December 16, 1966

MICHIGAN LAW REVISION COMMISSION

First Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Law Revision Commission hereby presents its first annual report to the Legislature pursuant to Section 14(e) of Act No. 412 of the Public Acts of 1965.

The Commission, created by Section 12 of that Act, consists of the chairmen and ranking minority members of the Committee on Judiciary of the Senate and House of Representatives, the Director of the Legislative Service Bureau, being the five ex-officio members, and four members appointed by the Legislative Council. Terms of appointed commissioners are initially for staggered terms and thereafter are four years. The Legislative Council designates the Chairman of the Commission. The ex-officio members serve without compensation. The appointed members receive $6,000 per year.

The members of the Commission during 1966 were Senator Basil Brown of Highland Park, Senator Haskell L. Nichols of Jackson, Representative William A. Boos of Saginaw, Representative Homer Arnett of Kalamazoo, Donald J. Hoenshell of Lansing, as ex-officio members, Tom Downs (4-year term), Jason L. Honigman (3-year term), Charles L. Levin (2-year term) resigned as of November 22, 1966, and Andrew Wisti (1-year term). Tom Downs was appointed Chairman of the Commission and Jason L. Honigman as Vice Chairman. Professor William J. Pierce of the University of Michigan Law School was appointed Executive Secretary of the Commission on May 16, 1966, at an annual salary of $12,000.00.

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reform.

2. To receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

This being the first report to the Legislature, it may be helpful to give a brief description of the organization and procedures of the Commission. These are, however, being subjected to a continuous review as experience is gained and as these are compared with comparable law reform agencies in other states.

The problems to which the Commission directed its studies during its first year of operation were largely identified by a study of statute and case law of Michigan and legal literature by the Commissioners and the Executive Secretary. Other subjects were brought to the attention of the Commission by members of the Legislature, judicial officers, the Legislative Service Bureau, and members of the public. From these topics, the Commission selected the following for immediate study and report:

(1) Creation and Exercise of Powers of Appointment.
(2) Multiple-Party Bank Deposits.
(3) Limitations on Possibilities of Reverter and Rights of Entry.
(4) Interstate and International Judicial Procedures.
(5) Dead Man's Statute.
(6) Qualifications of Fiduciaries.
(7) Corporations as Partners.
(8) Corporation Use of Assumed Names.
(9) Stockholder Approval of Mortgaging Assets.
(10) Stockholder Action Without Meeting.
(11) Original Jurisdiction of Court of Appeals.
(12) Appeals from Probate Courts.

Recommendations and proposed statutes have been prepared on the above twelve subjects and accompany this report. Commission members will be available to discuss the proposed statutes before any of the committees of the Legislature when called upon so to do.

Topics on the current study agenda of the Commission are:

(1) Condemnation Law and Procedures.
(2) Judicial Review of Administrative Actions.

(3) Interpleader Where Insurance Coverage Is Insufficient.
(4) Court Costs
(5) Stockholder Liability for Labor Debts.
(6) Releases of Joint Tortfeasor.
(7) Disposition of Automobile Accident Cases.

Topics on the future study calendar of the Commission are:

(1) Forfeitures and Foreclosures of Land Contracts.
(2) Evidence Code.
(3) Probate Code.
(4) Removal of Corporate Directors Without Assigning Cause.
(5) Bail Bonds.

A number of other topics were referred to appropriate state agencies for disposition. Other topics are receiving preliminary study before determining whether to place them on the immediate study or future study calendars. It is apparent that a number of worthwhile topics warrant investigation and study, but the Commission has been guided in its selection procedures during its initial period of operation by considerations of time and budgetary limitations.

In its operations the Commission has not hired any staff other than the Executive Secretary, whose offices are in Hutchins Hall, University of Michigan Law School, Ann Arbor, Michigan 48104. Instead it has relied upon the use of consultants. This procedure has made it possible to expedite a larger volume of work and at the same time gives the Commission the advantage of expert assistance at relatively low costs. The Deans of the four law schools in Michigan have cooperated by making members of their faculties available for specific research assignments. The Commission believes that the most economic use of available funds is achieved by utilizing the work of experts in the practicing and academic branches of the profession who are invited to assist the Commission on specific projects.

The Legislative Service Bureau has generously assisted in the development of proposed legislation and in reproducing reports, minutes, and studies of the Commission. The Director of the Legislative Service Bureau, who acts as Secretary of the Commission, has handled the fiscal operations of the Commission under procedures established by the Legislative Council.

Throughout its operations the Commission has provided progress reports to the Legislative Council and members of the Commission have met with the Council to obtain its advice and counsel. The submission of the first

annual report of the Commission affords a welcome opportunity to express the appreciation of the Commissioners for the assistance received from the Legislature, the Legislative Council, and the Legislative Service Bureau.

An important part of the Commission's function is the identification of defects in the law disclosed in the work of the courts. A review of recent court decisions is now in progress, and contact has been made with the Supreme Court of Michigan requesting its advice and assistance. The Commission has attempted to avoid duplicating the activities of other groups, such as the Criminal Code Revision Project and the Joint Committee for Minor Court Reorganization.

The Commission welcomes suggestions for improvement of its program and proposals from the members of the Legislature.

Respectfully submitted,
For the Commission

Tom Downs, Chairman

Jason L. Honigman,
Vice Chairman

Date: _____

Final Draft
Approved 11-28-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Powers of Appointment

Powers of appointment are among the most useful and flexible devices for effective transmission of family wealth. Although recognized for over 400 years, their use was minimal until federal income and estate taxation emphasized their utility. Powers of appointment accommodate two basic objectives of donors. One is the desire to limit the benefits of property to certain persons over a period of time. The other is to take into account changes in the needs of beneficiaries which the donor cannot foresee. These objectives are best served by a special power of appointment which typically allows the donee, who is often the life tenant, to designate ultimate dispositions from among members of a designated class, such as his children. A general power is even more flexible in that the donee is able to designate any person as beneficiary, including himself or his estate.

The most common use of powers today occurs in connection with the so-called marital deduction trust. Under that arrangement a husband leaves his wife a sufficient portion of his estate for life to obtain full benefit of the available deduction together with a general power to appoint the remainder with a further provision in case the wife does not exercise the power. The non-tax consequences of powers, however, are in a confused state because of lack of adequate legal development either by legislative action or judicial law-making. The situation was originally recognized by the New York property law reforms of 1830. A code was enacted in New York which subsequently was copied in Michigan in 1846. Five other states also copied the New York code provisions. This legislation, however, proved inadequate because of interpretive problems.

The Michigan legislation is inadequate because (1) it is limited to powers in relation to interests in land although the Michigan courts may apply the same rules to personalty; (2) it abolished powers not authorized by statute rather than leaving the common law in effect; (3) it purports to cover all powers in relation to lands and not merely powers of appointment; (4) it is replete with terms that have proven to be extremely ambiguous; (5) it defines general powers more narrowly than the common law so that certain powers are considered special which would be general powers at common law; (6) it has been interpreted in New York and Michigan to leave creditors with less rights than creditors in a common-law jurisdiction, apparently contrary to the intent of the legislature; (7) it assumes that a disability of coverture exists for married

women; (8) it refers to suspension of the power of alienation although Michigan has returned to the common-law rule against perpetuities; and finally (9) it fails to cover several important matters.

The old New York legislation has been repealed in three of the adopting states: Minnesota in 1943, New York in 1964, and Wisconsin in 1965. Each enacts the common law of powers of appointment with respect to all matters not covered by the new legislation. The New York and Wisconsin legislation adopt the terminology used in the Internal Revenue Code.

The Law Revision Commission believes that similar action in Michigan is desirable. Otherwise donors and draftsmen will be left with considerable doubt as they attempt to draft around the current statutory ambiguities. In preparing its recommendation, the Law Revision Commission has drawn heavily upon the recent New York and Wisconsin legislation. The Commission, however, has recommended retention of those provisions of Michigan's legislation that have proven valuable, as well as recommending sections not appearing in the New York and Wisconsin legislation which should clarify problems left outstanding by legislative developments in those states.

The Commission recommends the enactment of the attached statute.

For the Commission

_____
Tom Downs, Chairman

_____
Jason L. Honigman, Vice Chairman

Date: _____

Final Draft
11-28-66

POWERS

A bill relating to powers, the creation and exercise of powers, release of powers, contracts to appoint, dispositions when powers are unexercised, rights of creditors of donees of powers, computations under the rule against perpetuities, reservation of powers of revocation, and recording of instruments; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be knownand may be cited as the "powers of appointment act of 1967."

Sec. 2. As used in this act, unless the context indicates otherwise:

(1) "property" means any legal or equitable interest in real or personal property, including choses in action;

(2) "power" means a power of appointment over property;

(3) a "power of appointment" means a power created or reserved by a person having property subject to his disposition which enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it shall be received; but it does not include a power of sale, a power of attorney, or a power of revocation;

(4) "donor" means the person who creates or reserves the power; "donee" means the person to whom the power is granted or reserved; and "appointee" means the person to whom an interest in property is designated or transferred by exercise of the power.

(5) "creating instrument" means the deed, will, trust agreement, or other writing or document which creates or reserves the power;

(6) "general power" means a power exercisable in favor of the donee, his estate, his creditors, or the creditors of his estate, whether or not it is exercisable in favor of others. A power to appoint to any person or a power which is not expressly restricted as to appointees is a general power.

(7) "special power" means a power exercisable only in favor of one or more persons not including the donee, his estate, his creditors, or the creditors of his estate and, when exercisable in favor of a class, so limited in size by description of the class that in the event of non-exercise of the power distribution can be made under section 12 to persons within the class if the donor fails to provide for this contingency;

(8) "unclassified power" means a power which is neither a general power nor a special power.

(9) "gift in default" means a transfer to a person designated in the creating instrument as the transferee of property if a power is not exercised or is released.

Sec. 3. (a) A power may be created by any creating instrument which is executed in the manner required by law for that instrument.

(b) The donor of a power must be a person capable of transferring the interest in property to which the power relates.

Sec. 4. Unless otherwise provided in the creating instrument, an instrument manifests an intent to exercise the power (1) if the instrument purports to

transfer an interest in the appointive property which the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or (2) if the instrument either expressly or by necessary implication from its wording, interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power. A residuary clause or other general language in the donee's will purporting to dispose of all of the donee's estate or property is a sufficient manifestation of intention to exercise a general power exercisable by will if no gift in default is designated in the creating instrument, but in all other cases such a clause or language does not in itself manifest an intent to exercise a power exercisable by will.

Sec. 5. (a) A power can be exercised by any donee capable of transferring the interest in property to which the power relates.

(b) A power can be exercised only by a written instrument

(1) which would be sufficient to pass the interest intended to be appointed if the donee were the owner of the interest; and

(2) which complies with the creating instrument as to the manner, time, and conditions of the exercise of the power, except that a power exercisable only by deed is also exercisable by a written will executed as required by law.

(c) If the donor has authorized the power to be exercised by an instrument not sufficient in law to pass the appointive interest, the power is not void, but may be exercised by an instrument conforming to subsection (b).

(d) If consent of the donor or of any other person is required for the

exercise of a power, the consent must be expressed in the instrument exercising the power or in a separate written instrument, signed in either case by the persons whose consent is required. If any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee without the consent of that person unless the creating instrument, construed with regard to surrounding circumstances, manifests a contrary intent.

(e) Unless the creating instrument, construed with regard to surrounding circumstances, manifests a contrary intent, when a power is vested in two or more persons, all must unite in its exercise, but if one or more of the donees dies, becomes incapable of exercising the power, or renounces the power, the power may be exercised by the others.

Sec. 6. (a) If the will of a donee of a general power exercisable by will manifests an intent to exercise the power and satisfies the requirements of section 5, all interests which the donee could by will appoint and which the donee's will purports to appoint shall be regarded as part of the donee's estate for all purposes relating to the administration and disposition of his estate and the effectuation of his will, including but not limited to the following:

(1) the payment of the expenses of administration, to the extent that the donee's individual assets are insufficient for that purpose;

(2) the satisfaction of the claims of the donee's creditors, to the extent provided in section 13;

(3) the right of election of the donee's widow; and

(4) the distribution of any of such interests as the intestate property of the donee, to the extent that the donee's will does not effectively dispose of such interests and the creating instrument does not otherwise provide.

(b) This section does not affect the period during which the vesting of a future interest may be suspended or postponed by an instrument exercising a power as provided in section 14.

Sec. 7. The donee of any power may appoint the whole or any part of the appointive assets to any one or more of the permissible appointees and exclude others, except as otherwise provided in the creating instrument.

Sec. 8. (a) Unless the creating instrument expressly provides that a power cannot be released or expressly restricts the time, manner, or scope of release, all powers may be released except as provided in subsection (b).

(b) Unless the creating instrument expressly provides otherwise, a special power may not be released if either

(1) the power is not presently exercisable, or

(2) the power is exercisable by a trustee or other fiduciary in a fiduciary capacity which requires the exercise of the power.

(c) The release of a releasable power may (1) include all or any part of the property subject to the power; (2) reduce or limit the persons or objects, or classes of persons or objects in whose favor the power is exercisable; or (3) limit in any other respect the extent to or the manner in which the power may be exercised.

(d) A release may be effected, either with or without consideration, by

written instrument signed by the donee and delivered.

(e) Delivery of a release may be accomplished in any of the following ways, but this subsection does not preclude a determination that a release has been delivered in some other manner:

(1) delivery to any person specified in the creating instrument;

(2) delivery to a trustee or to one of several trustees, other than the donee, of the property to which the power relates, or by filing with the court having jurisdiction over the trust;

(3) delivery to any person, other than the donee, who could be adversely affected by an exercise of the power; or

(4) by recording or filing in the office of the register of deeds in the county where the property is located or where the donee resides, which release shall be recorded by the register.

(f) Any release, or partial release, of a releasable special power shall not be construed as a transfer in contemplation of death, and shall not be construed as the non-exercise of a power of appointment, within the meaning of the Michigan inheritance tax act.

Sec. 9. The creation, exercise, or release of a power is irrevocable unless the power to revoke is reserved in the instrument creating, exercising, or releasing the power.

Sec. 10. (a) Unless the creating instrument provides otherwise, the donee of a power, presently exercisable, can contract to make an appointment, if neither the contract nor the promised appointment confers a benefit upon a person who is not a permissible appointee under the power.

(b) Unless the creating instrument provides otherwise, the donee of a power not presently exercisable cannot contract to make an appointment. If the donee cannot contract to make an appointment, but nevertheless does so contract, the promisee cannot obtain either specific performance or damages, but he can obtain restitution of the value given by him for the promise.

Sec. 11. (a) Any of the following instruments relating to powers to appoint interests in land is entitled to be recorded as a conveyance upon compliance with section 565.23 of the Compiled Laws of 1948:

(1) an instrument, other than a will, exercising a power;

(2) an instrument expressing consent to exercise;

(3) a release.

(b) If a power is exercised by a will, a certified copy of the will and of the certificate of probate thereof may be recorded.

Sec. 12. If the donee of a special power fails to exercise effectively the power, or totally releases the power, the interests which might have been appointed under the power pass:

(1) if the creating instrument contains an express gift in default, then in accordance with the terms of the gift;

(2) if the creating instrument contains no express gift in default and does not clearly indicate that the permissible appointees are to take only if the donee exercises the power, then to the permissible appointees equally, but if the power is to appoint among a class such as "relatives," "issue," or "heirs," then to those persons who would have taken had there been an express

appointment to the described class; or

(3) if the creating instrument contains no express gift in default and clearly indicates that the permissible appointees are to take only if the donee exercises the power, then by reversion to the donor or his estate; but if the creating instrument expressly states that there is no reversion in the donor, then any language in the creating instrument indicating or stating that the permissible appointees are to take only if the donee exercises the power is to be disregarded and the interests shall pass in accordance with paragraph (2).

Sec. 13. (a) If the donee has either a general power or an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, his estate, his creditors, and the creditors of his estate, or a substantially similar exclusion, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for the purposes of satisfying claims of his creditors, as provided in this section.

(b) If the donee has an unexercised power of the kinds specified in subsection (a), and he can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. If the donee has exercised the power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances he could reach property which the donee has owned and transferred.

(c) If the donee has at the time of his death a power of the kinds

specified in subsection (a), whether or not he exercises the power, the executor or other legal representative of the donee may reach on behalf of creditors any interest which the donee could have appointed to the extent that the claim of any creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

(d) Under a general ssignment by the donee for the benefit of his creditors, the assignee may exercise any right which a creditor of the donee would have under subsection (b).

(e) A purchaser without actual notice and for a valuable consideration of any interest in property, legal or equitable, takes the interest free of any rights which the donee's estate or a creditor of the donee might have under this section.

Sec. 14. The period during which the vesting of a future interest may be suspended or postponed by an instrument exercising a power begins (1) in the case of an instrument exercising a general power presently exercisable, on the effective date of the instrument of exercise; and (2) in all other situations, at the time of the creation of the power.

Sec. 15. When the creator of a trust reserves to himself an unqualified power to revoke, the period during which the vesting of a future interest may be suspended or postponed begins

(1) when the unqualified power to revoke terminates, whether by reason of the death of the trust creator, by release, or otherwise; or

(2) on the effective date of the instrument exercising the power.

Sec. 16. When the provisions of sections 14 and 15 apply, the permissible period for the postponement of a vesting of a future interest shall be fixed in accordance with the law in effect at the time of the exercise of the power or of the termination of the unqualified power of revocation, and not in accordance with the law in effect at the time of the creation of the power.

Sec. 17. When the period during which the vesting of a future interest may be postponed must be computed from the time of the creation of a power, with respect to interests sought to be created by an instrument exercising the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account.

Sec. 18. When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned. If the grantor dies without exercising such power, the estate conveyed shall be deemed part of his estate so far as the rights of his creditors are concerned.

Sec. 19. As to all matters not within this chapter or any other applicable statute, the common law is to govern. This section is not intended to restrict in any manner the meaning of any provision of this act or any other applicable statute.

Sec. 20. The provisions of this chapter are applicable to any power existing on the effective date of this act, as well as a power created after that date.

Sec. 21. Chapter 64 of the Revised Statutes of 1846, being sections 556.1 to 556.62 of the Compiled Laws of 1948 and Act No. 296 of the Public Acts of 1945, being sections 556.101 to 556.106 of the Compiled Laws of 1948, are repealed.

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Approved 11-17-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Multiple Party Deposits

Deposits in financial institutions in the name of more than one person may serve many useful purposes. First, depositors may desire to create a true joint tenancy whereby each depositor is immediately owner of half of the account as well as of the entire balance if he is the survivor. Secondly, depositors may desire to create a bank-account will to avoid expense and delay of probate and to afford the survivor with available cash on the death of one depositor. Thirdly, depositors may desire an arrangement whereby both may withdraw funds but may desire that the funds go to other persons on death of a depositor. For example, an elderly person may desire an arrangement whereby one child may withdraw funds for his support but may desire that the funds be divided among all children upon his death.

At the present time Michigan legislation apparently handicaps financial institutions in providing accounts which meet these several purposes. Legislation enacted in 1909, Compiled Laws of 1948, §487.703, provides that an account payable to either of two persons or the survivor makes the parties joint tenants. However, litigation regarding this legislation has revealed the inadequacies of the present legislation from the standpoint of serving the intent of the depositors and protecting the banks in paying out sums to persons nominally having a right of withdrawal. In Leib v. Genesee Merchants Bank, 371 Mich. 89 (1963), the contract between the depositor and the bank provided for withdrawals by either "A" or "B". Both "A" and "B" had made withdrawals acting independently before "A's" death. Nevertheless, the bank was held liable for withdrawals made after "A's" death when the court found that "A" was the exclusive source of the funds in the account. Thus, an account in the names of "A" or "B" alone did not create a presumption of ownership by the survivor. Equating the protection afforded the bank when honoring withdrawal orders with the beneficial interests in the deposit as between the parties has unfortunate implications. The most important implication is that it discourages financial institutions from offering any two-party account except that which conclusively protects the financial institution which under present Michigan legislation is the survivorship account. Furthermore, the fact that financial institutions can only safely offer survivorship accounts may in the long run weaken that device because persons have been forced to utilize it even though contrary to their intentions.

To assist in making additional kinds of deposits available which can be adapted to the intent of the depositors, the Law Revision Commission recommends that legislation be adopted authorizing a statutory form of multiple

party bank accounts. Under this proposed legislation, a joint account contract could be established designating persons having the right to withdraw during the lifetime of both and persons having rights to withdraw upon death of a party. Ownership of the funds both during lifetime and after death is designated. Rights under existing law would not be affected. Financial institutions would be protected if they honor withdrawals in accordance with the terms of the statutory joint accounts. Furthermore, the rights of an owner prior to death may be reached by his estate to provide a widow's allowance or an allowance for dependent children or to protect the widow's share if the owner dies intestate or if the widow elects against the will. Creditors who could reach the funds prior to death may do so after death if the estate is insufficient to pay creditors' claims.

A copy of the proposed statute is attached.

For the Law Revision Commission

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Tom Downs, Chairman

_____

Jason L. Honigman, Vice Chairman

Date: _____

Approved 11-17-66

STATUTORY JOINT ACCOUNT CONTRACT

An act to define the rights and obligations of parties and financial institutions in connection with funds on deposit therein in which two or more persons have an interest by way of right of withdrawal or ownership.

Sec. 1. This act shall be known and may be cited as the "Statutory Joint Account Act."

Sec. 2. As used in this act, unless the context requires otherwise:

(a) "joint account" means any deposits in a financial institution in which two or more persons have an interest either by way of ownership or right of withdrawal.

(b) "statutory joint account" means a joint account as to which a statutory joint account contract, as herein provided for, has been signed by any person having a right of withdrawal thereon.

(c) "deposits" means funds on deposit in a financial institution and shares in a building and loan association, savings and loan company or association, or credit union, including interest, dividends or any insurance proceeds added to an account balance by reason of the death of a party to the account.

(d) "financial institution" means any bank, trust company, building and loan association, savings and loan company or association, or credit union.

(e) "net contribution" means the sum of all deposits made by a person into a statutory joint account less all withdrawals made by or for him plus his pro rata share of interest or dividends applicable thereto.

(f) "person" means any individual, corporation, partnership, trust, fiduciary, or any other entity capable of contracting.

Sec. 3. One or more persons may create a statutory joint account by signing a statutory joint account contract with indicated insertions in form substantially as follows:

FORM OF STATUTORY JOINT ACCOUNT CONTRACT

1. Name of financial institution:

2. Nature of Account:

Check_____Savings Account;_____Commercial Account;

_____Certificate of Deposit;_____Shares:

_____Other Credits (describe):

3. Name and address of person designated as A:

4. Name and address of person designated as B:

5. Who may withdraw funds during lifetime of A and B:

Check_____A; _____B;_____Either A or B;

_____Signatures of both A and B

6. Who may withdraw funds if A dies first:

Check_____B; _____A's estate; _____Joint signatures of both B and A's estate.

7. Who may withdraw funds if B dies first:

Check_____A; _____B's estate; _____Joint signatures of both A and B's estate.

8. Who may revoke this contract by written notice to the financial institution:

Check_____A; _____B; _____Either A or B;

_____Signatures of both A and B.

9. Who owns the funds during the lifetime of A and B;

Check_____A; _____B; _____Equally by A and B;

_____By A and B in proportion to the net contributions of A and B; _____Other proportions (describe):

10. Who owns the funds if A dies first:

Check_____B; _____A's estate; _____Equally by B and A's estate; _____By B and A's estate in proportion to the net contributions of A and B; _____Other proportions (describe):

11. Who owns the funds if B dies first:

Check_____A; _____B's estate; _____Equally by A and B's estate; _____By A and B's estate in proportion to the net contributions of A and B; _____Other proportions (describe):

12. If A and B should die simultaneously without proof of who survives, which provision shall control:

Check _____Item 10 above; _____Item 11 above:

13. Signature of persons having a right of withdrawal:

14. Date of Signature:

Notes (1) Each person signing shall receive a copy of this contract and his signature shall constitute acknowledgment of such receipt.
(2) When more than two persons are involved, add additional parties by designation of "C", etc. and modify form to conform therewith.

Sec. 4. The creation of a statutory joint account is a contract as to ownership of the deposits and is effective according to its terms without regard to requirements of testamentary dispositions. The rights of persons in joint accounts which are not statutory joint accounts are not affected by this act. The failure to answer any questions in a statutory joint account contract shall not invalidate the contract, but it shall be enforceable in accordance with its terms as to the questions answered and in accordance with the common law as to any unanswered questions or ambiguities, with the aim of effectuating the intent of of the parties.

Sec. 5. Financial institutions shall honor withdrawals of funds in accordance with the withdrawal provisions of the statutory joint account contract. In so doing, they shall be relieved of all liability to any persons having claim to ownership of the funds. A financial institution shall not be chargeable with changes in rights of withdrawal due to death or incompetency in absence of actual knowledge thereof.

Deposits in statutory joint accounts shall be subject to setoff for obligations to the financial institution by persons designated in the statutory joint account contract as owners of the funds to the extent of such ownership at the date of setoff.

Sec. 6. Deposits in a statutory joint account shall be subject to the rights of creditors of the persons designated in the statutory joint account contract as owners of the funds to the extent of such ownership, except that at all times such funds shall remain subject to laws applicable to transfers in fraud of creditors. If in his lifetime, a deceased party was an owner of a statutory joint account, his estate, in event of its insolvency, may recover from the surviving owner so much of such deposits as were owned by him immediately prior to his death to the extent required to satisfy claims against the estate.

Sec. 7. Upon the death of a person who in his lifetime owned the deposits in a statutory joint account, to the extent of the decedent's ownership immediately prior to his death, the rights of the owners of the deposits after such death shall be subject to the right of recovery by the estate of such deceased person to the extent that (1) the assets of such estate are insufficient for the payment of the widow's allowance or allowance for dependent children ordered by a court of competent jurisdiction; or (2) in an intestate estate or where the widow exercised her right to take against the will, the assets of such estate are insufficient for the payment of the widow's share of such estate if such deposits were included as part of such estate.

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RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Possibilities of Reverter and Rights of Entry

Possibilities of reverter and rights of entry may be used to enforce or prevent specified uses of land. A possibility of reverter arises from language in a conveyance or other instrument which expresses a time limitation upon the interest transferred. For example, a grant of land "so long as the land is used for church purposes" has been held to create a possibility of reverter. On the other hand, language of condition, such as "on condition that" or "provided that" is usually employed to create a right of entry. For example, a conveyance of land "provided that no liquor shall be sold on the premises" creates a right of entry.

If a possibility of reverter is created, the ownership of the land returns immediately and automatically to the grantor on the occurrence of the specified event. If a right of entry is created, however, the grantor must elect whether or not to retake the land by making an entry on the land or doing some other act recognized legally as the equivalent of an entry.

Neither a possibility of reverter nor the right of entry is subject to the rule against perpetuities. Therefore, they may continue for indefinite periods with the result that the land always remains subject to the restrictions, thereby making the land less marketable. Furthermore, because these interests descend to heirs unless otherwise disposed of by the grantor, the holders of the interests are often unascertainable.

At the present time, Michigan legislation on the subject is limited. Section 46 of Chapter 62 of the Revised Statutes of 1846, Comp. Laws 1948, §554.46, M.S.A. §26.46, provides:

> When any conditions annexed to a grant or conveyance of land are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.

The courts have generally interpreted this statute as an expression of legislative intent that conditions are to be strictly construed, but the statute has not been interpreted as placing a restriction on the duration of the interests.

Other states have enacted legislation limiting the duration of these interests.

A Massachusetts statute of 1887 limited these interests to a 30-year period, except in cases of gifts for public or charitable purposes. In 1947 Illinois adopted legislation limiting the duration of these interests to 50 years, but subsequent legislation reduced the period to 40 years. Rhode Island in 1953 placed a 20-year limitation on these interests, and Minnesota, which had a statute similar to Michigan's, placed a 30-year limitation on duration in 1937. Florida, using a different approach, placed a 21-year period of duration on these interests in 1951.

Because these interests tend to hamper marketability of title and because the effect of existing Michigan legislation can be determined only after litigation, the Commission recommends that legislation be adopted limiting the duration of these interests to 30 years. The Commission recommends that the existing legislation be retained for two reasons: (1) the courts have used the legislation to strike down other types of non-beneficial conditions such as covenants and (2) in the event that the retroactive features of the proposed legislation should be held unconstitutional, the existing legislation could still be utilized. The Commission believes that such an act would be held constitutional as was the Illinois legislation. Trustees of Schools of Twp. No. 1 v. Botford, 6 Ill. 2d 486, 130 N.E. 2d 111 (1955).

A copy of the proposed legislation is attached.

For the Law Revision Commission

_____
Tom Downs, Chairman

_____
Jason L. Honigman, Vice Chairman

Date: _____

Approved 11-17-66

STATUTE LIMITING RIGHTS OF REVERTER IN LAND

A bill to limit the duration of possibilities of reverter and rights of entry in conveyances of real property in certain cases.

Sec. 1. As used in this act:

(1) a "terminable interest" is a possessory or ownership interest in real property which is subject to termination by a provision in a conveyance or other instrument which either creates a right of reversion to a grantor or his heirs, successors or assigns or creates a right of entry on the occurrence of a specified contingency;

(2) "specified contingency" is the event described in a conveyance or other instrument creating a terminable interest, the occurrence of which requires or permits the divesting of the terminable interest.

Sec. 2. If the specified contingency does not occur within 30 years after the terminable interest is created, the right of termination by reason of the specified contingency shall by unenforceable.

Sec. 3. A right of termination under a terminable interest which was created prior to the effective date of this act is unenforceable if the specified contingency does not occur within 30 years after the terminable interest was created or within 1 year after the effective date of this act, whichever is later.

Sec. 4. This act does not apply:

(a) To a lease for a term of years;

(b) If the specified contingency must occur, if at all, within the period of the rule against perpetuities;

(c) If the terminable interest is held for public, educational, religious, or charitable purposes; or

(d) If the terminable interest is created in a conveyance from the United States of America, the State of Michigan or any agency or political subdivision of either of them.

Tentative Draft
12-7-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Interstate and International Judicial Procedures

In the years following the close of the Second World War, the number of cases having interstate or international connections has increased. This development has multiplied the instances in which process has had to be served out of the state, testimony taken abroad, sister state or foreign law ascertained, and the authenticity of foreign official records established. In many instances the problems caused by these contacts with other jurisdictions have had to be resolved under procedures that were adopted with little or no thought of their possible utilization in litigation arising in a multistate or international context. In response to the growing need for reform of the judicial assistance procedures in the United States, a number of developments have taken place since 1958 that have resulted in the complete revision of the federal practice in this area and the promulgation of the Uniform Interstate and International Procedure Act by the National Conference of Commissioners on Uniform State Laws. It is the adoption of substantial portions of this Uniform Act that the Law Revision Commission now recommends.

In order to improve the procedure for ascertaining sister state and foreign law, the Commission recommends the adoption of Articles 4 and 5 of the Uniform Interstate and International Procedure Act. The Commission also recommends that the sections of the Uniform Act dealing with assistance to foreign courts in obtaining testimony in Michigan be enacted. The provisions of the Uniform Act are more comprehensive, covering service of process as well as depositions and discovery and are considerably more flexible than existing Michigan law. These provisions also provide for methods of determining foreign law and for proof of official records, both within and without the jurisdiction of the United States.

The adoption of these recommendations, which parallel provisions of federal law, will promote the uniformity of laws throughout the United States as well as improve the efficiency of the administration of justice in Michigan.

A study prepared under the direction of the Commission is available to the Legislature. A copy of the proposed statute is attached.

For the Commission

_____
Tom Downs, Chairman

Date: _____

_____
Jason L. Honigman, Vice Chairman

Tentative Draft
12-7-66

INTERSTATE AND INTERNATIONAL PROCEDURE

A bill to amend Act No. 236 of the Public Acts of 1961, entitled "Revised judicature act of 1961,"

as amended, being sections 600.101 to 600.9911 of the Compiled Laws of 1948, by adding 1 new section to chapter 18 to stand as section 1852 and 2 new sections to chapter 21 to stand as sections 2114a and 2118a; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act no 236 of the Public Acts of 1961, being sections 600.101 to 600.9911 of the Compiled Laws of 1946 is amended by adding 1 new section to chapter 18 to stand as section 1852 and 2 new sections to chapter 21 to stand as sections 2114a and 2118a, the added sections to read as follows:

SEC. 1852(1) ANY COURT OF RECORD OF THIS STATE AS PROVIDED IN SUBSECTION (2) MAY ORDER SERVICE UPON ANY PERSON WHO IS DOMICILED OR CAN BE FOUND WITHIN THIS STATE OF ANY DOCUMENT ISSUED IN CONNECTION WITH A PROCEEDING IN A TRIBUNAL OUTSIDE THIS STATE. THE ORDER MAY BE MADE UPON APPLICATION OF ANY INTERESTED PERSON OR IN RESPONSE TO A LETTER ROGATORY ISSUED BY A TRIBUNAL OUTSIDE THIS STATE AND SHALL DIRECT THE MANNER OF SERVICE. SERVICE IN CONNECTION WITH A PROCEEDING IN A TRIBUNAL OUTSIDE THIS STATE MAY BE MADE WITHIN THIS STATE WITHOUT AN ORDER OF COURT. SERVICE UNDER THIS SECTION DOES NOT, OF ITSELF, REQUIRE THE RECOGNITION OR ENFORCEMENT OF AN ORDER,

JUDGMENT, OR DECREE RENDERED OUTSIDE THIS STATE.

(2) ANY COURT OF RECORD OF THIS STATE AS HEREAFTER PROVIDED MAY ORDER A PERSON WHO IS DOMICILED OR IS FOUND WITHIN THIS STATE TO GIVE HIS TESTIMONY OR STATEMENT OR TO PRODUCE DOCUMENTS OR OTHER THINGS FOR USE IN A PROCEEDING IN A TRIBUNAL OUTSIDE THIS STATE. THE ORDER MAY BE MADE UPON THE APPLICATION OF ANY INTERESTED PERSON OR IN RESPONSE TO A LETTER ROGATORY AND MAY PRESCRIBE THE PRACTICE AND PROCEDURE, WHICH MAY BE WHOLLY OR IN PART THE PRACTICE AND PROCEDURE OF THE TRIBUNAL OUTSIDE THIS STATE, FOR TAKING THE TESTIMONY OR STATEMENT OR PRODUCING THE DOCUMENTS OR OTHER THINGS. THE ORDER SHALL BE ISSUED UPON PETITION TO A COURT OF RECORD IN THE COUNTY IN WHICH THE DEPONENT RESIDES OR IS EMPLOYED OR TRANSACTS HIS BUSINESS IN PERSON OR IS FOUND FOR A SUBPOENA TO COMPEL THE GIVING OF TESTIMONY BY HIM. THE COURT MAY HEAR AND ACT UPON THE PETITION WITH OR WITHOUT NOTICE AS THE COURT DIRECTS. TO THE EXTENT THAT THE ORDER DOES NOT PRESCRIBE OTHERWISE, THE PRACTICE AND PROCEDURE SHALL BE IN ACCORDANCE WITH THAT OF THE COURT OF THIS STATE ISSUING THE ORDER. THE ORDER MAY DIRECT THAT THE TESTIMONY OR STATEMENT BE GIVEN, OR DOCUMENT OR OTHER THING PRODUCED, BEFORE A PERSON APPOINTED BY THE COURT. THE PERSON APPOINTED SHALL HAVE POWER TO ADMINISTER ANY NECESSARY OATH. A PERSON WITHIN THIS STATE MAY VOLUNTARILY GIVE HIS TESTIMONY OR STATEMENT OR

PRODUCE DOCUMENTS OR OTHER THINGS FOR USE IN A PROCEEDING BEFORE A TRIBUNAL OUTSIDE THIS STATE.

SEC. 2114A. A PARTY WHO INTENDS TO RAISE AN ISSUE CONCERNING THE LAW OF ANY JURISDICTION OR GOVERNMENTAL UNIT THEREOF OUTSIDE THIS STATE SHALL GIVE NOTICE IN HIS PLEADINGS OR OTHER REASONABLE WRITTEN NOTICE. IN DETERMINING THE LAW OF ANY JURISDICTION OR GOVERNMENTAL UNIT THEREOF OUTSIDE THIS STATE, THE COURT MAY CONSIDER ANY RELEVANT MATERIAL OR SOURCE, INCLUDING TESTIMONY, WHETHER OR NOT SUBMITTED BY A PARTY OR ADMISSIBLE UNDER THE RULES OF EVIDENCE. THE COURT, NOT JURY, SHALL DETERMINE THE LAW OF ANY GOVERNMENTAL UNIT OUTSIDE THIS STATE. ITS DETERMINATION IS SUBJECT TO REVIEW ON APPEAL AS A RULING ON A QUESTION OF LAW.

SEC. 2118A. (1) AN OFFICIAL RECORD KEPT WITHIN THE UNITED STATES, OR ANY STATE, DISTRICT, COMMONWEALTH, TERRITORY, INSULAR POSSESSION THEREOF, OR THE PANAMA CANAL ZONE, THE TRUST TERRITORY OF THE PACIFIC ISLANDS, OR THE RYUKYU ISLANDS, OR AN ENTRY THEREIN, WHEN ADMISSIBLE FOR ANY PURPOSE, MAY BE EVIDENCED BY AN OFFICIAL PUBLICATION THEREOF OR BY A COPY ATTESTED BY THE OFFICER HAVING THE LEGAL CUSTODY OF THE RECORD, OR BY HIS DEPUTY, AND ACCOMPANIED BY A CERTIFICATE THAT THE OFFICER HAS THE CUSTODY. THE CERTIFICATE MAY BE MADE BY A JUDGE OF A COURT OF RECORD HAVING JURISDICTION IN THE GOVERNMENTAL UNIT IN WHICH THE RECORD IS KEPT, AUTHENTICATED BY THE

SEAL OF THE COURT, OR BY ANY PUBLIC OFFICER HAVING A SEAL OF OFFICE AND HAVING OFFICIAL DUTIES IN THE GOVERNMENTAL UNIT IN WHICH THE RECORD IS KEPT, AUTHENTICATED BY THE SEAL OF HIS OFFICE.

(2) A FOREIGN OFFICIAL RECORD, OR AN ENTRY THEREIN, WHEN ADMISSIBLE, FOR ANY PURPOSE, MAY BE EVIDENCED BY AN OFFICIAL PUBLICATION OR COPY THEREOF, ATTESTED BY A PERSON AUTHORIZED TO MAKE THE ATTESTATION, AND ACCOMPANIED BY A FINAL CERTIFICATION AS TO THE GENUINENESS OF THE SIGNATURE AND OFFICIAL POSITION (1) OF THE ATTESTING PERSON, OR (2) OF ANY FOREIGN OFFICIAL WHOSE CERTIFICATE OF GENUINENESS OF SIGNATURE AND OFFICIAL POSITION EITHER (A) RELATES TO THE ATTESTATION OR (B) IS IN A CHAIN OF CERTIFICATES OF GENUINENESS OF SIGNATURE AND OFFICIAL POSITION RELATING TO THE ATTESTATION. A FINAL CERTIFICATION MAY BE MADE BY A SECRETARY OF EMBASSY OR LEGATION, CONSUL GENERAL, CONSUL, VICE CONSUL, OR CONSULAR AGENT OF THE UNITED STATES, OR A DIPLOMATIC OR CONSULAR OFFICIAL OF THE FOREIGN COUNTRY ASSIGNED OR ACCREDITED TO THE UNITED STATES. IF REASONABLE OPPORTUNITY HAS BEEN GIVEN TO ALL PARTIES TO INVESTIGATE THE AUTHENTICITY AND ACCURACY OF THE DOCUMENTS, THE COURT MAY, FOR GOOD CAUSE SHOWN, (1) ADMIT AN ATTESTED COPY WITHOUT FINAL CERTIFICATION OR (2) PERMIT THE FOREIGN OFFICIAL RECORD TO BE EVIDENCED BY AN ATTESTED SUMMARY WITH OR WITHOUT A FINAL CERTIFICATION.

(3) THE STATUTES, CODES, WRITTEN LAWS, EXECUTIVE ACTS, OR LEGISLATIVE OR JUDICIAL PROCEEDINGS OF ANY DOMESTIC OR FOREIGN JURISDICTION OR GOVERNMENTAL UNIT THEREOF MAY ALSO BE EVIDENCED BY ANY PUBLICATION PROVED TO BE COMMONLY ACCEPTED AS PROOF THEREOF IN THE TRIBUNALS HAVING JURISDICTION IN THAT GOVERNMENTAL UNIT.

(4) A WRITTEN STATEMENT THAT AFTER DILIGENT SEARCH NO RECORD OR ENTRY OF A SPECIFIED TENOR IS FOUND TO EXIST IN THE RECORDS DESIGNATED BY THE STATEMENT, AUTHENTICATED AS PROVIDED IN THIS ARTICLE IN THE CASE OF A DOMESTIC RECORD, OR COMPLYING WITH THE REQUIREMENTS OF THIS ARTICLE FOR A SUMMARY IN THE CASE OF A RECORD IN A FOREIGN COUNTRY, IS ADMISSIBLE AS EVIDENCE THAT THE RECORDS CONTAIN NO SUCH RECORD OR ENTRY.

(5) THE PROOF OF OFFICIAL RECORDS OF ENTRY OR LACK OF ENTRY THEREIN MAY BE MADE BY ANY OTHER METHOD AUTHORIZED BY LAW.

Section 2. Section 1851 of Chapter 18 and sections 2114, 2115, and 2118 of Chapter 21 of Act No. 236 of the Public Acts of 1961, being sections 600.1851, 600.2114, 600.2115, and 600.2118 of the Compiled Laws of 1948, are repealed.

Final Draft
Approved 11-17-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to the Dead Man's Statute

Under common-law doctrines, parties and persons interested in the outcome of litigation were considered incompetent to testify. This disqualification has been removed as a result of legislation in American jurisdictions. However, one vestige of the old common-law rule remains in Michigan and 29 other states. Known as the "Dead Man's Statute," the statutory exception provides that in actions by or against representatives of a deceased person a party "shall not be admitted to testify at all as to matters which, if true, must have been equally within the knowledge of such deceased person." The theory is that where one party dies, the living party should not be allowed to testify because the lips of the other party are sealed.

The Dead Man's Statute has been criticized since its enactment. A major criticism is that more honest claims are defeated than fictitious claims could be established if the statute were repealed. Dean Wigmore, perhaps the greatest American authority on evidence, has written: "There should be some tears for the living as well as for the dead." The Michigan Supreme Court has criticized the statute on numerous occasions. Furthermore, it has led to a vast amount of appellate litigation. By 1915, over 230 cases had been decided under the statute by the Michigan Supreme Court and hundreds since. Over 44 pages of the Michigan Statutes Annotated are devoted to cases decided under the statute. The results would seem to indicate that the current legislation is irrational, inconsistent, and unworkable.

To correct the harshness of the present statute which often prevents legitimate claims from being enforced, the Michigan Law Revision Commission recommends that it be replaced by a statute placing a more limited restriction upon admissibility of testimony of the surviving party. The new statute proposes that testimony of the living party would be admitted if any material portion of the testimony is corroborated. It is not intended that every portion of the survivor's testimony need be corroborated. Rather, if any material portion is corroborated either by testimony of other witnesses or by demonstrative evidence, then the testimony of the survivor should be admitted.

The requirement of corroboration coupled with the availability of modern pleading and discovery procedures will materially reduce the possibility of false testimony. At the same time, the injustice caused to survivors by not being able to prove their claims should be reduced substantially. To protect the deceased's estate, however, some additional protection may be desirable. Therefore, it is

recommended that the statute also make admissible memoranda and declarations of the decedent and other evidence of the decedent's acts and habits relevant to the claims of the surviving party which under present rules of evidence might be barred as self-serving, immaterial, or hearsay statements or on other grounds.

A study of this problem has been made at the direction of the Commission which is available to the Legislature.

The Commission recommends the enactment of the attached statute.

By the Commission

Tom Downs, Chairman

Jason L. Honigman, Vice Chairman

Date:

Approved 11-17-66

DEAD MAN'S STATUTE

A bill to amend Act No. 236 of the Public Acts of 1961, entitled "Revised judicature act of 1961,"

as amended, being sections 600.101 to 600.9911 of the Compiled Laws of 1948, by adding a section 2165; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 236 of the Public Acts of 1961, as amended, being sections 600.101 to 600.9911 of the Compiled Laws of 1948, is amended by adding a section 2165 to read as follows:

SEC. 2165. (1) NO JUDGMENT SHALL BE RENDERED AGAINST A PERSON INCAPABLE OF TESTIFYING IN FAVOR OF A PARTY FOUNDED ON SUCH PARTY'S OWN TESTIMONY AS TO ANY MATTER WHICH, IF TRUE, MUST HAVE BEEN EQUALLY WITHIN THE KNOWLEDGE OF THE PERSON INCAPABLE OF TESTIFYING, UNLESS SOME MATERIAL PORTION OF HIS TESTIMONY IS SUPPORTED BY SOME OTHER MATERIAL EVIDENCE TENDING TO CORROBORATE HIS CLAIM.

(2) A "PERSON INCAPABLE OF TESTIFYING" AS USED HEREIN INCLUDES ANY INDIVIDUAL WHO IS INCAPABLE OF TESTIFYING BY REASON OF DEATH OR INCOMPETENCY AND HIS HEIRS, LEGAL REPRESENTATIVES, OR ASSIGNS: AND INCLUDES ANY INDIVIDUAL, CORPORATION OR OTHER ENTITY, OR THE SUCCESSORS THEREOF, WHOSE AGENT, HAVING

MATERIAL KNOWLEDGE OF THE MATTER, IS INCAPABLE OF TESTIFYING BY REASON OF DEATH OR INCOMPETENCY. A "PARTY'S OWN TESTIMONY" AS USED HEREIN INCLUDES THE TESTIMONY OF HIS AGENTS, SUCCESSORS, ASSIGNS, PREDECESSORS, OR ASSIGNORS.

(3) IN ANY SUCH ACTIONS, ALL ENTRIES, MEMORANDA AND DECLARATIONS BY THE INDIVIDUAL SO INCAPABLE OF TESTIFYING, RELEVANT TO THE MATTER, AS WELL AS EVIDENCE OF HIS ACTS AND HABITS OF DEALING TENDING TO DISPROVE OR SHOW THE IMPROBABILITY OF THE CLAIMS OF THE ADVERSE PARTY, MAY BE RECEIVED IN EVIDENCE.

Section 2. Section 2160 of Act No. 236 of the Public Acts of 1961, being section 600.2160 of the Compiled Laws of 1948, is repealed.

Final Draft
12-5-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Qualifications of Fiduciaries

Michigan is one of twelve states which currently prohibit an individual who is not a resident of the state from qualifying as a fiduciary by appointment of the probate court. The remaining thirty-eight states, the District of Columbia, Puerto Rico, and the Virgin Islands permit non-residents to qualify as fiduciaries usually subject to certain limitations and restrictions. In five states, a non-resident must file a bond and designate an agent within the state for service of process. In sixteen states only the designation of a local agent for service of process is required. Two states require only the filing of a bond. Three states require a resident co-fiduciary, and eight states impose no restrictions whatsoever. One state permits non-residents to qualify if the state of their residence provides reciprocity. Five states permit non-residents to qualify as executors and not as administrators.

In view of the increasing mobility of American citizens, the number of situations in which two or more states may be involved in the administration of estates and other probate matters is increasing. Many of the problems would be simplified if the same person were permitted to act in more than one state. Furthermore, the disqualification of non-residents can cause family hardship. In 1965, for example, the Michigan legislation was amended to permit a non-resident to serve as guardian of resident minors where the will of the surviving parent nominates the non-resident as guardian.

The existing Michigan legislation, Comp. Laws 1948, §704.27, M.S.A. §27.3178(278), follows:

> "It is hereby declared to be the public policy of this state to require that all persons acting in a representative capacity under appointment of a probate court, as fiduciary, shall at all times be amenable to process issued out of the courts of this state, and to that end no person shall hereafter be deemed suitable and competent to act as a fiduciary, who is not a resident of this state and a citizen of the United States. Nothing herein shall be construed to limit the power of the court to appoint any bank or trust company authorized to do business in this state, or to appoint a nonresident of this state guardian of the person of a resident minor when the last will and testament of the surviving parent of the minor nominates the nonresident as guardian."

The Law Revision Commission recommends that legislation be enacted which permits individual non-resident fiduciaries to act in this state and which more specifically defines the qualifications of fiduciaries. At the same time, the Commission believes that non-resident fiduciaries should at all times be amenable to process issued out of the courts of Michigan for the protection of resident beneficiaries and creditors having claims.

A copy of the proposed statute is attached.

For the Commission

Tom Downs, Chairman

Jason L. Honigman, Vice Chairman

Date: _____

Final Draft
11-3-66

QUALIFICATIONS OF FIDUCIARIES

A bill to amend Chapter 4 of Act No. 288 of the Public Acts of 1939, entitled

"The probate code,"

as amended, being sections 704.1 to 704.60 of the Compiled Laws of 1948, by adding a new section 27a; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Chapter 4 of Act No. 288 of the Public Acts of 1939, as amended, being sections 704.1 to 704.60 of the Compiled Laws of 1948, is amended by adding a new section 27a to read as follows:

SEC. 27A. A PERSON IS NOT QUALIFIED TO SERVE AS A FIDUCIARY UNDER A TESTAMENTARY TRUST OR APPOINTMENT OF A COURT OF RECORD OF THIS STATE WHO IS:

(A) UNDER 21 YEARS OF AGE;

(B) OF UNSOUND MIND;

(C) A NONRESIDENT OF THIS STATE UNLESS PRIOR TO HIS QUALIFICATION, OR WITHIN 30 DAYS AFTER HE CEASES TO BE A RESIDENT, HE FILES AN INSTRUMENT WITH THE COURT DESIGNATING A RESIDENT AGENT APPROVED BY THE COURT TO ACCEPT SERVICE OF PROCESS IN ALL ACTIONS OR PROCEEDINGS WITH RESPECT TO THE ESTATE OR HIS CONDUCT AS A FIDUCIARY;

(D) A CORPORATION NOT AUTHORIZED TO ACT AS A FIDUCIARY IN THIS STATE; OR

(E) A PERSON WHOM THE COURT FINDS UNSUITABLE.

Section 2. Section 27 of Chapter 4 of Act No. 288 of the Public Acts of 1939, as amended, being section 704.27 of the Compiled Laws of 1948, is repealed.

Final Draft
12-5-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Authority of a Corporation To Become a Member of a Partnership

In a 1965 opinion, the Attorney General of Michigan ruled that a corporation could not become a member of a partnership. A. G. Op. No. 3652, October 18, 1965. This opinion was based on the following premises: (1) that the managerial function of a corporate board of directors may not be delegated to non-corporate members of a partnership; (2) that the provision of the Uniform Partnership Act adopted in 1917 which authorizes a corporation to become a partner cannot be given effect because of the lack of expression of that subject in the title; and (3) that corporations have only those powers expressly conferred by statute. The decision in the case of White Star Line v. Star Line of Steamers, 141 Mich. 604 (1905) supports this conclusion by way of dicta.

The weight of authority in the United States is that a corporation cannot become a member of a partnership in the absence of express statutory authorization. However, in at least eight states statutes have expressly authorized corporations to become members of partnerships. Under Michigan judicial decisions, it is clear that the other members of the partnership would be agents of the corporate members. Beecher v. Bush, 45 Mich. 188 (1881); Saums v. Parfet, 270 Mich. 165 (1935); Penner v. De Nike, 288 Mich. 488 (1939). Furthermore, Section 15 of the Michigan General Corporation Act, Comp. Laws 1948, §450.15, M.S.A. §21.15, permits the board of directors to delegate the managerial function.

The Law Revision Commission believes that authorizing a corporation to become a member of a partnership would not result in any improper delegation of the managerial function. Furthermore, such authorization would be beneficial in many situations where a partnership arrangement between corporations and individuals may be desirable to carry out business activities. The Commission recommends, therefore, that legislation be enacted which specifically authorizes corporations to become members of partnerships.

A study of the problem has been prepared at the direction of the Commission and is available to the Legislature. A copy of the proposed statute is attached.

For the Commission

_____
Tom Downs, Chairman

_____
Jason L. Honigman, Vice Chairman

Date: _____

Second Draft
11-30-66

POWER OF CORPORATION TO BECOME A PARTNER

A bill to amend Act No. 327 of the Public Acts of 1931, entitled "Michigan general corporation act,"
as amended, being sections 450.1 to 450.192 of the Compiled Laws of 1948, by adding a new section 10a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 327 of the Public Acts of 1931, as amended, being sections 450.1 to 450.192 of the Compiled Laws of 1948, is amended by adding a new section 10a to read as follows:

SEC. 10A. EVERY CORPORATION, UNLESS OTHERWISE PROVIDED OR INCONSISTENT WITH THE ACT UNDER WHICH IT IS FORMED, MAY BECOME A MEMBER OF OR PARTICIPANT IN ANY PARTNERSHIP, WHETHER THE CORPORATION IS A GENERAL OR LIMITED PARTNER, JOINT VENTURE OR ANY OTHER BUSINESS ENTERPRISE OR BUSINESS ENTITY FOR CARRYING ON ANY OR ALL OF THE PURPOSES FOR WHICH THE CORPORATION IS FORMED.

Revised Final Draft
Approved 11-28-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Use of Assumed Names

Most states have fictitious names statutes which require local filing of assumed business names. The primary purpose of these statutes is to enable creditors and persons who may have been injured to ascertain the identity of the persons with whom they are dealing or who may have injured them. The customary sanctions for disregard of the statutes are criminal penalities and the barring of suits on contracts until a statement is filed disclosing the identities of the persons trading under an assumed business name.

Michigan has had such legislation in force since 1907. Under Act No. 101 of the Public Acts of 1907, Comp. Laws 1948, §§445.1 - 445.5, M.S.A. §§19.821 - 19.827, any persons transacting business under an assumed name must file a statement with the county clerk indicating the true names of the persons owning and conducting the business. The statement is to be filed in each county in which business is transacted under an assumed name, and the filing fee is $2.00. The filed certificate authorizes use of the assumed name for five years and may be renewed. County clerks are to give notice of the necessity for renewal. County clerks may reject an assumed name that is likely to mislead the public or which is likely to lead to confusion or deception. If the assumed name concern goes out of business, the county clerk is to be notified. Filing by non-residents constitutes consent to suits in the courts of Michigan. County clerks receive a $3.00 fee for filing certificates and a $2.00 fee for filing consents. Failure to comply with the act constitutes a misdemeanor and suits by persons failing to comply are barred until the act has been complied with fully.

The Michigan legislation generally is satisfactory, but a major defect exists because it does not apply to corporations organized under the law of Michigan or elsewhere nor does it apply to limited, general, or special partnerships organized in Michigan. Corporations and partnerships both have occasions to engage in operating businesses under assumed names. To do so, they must either organize paper corporations or register in the name of an individual with a separate acknowledgement of trust for the real party in interest. Where this occurs, creditors are not afforded the protections intended by the assumed name statute. Therefore, the Law Revision Commission recommends that the existing legislation be amended to authorize the use of the present statute by corporations and partnerships. To accomplish this result it is also necessary to amend the act to provide adequate disclosure if the person conducting business under an assumed name is someone other than an individual.

A copy of the proposed statute is attached.

For the Law Revision Commission

_____
Tom Downs, Chairman

_____
Jason L. Honigman, Vice Chairman

Date: _____

Final Draft
11-30-66

ASSUMED NAME STATUTE

A bill to amend sections 1 and 4 of Act No. 101 of the Public Acts of 1907, entitled

"An act to regulate the carrying on of business under an assumed or fictitious name,"

Section 1 as amended by Act No. 151 of the Public Acts of 1949, being sections 445.1 and 445.4 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 1 and 4 of Act No. 101 of the Public Acts of 1907, section 1 as amended by Act No. 151 of the Public Acts of 1949, being sections 445.1 and 445.4 of the Compiled Laws of 1948, are amended to read as follows:

Sec. 1. No person ~~or persons~~ shall ~~hereafter~~ carry on or conduct or transact business in this state under any assumed name, or under any designation, name or style other than the real name ~~or names~~ of the ~~individual or individuals~~ PERSON owning, conducting or transacting such business, unless such person ~~or persons~~ shall file in duplicate in the office of the clerk of the county or counties in which such person ~~or persons own, conduct, or transact, or intend~~ OWNS, CONDUCTS, OR TRANSACTS, OR INTENDS to own, conduct, or transact such business, or ~~maintain~~ MAINTAINS an office or place of business, a certificate on a form furnished by the county clerk setting forth the name under which such business owned is, or is to be, conducted, or transacted, and the true or real full name ~~or names~~ of the person ~~or persons~~ owning, conducting or transacting the same, with the ~~home and postoffice~~ address ~~or~~

addresses of ~~said~~ THE person ~~or persons~~, at which time ~~said~~ THE person ~~or persons~~ shall pay the clerk a filing fee of $2.00. ~~Said~~ THE certificate shall be executed and duly acknowledged by the person ~~or persons~~ so owning, conducting, or intending to conduct ~~said~~ THE business. ~~Provided, That~~ The selling of goods by sample or through traveling agents or traveling salesmen or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this act as conducting or transacting business so as to require the filing of ~~said~~ THE certificates. The county clerk shall certify the duplicate and return it to the applicant. AS USED IN THIS ACT, "PERSON" MEANS ANY ONE OR MORE INDIVIDUALS, CORPORATIONS, PARTNERSHIPS, LIMITED PARTNERSHIPS, TRUSTS, FIDUCIARIES OR ANY OTHER ENTITIES CAPABLE OF CONTRACTING, AND "ADDRESS" MEANS THE RESIDENCE OR PRINCIPAL BUSINESS ADDRESS OF THE PERSON.

Sec. 4. ~~This act shall in no way affect or apply to any corporation, partnership association, limited or special partnership duly organized under the laws of this state, or to any corporation organized under the laws of any other state and lawfully doing business in this state.~~ THE CERTIFICATE REFERRED TO IN SECTION 1, IN THE CASE OF ANY PERSON NAMED THEREIN OTHER THAN AN INDIVIDUAL, SHALL STATE THE NATURE OF THE ENTITY; THE STATUTORY LAW, IF ANY, PURSUANT TO WHICH IT WAS ORGANIZED; THE PLACE AND THE DATE OF FILING WITH ANY GOVERNMENTAL AUTHORITY, IDENTIFYING IT, OF ANY DOCUMENTS, DESCRIBING THEM, REQUIRED TO BE FILED IN ORDER TO ACCOMPLISH

OR COMPLETE THE ORGANIZATION OF THE ENTITY AND TO ENTITLE IT TO OPERATE OR TRANSACT BUSINESS UNDER THE LAWS OF THIS STATE AND, IF ORGANIZED ELSEWHERE, OF THE STATE OR COUNTRY WHERE ORGANIZED; AND, IF A FIDUCIARY, THE DATE OF THE LAST WILL AND TESTAMENT OR TRUST AGREEMENT AND THE COURT, PLACE AND DATE OF ADMISSION TO PROBATE OF THE WILL OR THE NAMES AND ADDRESSES OF THE PARTIES TO THE TRUST AGREEMENT, AND THE NAME AND ADDRESS OF EACH FIDUCIARY; AND, IF A PARTNERSHIP OR LIMITED PARTNERSHIP, THE NAME AND ADDRESS OF EACH GENERAL PARTNER.

Final Draft
12-6-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Stockholder Approval of Mortgage of Corporate Assets

Under existing Michigan law it is uncertain as to whether or not the stockholders must approve a mortgage of all or substantially all of the assets of a corporation in the absence of any provision in the articles or bylaws of the corporation. Under Section 57 of the Michigan General Corporation Act, Comp. Laws 1948, §450.57, M.S.A. §21.57, stockholder approval is required where there is a sale, lease, or exchange of all or substantially all of the corporate assets. The stockholder approval must be by an affirmative vote of the holders of a majority of the shares of each class of stock either at a stockholder's meeting or by written consent In some states legal authority exists to the effect that a sale may be interpreted to include a mortgage because foreclosure and sale may follow default. However, there are no Michigan cases directly dealing with the problem. The result is that many attorneys require stockholder approval of a mortgage of all or substantially all of the assets of a corporation.

The legislative history of the Michigan legislation, however, leads one to conclude that stockholder approval is not required. Prior to the adoption of the Michigan General Corporation Act in 1931, Michigan had specific legislation requiring stockholder consent for such mortgages as well as statutory provisions dealing with sales. Act No. 84, P.A. 1921, Chapter 2, Section 12. Because the "sale" statute was in effect reenacted in 1931 and the mortgage statute was eliminated, the legislative history indicates that stockholder approval is not required by Michigan law today. Nonetheless, because of the absence of any conclusive judicial opinion on the problem and because some doubt has been expressed within the legal profession which hampers commercial transactions involving such mortgages, the Law Revision Commission believes that the law should be clarified on this subject.

In eight states, stockholder approval is required; in nine states, stockholder approval is required if the mortgage is not in the regular course of business; in twenty-seven jurisdictions, stockholder consent is not required in any case. The Model Business Corporation Act does not require stockholder approval. The current trend of state legislative actions is to permit the mortgaging of all corporate assets without stockholder approval whether or not the mortgage is in the regular course of business. Because Michigan law conforms to this trend and because statutory clarification is desirable to avoid unnecessary expenditures, the Commission recommends that the Michigan General Corporation Act be amended to specifically authorize a mortgage of all or any part of the assets of a corporation without stockholder approval unless the

articles or bylaws of the corporation provide otherwise.

A study of the subject made at the direction of the Commission is available to the Legislature. A copy of the proposed statute is attached.

For the Commission

Tom Downs, Chairman

Jason L. Honigman, Vice Chairman

Second Draft
11-30-66

MORTGAGE OF CORPORATE ASSETS WITHOUT STOCKHOLDER APPROVAL

A bill to amend Act No. 327 of the Public Acts of 1931, entitled "Michigan general corporation act,"

as amended, being sections 450.1 to 450.192 of the Compiled Laws of 1948, by adding a new section 57a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 327 of the Public Acts of 1931, as amended, being sections 450.1 to 450.192 of the Compiled Laws of 1948, is amended by adding a new section 57a to read as follows:

SEC. 57A. UNLESS OTHERWISE PROVIDED IN THE ARTICLES OR BYLAWS, THE BOARD OF DIRECTORS MAY AUTHORIZE THE MORTGAGE OR PLEDGE OF ALL OR ANY PART OF THE ASSETS OF THE CORPORATION WITHOUT THE VOTE OR CONSENT OF THE STOCKHOLDERS.

Tentative Draft
12-6-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Stockholder Action Without Meeting

Currently, under Michigan law, stockholder action is required on a number of matters, including election of the members of the board of directors, waiver of pre-emptive rights, amendment of the articles of incorporation, mergers or consolidation, the sale, lease, or exchange of substantially all of the corporate assets, voluntary dissolution, adoption and amendment of by-laws, and the establishment of consideration for shares without par value. Michigan law also requires that stockholder action take place at a duly constituted meeting of the stockholders, but concurrence may be given by written consent with respect to waiver of pre-emptive rights to issues of stock, the sale, lease, or exchange of substantially all of the corporate assets, the dissolution and liquidation in kind of the corporate assets, and the establishment of consideration to be received for shares without par value.

The rule requiring the convening of a duly constituted meeting as a condition of stockholder action has been criticized by several writers and several courts on the ground that there is no necessity of a formal meeting if the stockholders are unanimous in their views. The Model Business Corporation Act, in response to the criticism, authorizes stockholder action without a meeting if all shareholders entitled to vote on the question consent in writing. Twenty-two states and the District of Columbia have enacted such legislation. Eleven other states have enacted legislation involving the same underlying approach. The legislation in these thirty-four jurisdictions is particularly helpful in the case of small, close corporations. If the shares of a corporation are widely held, the legislation is not likely to be used because of the difficulties involved in obtaining unanimous consent and because proxies may be used. Nonetheless, because of the large number of small, close corporations in Michigan, the Law Revision Commission believes that legislation authorizing stockholder action without a meeting if all stockholders consent to the action would be beneficial.

The Commission therefore recommends the enactment of the attached statute.

For the Commission

Tom Downs, Chairman

Jason L. Honigman, Vice Chairman

Date: _____

Tentative Draft
12-6-66

STOCKHOLDER ACTION WITHOUT MEETING

A bill to amend Act No. 327 of the Public Acts of 1931, entitled "Michigan general corporation act,"

as amended, being sections 450.1 to 450.192 of the Compiled Laws of 1948, by adding a new section 39a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 327 of the Public Acts of 1931, as amended, being sections 450.1 to 450.192 of the Compiled Laws of 1948, is amended by adding a new section 39a to read as follows:

SEC. 39A. ANY ACTION REQUIRED BY THIS ACT TO BE TAKEN AT A MEETING OF THE SHAREHOLDERS OF A CORPORATION, OR ANY ACTION WHICH MAY BE TAKEN AT A MEETING OF THE SHAREHOLDERS, MAY BE TAKEN WITHOUT A MEETING IF A CONSENT IN WRITING, SETTING FORTH THE ACTION SO TAKEN, SHALL BE SIGNED BY ALL THE SHAREHOLDERS ENTITLED TO VOTE WITH RESPECT TO THE SUBJECT MATTER THEREOF. SUCH CONSENT SHALL HAVE THE SAME EFFECT AS A UNANIMOUS VOTE OF SHAREHOLDERS AND MAY BE STATED AS SUCH IN ANY ARTICLES OR DOCUMENT FILED WITH THE SECRETARY OF STATE UNDER THIS ACT.

Final Draft
Approved 11-17-66

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Original Jurisdiction of the Court of Appeals

The Michigan Constitution, 1963, Art. VI, § 10, provides: "The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." In addition, the Constitution specifically empowers the Supreme Court and Circuit Courts to hear and determine prerogative and remedial writs, but a similar power is not conferred on the Court of Appeals. Michigan Constitution, Art. VI, § 4.13.

Act No. 281 of the Public Acts of 1964, creating the Court of Appeals, did not contain any clear grant of authority to the Court of Appeals to hear original proceedings for superintending control, habeas corpus, mandamus, and quo warranto. Nonetheless, in order to handle the jurisdictional problems involved the Supreme Court by rule conferred jurisdiction with respect to the extraordinary writs upon the Court of Appeals. The problem has been recognized by a number of authorities and it appears that legislative conferral of jurisdiction would be appropriate and beneficial.

With respect to superintending control, in the opinion of the Commission, Section 310 of the Revised Judicature Act adequately implies jurisdiction to issue orders of superintending control on original application as contemplated by General Court Rule 711. However, authority to entertain original actions for habeas corpus, mandamus against a state officer, and quo warranto remains in doubt. The Commission believes that there is no question concerning the wisdom of the court rules which purport to delegate jurisdiction with respect to these extraordinary writs to the Court of Appeals. See GCR 1963, 710.1(3), 712.1(1), 714.1(1), 715.1(1), and 816.2(2). In at least two cases the Court of Appeals has acted on an original action for mandamus, but in neither was the jurisdictional question raised.

To remove any doubt concerning the validity of the existing court rules, the Commission recommends the enactment of the attached statute.

For the Commission

Tom Downs, Chairman

Date_____

Jason L. Honigman, Vice Chairman

Approved 11-17-66

ORIGINAL JURISDICTION OF THE COURT OF APPEALS

A bill to amend sections 310, 4304 and 4401 of Act No. 236 of the Public Acts of 1961, entitled

"Revised judicature act of 1961,"

section 310 as added by Act No. 281 of the Public Acts of 1964, being sections 600.310, 600.4304 and 600.4401 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 310, 4304 and 4401 of Act No. 236 of the Public Acts of 1961, section 310 as added by Act No. 281 of the Public Acts of 1964, being sections 600.310, 600.4304 and 600.4401 of the Compiled Laws of 1948, are amended to read as follows:

Sec. 310. The court of appeals has ORIGINAL JURISDICTION TO ISSUE PREROGATIVE AND REMEDIAL WRITS OR ORDERS AS PROVIDED BY RULES OF THE SUPREME COURT, AND HAS authority to issue any writs, ~~directive~~ DIRECTIVES and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it.

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

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

(2) THE COURT OF APPEALS, OR A JUDGE THEREOF;

~~(2)~~ (3) The circuit courts, or a judge thereof;

~~(3)~~-(4) The municipal courts of record, including but not limited to the recorder's court of the city of Detroit, ~~the superior court of the city of Grand Rapids~~, common pleas court, or a judge thereof.

Sec. 4401. All actions for mandamus against state officers shall be commenced in the COURT OF APPEALS OR IN THE supreme court, AS PROVIDED BY RULES OF THE SUPREME COURT.

Final Draft
12-6-66

RECOMMENDATIONS OF THE LAW REVISION COMMISSION TO THE LEGISLATURE

Relating to Appeals From Probate Court

Appeals from the probate court are under present law taken to the circuit court to be tried de novo. This practice is a carryover from the days when probate judges were not required to be lawyers, their proceedings were informal and no record or an inadequate record was made of the proceedings in the probate court. Today the probate court is a court of record, staffed by full-time lawyer judges, except for non-attorney judges in office under the Constitution, with a complete record of all proceedings had before the court.

Some years ago, the legislature changed the practice on appeals from common pleas courts whereby trial de novo in the circuit court was eliminated and appeal was taken to the circuit court only on the record made before the common pleas court. Since the creation of the court of appeals, appeals from the common pleas court have been taken directly to the court of appeals without trial de novo. There appears to be no sound reason why appeals from the probate court should not be similarly handled. There is at this time no justification for two de novo trials in probate court matters.

The legislation herein recommended eliminates all provisions of the probate code requiring appeals to be taken to the circuit court and the procedure applicable thereto. Instead, it directs that appeals from orders of the probate court be taken directly to the court of appeals under rules of the Supreme Court. It grants superintending control over the probate courts to the Supreme Court and the Court of Appeals, in lieu of the circuit courts. Such change is warranted inasmuch as most issues of a superintending control nature are raised by appeal from the lower court's order. Moreover, the rules of the court aptly provide that where appeal is available, that method of superintending control should be used in preference to original writs or other actions. GCR 711.4.

The present practice as to certification of will contests from the probate court to the circuit court is basically retained in view of the general importance of a trial involving a will contest and keeping in mind that the probate court is more largely an administrative court than a trial court. The circuit court is basically a trial court and in a matter as important as a will contest where parties can demand a jury trial, it would seem that it can be most efficiently handled in the circuit court.

The present provisions of section 37 of Chapter 1 of the probate code

are re-enacted in different form as the new section 45b. The provisions of the present section 37 which permit no appeal from the designated classification of orders of the probate court have been construed by the Michigan Supreme Court to mean that there is still a right of appeal on issues of law by way of mandamus. In the new provision, the right to appeal such orders is recognized in the same way as the right to appeal from any other orders of the probate court except that provision is made that such orders shall not be stayed pending appeal in the absence of a specific order of the court for good cause shown.

The proposed legislation also amends or repeals other laws involving appeals from the probate court, including estates of missing persons, mental incompetents, orders of the juvenile court, appeals from condemnation matters tried in the probate court and proceedings for specific performance pursuant to land contracts of a decedent. Amendment is also made of the Revised Judicature Act, Sec. 308, Comp. Laws, 1948, §600.308, M.S.A. §27A.308, governing the jurisdiction of the court of appeals so as to include appeals from the probate court. Because all three statutes relate to appeals from probate court, they should all be enacted or rejected at the same time.

The enactment of the attached statutes is recommended.

For the Commission

_____
Tom Downs, Chairman

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Jason L. Honigman, Vice Chairman

Date: _____

APPEALS FROM PROBATE COURT

Bill No. 1

Second Draft

November 30, 1966

A bill to amend section 26 of chapter 5, section 53 of chapter 9 and section 22 of chapter 12A of Act No. 288 of the Public Acts of 1939 , entitled

"The probate code,"

section 22 of chapter 12A as amended by Act No. 181 of the Public Acts of 1966, being sections 705.26, 709.53 and 712A.22 of the Compiled Laws of 1948; to add 3 new sections to chapter 1 to stand as sections 45a, 45b and 45c; and to repeal certain acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 26 of chapter 5, section 53 of chapter 9 and section 22 of chapter 12A of Act No. 288 of the Public Acts of 1939, section 22 of chapter 12A as amended by Act No. 181 of the Public Acts of 1966, being sections 705.26, 709.53 and 712A.22 of the Compiled Laws of 1948, are amended and 3 new sections are added to chapter 1 to stand as sections 45a, 45b and 45c, the amended and added sections to read as follows:

CHAPTER 1

SEC. 45A. (1) IN ALL CASES NOT SPECIFICALLY PROHIBITED BY STATUTE, ANY PERSON AGGRIEVED BY ANY ORDER, SENTENCE OR JUDGMENT OF A JUDGE OF THE PROBATE COURT MAY APPEAL THEREFROM TO THE COURT OF APPEALS AS PROVIDED BY RULES OF THE SUPREME COURT.

(2) NOTICE OF APPEAL SHALL BE GIVEN TO ALL INTERESTED PARTIES AS PROVIDED BY RULES OF THE SUPREME COURT.

(3) THE APPEALS SHALL NOT BE TRIED DE NOVO.

(4) THE SUPREME COURT AND THE COURT OF APPEALS SHALL HAVE SUPERINTENDING CONTROL OVER THE PROBATE COURTS AS PROVIDED BY RULES OF THE SUPREME COURT.

SEC. 45B. AN ORDER OF THE PROBATE COURT REMOVING A FIDUCIARY FOR FAILURE TO GIVE A BOND OR TO RENDER AN ACCOUNTING; APPOINTING SPECIAL ADMINISTRATORS OR SPECIAL GUARDIANS, GRANTING A NEW TRIAL OR REHEARING, GRANTING AN

ALLOWANCE TO THE WIDOW OR CHILDREN OF A DECEDENT, OR GRANTING PERMISSION TO SUE ON A FIDUCIARY'S BOND, SHALL NOT BE STAYED PENDING APPEAL UNLESS ORDERED BY THE COURT ON MOTION FOR GOOD CAUSE SHOWN.

SEC. 45C. IN ALL CONTESTS OVER THE ALLOWANCE OR DISALLOWANCE OF WILLS, THE PROBATE JUDGE AT THE REQUEST OF ANY INTERESTED PARTY BEFORE TRIAL IN THE PROBATE COURT, SHALL CERTIFY SUCH CONTEST FOR TRIAL IN THE CIRCUIT COURT FOR THE SAME COUNTY AS PROVIDED BY RULES OF THE SUPREME COURT.

CHAPTER 5

Sec. 26. Appeals may be had to the ~~circuit court~~ COURT OF APPEALS as in the case of such appeals in matters relating to the estates of deceased persons ~~and the judgments of the circuit court may in like manner be reviewed in the supreme court on appeal,~~ in the following cases:

(a) By any person interested, as apparent beneficiary, in the estate of any absent person, as defined in this act, from an order appointing an administrator of such estate or denying such appointment; or from an order admitting a will of such absent person to probate or denying such admission.

(b) By any person adversely affected, from an order of sale, mortgage, or other disposition prior to an order of assignment and distribution of property of an absent person, as defined in this act.

(c) By any person adversely affected, from the allowance or disallowance in whole or in part of any claim against the estate of an absent person, as defined in this act.

(d) By any person adversely affected, from an order affirming or denying any claimant to be the absent person, whose estate is being administered.

(e) By any person adversely affected, from an order affirming the right of any claimant as successor of the absent person, whose estate is being administered.

(f) By any person adversely affected, from an order allowing or refusing to allow in whole or in part the account of any administrator or executor.

(g) By any person adversely affected, from an order of assignment and distribution.

(h) By any person adversely affected, from any order where a like appeal or review would lie, in case the absent person were actually dead.

(i) By any person interested as beneficiary, from an order finding or refusing to find the existence of an apparent beneficiary, who has been absent as defined in this act.

(j) By any person adversely affected, from an order affirming or denying any claimant to be the absent person

or as having succeeded to the rights of an absent person interested in the estate of a deceased person being administered.

CHAPTER 9

Sec. 53. Any person interested may appeal from such order to the ~~circuit court for the same county, as in other cases;~~ COURT OF APPEALS IN THE SAME MANNER AS FROM OTHER ORDERS OF THE PROBATE COURT; but if no appeal ~~be~~ IS taken from ~~such~~ THE order within the time limited therefor by law, or if ~~such~~ THE order ~~be~~ IS affirmed on appeal, ~~it shall be the duty of~~ the fiduciary ~~to~~ SHALL execute the conveyance according to the direction contained in ~~such~~ THE order, and a certified copy of the order shall be recorded with the deed, in the office of the register of deeds in the county where the lands lie, and shall be evidence of the correctness of the proceedings, and of the authority of the fiduciary to make the conveyance.

CHAPTER 12A

Sec. 22. Appeal may be taken to the ~~circuit~~ court OF APPEALS by the prosecuting attorney or any person aggrieved by any order of the juvenile division of the probate court, in the SAME manner ~~provided by sections 36 to 52 of chapter 1, insofar as applicable, except that the provisions of section 39 of chapter 1 do not apply and no such appeal~~

~~bond shall be required~~ AS FROM OTHER ORDERS OF THE PROBATE COURT. The pendency of an appeal shall not suspend the order unless the circuit court shall specifically so order. ~~A petition for a delayed appeal shall be filed within 6 months after the making of the judgment or order complained of~~.

Section 2. Sections 15 to 23 of Chapter 25 of Act No. 215 of the Public Acts of 1895, being sections 105.15 to 105.23 of the Compiled Laws of 1948 and sections 36 to 45, 49 and 50 of Chapter 1 of Act No. 288 of the Public Acts of 1939, as amended, being sections 701.36 to 701.45, 701.49 and 701.50 of the Compiled Laws of 1948, are repealed.

APPEALS FROM PROBATE COURT
BILL NO. 2

Second Draft
11-30-66

A bill to amend section 43 of Act No. 151 of the Public Acts of 1923, entitled as amended

"The hospital act for mentally diseased persons,"

being section 330.53 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 43 of Act No. 151 of the Public Acts of 1923 being section 330.53 of the Compiled Laws of 1948, is amended to read as follows:

Sec. 43. Any person aggrieved by any order, sentence, decree or denial of the probate court, may appeal therefrom to the ~~circuit court for the same county~~ COURT OF APPEALS. Such appeal shall be taken within the same time and in the same manner, and the same proceedings shall be had thereon, except as herein otherwise mentioned, as is provided by law for appeals from such court. If the alleged mentally diseased person is an appellee, the notice of the appeal shall be served on him and on the person having him in charge, or his guardian ad litem. The bond to be given on such appeal shall run to the judge of probate of the county for the use and benefit of any person who shall be injured by the allowance of such appeal, in such penalty and with such surety or sureties as the probate court may approve, and it shall be conditioned for the diligent prosecution of such appeal, and the payment of all such damages and costs as shall be awarded to any person on account of the allowance of such appeal in case the person appealing shall fail to obtain a reversal of the decision appealed from. Any person injured by the allowance of such appeal shall have a right of action upon such bond, in case the decision so appealed from is not reversed. Proceedings under an order of admission shall not be stayed, pending an appeal therefrom, except upon special order of the probate court, which may revoke or modify ~~said~~ THE special order at any time. The court may also, during the pendency of ~~said~~ THE appeal, make such order for the temporary care or confinement of the alleged mentally diseased person as may be deemed necessary.

APPEALS FROM PROBATE COURT BILL NO. 3 Second Draft
11-30-66

A bill to amend section 308 of Act No. 236 of the Public Acts of 1961, entitled

"Revised judicature act of 1961,"

as added by Act No. 281 of the Public Acts of 1964, being section 600.308 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 308 of Act No. 236 of the Public Acts of 1961, as added by Act No. 281 of the Public Acts of 1964, being section 600.308 of the Compiled Laws of 1948, is amended to read as follows:

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

(1) All final judgments from the recorder's court, ~~superior court,~~ circuit courts, PROBATE COURTS and court of claims.

(2) All final judgments from justice courts, police courts, municipal courts, ~~probate courts,~~ common pleas courts, or other ~~court~~ COURTS OR TRIBUNALS inferior to the circuit courts, which on appeal are not triable de novo. All appeals from final judgments from the aforementioned courts which are triable de novo shall continue to be taken to the circuit court.

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