Suggestions

Have Archie check medical P. 306-7

Argue on Buster that bartender disinterested
Pedersons of incident. (See Pederson testimony, P. 329)

Argue Phrase on expecting friend (P. 330)

Note to Shown on "the Dancer"

Add Paul dream of Mary while
awaiting verdict

Any Possible Cuts?

Both 500
Mid 502

Use: Stool region

Changes

When jury is coming out, I think:

✓ Had the ^blocks-Buster testimony of Duke Miller caused a big switch?

Fix Lewis' left hand

✓ Add Buster at end of book (P. 547)

"He was a hell of a sassy fellow -- he even called me Buster."

✓ Bridge Bugler arg between Pp. 512-13

" Dancers' " P. 521

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* Add Judge Instr. on lying witness & shorten reasonable doubt & burden of P.

✓ Fix where Parn telling re Green Bay trip:

"And guess what his name was?"

"Grogan," I replied steadily.

At very end

Parnell was watching me slyly out of the corner of his eye.

"In fact, boy, she's expecting us that she is. You see, we're on tonds."

"What's expecting us?" I said, suddenly knowing.

"Why am many of course, lad," he said softly. "The sweet child invited us to dinner." He smiled privately. "I thought I told you."

Six early description of Dancer.

Fugitive silky tufts of hair, like patches of pasted fur.

Valiant Hail to the valiant

Moujiks

And, Since the area is reputed to be murkier than most,

✓ Shoes in pocket? (Too early?)
See both P 382 + 408, 409.

Damn it, Paw,
My heart bleedeth not for the downtrodden, I carry no torch for the oppressed, I mount no barricades for the poor.

✓ Soften * vague ref. beach incident as told Parnell re Mary Pelant * Sonny Softas

MURDER WILL OUT

The brave ringing phrase "Murder will out" is surely one of the finest fallacies with which man, the articulate ostrich, comforts his way to the grave. Every prosecutor knows this. Ah yes, savor its dark poetry on your tongue--"Murder will out!" Congreve stole it from either Shakespeare or Cervantes who in turn amiably stole it from each other or from Chaucer ("mordre wol out") who stole it from Aeschylus who doubtless stole it from the roof of a damp cave.

The grim fact is that most murders have to be dug out by main strength and awkwardness. Millions of dollars are spent annually, and often vainly, trying to pin murders on their uncooperative perpetrators. With their unblinking denials these murder suspects or defendants seem never to have heard of Aeschylus. And the annual toll of totally unsolved murders in this and every other so-called civilized country in the world would stagger the imagination. Our grisly tabulator would resolve his cases into at least three broad categories: Where the fact of the murder is apparent but no murderer has been found; where both the fact of the murder and the identity of the murderer remain officially shrouded in doubt; and, finally, in that large class of cases where no legally actionable suspicions whatever are aroused, that is, in the completely successful murder.

It is upon a phase of this last class of murders that I now wish to dilate. I like to call them "psychological" murders because I have a suspicion that the most successful of them are truly that. Let me tell you about the "murder" of Orion Fry. In a sense it is fictional in that it is frankly pieced together from the unreliable and colored back-stairs hints and rumors and chance gossip of the various maids, gardeners, cooks, scullions, butlers and valets that worked for him.

Orion Fry descended upon this neck of the woods out of nowhere shortly following World War I. Some said he was a war-profiteer, some said he was a retired munitions manufacturer, some said he was a draft dodger. I don't know. Perhaps he was all three. Certainly he was a man of mystery. That he was also

ESTATE OF SAMUEL MITCHELL, DECEASED

Memorandum regarding disposition of mining royalties as between Income and Principal.

Practically all of the cases cited by the trustees in their legal memorandum are found collected and commented on in an important and exhaustive 80-page annotation, appearing in 1951, entitled "Rights of tenant for life or for years and remaindermen inter se in royalties or rents under oil, gas, coal or other mineral lease" found in 18 A.L.R. 2d 98, to which the Court's attention is respectfully referred.

This comprehensive A.L.R. annotation apparently embraces every modern English and American case bearing upon the subject (except for one very recent Texas case cited subsequently in the A.L.R. "Bluebook"). It is difficult to believe that in their research the trustees did not frequently collide with this important "landmark" annotation, but since they have not chosen to cite it for the Court's enlightenment the guardian ad litem hastens to do so.

As the guardian ad litem views it, the trustees in their memorandum urge that the royalties here should go to the life beneficiaries here principally for two reasons: (a) because the royalties should be distributed to them the same as cash dividends; and (b) because the royalties should be distributed to them under the modern extensions of the so-called "open mine" doctrine. For convenience of discussion the guardian will cover each proposition in that order.

1.

THESE ROYALTIES SHOULD NOT BE TREATED AS CASH DIVIDENDS

The guardian ad litem believes that the trustees make an invalid assumption when they say, as they say in their memorandum, that "At the outset it is fair to assume that these royalties should be distributed in the same manner as though paid to the former corporations and distributed by them as dividends." They assume, without citing supporting authority, a basic major premise from which they then proceed to build a persuasive legal syllogism in favor of paying

the royalties here to the life beneficiaries as though they were cash dividends. Let us examine this assumption.

"A dividend is a corporate profit set aside, declared and ordered by the directors to be paid to the stockholders on demand or at a fixed time." (Italics ours.)

Cook, Principles of Corporation Law, page 296.

In the first place, as the trustees apparently concede, there were no profits in any of these three corporations to be distributed, whether from earnings or accumulated surplus; the only corporate assets were some potentially valuable but undeveloped mining lands in Minnesota which were subject to a potentially valuable royalty lease to a third party. Earnings or profits on these capital assets were nil. Instead there has been a dissolution of these corporations and a pro rata distribution, not of accumulated profits, but a total liquidation of capital assets, to-wit, land subject to a royalty lease. There were no cash dividends because there was no cash to distribute; there were no stock dividends because the trust estate already had its stock which it turned in in exchange for these capital assets; the estate did not receive stock but rather surrendered it. Instead, if one must insist upon loosely using the word dividend, there was at most here a liquidating "dividend" representing a distribution not of one cent of profits or earnings but rather of the total capital assets.

Thus the Poole case (Poole vs. Union Trust Co., 191 Mich. 162), far from merely supplying the solace on the "open mine" point which the trustees seek to extract from it in their brief, holds on another point precisely that such an increment belongs to corpus. There the court was considering a stock dividend, but in their brief the trustees cite the Poole case only to buttress their rather venerable proposition (with which the guardian ad litem does not particularly quarrel) that royalties from mines opened during the lifetime of the settlor ordinarily are treated as income and belong to the life tenant under the "open mine" rule. They choose either to ignore or are unaware of that

important portion of the case that squarely holds (Question 4 commencing on page 171) that any increment coming from stock held by the estate derived "from causes other than the accumulation of earnings" (page 174) belongs to the corpus of the estate.

The court in the Poole case on this phase of the case asks this question (page 175): "What are the elements of this case which tend to reveal the true character of these distributions?" and goes on to say (page 176) "It is clear... that there were no accumulated earnings at any time, no 'fund' out of which this additional stock was declared indirectly or directly." Then later on the same page: "The testimony of this witness, reviewed above, all seems to point to the conclusion that the assets had not been increased" and further (page 177) "So that, instead of representing transmuted earnings, these stock distributions, according to the only evidence in the record, seem to represent merely an enhancement in value of the corporate assets, from causes other than the accumulation of earnings..." (Italics ours.) The court then concludes (page 177) that "The trial judge was therefore correct in holding that under the showing made in this record the stock dividends should be considered a part of the corpus of the estate, rather than as income."

See also In re Etzel Estate (Iowa 1931) 234 NW 210, 29 Mich. Law Rev. 953, where the will of the testator gave his widow a life estate in all his property. The estate contained shares of the capital stock of a corporation. After several years the corporation was dissolved, and a dissolution dividend was declared which distributed to each shareholder a pro rate share of the sale of all the assets of the corporation. The question in the case was whether any, and if so how much, of the dividend was to go to the life tenant. It was shown that the dividend in question represented sale of the capital assets of the corporation. Held, the dividend was really a distribution of assets, and not of surplus or earnings and became part of the corpus of the estate.

The court said:

> "In the case at bar, however, the bequest to the life tenant is 'the use and income of all the rest,

> residue, and remainder of my estates during her lifetime'. That the testator intended the corpus of the estate to remain intact and the 'use and income' only was to be given to the life tenant is also evidenced somewhat from the fact that the testator conferred upon the life tenant the privilege of disposing of one half of said rest, residue and remainder of said estate. This case also involves a liquidating dividend, and is not a question of mere undivided earnings or what might be called a surplus. It has to deal with a liquidation dividend, and the liquidating dividend, is, in reality, only a division of the assets of the corporation. The estate of the testator owned certain shares. The liquidating dividend represented those shares in a new form. We are of the opinion that the entire pro rata account apportioned to the shares owned by said estate became a part of the corpus of the estate and would pass to the remaindermen and was not income passing to the life tenant. Of course, the life tenant is entitled to have the entire income (interest) from all the proceeds of the sale of the corporate property which were apportioned to the estate, under the terms of the will."

The guardian realizes that we are not dealing here with stock dividends, as in the Poole case, but with an undivided interest in land and royalties under a mining lease, but the point is that even if we treat the distribution upon dissolution here as a dividend (as the trustees would like to have it) by no stretch of the imagination can it be regarded as a cash dividend declared from profits so as to enable the increment to go to the life tenants. Not being so they must instead go to corpus. That is what the Poole case squarely holds on this point.

Since the Poole case was decided Michigan has by court decision squarely lined up behind the brutally simple Massachusetts doctrine of allocation, namely, that in the absence of controlling direction in the will that stock dividends go to corpus and cash dividends to income. It rejected as unworkable the Pennsylvania decisions which look into corporate financial structure in such cases. This was decided in Joy's Estate, 247 Mich. 418, relied on so heavily by the trustees.

But that case is no authority whatever for any rule here or elsewhere that royalties are to be treated as cash dividends. Far from supporting the assumption in which the trustees indulge at the outset of their brief, the Joy case

clearly indicates that there can be neither cash nor stock dividends until they are declared by the corporation. The directors of the corporation alone have that power--not any mere minority stockholder or his subsequent trustees.

To this extent, then, the authority of the Poole case is confined to other corporate increment, but we submit that the doctrine there laid down is still sound law on those situations where the increment or return from the stock is ambiguous, that is, where it is neither a cash dividend nor a stock dividend. That is our case. And the cases cited herein from other jurisdictions bear this out.

In other words, to summarize, it is the guardian's view that we are not considering cash dividends in our case at all, and any "dividends" of any other character are such as would clearly go to corpus.

While the trustees' memorandum does not go into extended discussion or detail on this point, it seems possible that they may argue that even if it is conceded that this recent distribution (land subject to royalty lease) may not be regarded as a cash dividend (and therefore not distributable to the life tenants under the holding in the Joy case), that the Court should somehow indulge a legal fiction and view any future royalties as though they were indeed "cash dividends," and therefore order their distribution to the life tenants; this presumably on the assumption that if the corporations had not been dissolved they would have done just that. (At this time it is pertinent to point out that neither the testator nor these trustees ever held a controlling interest in the stock of any of these corporations nor were they ever in a position to dictate the land or dividend policies of these corporations.)

In the first place, we have just seen under the Poole case that this distribution (land plus royalty lease) should be regarded as going to the corpus for the reasons already stated. One wonders under what legal authority (the trustees cite none) the life tenants should now be able to turn around and claim for themselves the future fruits of that distribution that clearly belongs to the corpus. Again one wonders how royalties paid directly to estate trustees can assume the guise of cash dividends and, if so, just how dissolved corporations go about declaring cash dividends?

It is surely no answer to speculate in our situation on what might have happened had the three corporations not been dissolved and had they not distributed their capital assets; or to ponder what might have been done had the corporations remained in existence and had in turn distributed these same royalties as cash dividends. One wonders how the trustees can venture to predict with such airy confidence just what the various directors of these corporations would have done with these royalties. How can they assume that they would have been cash dividends? Might it not be equally valid clairvoyance to predict that the directors of the Dunka-Mesaba Security Company would have instead issued a stock dividend, or sold or exchanged the lands, or even ploughed any profits back into purchasing other mining stocks, as it had a right to do?

The fact is that the three companies instead have been dissolved, the fact is that during their existence they had no profits or earnings to distribute, and the fact is that upon dissolution they instead made a pro rata distribution of their sole and entire capital assets. It would be just as profitable to speculate on what would have happendd if the corporations had not leased out the Minnesota property at all, but had instead sold it, or what would have happened had not scientific progress plus depletion of richer reserves elsewhere made certain deposits of taconite ore commercially valuable at this time. None of these contingencies were ever within the control or authority of either the testator or his fiduciaries.

This brings us to a further point. The trustees urge that Samuel Mitchell was a shrewd mining man and that this should be given due weight in considering and deciding the present issue. The guardian ad litem does not particularly rebel at this proposition, either, but indeed ~~rather~~ sees in it rather persuasive evidence that Mr. Mitchell was deliberately investing his money in a then non-wasting asset. He had already provided quite handsomely for his wife and children from Michigan assets in his 1904 will. In 1906 he helped negotiate the corporate purchase of these taconite lands, the title of which was put in two of these corporations. Taconite ore was then about as commercially valuable

for making steel as old cornstalks (and ~~apparently~~ still was in the early 1920's), but apparently this shrewd old mining man envisaged the day, however remote, when scientific progress in smelting, etc. plus depletion of the richer ore reserves elsewhere would pay off.

If we are to speculate about the testator's unexpressed intention, it is apparent that the man deliberately invested his money in a then non-wasting asset that he hoped would become of value in the non-foreseeable and distant future. He deliberately placed the title of these lands beyond control of himself or his fiduciaries. If he had been interested in making further assured income provisions for his wife and ten children one might perhaps assume without violence that he would have put his money on a running horse and not on an unborn (and unconceived) colt.

Perhaps, the trustees may say, perhaps he was simply trying to invest in a then non-wasting asset for his wife and children to tide them over when the income from the Michigan assets grew slim. The answer to that is that the life tenants still appear to be doing all right from the Michigan assets and had the decedent wanted to further provide for their assured future he would likely have invested in sounder known productive assets, perhaps leaving appropriate restrictive "non-wasting" provisions in a codicil or new will. (The able attorney who drew his 1904 will, F. A. Bell, lived close to him in Negaunee.) It does not seem that if he were concerned with assuring more income for the life tenants that he would have put his money on a dark horse that has not come in until 44 years after his death when only four of his ten children were still alive. And further, he would not have been at some pains to put the control of these lands in inactive corporations in which he held but a minority stock interest, thus carefully putting the destiny of these lands not only beyond his own control but that of his estate as well.

In any event there was no open mine on the Minnesota property when he died; there was no royalty lease on the property; there were no corporate earnings; there was no income from the stock; taconite ore was then a drug on the market;

and, last but not least, this shrewd business and mining man did not even bother to re-draft his will to allow his executors and trustees to sell or lease ~~these~~ or in any manner control these lands as he had carefully done with the Michigan lands. And this right cannot be assumed. Nor had he left any directions as to what the trustees should do with any increment realized from this stock. He could have easily seen his lawyer and changed his will. He did nothing. Courts should not be asked to board legal flying saucers and soar out into space to supply this intent.

THESE ROYALTIES SHOULD BE TREATED AS PART OF THE CORPUS TO BE HELD FOR THE REMAINDERMEN AS THIS IS NOT A SITUATION FALLING WITHIN ANY KNOWN OR LEGALLY PERMISSIBLE EXTENSION OF THE "OPEN MINE" DOCTRINE.

As will be seen from the historical foreword to the leading annotation in 18 A.L.R. 2d 98, the so-called "open mine" rule evolved rather slowly from the basic original holding that where a settlor died leaving open mines on his property, that in the absence of contrary provisions in his will it could be assumed that he intended that the entire income from such mines would go to the life tenants. Later it was held that where the settlor had executed royalty leases on such mining lands during his lifetime, the same result would follow for the same reasons. The next step, in some jurisdictions, was to hold to the same effect where the settlor specifically empowered his trustee to sell or lease mineral-bearing lands even though no mines had previously been opened or any leases executed thereon.

At about the same time there also slowly evolved the companion "unopened mine" doctrine, to the effect that in the absence of a contrary intent manifested by the trust instrument, that royalties derived from leases of mines not opened or leased by the settlor in his lifetime or "specifically authorized by him," should be conserved for the corpus and the entire fund paid to the remaindermen, the life tenants only to receive the interest earned from said fund. (See 18 A.L.R. 2d 115 for a statement of the rule.)

The trustees state near the close of their memorandum that "Except for the earnings (interest) on the reinvestment of the (Dunka-Mesaba) stock sold some years ago, they (the life tenants) have had no income from this property since the inception of this trust." (Explanatory portion in parentheses ours.)

This is as good a place as any to pause and point out that the facts are that on October 23, 1939 the trustees in this estate sold 80½ shares of the 250 shares of this Dunka-Mesaba stock for $120,750.00; that the trustees at first

accounted (in their 60th account) for the proceeds of the sale of this stock as corpus; that later they sought by an amended account to roughly split the proceeds of this sale between corpus and the life income beneficiaries; and that upon objection made by the mother (since deceased) of the contingent remainderman who objects here now, and upon briefs submitted, that the Court ruled that all of the proceeds from the sale of this stock should be conserved in corpus for the remaindermen.

This decision was appealed to circuit court but was never prosecuted and in 1941 was dismissed by stipulation. The proceeds have been so held by and accounted for by the trustees as corpus ever since. Now, since the balance of this very same stock was exchanged for the present royalty-producing asset (capital exchanged for capital), the trustees find themselves in the awkward position of maintaining that what was then held to be corpus should now, in effect, be treated as income. The guardian ad litem submits and urges that the status of this stock or the capital increment realized from it is res adjudicata and that the trustees and life tenants are now foreclosed from raising the questions and issues they now seek to raise here.

Instead of the remaining 169½ shares of Dunka-Mesaba stock being sold for cash it was exchanged upon dissolution of the corporation for an undivided interest in the Minnesota lands subject to the Reserve Mining Company royalty lease executed in 1915.

In other words, the stock constituting the capital of the trust, uniformly treated as belonging to corpus, was exchanged for a different form of capital consisting of the land and the royalty rights under the lease. Under Michigan law royalties accruing under a lease are profits or income from real estate held to be incorporeal heriditaments which follow the land and are part of the real estate. (See In re Rust's Estate, 213 Mich. 198; City of Saginaw vs. Bank, 213 Mich. 590.)

In our case the Mitchell will is silent on any authority of the trustees to sell or lease the Minnesota mining lands. The trustees were specifically

forbidden to sell the Michigan mining lands but were authorized to lease them. Nothing is said in the will about any royalties or dividends from Minnesota mining lands.

It is apparently the tacit suggestion of the trustees that since the settlor authorized his trustees to lease the Michigan lands, that by implication this right should be held to extend and apply to the Minnesota lands. We shall pass for the moment the important and, we believe, controlling fact that neither the settlor nor the trustees ever had ownership or control of the Minnesota lands.

The trustees in their brief remind this Court that by a decree in the Circuit Court for Marquette County it was held that the royalties from leases on Michigan mining lands should be held as income, based upon the express authority contained in the will for the trustees to lease the Michigan lands. This is nothing more than a normal recognition of "open mine" doctrine based upon sound legal authority. Then they say: "It is reasonable to assume that if Mr. Mitchell had been the actual owner of the Minnesota lands here involved he would have made a similar provision in his will as in the case of the Michigan lands. Instead he transferred (sic) his ownership to the two corporations which were authorized to engage in the mining business, the result of which was exactly the same as though he had conveyed to Trustees with like powers."

This is a sixty-four dollar assumption that goes to the heart of the issue. What case has ever held, anywhere--or in what case was it ever even argued--that because a man left some stock in a corporation that owned some undeveloped, unopened, unleased and unprofitable mineral lands that this was tantamount to authorizing his trustees to sell or lease these lands? No shred of authority is cited for such a bizarre extension of the open mine doctrine. None has been cited in the exhaustive 18 A.L.R. annotation.

Yet this is "exactly the same as though he had conveyed to Trustees with like powers," the trustees urge. What "like powers," one asks? The corporations could have mined or leased this land. They leased it. They could also

have sold or exchanged it. Were the trustees empowered to do any of these things? The corporations could have paid cash dividends, stock dividends, or bought other stocks and paid no dividends. Could the trustees have done so? The corporations could and did dissolve themselves and distribute the capital assets. Could the trustees have done so?

The trustees here must mean by their statement that because the settlor owned stock in corporations that in turn owned undeveloped, unopened, unleased and unprofitable mining lands in regard to which they could, among many other powers, execute a lease, that this was legally tantamount to the testator authorizing his trustees to do the same thing with the same lands. They wish to extend the "open mine" doctrine much farther than any case has ever done. It is an interesting, imaginative and daring attempt on the part of the presumably disinterested trustees. One would like, however, to first see some authority for such a proposition.

The trustees correctly anticipate that the guardian will disagree with their interpretation of the effect to be given in the De Brabrant and Knox cases cited by them in an effort to sustain their position. (De Brabrant vs. Commercial Trust Co., 113 N.J.Eq. 215, 166 Atl. 533 and Re Knox's Estate (1937), 328 Pa. 177, 195 Atl. 28, set out in full in 113 A.L.R. 1185.)

In the first place, as the trustees point out, these cases are basically distinguishable from our situation in that there the mines were opened and operating both before and at the time of death of the testator and regular cash dividends from profits were being paid on the stock owned by him; here no mines were opened or leased during the life of the testator, there was no income, and no mines were opened for some 44 years later.

All that the two cases hold are that, in the absence of directions in the will, such cash dividends paid from earnings of wasting-asset corporations go to income and not principal, regardless of whether the "earnings" were stashed away by the corporations in a depletion reserve account or what not. Here there were no earnings to distribute and none were distributed. The fact that the corporations there were mining corporations was only significant to the courts in determining whether the funds from which the dividends were paid represented earnings or capital.

At most these cases go only to show that if the corporations in our case had been operating or leasing mines at the time of the testator's death and paying him cash dividends on his stock in said corporations based upon earnings and if the corporations had not been dissolved and the stock here had remained in the trust estate, that then the life tenants here might have had a valid argument to claim the royalties, not as royalties but as cash dividends from earnings declared and paid by the corporations from profits. That situation is most definitely not ours.

As the court carefully says in the Knox opinion (113 A.L.R. 1191) "Our rules of apportionment look to the substance and not the form. In determining the rights of life tenants and remaindermen from the multifarious types of dividends paid by corporations, it has been the settled practice of this court to ascertain the sources from which they are paid, in adjusting their rights equitably. The origin of the dividends in the instant case is not disputed. They came from profits made by the corporation in carrying out the purpose for which it was founded."

In other words, the cases are in the last analysis simply no more than a confirmation and recognition of the Michigan Poole case over again, namely, that in a proper situation the court will look to the real source of the stock increment and, in the absence of controlling directions in the trust instrument, will allocate the returns to income or corpus depending upon the nature of the increment. To that extent the cases only serve to further buttress the contention of the guardian. And under our later Joy case cash dividends would clearly have gone to income.

The holding of the Knox case has later been curtailed and limited in Pennsylvania (as we shall see) and the court in In re Clarke's Will (Minn. 1939) 284 N.W. 876, sharply criticized the De Brabrant case because it "too much ignores the fact that the settlor himself had by definition" elaborately included the dividends there in income.

The Clark case also rejects those cases that seek to "pierce the corporate veil," and also holds that money or property received by the trustees as the

proceeds of the sale or exchange of capital of the trust property was "capital" and not "income" and that hence the trustee had a duty to allocate to corpus rather than to income all dividends of corporations so far as they consisted in increases in capital (which is our case). The court further holds that in doing so the fact that the testator during his lifetime treated these same dividends as income should be ignored as irrelevant.

On this last point the court said (N.W. 880):

> "The argument that because Mr. Clarke took all dividends, from whatever source derived, as income, Mrs. Clarke should be allowed a similar appropriation, is unsound. Mr. Clarke was in a very different category of status and duty from that in which his widow stands as trustee. He had no occasion to distinguish between rights of life tenant and remaindermen under an express trust. She is required to do just that with meticulous care. Mr. Clarke's will was carefully drawn by competent counsel. Its phrases, no other significance appearing, are to be given their ordinary meaning."

In the Clarke case the testator gave two-thirds of the residue of his estate to his wife as trustee "to receive and collect the principal, income, rents, issues and profits of the trust estate and pay the entire net income received or derived therefrom to herself." The remainder was bequeathed to a sister. Certain capital stock constituting part of the trust estate was sold for more than its cost. Such profits were carried as income and paid by the trustee to herself as life tenant. The question was whether the profits of the sale of this stock should be allocated to income or principal and also whether or not the fact that the testator in his lifetime took similar profits as income showed an intent that the trustee should also regard such profits as income payable to the life tenant. The court held that the proceeds of sale or exchange of capital of trust property is capital, not income. It was the duty of th the trustee to allocate to corpus rather than income all dividends of the corporation so far as they consisted of increases in its capital.

The court then said (N.W. 879):

> "While appellant is trustee of 'principal, income, rents, issues, and profits' she is significantly restricted as life tenant, to enjoyment of 'net income.' 'Net income' used in this connection is unambiguous. It is ascertained by subtracting expenditures chargeable to income from receipts properly credited thereto. Restatement, Trusts, Sec. 233. <u>The rule is that</u>: '***

'money or other property received by the trustee as the proceeds of a sale or exchange of the principal of trust property is principal. *** profits arising from the sale or exchange of the principal of trust property or any enhancements in the value of the principal of trust property are allocable to principal, not income; and losses incurred by the sale or exchange or destruction of or damage by casualty to the trust property are chargeable to principal." (Citing cases.)

(b): The 18 A.L.R. 2d note above cited shows considerable disposition to curb any implied extensions of the "open mine" doctrine, a doctrine which seems to have received its widest vogue and broadest interpretations in Pennsylvania. Yet in late case of Bruners Estate (1950), 363 Pa. 552, 70 Atl. 2d 18 (which case precedes the leading A.L.R. annotation and is cited several times throughout), it was held that no power to lease for mining purposes could be inferred from a power of sale given to the trustees. The Court is invited to read the case.

It is true that we do not have that situation here, but the case shows that even the liberal Pennsylvania court is not prone to extend the "open mine" principle beyond the express provisions of the will. Yet here the trustees go much farther and ask the court to in effect find a power to lease Minnesota lands (1) where in fact no such power was given; and (2) where no such power could have been exercised by the trustees even if it had been given because the estate did not own the land. If we are going to guess what was in Sam Mitchell's mind, isn't it equally valid to guess that he either didn't think of it or, thinking, deliberately chose the course he did.

Further cases restricting the extension of the open mine doctrine even where the trustee was given a general authority to sell or lease are found at 18 A.L.R. 2d commencing at page 167.

For further cases to the same general effect as the Bruner case, above, see Eager vs. Polland (1922), 194 Ky. 276, 239SW39, 43 A.L.R 808, briefly abstracted at page 172 of the 18 A.L.R. 2d annotation, and kindred following cases to which Court and counsel's attention is directed. All show a definite tendency to restrict implied extensions of the open mine rule.

Mairs v. Central Trust Co. (W. Vir. 1945) 34 S.E. 2d 742, 18 A.L.R. 2d 168, is another case showing the disposition of the courts to curb any implied

extensions of the open mine rule. There the testator gave his trustee the general power to lease, sell and dispose of trust property and pay the net income to the widow. After death the trustee executed an oil and gas lease pursuant to the authority in the will.

The widow sued demanding the royalties as income but the court held them to be part of principal for the reason that the open mine principle would not apply to such a situation. It rejected the widow's contention that mere general authority in the will to open a mine after death would throw these royalties into income, pointing out that the authority to lease came only from the general authority in the will, and that this was insufficient to show that the testator contemplated such a move by his trustee, or that he authorized such a move, and that it would be a departure from reality to hold that the well thus opened by the trustee was an "open" well in contemplation of law at the time of the testator's death.

The point here is that if general authority to lease will not permit royalties from a specific mining lease to go into income under the open mine dictrine, surely a specific authority to lease Michigan mining lands should not be expanded into a general authority to lease Minnesota mining lands even assuming for the moment that Sam Mitchell had owned outright the Minnesota mining lands at the time of his death.

The Knox case upon which the trustees here depend so much is mentioned at 18 A.L.R. 2d 174 in the later Pennsylvania case of Heron's Estate, there cited, the doctrine of the Knox case there being explained as deriving in every instance from those cases in which a power to lease was specifically given or where there was an existing lease. Here we have neither.

The Bruner case (same A.L.R. note, 173) also appears to lay down the doctrine that in those situations where trustees without clear authority nevertheless undertake to lease mineral lands that may be exhausted before the expiration of the lease, that this is equivalent to a sale and the proceeds should go to corpus to be held for the remaindermen.

Surely the trustees here never possessed any specific authority from the testator to lease or in any manner deal with these lands, yet they ask the court to in effect hold that since the corporations could and did lease the lands that this should be regarded as though it were done by the trustees under the settlor's authority. Under the above cases if the trustees here had undertaken to lease these lands it appears that because of their lack of specific authority many courts would have held it the equivalent of a sale and have ordered the royalty proceeds into corpus.

To show just how far the courts have gone to restrict the open mine rule let us make the facts better for the trustees and suppose that at the time of Sam Mitchell's death he had owned outright all of the Minnesota lands and had executed a royalty lease on a portion of them. Would the implication of this necessarily extend to the balance of the Minnesota lands? The answer is no according to the Pennsylvania case of McFadden's Estate (1909), 19 A.L.R. 2d 175, the court holding that the fact that a settlor had in his lifetime executed a lease on a small portion of his land was no reason for the court to extend the open mine doctrine to all his undeveloped mineral lands. The court supported its conclusion by stating that if the testator had owned a 200 acre farm upon which there was an open mine and adjacent to it 10,000 acres of undeveloped mineral lands (in our case 9,000), no reasonable interpretation of the doctrine would give the life tenant the right, because he could work the farm mine to exhaustion, to lease upon royalty the 10,000 acres and take the royalties.

The court stated that such a situation was not contemplated when the open mine rule was announced, and that it would do violence to the spirit and purpose of it to do so in that case.

The guardian here is aware that there are important factual differences between that case and ours, but since the trustees here seek to extend by implication the undoubted right to lease Michigan mineral lands so as to embrace the Minnesota lands, we cite the above case to show that even the liberal Pennsylvania court rebelled though the "other" tract there was not in Minnesota but merely "adjacent" to the leased tract.

See also the British cases of Campbell vs. Wardlaw and Maynard's Estate (both at 18 A.L.R. 2d 176). In the latter case the testator devised coal lands separated by a narrow strip of land owned by a stranger. During his lifetime the testator had leased mines under his lands lying north of strip, but the undeveloped mineral lands lying south had not been leased or worked. After his death the life tenant acquired the narrow intervening strip and wanted court authority to lease the undeveloped south tract. The court held that the intervening narrow strip of land prevented the proceeds of the south tract from going to the life tenant, further showing the courts' reluctance to extend the open mine doctrine by implication.

C O N C L U S I O N

We have now seen that under this will there would be very grave doubt that the royalties should go to income here even if Sam Mitchell had died owning the Minnesota mineral lands outright and there were no corporations involved.

But in addition to that the trustees seek to ignore the corporate entity, to "pierce the corporate veil," and to somehow persuade themselves that a mining lease executed by a corporation that was not even in existence until 7 years after the testator's death was somehow either (1) the act of the testator and/or (2) the act of the trustees under a carefully drawn will that maintained a reverberating silence on the whole thing.

The trustees close their brief on a note of quavering tremolo. They observe that time marches on; that only four of the testator's ten children still survive; that all of them are of advanced years. "At best," they conclude, "they will participate in the royalties for only a few years compared with the prospective duration of mining operations which will probably continue for many years after they are gone."

As the guardian has morosely dug into the welter of cases on this subject he has been struck by the absence of poetry and sentiment in the court decisions. He has had to keep a stiff upper lip as he has watched entire regiments of assorted widows, life tenants and remaindermen being coldly turned away empty handed. So it is doubly refreshing and not a little touching to note the trustees' concern here for the estate's charges of advancing years.

Be that as it may, the stakes here are not for hay. There are four surviving life tenants. The guardian is happy to note that according to his runners all of them appear to be enjoying reasonably good health. Due to their father's foresight and business acumen they also appear to have enjoyed lives of comparative ease and comfort. The youngest is about 70 years of age. The annual minimum royalties here are about $21,000.00.

Assuming that any one of the four life tenants lives another ten years, the Court will readily see that the minimum stakes here would amount to upwards

of a quarter of a million dollars. For that figure one is dreadfully afraid that sentiment is going to grow a trifle battered and shop-worn before this case is done.

In any event it strikes this guardian that the Court should not be asked to entertain strange and novel legal propositions in order that elderly life tenants may now bask in new and additional fields of income. And in our view the estate trustees, whom we were once taught were supposed to maintain a lofty and detached neutrality, devoid of both sentiment and bias, should not now be in here urging the Court to do so.

Summarizing, the guardian says:

(1) These royalties should not be treated as cash dividends for the reasons stated.

(2) These royalties should not be treated as income going to the life tenant under the broadest known interpretations of the "open mine" doctrine because:

(A) No mine was open at the time of the testator's death;

(B) No lease to mine said lands was made or specifically authorized by the testator prior to his death;

(C) No dividends or royalties or other income was paid to or received by the testator from said stocks or property during his lifetime;

(D) None was paid to his trustees;

(E) No express authority was granted by the testator to his fiduciaries to lease these Minnesota lands for mining purposes and none may be implied;

(F) Even if such authority to lease might be implied, the fiduciaries in fact did not lease these lands and were not in a legal position of authority to do so because the power of disposition of these lands clearly did not lie with the estate but resided exclusively with the corporations that owned the lands, in which corporations first the testator and later his fiduciaries were but minority stockholders;

(G) In any event the matter is res adjudicata.

Respectfully submitted,

John D. Voelker
Guardian Ad Litem

October 13, 1952

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

The People of the State of Michigan, Plaintiff,	)	
vs.	)	DEFENDANT'S REQUEST TO INSTRUCT
Coleman A. Peterson, Defendant.	)	File No. 15987

And now comes the said defendant, Coleman A. Peterson, by John D. Voelker, his attorney, and requests the Court to charge the jury in the above entitled cause as follows:

INSANITY

INSANITY (BURDEN OF PROOF ON)

At the outset there is a presumption in cases of this kind that the respondent is sane, but as soon as evidence is offered by the respondent to overthrow this presumption, the burden shifts and then it rests upon the People to convince the jurors beyond a reasonable doubt of the respondent's sanity, as that is one of the necessary conditions on which guilt in this case may be predicated. When any evidence is given on behalf of the defendant which tends to overthrow that presumption of his sanity, the jurors should examine, weigh and pass upon it with the understanding that, although the initiative in presenting the evidence is taken by the defense, the burden of proof in this part of the case is upon the prosecution to establish the conditions of guilt. Where there is any evidence in the case by the respondent which tends to show that at the time of the commission of the offense he was laboring under either permanent or temporary insanity, it then becomes the duty of the prosecution to prove the sanity of the respondent beyond a reasonable doubt and, unless they have done so, the defendant must be acquitted.

(This form is taken substantially en toto from form number 236 at Section 743 at Page 953 of Gillespie's Michigan Criminal Law and Procedure and is based upon the following cases cited by Judge Gillespie: People vs. Garbutt, 17 Mich. 8, 23; People vs. Finley, 38 Mich. 482; People vs. Eggleston, 186 Mich. 510. The main change in the instruction made by counsel here is that in the last sentence he has substituted the words "beyond a reasonable doubt" in place of the words "by at least a fair preponderance of the evidence" for the reason that the original instruction would be inconsistent with the very first sentence of that instruction; and further does not accord with the law and would constitute error if given in the original form. The burden on the People cannot be "reasonable doubt" in one breath and a "fair preponderance" in the next.)

INSANITY (DURATION OF)

It is the claim on behalf of the defendant that he was insane at the time he fired the fatal shots. His defense, as I understand it, is one generally known as temporary insanity, and I charge you that such a defense, if proven to your satisfaction, is just as valid as though the defendant were shown to be totally and permanently insane. In other words, the duration of the defendant's insanity is not the controlling test, but the issue is whether his insanity, however brief, was of such a nature and character as to render the defendant incapable of either (1) exercising his own free will and volition or (2) of appreciating the difference between right and wrong. If you should find that at the time he fired the fatal shots he was suffering from such insanity, then you should acquit him, despite the fact that prior and subsequent thereto he may have been as sane as you and I.

INSANITY

One of the important incidents of legal responsibility for crime is that the defendant must have had his wits about him, that is, that he must have been a sane person. And in the absence of proof to the contrary all men are in the eyes of the law presumed to be sane. But where the sanity of the defendant has been put in issue in a criminal case, as it has been put in issue in this case, then the burden of proof shifts to and falls on the People to prove the sanity of the defendant beyond a reasonable doubt. It follows, therefore, that if you should find (1) that the defendant here was insane at the time the fatal shots were fired or (2) that a reasonable doubt remains in your minds as to his sanity at that time, then, in either case, you should acquit him.

INSANITY (BELIEF OF DEFENDANT)

The main matter of defense offered here on behalf of the defendant is that he was insane at the time of the alleged offense and was therefore not legally responsible for his acts. The defendant has introduced evidence on his behalf tending to show that one of the contributing factors to such alleged insanity may have been his belief that his wife had just been threatened and assaulted and raped by the deceased.

In this connection I charge you that if you believe that the defendant was insane, as I (shall define) (have defined) that term, it is not controlling on this issue of insanity that you should first find that the defendant's wife was in fact actually threatened, assaulted and raped by the deceased or indeed that any of these things had happened to her. It is enough that you should find that the defendant actually believed that these things had occurred to her and that the deceased was guilty of them and that this belief of the defendant was based upon reasonable grounds.

Thus if some convincing practical joker had run breathlessly to the defendant's trailer that night and informed the defendant that all these things had just happened to his wife and that the deceased was guilty of them, whereas in truth and in fact she was still calmly playing shuffle board at the tavern, quite unharmed--I say, that if you should find that the defendant believed these things and you should further find that he did so on reasonable grounds, and you should further find that this belief of his contributed to any alleged insanity of the defendant which in turn you may find, then you should nevertheless acquit him, regardless of the fact that none of these things may have actually happened to his wife.

In other words it is sufficient that you find that the defendant actually believed his wife's story and that this belief was based on reasonable grounds and that it actually contributed to any alleged insanity on the part of the defendant, if you should find any such insanity, even though in fact no such threats, assaults or any act of rape may have ever actually occurred.

(If the court prefers to omit the illustration contained in the third paragraph of the above request, then, without waiving such request, the court is requested to instruct the jury omitting such third paragraph.)

INSANITY (IRRESISTIBLE IMPULSE)

Expert medical testimony has been offered on behalf of the defendant that he was insane at the time the fatal shots were fired, and that it was a form of insanity generally known to the law as "irresistible impulse." I charge you that such a form of insanity is recognized as a defense to crime in Michigan and that it is the law of this state that even if the defendant had been able to comprehend the nature and consequences of his act, and to know that it was wrong, that nevertheless if he was forced to its execution by an irresistible impulse which he was powerless to control in consequence of a disease of the mind, then he was insane and you should acquit him.

(Adapted from the leading article in 70 A.L.R. 659 on "Irresistible Impulse," as supplemented in 173 A.L.R. 391, and based upon the Michigan cases and other authorities therein cited.)

INSANITY (IRRESISTIBLE IMPULSE)

As was said in an earlier Michigan supreme court case on this subject:

> "It must appear in this case that the defendant is a man of sound mind. Now, by 'sound mind' is not meant a mind which is the equal of any mind possessed by any mortal in the world. We all know that there is a difference in the minds of our acquaintances. Some men are very bright, others are very dull; but they are held accountable. Perhaps it would be enough to say--and to leave it right here--that if, by reason of disease, the defendant was not capable of knowing he was doing wrong in the particular act, or if he had not the power to resist the impulse to do the act by reason of disease or insanity, that would be an unsound mind. But it must be an unsoundness which affected the act in question, and not one which did not affect it. There is a simple question for you."

(Taken verbatim from People vs. Durfee, 62 Mich. 487 at Page 493, quoted at form number 232 at Page 950 in Gillespie except for the last sentence. Above quoted and case cited in support of rule in 70 A.L.R. 659.)

INSANITY (IRRESISTIBLE IMPULSE)

Even if you should find here that the defendant knew the difference between right and wrong, if at the time of the shooting he had by mental disease or insanity so lost the power to choose between right and wrong that his free-will agency was at that time destroyed, and the act was so connected with said mental disease or insanity as to have been the sole cause of it, then the defendant would not be responsible, and your verdict should be "Not guilty because of insanity."

(Adapted from charge approved in People vs. Quimby, 134 Mich. 625 at Page 636. Case cited in 70 A.L.R. 659.)

INSANITY (BASIS OF MEDICAL TESTIMONY)

There has been expert medical testimony offered here on the question of the sanity or insanity of the defendant. Consider the testimony of the doctors and their opinions on the subject. Also consider what opportunity the doctors had to obtain knowledge upon which to base their opinions.

(Adapted from a portion of the charge approved in People vs. Quimby, 134 Mich. 625 near top of page 638. Case cited in 70 A.L.R. 659.)

RAPE

R A P E

There is evidence in this case that the deceased may have raped the wife of the defendant and it is therefore necessary for me to define that offense. Rape is a felony and is defined to be the carnal knowledge of a woman by force and against her will. Force is an essential element of the crime of rape and in order to convict a man of rape a jury must be satisfied beyond a reasonable doubt that the offense was accomplished by force and against the will of the woman, and that there was the utmost reluctance and resistance on her part or that her will was overcome by fear of the defendant or the consequences of her refusal.

(Based upon and adapted from form number 713, Section 1827, Page 2030 of Gillespie's Michigan Criminal Law and Procedure.)

RAPE (NATURE OF RESISTANCE TO)

In cases where rape is an issue the jury must believe that the offense was accomplished by force and against the will of the woman; and that there was the utmost reluctance and resistance on her part or that her will was so overcome by fear that she did not dare to resist. If consent to intercourse is made by the woman through mere weakness of will, without any threat being made or without fear of consequences if she resisted, then the offense would not be rape but if sexual intercourse is had with a woman and she did not willingly submit to such intercourse but submitted because of threats made against her if she did not yield to such intercourse and through fear and apprehension of dangerous consequences or great bodily harm, and that her mind was so overpowered by fear that she did not dare to resist, then the offense would be rape, although she may have made little or no physical resistance to such connection.

(Based and adapted from form number 716, Section 1827, Page 2031 of Gillespie's Michigan Criminal Law and Procedure.)

ASSAULT WITH INTENT TO RAPE

ASSAULT WITH INTENT TO RAPE

There is also evidence that later the same evening the deceased may have again assaulted the wife of the defendant with intent to rape her. The statute creating and defining this offense, so far as the same is material, provides: "Any person who shall assault any female with intent to commit the crime of rape, shall be guilty of a felony," punishable, etc. An assault is defined as an attempt or offer, with force and violence, to do corporal hurt to another. The essential elements of this offense are an assault, made with intent to commit the crime of rape. In such cases the jurors must be satisfied, before they could convict, that the man intended to gratify his passions on the person of the woman at all events, notwithstanding her lack of consent and any resistance on her part. Where such an assault has been made with the unlawful intent mentioned in the statute, it is no defense that the man thereafter abandoned or failed to accomplish his purpose.

(Based upon and adapted from form number 362, Section 864 at Page 1136 of Gillespie's Michigan Criminal Law and Procedure.)

ASSAULT WITH INTENT TO RAPE

If you are satisfied from the circumstances detailed in evidence that the deceased did later make a further attempt to have sexual intercourse with the defendant's wife, and that he did this with the intent to accomplish it at all events by his strength and power, against any resistance which might be offered to him, then he would have been guilty of assault with intent to commit rape, no matter whether he actually committed the rape or not.

(Based on and adapted from form number 363, Section 864, Page 1127 of Gillespie's Michigan Criminal Law and Procedure.)

RAPE (EXTENT OF EVIDENCE OF)

There has been some medical and other testimony here on the subject of whether or not any seminal fluid or male sperm did or could pass from the deceased unto or into the body of the defendant's wife and also whether or not the seminal fluid of the deceased could or could not contain male sperm.

In this regard I charge you that the presence of seminal fluid or sperm is not controlling on the question of whether or not the deceased raped the defendant's wife. Under the legal definition of rape that offense may be complete without seminal fluid or sperm because any penetration, however slight or fleeting, is sufficient to constitute rape provided that the intercourse was had against the will and without the consent of the woman. On the other hand the mere presence of seminal fluid or sperm does not of itself necessarily make every sexual intercourse a rape where the intercourse is in fact had with the consent of the woman. Once, however, that the sexual intercourse amounts to rape I charge you that it is not necessary that the man reach a sexual climax.

ARREST WITHOUT WARRANT

ARREST WITHOUT WARRANT (RIGHT OF PRIVATE PERSON)

It is claimed here on behalf of the defendant that he left his trailer that night and went to the tavern with the intention of apprehending and arresting the deceased. In this connection I charge you that it is the law of this state that a private person (that is, a person who is not a policeman or other peace officer) may make a legal arrest without a warrant when the person to be arrested has actually committed a felony even though such felony did not occur in the presence of the private person seeking to make the arrest.

Therefore, if you believe here that the deceased did actually commit one or more felonies earlier that night (and in this connection I repeat that rape and assault with intent to rape are both felonies) then the defendant here had the legal right to go and seek to arrest the deceased without a warrant, and this right would apply to the defendant even if he were a perfect stranger to the proceedings here and was no relation whatever to the woman victim in this case.

A private person may even make an arrest without a warrant on suspicion of a felony, but in such a case he must be prepared to show in justification that a felony actually had been committed, and that any reasonable person, acting without passion or prejudice, would have fairly suspected that the person sought to be arrested had committed it.

I further charge you that both an officer of the law or a private person may in such cases as outlined above use such force as reasonably seems to him to be necessary in forcibly arresting a felony offender or in preventing his escape after such an arrest, even to the extent of killing him.

(Based upon and adapted from authorities cited in M.S.A. Section 28.875 and Sections 152 and 153 of Gillespie's Michigan Criminal Law and Procedure at Pages 164 and 165.)

ARREST WITHOUT WARRANT (EFFECT OF INSANITY PLEA)

On the other hand there is no claim here that the defendant actually did arrest the deceased, or that he shot him in order to make such an arrest or to prevent his escape. Rather it is claimed that the defendant here became temporarily insane with the fatal results that followed.

However, you should carefully consider the foregoing charges I have just given you bearing on the subject of the right of the defendant to arrest the deceased as bearing on the important question of the intent with which he went to the tavern. If he went there with the intent to kill the deceased rather than to arrest him, then, if he were otherwise legally responsible, the offense is murder; but if he went there with the lawful intent to arrest him and not with the intent to kill him, and thereupon became insane as I (have defined) (shall define) that term, then you should acquit him.

INTENT OF DEFENDANT

INTENT OF DEFENDANT

While I am on the subject I should also charge you and do, that whatever the intent or motive you should find the defendant possessed when he went to the tavern, and even if you should find that he went there with the unlawful intention of killing the deceased, that if you should further find that he was legally irresponsible at the time the alleged offense was committed, that is, insane, then you should acquit him.

CONCEALED WEAPONS

CONCEALED WEAPONS (EXEMPTION OF SOLDIERS)

There has been some testimony (please add "and argument" if any is made) offered here that may have tended to show that the defendant might have been guilty of carrying an unregistered and concealed weapon on the night in question contrary to the law of Michigan. In this state it is required that the average citizen register any pistol possessed by him and it is also made a felony for the average citizen to carry a concealed weapon on his person or elsewhere without first obtaining a license to do so.

But in this regard I charge you that the Michigan pistol registration and concealed weapon laws do not apply to the defendant in this case. They do not apply here because our Michigan statutes on these subjects expressly provide that the provisions thereof, and I quote, "shall not apply...to any member of the army, navy or marine corps of the United States..." In other words, under the express provisions of Michigan law, Lieutenant Peterson, as a member of the United States Army, was exempt from the provisions of these laws and he had a lawful right to carry an unregistered and unlicensed concealed weapon upon his person on the night in question, and under the law it made no difference whether he was on duty or off duty. That is the law in this state.

(Based upon M.S.A. Sections 28.98 and 28.428 of the Michigan laws pertaining to the registration of pistols and the carrying of concealed weapons.)

John D. Voelker
Attorney for Defendant
Woolworth Building
Ishpeming, Michigan

Dated: September _____, 1952.