



# Society Update

The Official Publication of the Michigan Supreme Court Historical Society

Summer 2017

## Highlights *from* the 2017 Annual Luncheon



Included in this issue of the *Society Update* are the text of the legal vignettes presented at the Society's Annual Membership Luncheon on April 20, 2017, by State Bar President Lawrence Nolan and Chief Justice Stephen Markman; a photo collage of guests from the Luncheon; the presentation of the *Dorothy Comstock Riley Legal History Award*; and a brief history of the Douglass presentation cup.

This issue also includes updates on our Coleman internship, the presentation of the Law Prize, a new justice, a new portrait fund, and an article from the Advocates Guild. We hope you enjoy reading it!

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## *Ferguson v Gies*: A Supreme Decision



State Bar of Michigan President Larry Nolan delivers a legal vignette at the Detroit Athletic Club on Thursday, April 20, 2017.

I would be remiss if I failed to mention that the Articles of Incorporation of the Michigan Supreme Court Historical Society, Inc., giving life to the embryonic beginnings of this 501(c)(3) Non-Profit Corporation, were filed with the Michigan Department of Commerce on April 19, 1988, in conformity with Public Act 162, of Public Acts of 1982. That was 29 years ago yesterday, so I think it is appropriate that we wish this Society and its founder, Dorothy Comstock Riley, a belated happy organizational 29th birthday today.

The mission of the Supreme Court Historical Society has always been from the beginning to “**collect, preserve, and display** documents, records, and memorabilia relating to the Michigan Supreme Court and other courts of Michigan; to **promote the study** of history of Michigan’s courts; and seeking to increase public awareness of Michigan’s legal heritage.”

In furtherance of that mission special events and legal vignettes such as today’s have helped to highlight and preserve our rich history as a **leading Appellate Court in the United States** in all areas of the law.

As we are all aware, Michigan’s highest court is the Supreme Court and that it has always been a leader in decisions for other Supreme Courts in the United States to follow.

Consistent with these leading landmark decisions is the 1890 Michigan Supreme Court case of *Ferguson v Gies*, 358 Mich 1899, which happens to be the topic of my vignette here today.

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William Ferguson was born on May 22, 1857, to the family of Joseph Ferguson, one of Michigan’s first black doctors who happened to be the first black graduate of the Detroit Medical College. William received

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his education in the Detroit schools. He became successful in printing and in real estate in the Detroit area.

After being expelled from the Gies European Hotel restaurant in downtown Detroit for refusing to eat in the “colored section” he retained an African American lawyer to file a lawsuit.

His lawyer was originally from the Bahamas. His name—D. Augustus Straker. Straker was the first minority lawyer to ever argue a case before the Michigan Supreme Court after he was defeated in the lower court in the *Ferguson* case. Straker filed his appeal on behalf of his client, William Ferguson, in 1890.

The fundamental premise upon which he based his appeal was that separation by race in public places was illegal.

The former house of William Ferguson was located on Alfred Street between Antoine and the Chrysler Service Drive here in Detroit. A Michigan historical marker was placed at Ferguson’s former homesite on Alfred Street near the Brewster Wheeler Recreation Center. It has since been removed and is no longer in that location. This is a possible opportunity for the State Bar of Michigan series on Legal Milestones.

After winning his case before the Michigan Supreme Court, William Ferguson ended up going to law school and became an attorney. He was almost instantly propelled into significant stature in the black community in Detroit. He was later elected to the Michigan House of Representatives in 1893 and again in 1895. He died in 1910 and is buried in Section 10, Lot 54, of Detroit’s historic Elmwood Cemetery.

The case of *Ferguson v Edward G. Gies* was filed in Wayne County. The Honorable James Gartner heard arguments on the case on June 4, 1890. The lower court held that the keeper of a public restaurant could discriminate against colored persons as to the part of the restaurant in which he would serve those patrons with food and beverages solely on account of the color of their skin.

The Plaintiff Ferguson argued that the restaurant was in essence a “public place” and that it was licensed by the municipality (City of Detroit) to conduct business as a public restaurant.

Ferguson argued that when he entered the restaurant with a friend on August 15, 1889, and sat down at one of the tables provided for that purpose and

ordered supper, that he was denied service.

The Plaintiff claimed that the restaurant was divided in two parts. There were no separate rooms. However, one side of the business, or room, was known as the “restaurant side,” and the other side of the room was known as the “saloon side.” The restaurant side of the room had table cloths with glasses on the tables with napkins in them. The tables in the restaurant section were described as having a very neat appearance about them.

The tables on the saloon side were furnished with beer glasses, and had beer tables such as are usually found in saloons.

The Plaintiff, William Ferguson, and his friend sat down on the restaurant side of the room and asked for a lunch.

The waiter explained that he could not wait on Plaintiff or take his friend or take their order. The testimony established that the waiter stated:

“We cannot serve you kind of people here. It is against the rules of the house to serve colored people in the restaurant. If you want anything to eat, you will have to go on the other side of the house.”

After listening to the waiter, Ferguson went to the restaurant’s front office and told the Defendant Gies that he had been insulted by one of Mr. Gies’ waiters. Ferguson told Gies exactly what had been said.

Gies responded that the waiter was correct and that was in fact the “rule of the house” and that if Ferguson wanted anything to eat, he would have to go to the saloon section of the establishment. The defendant ended the conversation by telling the Plaintiff that he would get nothing to eat unless he went to the saloon side of the restaurant. The Defendant adamantly refused to serve Ferguson at any of the tables on the restaurant side of the room.

Plaintiff, William Ferguson, then left, accompanied by his friend, without eating anything. Defendant Gies testified that colored people were not permitted to sit in the restaurant except in one part of the room, but white men were welcome to sit and be served wherever they liked.

Recall that in May 1885 the Michigan Legislature passed “An Act to protect all citizens in their civil rights.”

Justice Allen B. Morse of the Michigan Supreme Court strongly rejected the ruling of the Wayne County Circuit Court Judge James Gartner by declaring:

“In Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that is denied to the black man. Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction.”

\* \* \*

Emphatically denouncing racism, Justice Morse declared that ‘any discrimination founded upon the race or color of the citizen is unjust and cruel, can have no sanction in the law of this State.’ Morse believed that this sort of discrimination, which could be found in other states, ‘taints justice.’ He then demolished the racist notion that God had made blacks inferior to whites. He argued that such ideas were founded on reasoning that ‘does not commend itself either to the heart or judgment.’ A civil war veteran who had lost an arm storming Missionary Ridge as a member of the 16th Infantry Michigan, Justice Morse understood exactly what the purpose of the war had

been, and he proudly and fearlessly declared that in Michigan equality was the law of the land.

In *Gies*, the Michigan Supreme Court offered one of the most emphatically egalitarian opinions of the century. The court placed Michigan in the vanguard of offering legal protection for black civil rights. Unfortunately, the decision could only give Ferguson the right to a new trial, and not guarantee him a fair judgment. That was to be left to a jury, which on retrial awarded him only token damages.

Remember that *Plessy v Ferguson*, 163 US 537, 1896 was the landmark case that upheld racial segregation under the Doctrine of “Separate but Equal.” That decision in 1896 was a 7-1 majority United States Supreme Court decision written by Justice Henry Billings Brown with the lone dissent being written by Justice John Marshall Harlan.

It was a mere 58 years later when the United States Supreme Court ruled in *Brown v Board of Education* that Michigan would finally be recognized as a leader in the law with its decision in *Ferguson v Gies*.

Oh, and by the way, William Ferguson’s lawyer, D. Augustus Straker, was apparently more than just another lawyer arguing his first case before the Michigan Supreme Court. He was obviously the forerunner to Attorney Thurgood Marshall before the United States Supreme Court in 1954 in the *Brown v Board of Education* victory.

# Thank you to our 2017 table sponsors!

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# Society Annual Membership



Society Coleman intern Jackie Guzman helps guests find their name tags at the registration table. Look for updates to the lesson plans online soon!



Justice Richard Bernstein (center) greets guests during the reception. L-R: Mayer Morganroth, Jennifer Bentley, Julie Fershtman, and Al Butzbaugh.



Former Justice Marilyn Kelly (center) poses with Michelle Busuito, a former Supreme Court law clerk, and Danielle Brown.



The State Bar's Appellate Practice Section was a table sponsor of the Luncheon. L-R Section Chair Gaëtan Gerville-Reaché and Bradley Hall.



L-R: Society members James Vlasic, James Robb, Mrs. Marian Impastato, Judge Joseph Impastato, 3rd Circuit Court Chief Judge Robert Colombo, Michael Coakley, and LeRoy Asher.



Justice Bridget McCormack chats with Justice Kurtis Wilder.

# Luncheon \* April 20, 2017



Another record crowd for this year's Annual Membership Luncheon. Nearly 175 people were in attendance.



Luncheon guests Thomas Kienbaum and Kurtis Wilder listen to the legal history vignettes.



Advocates Guild members Michael Brown and Tim Baughman join in a standing ovation.



Justice David Viviano (r) speaks with Len Niehoff (L) and Greg DeMars (center). DeMars was elected to the Society's Board of Directors at the meeting before the luncheon.



6th Circuit Court Judge Denise Langford Morris has served on the Society's Board of Directors since 1995.



Justice Brian Zahra (center) speaks with Jules Olsman (L) and Elizabeth Hardy (R).

All photos from Annual Luncheon by David Frechette

# Chief Justice Markman's Remarks

What a great honor to speak before the Michigan Supreme Court Historical Society. Our Court is so blessed to have an organization such as this, one that fosters an understanding of the Court's 182-year history, an appreciation for its many outstanding jurists and their decisions, and a respect and regard for its judicial traditions. And certainly not least, an organization that allows the justices of the Court, past

and present, to meet with its friends each year in the hallowed halls of the Detroit Athletic Club. There is simply no venue anywhere in our state wherein better to celebrate a venerable tradition than here at the DAC, and no better company than the members of the Michigan Supreme Court Historical Society. On behalf of the Court I thank Charlie Rutherford for his leadership, I thank the Board for its sense of continuity and direction, I thank Carrie Sampson for all that she does inside and outside the Hall of Justice, and, perhaps most of all, I thank Wally and Justice Dorothy Riley for the remarkable and enduring legacy that they have crafted in this Society. And, of course, I thank each of you, those who belong to this Society, a membership comprised of many of the most outstanding members of the *bar* and *bench* in Michigan, if not also the *bench* and *bar* in Michigan.

Let me thank in particular and give full credit for today's presentation of the Douglass cup my friend and counselor, and model of what it means to be an "engaged" jurist, Avern Cohn. There is no Justice on the *Michigan Supreme Court* who is more learned in the history and heritage of their Court than is Judge Cohn, and it is alone the result of his generosity and his passion for the Michigan judiciary that we have been bequeathed this Cup.

While I am enormously privileged for a fleeting time to serve this Court as its Chief Justice, my own deservedly-overlooked legacy on this great tribunal



Michigan Supreme Court Chief Justice Stephen J. Markman holds the silver cup that was presented to Justice Samuel Douglass by the Detroit Bar upon his retirement from the Supreme Court in 1857.

may well be that I am the longest-serving-ever *junior* member of the Court, having held that august position for more than nine years. Now, we don't have much in the way of tradition or convention that the junior member must do anything particularly demeaning—although our current junior member Justice Larsen does an admirable job in supplying her colleagues with water

and soda at our weekly conferences while one of her predecessors was diligent in supplying her colleagues with bagels—the principal burden borne by the junior justice is that he or she much more often than more senior Justices must cast the initial vote on matters being considered at conference. That is, the junior Justice must have settled, at least tentatively, upon a position in resolving the most difficult cases and controversies within our appellate system and be reasonably able to articulate that position for the edification of his or her colleagues. And that is not always an easy feat, for it is much easier to cast one's vote as the second or the third justice, or the seventh justice, around the table by an emphatic, "I agree with Justice Larsen," or "Justice Larsen makes a good point," or "I have reflected upon this matter at length and have reached the same conclusion as Justice Larsen," or perhaps by the even more useful and all-purpose rejoinder, "ditto." So it was with great relief after nine years on the Court that I finally obtained the seniority to be able at conferences to furrow my brow, pause portentously to reflect on the great issue of the moment, and opine to my colleagues "me too." And so just as we will imminently celebrate the appointment of a new Justice this week, let us pause for a moment and celebrate the imminent appointment of a new junior justice.

Let me also recognize the substantial contributions of my long-time colleague Bob Young whose final day on the Court was this week. I have served

on the appellate bench with Justice Young for more than twenty years and there are few Justices who have brought a greater intellect, work ethic, and commitment to his judicial responsibilities than did he. In particular, his leadership as Chief Justice has rendered the judiciary of our state leaner, more efficient and accountable, and better focused upon serving the people of Michigan. With his departure, and with Justices Zahra and McCormack, first elected in 2010 and 2012 respectively, now becoming the second and third most senior Justices, it has been a time of significant flux on the Court and this may well continue.

But this is hardly the first time that the Court has undergone a period of some dislocation. Indeed, today's "guest of honor," of sorts, Justice Samuel Douglass, is evidence of that. Justice Douglass' name is closely associated with meticulous legal research in Michigan, as it is his name that is engraved on the two volumes of our short-lived experience in the early 1840s with reports named after the Court's Reporter of Decisions—*Douglass' Michigan Reports*, or 1 and 2 "Doug," in advance of 1 "Mich" coming only in 1847. A quick check of the Society's *Michigan Supreme Court Historical Reference Guide* shows Justice Douglass later serving on the Court from 1852 to 1857, at which time he left the Court and was presented on his retirement with this beautiful cup from the Detroit Bar Association.

He left the Court just as it was being reduced in size from eight members to four. From 1835 until 1857, the Court had consisted of Michigan's circuit judges, who sat individually in their respective circuits and collectively as the Supreme Court. Thus, the size of the Court increased as the State's population expanded and new circuits were organized, from three in 1837 to eight in 1857. It was in this era that Justice Douglass first came to the Court following his stint as its Reporter, a path to the Court incidentally later followed by Randolph Manning in 1858 and by Thomas Cooley in 1864, the successor to U.S. Supreme Court Justice Joseph Story as the greatest American constitutional scholar of his time. During

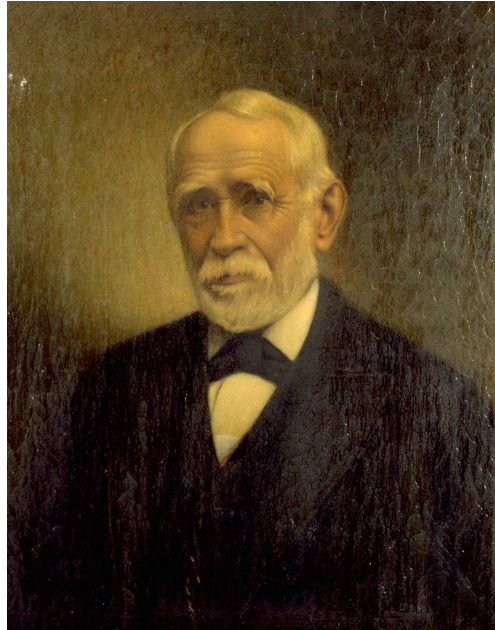
this era, the Justices were exactly equivalent to the membership of the circuit courts. Although the circuits elected *associate* judges until 1847, these were notorious for having little actual training in the law and thus bore relatively little actual judicial responsibilities. Cooley himself said that "their duty was to do nothing, and they did it faithfully;" and later, with

equal diplomacy, that though the associates "sometimes slept on their posts, whether sleeping or waking, they performed the duties equally well." By contrast, not once since *I* have served on the Court have I ever said anything similar about one of my colleagues, at least not to the best of my recollection.

As noted, contemporaneous with Justice Douglass' departure, the Court's membership was reduced from eight to four justices. And, this is because a substantial change had occurred in the Court's role—for the first time, the Legislature organized a tribunal of last resort whose mem-

bers were independent of the trial courts, a major step toward our contemporary notion of what a Supreme Court ought to look like. According to a speech given by Justice William Potter to a symposium of the Indiana State Bar Association, "[t]he original argument in favor of four justices was that a majority [of that number] constituted a larger percentage of the whole number [of four] than any other number [greater than two]." Ponder that calculation for a moment. That is, our Legislature was as steeped in mathematics as in the republican virtues of Rome and the Founding. However, the four-member Court soon thereafter proved unsatisfactory when in the *State Tax-Law Cases* in 1884, the *Marquette* circuit court held a controversial tax law to be constitutional, the *Wayne* circuit court held the same law to be unconstitutional, and the Supreme Court split at 2–2. Consequently, in 1889, the Court was increased to five members, although regrettably the percentage represented by a majority vote was sadly reduced from 75 percent to 60 percent and today stands, of course, at a paltry 57 percent.

Of course, in those days, there was no inter-



Samuel Douglass (MSC 1852–1857).  
Portrait by Percy Ives.

mediate court of appeals and so the work of even a Supreme Court whose members were not also conducting trial court work was substantial. By 1904, the Court's five Justices issued 502 opinions. Consequently, the next year, the size of the Court increased again, to eight members. But in a fascinating practice, the 1903 statute expanding the Court provided that only five Justices needed to sit to hear a given case, with the proviso that only in the event of a dissent would the losing party be allowed to reargue the case before the entire Court. Although by 1912, no case had actually arisen in which reargument by the full Court was required, as it was "the practice of the court in cases submitted to five justices who were unable to agree to itself order a *reargument* of the case." *Dolph v Norton*, 158 Mich 417, 422 (1909). Nonetheless, this proved inefficient and by 1912, it appears that the Court had abandoned this practice with *all* current members of the Court being listed on all the opinions by that time. The next 'size of the Court' milestone, obviously, was the reduction of the Court from eight to seven members provided in the Constitution of 1963, which also created an intermediate appellate court, allowing the Supreme Court to focus on its current discretionary docket.

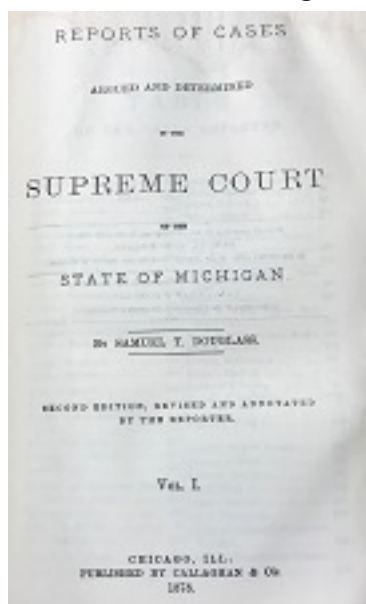
I find this judicial history fascinating, and on more than a few occasions have enjoyed taking down from my office shelves one or another of the 500 or so aged and tanned-and-red volumes of *Michigan Reports*, typically one from *exactly* one hundred years earlier, engaging in a close reading of several obscure cases from the volume, and trying to imagine what exactly was in the minds of the Justices who wrote of these long-forgotten disputes. By what customs did the Justices interact and communicate, in what kind of study or library did they research their law, and did they ever imagine what would become of their work one hundred years later? How, if at all, would it be remembered? Perhaps, like Christopher Reeves in the greatest of all Mackinac Island films, *Somewhere in Time*, by immersing myself in the biblio-artifacts of an earlier era, I might gain some deeper insight on

the work and evolution of the Court.

Take, for instance, *Michigan Reports* volume 196, encompassing April 1917, the exact month that America entered World War I by declaring war against Germany. There are any number of interesting distinctions that immediately draw my attention.

First, the period covered is essentially a calendar quarter and the table of contents lists in that period 102 cases reported in some 750 pages of text. These days, we typically decide only some 30 or 40 cases in an entire calendar year, although the average opinion is considerably lengthier. Also, a mere seven of the 102 cases reported are criminal cases. By contrast, in more recent terms, that figure is closer to 30-40 percent. On the other hand, there were five divorce matters heard in just that calendar quarter in 1917 and eight probate matters, which is five and eight more than we have heard of such matters in many recent terms. And of the 102 decisions in 1917, only one, *Schenk v Ann Arbor*, had much of a subsequent history as cited legal authority, being later described as "[t]he seminal case dealing with groundwater rights in Michigan." And among these 102 cases, I count only nine with an actual dissenting opinion, notwithstanding the larger size of the Court.

Even more intriguing, I think, are the *authorities* relied upon by the Court. Volume 196 cites the United States Constitution exactly *once*, and this only to recite an allegation made by a party in *Cleveland-Cliffs Iron Co v Republic Twp*, a case ultimately decided on wholly-unrelated grounds. This reflects, I think, that the work was done in an era well before so many garden-variety legal disputes were elevated to the status of "constitutional" cases in which realm legislative decision-making came increasingly to be supplanted by judicial decision-making. And yet—unlike in Justice Douglass' day—most of the legal authorities which were subsequently relied upon to constitutionalize legal issues today had long since been adopted by 1917, in particular the 14th Amendment and its due process and equal protection clauses. Even so, the Court primarily looked almost exclusively to *state* sources of law, in not insignificant part as a result of adhering to the constitutional jurisprudence of Thomas Cooley.



Front page from Douglass Report.

Consider, for example, *Larson v Feeney*, an action for unlawful imprisonment reported in volume 196. The facts are colorful:

[P]laintiff [a female] ... was walking upon one of the public streets of Muskegon in the early evening, and as [she] passed defendant [police officer] ... plaintiff coughed and said, "Hello there, kid." The defendant ... stepped into a cigar store, waited a moment, and came out again, as defendant sa[id], "for the purpose of giving [plaintiff] enough rope to see how far [she] would go with it." Nothing further was done or said by the [plaintiff]. Defendant followed [her] to the post office, where the plaintiff ... [was] taken into custody and locked up for the night.... [S]he was complained of as being a disorderly person because she solicited men for the purpose of prostitution.

The police officer alleged that he had authority to arrest the plaintiff under a provision of the Muskegon city charter "which confer[red] upon policemen the authority to arrest without warrant any and all persons in the act of committing any offense against the laws of this State or the ordinances of the city." The question in the case, then, was whether the plaintiff had committed an act constituting disorderly conduct. Writing for the Court, Justice John Bird held:

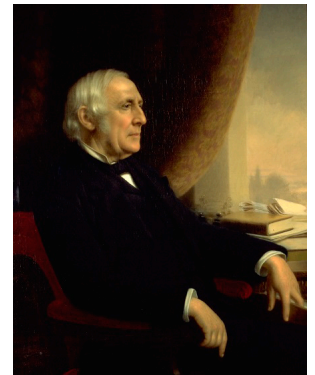
If plaintiff can be conclusively presumed to be a streetwalker or a soliciting prostitute by coughing and saying, "Hello there, kid," as she passes certain men on the street, the personal liberty of the citizen of this State has reached a pretty low ebb. As well might defendant have concluded that she had been disorderly because she turned up her nose at him, or because she was saucy to him, or because she was silly or bold and said indiscreet things. It is possible for a girl to be bold, silly, and have bad manners on the street and still be immune from arrest without a warrant. And it is evident that the defendant himself had his misgivings whether plaintiff's conduct was sufficient to justify her arrest, as he ...[gave] the girls more rope to see whether they would carry it any further. Why wait until they carried it further if the "cough and the salutation" characterized her as disorderly under the ordinances?"

In all this, not a word of the Fourth Amendment, or for that matter, Article II, § 10 of the Michigan Constitution of 1908, prohibiting unreasonable searches and seizures.

It is worth reflecting, I think, on what these and other differences say about the Court and the rule of law then and now, about understandings of judicial federalism yesterday and today, about the nature and role of litigation in our respective societies, but there is not the time here to do so. It is only the most obvious lesson that when the time capsule that rests in the rotunda of the Hall of Justice is opened in 2102, and the words of the seven Justices upon the Court in 2002 disclosed to their great-great-grandchildren that the differences in Court's practices and procedures, as well as its mission and constitutional role, may be as distinctive from those of our Court today as those of our Court are from the Court of 1917 and certainly from those of Justice Douglass' court sixty years before that.

Consider finally that in 1849, Douglass entered into law practice with one James V. Campbell and in 1856, married Campbell's sister, Elizabeth, who was reputed to be a lovely lady. But in April of 1857, elections were held for the reorganized and independent Supreme Court.

The seats were slotted and Douglass ran as the Democratic nominee for Chief Justice and lost to George Martin as part of a Republican Party "wave." While they did not face each other head-to-head, who else was part of that Republican "wave?" None other than Douglass' brother-in-law and former law partner, James Campbell, eventually considered as one of the Court's 'Big Four' Justices of the post-Civil War era. The tale in my view ends happily, as Samuel and Elizabeth had three children and remained married until Samuel's death in 1898. No word, however, on whether Justice Campbell was invited to the July 4, 1857 Independence Day remembrance at the Douglass home. Thank you all for being here this afternoon and for your continued support of this Society.



Big Four Justice James V. Campbell, (MSC 1858–1890). Portrait by Lewis T. Ives.

## Society Presents *Dorothy Comstock Riley Legal History Award* to President Charles Rutherford



State Bar President Lawrence Nolan (R) presented the *Dorothy Comstock Riley Legal History Award* to Society President Charles Rutherford.



Society President Charles Rutherford poses with his wife Patricia and their son John. He is the sixth recipient of the *Dorothy Comstock Riley Legal History Award*.

The Board of Directors of the Michigan Supreme Court Historical Society voted to award the organization's *Dorothy Comstock Riley Legal History Award* to Society President Charles R. Rutherford at the 2017 Annual Membership Luncheon. Mr. Rutherford has served as the Society's President since 2015. He has been on the Board of Directors since 1991. Previous recipients of the award include: Wallace Riley (2013); John W. Reed (2008); Rosa Parks, posthumously (2006); Dorothy Comstock Riley (2003); and Governor John Engler (2002). The award was re-named in honor of the Society's founder Chief Justice Dorothy Comstock Riley in 2015.

## Society Board of Directors



Front row (L-R): Judge Alfred M. Butzbaugh, President Emeritus Wallace D. Riley, Treasurer John P. Jacobs, Secretary Lawrence P. Nolan, President Charles R. Rutherford, Judge Denise Langford Morris, Professor John W. Reed, Judge Fred L. Borchard, Judge Avern L. Cohn. Back row (L-R): Mary Massaron, Stephen K. Valentine, Jr., Jill M. Wheaton, Richard D. Reed, Janet K. Welch, John G. Fedynsky, Justice James L. Ryan, Vice President Carl W. Herstein, Justice Mary Beth Kelly, Gregory J. DeMars, Susan Fairchild, Peter Ellsworth, and Julie Fershtman. Not pictured: Bruce A. Courtade, Matthew Herstein, Frank Kelley.

# Artifact Acquisition



The Douglass cup is a small, silver cup embossed with strawberries and inscribed on one side of the cup with a verse from Horace in Latin: "vilius argentum est auro virtutibus aurum" which translates to "as gold is worth more than silver so is virtue worth more than gold."



Special thanks to Judge Avern Cohn (L) for contributing the funds for the Society to purchase the Douglass cup!

## Testimonial to Judge Douglass

From the *Detroit Free Press* \* May 17, 1857

A meeting of the members of the Bar was held in this city on Friday afternoon, to decide upon some proper expression of the feelings of the legal fraternity in view of the resignation, and retirement into private life, of Judge Douglass. Numerous speeches were made, by those present, of a character highly laudatory of Judge Douglass, both as a judge, a lawyer, and a citizen. A subscription to the amount of \$380 was reported as having been collected, and a committee of three, consisting of Judge Hand, Geo Jerome, and J.W. Waterman, was appointed to procure a service of plate for presentation to Judge Douglass, as a testimonial of the regard and friendly feeling of the Bar of this city. The following resolutions were then offered, and unanimously adopted:

*Whereas*, The official term of the Hon. Samuel T. Douglass, Circuit Judge of the Third Judicial Circuit is about to terminate by the resignation of his office; and the members of the Bar practicing in this Circuit being convened for the purposes of taking such action as may seem appropriate to the occasion; it is by them, *therefore*,

1. Resolved, That the prosperity of any commonwealth is vitally concerned in the ability and integrity of its Judiciary.
2. That as the members of our profession must necessarily perceive more readily than others the evil effects of an incompetent Judiciary, so there are none who appreciate more highly the excellencies when they exist; and, therefore, there is resting on us a special obligation to render "honor to whom honor" is due.
3. That recognizing our obligations to his Honor, Judge Douglass, we desire to be prompt and earnest in expressing them; and while we cannot withhold our regrets that there should be any necessity which will deprive us of his continued service, and while we will most cordially welcome him back to the Bar, we gladly embrace this occasion to testify our high appreciation of the qualities which have marked his administration of Judicial office. Punctual and diligent in the routine of his duties; candid, patient, and courteous in hearing; self-sacrificing, in the labor of his investigations; discriminating clear and upright in his judgments; these are his qualities as we have found them, and these constitute his claims upon the respect, the confidence, and the approbation of his fellow-citizens.
4. That, as it seems to us suitable that the journal of the Court in which the services we request have been rendered should preserve a record of the sentiments we here express, a copy of these resolutions be presented to the Circuit Court for the county of Wayne, with a request that they be entered on the Journal of the Court.

On motion of H. K. Clarke, it was resolved that C.I. Walker, Esq., present the resolutions to the Circuit Court at the opening of the Court for the May term, on Tuesday next, and move that they be entered on the journal.

The meeting then adjourned.

## Kurtis Wilder Appointed to Michigan Supreme Court



**K**urtis T. Wilder was appointed to the Michigan Supreme Court by Governor Rick Snyder on May 9, 2017. Justice Wilder graduated from the University of Michigan with an A.B. degree in Political Science in 1981 and from the University of Michigan Law School with a Juris Doctor degree in 1984. After graduation from law school served he practiced with the law firms of Foster, Swift, Collins & Smith, P.C. in Lansing and Butzel Long, P.C. in Detroit. Justice Wilder served as a judge of the Washtenaw County Trial Court from March 1992–December 1998, when he was appointed by Governor Engler to the Court of Appeals. He served there from 1998–2017. Justice Wilder’s term expires January 1, 2019.

An investiture ceremony will be held for Justice Wilder at the Hall of Justice. Date to be announced. Please check our website at [www.micourthistory.org](http://www.micourthistory.org) for more details in the coming weeks.

If you would like to make a contribution on behalf of Justice Wilder, please submit payment to the MSCHS at 925 W. Ottawa Street, Lansing, MI 48915.

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## Wheaton, DeMars Elected to Society’s Board

At the board meeting prior to the Luncheon on Thursday, April 20, 2017, two longtime members of the Society—Jill M. Wheaton and Gregory J. DeMars—were elected to terms on the Society’s Board of Directors. Ms. Wheaton will serve two-year term, ending at the Annual Luncheon in 2019. Mr. DeMars will serve a three-year term, ending at the Annual Luncheon in 2020.

### Jill M. Wheaton



Jill M. Wheaton is a graduate of the University of Michigan School of Literature, Science and the Arts (1987) and the Univer-

sity of Michigan Law School (cum laude) (1990). Upon graduation from law school, Ms. Wheaton began her career at Paul, Weiss, Rifkind, Wharton & Garrison in New York City. In 1994, she returned home to Michigan and joined the law firm of Dykema, Gossett. She has been Dykema’s Chair of the firm’s Appellate Practice Group since 2007 and is resident in the firm’s Ann Arbor office. She has also served as a practice group leader for the Litigation group. Ms. Wheaton is a member of the Society’s Advocates Guild.

### Gregory J. DeMars



Gregory J. DeMars graduated with high distinction from Wayne State University, earned an MPA from Wayne State, and his Juris Doctor from Wayne State University Law School (magna cum laude). He was the articles editor of the Wayne Law Review from 1980–1981, and served as a law clerk to Chief Justice G. Mennen Wil-

liams from 1981–1983. Mr. DeMars is a real property law specialist, formerly with the Honigman firm. He is now an adjunct professor at the University of Detroit Mercy School of Law.

## Law Clerk Directory:

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## Spotlight on Solicitors: Part Two

A feature of the Advocates Guild, written by Andrea Muroto Bilabaye

The Solicitor General is the top appellate attorney in the state. In recognition of those who have held this prestigious post, the Advocates Guild will be running our *Spotlight on Solicitors* series throughout 2017. Our first installment of this series ran in the Winter 2017 newsletter, featuring a short history of the office and biographies of the first two men to hold this position: Edmund E. Shepherd (1941–1957) and Samuel J. Torina (1957–1961). Part Two covers the next three Solicitors General: Joseph B. Bilitzke (1961–1962), Eugene Krasicky (1962), and Robert A. Derengoski (1963–1982). All three of these men served under Attorney General Frank Kelly, who held this position from 1961 through 1999.

### **Joseph B. Bilitzke (1961–1962)**

A Detroit native, Bilitzke served in World War II as a Lieutenant Colonel in the Air Force after graduating college. Upon his return from service, he enrolled in the University of Detroit Law School, earning his law degree in 1949. He first joined the Attorney General's Office as an assistant attorney general, working his way up to Deputy Attorney General before being appointed Michigan's third Solicitor General.

Throughout the 1960s, the issue of *Allen* charges was frequently challenged in appellate courts.<sup>1</sup> Bilitzke had the opportunity to make his mark on this area of law in *People v. Barmore*, 368 Mich. 26 (1962). In this case, Bilitzke defended the trial judge's instruction to the seemingly deadlocked jury that "it was their duty to agree upon a verdict."<sup>2</sup> The Michigan Supreme Court found that the judge's instruction effectively coerced the jury into reaching a decision and granted the defendant a new trial. This case was a stepping stone on the road to *People v. Sullivan*, 392 Mich. 324 (1974), which regulated the use of *Allen* charges throughout the state, requiring judges to use an approved ABA model instruction.

Fourth Amendment search and seizure law was also developing throughout the 1960s. Bilitzke argued the interesting case of *People v. Kaiger*, 368 Mich. 281 (1962) before the Michigan Supreme Court. In this case, the defendant was arrested in

his home for the murder of his wife. The following day, the officers returned to the house to gather evidence that was later used against the defendant at trial. When the defendant challenged this on appeal, Bilitzke advanced a novel argument: since the house was still marked off as a designated crime scene, it—along with all its contents—were in the constructive possession of the police. According to Bilitzke, this meant that the police could return at any time while the premises were under their control to collect evidence. The Court, however, disagreed, finding that this interpretation of the Fourth Amendment was too broad. While it may seem evident by today's standards that Bilitzke's argument was going to fail, at the time he made it in 1962, it was a solid argument.

Though Michigan has a history of strong labor unions, their power was on the decline throughout the 1960s. Bilitzke aided the unions' struggle for power in *Local No. 1644 et al. v. Oakwood Hospital Corp.*, 367 Mich. 79 (1962). In this case, all the unskilled, non-clerical employees of Wayne County's Oakwood Hospital wanted to organize as a single collective bargaining unit. The hospital argued that it had no legal duty to recognize or bargain with the local chapter of the union. Intervening on behalf of the employees, Bilitzke argued that the hospital was required to engage in collective bargaining under Michigan's Labor Mediation Act.<sup>3</sup> The Court sided with Bilitzke and the hospital employees, giving labor unions across the state a much-needed victory.

Bilitzke remained with the Attorney General's Office after stepping down as Solicitor General, working in the Uninsured Motorist's Division until his retirement in the 1980s. He became a recognized expert in this field. He was also elected to the executive board of the Prosecuting Attorneys Association of Michigan and served on the State Bar's Aeronautical Law Committee for over ten years. After his retirement, he moved to Mullet Lake, where he remained until his death in 2000, at the age of 83.

### **Eugene Krasicky (1962)**

Michigan's fourth Solicitor General was Eugene Krasicky, another Detroit native who graduated from

Wayne State University Law School in 1946. Krasicky worked in at the Legal Aid Bureau before transitioning into the Attorney General's Office. He was working as an Assistant Attorney General when he was appointed Solicitor General.

The national increase in marijuana use during the 1960s led to an increase in the number of arrests for marijuana possession. However, the meaning of "possession" under Michigan's then-current narcotics act<sup>4</sup> was not clear until the Michigan Supreme Court decided *People v. Harper*, 365 Mich. 494 (1962). In this case, the defendant argued that he was not in possession of the marijuana that police found in his trunk because he did not have actual physical custody over the drugs at the time. Krasicky advocated against this narrow interpretation of the word "possession" and persuaded the Court to adopt a broader definition, encompassing situations where the defendant has only constructive possession of the drugs. The U.S. Supreme Court denied the defendant's petition for certiorari, letting this broad definition of possession stand.

Legislative reapportionment was a hot topic throughout the 1950s and 1960s, particularly in Michigan. In accordance with a Michigan constitutional amendment,<sup>5</sup> districts for the state senate were drawn according to geographical size, without regard to population fluctuation. This resulted in rural areas having a disproportionate influence compared to urban areas.<sup>6</sup> The Michigan Supreme Court heard the case of *Scholle v. Hare*, 367 Mich. 176 (1962) for a second time after the case had been remanded by the United States Supreme Court.<sup>7</sup> This time, Krasicky helped advance the state's position that the disproportionate voting power of rural constituents under the current apportionment scheme violated the Equal Protection Clauses of both the state and federal constitutions. The Michigan Supreme Court agreed, and it ordered the state senate to redraw the district boundaries so that they were equally proportioned. Krasicky saw his efforts come to fruition in the 1964 election, when constituents voted for the first time in districts that were equal based on population.

One of Krasicky's last cases before the Michigan Supreme Court interpreted the language of a 1961 amendment to the real estate exemption section of the General Property Tax Act.<sup>8</sup> In *Evanston Y.M.C.A. Camp v. State Tax Commission*, 369 Mich. 1 (1962), the appellant challenged a new provision of the ex-

emption that required at least fifty percent of Y.M.C.A. members to be Michigan residents in order for local chapters to claim the exemption. Krasicky argued that tax exemptions which distinguished between residents and nonresidents are not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Court found in Krasicky's favor, quoting extensively from his brief in its opinion. This provision of the real estate exemption section remains in effect today.

Krasicky stepped down as Solicitor General when he was appointed to the Attorney General's new Civil Rights and Civil Liberties Task Force, the first of its kind in this country in its approach to civil rights issues. He then went on to serve many years as Michigan's First Assistant Attorney General. He later taught at Thomas M. Cooley Law School, where he developed the school's Scholarly Writing program. Krasicky passed away in 2010, at the age of 87.

### **Robert A. Derengoski (1963–1982)**

Michigan's fifth and longest-serving Solicitor General hailed from Manistee.<sup>9</sup> After earning his law degree from Notre Dame, Derengoski was called to active duty and served in World War II. Following his return from service, he was hired as Governor William's Legal Advisor. He held the same position for William's successor, Governor Swainson, before running as Neil Staebler's Lieutenant Governor.<sup>10</sup>

Environmental protection became a focus of the Attorney General's Office during the time that Derengoski was Solicitor General. One of the cases, *Lake Carriers' Association v. MacMullan*, 406 U.S. 498 (1972), made it all the way to the U.S. Supreme Court, in front of which Derengoski argued for the first time. In this case, he defended Michigan's Watercraft Pollution Control Act,<sup>11</sup> which prohibited the dumping of treated or untreated sewage into Michigan waters and required boats with onboard toilets to have sewage storage devices. The Lake Carriers' Association argued that the Act burdened commerce and was preempted by the Federal Water Pollution Control Act. Despite Derengoski's eloquent arguments, the case was remanded back to the lower courts on civil procedure grounds.

Desegregating schools was still an important issue throughout the 1970s. Derengoski was heavily involved in Michigan's most famous case on this

issue—*Milliken v. Bradley*, 418 U.S. 717 (1974), which determined whether a district court could redraw a school district's boundaries to achieve integration. In this case, citizens alleged that Detroit schools were promoting de facto segregation, since the majority of students at inner city schools were African American, and the majority of students in the suburban schools were Caucasian. In order to remedy this, the district court ordered that the school district lines be redrawn to achieve greater diversity at all schools. The U.S. Supreme Court, however, held that this plan was not warranted by *Brown v. Board*, 347 U.S. 483 (1954). It found that a school was not required to achieve a particular level of racial balance among its students.

Derengoski appeared before the U.S. Supreme Court for the third and final time when he argued *Jenkins v. Anderson*, 447 U.S. 231 (1980). The defendant in this case was tried with first-degree murder, an act which he claimed was done in self-defense. During cross-examination of the defendant at trial, the prosecutor asked why the defendant waited two weeks to turn himself in to the police if his claim of self-defense was legitimate. On appeal, the defendant argued that this line of questioning regarding his pre-arrest silence violated his Fifth Amendment right against self-incrimination. Derengoski, however, argued that pre-arrest silence did not fall under the protection of the Fifth Amendment, and the prosecutor was allowed to ask him this to impeach the defendant's credibility as a witness. The Court agreed with Derengoski's position, leaving him victorious in his final case before the U.S. Supreme Court.

His retirement from the position of Solicitor General at the age of 65 marked his retirement from the workforce. In 2002, at the age of 85, Derengoski passed away.



A view of the lighthouse at Fifth Avenue Beach in Manistee, Michigan. Besides being the hometown of the longest-serving Solicitor General, this small town in the northern lower peninsula is significant for being the birthplace of the American Judicature Society. The 13th Michigan Legal Milestone notes that the idea was conceived aboard a skiff on Lake Michigan in 1911 by Manistee residents Herbert Harley and Charles Ruggles. At that time, Manistee County Judge Aaron McAlvay served on the Michigan Supreme Court as the 40th justice. Photo courtesy of Beth Peplinski.

### Author Info

Originally from Houghton Lake, Michigan, Andrea Muroto Bilabaye is a third-year law student at Western Michigan University Cooley Law School. She currently works as a law clerk at Speaker Law Firm, an appellate firm specializing in family law.

### Endnotes

<sup>1</sup> Its name taken from *Allen v. United States*, 164 U.S. 492 (1896), an *Allen* charge refers to a jury instruction that encourages a deadlocked jury to continue deliberations until they reach a unanimous verdict.

<sup>2</sup> *People v. Barmore*, 368 Mich. 26, 30 (1962).

<sup>3</sup> P.A.1939, No. 176, as amended (C.L.1948 and C.L.S.1956, § 423.1 et seq. [Stat.Ann.1960 Rev. § 17.454(1) et seq.]).

<sup>4</sup> P.A.1952, No. 266.

<sup>5</sup> MICH. CONST. art. 5, §§ 2, 4, (as amended in 1952).

<sup>6</sup> Since rural areas tended to vote Republican, some people viewed this as a deliberate attempt by conservative senators to skew the vote in favor of Republicans.

<sup>7</sup> The issue was first heard by the Michigan Supreme Court in the case of *Scholle v. Hare*, 360 Mich. 1 (1960). The U.S. Supreme Court remanded the case for consideration in light of the recently decided case of *Baker v. Carr*, 369 US 186 (1962), which held that the issue of legislative districts could be evaluated by the judicial branch under the Equal Protection Clause.

<sup>8</sup> Mich. Comp. Laws § 211.7 (1948) amended by P.A. 1960, No. 155.

<sup>9</sup> Manistee is located in the northwestern section of Michigan's lower peninsula, on the shore of Lake Michigan.

<sup>10</sup> George Romney and William G. Milliken defeated Staebler and Derengoski in the 1964 election.

<sup>11</sup> Mich. Comp. Laws § 323.331 et seq. (repealed by P.A. 1994, No. 451, § 90101, Eff. March 30, 1995).



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