and substantial evidence on the whole record to support the decision of the State Tax Commission affirming the denial of a property tax exemption to plaintiff.

2. *Has plaintiff been denied the equal protection of the laws guaranteed by the Michigan and*

United States Constitutions because it has been held not exempt from taxation while the real and personal property owned by the Old Ladies' Home Association of Ann Arbor in operating its Anna Batsford Bach Home has been exempted from taxation?

In attempting to show that it is entitled to an exemption, plaintiff seeks to compare Hillside Terrace to another facility in Ann Arbor known as the Anna Batsford Bach Home for which a tax-exempt status has been granted. However, a careful and thorough review of the record indicates that Hillside Terrace and the Anna Batsford Bach Home actually differ in many significant respects.

Hillside Terrace houses several times as many people as the Anna Batsford Bach Home, which is a converted house with rooms for only 17 elderly women. The Anna Batsford Bach Home is owned by the Old Ladies' Home Association of Ann Arbor, a Michigan nonprofit corporation. But unlike Hillside Terrace, the Bach Home is financed by charitable contributions as well as by a number of resident payment plans. Furthermore, unlike Hillside Terrace, the residents at the Bach Home do not pay the actual cost of their care at the facility. The difference between cost and resident payments is made up by principal and income withdrawn from an endowment fund which consists primarily of charitable contributions which have been invested in securities. Finally, perhaps the most important difference between these two homes is that women who have sufficient finances and are in condition to maintain themselves outside the Batsford Bach Home are not admitted to the home. Testimony indicates that the women who were admitted to the Bach Home were there because they were unable to live without supervision and because they needed help the most.

After reviewing these facts, we have no difficulty in concluding that plaintiff's claim of a denial of equal protection is without merit. As plaintiff readily concedes the equal protection claim is only meritorious where something in the nature of a benefit is simultaneously granted and denied to members of the same class. The differences between these two homes are of sufficient magnitude so as to preclude any argument that they are of the same class.

3. *Has plaintiff been denied the equal protection of the laws and deprived of due process of law under the Michigan and United States Constitutions because the exemptions from general property taxation under § 7d is limited to "a housing facility or project qualified, built or financed under § 202 of the National Housing Act of 1959, as amended"?*

Plaintiff claims that the Michigan Legislature, by limiting the exemption provided by § 7d(1) of the General Property Tax Act to nonprofit corporations which have obtained financing under § 202 of the National Housing Act, has made the exemption dependent of action by the Secretary of Housing and Urban Development, and that limiting the exemption in this manner is invalid as an unconstitutional delegation of power to a Federal official to decide who receives the exemption. We disagree.

The Federal official does not make a determination as to who shall receive the exemption. He merely determines which nonprofit corporations are eligible to receive Federal financing under § 202. Furthermore, this provision for Federal financing of housing for the elderly was no doubt created for the lowest income type of housing, since it is almost impossible to obtain sufficient financing for these projects from other sources. In

other words, our Legislature intended that the tax exempt status be extended to the lowest income type of housing. The Legislature has merely created a special category of low-income housing for the elderly which is to be granted tax-exempt status. We perceive neither discrimination nor any violation of either equal protection or due process in the creation of this special category of low-income elderly housing for exemption from taxation.

Affirmed.

All concurred.

PEOPLE v SCOTT

1. CRIMINAL LAW—INSTRUCTIONS TO JURY—INTENT—DEFENSE OF INTOXICATION—CAPACITY STANDARD.

An instruction which clearly informed the jury that in order to convict they must find that the defendant had the necessary intent and that if because of intoxication or any other reason he did not have the necessary intent, he must be acquitted, was not rendered erroneous by the fact that the court also indicated that if the jury found the defendant did not have, by reason of intoxication, the capacity to form the intent, they must acquit, where the giving of the so-called "capacity standard" did not create any irreconcilable conflict, inconsistency, or confusion.

2. TRIAL—INSTRUCTIONS TO JURY—DISCUSSION ABOUT CASE—PREJUDICE—APPEAL AND ERROR.

Failure of a trial court to remind the jury not to discuss a case with others or among themselves does not require reversal absent a showing of prejudice.

3. CRIMINAL LAW—ADJOURNMENTS—REASONS FOR ADJOURNMENT—TRIAL RECORD—PREJUDICE—MISCARRIAGE OF JUSTICE.

Criminal trials should not be adjourned or otherwise delayed except for good cause shown and explanations for adjournments should be on the record, but the mere failure to explain on the record the reasons for two lengthy adjournments does not mandate a reversal where there were no objections to the adjournments by the defendant, there is no indication of how the defendant was prejudiced by the adjournments, and defendant fails to show any miscarriage of justice.

4. CRIMINAL LAW—INSTRUCTIONS TO JURY—AIDING AND ABETTING—INTENT—DEFENSE OF INTOXICATION.

There is no reason to require a trial court to repeat its instruc-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 21 Am Jur 2d, Criminal Law §§ 107, 108.

[2] 53 Am Jur, Trial § 899.

[3] 21 Am Jur 2d, Criminal Law § 241 *et seq.*

Waiver or loss of accused's right to speedy trial. 57 ALR2d 302.

[4] 53 Am Jur, Trial § 647.

[5] 53 Am Jur, Trial § 800.

tions that the underlying intent is a necessary element and that intoxication is a defense to that theory when instructing the jury with respect to aiding and abetting where the court had already clearly instructed the jury on those matters in other portions of its charge.

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

Failure *sua sponte* to instruct the jury as to the lesser included offenses of the crime charged, where the court did not affirmatively exclude the question of lesser included offenses from the jury's consideration, was not reversible error.

Appeal from St. Clair, Halford I. Streeter, J. Submitted Division 2 June 4, 1974, at Detroit. (Docket No. 17216.) Decided October 7, 1974.

James H. Scott was convicted of breaking and entering with intent to commit larceny. Defendant appeals. Affirmed.

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.

John B. Phelps, Assistant State Appellate Defender, for defendant.

Before: BRONSON, P. J., and QUINN and VAN VALKENBURG,* JJ.

VAN VALKENBURG, J. The defendant was found guilty by a jury on February 6, 1973, of breaking and entering with intent to commit larceny, MCLA 750.110; MSA 28.305.

Five issues are raised for our consideration, the

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

most important one being the claim that the instructions to the jury on the defense of intoxication were erroneous, confusing and contradictory.

The disputed charge reads as follows:

"While voluntary drunkenness is not an excuse for the commission of a crime, where a certain criminal intent is necessary, as in breaking and entering, if the defendant was so intoxicated as to be incapable of entertaining such intent, he cannot be convicted. Proof of the defendant's condition under such circumstances is a missible to enable the jury to determine whether or not he could entertain the criminal intent necessary under the statute. He must have the intent to commit a larceny or felony, and whether he doesn't have through intoxication or does not have it for any other reason, if he does not have the intent to commit the larceny or felony, of course, he is innocent."

Defendant argues that since the above quoted charge to the jury contains both the so-called "capacity standard", which the Supreme Court in *People v Crittle,* 390 Mich 367; 212 NW2d 196 (1973) indicated should not be followed, and the so-called "COOLEY standard" found in *People v Walker,* 38 Mich 156, 158 (1878), which found favor in the eyes of the *Crittle* Court, it must be presumed that the jury applied the "capacity standard" and that reversible error resulted.

Defendant is, of course, correct that the charge as given herein contained both the so-called "capacity standard" and the so-called "COOLEY standard". It does not necessarily follow, however, that reversible error resulted. The underlying premise of defendant's argument is that the "capacity standard" as given in the instant case is in irreconcilable conflict with the "COOLEY standard", and therefore, it must be presumed that the jury followed

the improper standard. It is as to this premise that we cannot agree with defendant.[1]

We can understand why defendant feels that there is an irreconcilable conflict between the "capacity standard" and the "COOLEY standard", for the Court's opinion in *Crittle* does seem to leave that impression; however, a closer reading of *Crittle* in light of the narrow holding in that case and in light of the underlying purpose of the *Crittle* criticism of the "capacity standard" leaves us with the abiding conviction that the instruction given herein did not result in reversible error.

It is first necessary to note that the narrow question which confronted the Court in *Crittle* is not present here. In *Crittle* the trial court instructed the jury that they could not acquit unless they found "that he was not conscious of what he was doing or why he was doing it". The Court pointed out that such an instruction precluded the jury from looking to the defendant's actual intent and acquitting on the basis of the absence of that actual intent. The Court took great pains to point out that the instruction in *Crittle* did not even comport with the "capacity standard" promulgated in *Roberts v People,* 19 Mich 401, 418–419 (1870), which provided that the jury should be instructed "that if his mental faculties were so far overcome by the intoxication, that he was not conscious of what he was doing, or if he did know what he was doing, but did not know why he was doing it * * *

[1] We would note that neither defendant nor his trial counsel objected to the charge as given. This, however, does not preclude him from raising this instructional error on appeal, since, having undertaken to charge the jury as to intoxication, the trial court had the affirmative duty to charge the jury correctly. *People v Guillett,* 342 Mich 1; 69 NW2d 140 (1955); see also *Crittle, supra.* We therefore hold that this challenge to the trial court's charge is properly before this Court even in the absence of a timely objection below.

then he had not sufficient capacity to entertain the intent".[2] Thus, the *ratio decidendi* of the *Crittle* holding was that the instruction given therein was not proper even if gauged by the *Roberts* capacity standard.

The present question deals not with this narrow holding of *Crittle,* but rather with what might be called, for lack of a better term, the advisory dicta which followed the narrow holding. The *Crittle* Court, after having already reached the conclusion that the specific instruction as given mandated reversal, continued with "the consideration of some of the confusing rules re jury instruction on the effect of drunkenness in specific intent crimes". After citing some examples wherein the *Roberts* type instruction was followed, the Court continued:

> "These various rules all have one thing in common. They refer to a *capacity* standard. Their test is not Justice COOLEY'S—'[T]he crime cannot have been committed when the intent *did not exist.'* Their test is rather 'the crime cannot have been committed when the intent *could not exist'.* It is obviously a different standard and not to be followed.
>
> "As a consequence, trial judges would do well to follow Justice COOLEY'S language and posit their instructions in terms of whether in the light of defendant's intoxication he in fact had the required specific felonious intent." *Crittle, supra,* 374; 212 NW2d 199–200.

While the COOLEY standard (the intent *did not exist)* is different than the capacity standard (the intent *could not exist),* this is not to say that there is an irreconcilable conflict between the two when

[2] See footnote 1 in *Crittle, supra,* 372; 212 NW2d 198–199.

both are found in the same charge.[3] The problem with the capacity standard is not that it is an inaccurate statement of a valid legal conclusion, but rather that standing alone it can, by inference, misdirect the jury's attention from the fact that defendant must in fact have the requisite intent and that if, in fact, defendant for any reason did not have that intent, he must be acquitted. The thrust of *Crittle* was not to formulate an absolute rule that the mentioning of the capacity standard resulted in reversible error, but rather to require that the jury be clearly instructed that it is not enough to merely look to the question of whether the defendant *could not* entertain the intent but rather that they also must determine in light of all the testimony whether defendant *did not* entertain the intent.

Against that standard, would the instruction as given herein confuse the jury as to what they must find in order to acquit? We think not. The trial court clearly indicated that, in order to convict, the jury must find that defendant had the necessary intent, and further indicated that if defendant, because of intoxication or any other reason, did not have the necessary intent he must be acquitted. The jury being clearly informed that they must find that defendant did have the necessary intent, no error resulted from the fact that the trial court also indicated that *if* the jury found defendant did not have by reason of intoxication

[3] When stated as it was herein—"if the defendant was so intoxicated as to be incapable of entertaining such intent, he cannot be convicted"—the capacity standard is a valid legal truism, since if defendant is so intoxicated as to lack the capacity to entertain the necessary intent, he, as both a matter of fact and law, *did not* in fact entertain that intent and thus could not be convicted. In other words, if the intent *could not exist,* it necessarily follows that the intent *did not exist,* since a finding of the greater must include the finding of the lesser.

the capacity to form the intent, they must acquit. Thus stated the capacity standard is supplementary to, rather than in conflict with the COOLEY standard, since it merely states the logical conclusion which must follow when the degree of intoxication renders the defendant totally incapable of forming the intent.[4]

Where, as here, the trial court affirmatively instructs the jury that they must address themselves to the question of whether defendant did in fact have the necessary intent, the giving of the so-called "capacity standard" not only does not create any irreconcilable conflict, inconsistency or confusion, but rather it more fully informs the jury of the overall scope of their duty.[5] The instruction as a whole properly informed the jury of the effect of intoxication upon the finding of criminal responsibility. We are not persuaded that the Supreme Court's opinion in *Crittle* mandates reversal, even if we were to determine that *Crittle* should control

[4] The COOLEY-*Crittle* instruction, while an eminently correct statement of what the jury must do, *i.e.,* they must find that defendant did in fact have the necessary intent, offers little guidance to the jury in determining exactly what effect intoxication has upon finding that intent. Indeed, COOLEY's statement in *Walker, supra,* makes absolutely no reference to intoxication save for the introductory phrase that "drunkenness cannot excuse a crime". The COOLEY statement is a legal truism applicable to any crime where an intent must be proved, be it a specific intent or merely the necessary general criminal intent, irrespective of whether intoxication is raised as a defense. Perhaps, in the final analysis, the instruction as given by the trial court herein is the preferable approach in that the jury is both clearly informed of the fact that intoxication is an absolute defense if it renders defendant incapable of forming the necessary intent and yet clearly indicates to the jury that the question of intoxication must also be considered in determining whether defendant, in fact, had the necessary intent.

[5] In most cases it would appear that defendant would welcome a capacity instruction, if coupled with the COOLEY instruction as given here, since typically the assertion of defendant in bringing the defense of intoxication is that he *did not* have the necessary intent because he was so intoxicated that he *could not* form the necessary intent.

cases, such as the instant case, which were tried prior to the decisional date of *Crittle*.[6]

Defendant next contends that the trial court erred in failing to advise the members of the jury that they should refrain from discussing the case with others or between themselves. We have no record of the preliminary instructions to the jury panel and thus are unable to ascertain whether this matter was covered at that time. In any event, while it would have been better practice for the trial court to remind the jury not to discuss the case, the touchstone on appeal is whether defendant was thereby prejudiced. Since defendant has failed to show any instances of conversations or prejudice, the question is controlled by the holding in *People v Haugabook,* 23 Mich App 356, 358–359; 178 NW2d 556, 557 (1970):

"While prudence would dictate that the trial judge should remind the jury not to discuss the case, failure to do so does not require reversal absent a showing of prejudice. *People v McIntosh,* 6 Mich App 62; 148 NW2d 220 (1967). The brief, noninflammatory newspaper article attached to defendants' brief does not by itself constitute a showing of prejudice."

[6] There would appear to be a real question of whether *Crittle,* to the extent that it appears to repudiate the capacity standard, should be given retrospective application. While *Crittle* relies upon the statement made by COOLEY in *People v Walker, supra,* it is questionable that COOLEY really intended to formulate a rule different from that in *Roberts v People, supra.* Not only did COOLEY, along with CAMPBELL and GRAVES, sit on both panels, but also COOLEY in his opinion in *Walker* indicates that what he was saying therein was fully explained by Justice CHRISTANCY in *Roberts.* Whatever COOLEY may have meant by his language in *Walker,* it is the rule as stated in *Roberts* which has been treated as controlling for the last century. Thus while *Crittle* used COOLEY's language in *Walker* as the vehicle by which to formulate the presently approved instruction on intoxication, *Crittle* marked a change in the established law with respect to what the proper instruction was. It would therefore appear that since the trial courts of this state had every reason to rely on the *Roberts* rule which had been oft repeated as proper, the change in focus evidenced by *Crittle* should be given only prospective application from the decisional date of *Crittle.*

Defendant asserts that reversible error arose by reason of the absence of any explanation for two rather lengthy adjournments during the trial. The first adjournment took place immediately after the jury had been sworn and before any testimony had been taken and ran from January 16, 1973 to January 24, 1973. The second adjournment took place after the people had rested and ran from January 24, 1973 to February 6, 1973.

It is clearly the public policy of this state that criminal trials should not be adjourned or otherwise delayed except for good cause shown. MCLA 768.2; MSA 28.1025. We thus do not condone the manner in which this matter was handled. On the other hand, defendant does not claim that he was denied a speedy trial nor does he claim that there was not, in fact, good cause for the adjournments, rather he complains only that reversal is mandated by the mere failure to have some explanation for the adjournments on the record. Since the record is barren of any objections by defendant or his counsel to the adjournments, and is likewise barren of any indication how he was prejudiced by the adjournments, we find that the technical failure to set forth in the record the reasons for the adjournments does not mandate reversal. It would moreover appear that the reason for the second adjournment was for the purpose of locating and producing an indorsed witness pursuant to the defendant's demand for production of that witness. Defendant having failed to show any miscarriage of justice, we find this issue to be without any substantial merit.

Defendant also argues that the trial court erred by failing to instruct the jury, during his charge with respect to aiding and abetting, that to convict on the theory of aiding and abetting the underly-

ing intent is a necessary element and that intoxication is a defense to that theory. In essence, defendant asserts that the trial court must repeat the general instructions with respect to intent and the defense of intoxication during the aiding and abetting charge. This assertion is patently without merit. Since, as discussed previously, the trial court clearly charged the jury that the defendant must have the necessary intent and that if by reason of intoxication or otherwise defendant did not have the necessary intent he must be acquitted, we can perceive no reason to require the trial court to repeat these instructions in charging as to the theory of aiding and abetting. The charge to the jury when read as a whole clearly informed the jury that in order to convict, either as a principal or an aider, intent was a necessary element and intoxication was a proper defense.

Lastly, defendant argues that the trial court erred in not instructing the jury *sua sponte* as to the lesser included offenses of the charged crime of breaking and entering with intent to commit a larceny. Since the trial court did not affirmatively exclude from the jury's consideration the question of lesser included offenses, no reversible error resulted. *People v Membres,* 34 Mich App 224, 232; 191 NW2d 66, 69 (1971), *lv den* 386 Mich 790 (1972); *People v Kelly,* 51 Mich App 28; 214 NW2d 334 (1973).

Affirmed.

All concurred.

INDEX-DIGEST

ABANDONMENT—See
BURGLARY 1

ABSENCE OF COUNSEL—See
CRIMINAL LAW 39

ABSENCE OF JUDGE—See
CRIMINAL LAW 79

ABSENTEE BALLOTS—See
CONSTITUTIONAL LAW 8
ELECTIONS 1, 2

ABUSE OF DISCRETION—See
APPEAL AND ERROR 2, 11
ATTORNEY AND CLIENT 2
CRIMINAL LAW 8, 64, 92, 111
TRIAL 5
VENUE 1
WITNESSES 2

ABUSE OF PROCESS—See
PROCESS 1

ACCELERATED JUDGMENT—See
APPEAL AND ERROR 7
JUDGMENT 6, 9, 10
PLEADING 1

ACCEPTANCE OF TESTIMONY—See
CRIMINAL LAW 36

ACCESS—See
PROPERTY 2

ACCOMPLICES—See
CRIMINAL LAW 62
WITNESSES 3, 4, 7

ACCORD AND SATISFACTION

1. Acceptance of a promise or agreement in satisfaction of a demand where based upon sufficient consideration extinguishes the original demand, and the original demand cannot be the foundation of an action. *Williams v Slazinski,* 221.

2. An agreement between parties which released and discharged defendant and her insurance company from tort liability in return for certain monies and the promise of future payments extinguished the original demand and eliminated it as the foundation of a tort action where nothing on the record indicates that the parties to the contract intended it to operate in any other manner; the release agreement operated as a valid affirmative defense to plaintiff's action in tort, and plaintiff's remedy was in contract for breach of the settlement agreement, not in tort for the underlying claim. *Williams v Slazinski,* 221.

ACCOSTING A CHILD—See
CRIMINAL LAW 98

ACCOUNTS—See
EXECUTORS AND ADMINISTRATORS 2

ACCRUAL OF CLAIM—See
LIMITATION OF ACTIONS 1, 6
TORTS 2

ACCRUAL OF INTEREST—See
INTEREST 1

ACCRUED RIGHTS—See
CONSTITUTIONAL LAW 4, 13
INTOXICATING LIQUORS 1

ACCURATE REPRESENTATIONS—See
CRIMINAL LAW 112

ACCUSATIONS—See
CRIMINAL LAW 89

ACTION—See
ACCORD AND SATISFACTION 1, 2

ACTIONABLE FRAUD—See
FRAUD 2

ADDED COMPENSATION—See
CONTRACTS 1

ADDITIONAL CHARGES—See
CRIMINAL LAW 117

ADDITIONAL CRIMINAL ACTIVITY—See
CRIMINAL LAW 115

ADEQUATE REMEDY—See
EQUITY 4

ADJOURNMENTS—See
CRIMINAL LAW 127

ADJUDICATION OF GUILT—See
CONSTITUTIONAL LAW 10

ADMINISTRATIVE LAW

1. *A fundamental principle of administrative law requires that all administrative remedies be exhausted before judicial relief is sought, and this rule is not suspended merely because the administrative action may be erroneous. Ypsilanti v Civil Rights Comm,* 104.

2. Noncompliance with its procedure is more properly charged to the state where both the state and a claimant strayed from the departmental procedure for presenting and appealing claims against the State Highway Commission. *Cooke v Highway Dept #1 (Rehearing),* 336.

See
CIVIL RIGHTS 1–5
LIMITATION OF ACTIONS 1
SCHOOLS AND SCHOOL DISTRICTS 4, 5
ZONING 16

ADMISSIBILITY—See
CRIMINAL LAW 26, 27, 29, 38, 55, 63, 64, 66, 72, 123
EVIDENCE 2
WITNESSES 8

ADULT CONVICTIONS—See
CRIMINAL LAW 78

ADVICE OF COUNSEL—See
CRIMINAL LAW 13, 87

AFFIDAVIT—See
SEARCHES AND SEIZURES 3

AFFIRMATIVE ACKNOWLEDGMENT—See
CRIMINAL LAW 74–76

AFFIRMATIVE DEFENSES—See
ACCORD AND SATISFACTION 2

AGE DISCRIMINATION—See
CIVIL RIGHTS 2

AGENCY—See
PRINCIPAL AND AGENT 1

AGENCY BY ESTOPPEL—See
JUDGMENT 2

AGENTS—See
PRINCIPAL AND AGENT 2-3

AGREEMENT—See
CRIMINAL LAW 15

AGRICULTURAL LANDS—See
ZONING 2

AIDING AND ABETTING—See
CRIMINAL LAW 128

AIDING ESCAPE FROM PRISON—See
ESCAPE 1, 2

ALIBI DEFENSE—See
APPEAL AND ERROR 6
CRIMINAL LAW 60

ALLEGATIONS—See
JUDGMENT 6

ALTERNATIVE REMEDIES—See
APPEAL AND ERROR 1

AMBIGUITIES—See
BROKERS 5
INSURANCE 1

AMENDED PLEADINGS—See
PLEADING 1

AMENDMENTS—See
INTOXICATING LIQUORS 1
STATUTES 3
WORKMEN'S COMPENSATION 11

AMNESIA—See
CRIMINAL LAW 21

AMOUNT DUE—See
VENDOR AND PURCHASER 4

APPEAL AND ERROR

1. *An order of superintending control will not issue where an alternative remedy is available. Ypsilanti v Civil Rights Comm,* 104.

2. *Grant or denial of an order of superintending control is within the sound discretion of the court and a denial of the order should be upheld where no clear abuse of that discretion is shown. Ypsilanti v Civil Rights Comm,* 105.

3. The Court of Appeals has a duty to accept a trial judge's conclusion, after a nonjury trial, where it was supported by competent, credible and virtually uncontradicted testimony. *Detroit B & T v Highway Dept,* 131.

4. An order of superintending control should not be issued if another plain, speedy and adequate remedy is available to the party seeking the order (GCR 1963, 711.2). *Schwan v City of Lansing,* 191.

5. The general rule that a question may not be raised for the first time on appeal is not inflexible; when a consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied. *Huey v Campbell Foundry Co,* 227.

6. The Court of Appeals will not consider a challenge to the constitutionality of the alibi statute where the issue was not timely raised below and therefore not preserved for review (MCLA 768.20). *People v Kochan,* 327.

7. The defense of res judicata is waived where defendants neither pled this defense in a timely fashion nor filed a motion for accelerated judgment on this ground; an assertion of this defense in a motion for judgment notwithstanding the verdict comes too late to preserve this issue for appellate review. *Head v Benj Rich Realty Co,* 349.

8. Alleged denial of a fair trial because plaintiffs' counsel referred in his final argument to facts not in evidence and made other remarks that were prejudicial is an issue that has not been preserved for appeal where no objection was articulated, no request was made for a curative instruction, and the argument was not so prejudicial as to render a curative instruction ineffective. *Head v Benj Rich Realty Co,* 349.

9. The rights of the Attorney General, once he has intervened in a case, are no greater than those of any other party to the lawsuit, and the failure to file a brief within the time prescribed by court rule is a waiver of his right to participate in the appeal (GCR 1963, 815.1[a]). *Anchor Bay Citizens v Bd of Ed,* 428.

10. The Court of Appeals reviews equity cases *de novo* but hesitates to overturn the trial court's findings of fact unless con-

APPEAL AND ERROR—Cont'd

vinced that it would have reached a different result. *Land Dev Corp v Bloomfield Twp,* 438.

11. Failure to object to jury instructions bars consideration of error on appeal unless a clear abuse of discretion resulting in manifest injustice is apparent (GCR 1963, 516.2). *People v Tooks,* 537.

12. A defendant who was questioned on cross-examination about an arrest which did not result in a conviction but who failed to object to this questioning is not entitled to a reversal of his conviction where manifest injustice has not been demonstrated. *People v Tooks,* 538.

13. Consideration by the Court of Appeals of an issue not raised in an application for leave to appeal is normally precluded, but a constitutional question of first impression not so raised may be decided in the discretion of the Court to settle the issue for future cases. *Kunde v Teesdale Lumber (Amended),* 547.

14. The Court of Appeals does not reverse where independent grounds exist to support the result reached by the trial court even though the trial court did not identify and apply the appropriate test for granting a waiver use in a zoning case. *Eliassen v City of Livonia,* 596.

15. The test for granting appellate relief because a jury verdict is contrary to law and against the great weight of the evidence is that the verdict is against the overwhelming weight of the evidence, and this test was not met where the record shows that, at most, the evidence presented was a question of fact for the jury to decide. *Doyle Vacuum Co v Siller & Co,* 602.

16. A statement of position alone, without argument or citation of authority, is insufficient to bring an issue before the Court of Appeals. *McKinstrie v Henry Ford Hospital,* 659.

See

ARBITRATION AND AWARD 1–3
CRIMINAL LAW 11, 16, 24, 35, 65, 66, 69, 73, 77, 79, 86, 92, 93, 96
DIVORCE 1, 3
HOMICIDE 2
INSURANCE 8
JUDGES 1
SCHOOLS AND SCHOOL DISTRICTS 4, 5
SEARCHES AND SEIZURES 8
TRIAL 6, 7
WORKMEN'S COMPENSATION 3, 5
ZONING 16

APPEAL AS OF RIGHT—See

CRIMINAL LAW 22

APPEAL BOARD—See

WORKMEN'S COMPENSATION 5, 7, 8

APPEARANCE—See
COURTS 3, 4
JUDGMENT 4
TRIAL 2

APPORTIONMENT—See
AUTOMOBILES 3

APPROVAL OF SALE—See
EXECUTORS AND ADMINISTRATORS 1

ARBITRARY EXCLUSION—See
ZONING 6

ARBITRATION AND AWARD

1. Appellate courts accord judgments confirming or vacating arbitration awards a limited scope of review; an award will not be held invalid merely because it is unjust, inadequate, excessive, or contrary to law. *Werner v Travelers Ind Co,* 390.

2. A court's power to vacate an arbitration award is limited by court rule (GCR 1963, 769.9[1]). *Werner v Travelers Ind Co,* 390.

3. The manner in which an appeal from an arbitration award shall be taken is specified by court rule and a defendant is not properly before an appellate court where he failed to pursue his rights according to the terms of the rule (GCR 1963, 769.9). *Werner v Travelers Ind Co,* 390.

ARGUMENT OF COUNSEL—See
CRIMINAL LAW 65

ARMED ROBBERY—See
ROBBERY 2, 3

ARRAIGNMENT—See
CRIMINAL LAW 54

ARREST

1. Probable cause for arrest existed where the arresting officer knew that a trailer loaded with auto parts had been stolen, the defendants were found unloading auto parts from a trailer matching the description of the one stolen, and the defendants had no bill of lading or other paperwork to indicate that their possession was rightful. *People v McLott,* 199.

See
CRIMINAL LAW 84, 119, 120
SEARCHES AND SEIZURES 1

ARREST RECORD—See
APPEAL AND ERROR 12
WITNESSES 6

ASSAULT AND BATTERY

1. A factual basis for a defendant's plea of guilty of assault with intent to rob while armed was established where the defendant told the court that he had entered a bar by the back door with a gun in a bag, when an accomplice announced a holdup he pulled out the gun and proceeded to rob the bar and the patrons, and that he was pleading guilty because he was guilty and that he had told the judge the truth. *People v Palmer,* 43.

2. A defendant who received a maximum sentence of ten years upon his plea of guilty of assault with intent to rob while armed, an offense for the conviction of which the statute provides imprisonment for life or for any term of years, was not impermissibly induced to plead guilty because of a promise of leniency through a ten-year maximum sentence where he could have chosen to be tried on the charge of armed robbery and face a possible sentence of life imprisonment; the court agreed to a ten-year maximum because the defendant had cooperated with the police in solving several other cases, and the court rule governing the taking of pleas was fully complied with (MCLA 750.89; GCR 1963, 785.7). *People v Palmer,* 43.

ASSAULT WITH INTENT TO RAPE—See
RAPE 1

ASSESSMENTS—See
EQUITY 7
TAXATION 1, 2

ASSETS—See
FRAUDULENT CONVEYANCES 1

ASSIGNED COUNSEL—See
ATTORNEY AND CLIENT 1, 2

ASSISTANCE OF COUNSEL—See
ATTORNEY AND CLIENT 1, 2
CRIMINAL LAW 11–13, 16, 39, 48, 57, 67–72, 74–76, 101, 124
JUDGMENT 4
TRIAL 2
WITNESSES 5

ATTORNEY AND CLIENT

1. The statute which authorizes the appointment of attorneys to represent indigent defendants gives the judge presiding at trial wide discretion to determine the value of services rendered by an appointed attorney (MCLA 775.16). *In the Matter of Hayes,* 30.

2. Denial of payment of attorney fees to a court-assigned attorney who engaged in unprofessional and contemptuous conduct and

ATTORNEY AND CLIENT—Cont'd
refused to proceed with the case prior to completion of the trial, necessitating appointment of another attorney to continue the defense, was not an abuse of the judge's discretion. *In the Matter of Hayes,* 30.

ATTORNEY GENERAL—See
APPEAL AND ERROR 9

ATTORNEY'S CERTIFICATION—See
NOTICE 4

AUTHORITY—See
PRINCIPAL AND AGENT 3, 4

AUTHORITY TO PAY—See
TOWNS 1

AUTOMOBILES

1. An action against the owner of a motor vehicle based upon the owner's civil liability statute is not precluded even though an action against the driver of the vehicle is barred by the Workmen's Compensation Act (MCLA 257.401, 418.827). *Wilson v Al-Huribi,* 95.

2. Resolution of a driver's status as a coemployee of a party injured in an automobile accident with the resultant tort immunity provided by the Workmen's Compensation Act does not control the question of the owner's employee status or his possible civil liability under the owner's civil liability statute; this question must be answered separately, and immunity from liability should be given a strict construction (MCLA 257.401, 418.827). *Wilson v Al-Huribi,* 95.

3. An insurance policy issued to the owner of a vehicle involved in an accident with an uninsured vehicle is the primary policy, and the company which issued that policy is liable to a passenger in the insured vehicle to the limits of the policy without apportionment despite the presence of a pro-rata clause in the policy, and a policy issued to another party by another company providing uninsured motorist coverage, which covers the injured passenger, is a secondary policy under which that company will be responsible only for the amount of damages which exceed the primary insurer's policy limits. *Werner v Travelers Ind Co,* 390.

4. A defendant lessee's interest in a leased motor vehicle is substantially identical, if not precisely identical, with that of another defendant holder of legal title of the leased motor vehicle where the statute defines the word "owner" as a person, including a corporation, which has exclusive use of a vehicle, "under a lease or otherwise", for more than 30 days (MCLA 257.37[a]). *Braxton v Litchalk,* 709.

AUTOMOBILES—Cont'd
See
INSURANCE 6, 7
SEARCHES AND SEIZURES 7, 9
WORKMEN'S COMPENSATION 2

AUTOMOBILE THEFT—See
CRIMINAL LAW 82–84

AUTO PARTS—See
ARREST 1
SEARCHES AND SEIZURES 1

AVERAGE WEEKLY WAGE—See
WORKMEN'S COMPENSATION 8

AWARDS—See
ARBITRATION AND AWARDS 1–3

BACK INJURIES—See
WORKMEN'S COMPENSATION 6

BAKERIES—See
ZONING 8

BANKS AND BANKING—See
CRIMINAL LAW 104

BASIS FOR PLEA—See
ASSAULT AND BATTERY 1
CRIMINAL LAW 41

BASTARDS

1. The Paternity Act defines a child born out of wedlock as a child begotten and born to any woman who was unmarried from the conception to the date of birth of the child (MCLA 722.711). *Hinterman v Stine,* 282.

2. Testimony by a plaintiff in a paternity action that she was menstruating at the time of her divorce was admissible because it was relevant to the question of whether she was unmarried at the time of conception, and coupled with her testimony that she had intercourse only with the defendant in the two months following her divorce, the coincidence of her last menstrual period before the birth of the child and her divorce was relevant to the question of whether he fathered a child born 9-1/2 calendar months, or 287 actual days, after her divorce. *Hinterman v Stine,* 282.

3. The admission of evidence of intercourse between the plaintiff and the defendant in a paternity case during the pendency of her divorce action was not reversible error where the trial court specifically found that the child was conceived after the

BASTARDS—Cont'd
judgment of divorce was entered, testimony concerning events before that date played no part in the court's decision, and there was sufficient other evidence to rebut the presumption of legitimacy. *Hinterman v Stine,* 282.

BENEFICIARIES—See
EQUITY 4
FRAUD 1
LIMITATION OF ACTIONS 5

BENEFITS—See
WORKMEN'S COMPENSATION 12

BENEVOLENT INSTITUTIONS—See
TAXATION 3, 4

BEST INTERESTS OF CHILDREN—See
DIVORCE 3

BEST USE—See
ZONING 9

BIAS—See
JUDGES 1
WITNESSES 2, 5

BID PROPOSALS—See
JUDGMENT 8

BILLS OF LADING—See
ARREST 1

BLOOD BANKING AND TRANSFUSION ACT—See
STATUTES 4, 5

BOARD OF REVIEW—See
TAXATION 1

BREACH OF CONTRACT—See
ACCORD AND SATISFACTION 2
SCHOOLS AND SCHOOL DISTRICTS 6

BREACH OF DUTY—See
HIGHWAYS 1

BREAKING AND ENTERING—See
BURGLARY 1, 4

BRIBERY
1. Intent is an essential element of the crime of bribery and may be proved by reference to a definite and continual course of conduct. *People v Duncan,* 403.

BRIBERY—Cont'd
See
CRIMINAL LAW 64

BRIDGE CONSTRUCTION—See
JUDGMENT 8

BRIEFS—See
APPEAL AND ERROR 9

BROKERS

1. The general rules that a broker is deemed to have earned his commission when the seller and the purchaser enter into a binding agreement, and that a broker and his principal may agree that the broker's right to a commission is contingent upon the actual performance of an executory agreement are applicable to a lease as well as to a sale. *Rich v Emerson-Dumont Dist Corp,* 142.

2. A broker did not earn his commission under the terms of an offer to lease which provided that the lessor would pay the broker's commission "upon execution of lease" where the lease was never executed. *Rich v Emerson-Dumont Dist Corp,* 142.

3. A purchaser or lessee is not subject to an implied obligation to a broker to complete a purchase or lease nor is he held liable to pay the broker's commission upon default in completion of the contract or lease. *Rich v Emerson-Dumont Dist Corp,* 142.

4. A clause in a real estate company's listing agreement which states that the broker must produce a purchaser "ready, willing and able" to purchase before it was entitled to a commission is interpreted to mean that the purchaser must be ready, willing and able to purchase the property within the time limitations provided in the listing agreement. *Murphy Real Estate v Barron,* 210.

5. Any imperfections or ambiguities in a real estate listing agreement on a form drawn up by a broker must be construed most strongly against the broker. *Murphy Real Estate v Barron,* 210.

6. A real estate broker cannot recover its commission under a clause in a buy and sell agreement providing that "seller also agrees to pay broker above named a commission equal to 6% of the sale price for negotiating the sale" where the purchaser it had found for sellers' property was not able to secure financing in conformity with the buy and sell agreement and where finally some nine months after the listing agreement between the broker and the property owners had expired the sellers made a new agreement to sell to the same purchasers on land contract terms; a sale was never consummated according to the terms of the agreement and the broker cannot recover a commission for negotiating a sale that never took place. *Murphy Real Estate v Barron,* 210.

7. An agreement to mutually terminate a buy and sell agreement

BROKERS—Cont'd
because of a potential purchaser's inability to secure financing, the real estate broker's refunding of the earnest money, and the lapse of a considerable period of time after the listing agreement had expired before the property owners had agreed to a new sale of the property on land contract, support a conclusion that the buy and sell agreement terminated prior to the land contract negotiations. *Murphy Real Estate v Barron,* 211.

8. A real estate broker was not the procuring cause of a sale and was not entitled to a commission where while the ultimate purchaser learned of the property through the broker, it was not through the broker's efforts that the sale was made; the sale was a direct result of the efforts of the owners themselves to willingly accommodate a buyer, who was experiencing financial difficulties, with a land contract arrangement some nine months after the listing agreement had expired. *Murphy Real Estate v Barron,* 211.

BUILDERS—See
TOWNS 1

BUILDING AUTHORITIES—See
PRINCIPAL AND AGENT 2, 3

BUILDINGS—See
INSURANCE 4

BURDEN OF PROOF—See
CONTEMPT 1
CRIMINAL LAW 12, 37
INTOXICATING LIQUORS 1
STATUTES 3
FRAUD 3
TAXATION 2
ZONING 17

BURGLARY

1. The intent to permanently deprive the owner of his goods which is a key element of the crime of breaking and entering an occupied dwelling with intent to commit larceny can be inferred from the totality of facts and circumstances present in a case; if a defendant had the requisite intent at the time of the breaking and entering, an abandonment of the goods does not render him less culpable (MCLA 750.110). *People v Kochan,* 326.

2. Evidence on whether a defendant's screwdriver made the entry marks on the home of a burglary victim was not deliberately suppressed and kept from defendant's knowledge, there was no prejudice to defendant's substantial rights, and the constitutional guarantee of due process was not interdicted, where defendant sought discovery of the scientific information prior to

BURGLARY—Cont'd
the preliminary examination and the prosecutor answered that comparison tests with the screwdriver were incomplete, defendant's discovery motion at trial did not cover results of the scientific tests, the expert witness could not state unequivocally that the screwdriver made the entry marks, and defense counsel was afforded the opportunity to cross-examine the expert. *People v Kochan,* 326.

3. Identification testimony elicited by the prosecutor from the victim of a burglary in which the victim made no reference to the fact that he had previously described one of the burglars in a phone call to the police as having a beard did not deny defendant due process because of possible false testimony, where the defense was allowed to impeach the witness's testimony by playing the police tape recording in which he described the culprit as having a beard and the victim was recalled as a rebuttal witness and stated that he did not recall using the word "beard"; the discrepancy in the identification testimony raised a controverted question of fact for the jury under proper instructions. *People v Kochan,* 327.

4. *A prosecutor's demonstration of how a door was opened, in a trial for breaking and entering, is admissible as part of the explanation of his theory of entry. People v Terry Moore,* 678.

BUSINESS INVITEES—See
JUDGMENT 3

CALLING WITNESSES—See
WITNESSES 7

CANCELLATION—See
EQUITY 1

CAPACITY STANDARD—See
CRIMINAL LAW 126

CARE, CUSTODY OR CONTROL—See
INSURANCE 1-4
PROPERTY 2

CASE PRECEDENT—See
CRIMINAL LAW 7, 40, 49, 62, 102, 114
NEGLIGENCE 3
NOTICE 3
WITNESSES 6

CAUSE OF ACTION—See
JUDGMENT 7
MOTIONS 3

CENTER FOR FORENSIC PSYCHIATRY—See
CRIMINAL LAW 17, 19

CERTIFICATION—See
NOTICE 4

CHANGE OF VENUE—See
VENUE 1

CHARACTER WITNESSES—See
WITNESSES 9

CHARITABLE INSTITUTIONS—See
TAXATION 3, 4

CHARTERS—See
MUNICIPAL CORPORATIONS 3

CHILD CUSTODY—See
DIVORCE 1, 2

CHILDREN—See
BASTARDS 1–3
CRIMINAL LAW 98
DIVORCE 5

CHIPPEWA INDIANS—See
CRIMINAL LAW 121, 122
TREATIES 2

CIRCUIT COURT—See
CRIMINAL LAW 54
SCHOOLS AND SCHOOL DISTRICTS 6

CIRCUMSTANTIAL EVIDENCE—See
CRIMINAL LAW 30, 33
HOMICIDE 5

CITY COUNCIL—See
ZONING 16, 17

CITY PLANNING—See
MUNICIPAL CORPORATIONS 4
PRINCIPAL AND AGENT 2, 3

CIVIC CENTERS—See
MUNICIPAL CORPORATIONS 4
PRINCIPAL AND AGENT 3

CIVIL ACTIONS—See
CONTEMPT 1

CIVIL LIABILITY—See
AUTOMOBILES 1, 2

CIVIL RIGHTS

1. The Civil Rights Commission has jurisdiction to entertain a complaint of employment discrimination on the basis of age and sex although the constitutional provision which created the commission authorized it to investigate only discrimination because of "religion, race, color or national origin"; legislation which subsequently expanded the jurisdiction of the commission to include complaints of discrimination because of age and sex is constitutionally valid (Const 1963, art v, § 29; MCLA 423.303a). *Ypsilanti v Civil Rights Comm,* 103.

2. The Civil Rights Commission lacked jurisdiction as a matter of law to consider a complaint against a city alleging age and sex discrimination in employment where the city, pursuant to a statute authorizing it to establish bona fide occupational qualifications for various job classifications, limited prospective new employees of its police force to those persons between the ages of 21 and 31 (MCLA 423.303a). *Ypsilanti v Civil Rights Comm,* 104.

3. *A city, faced with a complaint from the Civil Rights Commission alleging discrimination in its employment practices, prematurely started suit against the commission in circuit court; it should have answered and defended on the merits before the commission. Ypsilanti v Civil Rights Comm,* 104.

4. *An order of superintending control, the effect of which is to prevent the Civil Rights Commission from proceeding upon a complaint of employment discrimination, should not be issued because the courts should not act on such a matter and prevent the commission from functioning effectively. Ypsilanti v Civil Rights Comm,* 104.

5. *A plaintiff city is not entitled to equitable relief against the Civil Rights Commission where it has not made a sufficient showing that it would suffer harm if required to proceed initially before the commission. Ypsilanti v Civil Rights Comm,* 104.

CLAIMANTS—See

TORTS 2

CLAIMS—See

PARTIES 1

CLAIMS AGAINST ESTATES—See

EXECUTORS AND ADMINISTRATORS 3

CLAIMS AGAINST THE STATE—See

ADMINISTRATIVE LAW 2
CONSTITUTIONAL LAW 2
HIGHWAYS 6
LIMITATION OF ACTIONS 1

CLAIMS AGAINST STATE—Cont'd
NOTICE 1, 2

CLASSIFICATION—See
TAXATION 5
ZONING 5

CLOSING ARGUMENTS—See
CRIMINAL LAW 51

CODE VIOLATIONS—See
FRAUD 3

COERCED CONFESSIONS—See
CRIMINAL LAW 87

COERCION—See
CRIMINAL LAW 93, 117
DRUGS AND NARCOTICS 3
HOMICIDE 8

COLLATERAL ESTOPPEL—See
JUDGMENT 11–20

COLLISIONS—See
JUDGMENT 14

COMMENTS BY COURT—See
TRIAL 6

COMMERCIAL FISHING LICENSES—See
CRIMINAL LAW 121

COMMERCIAL ZONING—See
ZONING 8

COMMISSIONS—See
BROKERS 1–4, 6, 8

COMMITMENT—See
CRIMINAL LAW 17, 19

COMMON GOOD—See
TORTS 1

COMMON ENTERPRISES—See
WITNESSES 3

COMMON LAW—See
CONSTITUTIONAL LAW 13

COMMON-LAW DISPUTE—See
SCHOOLS AND SCHOOL DISTRICTS 6

COMMON MEANING—See
INSURANCE 7

COMMON PLEAS COURT—See
JUDGMENT 11

COMPENSATION—See
AUTOMOBILES 1, 2
WORKMEN'S COMPENSATION 1–6, 9–12

COMPETENCE—See
CRIMINAL LAW 87

COMPETENCE TO STAND TRIAL—See
CRIMINAL LAW 17, 19

COMPLAINT—See
JUDGMENT 6

CONCEALMENT—See
LIMITATION OF ACTIONS 5
RECEIVING STOLEN GOODS 1, 4

CONCLUSIVE PRESUMPTIONS—See
CRIMINAL LAW 91
DRUGS AND NARCOTICS 3

CONFERENCES—See
CRIMINAL LAW 80

CONFESSIONS—See
CRIMINAL LAW 24–29, 87
HOMICIDE 4

CONFIDENCES—See
CONSTITUTIONAL LAW 1

CONFISCATION—See
ZONING 11,12,14

CONFISCATORY ZONING—See
ZONING 8

CONFLICTING EVIDENCE—See
TRIAL 1

CONFLICTING INFERENCES—See
MOTIONS 2

CONFLICT OF INTEREST—See
EXECUTORS AND ADMINISTRATORS 1

CONFLICTS—See
STATUTES 1

CONFRONTATION—See
CRIMINAL LAW 5, 124, 125

CONSECUTIVE SENTENCES—See
RECEIVING STOLEN GOODS 4

CONSENT—See
CONSTITUTIONAL LAW 1

CONSENT TO SEARCH—See
SEARCHES AND SEIZURES 9–11

CONSERVATION OF FISH—See
CRIMINAL LAW 122
TREATIES 3

CONSIDERATION—See
ACCORD AND SATISFACTION 1, 2
FRAUDULENT CONVEYANCES 1

CONSISTENT USE—See
ZONING 8, 9

CONSPIRACY—See
CRIMINAL LAW 64
RECEIVING STOLEN GOODS 1, 4

CONSTITUTIONALITY—See
ZONING 7

CONSTITUTIONAL LAW

1. The Federal Constitution does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it; therefore, a defendant's constitutionally protected rights were not violated by the admission of testimony regarding a telephone conversation which was voluntarily entered into by the defendant with a brother who had consented that the conversation be overheard by the police. *People v Rappuhn,* 53.

2. Withholding a legal remedy from persons injured by the state, while granting one to persons injured by a non-governmental tortfeasor, does not offend the equal protection clause. *Snow v Freeman,* 84.

3. The constitutional provision of due process extends to protect that property considered to be a vested right; for a right to be considered vested it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemp-

CONSTITUTIONAL LAW—Cont'd

tion from a demand made by another (Const 1963, art 1, § 17). *Snow v Freeman,* 84.

4. The governmental immunity statute which denies a plaintiff his right to enforce a cause of action does not result in a deprivation of property where the plaintiff's cause of action was never a vested or accrued right (MCLA 691.1407). *Snow v Freeman,* 84.

5. A corporation conducting a loan-by-mail business in this state is involved solely in interstate commerce where the corporation solicits loans only by mail, is not admitted to do business in the state, owns no property in the state, maintains no employees in the state, executes no agreements in the state, and where default collections are made by a wholly independent collection agency. *Attorney General v Fairfax,* 305.

6. A statute shall be construed as constitutional if such a result can be reached. *Attorney General v Fairfax,* 305.

7. Plaintiffs, who as pretrial detainees in a county jail raise a constitutional challenge to the denial of their right of franchise in the November 1972 elections, are entitled to a determination of that challenge on the merits in view of the grave importance of the question, even though the adjudication may come too late to allow them to vote in the November 1972 elections, the plaintiffs are probably no longer pretrial detainees, and the opinion may be construed to be in the form of a declaratory judgment. *Arlee v Wayne County Sheriff,* 340.

8. A statute is unconstitutional because it fails to give equal protection of the laws where it would allow a person, even though confined in a prison or jail, to obtain an absentee ballot because of some physical disability, religious tenet, or because of being 65 years of age or more, yet prohibits the distribution of absentee ballots to detainees who cannot qualify on such grounds. *Arlee v Wayne County Sheriff,* 340.

9. The right to vote is a fundamental right that cannot be prohibited in such a manner as will give rise to a situation whereby wealth will be a substantial factor in determining who shall have the right to vote. *Arlee v Wayne County Sheriff,* 340.

10. Due process demands an adjudication of guilt of those charged with crimes before a prohibition as grave as disfranchisement may be imposed; therefore, a statutory scheme which prohibits pretrial detainees from voting cannot stand (MCLA 168.758). *Arlee v Wayne County Sheriff,* 341.

11. The statutory presumption section of the Controlled Substances Act of 1971 which provides that possession of more than two ounces of marijuana is prima facie evidence of possession with intent to deliver is constitutionally infirm because there is no rational connection between the proven fact of possession of two ounces or more of marijuana and the presumed fact of intent to deliver, and such a statutory presumption impermissibly compels a defendant to take the stand in violation of his

CONSTITUTIONAL LAW—Cont'd
right against self-incrimination and violates the due process clause of the Fourteenth Amendment (US Const, Am V, XIV; Const 1963, art 1, § 17; MCLA 335.341[2]). *People v Serra,* 515.

12. There is no violation of constitutional principles of equal protection of the law in the area of social welfare legislation as long as the legislative classification is reasonably related to the purpose of the statute enacted. *Kunde v Teesdale Lumber (Amended),* 547.

13. A right which has accrued, whether given by statute or by common law, may not be taken away without due process of law. *Koehler v DRT Sportservice, Inc,* 567.

See
APPEAL AND ERROR 13
CIVIL RIGHTS 1
CRIMINAL LAW 21, 43, 57, 59, 66, 68, 73, 89–91, 94, 111, 118–120
DRUGS AND NARCOTICS 1, 2
ELECTIONS 1
LICENSES 1
MUNICIPAL CORPORATIONS 1
OFFICERS 1
RAPE 1
SCHOOLS AND SCHOOL DISTRICTS 2
SEARCHES AND SEIZURES 2, 5
STATUTES 1, 4, 5
TREATIES 3
WORKMEN'S COMPENSATION 11
ZONING 3, 4, 6, 16

CONSTITUTIONAL-NONCONSTITUTIONAL DICHOTOMY—See
CRIMINAL LAW 66

CONSTITUTIONAL RIGHTS—See
CRIMINAL LAW 10, 12, 73

CONSTRUCTION CONTRACTORS—See
LIMITATION OF ACTIONS 1

CONSTRUCTION CONTRACTS—See
HIGHWAYS 7

CONSTRUCTION OF CONTRACTS—See
BROKERS 5
CONTRACTS 2
INDEMNITY 1–3
INSURANCE 1, 2

CONSTRUCTION OF STATUTES—See
AUTOMOBILES 2
CONSTITUTIONAL LAW 6

CONSTRUCTION OF STATS—Cont'd
COURTS 1
LICENSES 2
WORKMEN'S COMPENSATION 4

CONSTRUCTION OF TREATIES—See
TREATIES 1

CONSTRUCTION PROJECTS—See
CONTRACTS 1

CONSTRUCTION SITES—See
NEGLIGENCE 2

CONSTRUCTIVE FRAUD—See
EQUITY 3

CONTEMPT

1. The burden of proof in a civil contempt proceeding for violation of an injunction rests upon the party charging the violation, and the standard of proof is more stringent than the usual preponderance test applied in other civil actions; the power to punish is to be applied only when the contempt is clearly and unequivocally shown. *Det Bd of Ed v Det Fed Reachers,* 499.

2. A trial court's finding that the officers of a striking teachers union were in contempt of an injunction which required them to hold a meeting and to there recommend and actively urge the members to return to work, was not supported by sufficient evidence where such a meeting was in fact held and the uncontroverted evidence presented was that at that meeting the union president told the members to return to work; she was not required to be enthusiastic about it, she was not required to persist in the face of shouts and threats, and she was not required to succeed in ending the strike. *Det Bd of Ed v Det Fed Teachers,* 500.

CONTINGENT COMMISSIONS—See
BROKERS 1

CONTINUANCE—See
CRIMINAL LAW 52

CONTINUING WRONGFUL ACTS—See
LIMITATION OF ACTIONS 2

CONTINUOUS TRANSACTION—See
HOMICIDE 6, 7

CONTRACTORS—See
NEGLIGENCE 2, 3
PRODUCTS LIABILITY 2

CONTRACTORS AND GARAGEMEN—See
INSURANCE 1, 4

CONTRACTS

1. A coordinating clause included in the highway department's bid proposal for a highway construction project which specifically exempted the state from liability for delay caused by the actions of third parties working on certain specified segments of the project clearly indicated the state's intent to exclude itself from any claim for added compensation if for some reason delay in the construction job were to occur on any of the specifically designated projects being performed by others; the clause's unambiguous wording and logical position in the contract was clear notice to the bidder that any delay on a third-party contract would not be chargeable on the state contract. *Cooke v Highway Dept #2,* 479.

2. The language used in a contract, if unambiguous, must be held to express the intention of the parties; where there is no ambiguity, the language used will be confined to its usual and ordinary meaning. *Cooke v Highway Dept #2,* 479.

See
ACCORD AND SATISFACTION 1, 2
BROKERS 4–7
DAMAGES 1
HIGHWAYS 7
INDEMNITY 1–3
INSURANCE 1–4
JUDGMENT 8
LIMITATION OF ACTIONS 4
SCHOOLS AND SCHOOL DISTRICTS 6
TOWNS 1
VENDOR AND PURCHASER 1–6

CONTROL—See
NEGLIGENCE 2
PROPERTY 1
SEARCHES AND SEIZURES 2

CONTROLLED SUBSTANCES ACT—See
CONSTITUTIONAL LAW 11

CONVERSATIONS—See
CONSTITUTIONAL LAW 1

CONVEYANCES—See
FRAUDULENT CONVEYANCES 1

CONVICTIONS—See
APPEAL AND ERROR 12
CRIMINAL LAW 11, 12, 50
HOMICIDE 4
WITNESSES 6

COOPERATION WITH POLICE—See
ASSAULT AND BATTERY 2

COOPERATIVE HOUSING—See
TAXATION 4

COORDINATING CLAUSES—See
HIGHWAYS 7

CORNEAL SCARRING—See
WORKMEN'S COMPENSATION 9

CORPORATE BENEFITS—See
TORTS 1

CORPORATIONS—See
CONSTITUTIONAL LAW 5
EXECUTORS AND ADMINISTRATORS 1, 2
LICENSES 1
TAXATION 3, 6

CORPUS DELICTI—See
CRIMINAL LAW 28–30
HOMICIDE 5

CORRECTED VISION—See
WORKMEN'S COMPENSATION 10

COUNSEL—See
ATTORNEY AND CLIENT 1, 2
CRIMINAL LAW 11–13, 16, 39, 48, 51, 57–59, 65, 67–72, 74–76, 87, 99–101, 124
JUDGMENT 4
TRIAL 2
WITNESSES 5

COUNTY ROAD COMMISSIONS—See
HIGHWAYS 1–3

COURSE OF CONDUCT—See
BRIBERY 1
CRIMINAL LAW 63, 64

COURT OF CLAIMS—See
NOTICE 1, 4

COURT RECORDS—See
CRIMINAL LAW 12

COURT RULES—See
APPEAL AND ERROR 9
ARBITRATION AND AWARD 2, 3
ASSAULT AND BATTERY 2
COURTS 2
CRIMINAL LAW 19, 74, 76, 108
JUDGMENT 7, 9, 10
MOTIONS 1–3
NOTICE 4
PARTIES 1
PLEADING 1
TRIAL 1, 2

COURTS

1. The Court of Appeals must strive to construe statutes consistently and will uphold the historic power of courts to enjoin strikes by public employees in the absence of specific language to the contrary. *Det Bd of Ed v Det Fed Teachers,* 499.

2. A defense of lack of personal jurisdiction must be made in the responsive pleading or motion first filed, or it is waived (GCR 1963, 116.2). *Maxman v Goldsmith,* 656.

3. A defendant did not waive the defense of lack of personal jurisdiction by filing a general appearance because an appearance is neither a motion nor a responsive pleading (GCR 1963, 116.2). *Maxman v Goldsmith,* 656.

4. A defense of lack of personal jurisdiction was timely raised by a motion filed after a general appearance had been entered. *Maxman v Goldsmith,* 656.

See
APPEAL AND ERROR 14
CRIMINAL LAW 2
SCHOOLS AND SCHOOL DISTRICTS 5, 6
STATUTES 1
ZONING 15

CREDIBILITY—See
CRIMINAL LAW 8, 25–27, 45, 61
MOTIONS 2
TRIAL 1
WITNESSES 5

CREDIT FOR TIME SERVED—See
CRIMINAL LAW 20

CREDITORS—See
INTEREST 1
TORTS 2

CRIMINAL INTENT—See
CONSTITUTIONAL LAW 11

CRIMINAL LAW

1. Twice rereading instructions to a jury in a criminal trial in response to the jury's request for reinstruction did not constitute impermissible overemphasis and was not reversibly prejudicial where on both occasions all possible verdicts including all lesser included offenses were explained. *People v Bates,* 1.

2. A trial court is obligated to present to a jury in a criminal trial the defendant's theory of the case if a proper request is made and supported by competent testimony; however, a defendant cannot complain that the failure to give a charge was error where the defendant made no request to charge concerning his theory. *People v Bates,* 1.

3. A trial court's characterization of a defendant's girlfriend, who was called by the prosecution as a res gestae witness, as "hostile" was not necessary in order to allow the prosecution to cross-examine her, but was not reversibly prejudicial where it told the jury no more than was already obvious from the witness's testimony and her relationship with the defendant (MCLA 767.40). *People v Bates,* 1.

4. A trial court's instruction that a jury should deliberate initially on the major charge, then weigh the lesser included offenses, and finally consider an acquittal did not impose a requirement of unanimous agreement at each stage of the jury's deliberation, but merely indicated a logical method whereby the various possible verdicts would be considered in an orderly sequence, and was not reversibly erroneous where no objection was made at trial. *People v Bates,* 1.

5. An in-court identification preceded by a questionable or illegal confrontation will not be deemed inadmissible or prejudicial if the in-court identification has an independent basis. *People v Fry,* 18.

6. There was an independent basis for an in-court identification where the complainant was in the same room with his attacker for several hours, the attacker stayed overnight, the complainant went with him to a bank and was assaulted and robbed by him, and the complainant was able to describe his clothes and height. *People v Fry,* 18.

7. Case law which disallows identification by photo when the accused is in custody is not to be applied retroactively. *People v Fry,* 18.

8. A defendant's prior felony convictions are admissible to test his credibility; therefore, it was not an abuse of discretion to deny

CRIMINAL LAW—Cont'd

defense counsel's motion to preclude the use of the defendant's prior convictions for credibility purposes (MCLA 600.2158). *People v Fry,* 18.

9. It is improper for a court to inform the jury as to which party requested instructions; however, a conviction will not be reversed where no miscarriage of justice resulted when the trial court informed the jury that defense counsel requested instructions on two lesser included offenses (MCLA 769.26). *People v Fry,* 19.

10. It is not reversible error to give to the jury, *sua sponte,* the standard instruction regarding a defendant's right not to take the witness stand. *People v Fry,* 19.

11. A defendant's claim that his sentence was improperly imposed by a sentencing judge who considered prior convictions which were invalid because the defendant was indigent on each occasion and was not offered counsel or informed of his right to counsel will not be considered for the first time on appeal. *People v Fry,* 19.

12. A defendant, to pursue a hearing to determine if the sentence might have been different if the sentencing judge had known that defendant's previous convictions had been unconstitutionally obtained because the defendant had been unrepresented by counsel and he had been neither advised of his right to legal assistance nor had he intelligently and understandingly waived his right to the assistance of counsel, must (1) present prima facie proof that a previous conviction was violative of his right to counsel, such as a docket entry showing the absence of counsel or a transcript evidencing the same; or (2) present evidence that he has requested such records from the sentencing court and it has failed to reply or has refused to furnish copies of records within a reasonable period of time; upon such presentation, either (1) or (2), the burden will then be upon the prosecutor to establish the constitutional validity of the prior conviction; thus, if the prosecutor contends that the defendant waived counsel, the burden will be on him to show affirmative record evidence of waiver, and if he obtains and furnishes the judge and the defendant or his lawyer with photocopies of records establishing the constitutional validity of the prior conviction, the judge may decide the matter on the papers presented unless the defendant, on notice, shows cause to hold a hearing at which he is present; unless the prosecutor furnishes such evidence within one month of the defendant's motion, the judge shall set the matter for an early hearing and order the production of the defendant at the hearing. *People v Fry,* 19.

13. A defendant should be resentenced where he appeared at the sentencing *in propria persona,* the transcript is silent concerning the presence or advice of counsel, and the prosecutor stipulated that he should be resentenced. *People v Fry,* 20.

14. It is as permissible to have the expected lesser sentence accom-

CRIMINAL LAW—Cont'd

plished by a stated sentence concession as by reduction of the charge to fit the sentence expectation where leniency in sentencing is appropriate. *People v Palmer,* 43.

15. A plea of guilty is not made involuntary by the existence of an agreement, whether the agreement was a charge reduction, dismissal of other charges, or the expectation of a stated sentence concession. *People v Palmer,* 43.

16. Counsel cannot sit back and harbor error to be used as an appellate parachute in the event of a jury failure and should make any relevant objections during the course of the trial. *People v Rappuhn,* 52.

17. A defendant's oral motion for commitment to the center for forensic psychiatry to determine competency to stand trial, made on the day of the trial, was properly denied where the only showing of incompetence to stand trial was that the defendant was reserved, that he had been a user of heavy narcotics and had not had access to them while in jail, and where his attorney had met with him at various times prior to the trial and had not presented a petition for an examination nor provided any information to help determine whether an examination was necessary. *People v Kennington,* 61.

18. No reversible error was committed where a witness identified the defendant by photograph while the defendant was in custody and this identification occurred before the release of a Supreme Court ruling, which has not conclusively been held retroactive, interdicting such an identification. *People v Kennington,* 61.

19. A trial judge has no discretion and must commit a defendant to the center for forensic psychiatry for determination of competency to stand trial when a proper motion for commitment is made; however, a court rule requires such a motion to be made in writing prior to trial (GCR 1963, 786.1). People v Kennington, 61.

20. No credit for time spent in prison while awaiting trial for prison escape can be given when sentencing a defendant for the prison escape (MCLA 769.11b). *Jackson Prosecutor v Circuit Judge,* 121.

21. A defendant's right against self-incrimination was not violated by allowing a court-appointed psychiatrist to testify in rebuttal to the testimony of a defense psychiatrist where the defendant had originally undergone examination by court order because he had given notice of the defense of insanity, and later changed his defense to one of intoxication, and where the psychiatrist's testimony was offered solely to rebut the claim that defendant was suffering from alcohol and drug induced amnesia at the time of the crime and did not extend to any other statements made by the accused in the course of the court-ordered examination. *People v Brown,* 124.

22. An appeal as of right following a determination of probation

CRIMINAL LAW—Cont'd

violation and sentence is limited to those matters relating to the probation violation and the hearing thereon and is not available as to matters concerning the original conviction for which probation was imposed. *People v Donald Moore,* 139.

23. A defendant's claim that he was not given a written copy of the charges of probation violation against him and was not informed of his right to produce witnesses in his behalf is without merit where the record indicates that two days before he pled guilty to violating his probation, he was served with a copy of a notice of the violation of probation, and that at the hearing he was represented by counsel and was adequately informed of his right to present a defense to the charge. *People v Donald Moore,* 139.

24. The findings of a trial court in a hearing to determine the voluntariness of a confession will be reversed upon appeal only if they are clearly erroneous. *People v Gilbert,* 168.

25. A confession properly admitted into evidence is on an equal footing with all other properly admitted evidence, and the defendant is free to familiarize the jury with the circumstances that attended the taking of his confession, including facts bearing on voluntariness, to impeach its credibility, or to challenge the fact that it was ever given at all. *People v Gilbert,* 168.

26. Informing a jury of the existence, nature, and results of a pretrial hearing to determine the voluntariness and admissibility of a defendant's confession improperly impinges upon the province of the jury; such information makes it unlikely that the jury will thereafter decide that the confession was never made and tends to unfairly discount the credibility of the defendant's impeaching evidence, especially that properly admitted evidence which relates to voluntariness. *People v Gilbert,* 168.

27. It is proper for a trial judge to inform the jury of a pretrial hearing to determine the voluntariness and admissibility of a confession where the defense has challenged the credibility of the confession by attempting to introduce evidence bearing on its voluntariness. People v Gilbert, 169.

28. The corpus delicti was proved by more than the accused's naked confession where there was sufficient other evidence in the several statements that the accused made to the police regarding the crime which were simple statements of fact that may have had inculpatory overtones but were far short of a confession. People v Gilbert, 169.

29. A confession itself becomes admissible when there is any evidence of the corpus delicti dehors the confession. People v Gilbert, 169.

30. It is not necessary to prove the corpus delicti beyond a reasonable doubt before proof is admissible tending to connect the accused with the crime where the same set of facts, in a case of

CRIMINAL LAW—Cont'd

circumstantial evidence, tends to connect the defendant with the commission of the crime and to prove the corpus delicti. People v Gilbert, 170.

31. A jury in a criminal case has the right to return a general verdict on the merits, and there is no authority which holds that, when the case is submitted to the jury on two theories, the form of the verdict must specify upon which theory the jury based the verdict. People v Gilbert, 170.

32. No charge as to a lesser included offense need be given if there is a request to charge as to a lesser included offense but there is no evidence of such a lesser included offense or the facts are such that the court or the jury would be obliged to conclude that the defendant was guilty of the offense charged or not guilty; however, if the evidence is subject to different interpretations that would justify a finding of a lesser offense, a charge as to the lesser offense, especially if one is requested, should be given. *People v Smith,* 184.

33. A defendant's motion for a directed verdict was properly denied where there was some evidence, either direct or circumstantial, on each material element of the offense charged. *People v McLott,* 199.

34. The trial court must instruct the jury as to all the essential elements of the crime charged, and the entire charge to the jury is considered in determining whether the court's instructions were proper. *People v McLott,* 199.

35. Failure of the trial court to give the jury an instruction requested by a defendant in the precise form sought is not reversible error where the substance of the requested instruction was given. *People v McLott,* 199.

36. A trial court, as a trier of fact, is not bound to accept the testimony of a defendant's expert witnesses. *People v McBride,* 234.

37. A trial court did not improperly place upon a defendant the burden of proving that he was sane at the time of the offense charged by concluding that the testimony of defendant's expert witnesses did not constitute evidence of defendant's insanity where the opinions of the trial court show that he was well aware of the people's burden to prove the defendant sane at the time of the offense and that he did not shift the burden to the defendant. *People v McBride,* 234.

38. Testimony of police officers regarding their observations of the behavior of a defendant who claimed insanity was properly admitted lay testimony on the basis of the opportunities which the officers had to observe the defendant, the extent of which was made known to the court; the matter involved a question of weight to be given their testimony rather than one of admissibility. *People v McBride,* 234.

39. A photographic showup conducted by police where defense

CRIMINAL LAW—Cont'd
counsel was not present was improper, but the witness's subsequent in-court identification of the defendant will not be deemed inadmissible where the in-court identification was based on the witness's memory and was therefore independent of the tainted photographic showup, *People v McBride.* 234.

40. A Supreme Court decision which disallows identification by photograph when the accused is in custody is not retroactive and therefore this defense is not available to a defendant whose trial occurred prior to release of that decision. *People v McBride,* 235.

41. The court cannot rely solely upon the record of the preliminary examination to establish the factual basis for acceptance of a guilty plea; however, the court may rely solely upon the record of the preliminary examination to establish the factual basis for a plea of nolo contendere (GCR 1963, 785.7[3]). *People v Conville,* 251.

42. A plea of nolo contendere cannot be substantiated through direct questioning of the defendant concerning his participation in the crime (GCR 1963, 785.7[3] [b] [d]). *People v Conville,* 251.

43. A defendant lacks standing to challenge the constitutionality of the sodomy statute on the grounds that the statute could be applied to acts engaged in by husband and wife in the privacy of their home where the defendant was not charged with committing acts of sodomy with his wife (MCLA 750.158). *People v Conville,* 251.

44. A motion for a directed verdict of acquittal may be granted only where there is no evidence at all, either direct or circumstantial, on each material element of the offense charged. *People v Edwards,* 256.

45. The credibility of identification testimony is a matter left solely for the jury to determine. *People v Edwards,* 256.

46. Factors to be considered when determining whether a defendant was denied a speedy trial are: length of the delay, reason for the delay, defendant's demand for speedy trial, and the prejudice suffered by the defendant because of the delay. *People v Edwards,* 256.

47. A defendant was not denied a speedy trial where, although over two years elapsed between issuance of the warrant and the trial, the delay can not be attributed to any deliberate attempt by authorities to hamper the defense, the defendant has not made a sufficient showing of prejudice resulting from the delay, the defendant did not make a timely demand for a speedy trial, nor did he raise the issue when he made a motion for a new trial. *People v Edwards,* 256.

48. The in-court identification of a defendant by a witness was proper, although the witness had previously made photographic identifications at which no counsel was present and where the defendant had not waived his right to counsel, where the

CRIMINAL LAW—Cont'd

witness testified that she was satisfied beyond reasonable doubt that the defendant was the man who robbed her, she had ample opportunity to observe the robber during the robbery, and she indicated that the photographs shown her earlier did not influence her identification in court; an in-court identification will not be deemed inadmissible if it has an independent basis. *People v Edwards,* 257.

49. A Supreme Court ruling that identification by photograph should not be used when a defendant is in custody is not to be applied retroactively. *People v Edwards,* 257.

50. Review by the Court of Appeals is limited to ascertaining whether or not a miscarriage of justice resulted where the defendant claims error because the prosecutor questioned him on cross-examination concerning a burglary conviction which allegedly occurred when the defendant was a juvenile, but the defendant did not object at trial. *People v Edwards,* 257.

51. A prosecutor properly objected to statements of the defense counsel during defense counsel's closing argument where the statements were not supported by the evidence produced at trial. *People v Edwards,* 257.

52. A continuance or later a mistrial should have been granted a defendant to allow him to secure the services of another psychiatrist where the defense was insanity and it became apparent that the psychiatrist appointed by the trial court could not be produced through no fault of defendant or his counsel, the defense was timely raised by defendant, no undue delay was attributable to defendant, and defendant had no opportunity to present this defense without the benefit of expert assistance. *People v Fields,* 265.

53. A trial court may not rely on a defendant's demeanor or his statements in determining whether or not the defendant will be allowed to present a defense of insanity; the defendant's demeanor and statements are for the jury on the question of sanity. *People v Fields,* 265.

54. After proper arraignment in the circuit court and a plea of guilty or a plea of not guilty by defendant the prior proceedings had before an examining magistrate cannot be questioned. *People v Cullens,* 272.

55. Fingerprints found on a cash box at the scene of a crime were properly entered in evidence, even though the police destroyed the cash box after the fingerprints had been lifted, because the fingerprints were the evidence; they were lifted from the cash box and preserved, and defendant had an opportunity for experts to examine the prints and testify. *People v Cullens,* 272.

56. The criteria for a conviction based upon fingerprint evidence are that fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have

CRIMINAL LAW—Cont'd

been impressed at the time when the crime was committed. *People v Cullens,* 272.

57. One accused of a crime has a right to either represent himself or be represented by an attorney (Const 1963, art 1, § 13; MCLA 763.1). *People v Anderson,* 317.

58. The right to conduct one's defense personally in a criminal prosecution is absolute but the right to discharge counsel after commencement of the trial is qualified. *People v Anderson,* 317.

59. A defendant's constitutional and statutory rights to represent himself were violated where, prior to the selection of the jury, he made a request to discharge his attorney accompanied by an unequivocal statement that he desired to represent himself, and the request was denied by the trial court (Const 1963, art 1, § 13; MCLA 763.1). *People v Anderson,* 317.

60. A defendant was not prejudiced where the trial court refused to allow alibi witnesses to be called at trial because the defendant failed to exercise due diligence in finding the witnesses, where defendant already had produced three witnesses who supported his alibi defense and a separate record made of the testimony concerning the additional alibi witnesses shows that the excluded evidence was largely cumulative. *People v Kochan,* 327.

61. A defendant was not denied the right to cross-examine a witness who was allowed to assert her privilege against self-incrimination at a retrial where at the first trial she had testified to her involvement in other criminal activity; her statements from the first trial could have been used at the second trial to impeach her credibility had the defendant chosen to do so. *People v Thomas,* 368.

62. The failure of a trial court to instruct a jury that an accomplice who testified against the defendant had pled guilty to a lesser included offense, where the defendant did not request such an instruction, cannot be considered on appeal where there is no showing of manifest injustice; a recent Supreme Court decision that in certain circumstances a trial judge may *sua sponte* give such instructions is not applicable to a case tried before that decision. *People v Thomas,* 368.

63. Evidence of a defendant's prior criminal acts may be admissible where defendant's motive, intent, the absence of mistake or accident on his part, or defendant's scheme, plan, or system of doing the act is material; however, it is within the discretion of the trial court to determine whether the probative value of the evidence is outweighed by the risk of prejudice to the defendant (MCLA 768.27). *People v Duncan,* 403.

64. In a prosecution of two policemen for conspiracy and solicitation of a bribe, the trial court did not abuse its discretion by admitting evidence that defendants previously obtained payments from local narcotics dealers in exchange for information on police activities and for protection where the evidence was

CRIMINAL LAW—Cont'd

relevant to show a continuing course of conduct on the part of defendants and where the trial judge gave very explicit limiting instructions on the admissibility of the evidence. *People v Duncan,* 403.

65. Claimed error in the prosecutor's closing argument will not be considered on appeal if the argument's prejudicial effect could have been curtailed by a curative instruction and no objection was made, and no miscarriage of justice occurred. *People v Duncan,* 403.

66. The question of harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the contest of a particular case, and there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission; therefore, there is no rational basis for the constitutional-nonconstitutional dichotomy resulting in two standards for testing harmless error. *People v Roberson,* 413.

67. Both before and after commencement of the judicial phase of a prosecution a suspect is entitled to be represented by counsel at a corporeal identification or a photographic identification unless the circumstances justify the conduct of an identification procedure before the suspect can be given an opportunity to request and obtain counsel, and, except in exigent circumstances, photographs of a suspect known to be in custody or who can readily be produced for a lineup may not be displayed to witnesses. *People v Roberson,* 413.

68. The right to counsel guaranteed by the Sixth Amendment does not extend to photographic displays; therefore, the denial of a defendant's right to counsel at a photographic display is not error of constitutional magnitude (US Const, Am VI). *People v Roberson,* 413.

69. A denial of a defendant's right to counsel at a photographic display is not covered by the statutory "miscarriage of justice" standard for determining harmless error (MCLA 769.26). *People v Roberson,* 414.

70. A denial of a defendant's right to counsel at a photographic display is not harmless error unless the court is able to declare that it was harmless beyond a reasonable doubt. *People v Roberson,* 414.

71. Conducting three photographic identification proceedings in the absence of defendant's counsel was harmless error beyond a reasonable doubt where the proofs were so overwhelming that, even if there had been no identification testimony from the witnesses participating in the prior proceedings, all reasonable jurors would have found guilt beyond a reasonable doubt. *People v Roberson,* 414.

72. The admission of the identification testimony of eyewitnesses who had previously identified the defendant at a pretrial photographic display, after defendant's arrest, in which the defend-

CRIMINAL LAW—Cont'd

ant was not represented by counsel was proper where a physical lineup was impossible, the photographic lineup was fairly presented, defense counsel did not move to suppress the in-court identification until the first day of trial although he had known of the photographic display for two months, no attorney had been appointed for the defendant before the time of the photographic display, and a post-trial evidentiary hearing established that the identifications at trial were independent of the photographic display. People v Roberson, 414.

73. A conviction should be upheld where an error was not a violation of a constitutional right and did not deprive the defendant of a substantial right or result in a miscarriage of justice. People v Roberson, 414.

74. A general court rule requires that the agreement be stated on the record and affirmatively acknowledged by the defendant, his lawyer, and the prosecutor, whenever a guilty plea was the result of an agreement (GCR 1963, 785.7[2]). *People v Aleman,* 445.

75. In a prosecution for breaking and entering and injury to a safe, the prosecutor's statement that the people intend to add a new count of larceny in a building and that the addition was the result of discussions and negotiations, constitutes an affirmative acknowledgment by the prosecutor of his willingness to accept a plea to that count, particularly where no objection was made to the court's taking and receiving the guilty plea and where the prosecutor would be bound by the accepted plea and could not thereafter prosecute on the greater offenses; defense counsel's affirmative indication that he had no objection to adding the new count, coupled with the indication that he discussed the disposition of the matter with defendant and that defendant wished to offer a plea of guilty to the added count, constitutes an affirmative acknowledgment on the part of defense counsel to the agreement to add the extra count in exchange for the plea; defendant's act of offering his plea of guilty after being fully informed of his rights with respect to the nature and effect of his guilty plea is sufficient to constitute an affirmative acknowledgment of the agreement. *People v Aleman,* 445.

76. The Michigan Supreme Court when it promulgated a court rule that agreements between the prosecutor and the defendant or his lawyer regarding the entry of a plea shall be stated on the record and affirmatively acknowledged by the defendant, his lawyer and the prosecutor, did not intend to require some ritualized incantation by the parties but rather intended that the rule be applied in such a manner as would effectuate the underlying purpose of apprising the trial court of the nature of the plea agreement (GCR 1963, 785.7[2]). *People v Aleman,* 445.

77. A defendant who cannot show that he was prejudiced by the trial court's dismissal of a juror, even though the dismissal may have been improper because the grounds for a challenge for

CRIMINAL LAW—Cont'd

cause were insufficient, by having agreed to the procedure followed by the trial court may be held on the record to have consented to the dismissal of the juror and therefore will not be heard in contention of error. *People v Clyburn,* 454.

78. A trial court did not depart from that standard of judicial impartiality which protects a defendant's right to a fair trial by assisting defense counsel while seeking to examine the defendant witness concerning his prior criminal convictions in formulating a question which elicited a prior adult conviction, but avoided references to defendant's transgressions as a minor, where no compulsion was exerted, and the court merely protected the record while aiding defense counsel. *People v Clyburn,* 454.

79. The presence of the judge in the courtroom while a trial is in progress is to be expected, but his absence during noncritical stages of the trial will not constitute reversible error unless it clearly appears that prejudice has resulted to the defendant; there was no prejudice where the trial judge was once absent while testimony of witnesses was being read to the jury in response to their request and was again absent during a day of jury deliberations to attend a funeral after arranging for another judge to take the verdict if one was reached in his absence, and in both cases defendant and his attorney stated they had no objections and agreed to proceed. *People v Clyburn,* 454.

80. An in-chambers conference to discuss matters of procedure or law attended by defendant's counsel, to which the defendant raises no objection, does not violate the defendant's right to be present during his trial; a defendant's presence at conference is required only where his substantial rights may be affected. *People v Clyburn,* 455.

81. A jury is not required to restate all of the statutory language defining the offense when rendering a verdict; therefore, where defendant was charged with breaking and entering a business place with intent to commit larceny and the jury found him guilty "as charged" and upon being polled each juror responded affirmatively when asked if he found the defendant guilty "of the charge of breaking and entering a business place, as the people have charged", there is no basis for the claim that the verdict was for breaking and entering a business place, a misdemeanor, under another statute. *People v Clyburn,* 455.

82. An automobile driver's inability to produce evidence of the vehicle's registration does not standing by itself provide a basis for a reasonable belief that the automobile is stolen. *People v 7th District Judge,* 471.

83. An automobile driver's inability to produce a registration certificate can be held to provide a reasonable basis for believing the automobile to be stolen in cases where there are other factors which in cumulative effect justified that conclusion, *e.g.,* inability to identify the owner of the vehicle, contradictory or

CRIMINAL LAW—Cont'd

improbable exculpatory statements, and noncompliance with other registration or licensing requirements. *People v 7th District Judge,* 471.

84. A police officer's mere suspicion that an automobile is stolen is not probable cause and this without sufficient fact or foundation cannot support a reasonable or probable cause to conclude that the vehicle was stolen and to follow this with an arrest. *People v 7th District Judge,* 471.

85. A rule which allows a defendant to withdraw a plea of guilty and proceed to trial if a statement of a judge or prosecutor may be fairly interpreted as a promise of leniency and the promise is unfulfilled, should apply as well to promises alleged to have been made by a juvenile officer to a juvenile defendant. *People v Rogers,* 491.

86. A claim by a defendant who has pleaded guilty that he had been promised leniency and that such promise was unfulfilled, where such a claim is not supported by the plea-taking proceedings, requires action in the trial court by a motion to withdraw his plea of guilty, in order to establish a testimonial record and findings by a judge upon which an appeal may be taken. *People v Rogers,* 491.

87. A plea of guilty induced by an arguably coerced confession is still a voluntary act if made with the advice of counsel and such advice does not justify a conclusion that the attorney was incompetent or ineffective. *People v Rogers,* 491.

88. A defendant's allegation that the trial court considered a pending charge when sentencing the defendant is not justified where the record does not support such an interpretation of the remarks of the trial court on which such an allegation was based and the defendant has not complained that he was deprived of the opportunity to explain or challenge anything in the presentence report. *People v Rogers,* 491.

89. A defendant's silence in the face of interrogation or accusational remarks may not be used against him at trial, nor may the defendant's silence be used to impeach the defendant who testifies for himself at trial. *People v Gant,* 510.

90. The rule against using silence as evidence is designed to protect a defendant's Fifth Amendment right to remain silent; however, where the defendant has made a statement voluntarily, or in response to police investigatory questioning, he has waived his right to remain silent (US Const, Am V). *People v Gant,* 510.

91. Conclusive presumptions are absolutely forbidden in criminal prosecutions and the presumption need not be labeled conclusive to run afoul of constitutional protections. *People v Serra,* 514.

92. An instruction designed to facilitate the reaching of a verdict was not erroneous where the jury had deliberated for seven

CRIMINAL LAW—Cont'd

hours, the case was not complex, yet the jury requested a large portion of the transcript to be reread, and the foreman informed the court that if it were not read, a verdict would not be forthcoming; in these circumstances the use of such an instruction was not an abuse of discretion. *People v Tooks,* 537.

93. A jury instruction must be read as a whole, and where review of an instruction as a whole which was designed to facilitate the jury's arrival at a verdict does not reveal that the jury was coerced, and where, moreover, the jury deliberated for an additional two hours after receiving the instruction, there is indication that any coercive import had been effectively ignored. *People v Tooks,* 537.

94. The indecent liberties statute is not unduly vague and unconstitutional (MCLA 750.336). *People v Wheat,* 559.

95. A charge to the jury which includes a reading of the information and the applicable statutes will generally be found to be sufficiently comprehensive. *People v Wheat,* 559.

96. Error relating to jury instructions has not been preserved for review where defense counsel not only failed to object, but affirmatively expressed satisfaction with the charge, and where no miscarriage of justice occurred. *People v Wheat,* 559.

97. An offense to be a lesser included offense must contain some, but not all, of the elements of the higher offense and there must be no additional elements in the included offense which are not a part of the higher offense. *People v Wheat,* 559.

98. The crime of accosting a child for immoral purposes is not a lesser included offense of the crime of taking indecent liberties with a child; therefore, in a prosecution for attempting to take indecent liberties with a child, it was not error for the court to refuse to instruct the jury on accosting a child for immoral purposes (MCLA 750.145a, 750.336). *People v Wheat,* 559.

99. Comments made by a prosecutor during his opening argument do not require a new trial where the comments were not so manifestly prejudicial as to have tainted the entire proceedings and where a timely objection was not made. *People v Wheat,* 560.

100. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence of the case; however, a verdict in a criminal case will not be set aside because of a prosecutor's unsupported statement where no miscarriage of justice occurred, the statement was made in good faith, an extensive curative instruction was given, and the statement was not so inherently prejudicial that a curative instruction could not compensate for its effect on the jury. *People v Wheat,* 560.

101. Photographs of a suspect known to be in custody or who can readily be produced for a lineup, except in exigent circum-

CRIMINAL LAW—Cont'd

stances, may not be displayed to witnesses and a lineup cannot be conducted in the absence of counsel. *People v Beasley,* 583.

102. Language in the Michigan Supreme Court case setting forth the rules for photographic lineups, which states that it "appears" that at least as to appeals from Wayne County, the decision "ought to be" retroactive is suggestive rather than directory. *People v Beasley,* 583.

103. A trial judge properly used his discretion when he excused a juror after the juror disclosed during the trial that he was acquainted with one of the witnesses, where the full basis of the juror's relationship to the witness was disclosed to both parties, where the judge made clear his reason for excusing the juror, and where after excluding the juror in question, 12 jurors remained as triers of fact (MCLA 768.18). *People v Beasley,* 583.

104. A remark by a trial judge in an uttering and publishing case that there was no law requiring a bank to immediately report the crimes alleged to have been committed by the defendant did not prejudice the defendant and was not error, although the remark, a response to a statement made by defense counsel while objecting to the prosecution's direct examination of the bank's security officer, was made in the jury's presence; it was an accurate statement of the law. *People v Beasley,* 583.

105. A judge's exclusion, over objection, of a defendant's handwriting expert from the courtroom was not an abuse of discretion, although defendant wanted his expert, after hearing the prosecution's rebuttal handwriting expert, to assist in cross-examination, where defendant had excused his expert witness, where defendant had himself requested that all witnesses be sequestered, and where the exclusion did not prejudice defendant because the rebuttal witness's testimony was not damaging. *People v Beasley,* 584.

106. The decision to allow rebuttal testimony and to indorse witnesses is within the discretion of the trial judge. *People v Beasley,* 584.

107. A trial judge did not abuse his discretion in allowing two unindorsed prosecution witnesses to testify in rebuttal where the witnesses were called only to rebut evidence introduced by the defendant, not to introduce new evidence which belonged in the prosecution's case in chief. *People v Beasley,* 584.

108. A trial judge was not required to ascertain whether a factual basis existed for a plea of nolo contendere offered before June 1, 1973, the effective date of the general court rule which governs such pleas (GCR 1963, 785.7[3][d]). *People v Graham,* 590.

109. An inquiry by the trial judge as to whether a defendant's plea of nolo contendere was freely, intelligently and voluntarily made was sufficient to assure that the defendant's rights were safeguarded and was all that was required with respect to pleas

CRIMINAL LAW—Cont'd

of nolo contendere offered before June 1, 1973 (GCR 1963, 785.7[3][d]). *People v Graham,* 590.

110. Payment of restitution as a condition of probation is authorized by statute, and the amount and manner of payment is a matter for the judgment of the sentencing judge (MCLA 771.3). *People v Gallagher,* 613.

111. A requirement that a defendant pay restitution as a condition of probation in the amount of the value of a stolen car, the cowl section of which was found in the defendant's collision shop, although the cowl section's value was less than that of the entire car, is not in violation of the probation statute nor of any constitutional right of the defendant, and is not an abuse of the judge's discretion (MCLA 771.3). *People v Gallagher,* 613.

112. A trial judge, if he elects to comment on the evidence, must take great pains to make sure his comment is at least an accurate representation of the subject; the review should be fair and impartial. *People v Potts,* 622.

113. It was proper for the trial judge to give the usual charge relating to a defendant who has not taken the stand where he was requested to give the instruction by counsel for the defense and did not give it *sua sponte;* had the court not given the instruction when requested it would have been reversible error. *People v Potts,* 623.

114. There was no error in accepting a criminal defendant's plea of guilty to a charge of a lesser offense in a supplemental information after an agreement to drop a more serious charge in an earlier information where the plea was accepted before the decision in a case on which defendant relies and that case would seem to be in point except that it is not retroactive. *People v Potts,* 623.

115. The statutes providing for prosecution of a repeating offender by supplemental information are constitutional and are not cruel and unusual; the state has a right to protect its citizens from persons who continue to engage in criminal activities, and the statutes are based upon additional particular acts of criminal activity and, thus, are not directed toward the status of being an habitual criminal (MCLA 769.10; 769.13). *People v Potts,* 623.

116. A sentencing judge is entitled to review a presentence report giving the defendant's background concerning his antecedents, character and circumstances, and where the judge had knowledge of a pending trial and a pending charge against the defendant in other courts and the defendant admitted that both the trial and the charge were indeed pending, an assertion that the trial judge relied upon improper criteria must fail; the sentence need not be vacated when there is no showing that the trial judge relied upon the pending charges when sentencing. *People v Potts,* 623.

117. A criminal defendant could have been improperly coerced and

CRIMINAL LAW—Cont'd

induced to plead guilty to a supplemental information as a second offender where, after his guilty plea was set aside, the defendant was not only recharged with the original offenses but where the prosecutor also brought additional charges against the defendant in the form of an amended supplemental information; thus, upon remand from his successful appeal, defendant was faced with an additional charge that had never been presented at the original proceedings. People v Potts, 624.

118. A defendant charged with violating a municipal ordinance covering a crime which in terms is identical to a section of the general criminal legislation of the state or charged with violating an ordincance which authorizes incarceration as a permissible sentencing alternative is entitled to a jury trial as guaranteed by the state constitution (Const 1963, art 1, § 20). *People v Burnett,* 649.

119. The use against a defendant at trial of his exercise of his constitutional right to remain silent at the time of arrest constitutes prejudicial error. *People v Terry Moore,* 678.

120. The use against a defendant at trial of his exercise of his constitutional right to remain silent at the time of arrest constitutes prejudicial error only where the defendant has made no allegations on direct examination as to what was said or not said at the time of arrest. People v Terry Moore, 678.

121. A defendant Chippewa Indian's conviction of fishing without a commercial license is reversed because the application of the state statute to such a defendant conflicts with the exercise of a Federal treaty right (7 Stat 491 [1836]; MCLA 308.22). *People v LeBlanc,* 684.

122. A statute which outlaws the use of gill nets may properly be applied to a defendant Chippewa Indian, who was given fishing rights pursuant to a Federal treaty, if the state can show that the statute is necessary to prevent a substantial depletion of the fish supply (MCLA 302.1). *People v LeBlanc,* 684.

123. Failure to give an instruction *sua sponte* that prior inconsistent testimony was admitted solely for impeachment purposes is not reversible error where there is no request for a limiting instruction, there is no demonstration or likelihood of prejudice, and neither the court nor the prosecutor has suggested to the jury that the prior inconsistent statement could be used as substantive evidence. *People v Paul Mathis,* 694.

124. A trial judge's statement to a defendant at a plea-taking proceeding that at a trial he could have a lawyer with him to assist him and to question witnesses for him, subpoena witnesses on his behalf, make legal arguments for him, argue his case to the jury, and help in other ways, is not sufficient to inform the defendant of his right to confront his accusers. *People v Thomas Mathis,* 699.

125. A trial judge's language, when accepting a plea of guilty, which clearly pointed out to a defendant that at a trial he could bring

CRIMINAL LAW—Cont'd

witnesses in and that the witnesses presented could be examined, fulfills the requirement of advising the defendant of his right to confront his accusers. People v Thomas Mathis, 699.

126. An instruction which clearly informed the jury that in order to convict they must find that the defendant had the necessary intent and that if because of intoxication or any other reason he did not have the necessary intent, he must be acquitted, was not rendered erroneous by the fact that the court also indicated that if the jury found the defendant did not have, by reason of intoxication, the capacity to form the intent, they must acquit where the giving of the so-called "capacity standard" did not create any irreconcilable conflict, inconsistency, or confusion. *People v Scott,* 739.

127. Criminal trials should not be adjourned or otherwise delayed except for good cause shown and explanations for adjournments should be on the record, but the mere failure to explain on the record the reasons for two lengthy adjournments does not mandate a reversal where there were no objections to the adjournments by the defendant, there is no indication of how the defendant was prejudiced by the adjournments, and defendant fails to show any miscarriage of justice. *People v Scott,* 739.

128. There is no reason to require a trial court to repeat its instructions that the underlying intent is a necessary element and that intoxication is a defense to that theory when instructing the jury with respect to aiding and abetting where the court had already clearly instructed the jury on those matters in other portions of its charge. *People v Scott,* 739.

129. Failure *sua sponte* to instruct the jury as to the lesser included offenses of the crime charged, where the court did not affirmatively exclude the question of lesser included offenses from the jury's consideration, was not reversible error. *People v Scott,* 740.

See

ARREST 1
ASSAULT AND BATTERY 1, 2
BRIBERY 1
BURGLARY 1–4
CONSTITUTIONAL LAW 1
ESCAPE 1, 2
HOMICIDE 1–8
RAPE 1
RECEIVING STOLEN GOODS 1–4
ROBBERY 2, 3
SEARCHES AND SEIZURES 1–3
VENUE 1
WITNESSES 3, 4, 7, 9

CROSS-CLAIM—See

TRIAL 5

CROSS-EXAMINATION—See
APPEAL AND ERROR 12
BURGLARY 2
CRIMINAL LAW 3, 50, 61, 105
WITNESSES 1–5, 8, 9

CUMULATIVE EVIDENCE—See
CRIMINAL LAW 60

CURATIVE INSTRUCTIONS—See
APPEAL AND ERROR 8
CRIMINAL LAW 64, 65, 100

CUSTODY—See
CRIMINAL LAW 18, 49
DIVORCE 1, 2

DAMAGED PROPERTY—See
INSURANCE 3

DAMAGES

1. The prevailing rule is that a contractor on public work projects is not entitled to damages resulting from delay caused by other contractors. *Cooke v Highway Dept #2,* 480.

2. Failure to give a requested instruction as to the intervening acts of third parties in a case where a plaintiff's building was alleged to have been damaged by defendants while installing a sewer and may have been further damaged during the course of repair, was at the most harmless error where the jury reached a verdict of no cause of action, thus finding no liability and not reaching the question of damages, and the verdict would not have been different had the instruction been given, and where the instructions given adequately informed the jury of the issues, the parties' positions, and the applicable law. *Doyle Vacuum Co v Siller & Co,* 601.

3. Damages for loss of profits may be recovered when those damages are proved with a reasonable degree of certainty. *Doyle Vacuum Co v Siller & Co,* 602.

4. Claimed damages for loss of profits were too speculative where the products for which the lost profits were alleged were not in production, nor had any been marketed at the time a plaintiff's factory was damaged. *Doyle Vacuum Co v Siller & Co,* 602.

See
HIGHWAYS 6
INSURANCE 8
LIMITATION OF ACTIONS 1
VENDOR AND PURCHASER 2

DANGEROUS FORCES—See
PRODUCTS LIABILITY 2

DANGERS—See
NEGLIGENCE 3

DATE OF INJURY—See
WORKMEN'S COMPENSATION 4

DEAD BODIES—See
HOMICIDE 5

DEBTS—See
INTEREST 1

DECLARATORY JUDGMENTS—See
CONSTITUTIONAL LAW 7

DEFAULT JUDGMENT—See
JUDGMENT 4, 5, 12

DEFAULT OF LESSEE—See
BROKERS 3

DEFECTS IN DESIGN—See
HIGHWAYS 3

DEFECTS IN PROCEEDINGS—See
JUDGMENT 5

DEFENDANTS—See
APPEAL AND ERROR 12
WITNESSES 8

DEFENDANT'S SILENCE—See
CRIMINAL LAW 89, 90, 119, 120

DEFENDANT'S THEORY—See
CRIMINAL LAW 2

DEFENSES—See
ACCORD AND SATISFACTION 2
APPEAL AND ERROR 6, 7
CONSTITUTIONAL LAW 11
COURTS 2–4
CRIMINAL LAW 21, 52, 53, 60, 126, 128
DRUGS AND NARCOTICS 2
EQUITY 6
JUDGMENT 4, 9, 10
LIMITATION OF ACTIONS 6
NEGLIGENCE 1
NOTICE 2

DEFENSES—Cont'd
PARTIES 1
PLEADING 1

DEFENSE WITNESSES—See
WITNESSES 5

DEFINITIONS—See
INSURANCE 6, 7

DELAY—See
CONTRACTS 1
CRIMINAL LAW 46, 47, 52, 127
DAMAGES 1
JUDGMENT 8

DELAYED RETIREMENT BENEFITS—See
MUNICIPAL CORPORATIONS 3

DELEGATION OF LEGISLATIVE POWER—See
STATUTES 4

DELIBERATION—See
CRIMINAL LAW 4, 93

DEMAND—See
ACCORD AND SATISFACTION 1, 2

DEMAND FOR JURY TRIAL—See
JUDGMENT 9

DEMAND FOR SPEEDY TRIAL—See
CRIMINAL LAW 46, 47

DEMEANOR OF DEFENDANT—See
CRIMINAL LAW 53

DEMONSTRATIONS—See
BURGLARY 4

DE NOVO REVIEW—See
APPEAL AND ERROR 10

DEPARTMENTAL PROCEDURE—See
ADMINISTRATIVE LAW 2

DEPLETION OF FISH SUPPLY—See
CRIMINAL LAW 122

DEPRIVATION OF PROPERTY—See
CONSTITUTIONAL LAW 4

DE NOVO REVIEW—See
ZONING 1

DESIGN OF HIGHWAYS—See
HIGHWAYS 3

DETROIT CHARTER—See
MUNICIPAL CORPORATIONS 3

DIFFERENCE OF OPINION—See
ZONING 10

DIFFERENT CAUSES OF ACTION—See
JUDGMENT 13, 14

DIRECTED VERDICT—See
CRIMINAL LAW 33, 44

DIRECT EXAMINATION—See
CRIMINAL LAW 120
WITNESSES 8

DISABILITIES—See
WORKMEN'S COMPENSATION 4

DISCHARGED TEACHERS—See
SCHOOLS AND SCHOOL DISTRICTS 4, 5

DISCHARGE OF COUNSEL—See
CRIMINAL LAW 58, 59

DISCOVERY—See
BURGLARY 2

DISCRETION—See
APPEAL AND ERROR 2, 11, 13
ATTORNEY AND CLIENT 1, 2
CRIMINAL LAW 8, 19, 36, 63, 64, 92, 103, 106, 107, 110, 111
DIVORCE 1, 3
EVIDENCE 2
NEW TRIAL 1
TRIAL 4, 5
VENUE 1
WITNESSES 1, 2

DISCRIMINATION—See
CIVIL RIGHTS 1–4
CONSTITUTIONAL LAW 8, 9
LIMITATION OF ACTIONS 3
TREATIES 3
ZONING 3

DISCUSSION ABOUT CASE—See
TRIAL 7

DISMISSAL—See
CRIMINAL LAW 77

DISMISSAL OF ACTION—See
TRIAL 5

DISMISSAL OF CHARGES—See
CRIMINAL LAW 15

DISPARITY OF BENEFITS—See
WORKMEN'S COMPENSATION 11

DISQUALIFICATION—See
JUDGES 1

DISTRICT ATTORNEYS—See
CRIMINAL LAW 12

DIVISION OF PROPERTY—See
DIVORCE 3, 4

DIVORCE

1. A trial court's custody adjudication will not be disturbed unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue (MCLA 722.28). *Feldman v Feldman,* 147.

2. Moral fitness is only one of the factors which a court considers in determining the best interest of the child in custody disputes; therefore, the best interests of the children would be served by giving custody to the plaintiff who had admittedly engaged in two adulterous affairs where the plaintiff had been a good mother, had been solely responsible for her sons' religious education, and evidence damaging to the defendant husband regarding his mental health had been introduced. *Feldman v Feldman,* 147.

3. The trial court has wide discretion in dividing property of a marital estate and the Court of Appeals will not reverse or modify a property award in a divorce action unless convinced that a different result would have been reached had the Court of Appeals occupied the position of the trial court. *Feldman v Feldman,* 147.

4. A court is not required to return property to the party who brought it into the marriage; property may be considered a marital asset even though one spouse accumulated it prior to marriage; therefore, the trial court properly ruled that the total equity of $35,350 in the parties' home was a marital asset even though the defendant husband had made a $25,000 down payment from funds accumulated prior to the marriage. *Feldman v Feldman,* 147.

5. The legitimacy of all children begotten before commencement

DIVORCE—Cont'd
of any action under the divorce act is presumed until the contrary is shown (MCLA 552.29). *Hinterman v Stine,* 282.

See
BASTARDS 2

DOCKET ENTRIES—See
CRIMINAL LAW 12

DOUBLE JEOPARDY—See
RAPE 1

DRAMSHOP ACT—See
INTOXICATING LIQUORS 1

DRIVERS—See
AUTOMOBILES 1, 2
CRIMINAL LAW 82, 83

DRUGS AND NARCOTICS

1. The statutory presumption that possession of marijuana in an amount in excess of two ounces constitutes possession with intent to deliver is unconstitutional as a violation of the privilege against self-incrimination (US Const Am V, XIV; Const 1963, art 1, § 17; MCLA 335.341[2]). *People v Serra,* 514.

2. The statutory presumption that possession of over two ounces of marijuana constitutes possession with intent to deliver involves an inference from the fact of possession to the possessor's intent and the only evidence which can effectively rebut such an inference is the testimony of the defendant as to his intent, and thereby his choice of exercising his constitutional right to remain silent is nullified (MCLA 335.341[2]). *People v Serra,* 514.

3. The statutory presumption that possession of more than two ounces of marijuana constitutes possession with intent to deliver, by raising an inference from the fact of possession to the possessor's intent, while not technically a conclusive presumption, coerces the jury to draw the inference of intent to deliver, and the presumption becomes conclusive (MCLA 335.341[2]). *People v Serra,* 514.

DUE PROCESS—See
BURGLARY 2
CONSTITUTIONAL LAW 3, 4, 10, 11, 13
TAXATION 6

DUST DISEASE—See
WORKMEN'S COMPENSATION 4

DUTY—See
CRIMINAL LAW 2
HIGHWAYS 2–4

DWELLINGS—See
BURGLARY 1

EARNEST MONEY—See
BROKERS 7

EFFECTIVE COUNSEL—See
CRIMINAL LAW 87

ELECTIONS

1. Michigan citizens have a constitutional right to vote by an absentee ballot (Const 1963, art 2 § 4). *Arlee v Wayne County Sheriff,* 340.

2. Pretrial detainees who are otherwise qualified and registered are entitled to vote by absentee ballot. *Arlee v Wayne County Sheriff,* 341.

See
CONSTITUTIONAL LAW 7–10
SCHOOLS AND SCHOOL DISTRICTS 1

ELECTRICAL CABLES—See
PRODUCTS LIABILITY 2

ELEMENTS OF CRIME—See
ROBBERY 3

ELEMENTS OF FRAUD—See
FRAUD 4

ELEMENTS OF OFFENSE—See
CRIMINAL LAW 33, 34, 44

ELEMENTS OF TORT—See
FRAUD 2

EMPHASIS—See
CRIMINAL LAW 1

EMPLOYERS AND EMPLOYEES—See
AUTOMOBILES 2
NEGLIGENCE 2, 3
WORKMEN'S COMPENSATION 1, 2, 5, 6, 8, 11

EMPLOYMENT—See
MUNICIPAL CORPORATIONS 2, 3

EMPLOYMENT DISCRIMINATION—See
CIVIL RIGHTS 1–4

EMPLOYMENT RELATIONS COMMISSION—See
LABOR RELATIONS 1, 2

ENJOYMENT OF PROPERTY—See
LIMITATION OF ACTIONS 3

ENTRY MARKS—See
BURGLARY 2

EQUAL PROTECTION—See
CONSTITUTIONAL LAW 2, 8, 9, 12
TAXATION 5, 6
WORKMEN'S COMPENSATION 11
ZONING 3

EQUITY

1. Equity has jurisdiction where complete protection and relief requires the cancellation of written instruments, the rescission of a transaction, or other specific relief of an equitable character and therefore a demand for a jury trial was properly denied because equity disposition was required where transfers of real estate and stock were contested. *Hudson v Maher,* 90.

2. Equity is precluded from serving as a reviewing court with broader powers of substitute judgment; therefore, mere perjured testimony is not sufficient to permit equitable intervention. *Kita v Matuszak,* 288.

3. Equity may interfere with a probate order obtained by positive fraud, but not for merely constructive fraud in obtaining the judgment. *Kita v Matuszak,* 288.

4. An order of a probate court, admitting a will to probate, is not res judicata in an equitable action to set aside the order because of fraud where the defendant beneficiary had procured and filed a false will and procured the heirs' consent in seemingly innocent fashion; the fraud thus perpetrated was positive and intentional, depriving the plaintiff heirs of an adversary trial, for which the probate court could provide no adequate remedy and an equity court had jurisdiction to exercise its inherent equity powers. *Kita v Matuszak,* 288.

5. Plaintiffs were not guilty of laches where there was no dilatory behavior on their part which operated to the defendant's prejudice, and where the claim against the defendant arose from his own fraud and the success of that fraud placed the plaintiffs in temporary ignorance of their rights causing the lapse of time prior to the assertion of their claim. *Kita v Matuszak,* 288.

6. Laches is an equitable defense and is inapplicable to a suit at law. *Head v Benj Rich Realty Co,* 348.

7. Plaintiff property owners were barred by laches and estoppel from prevailing in an action for a determination that a special assessment as applied to them was void and to recover all special assessment taxes paid, where credible evidence showed that the special assessment roll was confirmed without plaintiffs making an objection thereto at or prior to the hearing on

EQUITY—Cont'd

confirmation, where no notice of intent to commence suit was filed within 30 days after confirmation as required by the city charter and code, where payments were made on the assessments without protest, and where the project was completed and the contract price fully paid by the city approximately three years before plaintiffs commenced their action (MCLA 211.53; Southfield City Charter, § 9.26[c]; Southfield City Code, title I, ch 6, § 1.241). *Romisch v Feder,* 496.

See

APPEAL AND ERROR 10
CIVIL RIGHTS 5
VENDOR AND PURCHASER 1

ESCAPE

1. A general intent is required by a section of the statute which provides that it shall be a crime for any person to aid or assist another in his escape from any jail or prison; general intent in this context refers to the doing of a voluntary act which in fact aids or assists in the escape of another (MCLA 750.183). *People v Potts,* 622.

2. Sufficient instructions were given to the jury as to the intent required for conviction of aiding or assisting a prisoner to escape where the court stated that it was sufficient if defendant acted knowingly and intentionally and his act did in fact aid or assist the prisoner in his attempt to escape, and that if the jury found that defendant assaulted the jail turnkey and that the natural and ordinary consequence of his assault would be to assist the prisoner in an attempted escape, the jury could presume that the assault was made with the intent to aid or assist the prisoner's attempt to escape (MCLA 750.183). *People v Potts,* 623.

See

CRIMINAL LAW 20

ESTATES—See

EQUITY 4
EXECUTORS AND ADMINISTRATORS 1, 3
FRAUD 1
LIMITATION OF ACTIONS 5

ESTOPPEL—See

EQUITY 7
JUDGMENT 2, 11–20

EVIDENCE

1. A plaintiff's rebuttal evidence is limited to testimony which tends to contradict evidence already introduced by the defendant, and evidence which tended to substantiate a plaintiff's case was properly excluded on rebuttal. *Doyle Vacuum Co v Siller & Co,* 601.

EVIDENCE—Cont'd
2. The admission of rebuttal evidence rests in the sound discretion of the court. *Doyle Vacuum Co v Siller & Co,* 601.

See
APPEAL AND ERROR 3, 8, 15
BRIBERY 1
BURGLARY 1, 2, 4
CONSTITUTIONAL LAW 1
CONTEMPT 2
CRIMINAL LAW 8, 11, 21, 25, 27, 30, 32, 33, 38, 44, 45, 51, 53, 55, 56, 63, 64, 66, 72, 90, 100, 107, 112, 123
DIVORCE 1
EQUITY 7
FRAUD 1
HOMICIDE 1–3, 5, 8
LIBEL AND SLANDER 1
MOTIONS 1, 2
NOTICE 1, 2
RECEIVING STOLEN GOODS 1–3
SEARCHES AND SEIZURES 2, 4–6
TRIAL 1
WITNESSES 1, 8
WORKMEN'S COMPENSATION 5, 6
ZONING 15–17

EVIDENCE OF WAIVER—See
CRIMINAL LAW 12

EXAMINATION—See
WITNESSES 4

EXCESS INSURANCE—See
AUTOMOBILES 3

EXCLUDED USE—See
ZONING 3

EXCLUSIONARY CLAUSES—See
INSURANCE 1–4

EXCLUSION FROM COURTROOM—See
CRIMINAL LAW 105

EXCLUSION FROM JURY CONSIDERATION—See
CRIMINAL LAW 129

EXCLUSIVE OCCUPATION—See
PROPERTY 1

EXECUTORS AND ADMINISTRATORS
1. A bank and the president of a corporation, who were co-execu-

EXECUTORS—Cont'd
tors of an estate which was composed mainly of shares of stock in the corporation, committed a fraud on the probate court where the bank petitioned the court for authority to sell a large block of the shares to one of the members of a stockholders' group in which the co-executor president was interested and obtained the court's approval of the sale, and where it was later discovered that a competing group of stockholders had offered to buy all the stock at a higher price, and that this information had not been given to the probate court; a claim that the sale was proper under a broad power of sale in the will has no support because the bank failed to exercise the power of sale and instead sought the authority of the probate court to sell the stock, and the co-executor president did not properly exercise his power of sale over the stock because of his conflict of interest (MCLA 704.37). *Sinclair v Mfrs Nat Bk of Det,* 530.

2. The approval by a probate court of co-executors' second account, which included the sale of stock to one of the members of a stockholders' group in which one of the co-executors was interested, where the co-executors perpetrated a fraud on the court by not informing the court that more money had been offered for the stock by a competing stockholder group, did not bar a subsequent action by a beneficiary of the estate against one of the co-executors because of the fraud (MCLA 704.39). *Sinclair v Mfrs Nat Bk of Det,* 530.

3. A claim against an estate is statutorily barred where the claim was made more than three months after the estate has been closed (MCLA 701.19, 708.18). *Maxman v Goldsmith,* 656.

See
LIMITATION OF ACTIONS 5

EXECUTORY AGREEMENTS—See
BROKERS 1, 2

EXEMPTIONS—See
TAXATION 3–6

EXEMPTIONS FROM LIABILITY—See
AUTOMOBILES 2
WORKMEN'S COMPENSATION 1, 2

EXHAUSTION OF REMEDIES—See
ADMINISTRATIVE LAW 1
CIVIL RIGHTS 3
LIMITATION OF ACTIONS 1

EXPEDITION OF TRIAL—See
TRIAL 3

EXPERT WITNESSES—See
BURGLARY 2
CRIMINAL LAW 36, 37, 52, 105

EXPIRATION OF LISTING—See
BROKERS 6–8

EXPRESS OR IMPLIED CONTRACT—See
LIMITATION OF ACTIONS 4

EXTINGUISHMENT OF DEMAND—See
ACCORD AND SATISFACTION 1, 2

EYE INJURIES—See
WORKMEN'S COMPENSATION 9

EYEWITNESSES—See
CRIMINAL LAW 72

FACTS—See
CRIMINAL LAW 30

FACTUAL BASIS—See
ASSAULT AND BATTERY 1
CRIMINAL LAW 41, 108

FAILURE TO EXECUTE—See
BROKERS 2

FAILURE TO FILE BRIEF—See
APPEAL AND ERROR 9

FAIR TRIAL—See
APPEAL AND ERROR 8
CRIMINAL LAW 78
TRIAL 6

FALSE REPRESENTATIONS—See
FRAUD 2, 3

FALSE STATEMENTS—See
RECEIVING STOLEN GOODS 3

FALSE TESTIMONY—See
BURGLARY 3

FARMING—See
ZONING 2

FEDERAL TREATY RIGHTS—See
CRIMINAL LAW 121, 122

FEES—See
ATTORNEY AND CLIENT 1, 2

FELLOW EMPLOYEES—See
AUTOMOBILES 2
WORKMEN'S COMPENSATION 1

FELONY CONVICTIONS—See
CRIMINAL LAW 8

FELONY MURDER—See
HOMICIDE 4, 6, 7

FINAL ARGUMENT—See
APPEAL AND ERROR 8

FINANCIAL EXPECTATIONS—See
LIMITATION OF ACTIONS 4

FINDINGS OF FACT—See
APPEAL AND ERROR 10
TRIAL 1
WORKMEN'S COMPENSATION 7, 8

FINGERPRINTS—See
CRIMINAL LAW 55, 56

FIREMEN—See
MUNICIPAL CORPORATIONS 3

FIRES—See
INSURANCE 2

FIRST-DEGREE MURDER—See
HOMICIDE 4, 8

FISHING RIGHTS—See
CRIMINAL LAW 122
TREATIES 2, 3

FISHING WITHOUT A LICENSE—See
CRIMINAL LAW 121

FORECLOSURE—See
LIBEL AND SLANDER 2, 3
MORTGAGES 1

FOREIGN CORPORATIONS—See
CONSTITUTIONAL LAW 5
LICENSES 1

FOREMEN—See
WORKMEN'S COMPENSATION 6

FORENSIC PSYCHIATRY—See
CRIMINAL LAW 17

FORGERY—See
FRAUD 1

FORM OF INSTRUCTIONS—See
CRIMINAL LAW 35

FORM OF VERDICT—See
CRIMINAL LAW 31, 81

FOUNDATION OF FURTHER ACTION—See
ACCORD AND SATISFACTION 1, 2

FOUR-WHEELED VEHICLES—See
INSURANCE 6

FRAMING ISSUES—See
TRIAL 4

FRAUD

1. The existence of a fraud on the part of a defendant beneficiary under a will who had filed the will for probate was shown by clear and convincing evidence where a preponderance of evidence indicated that the testator's signature was forged, the will was possibly misdated, hospital records indicated that the testator was in an oxygen tent and semicomatose for much of the period during which the will was allegedly signed, testimony of the defendant and the attorney who drew up the will was inconsistent and contradictory, the testimony of a witness to the will was equivocal, and the defendant had also attempted to probate a forged will naming himself sole beneficiary of another estate. *Kita v Matuszak,* 289.

2. The general rule is that to constitute actionable fraud, it must appear that defendant made a material representation; that it was false; that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; that he made it with the intention that it should be acted upon by plaintiff; that plaintiff acted in reliance upon it; and that he thereby suffered injury. *Head v Benj Rich Realty Co,* 348.

3. The plaintiff met his burden of proof in an action for fraudulent misrepresentation in the sale of property where the record showed that the defendants had made material misrepresentations as to the lack of city and health code violations, and as to the amount of income the plaintiffs would realize, and where plaintiffs relied upon defendants' representations and suffered injury thereby. *Head v Benj Rich Realty Co,* 349.

4. A party making a misrepresentation must either know it was

FRAUD—Cont'd
false when made or make it recklessly without any knowledge of its truth and as a positive assertion in order for the misrepresentation to constitute fraud. *Cooke v Highway Dept #2,* 480.

See
EQUITY 3–5
JUDGMENT 8
VENDOR AND PURCHASER 2

FRAUD ON THE COURT—See
EXECUTORS AND ADMINISTRATORS 1, 2
LIMITATION OF ACTIONS 5

FRAUDULENT CONVEYANCES
1. The actual intent of one who transfers assets to others without a fair consideration is unimportant where it leaves the transferor insolvent. *Hudson v Maher,* 90.

FUNDAMENTAL RIGHTS—See
CONSTITUTIONAL LAW 9

GENERAL CONTRACTORS—See
NEGLIGENCE 2, 3

GENERAL INTENT—See
ESCAPE 1, 2

GENERAL SEARCH—See
SEARCHES AND SEIZURES 7

GENERAL VERDICTS—See
CRIMINAL LAW 31
HOMICIDE 4

GENERAL WELFARE—See
ZONING 7

GILL NETS—See
CRIMINAL LAW 122

GOOD CAUSE—See
JUDGMENT 4, 5

GOOD FAITH—See
CRIMINAL LAW 100

GOVERNMENTAL AGENCIES—See
NOTICE 1, 2

GOVERNMENTAL FUNCTIONS—See
TORTS 1

GOVERNMENTAL IMMUNITY—See
CONSTITUTIONAL LAW 2, 4
NEGLIGENCE 1
TORTS 1

GRANTS OF WAIVER USE—See
APPEAL AND ERROR 14

GUILTY PLEA—See
ASSAULT AND BATTERY 1, 2
CRIMINAL LAW 14, 15, 41, 62, 74–76, 85–87, 114, 117, 124, 125

HANDWRITING EXPERTS—See
CRIMINAL LAW 105

HARASSMENT—See
LIMITATION OF ACTIONS 3

HARMLESS ERROR—See
CRIMINAL LAW 66, 68–71
DAMAGES 2
ROBBERY 2

HEARINGS—See
CRIMINAL LAW 12, 23, 24
ZONING 15

HEIRS—See
EQUITY 4

HIGHER OFFENSES—See
CRIMINAL LAW 97

HIGHEST USE—See
ZONING 9

HIGHWAYS

1. A county road commission is bound by statute to keep a highway in a condition reasonably safe and fit for travel; summary judgment for a defendant road commission was error where whether this duty was breached by a failure to erect snow barriers at a point where an accident occurred, under an allegation in the complaint and the facts in the case, was a question of fact for jury determination (MCLA 224.21). *Weckler v Berrien Co Rd Comm*, 7.

2. A county road commission has the statutory duty to keep roads under its jurisdiction in reasonable repair so that they shall be reasonably safe and convenient for public travel, but is not liable for injuries caused by the usual and natural accumulation of snow and ice on its roads (MCLA 224.21). Weckler v Berrien Co Rd Comm, 7.

HIGHWAYS—Cont'd

3. A statute imposes upon a county road commission a duty to design roadways in a reasonably safe manner and to correct defects in design (MCLA 224.21). Weckler v Berrien Co Rd Comm, 7.

4. The state is statutorily obligated to maintain a highway median in reasonable repair so that the median is reasonably safe for its intended use as an adjunct of the paved portion of the highway (MCLA 691.1402). *Detroit B & T v Highway Dept,* 131.

5. Highway medians are an integral part of the improved portion of a highway (MCLA 691.1402). *Detroit B & T v Highway Dept,* 131.

6. The state is not an insurer and a motorist who misuses any part of the improved portion of a highway is answerable for his own negligence which could bar his recovery against the state; the asserted negligence of the state must be established as the proximate cause of the claimed injury and damage (MCLA 691.1402). *Detroit B & T v Highway Dept,* 131.

7. A coordinating clause of a highway construction contract controls over the standard specificatoins; standard specifications deal with the generality of construction contracts whereas special provisions, whether they be termed special requirements supplemental specifications or coordinating clauses, refer to the unique problems of any construction project, and they are used to individualize the contract. *Cooke v Highway Dept #2,* 480.

See

CONTRACTS 1

HOME RULE CITIES—See

MUNICIPAL CORPORATIONS 1

HOMES FOR THE AGED—See

TAXATION 3–6

HOMICIDE

1. Premeditation may be inferred from the facts and circumstances surrounding a killing. *People v Rappuhn,* 52.

2. Premeditation is a question for the jury and on appeal a jury's finding of premeditation will not be disturbed unless there is no evidence which would support a reasonable inference thereof. *People v Rappuhn,* 52.

3. Sufficient evidence was produced to support a reasonable inference of premeditation where testimony clearly established that a defendant left the victim's apartment to remove a knife from his pocket and open the blade, and returned to the apartment to repeatedly stab the victim; the trip outside the apartment to open the knife and the pauses of the defendant between stabbings indicate the presence of the "second look" necessary to a finding of premeditation. *People v Rappuhn,* 52.

HOMICIDE—Cont'd

4. A defendant's conviction of first-degree murder in a general verdict must be reversed where the jury was instructed upon both premeditated and felony murder theories but the felony murder theory was proved only by the defendant's confession and was therefore not sufficiently established, because a conviction must be reversed where it rests upon one of the two theories, one of which is permissible and one of which is not, and it is not possible to say for sure upon which theory the conviction rests (MCLA 750.316). *People v Gilbert,* 168.

5. *The corpus delicti refers to the crime, not to the accused perpetrator, and proof of the identity of the perpetrator of the crime is not a part of the corpus delicti; therefore, in a murder case, the corpus delicti was sufficiently established where the evidence consisted of the identification of two dead bodies riddled by gunshots, bits of glass which matched the broken headlights of the car abandoned by the accused, and testimony of a witness who saw two men running near the house where the bodies were found and who saw them leaving in the car which was later found and identified as the car involved; the corpus delicti may be established by circumstantial evidence and reasonable inferences. People v Gilbert,* 169.

6. A murder committed while attempting to escape from or prevent detection of a felony is felony murder, but only if the murder is committed as part of a continuous transaction with, or is otherwise immediately connected with, the underlying felony. *People v Smith,* 184.

7. Refusal of the trial court to instruct the jury on the lesser included offenses of second-degree murder and voluntary manslaughter in a felony-murder trial was error where the jury could find that the homicide was not committed while attempting to escape, was not committed while attempting to prevent detection of the felony, and was not immediately connected with the underlying felony. *People v Smith,* 184.

8. A defendant's contention that his plea of nolo contendere to a charge of second-degree murder was coerced by the effect of being bound over for trial on a charge of first-degree murder was without merit where the preliminary examination reveals sufficient evidence upon which the district court could base its decision to bind defendant over for trial on the first-degree murder charge. *People v Graham,* 590.

HONEST BELIEF—See

SEARCHES AND SEIZURES 8

HOSPITALIZATION—See

WORKMEN'S COMPENSATION 6

HOSPITAL RECORDS—See

FRAUD 1

HOSPITALS—See
NEGLIGENCE 1
TORTS 1

HOSTILE WITNESSES—See
CRIMINAL LAW 3

HOUSING—See
TAXATION 3–6

HUSBAND AND WIFE—See
CRIMINAL LAW 43

IDENTIFICATION—See
BURGLARY 3
CRIMINAL LAW 5–7, 18, 39, 40, 48, 49, 67–72, 101, 102

IDENTIFICATION TESTIMONY—See
CRIMINAL LAW 45

IDENTITY—See
HOMICIDE 5

IDENTITY OF PARTIES—See
JUDGMENT 15

IDENTITY OF STOLEN GOODS—See
RECEIVING STOLEN GOODS 1

ILLEGAL CONFRONTATION—See
CRIMINAL LAW 5

ILLEGAL SEARCHES—See
SEARCHES AND SEIZURES 9

IMMUNITY—See
AUTOMOBILES 2
CONSTITUTIONAL LAW 2, 4
NEGLIGENCE 1
TORTS 1

IMPARTIAL TRIAL—See
CRIMINAL LAW 78

IMPEACHMENT—See
BURGLARY 3
CRIMINAL LAW 25, 61, 89, 120, 123
WITNESSES 6

IMPLIED AUTHORITY—See
PRINCIPAL AND AGENT 3

IMPLIED CONTRACT—See
LIMITATION OF ACTIONS 4

IMPLIED OBLIGATIONS—See
BROKERS 3

IMPLIED WARRANTY—See
PRODUCTS LIABILITY 1, 2

IMPROPERLY SEIZED EVIDENCE—See
SEARCHES AND SEIZURES 4, 5

IMPROVED PORTION—See
HIGHWAYS 5, 6

INCARCERATION—See
CONSTITUTIONAL LAW 7, 8, 10
CRIMINAL LAW 118
ELECTIONS 2

INCLUDED OFFENSES—See
CRIMINAL LAW 1, 4, 9, 32, 62, 97, 98, 129
HOMICIDE 7

INCOME—See
FRAUD 3

INCOMPETENCE—See
CRIMINAL LAW 17

INCONSISTENT TESTIMONY—See
CRIMINAL LAW 123

IN-COURT IDENTIFICATION—See
CRIMINAL LAW 5, 6, 39

INCULPATORY STATEMENTS OF FACT—See
CRIMINAL LAW 28

INDECENT LIBERTIES—See
CRIMINAL LAW 94, 98

INDEMNITOR AND INDEMNITEE—See
JUDGMENT 19

INDEMNITY

1. Indemnity clauses are construed most strictly against the party who drafts them and the party who is the indemnitee. *Hubbert v Acme Equipment Co,* 313.

2. An indemnity contract will not be construed to indemnify an

INDEMNITY—Cont'd
indemnitee against losses arising out of its own negligent acts unless such an intention is expressed in unequivocal terms. *Hubbert v Acme Equipment Co,* 313.

3. The language used in an indemnity clause in a leasing agreement is not sufficient to indemnify the indemnitee for claims arising out of its own acts of negligence, where the lessee-indemnitor agreed only to defend and hold the lessor harmless for claims arising out of lessee's use or handling of the equipment, *i.e.,* for lessee's acts of negligence, and the language used did not amount to a clear and unequivocal expression that the lessee would indemnify the lessor's negligent acts. *Hubbert v Acme Equipment Co,* 313.

See
TRIAL 5

INDEPENDENT BASIS—See
CRIMINAL LAW 39, 48

INDIANS—See
CRIMINAL LAW 121, 122
TREATIES 1, 2

INDIGENTS—See
ATTORNEY AND CLIENT 1
CRIMINAL LAW 11

INDORSED WITNESSES—See
WITNESSES 7

INDORSEMENT—See
CRIMINAL LAW 106, 107

INDUCEMENT TO PLEAD—See
ASSAULT AND BATTERY 2

INFERENCES—See
BURGLARY 1
DRUGS AND NARCOTICS 2, 3
HOMICIDE 1–3, 5
MOTIONS 1

INFORMATION—See
CRIMINAL LAW 95

INHERENT DANGERS—See
NEGLIGENCE 3

INJUNCTION—See
CONTEMPT 1, 2
COURTS 1

INJURIES—See
HIGHWAYS 6
WORKMEN'S COMPENSATION 4–6

INJURIES TO PERSONS OR PROPERTY—See
LIMITATION OF ACTIONS 4

INSANITY—See
CRIMINAL LAW 21, 37, 38, 52, 53

INSOLVENCY—See
FRAUDULENT CONVEYANCES 1
JUDGMENT 1

INSTALLATIONS—See
PRODUCTS LIABILITY 2

INSTALLMENTS—See
VENDOR AND PURCHASER 4

INSTRUCTIONS TO JURY—See
APPEAL AND ERROR 8, 11
CRIMINAL LAW 1, 2, 4, 9/10, 26, 27, 32, 34, 35, 62, 64, 65, 92, 93, 95, 96, 98, 100, 113, 123, 126, 128, 129
DAMAGES 2
ESCAPE 2
HOMICIDE 4, 7
NEGLIGENCE 3
ROBBERY 1–3
TRIAL 7

INSURANCE

1. The applicability of a clause in a policy of insurance on the liability of contractors and garagemen which excludes coverage of property in the "care, custody or control * * * [or] for any purpose exercising physical control" is a question of fact, not law; the clause is inherently ambiguous and thus is to be strictly construed against the insurer; the most valuable indicium of applicability is whether the property damaged was necessary to the insured's work or merely incidental, and physical control connotes some degree of responsibility. *NW Nat Ins v Pennington Bros,* 66.

2. A trial judge in a suit for construction of a policy of insurance between a plaintiff insurance company and an insured defendant who had contracted with another to clean and gas-free an oil tank, where the issue was whether or not the tank was under the care, custody, or control of the insured at the time of a fire in the tank, erred in failing to determine whether the tank was so affixed to the real estate as to have become part of it or whether the tank was movable. *NW Nat Ins v Pennington Bros,* 66.

INSURANCE—Cont'd

3. Property damged by an insured contractor which is merely incidental to the property upon which work is being performed by the insured under a policy of liability insurance is not considered as in such "care, custody or control" of the insured to be excluded under the exclusionary clause found in the liability policy; but where the damaged property is under the immediate supervision of the insured and is a necessary element of the work involved, it is considered as under the care, custody or control of the insured, and the insurer is not liable. *NW Nat Ins v Pennington Bros,* 66.

4. The exclusionary clause of property in the care, custody, or control of an insured which is commonly found in contractors' and garagemen's liability policies has only rarely been applied to realty, and courts have refused to extend the insured's work on a specific item of property to cover the care, custody or control of the building or surrounding area. *NW Nat Ins v Pennington Bros,* 67.

5. The terms of an insurance policy must be construed in accordance with the ordinary and popular sense of the language used, so as to avoid strained interpretations. *Cora v Patterson,* 298.

6. An insurance policy which defines a "non-owned automobile" as a "private passenger, station wagon, or jeep type vehicle" refers solely to four-wheeled vehicles. *Cora v Patterson,* 298.

7. The common meaning of "automobile" does not include "motorcycle"; thus an insurance policy providing liability coverage to a "non-owned automobile" did not provide coverage for a non-owned motorcycle operated by one who was not a named insured. *Cora v Patterson,* 298.

8. Appeal should not be allowed in a dispute between two insurance companies about coverage where both acknowledge liability to the plaintiff unless the plaintiff has been paid the damages determined by the tribunal below, subject to one insurer's recovery from the other, if successful on appeal. Werner v Travelers Ind Co, 391.

See

ACCORD AND SATISFACTION 2
AUTOMOBILES 3

INTENT—See

BRIBERY 1
BURGLARY 1
CONSTITUTIONAL LAW 11
CONTRACTS 2
CRIMINAL LAW 63, 126, 128
DRUGS AND NARCOTICS 1–3
ESCAPE 1, 2
FRAUDULENT CONVEYANCES 1
INDEMNITY 2, 3

INTENT—Cont'd
RAPE 1
ROBBERY 1

INTENTIONS—See
PROCESS 1

INTENT TO DEFRAUD—See
JUDGMENT 1

INTEREST

1. The accrual of interest on an obligation is suspended where a debtor is willing and ready to make payment but is prevented from doing so by the act or omission of his creditor. *Michaels v Mellish,* 374.

See
VENDOR AND PURCHASER 3, 4, 6

INTERFERENCE WITH ENJOYMENT OF PROPERTY—See
LIMITATION OF ACTIONS 3

INTERPRETATION OF CONTRACTS—See
BROKERS 4
INSURANCE 5

INTERPRETATION OF EVIDENCE—See
MOTIONS 1

INTERROGATION—See
CRIMINAL LAW 89

INTERSTATE COMMERCE—See
CONSTITUTIONAL LAW 5
LICENSES 1

INTERVENTION—See
APPEAL AND ERROR 9
PARTIES 1

INTOXICATING LIQUORS

1. An amendment to the dramshop act providing that no action against a retailer or wholesaler shall be commenced unless the alleged intoxicated person is named and retained as a defendant, containing a change in the monetary limits of recovery, and imposing a higher burden of proof, is to be given prospective effect; it applies only to the wrongful furnishing of intoxicants occurring after June 29, 1972, and does not apply to claims for damages against dramshop owners accruing prior to such date even though the dates of trials are subsequent thereto (MCLA 436.22). *Koehler v DRT Sportservice, Inc,* 567.

INTOXICATION—See
CRIMINAL LAW 21, 126, 128

INVALID CONVICTIONS—See
CRIMINAL LAW 11, 12

INVALIDITY—See
ZONING 5

INVESTIGATORY QUESTIONING—See
CRIMINAL LAW 90

INVOLUNTARY PLEA—See
CRIMINAL LAW 15

ISSUES—See
APPEAL AND ERROR 13, 16
JUDGMENT 1
TRIAL 3, 4
WORKMEN'S COMPENSATION 3

ISSUES LITIGATED—See
JUDGMENT 12, 13, 20

JOB CLASSIFICATIONS—See
CIVIL RIGHTS 2
MUNICIPAL CORPORATIONS 2

JUDGES

1. A challenge to the qualifications of a judge to preside at a trial because of claimed bias or prejudice must initially be raised prior to trial and will not be considered for the first time on appeal. *People v Thomas,* 369.

JUDGE'S ABSENCE—See
CRIMINAL LAW 79

JUDGE'S REMARKS—See
CRIMINAL LAW 3, 104, 112

JUDGMENT

1. Plaintiffs were entitled to a summary judgment as a matter of law on the questions of insolvency and intent to defraud on the part of the defendant where there was no genuine issue of any material fact regarding these questions (GCR 1963, 117.2[3]). *Hudson v Maher,* 90.

2. Summary judgment was erroneously granted a defendant gasoline service station owner where the plaintiff customer was bitten by the station operator's dog, the plaintiff contended in her complaint and at the hearing in opposition to the motion that the owner, a major oil company, was more than merely passively involved with the dealer's business, and the plaintiff could possibly be able to prove at a trial that the involvement

JUDGMENT—Cont'd

of the oil company was so substantial as to justify application of the doctrine of agency by estoppel. *Clark v Texaco, Inc,* 100.

3. Summary judgment was erroneously granted a defendant oil company where the plaintiff, a customer at a gasoline service station, could conceivably establish her contentions that the oil company, as a landlord, was so involved with the solicitation of business invitees to the leased premises that it became liable to those invitees who responded to its efforts. *Clark v Texaco, Inc,* 100.

4. A trial court properly refused to set aside a default judgment entered because of defense counsel's failure to appear for a scheduled pretrial conference, where defendant showed neither good cause to set aside the default nor filed an affidavit showing a meritorious defense (GCR 1963, 520.4). *Kiilunen v Moodie,* 128.

5. Good cause to set aside a default judgment includes (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. *Kiilunen v Moodie,* 128.

6. The allegations of the complaint and amendments must be taken at face value when determining whether or not an accelerated judgment was proper. *George v Petoskey,* 433.

7. The test to determine if a summary judgment should be granted a defendant is whether the plaintiff's claim, on the pleadings, is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery (GCR 1963, 117.2[1]). *Cooke v Highway Dept #2,* 479.

8. Summary judgment was properly granted to the defendant state highway department in an action by contractors for damages arising out of delay in the scheduled date for the start of construction of a bridge, where there was no fraud or misrepresentation by the state in regard to when the bridge construction would start, the state's bid proposal did not say positively when the bridge construction could begin but used qualifying language as to the starting date, called attention to a third-party contract for the work which had to be finished before the bridge construction could begin, and suggested that the bidder cooperate with the contractors on the third-party job, and all details were fully made known to plaintiffs before they voluntarily signed the contract. *Cooke v Highway Dept #2,* 480.

9. The procedure to be followed in considering a motion for accelerated judgment when a statute of limitations defense has been raised is governed by court rule and is dependent upon whether a disputed question of fact on that issue has been

JUDGMENT—Cont'd
presented and whether a jury trial has been demanded (GCR 1963, 116.3). *Flynn v McLouth Steel Corp,* 669.

10. A trial court could properly consider a defendant's motion for accelerated judgment which was brought after the filing of the first responsive pleading, although such a delay would ordinarily violate the court rule, where the defendant could not be expected to anticipate from the plaintiff's complaint that a statute of limitations defense would become apparent, and where the plaintiff did not object to the timeing of the motion but rather filed an answer and supporting affidavit and participated in the hearing on the motion (GCR 1963, 116.1). *Flynn v McLouth Steel Corp,* 669.

11. The common pleas court may enter a judgment to which the doctrines of collateral estoppel and res judicata apply in a second action. *Braxton v Litchalk,* 708.

12. The doctrine of res judicata applies to a default judgment and a default judgment has the effect of collateral estoppel in a subsequent action between the parties arising out of the same transaction or occurrence; the important factor is not whether the prior case has been formally tried as distinguished from judgment taken by default, but whether the question of fact was actually litigated and determined in the prior action. *Braxton v Litchalk,* 708.

13. Collateral estoppel bars the relitigation of issues previously decided in a first action when the parties to a second action are the same; where the second action is a different cause of action, the bar is conclusive only as to issues actually litigated in the first action. *Braxton v Litchalk,* 708.

14. A subsequent action involved the doctrine of collateral estoppel and whether it could be properly invoked by each of three named defendants as a bar to plaintiffs' claims where in the subsequent action plaintiffs alleged defendants were negligent and that their negligence was a proximate cause of plaintiffs' loss, and claimed compensation for property damage and personal injury, and these claims were not pled in the previous action, wherein it was claimed that one of the present plaintiffs was negligent and that this negligence caused the collision between two vehicles. *Braxton v Litchalk,* 709.

15. Collateral estoppel applies only if the litigants were parties or privy to a party to the previous action; substantial identity of the parties, rather than precise identity, is sufficient for application of the doctrine. *Braxton v Litchalk,* 709.

16. A defendant record title owner of a motor vehicle may assert collateral estoppel "defensively" in a subsequent action where its lessee of the motor vehicle has established its right to recover in a previous action. *Braxton v Litchalk,* 709.

17. A defendant in a subsequent action is not in privity with the parties to a previous action where he was not a party to the previous action and he has not acquired an interest in the

JUDGMENT—Cont'd
subject matter of that action through inheritance, succession, or purchase. *Braxton v Litchalk,* 709.

18. Collateral estoppel generally applies only when there is a mutuality of estoppel; a party cannot rely upon a previous judgment unless the other party could have pled it against him had the judgment gone the other way. *Braxton v Litchalk,* 709.

19. A well-recognized exception to the requirement of mutuality of estoppel in a subsequent action exists in cases involving a relationship such as a principal and agent, master and servant, or indemnitor and indemnitee. *Braxton v Litchalk,* 710.

20. A servant-agent-employee driver, defendant in a second action, who was not a party to a first action in which the principal-employer prevailed on the ground that the defendant in the first action, plaintiff in the second action, was negligent and that his negligence was a proximate cause of the accident, may apply the doctrine of collateral estoppel defensively because the plaintiff in the second action against whom collateral estoppel is asserted had an opportunity to litigate the issue in the first issue. *Braxton v Litchalk,* 710.

See
HIGHWAYS 1
LIBEL AND SLANDER 2
MOTIONS 3

JUDGMENT NOTWITHSTANDING THE VERDICT—See
APPEAL AND ERROR 7

JUDICIAL DISCRETION—See
ATTORNEY AND CLIENT 1, 2
CRIMINAL LAW 19, 110, 111
EVIDENCE 2
NEW TRIAL 1
WITNESSES 1, 2

JUDICIAL FINDINGS—See
APPEAL AND ERROR 3
CRIMINAL LAW 24

JUDICIAL FUNCTIONS—See
MOTIONS 2

JUDICIAL IMPARTIALITY—See
CRIMINAL LAW 78

JUDICIAL REVIEW—See
ADMINISTRATIVE LAW 1

JURISDICTION—See
CIVIL RIGHTS 1, 2
COURTS 2–4

JURISDICTION—Cont'd
EQUITY 1
LABOR RELATIONS 1, 2
PARTIES 1
SCHOOLS AND SCHOOL DISTRICTS 5, 6

JURORS—See
CRIMINAL LAW 77

JURY—See
CRIMINAL LAW 26, 31, 45, 81, 100, 103
DRUGS AND NARCOTICS 3
HOMICIDE 2, 4
VENDOR AND PURCHASER 1

JURY INSTRUCTIONS—See
APPEAL AND ERROR 8, 11
CRIMINAL LAW 1, 2, 4, 9, 10, 26, 27, 32, 34, 35, 62, 64, 65, 92, 93, 95, 96, 98, 100, 113, 123, 126, 128, 129
DAMAGES 2
ESCAPE 2
HOMICIDE 7
NEGLIGENCE 3
ROBBERY 1–3
TRIAL 7

JURY QUESTION—See
APPEAL AND ERROR 15
BURGLARY 3
CRIMINAL LAW 53

JURY TRIAL—See
CRIMINAL LAW 118
EQUITY 1
JUDGMENT 9

JUVENILE DEFENDANTS—See
CRIMINAL LAW 85

JUVENILE OFFICERS—See
CRIMINAL LAW 85

JUVENILE RECORD—See
CRIMINAL LAW 50

KIDNAPPING—See
RAPE 1

KNOWLEDGE—See
FRAUD 4
RECEIVING STOLEN GOODS 2, 3

KNOWLEDGE AND INTENT—See
ESCAPE 2

LABOR RELATIONS

1. Exclusive jurisdiction over all unfair labor practices under a statute regulating strikes by public employees has been given to the Michigan Employment Relations Commission (MCLA 423.216). *Det Bd of Ed v Det Fed Teachers,* 499.

2. A "strike" as defined in the statute regulating strikes by public employees is not necessarily an unfair labor practice, and thus a strike by public employees is not subject to the exclusive jurisdiction of the Michigan Employment Relations Commission; extending jurisdiction by implication is appropriate only when absolutely necessary (MCLA 423.201, 423.210). *Detroit Bd of Ed v Det Fed Teachers,* 499.

See
CONTEMPT 2

LACHES—See
EQUITY 5–7
LIMITATION OF ACTIONS 5

LAND CONTRACTS—See
BROKERS 6–8
VENDOR AND PURCHASER 1, 3–6

LAND DEVELOPMENT—See
TOWNS 1
ZONING 3, 5, 6

LANDLORD AND TENANT—See
JUDGMENT 3

LANDLORD'S LIABILITY—See
JUDGMENT 3

LAND USE—See
ZONING 2, 7–14

LARCENY—See
BURGLARY 1

LAY WITNESSES—See
CRIMINAL LAW 38

LEASED MOTOR VEHICLES—See
AUTOMOBILES 4

LEASED PREMISES—See
JUDGMENT 3

LEASES—See
BROKERS 1–3
INDEMNITY 3

LEAVE TO APPEAL—See
APPEAL AND ERROR 13

LEGISLATIVE BODIES—See
MUNICIPAL CORPORATIONS 1

LEGISLATIVE CLASSIFICATION—See
CONSTITUTIONAL LAW 12

LEGISLATIVE POWER—See
STATUTES 4

LEGITIMACY—See
BASTARDS 1, 3
DIVORCE 5

LENIENCY—See
CRIMINAL LAW 85, 86

LENIENCY IN SENTENCING—See
ASSAULT AND BATTERY 2
CRIMINAL LAW 14

LESSEES—See
AUTOMOBILES 4
JUDGMENT 16

LESSER INCLUDED OFFENSES—See
CRIMINAL LAW 1, 4, 9, 32, 62, 97, 98, 129
HOMICIDE 7

LIABILITY—See
AUTOMOBILES 1–3
INSURANCE 8
NEGLIGENCE 2
PRODUCTS LIABILITY 1, 2
WORKMEN'S COMPENSATION 1, 2

LIABILITY FOR DELAY—See
CONTRACTS 1
DAMAGES 2
JUDGMENT 8

LIABILITY FOR INJURIES—See
HIGHWAYS 2

LIABILITY INSURANCE—See
INSURANCE 1–4, 7

LIBEL AND SLANDER

1. The crucial element of slander of title is malice; whenever a man claims a right or title in himself, in possession or in remainder, it is not enough for the plaintiff to prove that he had no such right, he must also give evidence of express malice. *Gehrke v Janowitz,* 643.

2. Summary judgment for defendant on plaintiffs' damage claim against a builder for slander of title was properly granted where the claim rested on an invalid power of sale in a mortgage on plaintiffs' house, and where the mortgage had been foreclosed, because it was necessary to show real malice on the builder's part to establish a slander of title, and where reasonable men could well differ over whether or not the subject mortgage contained the power of sale within the contemplation of the mortgage statutes, there was no real malice established (MCLA 600.3201, 600.3208). *Gehrke v Janowitz,* 643.

3. The fact that a mortgagee knew that notice had to be given a mortgagor that a foreclosure was under way in order for the foreclosure to be valid serves as no basis for finding express malice, the crucial element the mortgagor needs to prove in a slander of title case, where the mortgage foreclosed contained language that notice need not be given (MCLA 600.3201, 600.3208). *Gehrke v Janowitz,* 643.

LICENSE PLATES—See
SEARCHES AND SEIZURES 9

LICENSES

1. A foreign corporation conducting a loan-by-mail business with residents of Michigan is not required to obtain a license in the manner provided by the statutes regulating small loan businesses where the corporation is involved solely in interstate commerce, where the corporation is in compliance with the regulatory loan law of another state, and where licensing would result in a complete compulsory domestication of the corporation (MCLA 493.1 *et seq.). Attorney General v Fairfax,* 305.

2. The phrase "except that loans made by mail to Michigan residents shall be subject to the provisions of this act", in an act regulating small loan businesses, does not require the general licensing of out-of-state small loan companies. *Attorney General v Fairfax,* 305.

LICENSING—See
CRIMINAL LAW 121

LICENSING REQUIREMENTS—See
CRIMINAL LAW 83

LIMITATION OF ACTIONS

1. A construction contractor's claim against the State Highway Commission did not accrue and further action could not be commenced until after the final denial of an appeal to the Central Office Adjusting Board because only at that time could the plaintiff calculate the extent of damages with certainty. *Cooke v Highway Dept #1 (Rehearing),* 336.

2. Recovery is not barred by the statute of limitations where there are continuing wrongful acts within the period limited by statute. *George v Petoskey,* 433.

3. In an action to recover damages based upon a defendant city's improper interference with plaintiffs' enjoyment of their property and defendant's intentional discrimination and harassment of plaintiffs, the statute of limitations began to run when the defendant city dropped the legal proceedings it had brought against plaintiffs and their tenants where it was alleged that the suit constituted another act of harassment and an attempt to deprive plaintiffs of their rightful enjoyment of their property. *George v Petoskey,* 433.

4. An action is governed by the general six-year statute of limitations where plaintiffs are seeking damages to their financial expectations and economic benefit which they had a right to expect from the ownership of their property, and not for injuries to persons or property or upon an express or implied contract (MCLA 600.5805[7], 600.5807[8], 600.5813). *George v Petoskey,* 433.

5. A beneficiary of an estate in which a fraud had been perpetrated on the probate court by the co-executors in the matter of the sale of stock is not barred by the statute of limitations or the doctrine of laches where he has brought an action against one of the co-executors for damages for selling the stock for less than could have been obtained less than two years after he discovered the alleged fraud and concealments (MCLA 700.5855). *Sinclair v Mfrs Nat Bk of Det,* 530.

6. The question of the governing date of accrual of a cause of action for statute of limitations purposes was a disputed question of fact where a claimant alleged in his complaint that his injury occurred on a specific date, and in a later deposition gave another date, which brought into play a statute of limitations defense. *Flynn v McLouth Steel Corp,* 669.

7. *The deposition testimony of a plaintiff which clearly, unequivocally, and persuasively relates the date of his injury to the death of another employee, which is a known date, leads to the conclusion that the date of the injury is not a disputed fact and that the statute of limitations applies. Flynn v McLouth Steel Corp,* 670.

LIMITATION OF ACTIONS—Cont'd
See
JUDGMENT 9, 10
NOTICE 2
WORKMEN'S COMPENSATION 4

LIMITED REVIEW—See
ARBITRATION AND AWARD 1

LIMITING INSTRUCTIONS—See
CRIMINAL LAW 123

LIMITS OF RECOVERY—See
INTOXICATING LIQUORS 1
STATUTES 3

LINEUPS—See
CRIMINAL LAW 67, 101, 102

LISTING AGREEMENTS—See
BROKERS 4–8
PRINCIPAL AND AGENT 1

LITIGANTS—See
JUDGMENT 15

LITIGATION—See
JUDGMENT 13

LOANS BY MAIL—See
CONSTITUTIONAL LAW 5
LICENSES 1

LOCAL COURT RULES—See
SEARCHES AND SEIZURES 6

LOSS OF AN EYE—See
WORKMEN'S COMPENSATION 10

LOSS OF PROFITS—See
DAMAGES 3, 4

LOSS OF VISION—See
WORKMEN'S COMPENSATION 9, 10

LOW INCOME HOUSING—See
TAXATION 6

MAIL ORDERS—See
CONSTITUTIONAL LAW 5
LICENSES 1, 2

MAINTENANCE OF HIGHWAYS—See
HIGHWAYS 1, 2, 4

MALICE—See
LIBEL AND SLANDER 1–3

MALICIOUS ABUSE—See
PROCESS 1

MALPRACTICE—See
NEGLIGENCE 1

MANIFEST INJUSTICE—See
APPEAL AND ERROR 11, 12

MARIJUANA—See
CONSTITUTIONAL LAW 11
DRUGS AND NARCOTICS 1–3

MARITAL ASSETS—See
DIVORCE 3, 4

MARKETABILITY—See
ZONING 8

MARRIED WOMEN—See
BASTARDS 2, 3

MASTER AND SERVANT—See
JUDGMENT 19

MEDIANS—See
HIGHWAYS 4, 5

MEMORY—See
CRIMINAL LAW 39

MERITORIOUS DEFENSES—See
JUDGMENT 4

MINORS—See
CRIMINAL LAW 78, 98

MISCARRIAGE OF JUSTICE—See
CRIMINAL LAW 69, 73, 96, 100, 127

MISREPRESENTATIONS—See
FRAUD 2
JUDGMENT 8
PRINCIPAL AND AGENT 1

MISSTATEMENT—See
ROBBERY 2

MISTRIAL—See
CRIMINAL LAW 52

MOBILE HOME PARKS—See
ZONING 2, 6

MODIFICATION—See
TRIAL 4

MOOT QUESTION—See
CONSTITUTIONAL LAW 7

MORAL FITNESS—See
DIVORCE 2

MORTGAGES

1. A provision in a mortgage that on foreclosure the mortgagee may without notice to any persons take possession and sell the property is directly contrary to the statute requiring publication and posting by way of notice to the mortgagor that the foreclosure is under way and is invalid (MCLA 600.2301, 600.2308). *Gehrke v Janowitz,* 643.

See
LIBEL AND SLANDER 2, 3

MOTION FOR COMMITMENT—See
CRIMINAL LAW 17, 19

MOTIONS

1. A trial court, in ruling upon a motion to dismiss, is not required to give the plaintiff the advantage of every inference and the most favorable interpretation of the evidence (GCR 1963, 504.2; DCR 504.2). *Murphy Real Estate v Barron,* 211.

2. A motion at the close of a plaintiff's proof for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief is available only in cases tried without a jury; the judge, in passing on the motion, may exercise his function as trier of facts, weighing the evidence, passing upon the credibility of witnesses, and selecting between conflicting inferences, and if his resulting findings of fact leave the plaintiff unqualified for relief, the action is to be dismissed (GCR 1963, 504.2; DCR 504.2). *Murphy Real Estate v Barron,* 211.

3. A motion for summary judgment on the ground that the opposing party has failed to state a claim is to be tested by the pleadings (GCR 1963, 117.2[1]). *Cooke v Highway Dept #2,* 479.

See
APPEAL AND ERROR 7

MOTIONS—Cont'd
COURTS 4
PARTIES 1
PLEADING 1

MOTION TO DISMISS—See
MOTIONS 1, 2

MOTIVE—See
CRIMINAL LAW 63

MOTORCYCLES—See
INSURANCE 7

MOTORISTS—See
HIGHWAYS 6

MOTOR VEHICLES—See
AUTOMOBILES 1–4
CRIMINAL LAW 82–84.
INSURANCE 6, 7
JUDGMENT 14, 16
SEARCHES AND SEIZURES 7, 9
WORKMEN'S COMPENSATION 2

MUNICIPAL CORPORATIONS

1. The legislative body of a home rule city is permitted to make policy that is not inconsistent with state statutes or is not constitutionally infirm. *Ypsilanti v Civil Rights Comm,* 103.

2. A municipality has the right to establish bona fide occupational qualifications for various job classifications (MCLA 423.303a). *Ypsilanti v Civil Rights Comm,* 103.

3. A Detroit fireman who leaves his employment after 40 years of age and after eight years of service is eligible to receive delayed retirement benefits on the date he would have been entitled to receive full retirement benefits had he continued in city service as a fireman; if he was a member of the system before January 1, 1969, this date will be when he would have had 25 years of service, or age 60, whichever occurs first; if he became a member on or after January 1, 1969, this date will be when he would have had 25 years of service and is age 55, or when he is age 60, whichever occurs first (Detroit Charter, Title 9, ch 7, Art 6, Pt A, § 4). *Fire Fighters Assn v Detroit,* 276.

4. The failure of a defendant city to record officially changes made in the plans for a proposed civic center during study sessions held prior to or after the regular council meetings does not bar a plaintiff planner from recovery of payment for its professional services; the city cannot escape the consequences of its acts. *Smith, H & G Assoc v Riverview,* 703.

MUNICIPAL CORP—Cont'd
See
CIVIL RIGHTS 2, 3, 5
NEGLIGENCE 1
PRINCIPAL AND AGENT 2, 3
TORTS 1
ZONING 3, 15–17

MURDER—See
HOMICIDE 4–8

MUTUALITY OF ESTOPPEL—See
JUDGMENT 18, 19

NAME AND RETAIN PROVISION—See
INTOXICATING LIQUORS 1

NAMED INSURED—See
INSURANCE 7

NARCOTICS—See
CRIMINAL LAW 64
DRUGS AND NARCOTICS 1–3

NATIONAL HOUSING ACT—See
TAXATION 3, 6

NATURAL VISION—See
WORKMEN'S COMPENSATION 10

NEGLIGENCE

1. There is no authority for the proposition that malpractice is synonymous with nuisance; therefore, an action in the nature of malpractice against a municipally-owned hospital may not be aligned with nuisance and thus deprive the hospital of the defense of immunity. *Snow v Freeman,* 84.

2. Public policy demands that a general contractor be charged with the responsibility of insuring that adequate safety measures be implemented on a construction site, and the liability of the owner of the property to an injured employee of a subcontractor is based on the same standard to the extent that the property owner retains control of the work. *Yoakum v Practical Home Builders,* 384.

3. An instruction to the jury which based liability of a general contractor and a property owner upon the negligent failure to take reasonable precautions against a danger which resulted in injury to an employee of a subcontractor was not reversibly erroneous, even though the language of the instructions was couched in terms of an activity which is inherently dangerous, where the ultimate question presented to the jury required them to determine whether the defendants had failed to imple-

NEGLIGENCE—Cont'd
ment reasonable safety measures, as required by the most recent case law. *Yoakum v Practical Home Builders,* 384.

See
HIGHWAYS 6
INDEMNITY 2, 3
JUDGMENT 14
TORTS 1

NEW ACTS—See
LIMITATION OF ACTIONS 3

NEW TRIAL
1. The grant or denial of a new trial lies within the discretion of the trial judge. *Doyle Vacuum Co v Siller & Co,* 602.

See
CRIMINAL LAW 99

NOLO CONTENDERE—See
CRIMINAL LAW 41, 42, 108, 109
HOMICIDE 8

NONAPPEARANCE OF COUNSEL—See
JUDGMENT 4
TRIAL 2

NONCOMPLIANCE—See
ADMINISTRATIVE LAW 2
NOTICE 2

NON-JURY TRIAL—See
APPEAL AND ERROR 3
MOTIONS 2
TRIAL 1

NON-OWNED AUTOMOBILES—See
INSURANCE 6, 7

NONPRODUCTION OF REGISTRATION CERTIFICATE—See
CRIMINAL LAW 82, 83
SEARCHES AND SEIZURES 9

NONPROFIT CORPORATION—See
TAXATION 3, 6

NOTICE
1. The purpose of the statute requiring that notice of a claim against the state must be filed in the Court of Claims within one year after such claim has accrued is to apprise the governmental agency that an action is contemplated so that it may take appropriate measures to gather evidence before the requi-

NOTICE—Cont'd
site information is lost (MCLA 600.6431[1]). *In re Fair Estate,* 35.

2. Statutes requiring notice of claim are not aimed at forestalling litigation altogether, but mainly seek to provide a governmental authority with early warning so that it can assemble information in support of a defense on the merits while the evidentiary trial is still hot; therefore, it frequently would be excessive to treat noncompliance with a notice requirement as being as irremediable as a failure to commence an action within the time period established in a statute of limitation. *In re Fair Estate,* 35.

3. Only substantial compliance with the notice provisions of a statute is required under case law. *In re Fair Estate,* 35.

4. Statutory notice provisions for claims in the Court of Claims which include a requirement of verification of the claim or nature of claim were substantially complied with where an unverified complaint was signed by the plaintiff's attorney, and where the defendant failed to demonstrate in what manner it was prejudiced by the unverified complaint, because verification is a certification of truth and an attorney who signs a complaint certifies that to the best of his knowledge, information, and belief there is good ground to support it; such certification is the equivalent of a verification (MCLA 600.6431[1]; GCR 1963, 114.2). *In re Fair Estate,* 35.

See
LIBEL AND SLANDER 3
MORTGAGES 1
TRIAL 2

NOTICE OF CLAIM—See
NOTICE 1, 2

NOTICE OF HOSPITALIZATION—See
WORKMEN'S COMPENSATION 6

NOTICE OF INJURY—See
WORKMEN'S COMPENSATION 5, 6

NOTICE OF VIOLATION—See
CRIMINAL LAW 23

NUISANCE—See
NEGLIGENCE 1

OBJECTIONS—See
APPEAL AND ERROR 8
CRIMINAL LAW 16, 51, 65, 96, 99
WITNESSES 9

OBSERVATIONS—See
CRIMINAL LAW 38

OCCUPATION—See
PROPERTY 1

OCCUPATIONAL QUALIFICATIONS—See
CIVIL RIGHTS 2
MUNICIPAL CORPORATIONS 2

OCCUPIED DWELLINGS—See
BURGLARY 1

OFFENSES—See
CRIMINAL LAW 97

OFFER TO LEASE—See
BROKERS 2

OFFICERS

1. A statute which does not comply with the constitutional formula for ascertaining the necessary number of signatures on a recall petition is unconstitutional because the Legislature cannot adopt a statutory standard which conflicts with a constitutional standard (Const 1963, art II, § 8; MCLA 168.956). *Anchor Bay Citizens v Bd of Ed,* 428.

OFFICE STRUCTURES—See
ZONING 8

OFFICIAL RECORDS—See
MUNICIPAL CORPORATIONS 4

OIL COMPANIES—See
JUDGMENT 2, 3

OIL TANKS—See
INSURANCE 2

OPINION—See
ZONING 10

ORDER OF PROOF—See
CRIMINAL LAW 30

ORDINANCES—See
CRIMINAL LAW 118
ZONING 3-11, 13, 14

OUT-OF-STATE COMPANIES—See
LICENSES 3

OWNERSHIP OF PROPERTY—See
LIMITATION OF ACTIONS 4

OWNERS' LIABILITY—See
AUTOMOBILES 1, 2

OWNERS OF PROPERTY—See
NEGLIGENCE 2, 3

OWNERS OF VEHICLES—See
AUTOMOBILES 4
JUDGMENT 16

PARENT AND CHILD—See
DIVORCE 2

PARTIES

1. A party's motion for intervention is required by court rule to be accompanied by a pleading setting forth a claim or defense; absent a complaint setting forth the intervening plaintiff's claim, the claim is never before the trial court so as to rest jurisdiction in the court to render a judgment upon the claim (GCR 1963, 209). *Kolar v Hudson,* 114.

See
APPEAL AND ERROR 9
JUDGMENT 13–15, 17

PART-TIME EMPLOYEES—See
WORKMEN'S COMPENSATION 8

PASSENGERS—See
AUTOMOBILES 3

PATERNITY—See
BASTARDS 1–3

PAYMENT—See
INTEREST 1
VENDOR AND PURCHASER 6

PAYMENT FOR PROFESSIONAL SERVICES—See
MUNICIPAL CORPORATIONS 4

PAYMENT PENDING APPEAL—See
INSURANCE 8

PECUNIARY PROFITS—See
TORTS 1

PENDING CHARGES—See
CRIMINAL LAW 88, 116

PERJURY—See
EQUITY 2

PERPETRATORS OF CRIME—See
HOMICIDE 5

PERSONAL JURISDICTION—See
COURTS 2–4

PERSONAL KNOWLEDGE—See
SEARCHES AND SEIZURES 3

PETITIONS—See
OFFICERS 1
SCHOOLS AND SCHOOL DISTRICTS 1, 2

PHOTOGRAPHIC IDENTIFICATION—See
CRIMINAL LAW 7, 18, 39, 40, 48, 49

PHOTOGRAPHS—See
CRIMINAL LAW 67–72, 101, 102

PHYSICAL CONTROL—See
INSURANCE 1

PLAIN VIEW—See
SEARCHES AND SEIZURES 1

PLANNING COMMISSION—See
ZONING 15–17

PLANNING SERVICES—See
MUNICIPAL CORPORATIONS 4
PRINCIPAL AND AGENT 2, 3

PLEA AGREEMENTS—See
CRIMINAL LAW 74–76
WITNESSES 1

PLEADING

1. A request for permission to file an amended answer raising a newly discovered defense is to be preferred over filing a motion for accelerated judgment without amending the answer, where discovery of the new defense comes too late for the defendant to comply with the court rule requirement that a motion for accelerated judgment be filed not later than the first responsive pleading (GCR 1963, 116). *Flynn v McLouth Steel Corp,* 669.

See
JUDGMENT 7
MOTIONS 3
PARTIES 1

PLEA OF GUILTY—See
ASSAULT AND BATTERY 1, 2
CRIMINAL LAW 14, 15, 41, 54, 62, 74–76, 85–87, 114, 117, 124, 125

PLEA OF NOLO CONTENDERE—See
CRIMINAL LAW 41, 42, 108, 109
HOMICIDE 8

PLEA OF NOT GUILTY—See
CRIMINAL LAW 54

POLICE—See
CONSTITUTIONAL LAW 1

POLICE FORCE—See
CIVIL RIGHTS 2

POLICE OFFICERS—See
ARREST 1
CRIMINAL LAW 38, 39, 55, 64, 84
SEARCHES AND SEIZURES 1–3, 7–9

POLICE POWER—See
CRIMINAL LAW 115

POLICE PRACTICES—See
SEARCHES AND SEIZURES 4, 5

POLICE QUESTIONING—See
CRIMINAL LAW 90

POSITIVE FRAUD—See
EQUITY 3

POSSESSION—See
ARREST 1
CONSTITUTIONAL LAW 11
DRUGS AND NARCOTICS 1–3
PROPERTY 1
RECEIVING STOLEN GOODS 2
SEARCHES AND SEIZURES 2

POWER OF SALE—See
EXECUTORS AND ADMINISTRATORS 1
LIBEL AND SLANDER 2
MORTGAGES 1

POWERS—See
MUNICIPAL CORPORATIONS 1, 2

PRECAUTIONS—See
NEGLIGENCE 1, 2

PRECEDENT—See
CRIMINAL LAW 7, 114

PREJUDICE—See
APPEAL AND ERROR 8
CRIMINAL LAW 1, 3, 5, 46, 47, 63, 65, 77, 79, 99, 104, 105, 123, 127
EQUITY 5
JUDGES 1
NOTICE 4
TRIAL 6, 7

PREJUDICIAL ERROR—See
CRIMINAL LAW 119, 120

PRELIMINARY EXAMINATION—See
CRIMINAL LAW 41, 54
HOMICIDE 8
RECEIVING STOLEN GOODS 1, 3

PREMEDITATED MURDER—See
HOMICIDE 4

PREMEDITATION—See
HOMICIDE 1–3

PRESENCE OF COUNSEL—See
CRIMINAL LAW 13

PRESENCE OF DEFENDANT—See
CRIMINAL LAW 80

PRESENCE OF JUDGE—See
CRIMINAL LAW 79

PRESENTENCE REPORT—See
CRIMINAL LAW 88, 116

PRESERVING QUESTION—See
APPEAL AND ERROR 5–8, 11, 12
CRIMINAL LAW 2, 4, 11, 16, 50, 55, 62, 65, 79, 86, 88, 96, 99
JUDGES 1
ROBBERY 1
WORKMEN'S COMPENSATION 3

PRESUMPTIONS—See
BASTARDS 3
CONSTITUTIONAL LAW 11
CRIMINAL LAW 91
DIVORCE 5
DRUGS AND NARCOTICS 1–3
STATUTES 2

PRESUMPTIONS—Cont'd
ZONING 4, 7

PRETRIAL CONFERENCE—See
JUDGMENT 4
TRIAL 2–5

PRETRIAL DETAINEES—See
CONSTITUTIONAL LAW 7, 8, 10
ELECTIONS 2

PRETRIAL HEARING—See
CRIMINAL LAW 26, 27

PRETRIAL SUMMARY—See
TRIAL 4

PREVENTION OF PAYMENT—See
INTEREST 1

PRIMA FACIE EVIDENCE—See
CONSTITUTIONAL LAW 11

PRIMA FACIE PROOF—See
CRIMINAL LAW 12

PRIMARY INSURANCE—See
AUTOMOBILES 3

PRINCIPAL AND AGENT

1. In a dispute as to agency, a question of fact is present for the jury if there is any testimony tending to establish agency; therefore, where alleged misrepresentations were made by a realtor, the jury could properly find that the vendors were liable where the vendors had entered into a listing agreement with the realtor, the vendors had engaged the realtor to find a buyer, and the record showed that the realtor was acting on behalf of the vendors both prior to and at the time of purchase, even though the realtor had made a management agreement with the vendees after the vendees acquired possession of the property. *Head v Benj Rich Realty Co,* 348.

2. A city building authority was properly found to be an agent of the city where the city directly contracted for a planner's services, made change orders and approvals, and then transferred control of a project to the authority, reserving rights of approval of future planning, and subsequently withdrew from the arrangement, effectively terminating the agency. *Smith, H & G Assoc v Riverview,* 703.

3. An agent has the implied power to carry out all acts necessary in execution of the principal's expressly conferred authority; thus the settlement of accounts for professional planning services is within the scope of authority of a building authority

PRINCIPAL AND AGENT—Cont'd
where a city has broadly granted it the authority for all future planning of a civic center project. *Smith, H & G Assoc v Riverview,* 703.

4. Whether an act of an agent is within the authority granted depends upon the act's usual or necessary connection to accomplishing the purpose of the agency, and payment for professional services rendered is usually, if not necessarily, so connected. *Smith, H & G Assoc v Riverview,* 703.

See
JUDGMENT 2, 19

PRIOR ARRESTS—See
APPEAL AND ERROR 12
WITNESSES 6

PRIOR CONVICTIONS—See
APPEAL AND ERROR 12
CRIMINAL LAW 8, 11, 12, 50, 78
WITNESSES 6, 9

PRIOR INCONSISTENT TESTIMONY—See
CRIMINAL LAW 123

PRIOR OFFENSES—See
CRIMINAL LAW 61, 63, 64
WITNESSES 1, 2, 4

PRISONERS—See
CONSTITUTIONAL LAW 8

PRISON ESCAPE—See
CRIMINAL LAW 20
ESCAPE 1, 2

PRIVILEGE—See
CRIMINAL LAW 61, 113
WITNESSES 3, 4

PRIVITY—See
JUDGMENT 17

PROBABLE CAUSE—See
ARREST 1
CRIMINAL LAW 82–84
SEARCHES AND SEIZURES 8, 9, 11

PROBATE—See
FRAUD 1

PROBATE COURT—See
EXECUTORS AND ADMINISTRATORS 1, 2

PROBATE ORDERS—See
EQUITY 3, 4

PROBATION—See
CRIMINAL LAW 22, 23, 110, 111

PROBATIONARY TEACHERS—See
SCHOOLS AND SCHOOL DISTRICTS 3

PROBATIVE VALUE—See
CRIMINAL LAW 63

PROCEDURE—See
ADMINISTRATIVE LAW 2

PROCESS

1. A regular use of process with bad intentions is not a malicious abuse of that process. *Gehrke v Janowitz,* 644.

PROCURING SALES—See
BROKERS 8

PRODUCTS LIABILITY

1. Implied warranties, apart from those imposed by statute, may apply to the sale of services as well as to the sale of goods. *INA v Radiant Electric Co,* 410.

2. There was an implied warranty of fitness and merchantability with respect to the manner in which a contractor installed electrical cable in a building where the cable was to be used for handling electricity, a dangerous force. *INA v Radiant Electric Co,* 410.

PROFESSIONAL SERVICES—See
MUNICIPAL CORPORATIONS 4
PRINCIPAL AND AGENT 4

PROFITS—See
DAMAGES 3, 4

PROMISES OF LENIENCY—See
ASSAULT AND BATTERY 2
CRIMINAL LAW 85, 86

PROOF—See
CONTEMPT 1
CRIMINAL LAW 12, 30, 37
FRAUD 3
INTOXICATING LIQUORS 1
STATUTES 3
TAXATION 2
ZONING 13, 14

PROOF OF LOST PROFITS—See
DAMAGES 3

PROPER ARREST—See
SEARCHES AND SEIZURES 1

PROPERTY

1. Possession or control of real property is indicated by an occupation exclusive of the control of anyone else. *NW Nat Ins v Pennington Bros,* 67.

2. Care, custody or control of property implies more than the mere right of access to it. *NW Nat Ins v Pennington Bros,* 67.

See
BROKERS 4
CONSTITUTIONAL LAW 3

PROPERTY AWARD—See
DIVORCE 3, 4

PROPERTY DAMAGE—See
DAMAGES 2
INSURANCE 3

PROPERTY OWNERS—See
EQUITY 7
NEGLIGENCE 2, 3

PROPERTY RIGHTS—See
LIMITATION OF ACTIONS 3, 4

PROPERTY TAX—See
TAXATION 3-6

PROPRIETARY FUNCTIONS—See
TORTS 1

PRO-RATA CLAUSES—See
AUTOMOBILES 3

PROSECUTORS—See
WITNESSES 5

PROSECUTOR'S ARGUMENT—See
CRIMINAL LAW 65

PROSECUTOR'S DUTY—See
WITNESSES 7

PROSECUTOR'S QUESTIONS—See
WITNESSES 9

PROSECUTOR'S REMARKS—See
CRIMINAL LAW 99, 100

PROSPECTIVE APPLICATION—See
INTOXICATING LIQUORS 1
STATUTES 3

PROTECTION—See
CRIMINAL LAW 64

PROTEST—See
EQUITY 7
TAXATION 1, 2

PROVINCE OF JURY—See
CRIMINAL LAW 26

PROXIMATE CAUSE—See
HIGHWAYS 6

PSYCHIATRIC EXAMINATIONS—See
CRIMINAL LAW 17, 19, 21

PSYCHIATRISTS—See
CRIMINAL LAW 52

PUBLICATION—See
MORTGAGES 1

PUBLIC EMPLOYEES—See
CONTEMPT 2
COURTS 1
LABOR RELATIONS 1, 2

PUBLIC POLICY—See
NEGLIGENCE 2

PUBLIC WELFARE—See
TORTS 1

PUBLIC WORK PROJECTS—See
DAMAGES 1

PURCHASERS—See
BROKERS 4

PURPOSE OF ACT—See
NOTICE 1

PURPOSE OF AGENCY—See
PRINCIPAL AND AGENT 4

QUALIFIED RIGHTS—See
CRIMINAL LAW 58

QUESTION OF FACT—See
APPEAL AND ERROR 15
BURGLARY 3
CRIMINAL LAW 45, 53
HIGHWAYS 1
HOMICIDE 2
INSURANCE 1
JUDGMENT 1, 9, 12
LIMITATION OF ACTIONS 6, 7
PRINCIPAL AND AGENT 1
WORKMEN'S COMPENSATION 5

QUESTIONS REVIEWABLE—See
APPEAL AND ERROR 5
WORKMEN'S COMPENSATION 3

RAPE

1. The prosecution of a defendant for assault with intent to rape after his acquittal on the charge of kidnapping violated the double jeopardy provisions of the state and federal constitutions where both crimes were part of a single criminal transaction, were committed in a continuous time sequence, and displayed a single intent and goal (US Const, Am V; Const 1963, art 1, § 15). *People v Joines (On Remand),* 334.

REAL PROPERTY—See
BROKERS 1–8
EQUITY 1
FRAUD 3
INSURANCE 2, 4
MORTGAGES 1
PROPERTY 1
VENDOR AND PURCHASER 1, 3–6
ZONING 2, 15, 17

REALTORS—See
PRINCIPAL AND AGENT 1

REASONABLE DOUBT—See
CRIMINAL LAW 30, 70, 71

REASONABLE INFERENCES—See
HOMICIDE 2, 3

REASONABLE SEARCHES—See
SEARCHES AND SEIZURES 8

REASONABLE USE OF PROPERTY—See
ZONING 11–14

REASONABLE ZONING—See
ZONING 10

REASONS FOR ADJOURNMENT—See
CRIMINAL LAW 127

REBUTTAL—See
CRIMINAL LAW 105–107
EVIDENCE 1, 2

RECALL PETITIONS—See
OFFICERS 1
SCHOOLS AND SCHOOL DISTRICTS 1, 2

RECEIVING STOLEN GOODS

1. Testimony at a preliminary examination by two persons that they had observed the loading of a trailer and inventoried the goods and subsequently examined the trailer at the defendant's warehouse and identified the goods therein as those that they had observed being loaded was sufficient evidence of the identity of the goods, which had been stolen, to justify binding the defendants over for trial on charges of conspiring to receive and conceal stolen property and receiving and concealing stolen property. *People v McLott,* 198.

2. Possession and use of stolen merchandise, near in time to its misappropriation, is some evidence that those in possession acquired it with knowledge that it was stolen. *People v McLott,* 198.

3. Evidence presented at a preliminary examination was sufficient to warrant a magistrate in finding that two defendants had acquired property knowing it to be stolen and in binding the defendants over for trial where they were found with the property shortly after it had been stolen, where one defendant had stated to the police that he did not have any paperwork pertaining to the goods and later at the police station ripped up a tally sheet which had been prepared by the shipper of the goods, and where the other defendant had made a patently false statement to the police that he had ordered the goods several days before. *People v McLott,* 198.

4. There is no statutory authorization for the imposition of consecutive sentences for conspiring to receive and conceal stolen goods and the concealing and receiving of stolen goods. *People v McLott,* 200.

RECOVERY—See
INTOXICATING LIQUORS 1
STATUTES 3

REDUCTION OF CHARGES—See
CRIMINAL LAW 14, 15

RE-ELECTION—See
SCHOOLS AND SCHOOL DISTRICTS 1

REFUND AGREEMENTS—See
TOWNS 1

REGISTRATION CERTIFICATES—See
CRIMINAL LAW 82, 83
SEARCHES AND SEIZURES 9

REGULATIONS—See
TREATIES 3

REGULATORY LOAN LAWS—See
LICENSES 1

REINSTATEMENT—See
SCHOOLS AND SCHOOL DISTRICTS 6

REINSTRUCTION—See
CRIMINAL LAW 1

RELEASES—See
ACCORD AND SATISFACTION 1, 2

RELIEF—See
EQUITY 1
MOTIONS 2

REMARKS OF COUNSEL—See
CRIMINAL LAW 51, 99, 100

REMEDIES—See
ADMINISTRATIVE LAW 1
APPEAL AND ERROR 1, 4
CIVIL RIGHTS 3
CONSTITUTIONAL LAW 2
EQUITY 4
LIMITATION OF ACTIONS 1
SCHOOLS AND SCHOOL DISTRICTS 6
TAXATION 1

REMOVAL OF JUROR—See
CRIMINAL LAW 103

REMOVAL OF PROPERTY—See
SEARCHES AND SEIZURES 2

REPAIR OF HIGHWAYS—See
HIGHWAYS 4

REPEATING OFFENDERS—See
CRIMINAL LAW 115

REPUDIATION—See
VENDOR AND PURCHASER 3, 4, 6

REQUESTED INSTRUCTIONS—See
CRIMINAL LAW 113

REQUEST TO CHARGE—See
CRIMINAL LAW 2, 9, 32, 35
ROBBERY 1

RESCISSION—See
EQUITY 1
VENDOR AND PURCHASER 1

RESENTENCING—See
CRIMINAL LAW 13

RES GESTAE WITNESSES—See
CRIMINAL LAW 3

RESIDENCES—See
ZONING 14

RESIDENTIAL DEVELOPMENTS—See
ZONING 2

RESIDENTIAL USE—See
ZONING 5, 6

RES JUDICATA—See
APPEAL AND ERROR 7
EQUITY 4
EXECUTORS AND ADMINISTRATORS 2
JUDGMENT 11, 12

RESTITUTION—See
CRIMINAL LAW 110, 111

RESTRICTIONS—See
ZONING 12, 13

RETIREMENT BENEFITS—See
MUNICIPAL CORPORATIONS 3

RETRIAL—See
CRIMINAL LAW 61

RETROACTIVE APPLICATION—See
CRIMINAL LAW 102
STATUTES 2

RETROACTIVITY—See
CRIMINAL LAW 7, 18, 40, 49, 62, 114
WITNESSES 6

REVENUES—See
TOWNS 1

REVIEW—See
ADMINISTRATIVE LAW 1
APPEAL AND ERROR 2, 5, 10
ARBITRATION AND AWARD 1
CRIMINAL LAW 50
EQUITY 2
TAXATION 2
TRIAL 1
WORKMEN'S COMPENSATION 3
ZONING 1

RIGHT AGAINST SELF-INCRIMINATION—See
CRIMINAL LAW 21

RIGHT OF ACCESS—See
PROPERTY 2

RIGHT OF CONFRONTATION—See
CRIMINAL LAW 124, 125

RIGHT TO BENEFITS—See
WORKMEN'S COMPENSATION 12

RIGHT TO COUNSEL—See
ATTORNEY AND CLIENT 1, 2
CRIMINAL LAW 11–13, 39, 48, 57, 67–72, 101, 124
TRIAL 2
WITNESSES 5

RIGHT TO CROSS-EXAMINE—See
CRIMINAL LAW 61

RIGHT TO JURY TRIAL—See
CRIMINAL LAW 118

RIGHT TO PRODUCE WITNESSES—See
CRIMINAL LAW 23

RIGHT TO REMAIN SILENT—See
CRIMINAL LAW 89, 90, 119, 120
DRUGS AND NARCOTICS 2

RIGHT TO REPRESENT SELF—See
CRIMINAL LAW 57–59

RIGHT TO VOTE—See
CONSTITUTIONAL LAW 7–10
ELECTIONS 1, 2

ROADWAYS—See
HIGHWAYS 2, 3

ROBBERY

1. Failure to use the term "specific intent to permanently deprive the owner of his property" when charging the jury in a prosecution for unarmed robbery is not assignable as error where no request was made to instruct on intent and no objection was recorded; and there was no reversible error where the instructions did not mislead the jury and were adequate and consistent with substantial justice (MCLA 769.26; GCR 1963, 516.2). *People v Fry,* 19.

2. An unintentional slip of the tongue by the trial judge in an unarmed robbery case in referring at one point in his instructions to the jury to armed robbery did not result in manifest injustice where it was made clear many times during the proceedings that the only charge involved was unarmed robbery and the defendant was found guilty of the crime charged (MCLA 750.530). *People v Tooks,* 537.

3. The use of an illustration to explain one of the elements of the crime of unarmed robbery was proper and did not impermissibly suggest that the case involved armed robbery where there was uncontroverted testimony to support the illustration given and the judge was merely fulfilling his obligation to fashion instructions which meet the factual demands of the particular case by language which is comprehensible by the jury and directly relevant to facts in evidence (MCLA 750.530). *People v Tooks,* 538.

RULINGS—See
APPEAL AND ERROR 14

SAFE HIGHWAYS—See
HIGHWAYS 2–4

SAFETY MEASURES—See
NEGLIGENCE 2, 3

SALE OF REAL PROPERTY—See
MORTGAGES 1

SALE OF SERVICES—See
PRODUCTS LIABILITY 1, 2

SALE OF STOCK—See
EXECUTORS AND ADMINISTRATORS 1, 2
LIMITATION OF ACTIONS 5

SALES—See
BROKERS 8

SALES AGREEMENTS—See
BROKERS 6, 7

SAME TRANSACTION—See
JUDGMENT 12
RAPE 1

SANITY—See
CRIMINAL LAW 21, 37, 38, 52, 53

SATISFACTION—See
ACCORD AND SATISFACTION 1, 2

SCHOOLS AND SCHOOL DISTRICTS

1. Recall petitions which were circulated and filed prior to a board of education member's re-election to a succeeding term of office are void by virtue of the re-election. *Anchor Bay Citizens v Bd of Ed,* 428.

2. A statute providing for recall of elected officials which requires signatures on petitions in a fractional school district equal in number to 25 per cent of the number of qualified electors assessed for school taxes does not comply with the constitutional formula which requires 25 per cent of the number of persons voting in the last preceding election for the office of governor in the district involved (Const 1963, art II, § 8; MCLA 168.956). *Anchor Bay Citizens v Bd of Ed,* 428.

3. A school board properly terminated the services of probationary teachers where it complied with the statute when notifying the teachers of the termination, and the number of teachers whose services were terminated was not arbitrary and capricious where the record indicates that it was based upon extensive study of projected needs (MCLA 38.83). *E Detroit Teachers v Bd of Ed,* 451.

4. Failure of a discharged school teacher to perfect a timely appeal to the State Tenure Commission is excusable where the school board failed to afford the teacher the procedural safeguards of the teachers' tenure act and the teacher was thereby likely to be unaware of her right to appeal. *Shippey v Madison Dist Schools,* 663.

5. Appeal to the circuit court of a decision by the State Tenure

SCHOOLS—Cont'd

Commission was not timely where over seven months elapsed between the commission's decision and the filing of the appeal, the circuit court was without jurisdiction to determine a terminated teacher's rights under the teachers' tenure act (MCLA 24.108[2], 600.631; GCR 1963, 705). *Shippey v Madison Dist Schools,* 663.

6. The teachers' tenure act does not deprive the circuit court of jurisdiction to decide common-law breach of contract disputes, nor does it limit aggrieved teachers to any particular remedy; teachers are not required to resort to appeal to the State Tenure Commission and a request for reinstatement. *Shippey v Madison Dist Schools,* 663.

See

OFFICERS 1

SCOPE OF APPEAL—See

CRIMINAL LAW 22

SCOPE OF AUTHORITY—See

PRINCIPAL AND AGENT 3, 4

SCOPE OF REBUTTAL—See

EVIDENCE 1

SCOPE OF REVIEW—See

ARBITRATION AND AWARD 1
CRIMINAL LAW 50
EQUITY 2
ZONING 16

SCREWDRIVER MARKS—See

BURGLARY 2

SEARCH AFTER ARREST—See

SEARCHES AND SEIZURES 11

SEARCHES AND SEIZURES

1. A seizure was proper where the evidence was in the plain view of the police at the time they made a proper arrest and the evidence, consisting of a trailer which was backed up to a warehouse and boxes of auto parts both in the trailer and in the warehouse, was seized immediately upon the arrest of two defendants who were in the process of unloading the trailer. *People v McLott,* 199.

2. A seizure of evidence occurred when the police unequivocally took possession and control of a warehouse and trailer containing stolen boxes of goods; the mere fact that, for practical reasons, the property was not physically removed until some later time is constitutionally irrelevant (US Const, Am IV). *People v McLott,* 199.

SEARCHES AND SEIZURES—Cont'd

3. A search warrant was valid though the affidavit was not based on the police officer-affiant's personal knowledge, where the affidavit was supported by the knowledge of a fellow police officer. *People v Kochan,* 327.

4. The purpose of the rule which requires the suppression of evidence which was improperly seized is to protect the public from impermissible police practices. *People v Mordell,* 462.

5. The rule which requires the suppression of evidence which was improperly seized is a guarantee against unreasonable searches and seizures where the court has reason to believe the search involves unreasonable police methods, but it is not invoked to suppress evidence, even though error is found in the issuing of a warrant, where the facts indicate that the arresting officers acted reasonably on the evidence before them and the court finds no threat to Fourth Amendment values (US Const, Am IV). *People v Mordell,* 462.

6. A warrant issued by a judge other than an examining magistrate in violation of a local court rule which requires that a warrant be issued by an examining magistrate unless he is unavailable, is not thereby rendered so improper as to be grounds for suppressing the evidence seized pursuant to the warrant and dismissing the case, where the police officer's affidavit, the preparation of the warrant, and the reasonableness or propriety of the search are not challenged; the public should not be penalized for the breach of an in-house court rule. *People v Mordell,* 462.

7. Police do not have the right to make a general search of an automobile as an incident to an arrest for a traffic offense. *People v 7th District Judge,* 471.

8. The legality of a search conducted without a warrant depends upon the law's appraisal of its reasonableness and probable cause is the test; it is not suspicion but rather stems from some fact, circumstance, or information which would create an honest belief in the mind of a reasonably prudent man; and, in determining probable cause, the Court of Appeals is limited to the facts, circumstances, and information known to the officer at the time of the arrest and seizure. *People v 7th District Judge,* 471.

9. A police officer who lawfully stopped an automobile and ticketed the driver for speeding made an illegal search and seizure when he removed a pistol from the glove box after arresting the driver for possession of a stolen automobile, where the only facts that made the police officer suspicious were that there was a beat-up, bent, out-of-state, rear license plate on a new-looking car, the driver was not able to produce a registration for the vehicle, and the driver consented to a search of the car except for the glove box; license plates go with the owner, not the car, the driver stated that he borrowed the car from his brother and the officer could have easily checked out the story with a phone call, and the driver's exercise of his constitutional

SEARCHES AND SEIZURES—Cont'd
right in refusing to let the officer search the glove box was proper and cannot be the basis for the violation of that same constitutional right (US Const, Am IV). *People v 7th District Judge,* 472.

10. A search of a defendant's premises, made without a warrant, is proper where the defendant voluntarily has consented to the search; the people are not required to show that a defendant knew or was told that he did not have to consent to a search. *People v Gallagher,* 613.

11. A limited search made without a warrant after a defendant had been placed under arrest, which consisted mainly of photographing and examining evidence already seen, was proper where an initial search of the defendant's premises, voluntarily consented to by the defendant, uncovered evidence which provided probable cause to arrest him and to seize that evidence. *People v Gallagher,* 613.

SECONDARY INSURANCE—See
AUTOMOBILES 3

SECOND-DEGREE MURDER—See
HOMICIDE 8

SECOND INJURY FUND—See
WORKMEN'S COMPENSATION 11

SECOND LOOK—See
HOMICIDE 3

SECOND OFFENDERS—See
CRIMINAL LAW 117

SEIZURES—See
SEARCHES AND SEIZURES 1, 2

SELF-INCRIMINATION—See
CONSTITUTIONAL LAW 11
CRIMINAL LAW 10, 21, 61, 113
DRUGS AND NARCOTICS 1
WITNESSES 2, 4

SENTENCE CONCESSIONS—See
CRIMINAL LAW 14, 15

SENTENCES—See
CRIMINAL LAW 11–13, 20

SENTENCING—See
ASSAULT AND BATTERY 2
CRIMINAL LAW 14, 88, 116, 118
RECEIVING STOLEN GOODS 4

SEQUENCE OF DELIBERATION—See
CRIMINAL LAW 4

SEQUESTRATION OF WITNESSES—See
CRIMINAL LAW 105

SERVICES—See
PRODUCTS LIABILITY 1, 2

SERVICE STATIONS—See
JUDGMENT 2, 3

SETTING ASIDE JUDGMENT—See
JUDGMENT 4, 5

SETTLEMENT OF ACCOUNTS—See
PRINCIPAL AND AGENT 3

SEWER SYSTEMS—See
TOWNS 1

SEX DISCRIMINATION—See
CIVIL RIGHTS 2

SILENCE—See
CRIMINAL LAW 89, 90
DRUGS AND NARCOTICS 2

SILICOSIS—See
WORKMEN'S COMPENSATION 4

SINGLE-FAMILY RESIDENCES—See
ZONING 14

SLANDER OF TITLE—See
LIBEL AND SLANDER 1–3

SMALL LOAN BUSINESSES—See
LICENSES 1, 2

SOCIAL WELFARE—See
CONSTITUTIONAL LAW 12

SODOMY—See
CRIMINAL LAW 43

SOLICITATION OF BRIBES—See
CRIMINAL LAW 64

SOLICITATION OF BUSINESS—See
JUDGMENT 3

SOURCE OF PROPERTY—See
DIVORCE 4

SPECIAL ASSESSMENTS—See
EQUITY 7

SPECIAL PROVISIONS—See
HIGHWAYS 7

SPECIFIC INTENT—See
ROBBERY 1

SPECULATED DAMAGES—See
DAMAGES 4

SPEEDY TRIAL—See
CRIMINAL LAW 46, 47

STANDARD INSTRUCTIONS—See
CRIMINAL LAW 10

STANDARD OF PROOF—See
CONTEMPT 1

STANDARD SPECIFICATIONS—See
HIGHWAYS 7

STANDING TO CHALLENGE—See
CRIMINAL LAW 43

STATE CONTRACTS—See
CONTRACTS 1

STATE HIGHWAY COMMISSION—See
ADMINISTRATIVE LAW 2
JUDGMENT 8
LIMITATION OF ACTIONS 1

STATE LAW—See
TREATIES 3

STATEMENT OF LAW—See
CRIMINAL LAW 104

STATEMENT OF POSITION—See
APPEAL AND ERROR 16

STATES—See
TREATIES 3

STATE TENURE COMMISSION—See
SCHOOLS AND SCHOOL DISTRICTS 4–6

STATUTE OF LIMITATIONS—See
JUDGMENT 9, 10
LIMITATION OF ACTIONS 2–7
NOTICE 2

STATUTES

1. The conflict between a statute and constitutional provisions must be clear and inevitable before the courts will strike down a statute as unconstitutional. *People v Serra,* 515.

2. A substantive statute is presumed not to be retroactive, and it will not be applied retroactively unless the language of the statute absolutely requires such application. *Koehler v DRT Sportservice, Inc,* 567.

3. A statutory amendment is to be given prospective effect where it contains both a change in the monetary limits of recovery and imposes a higher burden of proof. *Koehler v DRT Sportservice, Inc,* 567.

4. The blood banking and transfusion act does not involve an unconstitutional delegation of legislative power because there is no delegation of power in the statute (Const 1963, art 3, § 2, art 4, § 1; MCLA 691.1511). *McKinstrie v Henry Ford Hospital,* 659.

5. The blood banking and transfusion act is constitutional (MCLA 691.1511). *McKinstrie v Henry Ford Hospital,* 659.

See
APPEAL AND ERROR 6
ATTORNEY AND CLIENT 1
AUTOMOBILES 1, 2, 4
BURGLARY 1
CONSTITUTIONAL LAW 6, 11, 13
COURTS 1
CRIMINAL LAW 43, 57, 59, 63, 69, 94, 95, 98, 103, 110, 111, 115, 118, 121, 122
EQUITY 7
ESCAPE 1
HIGHWAYS 1–5
LABOR RELATIONS 1, 2
LIBEL AND SLANDER 3
LICENSES 1, 2
MORTGAGES 1
MUNICIPAL CORPORATIONS 1
NOTICE 1–4
OFFICERS 1
SCHOOLS AND SCHOOL DISTRICTS 2, 3
TAXATION 3
VENUE 1
WITNESSES 1

STATUTES—Cont'd
WORKMEN'S COMPENSATION 2, 4–6, 10, 11

STIPULATION—See
CRIMINAL LAW 13

STATUTORY PRESUMPTIONS—See
DRUGS AND NARCOTICS 1–3

STATUTORY RIGHTS—See
WORKMEN'S COMPENSATION 12

STOCKHOLDERS—See
EXECUTORS AND ADMINISTRATORS 1, 2

STOLEN GOODS—See
ARREST 1
BURGLARY 1
RECEIVING STOLEN GOODS 1–4
SEARCHES AND SEIZURES 2

STOLEN VEHICLES—See
CRIMINAL LAW 82–84

STRICT CONSTRUCTION—See
AUTOMOBILES 2
INDEMNITY 1
INSURANCE 1

STRIKES—See
CONTEMPT 2
COURTS 1
LABOR RELATIONS 1, 2

SUA SPONTE INSTRUCTIONS—See
CRIMINAL LAW 129

SUBCONTRACTORS—See
NEGLIGENCE 2, 3

SUBDIVISIONS—See
TOWNS 1

SUBSEQUENT ACTIONS—See
JUDGMENT 13, 14, 18–20

SUBSTANCE OF INSTRUCTIONS—See
CRIMINAL LAW 35

SUBSTANTIAL COMPLIANCE—See
NOTICE 3, 4

SUBSTANTIATION OF PLEA—See
CRIMINAL LAW 42

SUBSTANTIVE STATUTES—See
STATUTES 2

SUBSTITUTION OF COUNSEL—See
ATTORNEY AND CLIENT 2

SUFFICIENCY OF EVIDENCE—See
CONTEMPT 2
CRIMINAL LAW 17, 56

SUMMARY JUDGMENT—See
HIGHWAYS 1
JUDGMENT 1–3, 7, 8
LIBEL AND SLANDER 2
MOTIONS 3

SUPERINTENDING CONTROL—See
APPEAL AND ERROR 1, 2, 4
CIVIL RIGHTS 4
TAXATION 1
ZONING 15

SUPPLEMENTAL INFORMATION—See
CRIMINAL LAW 114, 115, 117

SUPPRESSION OF EVIDENCE—See
BURGLARY 2
SEARCHES AND SEIZURES 4–6

SUPREME COURT RULINGS—See
CRIMINAL LAW 18

SURGERY—See
WORKMEN'S COMPENSATION 9

SUSPICIONS—See
CRIMINAL LAW 84

TAXATION

1. A trial court improvidently assumed superintending control in a tax assessment matter over proceedings conducted by the Lansing Board of Review where the plaintiffs had available two plain, speedy, and adequate remedies to satisfy their grievances in respect to their tax assessments, either to appeal their assessments to the Michigan State Tax Commission, or to pay their taxes under protest and then file suit in circuit court within 30 days (MCLA 211.53, 211.152). *Schwan v City of Lansing,* 191.

TAXATION—Cont'd

2. Taxpayers who have paid their taxes and protested the decision of the Board of Review are entitled to review of their tax assessments by the courts; correction of assessments is the only proper relief provided by statute and the burden of proof is on the taxpayers. *Schwan v City of Lansing,* 191.

3. A nonprofit corporation which owns and operates a home for the aged will not receive an exemption from property taxation unless the housing facility or project is qualified, built or financed under § 202 of the National Housing Act of 1959, as amended, and unless the home may properly be categorized as a charitable or benevolent institution (MCLA 211.7d, 211.9; 12 USC 1701q). *Mich Baptist Homes v Ann Arbor,* 725.

4. A home for the housing and care of the aged, where the applicants for residence must be at least 65 years old and physically able to maintain themselves in a room without the aid of nursing personnel, and where each resident must pay two charges, a life-lease fee and a monthly service charge, and the ability to pay both charges is a factor which is considered in determining whether an applicant will be admitted, does not qualify as a housing facility or project built or financed under the housing act, and is not a charitable or benevolent institution where it appears to be more of a cooperative housing facility for elderly people in good financial condition and physical health than a charitable institution (MCLA 211.7d, 211.9; 12 USC 1701q). *Mich Baptist Homes v Ann Arbor,* 725.

5. There was no denial of equal protection to a plaintiff home for the aged because it was not granted exemption from taxation while the property of another home for elderly women was granted an exemption, where the differences between the two homes were of sufficient magnitude so as to preclude any argument that they were of the same class; the equal protection claim is meritorious only when something in the nature of a benefit is simultaneously granted and denied to different members of the same class. *Mich Baptist Homes v Ann Arbor,* 725.

6. The Legislature by limiting the exemption provided by a section of the General Property Tax Act to nonprofit corporations which have obtained financing under a section of the National Housing Act of 1959, as amended, has not denied anyone the equal protection of the laws and due process of law; it intended that the tax exempt status be extended to the lowest income type of housing and has merely created a special category of low income housing for the elderly which is to be granted tax exempt status (MCLA 211.7d; 12 USC 1701q). *Mich Baptist Homes v Ann Arbor,* 726.

See

EQUITY 7

TEACHERS—See

SCHOOLS AND SCHOOL DISTRICTS 3

TEACHERS' TENURE ACT—See
SCHOOLS AND SCHOOL DISTRICTS 4–6

TEACHERS UNIONS—See
CONTEMPT 2

TELEPHONE CONVERSATIONS—See
CONSTITUTIONAL LAW 1

TENDER—See
VENDOR AND PURCHASER 4, 5

TENURE—See
SCHOOLS AND SCHOOL DISTRICTS 4, 6

TERMINATION OF CONTRACTS—See
BROKERS 7

TERMINATION OF SERVICES—See
SCHOOLS AND SCHOOL DISTRICTS 3

TESTATORS—See
FRAUD 1

TESTIMONY—See
CRIMINAL LAW 36, 38

TESTIMONY OF DEFENDANT—See
CRIMINAL LAW 53

THEFT—See
CRIMINAL LAW 82–84
SEARCHES AND SEIZURES 9

THEORY OF CASE—See
CRIMINAL LAW 2

THIRD-PARTY ACTS—See
DAMAGES 2

THIRD-PARTY CONTRACTS—See
CONTRACTS 1
DAMAGES 1
JUDGMENT 8

THIRD-PARTY LIABILITY—See
WORKMEN'S COMPENSATION 1

THIRD-PARTY TORTFEASOR—See
WORKMEN'S COMPENSATION 2

TIME LAPSE—See
BROKERS 6–8
EQUITY 5

TIME LIMITATIONS—See
BROKERS 4

TIMELINESS—See
APPEAL AND ERROR 7

TIMELINESS OF CLAIM—See
EXECUTORS AND ADMINISTRATORS 3

TIMELINESS OF MOTIONS—See
CRIMINAL LAW 17, 19

TIMELINESS OF NOTICE—See
WORKMEN'S COMPENSATION 5, 6

TIME SEQUENCE—See
RAPE 1

TIME SERVED—See
CRIMINAL LAW 20

TITLE—See
LIBEL AND SLANDER 1, 3

TORTFEASORS—See
CONSTITUTIONAL LAW 2
WORKMEN'S COMPENSATION 1, 2

TORTS

1. A governmental agency is immune from tort liability where the operation of the agency constitutes a governmental as opposed to a proprietary function; the operation of a municipally-owned hospital was a governmental function where the activity of the hospital was for the common good and not for corporate benefit or pecuniary profit (MCLA 691.1407, 691.1413). *Snow v Freeman,* 85.

2. A tort claimant is a creditor from the date of the tort. *Hudson v Maher,* 90.

See
ACCORD AND SATISFACTION 2
AUTOMOBILES 2

TOTAL EXCLUSION—See
ZONING 6

TOWNS

1. A township must refund sums advanced to it by a builder to

TOWNS—Cont'd
enable the township to construct extensions of the township water and sewer system to the builder's subdivision developments under agreements whereby such refunds were to be made after completion of the work where those extensions were at all times in the possession and control of the township and the township collected and retained all revenues from the operation of the facilities thus acquired; the township had the authority to construct the system and it must follow that it has the authority to pay for the project. *Houlihan Bros v Carrollton Township,* 80.

TOWNSHIPS—See
ZONING 6

TRAFFIC OFFENSES—See
SEARCHES AND SEIZURES 7

TRAILER PARKS—See
ZONING 6

TRANSFER OF ASSETS—See
EQUITY 1
FRAUDULENT CONVEYANCES 1

TREATIES

1. The language used in treaties with the Indians should never be construed to their prejudice; how the words of a treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction. *People v LeBlanc,* 684.

2. The Treaty of 1836 gave the Chippewa Indians unlimited fishing rights in all the waters adjoining those lands which were ceded by the treaty, and such rights were not relinquished by the Treaty of 1855 (7 Stat 491 [1836], 11 Stat 621 [1856]). *People v LeBlanc,* 684.

3. State law cannot qualify or condition fishing rights under a Federal treaty; however, the state can, consistent with the mandates of the Constitution, regulate the time and manner in which such rights are exercised provided the regulations are nondiscriminatory and necessary for the conservation of fish. *People v LeBlanc,* 684.

See
CRIMINAL LAW 121, 122

TRIAL

1. Findings of fact based upon credibility assessment and conflicting evidence in an action tried upon the facts without a jury will not be overturned where review of the record does not indicate they are clearly erroneous (GCR 1963, 517.1). *Hudson v Maher,* 90.

TRIAL—Cont'd

2. The pretrial conference notice requirements of the general court rules apply only to the circuit court for Wayne County; therefore, a failure to receive official notice did not excuse the nonappearance of counsel at a pretrial conference in the Circuit Court for Livingston County, where counsel knew of the conference because he was present when the conference was scheduled (GCR 1963, 301.10). *Kiilunen v Moodie,* 128.

3. A pretrial conference is conducted to simplify and narrow the issues of the case for expeditious trial and to avoid traps and surprises. *Barrow v Saly,* 156.

4. The modification of a pretrial summary rests with the sound discretion of the trial judge, but a party may generally rely on a pretrial summary to frame the triable issues. *Barrow v Saly,* 156.

5. A trial court abused its discretion creating injustice by dismissing a defendant's cross-claim against another defendant for indemnification because it was filed after the pretrial conference where almost seven months elapsed between the filing of the cross-claim and the actual start of the trial; the parties were entitled, in view of the lengthy passage of time between the filing of the cross-claim and the trial, to know what their respective positions were at trial; that knowledge may well have altered preparation or trial tactics, and it was the duty of the judge to place the parties in their correct stance for trial. *Barrow v Saly,* 156.

6. Comments made by the trial judge, asserted to have been prejudicial, do not warrant reversal and a new trial where a review of the record as a whole leads to a finding that the appellant had a fair trial. *Doyle Vacuum Co v Siller & Co,* 601.

7. Failure of a trial court to remind the jury not to discuss a case with others or among themselves does not require reversal absent a showing of prejudice. *People v Scott,* 726.

See

CRIMINAL LAW 16, 51, 79, 80, 104
MOTIONS 2

TRIAL BY JURY—See
CRIMINAL LAW 118

TRIAL RECORD—See
CRIMINAL LAW 127

TRIAL TACTICS—See
TRIAL 5

TRIER OF FACT—See
CRIMINAL LAW 36
MOTIONS 2
WITNESSES 5

UNANIMOUS AGREEMENT—See
CRIMINAL LAW 4

UNARMED ROBBERY—See
ROBBERY 1–3

UNFAIR LABOR PRACTICES—See
LABOR RELATIONS 1, 2

UNINSURED MOTORISTS—See
AUTOMOBILES 3

UNMARRIED WOMEN—See
BASTARDS 1–3

UNPROFESSIONAL CONDUCT—See
ATTORNEY AND CLIENT 2

UNREASONABLE SEARCHES—See
SEARCHES AND SEIZURES 5

UNREASONABLE ZONING—See
ZONING 10

USABLE VALUE—See
ZONING 12

UTTERING AND PUBLISHING—See
CRIMINAL LAW 104

VACATING AWARDS—See
ARBITRATION AND AWARDS 2

VALID CONVICTIONS—See
CRIMINAL LAW 12

VALIDITY—See
EQUITY 7
SCHOOLS AND SCHOOL DISTRICTS 1
SEARCHES AND SEIZURES 3

VEHICLES—See
INSURANCE 6
JUDGMENT 14

VENDOR AND PURCHASER

1. Rescission is an equitable action that should not be tried before a jury; however, an action to recover money paid on a land contract was properly tried before a jury where, prior to trial, rescission was a *fait accompli. Head v Benj Rich Realty Co,* 348.

2. A vendee may elect to rescind a transaction because of the vendor's fraud, and he will be entitled to recover the purchase

VENDOR AND PURCHASER—Cont'd
price with interest and such additional damages suffered by reason of losses and expenses incurred which were the natural and reasonable consequences of the fraud. *Head v Benj Rich Realty Co,* 349.

3. A seller's repudiation of a contract for the sale of land stops the running of interest under the contract as of the date the repudiation was communicated to the purchaser, and the seller is not entitled to interest from that date until the date on which the existence and validity of the contract were acknowledged by the seller. *Michaels v Mellish,* 374.

4. The "whole amount due" on an installment land contract, necessary to be tendered to stop the running of interest when the tender was refused, was the amount due at the termination of the period at which an individual and separate installment was due, not the entire balance, where before the installment became due the vendor wrongfully repudiated the contract, and where before the repudiation the purchaser had paid installments properly. *Michaels v Mellish,* 374.

5. A formal tender under a land contract is not necessary where a party has shown by act or deed that it would not be accepted if it were made. *Michaels v Mellish,* 374.

6. Interest need not be paid for the time a repudiation of a land contract was in effect where the land contract purchaser was willing and ready to make payment of an obligation and was prevented from doing so by the wrongful act of the seller who repudiated the contract. *Michaels v Mellish,* 374.

See
FRAUD 3
PRINCIPAL AND AGENT 1

VENUE

1. A circuit judge may grant either party in a criminal proceeding a change of venue upon good cause shown or may deny the motion in his discretion; to set aside such a decision, there must be a clear showing of abuse on the part of the court (MCLA 762.7). *People v Kochan,* 326.

VERDICTS—See
APPEAL AND ERROR 15
CRIMINAL LAW 31, 44, 81, 92, 93

VERIFICATION—See
NOTICE 4

VESTED RIGHTS—See
CONSTITUTIONAL LAW 3, 4

VIOLATION—See
SEARCHES AND SEIZURES 6

VIOLATION OF INJUNCTION—See
CONTEMPT 1

VIOLATION OF ORDINANCES—See
CRIMINAL LAW 118

VIOLATION OF PROBATION—See
CRIMINAL LAW 22, 23

VISION LOSS—See
WORKMEN'S COMPENSATION 10

VOLUNTARINESS—See
CRIMINAL LAW 24–27

VOLUNTARY ACTS—See
ESCAPE 1

VOLUNTARY PLEA—See
CRIMINAL LAW 15, 109

VOLUNTARY STATEMENTS—See
CRIMINAL LAW 90

VOTE FRANCHISE—See
CONSTITUTIONAL LAW 7–10
ELECTIONS 1, 2

WAIVER—See
APPEAL AND ERROR 7, 9
COURTS 2, 3
CRIMINAL LAW 48

WAIVER OF RIGHTS—See
CRIMINAL LAW 90

WAIVER USE—See
APPEAL AND ERROR 14
ZONING 15, 17

WARRANTS—See
SEARCHES AND SEIZURES 3, 5, 6, 8

WARRANTY—See
PRODUCTS LIABILITY 1, 2

WATER AND SEWER SYSTEMS—See
TOWNS 1

WEIGHT OF EVIDENCE—See
APPEAL AND ERROR 15
CRIMINAL LAW 38

WILLS—See
EXECUTORS AND ADMINISTRATORS 1
FRAUD 1

WITHDRAWAL OF PLEA—See
CRIMINAL LAW 85, 86

WITHOUT WARRANT—See
SEARCHES AND SEIZURES 8–11

WITNESSES

1. A trial court properly limited a defendant's cross-examination of a prosecution witness where the witness had confessed to the commission of the crime with the defendant, and upon cross-examination the defense attorney interrogated him about prior arraignments and arrests, about a plea agreement which had been made in an unrelated offense, and other matters which the judge deemed inadmissible; the trial judge was performing his duty to control the receipt of evidence at trial (MCLA 768.29). *People v Madden,* 363.

2. The permissible scope of cross-examination is in the sound discretion of the trial judge and is not to be disturbed unless a clear abuse of that discretion is shown, and there was no such clear abuse shown where a defendant was not foreclosed from showing bias or interest on the part of a prosecution witness, but was merely precluded from going into the details of confessions the witness had made to other crimes. *People v Madden,* 363.

3. An accomplice, on cross-examination, may not invoke the privilege against self-incrimination about his involvement in the crime where on direct examination he has given testimony incriminating the defendant in a common criminal enterprise. *People v Thomas,* 368.

4. An accomplice was properly allowed to assert the privilege against self-incrimination when questioned on cross-examination about her involvement in other criminal activity not related to the defendant's prosecution where no information concerning these other alleged criminal activities had been previously elicited on direct examination. *People v Thomas,* 368.

5. A prosecutor may properly explore the possibility of bias when cross-examining defense witnesses and such cross-examination does not impugn their reputations as truthtellers; the trier of fact may properly consider the interest or lack of interest on the part of a witness in evaluating the testimony of that witness. *People v Tooks,* 538.

6. A Supreme Court decision which makes impeachment of any witness by use of arrests not resulting in convictions *per se* reversible error, even where there is a failure to object, is not

WITNESSES—Cont'd
given retroactive effect absent a clear showing by the Supreme Court that retroactivity is intended. *People v Tooks,* 538.

7. The prosecution is not required to call accomplices, even though indorsed upon the information (MCLA 767.40). *People v Potts,* 622.

8. *A prosecutor has the right to cross-examine a defendant in those areas covered on direct examination, even though the testimony may not otherwise have been admissible. People v Terry Moore,* 678.

9. Allowing a prosecutor to ask a character witness whether she had considered the fact that defendant had previously been convicted of an attempted breaking and entering was not reversible error where no objection was made, where the defendant had previously admitted the conviction on cross-examination without objection to the question, and where the defendant testified on re-direct examination that he had been convicted of the offense some 16 years before. *People v Paul Mathis,* 694.

See
BURGLARY 2, 3
CRIMINAL LAW 3, 18, 36–38, 52, 60–62, 105–107, 120, 123

WORDS AND PHRASES—See
CONTRACTS 2
INSURANCE 5–7

WORKMEN'S COMPENSATION

1. The phrase "natural person in the same employ" as used in the third-party tortfeasor section of the Workmen's Compensation Act has been construed to require that the employee be in the course of his employment at the time of the injury in order for the statutory bar to operate (MCLA 418.827). *Wilson v Al-Huribi,* 95.

2. An action brought by a plaintiff who was injured in an automobile accident in a collision with a car driven by a coemployee against the defendant owner of that other vehicle is not barred by the third-party tortfeasor section of the Workmen's Compensation Act unless the defendant owner was acting in the course of his employment (MCLA 418.827). *Wilson v Al-Huribi,* 95.

3. An issue not raised before the Workmen's Compensation Appeal Board generally will not be considered on appeal, but where an issue was raised by the appeal board itself and discussed fully in several of the members' opinions, the issue will be allowed on appeal, especially where the question is solely one of law, and all the facts necessary for its resolution have been found by the appeal board; the rule preventing a party from raising an issue on appeal which was not raised below is not absolute. *Huey v Campbell Foundry Co,* 227.

4. The $10,500 limitation set forth in a former statute providing

WORKMEN'S COMP—Cont'd

for workmen's compensation benefits for temporary or permanent total disability or death from silicosis or other dust disease applies only to those cases in which the "date of injury" was prior to May 2, 1966, and the phrase "date of injury" means the "last day of work in the employment in which the employee was last subjected to the conditions resulting in disability or death" (MCLA 417.4). *Huey v Campbell Foundry Co,* 227.

5. The determination whether notice of an injury was given to the employer by the injured employee within three months after the happening thereof as required by the Workmen's Compensation Act is a question of fact for the appeal board; where the board impliedly found that the notice provision had been complied with, the Court of Appeals must affirm such a finding if it is supported by any evidence (MCLA 412.15). *Jones v Douglas & Lomason,* 323.

6. An injured employee gave timely notice of his injury to his employer as required by the Workmen's Compensation Act where the employee's uncontradicted testimony indicates that he informed the company foreman of a back injury minutes after its occurrence, because notice to the foreman is notice to the employer and sufficient to meet the demands of the statute, and where the company received word within the statutory time limit that the injured employee had been treated and hospitalized for a back injury and that a hemilaminectomy had been performed (MCLA 412.15). *Jones v Douglas & Lomason,* 323.

7. Absent fraud, the Court of Appeals may not disturb findings of fact made by the Workmen's Compensation Appeal Board (Const 1963, art 6, § 28; MCLA 418.861). *Kunde v Teesdale Lumber (Amended),* 546.

8. The Workmen's Compensation Appeal Board could properly find that an injured employee was not a part-time employee where he was employed on a work-available basis with no agreement to limit the hours he was expected to work, and a determination of the average weekly wage based upon such a finding is proper. *Kunde v Teesdale Lumber (Amended),* 546.

9. Surgical removal of the natural lens of an injured eye is not a prerequisite to a finding of loss of vision of the eye where there is permanent corneal scarring closely equivalent in effect to the removal of the lens (MCLA 418.361). *Kunde v Teesdale Lumber (Amended),* 546.

10. A finding of the specific loss of an eye is based upon the measurement of the vision loss under natural conditions, rather than after correction; the statutory requirement of 80% loss of vision for a finding of specific loss is satisfied where a plaintiff lost 85% of the vision of an eye even though the loss was correctable to 35% through use of a contact lens (MCLA 418.361). *Kunde v Teesdale Lumber (Amended),* 546.

11. A statutory amendment which effected a change in benefits

WORKMEN'S COMP—Cont'd
payable to injured employees from the Second Injury Fund is not violative of the constitutional guarantee of equal protection of the laws even though it results in disparate treatment of those injured prior to the effective date of the amendment as opposed to those injured after that date (1968 PA 227). *Kunde v Teesdale Lumber (Amended),* 547.

12. Rights to benefits under the Workmen's Compensation Act are purely statutory, and the Legislature has the prerogative to redefine the extent of those benefits. *Kunde v Teesdale Lumber (Amended),* 547.

See
AUTOMOBILES 1, 2

WRITTEN INSTRUMENTS—See
EQUITY 1

WRONGFUL ACTS—See
LIMITATION OF ACTIONS 2

ZONING

1. The Court of Appeals reviews the decisions of trial courts *de novo* in zoning cases although great weight is accorded the trial judge's decision. *Davis v Bridgeport Twp Pl Comm,* 15.

2. A zoning ordinance was erroneously declared unconstitutional as applied to plaintiffs' land where the plaintiffs wished to use the land, which was zoned single family agricultural, for a mobile home park and the court found that the land was not suitable for single family residential development but failed to consider its suitability for farming, for which it was actually used. *Davis v Bridgeport Twp Pl Comm,* 15.

3. A zoning ordinance which, on its face, *totally* excludes from a municipality a use recognized by the constitution or other laws of the state as legitimate carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law as to the excluded use; however, such a taint is not presumed when the general use is reasonably permitted in the community and the only issue is whether it was arbitrarily or capriciously denied as to a particular parcel of land. *Tocco v Atlas Township,* 160.

4. Zoning ordinances enjoy a presumption of validity and that presumption is rebutted only when constitutional defects appear on the face of the ordinance or are shown by competent evidence. *Tocco v Atlas Township,* 160.

5. Invalidity does not appear on the face of a zoning ordinance merely from its classification of certain property for use as single residences only. *Tocco v Atlas Township,* 160.

6. A township zoning ordinance is invalid insofar as it prevents the plaintiff from using his property as a mobile home park site where the plaintiff's property was not suitable for single family

ZONING—Cont'd

residential development, as presently zoned, no land in the defendant township was in fact zoned for trailer parks, no rational reasons were advanced for denial of plaintiff's rezoning petition and the defendant affirmatively sought to zone trailer parks out altogether; the exclusion of plaintiff's proposed use is arbitrary, capricious, and fanciful. *Tocco v Atlas Township,* 160.

7. Zoning ordinances are presumed to be constitutional, and that presumption is overcome only by a clear showing that their application is arbitrary and unreasonable, bearing no substantial relationship to the public health, safety, morals or general welfare. *American Bakery v Warren,* 245.

8. Zoning of a parcel of land to permit construction of an office structure, where the owner sought light commercial zoning in order to construct and operate a bakery, was not confiscatory where the owner could feasibly develop the property for a use consistent with the zoning or find a reasonable ready market for it. *American Bakery v Warren,* 245.

9. Land need not be zoned for the highest and best use of the land provided it can feasibly be used as presently zoned. *American Bakery v Warren,* 245.

10. The test of a zoning ordinance is reasonableness, and a showing of no more than a fair difference of opinion between a landowner and the zoning authorities does not demonstrate that existing zoning is unreasonable. *American Bakery v Warren,* 245.

11. An application of a zoning ordinance to particular property, even though rational, may prevent any reasonable use of the property and, hence, be invalid or confiscatory. *Land Dev Corp v Bloomfield Twp,* 438.

12. A zoning restriction deprives the zoned property of any reasonable use and is, therefore, confiscatory if all permitted uses are so devoid of feasibility that the restriction has accomplished the destriction of all usable value. *Land Dev Corp v Bloomfield Twp,* 438.

13. An aggrieved property owner, in order to sustain an attack on a zoning ordinance, must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted. *Land Dev Corp v Bloomfield Twp,* 438.

14. A single-family residence classification in a zoning ordinance, as applied to a plaintiff's property, is confiscatory and void where the plaintiff introduced credible expert testimony which was not adequately challenged that, if the land was subdivided and sold as single-family residential lots in accordance with the present zoning classification, the cost of development would exceed the sales price; the plaintiff succeeded in demonstrating that the restriction has accomplished the destruction of all usable value and precludes the use of the property for any

ZONING—Cont'd
purposes to which it is reasonably adapted. *Land Dev Corp v Bloomfield Twp,* 438.

15. A circuit court is confined to the record below and additional evidence can not be offered to support a plaintiff's request for superintending control to compel waiver use approval of property where, in a zoning matter, waiver use approval was sought from a municipal planning commission, and denied, and the planning commission's findings were adopted by the city council; the circuit court may not consider evidence not heard by a zoning appeals board (MCLA 125.585). *Eliassen v City of Livonia,* 596.

16. The Constitution requires in a zoning case that the Court of Appeals determine whether the action of a planning commission and a city council were authorized by law and whether their action was supported by competent, material and substantial evidence on the whole record (Const 1963, art 6, § 28). *Eliassen v City of Livonia,* 596.

17. The denial of a plaintiff's application for waiver use of property in a zoning case was proper because where plaintiff failed to carry the burden of proof to support his application, and where plaintiff failed to adduce affirmative evidence of compliance, the planning commission and city council were bound to deny the application according to the mandate of the ordinance (Livonia City Ordinance § 11.03). *Eliassen v City of Livonia,* 596.

See
APPEAL AND ERROR 14

ZONING APPEALS BOARDS—See
ZONING 15