

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE  
STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

Supreme Court No. 151342  
Court of Appeals No. 317697  
Wayne County Circuit Court  
Criminal Case No. 13-3955  
Hon. Vera Massey Jones, Circuit Court  
Judge

TIMOTHY PATRICK MARCH,

Defendant/Appellant.

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**DEFENDANT/APPELLANT TIMOTHY PATRICK MARCH'S  
SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**

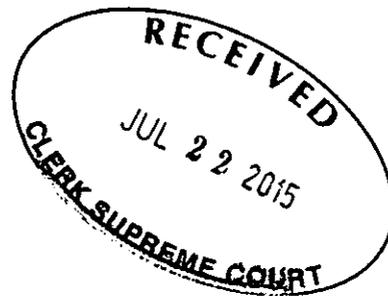
Respectfully submitted,

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Dated: July 22, 2015



**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Title Page .....	1
Table of Contents .....	2
Index of Authorities .....	3
Statement of Supplemental Questions Presented .....	5
Argument .....	5
Conclusion .....	11

## INDEX OF AUTHORITIES

### Pages

#### Case Law

<u>Colton vs. Mich Lafayette Bldg Co</u> , 276 Mich 126, 255, NW 433 (1934) .....	9
<u>Detroit Trust Co, vs. Detroit City Service Co</u> , 262 Mich 14, 247 NW 76 (1933) .....	9
<u>Empire Iron Mining Partnership vs. Orhanen</u> , 455 Mich 410, 565 NW2d 844 (1994) .....	10
<u>Fleischman vs. State</u> , 89 TexCrR 259, 231 SW 397 (1921) .....	6-7
<u>Kenneth Hines Special Projects Procurement Mktg &amp; Consulting Group vs. Continental Biomass Industries (In re Certified Question)</u> 468 Mich 109, 659 NW2d 597 (2003). .....	9
<u>Kent Storage Co vs. Grand Rapids Lumber Co</u> , 239 Mich 161, 214 Mich 111 (1927) .....	9
<u>Kondzer vs. Wayne County Sheriff</u> , 219 MichApp 632 558 NW2d 255 (1996) .....	8
<u>Lambert vs. California</u> , 355 US 225, 78 SCt 240, 2 LEd2d 228 (1957) .....	8
<u>People vs. Schultz</u> , 71 Mich 315, 38 NW 869 (1888) .....	7
<u>People vs. Smith</u> , 246 Mich 393, 224 NW 402 (1929) .....	10
<u>People vs. Stoudemire</u> , 429 Mich 262, 414 NW2d 698 (1987). .....	9

#### Legal Treatises

52B CJS, Larceny, Section 29, pp. 305-306 .....	9
52B CJS, Larceny, Section 35, p. 311 .....	5-6
29 <u>Mich Law &amp; Practice Encyclopedia</u> , Statutes, Ch. 6, Sect. 83, pp. 414-16 .....	11
29 <u>Mich Law &amp; Practice Encyclopedia</u> , Statutes, Ch. 6, pp. 430-432 .....	10
Michaels, <u>Constitutional Innocence</u> , 112 Harv L Rev 828 (1999) .....	8

**STATUTES**

MCL 600.3240 (8) ..... 6

MCL 600.3278 ..... 8

MCL 750.356(1) ..... 6, 8

MCL 750.359 ..... 10

**STATEMENT OF SUPPLEMENTAL QUESTIONS PRESENTED**

I. DOES THE REMOVAL OF FIXTURES BY A MORTGAGOR FROM THE MORTGAGED PREMISES AFTER A SHERIFF'S SALE BUT PRIOR TO THE EXPIRATION OF THE REDEMPTION PERIOD SUBJECT THE MORTGAGOR TO CRIMINAL LIABILITY FOR LARCENY?

DEFENDANT/APPELLANT TIMOTHY MARCH ANSWERS ..... NO

PLAINTIFF/APPELLEE WOULD RESPOND ..... YES

THE TRIAL COURT HELD ..... NO

THE COURT OF APPEALS HELD ..... YES

II. CAN FIXTURES TAKEN FROM REAL PROPERTY BE THE SUBJECT OF LARCENY UNDER MCR 750.356(1)?

DEFENDANT/APPELLANT TIMOTHY MARCH ANSWERS ..... NO

PLAINTIFF/APPELLEE WOULD RESPOND ..... YES

THE TRIAL COURT HELD ..... NO

THE COURT OF APPEALS HELD ..... YES

**ARGUMENT**

I. THE REMOVAL OF FIXTURES BY A MORTGAGOR FROM THE MORTGAGED PREMISES AFTER THE SHERIFF'S SALE BUT PRIOR TO THE EXPIRATION OF THE REDEMPTION PERIOD CANNOT SUBJECT THE MORTGAGOR TO CRIMINAL LIABILITY FOR LARCENY.

Defendant/Appellant March avers that the "taking" element is not present where a mortgagor removes fixtures from realty since there is not trespass on the purchaser's interest:

Since trespass is an essential element of the offense of larceny the taking must be unlawful or felonious....

Generally, the method or means by which the taking is accomplished are immaterial. All that the law requires is that there should be a trespass on the possessory right of the thing taken . . . . .

CJS Larceny Section 35, p. 311

What is fatal to the prosecution's case is that the sheriff's sale purchaser has no possessory interest until after the expiration of the redemption period, and in the case at bar, the prosecution conceded that Defendant/Appellant had both a possessory interest and ownership interest on the fixtures at the time in question. The Michigan Court of Appeals never addressed the deficiencies in the prosecution's case with the "taking" element, even though the trial court examined this issues and it had been brief, also, in that circuit court.

In Fleischman vs. State, 89 TexCrR 259, 231 SW 397(1921), the court faced facts not unlike the case at bar where a larceny defendant claimed that his possession and control of leased realty prevented him from being convicted of that crime for taking fixtures from a barn:

"The premises were leased or hired to the appellant from the standpoint of the state, the pieces of timbers described in the indictment were part of the barn, that is, a part of the realty, and were detached by the appellant, thereby becoming personal property. Conceding this, the property was still under the care, control, custody of the appellant. His possession was exclusive.....

\* \* \* \* \*

We, in the case of Lee vs. State, supra, cited authorities and discussed in some detail the term "bailee." As the term is applied to personal and not to real property, we are not certain under the facts of this case, a crime was committed, conceding the testimony of the state to be true....

We are clear, however, in the opinion that the appellant is not guilty of the offense charged in the indictment, which is ordinary theft.

At the time of dismissal, the prosecution freely admitted no case law existed which supported their position that fixtures taken during a redemption period by a mortgagor subjects one to criminal liability; this gives rise to an argument that Mr. March could not have been put on any notice that this conduct constituted a criminal offense. In Lambert vs. California, 355 US 225, 78 SCt 240, 2 LEd2d 228(1957) (1987) that the Due Process Clause of the 14<sup>th</sup> Amendment is violated where there is insufficient probability that the accused party had notice that his behavior was criminal. There has been no allegation herein by the prosecution that Mr. March had any criminal intent - but was merely administering his father's property; also see Michaels, Constitutional Innocence, 112 Harv L Rev 828(1999).

In all doubtful matters and where the expression is in general terms, statutes are to receive a construction that may be agreeable to the common law in cases of that nature, for statutes are not to be presumed to make any alteration in common law, farther or otherwise, than the act expressly declares; Kondzer vs. Wayne County Sheriff, 219 MichApp 632, 558 NW2d 215(1996). In the case at bar Michigan Penal Code does not expressly state that reality fixtures taken by a mortgagor during a redemption period is unlawful - so the common law, which has no such prohibition - controls, meaning that Mr. March is not subject to criminal prosecution herein - despite the passage of MCL 600.3278, which involves "damage" by a mortgagor to real property and civil remedies thereunder.

In sum, there is no legal authority in Michigan, or anywhere else, to subject a mortgagor to a larceny prosecution for removing fixtures during a redemption period, as is alleged herein.

II. FIXTURES TAKEN FROM REAL PROPERTY  
MAY NOT BE SUBJECT OF LARCENY UNDER  
MCL 750.356(1)

id. 397-98

The operative facts, recited in that case, are not very dissimilar to the case at bar:

The appellant leased from Greenberg a 40-acre tract of land with improvements. The lease was in writing, and by its terms the appellant acquired the right to use and occupy the premises during the year 1920.

The state's theory and testimony is to the effect that the appellant disconnected from the barn on the premises "five joists timbers of the value 50 cents each" and "three boxing planks of the value of 50 cents each," and that he appropriated them to his own use.  
id. at 397

Applying Fleischman herein, it is clear that larceny does not occur where fixtures are removed from realty, where "possession and control" does not lie with the putative "victim", so Defendant/Appellant, by virtue of his father's legal title, possession and control, and his power of attorney instrument, cannot be guilty of "larceny in a building" or receiving stolen property. There is also no evidence of a trespass by Defendant/Appellant at any time.

The sheriff's sale purchaser had neither any possessory interest nor any legal title to the realty at issues until after the six-month redemption period established by MCL 600.3240(8) expired and lawful possession acquired upon any subsequent District Court eviction judgment or otherwise afterward.

In People vs Schultz, 71 Mich 315, 38 NW 868 (1888) it was held that there can be no larceny where it appeared that the defendant owned the article - a sewing machine - sold at an execution sale, where the defendant, in good faith, believed that item was exempt from execution.

The Court of Appeals opinion erred herein by citing a general property law principle that fixtures attached to realty become personalty upon disconnection without regard to the substantive law of larceny at common law which recognizes that where severance and asportation are but different parts of a character as realty and hence, is not subject to prosecution for larceny; see 52B CJS, Larceny, Section 29, pp. 305-306.

Further, the term "fixture" is defined as an item that has a possible existence apart from realty, but capable by annexation of being assimilated into realty. Kent Storage Co vs. Grand Rapids Lumber Co, 239 Mich 161, 214 NW 111 (1927). "Fixtures" cannot be construed as "goods" or chattels as subject of larceny under Michigan law.

In the context of a foreclosure action the dichotomy between "fixtures" and "chattels" were made in determining whether a mortgagor could foreclose on certain items of realty that were attached in the case of Detroit Trust Co vs. Detroit City Service Co, 262 Mich 14, 247 NW2d 76 (1933). A further dichotomy between "fixtures" vs "chattels" were made in the context of a leasehold relationship in Colton vs. Mich Lafayette Bldg Co, 267 Mich 126, 255 NW 433 (1974).

The Michigan Supreme Court has emphasized that where a statute is clear there is not ambiguity that would permit or justify looking outside the plain words of the statute; Kenneth Hines Special Projects Procurement Mktg & Casualty Group vs. Continental Biomass Industries (In re Certified Question) 468 Mich 109, 659, NW2d 597 (2005) However, the spirit and purpose of a statute should prevail over its strict letter. People vs. Stoudemire, 429 Mich 262, 414 NW2d 693 (1987).

Although the courts accept legislative definitions, when the legislature employs a common term as indicative of a purpose of the enactment, the court must let the term speak in its

ordinary sense. People vs. Smith, 246 Mich 393, 224 NW402 (1929). Omissions in the statute are generally considered to be intentional, so that court cannot read requirements in a statute that the Michigan Legislature did not put into it. Empire Iron Mining Partnership vs. Orhanen, 455 Mich 410, 565 NW2d 844 (1997). In sum, the term “fixture” is not used in the subjects of larceny in a building delineated in the larceny section that Mr. March is accused of violating nor can fixtures be reasonably inferred to be “goods” or “chattels” which are cited in the relevant statutory section.

“A general maxim of construction is that *“expressio unius exclusio est alterius”*, that is, the express mention in a statute of one thing implies the exclusion of other similar things and puts an end to, or renders ineffective that which is implied”; 29 Michigan Law & Practice Encyclopedia, Statutes, Ch. 6, pp. 430-432. In the instant case, the term “fixture” only appears once in the Chapter LII of the Michigan Penal Code, which forms the body of the law of larceny in this state. That section of the cited chapter deals with removing or damaging fixtures of a vacant structure or building (MCL 750.359); that section makes the conduct of a misdemeanor offense. Applying the maxim cited above to the instant case, “fixture” not being expressly enumerated in the categories of items that larceny in a building may be the subject of, coupled with the express mention of fixtures at MCL 750.359, gives rise to the conclusion that the legislature intended to exclude fixtures from the operation of the larceny in a building section.

“The construction of a statute must be aimed at preventing injustice and hardship, obviating absurd consequences, unreasonable results, and opposing all prejudice to the public interest”. 29, Michigan Law & Practice Encyclopedia, a, Ch. 6, Sect. 82, pp. 414-416. In the

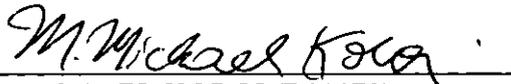
case at bar it would be absurd and unreasonable to prosecute a homeowner removing fixtures that he himself installed, because he was later subject for a mortgage foreclosure sale and did remove those fixtures during his redemption period, where a trespasser could come unto the same realty after the homeowner vacated the premises and seize the same items and only be charged with a misdemeanor, whereas the homeowner could conceivably be charged under the larceny in a building section as a felon this interpretation is ludicrous and unreasonable.

In sum, "fixtures" cannot be interpreted as "goods" or "chattels" for purported of the larceny in a building charge.

### CONCLUSION

In conclusion, this Honorable Court, should grant leave to appeal given the substantial legal issues raised or, in the alternative, peremptorily reverse the judgment of the Michigan Court of Appeals and reinstate the Order of Dismissal issued by the Honorable Vera Massey Jones of the Wayne County Circuit Court.

Respectfully submitted,

  
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