MICHIGAN LEGAL STUDIES

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Unreported Opinions of the Supreme Court of Michigan 1836-1843
William Wirt Blume, Editor
UNREPORTED OPINIONS
OF THE
SUPREME COURT OF MICHIGAN
1836-1843

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Foreword
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Historical Introduction
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Foreword

In July 1836 final jurisdiction of non-federal litigation passed from the Michigan Territorial Supreme Court to the Supreme Court of the State of Michigan. Then, substantially as now, the Constitution provided: “The judicial power shall be vested in one supreme court, and such other courts as the legislature may from time to time establish.” Mich. Const. 1835, Art. VI, §1. Those who are interested in the judicial history of Michigan prior to 1836 are fortunate in having access to much of such history contained in the six volumes entitled “Transactions of the Supreme Court of Michigan,” edited by Professor William Wirt Blume of the Michigan Law School faculty. Along with other interesting material, he has included therein and thus made available some seventy of the opinions of the Michigan Territorial Supreme Court. His present volume of “Unreported Opinions of the Supreme Court of Michigan, 1836-1843” brings to light and for the first time makes accessible the Michigan Supreme Court decisions therein contained which were rendered during the indicated period of seven years.

Contrary to the prevailing assumption among laymen and some members of the legal profession, the Michigan Supreme Court Reports do not (with a few exceptions) contain the Supreme Court opinions which were rendered during this seven year period from 1836 to 1843. This failure to perpetuate opinions of the Supreme Court from 1836 to 1843 may in part be attributed to the fact there had been no printed reports of the Michigan Territorial Court during the immediately preceding period. Seemingly there was no orderly procedure adopted for permanent preservation of the Michigan Supreme Court’s opinions during the first years following its
creation. Thus quite naturally such of the Court’s opinions as were reduced to writing found lodgment in diversified repositories and often in obscure places. The fact that during the noted period the Supreme Court held its sessions in various localities doubtless was a contributing circumstance to the disappearance of many of its records. But since the informative introduction to this volume by Doctor Clark F. Norton of the University of Michigan so amply narrates the circumstances which produced this hiatus in Michigan’s judicial history, there is no need of amplification in this foreword; but the circumstance is worthy of note as indicative of the value of Professor Blume’s present contribution to Michigan’s judicial history.

The authenticity of this volume’s contents is vouchsafed by the detailed references painstakingly provided by the editor to many manuscripts, public records, etc. Readers of this volume will find therein the earlier and probably the first utterances of the Supreme Court of Michigan relative to many interesting phases of our law. Suffice to note among them the following:

In addition to the subject matter hereinbefore noted, Professor Blume has preserved for us in this volume the early rule making activities of Michigan State Courts. He notes that at the outset (1837) the State Supreme Court adopted the rules of the Michigan Territorial Court. And by reproduction to some extent of the early promulgated court rules, we are given the genesis of the exercise of the rule making power by the judicial branch of our State government, thereby seeming to exemplify the fact that this is an inherent power of Michigan’s judiciary.

The compiler of this volume has, as it were, saved from complete loss much of the subject matter presented. By its perusal the reader can gain a closer touch with the manner in which cases were presented in the State Supreme Court by early and noted practitioners, among them such outstanding members of the legal profession as Henry M. Walker, Alpheus Felch, E. Burke Harrington, G. E. Hand, B. F. H. Witherell, E. Farnsworth, and Samuel T. Douglass.

In this volume and the preceding volumes of “Transactions of the Supreme Court of Michigan” we seemingly have as complete an assemblage of the record from 1805 to 1843 of both the Michigan Territorial Court and the Michigan State Supreme Court as could well be accomplished. These volumes are a merited tribute to the patience, industry and ingenuity of Professor Blume, and likewise a credit to the Michigan Law School which has made their publication possible. For this work the bench and bar of the State, historians, and others interested owe a debt of gratitude to those who have made it accessible.

Walter H. North
Justice, Michigan Supreme Court
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Historical Introduction*

IT IS a commonly known fact that, although Michigan was admitted to the Union in 1837 (many of her citizens had claimed statehood for more than a year prior to her formal admission), few opinions of the state supreme court written before 1843 have ever been published. Why a period of almost ten years should have elapsed before the first volume of state reports was issued in 1846 (with the exception of two volumes of chancery reports), or why the early reporters seem, from a casual examination, to have neglected decisions of the court before 1843, or what happened to the opinions, if any, that were rendered by supreme court justices during the first seven years of the state's existence, are questions which have never been answered adequately.

The historical setting of this subject may be summarized for present purposes in a few sentences. During the summer of 1835 a constitutional convention, which had been elected by the people of the Territory of Michigan, drew up and submitted to the electorate for ratification the first constitution of the state. This document was approved by a large majority of the people voting at a surprisingly small election in October of that year.¹ At the same time a governor, lieutenant-governor, and members of the state legislature were chosen, all of whom shortly thereafter assumed office and, without Congres-


¹ The total vote was: Yes—6,299; No—1,359. In only one county (Branch) were there more ballots cast against than for the constitution, and that was by the narrow margin of 29 to 32. JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN (hereafter cited as SENATE JOUR.), 1835-1836, Doc. No. 1.
sional sanction, attempted to establish a state government and to cast off the territorial government. Of the various measures undertaken in the interim preceding final entrance into the Union, it is necessary to note here only that the new legislature early in the next year adopted laws which provided for the cessation on July 4, 1836, of the terms and functions of the territorial officers, for the establishment of a peripatetic supreme court whose members were to act singly as presiding judges in the circuit courts of the various counties and jointly as the highest court of review, and for the selection of the new state judges. Subsequently, the governor in July nominated for the positions of chief justice and associate justices of the state supreme court three men who were approved almost unanimously by the senate. Within a week after their appointment these men began to assume control of Michigan’s judicial business.

For a detailed account of the actions taken by the governor and legislature of Michigan, counter measures carried out by President Jackson and his aides, and the arguments presented on both sides in regard to the right of Michigan to proceed as a state previous to approval by Congress of her constitution, see Norton, A History of the Supreme Court of the State of Michigan, 1836-1857, pp. 68-111 (1940). Also see the treatment of the same subject in Transactions of the Supreme Court of the Territory of Michigan, 1825-1836, pp. xlv-liii (1940) (edited by W. W. Blume).


The three were William A. Fletcher, George Morell, and Epaphroditus Ransom, all nominated and approved on July 18, 1836. Executive Journal of the Senate of the State of Michigan, 1835-1836, pp. 17-18.

Although no session of the state supreme court as a whole was held until January 1837, the individual justices, as required by law, presided in the state circuit courts which were held in several counties during the latter part of 1836. See the State Journal (Ann Arbor), Oct. 20, 1836, and the Journal of the Washtenaw County Circuit Court for the session of circuit court held in Washtenaw County; for reports on circuit court terms in Kalamazoo and St. Clair Counties, see Ransom, “Kalamazoo County,” 7 Michigan Pioneer Collections 469 at 473 (1886), (Michigan Historical Commission) and W. L. Jenks, St. Clair County, Michigan: Its History and Its People 196 (1912). In addition there were at least three writs issued before August 1, 1836, which bore the heading “State Supreme Court”: a writ of certiorari, dated July 25, in Batty v. Fraser, Sup. Ct., 1st cir., file No. 23; a writ of certiorari, dated July 30, in Lee v. Force, Sup. Ct., 2d cir., file No. 18; and a writ of error, dated July 30, in Mathews v. Howell, Sup. Ct., 1st cir., file No. 8.
Little emphasis had been placed upon the reporting and publishing of judicial opinions during the thirty-one years Michigan had territorial status. As far as is known, the Supreme Court of Michigan Territory never appointed an official reporter of its decisions, although for two years (1819-1821) a court rule was in force which provided that reports of the judges' opinions should be kept by some person appointed by the court, and James Duane Doty, clerk of the supreme court at that time, appears to have made an attempt to report several cases.\(^7\) In 1825 another private venture at reporting the supreme court decisions at least was projected,\(^8\) apparently without success. The legislative council adopted a resolution in 1828 instructing the committee on the judiciary to inquire whether it would be advisable to require the judges when sitting in bank to file written opinions on the cases disposed.\(^9\) While there were no immediate tangible results of this resolution, in 1831 a law was passed by the legislative council which required the judges of the Territorial Supreme Court and of the Wayne County Circuit Court to write decisions “in such cases and matters as are usually reported in the several States of the United States, where there are reporters provided by law,” and such opinions to be filed and preserved by the clerks of the courts.\(^10\) However, no collection of decisions by the Territorial Supreme Court was published until recently,\(^11\) and the few opinions which were printed

\(^7\) Doty's reportorial activities, as well as his manuscript volume of reports, have been recorded in 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1814-1824, pp. 365-427 (1938).

\(^8\) Notice was given in 1825 that A. G. Whitney, United States District Attorney, was engaged in taking notes on the arguments of counsel and on the decisions by the supreme court with the intention of collecting materials for a report of cases in that court. MICHIGAN HERALD (Detroit), Dec. 13, 1825 (photostatic copy in the Legal Research Library, University of Michigan).


\(^11\) All available opinions which could be located have been printed in the
contemporaneously appeared mainly in newspapers.

In view of these precedents, as well as the examples of similar practices followed by many other states during their early history, it is not surprising that neither the constitution of 1835, nor the acts which established the state supreme court in 1836, provided that the justices should write their opinions or that a reporter should edit and publish them. Some evidence exists that at least Chief Justice William A. Fletcher intended to write some opinions during 1837, which was the first year sessions of the court were held, but no extant opinions have been found which date prior to 1838.

The latter year marked the earliest statutory provision for a court reporter. According to the revision of the laws made in 1838, this official was to report the decisions of both the supreme court and the court of chancery, and was required to attend all terms of those courts, to make "true reports of their decisions upon all such causes and matters as are usually reported," and to publish every year the decisions of each court separately. His appointment and tenure of office were subject to the action of a majority of the justices and the chancellor, but in the selection of cases to be reported he was given a certain amount of discretion on the basis of their importance. In turn it was made the duty of the courts to give their opinions to the reporter in writing as soon as convenient. Although the compensation of the reporter was fixed at six

six volumes of Transactions of the Supreme Court of the Territory of Michigan (1935-1940).

13 In 1842 newly appointed Chief Justice George Morell wrote a notation on the wrapper of a case file that Fletcher had taken the papers in that particular file at the June term, 1837, "to draw up the opinion of the court." Fletcher did not return the papers until March 31, 1842. United States v. Cornell, Sup. Ct., 1st circ., file No. 62.

13 There are thirty-seven cases decided before 1843 in which opinions, manuscript and printed, are known to be in existence. By year, these are 1838, six; 1839, four; 1840, two; 1841, eight, and 1842, seventeen. Eight of the thirty-seven have been published in full and one in part. The remainder are published for the first time in the present volume.
hundred dollars annually, payable quarterly, he was to receive in addition any profits which might result from the sale of the reports. Under this law the reporter, while nominally a state official, was forced to assume personally the risk and expense of publishing the reports, although, as will be seen, state assistance was sometimes extended.14

Available information indicates that the only two active candidates for the new position were Charles H. Stewart15 and Ebenezer Burke Harrington. The latter, a young lawyer, was selected by the court. Much of Harrington’s early life is obscure. He apparently left the home of his parents in Michigan while still a youth, learned the trade of a cabinet-maker at Jamestown, New York, then later studied law at Whitestown in the same state.16 Before he returned to Michigan in 1836 he had been one of the compilers of Barbour’s and Harrington’s Equity Digest for the state of New York.17


15 In soliciting the support of William Woodbridge for the office, Stewart claimed that he had received favorable expressions from most of the Detroit bar, including A. D. Fraser. An inclosure from Fraser stated the opinion that Stewart would make an excellent reporter. Dec. 4, 1838, WOODBRIDGE PAPERS (Burton Historical Collection, Detroit Public Library).

16 “Daniel B. Harrington,” 5 MICHIGAN PIONEER COLLECTIONS 138 at 141-142 (1884). Authorities differ on whether Harrington’s first name was “Ebenezer” or “Edmund.” The above article, along with 1 MICHIGAN BIOGRAPHIES 374 (1924) (Michigan Historical Commission) and 1 Jenks, St. CLAIR COUNTY, MICHIGAN: ITS HISTORY AND ITS PEOPLE 196 (1912), use the former name, but the supreme court journal calls him by the latter. Sup. Ct. Journ., 1st circ., vol. 1, pp. 299, 350. In 1836 he signed his name as “Ebenezer” (Fisk v. Leroy, Sup. Ct., 1st circ., file No. 5), which should be conclusive unless he had it legally changed. A short biographical sketch of Harrington can be found in R. B. Ross, THE EARLY BENCH AND BAR OF DETROIT 85 (1907).

17 An article had appeared in the Detroit Advertiser, Sept. 21, 1838, purporting to be an extract from the American Jurist, which charged that Harrington had acted as no more than a clerk in the compilation of the Equity Digest. Harrington replied in a letter to the editor of the Free Press that the charge was false, that a contract had been made by Barbour and by himself, providing that both their names should appear on the title page, and that he had actually done
He was reputed to have been admitted on October 20, 1836, to the bar in the circuit court of St. Clair county, and then to have opened a law office in the village of Desmond, Michigan. During the next few months he edited and published the *Lake Huron Observer* at Port Huron, made a venture in real estate speculation which was a complete failure, and then moved in 1838 to Detroit, where he practiced law as a partner of James A. Van Dyke. Governor Stevens T. Mason appointed him and E. J. Roberts to edit and superintend the publication of the revision of Michigan laws made in 1838.

A practical politician, he was a delegate from St. Clair county to the Democratic state convention at Ann Arbor, July 20, 1837, and was nominated and elected state senator from the fourth district in 1838. He continued to hold his senatorship through the 1839 session and was called "as useful a legislator, as any man in the senate." Moreover, he was in 1840, while still state reporter, the prosecuting attorney for Michilimackinac county. These activities, in addition to his continuous services as an attorney and counselor at law, would seem to indicate that the duties of reporting were not then very onerous.

The exact date of Harrington's appointment as reporter has not been determined, but it was probably about February
"To handsome talents and much legal learning and experience, Mr. Harrington unites habits of industry which well qualify him for the proper discharge of the duties of the office," was the comment of the Detroit Free Press. In view of the fact that the only volume of reports which he edited was that of the court of chancery, and that no opinions of the supreme court were published while he was in office, the question whether Harrington adequately fulfilled his duties as reporter may well be raised. Existing manuscript opinions prove without doubt that he did edit several opinions, complete with headnotes, statement of facts, arguments of counsel, and revisions of the original drafts of opinions written by the justices of the supreme court. Included in the files of the court are six opinions in cases decided at the January terms of 1838, held at Detroit and Ann Arbor, all of which are in the handwriting of Associate Justice Epaphroditus Ransom. They are accompanied by other drafts of the same opinions written by Harrington in the form of reports. Some of these contain a penciled annotation, "not to be reported," written by an unidentified person, probably a later reporter; there are also short memoranda penned by Harrington for both the majority and dissenting opinions delivered in a case decided in 1839. However, the

24 There is no entry in any of the extant Journals of the Supreme Court indicating the date of appointment, but H. N. Walker, Harrington's successor as reporter, stated that it was in February 1839. See the preface to MICHIGAN CHANCERY REPORTS (Harrington). The leading Democratic newspaper of the state did not announce the appointment until May 22. FREE PRESS, May 22, 1839. However, there is documentary proof that his salary must have begun sometime in February, because on April 23 he was paid $162, more than a quarter of a year's salary. DOCUMENTS OF THE SENATE OF THE STATE OF MICHIGAN (hereafter cited as SENATE Docs.), 1840, I, 518.

25 May 22, 1839.


27 Henretty v. City of Detroit, Sup. Ct., 1st cir., file No. 159.
remaining manuscript opinions, most of which were written by Chief Justice Fletcher, show no marks of editing by the reporter.

This paucity of existing opinions reported by Harrington does not by itself constitute sufficient evidence to censure him for neglecting his duties; because of the incomplete status of the files, and the probability that many of his reported opinions were never in the official files, it would be unjust, without more positive evidence, to make such a charge. Moreover, there are strong grounds to believe that he intended as early as 1840 to publish a volume of chancery court and supreme court reports.28

Formal notice of the delay in publishing the reports was taken by the state senate in 1841, which adopted a resolution directing Harrington to inform the senate in the near future "the number of cases decided by the supreme court, designating the title of the cause, what judges have furnished him with a written opinion, and the time when furnished, and in what circuit the cause has been decided, and also the same, as near as may be, in the court of chancery, and at what time a volume of reports of the decisions of the supreme court, or of the court of chancery will be published."29

Harrington's reply to this legislative request is most instructive. He claimed that since the date of his appointment as reporter he had attended nearly all the terms of both the supreme court and the chancery courts, that he had kept an accurate list of cases with notes on their principal points, and

28 A notice appeared in the newspapers requesting the clerks of the several counties to send to Harrington at Detroit the names of attorneys in their counties, because he is "now preparing the first number of reports of the cases decided in the court of chancery and supreme court of this state, which will be published during the ensuing winter, and is desirous of ascertaining the number of Attorneys in the State, that he may the better judge how large an edition will be necessary." FREE PRESS, NOV. 28, 1839; MICHIGAN STATE JOURNAL (Ann Arbor), Jan. 1, 1840.

29 SENATE JOUR., 1841, p. 74. Adopted on Jan. 15.
that he had examined the papers in over seven hundred causes. However, it was his contention that the justices of the supreme court had directed him to report only seventy-three decisions. According to Harrington, up to 1841 only one member of the court, Justice Ransom, had sent in his opinions; these, the reporter asserted, he had prepared for the press, but he had been informed by the chief justice that opinions had been written in most of the cases in “schedule B” and were then ready for the reporter. Furthermore, Harrington stated that in September, 1840, he had contracted with Dawson and Bates for the printing of one volume of reports for each court, that this printing had begun in October, and that about three hundred pages of the chancery volume were finished and about one hundred more pages ready to be printed. “The cases in the supreme court will be printed and ready for delivery by the fifteenth of June next [1841].”

The following year, when the advisability of maintaining the office of reporter was questioned by the new economy-minded governor, John S. Barry, the legislature proceeded

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30 Senate Docs., 1841, No. 38, pp. 147-148. On the last day of the legislative session in 1841, a resolution was offered that Dawson and Bates should be paid the sum of $912 for printing the first volume of chancery reports, provided that the reporter should relinquish all his right and title to any profits from the sale of the reports, but it was not adopted. Senate Jour., 1841, pp. 489-490. However, it appears that Harrington proceeded with his plans and published a pamphlet volume of chancery reports which extended through 1840 and was ready for sale in the summer of 1841. See the Daily Advertiser (Detroit), July 7, 1841.

31 In his annual address (1842) Governor Barry repeated most of the information which Harrington had conveyed to the senate in 1841, but said that enough opinions had been received from Justice Ransom to make about 100 pages and none from the other justices. “These facts naturally suggest the inquiry whether, under the present legislation upon the subject, the public are likely to receive an adequate benefit for the expense incurred in providing a reporter.” He said that the subject required the attention of the legislature, and that either the reporter should be abolished or more effectual means should be provided to publish supreme court decisions. Journal of the House of Representatives of the State of Michigan (hereafter cited as House Jour.), 1842, p. 48.
to investigate the whole subject. A petition by Harrington asking for relief in return for the printing of three hundred and seventy-two pages of chancery reports was rejected on the recommendation of the house committee on claims, which held that the law giving the reporter a salary and allowing him profits from sale of reports rendered such relief unnecessary.\textsuperscript{32} In reply to inquiries sent by the house committee on the judiciary to the members of the supreme court to ascertain their views upon the subject and to learn the "true reasons" why the reports had not been published, letters were received from each of the four justices.\textsuperscript{33}

Chief Justice William A. Fletcher's answer was a conditional one: "If the present judicial system is to continue, I think some other means of publishing the reports, as they can be prepared, might be adopted which would be attended with less expense."\textsuperscript{34} Justice Ransom stated that the creation of a reporter was entirely premature, that in 1838 there had been few cases pending which, when decided, would settle the law, and that the benefits derived from reporting them would not equal the expense to the treasury. He suggested that instead of abolishing the office, it would be necessary only to repeal the law providing for the reporter's salary, as the incumbent would thereupon resign; by this procedure the office would be left in existence so that when a reporter was needed one could be provided by merely restoring the salary. He also suggested that until a new reporter should be appointed, the opinions of the supreme and chancery courts ought to be filed

\textsuperscript{32} Id., pp. 127, 327.

\textsuperscript{33} Documents of the House of Representatives of the State of Michigan (hereafter cited as House Docs.), 1842, No. 21, pp. 85-94. The judiciary committee included the letters of the justices in full in their report because of the complete information they contained and because "they so perfectly exculpate those functionaries from what a cursory reader of the governor's message might suppose a censure upon them," but asserted that the only desire of the governor was "to discharge his whole duty to the people of this state." Id., 87.

\textsuperscript{34} Id.
with the secretary of state, who should publish a synopsis of each case in the newspapers at no cost to the state. Justice Charles W. Whipple wrote that

"... under existing circumstances, the office of reporter is of but little practical importance, and might well be dispensed with. In expressing this opinion, I am not insensible of the great importance of perfecting the judgments and opinions of the highest judicial tribunal in the state; but under the present system, this cannot be done."

Of the four justices, the only one who believed that it was proper for the position of reporter as constituted to be continued was George W. Morell, who stated that the business of the supreme court had accumulated and in the near future would be increasing sufficiently to justify retention of the office.

Although a majority of the court seemed to have been inclined to doubt the necessity for an official reporter, the fundamental reason for their stand clearly arose from the belief that they did not have enough opportunity (because of their burdensome task of presiding in the circuit courts) to perform the research and to spend the time necessary for the writing of adequate opinions. Each one of them stressed this point emphatically in his letter to the house judiciary committee. For example, Chief Justice Fletcher wrote that

"... we have not time, under the present system, to do that which we think the interest of the public requires, to draw up with care, opinions in the great variety of cases which are presented, many of them involving new and important principles, and which opinions are to become written law."

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35 Id., p. 89.
36 Id., p. 91.
37 Id., p. 94.
38 Id., p. 88.
Associate Justices Ransom, Whipple, and Morell expressed similar views, all of them blaming the requirement of circuit duty as the chief obstacle to thoughtful consideration and preparation of opinions in the majority of decisions. With the exception of Ransom, none of them intimated the belief that the quality of causes which had been adjudicated by the supreme court since the appointment of a reporter in 1838 was of so minor a character that written and published opinions were not justified or desirable, at least in many cases. Even the statement of Ransom on this point (referred to above) appears to be rather singular in the light of the fact that he himself had written at least six opinions for the year 1838. Moreover, Justice Whipple very pointedly called attention in a later decision to the handicap that resulted from a lack of published opinions before 1843, and neither Fletcher nor Morell was opposed to the principle of printing reports of the supreme court's decisions. Nevertheless, the judiciary committee of the house recommended, as Ransom had advised, the repeal of the law which had provided for the salary of the reporter, and a joint resolution to that effect was adopted by the legislature and approved by the governor on February 16, 1842.

Id., pp. 90, 91-92, 93-94. Whipple suggested another justice be added to the supreme court, which would help both the supreme and the circuit courts and allow the members more time to write opinions.

See note 26 above.

In the case of Robinson v. Steam Boat Red Jacket, 1 Mich. 171 at 173 (1849), Whipple wrote: "The learned counsel for the plaintiff was not advised, until the argument of the case, that a construction had been given to the statute in question by this court—the opinion never having been published [referring to Moses v. Steam Boat Missouri, decided Jan. 1842]. Had the fact of its promulgation been known, it must have narrowed a discussion which assumed a wider range in consequence of the prominence given to a question which it was supposed had not been judicially determined."

House Docs., 1842, No. 21, p. 94.

Perhaps more important than the fate of either Harrington or the office of reporter is the question how many opinions were written by the justices of the supreme court prior to 1843 and what happened to them. To summarize briefly, opinions from thirty-seven cases which date from that period are known to be in existence. All these cases are listed in a table of cases, infra p. lii. The opinions in twenty-eight cases are published for the first time in the present volume, two others for which the manuscripts are still in the court files have been printed, and the remaining seven can be found only in later published reports. The assertions by Harrington noted above concerning his intentions to publish a volume of supreme court reports during 1840-1841 were of a prospective nature and can be relied upon only as an indication that he expected to have collected enough opinions by those dates to constitute a volume, but the significance of his statement that the supreme court had directed him, by 1841, to report seventy-three cases cannot be waived lightly. If true, it would mean that nearly two years before 1843 the supreme court had selected twice as many cases to be reported as now exist for the whole period, and had, presumably, assigned them to the various members to be written. Even more striking is the fact that of the thirty-seven opinions now extant which were delivered before 1843, seventeen bear the date 1842, so that for the years in which the Supreme Court intended at least seventy-three cases to be reported we have opinions in only twenty cases.

It is certain that as late as 1842 many of the opinions were still in the hands of the justices who wrote them and not in the possession of the reporter. For instance, Whipple stated

"Of these, one case is represented only by a dissenting opinion (infra, p. 36) and another only by a long quotation in a later case (infra, p. 69). In one case (infra, p. 85) there is both a majority and a dissenting opinion."
that all of the opinions which he had delivered were in written form and were ready to be given to the reporter, who had been advised of their availability but had neglected to collect them. Truly mysterious are the circumstances involving the Morell opinions. Justice Morell's own words testify that he wrote them, as well as to the fact that they were mainly dissenting ones, but most of them have completely disappeared. Morell's wife, daughter, and son, after the justice's death in 1845, accused Justice Ransom of having called at their home and taken away the supreme court opinions of their husband and father, but Ransom vigorously denied the charge and countered with the statement that no such opinions ever existed. However, another authority who cannot be entirely disregarded maintained directly the opposite view. He said:

"... Judge Morell always wrote out in full his important opinions, and a full series of his manuscripts was found, but they could not well be published with-

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45 House Docs., 1842, No. 21, p. 92.
46 According to Morell, Chief Justice Fletcher was to have prepared his opinions in the cases he thought proper to report and give a list of them to the reporter, who was to submit it to Morell for his examination. If Morell approved the list he was to give the reporter his own decisions in cases they thought advisable to report, but he claimed that no such list had been furnished him. "The reporter was informed long ago, that my decisions, (which are most all dissenting ones,) would be furnished at a moment's notice, whenever he got the opinions of a majority of the court, for I supposed it would hardly be admissible [sic] to publish a minority decision before publishing that of the majority. The fact is, that I have had so many legal opinions to give and write out, in cases arising alone in the county of Wayne, that I have had but very little time to draw up opinions for publication in the Supreme Court, and as my brethren are willing to spread their opinions upon the record, I was perfectly willing to accommodate them." House Docs., 1842, No. 21, p. 93.
47 Epaphroditus Ransom to S. T. Douglass, Kalamazoo, Dec. 1, 1845, Herbert Bowen Papers (Burton Coll.). Ransom said in this letter that he had at one time examined some opinions delivered by Morell in Wayne Circuit Court, but that he had returned them immediately, and that the only time he had visited the Morell home since 1843 was at attend Morell's funeral in 1845. He claimed that Morell had not drawn up or delivered a written opinion in a single case during the year prior to the expiration of his term, except at Kalamazoo in 1843, when he delivered two or three opinions.
out the rest [of the court’s opinions]. The Reporter [Douglass] therefore, although his friend and admirer, was reluctantly compelled to begin his work at a time when the materials were more complete; and our series, for this reason, contains but a few of his opinions, and these all belong to the later years of his judicial career.”

The full significance of these words can be understood better if it is remembered that their author, Justice James V. Campbell, had been from 1845 to 1850 a law partner of Samuel T. Douglass, who was without doubt the “Reporter” to whom Campbell referred, and that a few years later Douglass, by his marriage to Campbell’s sister, became his brother-in-law. These circumstances would make for an intimate acquaintance both in business and personal affairs between the two men and add credence and authenticity to Campbell’s words. Certainly Douglass had made efforts to locate Morell’s opinions, for he wrote to Chief Justice Ransom in 1845 asking for them, and, if we are to believe what Justice Campbell said, Douglass found but did not print them. Only two opinions written by Justice Morell are known to exist today, both delivered in 1843, and both have been published.

In addition to the above-mentioned six manuscript opinions of 1838 by Ransom, we have but one other of his previous to 1843. Nine of Justice Whipple’s opinions before 1843 are extant, five of which have been printed. Chief Justice

48 Justice James V. Campbell’s address delivered at the acceptance of Judge Morell’s portrait by the Supreme Court in 1880, printed in 43 Mich. xviii (1880).
49 See note 47 above.
50 Beach v. Botsford, 1 Doug. 199 (1843); Taylor v. Kneeland, 1 Doug. 67 (1843).
51 Owen v. Farmers’ Bank of Sandstone, 2 Doug. 134, note (1841).
52 Davis v. Ingersoll, 2 Doug. 372 (1840); Godfrey v. Beach, Sup. Ct., 1st circ., file No. 188; Caswell v. Ward, 2 Doug. 374 (1842); Slaughter v. People, 2 Doug. 334, note (1842), and also with the By-Laws and Ordinances of the City of Detroit, 1842 in the Burton Historical Collection,
Fletcher before his retirement in 1842 wrote nineteen opinions, or nearly two-thirds of all those prior to 1843 which are still available, but only two of his have been included in later reports. Moreover, it should be noted that of Fletcher's nineteen opinions, only eight were written before the year (1842) he resigned from the bench: two in 1839, one in 1840, and five in 1841. The very fact that Chief Justice Fletcher, in the few months of 1842 during which he was a member of the supreme court, wrote nearly as many opinions as did any one justice during any full year of the whole period between 1836 and 1857 permits the inference that he probably drew up more opinions than eight during the five years he served on the bench prior to 1842. We know that as early as the June term, 1837, he had taken the papers from a certain file with the intention of writing an opinion in that particular case. Although it has been stated that some of Fletcher's opinions were printed in contemporary newspapers, the present writer has found none in any of the newspaper files which he has searched.

Detroit; Royce v. Bradburn, 2 Doug. 377 (1842). In Campbell, Appellant, 2 Doug. 144 (1845), Justice Ransom quoted a long paragraph that supposedly was an excerpt from an opinion written by Justice Whipple in the case of Godfroy v. Brooks. He undoubtedly meant Godfrey v. Beach, above. See infra, p. 69.

Bomier v. Caldwell, 8 Mich. 463 (1841); Chamberlin v. Brown, 2 Doug. 120, note (1842). A manuscript copy of the latter opinion in the handwriting of Harrington is also extant, but it is not identical with the printed report. See Sup. Ct., 1st circ., file No. 195.

See infra. See notes 12 above.

Both R. B. Ross and G. B. Catlin, Landmarks of Detroit, Burton rev. ed., 394 (1898), and R. B. Ross, Early Bench and Bar of Detroit 64 (1907), make such statements. The latter quotes Alpheus Felch as having supposedly said the following: "Some of his [Fletcher's] opinions, however, found their way into the newspapers of the day; and many are treasured up in the memory of early members of the bar. The latter were often cited by them in Court, and even at this late day they are sometimes quoted, and always regarded as high authority."

Their nonexistence in the newspapers is corroborated by another worker
In spite of the fact that his salary as reporter was suspended by the legislature on February 16, 1842, Harrington did not stop his attempts to report the cases of both the supreme and the chancery courts. His interest in the decisions and in their publication was so genuine that he continued his work, providing the public press with abstracts of many chancery court opinions and presumably of some supreme court opinions. In a letter to the editor of the Detroit Free Press he explained his position admirably:

“The Legislature of this state have made no provision for the preservation or publication of the judicial decisions of our Supreme Court or Court of Chancery. Although these decisions form an important part of the law they are only known to the judges themselves, and those who are in constant attendance upon the courts. Many of these opinions have been written out with care and placed in my hands as Reporter for publication, and I have prepared them for the press, but I am unable to publish them without compensation. I will hereafter furnish you with the headnotes for publication from time to time as my leisure will permit.”

The headnotes of at least nineteen chancery court cases were printed in the Free Press between December 15, 1842 and July 25, 1843; unfortunately none has been found for supreme court cases.

Early in 1843 Governor Barry formally recognized Harrington’s continued services as well as the need for publication of the supreme court and chancery court opinions.
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Apparently the governor's attitude had changed considerably since his first annual message; nevertheless he still expressed hope that "if such reports were judiciously prepared under well digested regulations of law, the proceeds from their sale would nearly, if not altogether, reimburse the expense of their publication." The legislature, however, was not willing to carry out completely the governor's recommendations and adopted a compromise scheme. According to the new law it was provided that in any matter adjudicated by the supreme court, the justices thereof must pronounce an opinion and prepare an abstract of it in writing. These abstracts were to be filed by the first Monday in January of each year with the secretary of state, who was to have them published in one newspaper of each judicial circuit with the printing costs borne by the state. When enough abstracts of opinions had been accumulated to compose a volume of about three hundred and fifty pages, the secretary of state was directed to have them edited and to have one thousand copies printed at state expense and offered for sale, any profits derived therefrom to go to the state. As a consequence of this statute, the task of reporting what condensed opinions the justices might seems to me that the best interest of [the] state requires the decisions of its courts to be published, and that much other printing is now required which is of less importance and less beneficial. Indeed I consider the reports of decisions which give construction to the statutes, as important as the statutes themselves, and as necessary to be distributed among the citizens of the state for their information and guidance." House Jour., 1843, p. 16.

Id.

Mich. Pub. Acts (1843), pp. 169-170. This act was approved by the governor March 9, 1843, and given immediate effect. On Feb. 3, 1843, a statement made by Harrington had been presented to the house of representatives by Justus Goodwin of Calhoun County, and as a result the question what would be the best method and means of procuring reports of the decisions of the supreme court and the court of chancery was referred to the judiciary committee. House Jour., 1843, p. 225. Further action on the bill can be found in id., 1843, pp. 534, 535, 537, and in Senate Jour., 1843, pp. 268, 281, 422, 429, 430, 431. A second bill which provided for the publication of the reports was adopted by the senate but not by the house. See id. 1843, pp. 363, 374-375; House Jour., 1843, pp. 495, 499.
furnish was added to the regular duties of a state officer who had little connection with the courts and who might not possess any interest in their decisions. It is not surprising that, as far as can be learned, there were never any tangible results from this act; certainly it was not an adequate solution of the problem.

Great influence must have been exercised upon the legislators by the very able report made in the house of representatives early in 1844 by H. N. Walker, a member of the house from Detroit who, after a few months, succeeded Harrington as reporter. Petitions by Harrington concerning publication of the opinions had been presented in both the senate and the house, and the latter body referred the matter to a select committee of which Mr. Walker was the chairman. As a result of their deliberations, the representatives composing this committee concluded that the decisions of the highest state courts were too important a part of the law for their publication to be neglected. They believed that the establishment of legal principles, the interpretation of constitutional provisions, and the construction of important laws, all of which in their reasoning were essential to the administration of justice, could not be understood by the people without printed opinions. Other points the committee emphasized were that requiring written opinions would insure careful attention and examination by the courts to the questions before them, and that their publication would create a guide for future courts which would make for uniformity in practice and procedure.

Not one such abstract has ever been found in any of the newspapers searched by this writer. Moreover, it was stated in the house of representatives in 1844 that this act had never been complied with and that it never could be "with any benefit or advantage to the state." House Jour., 1844, p. 118.

S. M. Green, later a justice of the supreme court, presented the petition in the senate and Mr. Walker presented it in the house, both on Jan. 15, 1844. See Senate Jour., 1844, p. 50, and House Jour., 1844, p. 52.
Rather strangely, the committee adopted the view that published court decisions would be a means of preserving the separation of powers guaranteed by the state constitution, and would thus constitute a "guard against encroachments by the judiciary upon other departments, and the assumption of powers which do not belong to them." The statute of 1843 which required justices of the supreme court to prepare abstracts of their opinions and which provided for the publication of these abstracts in various newspapers at the expense of the state was scoffed at in the committee report. It was pointed out that the cost of such an undertaking would equal that of the regular form of reports, and that "the publication of an abstract of an opinion of the court without the statement of the case, and without the care and attention of a proper and competent person to correct the proof, would be of no more authority in legal proceedings than any other article found inserted in a newspaper would be evidence of the facts therein contained." Consequently, the committee introduced a bill to provide for publication of the decisions of the supreme court and of the court of chancery; after much discussion and several amendments, the bill was passed by both houses and approved by the governor on February 29, 1844.

With one exception this new law established the reports and the office of reporter on a basis similar to that set forth in 1838 by the Revised Statutes. By virtue of its provisions the justices of the supreme court and the chancellor, or any

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65 The entire report of the select committee is in the House Jour., 1844, pp. 116-119.
66 The greatest amount of controversy over the bill occurred in the house, where the question of salary to be paid the reporter was much disputed, but the senate made several amendments and set the salary at $600 per year. See House Jour., 1844, pp. 119, 195, 209, 279-280, 297, 314-315, 319, 324, 353, 359, 364, 389; Senate Jour., 1844, pp. 230, 245, 246, 251.
three of them, were authorized to select the reporter, who would hold office entirely at their pleasure. For those cases which were considered to be of enough importance, they were directed to send full notes of the decisions to the reporter, who was to prepare them for publication, along with condensed arguments of counsel, in volumes of approximately six hundred pages. Of the one thousand copies ordered to be printed, nine hundred were to be sold at a price not over three and one-half dollars each in Michigan or five dollars each out of the state; the remaining one hundred copies were to be sent to the secretary of state, whose duty it was to distribute two of them to the Library of Congress, one to each of the state libraries of the United States, one to each county clerk in Michigan, and the remaining ones to the Michigan State Library. A very fundamental change, however, was made by the fourth section of the law, which relieved the reporter of the risk of publishing the works at his own expense. This desirable removal of responsibility was to some degree neutralized, however, by the requirement that payment to him for cost of publication was to be made only after completion of a volume. In addition the reporter's compensation was reduced to five hundred dollars annually; however, he was still entitled to any profits from the sale of reports. 68

Although this act was given immediate effect, the justices and the chancellor, apparently anticipating by one day their powers thus conferred, reappointed Harrington as reporter on February 28, 1844. 69 This action constituted definite endorsement of his services as reporter since 1839, but it was not

68 Id. The act specifically repealed those provisions of the Revised Statutes of 1838 and of the law of 1843 which concerned the reports and the reporter.
69 SUP. CT. JOUR., 1st circ., vol. 1, p. 299. The appointment was dated Feb. 28, 1844, but the entry does not appear to have been made in the Journal until May 3, 1844. It is possible but not certain that the appointment was not made until the later date, but was effective retroactively to the former. Justices Ransom, Whipple, Felch, and Goodwin and Chancellor Manning signed the appointment.
destined that Harrington should live to vindicate himself of the last vestige of suspicion concerning the adequate performance of his duties; he died in early August, 1844, a little over five months after his second appointment and before a single volume of reports, either of the supreme court or of the court of chancery, had been issued to the public.\(^70\)

In addition to the evidence already presented to indicate that the justices of the supreme court before 1843 wrote more opinions than are known to be extant, there is good proof that Harrington himself possessed many more opinions of that period than we now have. For instance, it was said as early as January 2, 1843, that "All the present justices of the supreme court, have furnished to the reporter their written opinions in cases decided by them previous to the January term of 1842, which, together with the opinions now in the hands of the late chief justice for revision, will make a volume of reports of that court."\(^71\)

Again in 1844 it was stated that the reporter had sufficient manuscript opinions delivered by the supreme court justices to make a volume of about six hundred pages, which, along with the volume of chancery court reports (the publication of which had already been commenced), would "embrace all the decisions of the supreme court and court of chancery, of

\(^70\) The Proceedings and Resolutions on the death of Harrington, adopted by the Bar of Detroit on Aug. 5, 1844, may be found in Sup. Ct. Jour., 1st circ., vol. 1, 350 (1845), and in the Free Press, Aug. 6, 1844. J. A. Van Dyke, Harrington's law partner, expressed his great respect for the deceased, and H. N. Walker and G. C. Bates were appointed members of a committee to write the resolutions of the bar. It was resolved in part that "we cherish the highest respect for the professional learning of the deceased, for the purity and uprightness of his public and private character, for his uniformly honorable and correct deportment in every relation of life, and for the many excellent qualities which belonged to him as a man." Id.

\(^71\) Annual Address of Governor Barry, House Jour., 1843, p. 16. The "late chief justice" referred to was W. A. Fletcher, who, it would seem, still had in his possession several opinions to revise. Possibly some or all of them were the eleven Fletcher opinions delivered in 1842 which are now in the files or in later reports.
sufficient importance to report from the organization of the state government down to the present time." Some time previous to June 22, 1844, Harrington had made overtures and had received a proposition for the publishing of a volume of supreme court reports, but there is no proof that any had been printed before his death. The wide discrepancy between the number of opinions which would have been necessary to constitute a volume of supreme court reports of approximately six hundred pages and the number of opinions which are known to exist—many of which are, indeed, quite brief—makes it appear that, even if the decisions which never came into the possession of the reporter are disregarded and not counted, the justices of the state supreme court wrote opinions in more cases during the first seven or eight years of their incumbency than the thirty-seven which are now in the files or included in later volumes of reports.

In September, 1844, Henry N. Walker was appointed by the supreme court justices and by the chancellor to be the second state reporter. Mr. Walker, a graduate of the Academy at Fredonia, New York, came to Michigan in 1835, entered the office of Elon Farnsworth and A. D. Bates as a law student, and was admitted to the bar, becoming Bates' partner after Farnsworth was appointed chancellor. Walker

Report of H. N. Walker from the select committee to consider the petition of E. B. Harrington, House Jour., 1844, p. 118.

A memorandum written by Harrington on June 22, 1844, assured the firm of Wilcox and Harsha that they could depend upon publishing the second volume of his chancery reports "according to the proposition to publish the Supreme Court Reports. . . ." E. W. Morgan Papers (Burton Coll.).

There were nearly sixty opinions, delivered between 1843 and 1845, printed in the first volume of Douglass' Michigan Supreme Court Reports, and several of them were of great length.

Free Press, Sept. 10, 1844.

See the obituary of Walker in Michigan Pioneer Collections 88-89 (1886). This law partnership of Bates and Walker was changed during the late thirties and early forties first to Bates, Walker, and Douglass, then to Douglass and Walker, and finally to Walker, Douglass and Campbell, the two new members being S. T. Douglass and J. V. Campbell, both of whom later became justices of the supreme court.
had been elected to serve in the 1844 session of the legislature, where, it will be recalled, he introduced and supported in the house the bill, which later became law, providing for restoration of the reporter’s salary and for publishing the reports of the supreme court and court of chancery. 77 Quite likely his legislative work on this bill had some influence on his selection by the justices and the chancellor. Walker’s efforts to obtain the position indicate that he desired it and that it was neither unwanted nor thrust upon him without notice. 78 His appointment was approved by the Democratic press of the state and probably by the bar in general. 79

Undertaking his duties immediately, the new reporter soon brought out the first large volume of reports of the decisions of any court in Michigan’s history, those of the court of chancery under Chancellor Elon Farnsworth, 1836-1842. It was fittingly termed Harrington’s Chancery Reports, inasmuch as practically all of the work on it had been done by the first reporter and not by Walker. In fact, as early as 1841 nearly three hundred pages of chancery opinions had been printed by Harrington at his own expense. 80 Although the

77 See notes 64 and 65 above.
78 On Aug. 24, 1844, he wrote to Lucius Lyon that the supreme court was about to appoint a reporter, that his (Walker’s) name had been presented as a candidate, and that he wished Lyon to write to Chief Justice Ransom in his favor because of Lyon’s “strong influence” with the Chief Justice. LYON LETTERS (William L. Clements Library, University of Michigan).
79 “The high legal attainments and untiring industry of Mr. Walker render him peculiarly well qualified for the proper discharge of the duties of the office in question.” FREE PRESS, Sept. 10, 1844.
80 Harrington’s bill for printing ($831.43) was not allowed by the legislature because the reporter had been required to publish the volumes at his own expense, although the statute had not been very clear on the question. See HOUSE JOUR., 1843, p. 16, and id., 1844, pp. 117-118. A committee of the house recommended in 1844 that Harrington should be reimbursed for the reports already printed and should be paid reasonable compensation for his services (id., 1844, p. 119), and an act of the same year authorized the state treasurer, auditor general, and secretary of state to settle his claim. Mich. Pub. Acts (1844), pp. 20-21. In the “Annual Report of the Auditor General” dated Nov. 30, 1844, an item shows that the sum of $2,323.66 had been paid for the supreme and chancery courts’ reports, including the salary of reporter, but
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burning of the printing office destroyed a portion of the rest of the manuscript, the volume was prepared almost entirely by Harrington and the last half of it was partly in press when Walker assumed office. A contemporary newspaper notice stated that "A portion of the volume is composed of the pamphlet volume of reports published sometime prior to Mr. Harrington's decease, and the remainder has since been made up from his manuscripts and notes," which would indicate that some of the sets of pages printed by Harrington in 1841 and 1842 were perhaps bound into pamphlet form before the full volume was issued. However, no copy has been found, nor even any confirmation that one ever existed.

Although Walker was appointed attorney-general of Michigan by the governor and the senate on March 24, 1845, this date does not mark the end of his activities as reporter; at least, the preface he wrote to the second volume of chancery reports, published under his auspices, bears the date April 10, 1845, and his successor was not named until the following July. However, in the preparation of this second volume Walker was aided by Chancellor Manning,

there is no indication of how much of this went to Harrington or his estate, to the printer, or to Walker. Joint Documents of the Senate and House of Representatives of the State of Michigan (hereafter cited as Joint Docs.), 1845, No. 2, p. 10.

See the preface by H. N. Walker to Harrington, Michigan Chancery Reports.

Free Press, March 13, 1845. There is evidence that in the summer of 1841 the first portion of the volume, containing decisions through 1840, was bound up in some fashion and offered for sale at three dollars per copy. See the advertisement in Daily Advertiser (Detroit), July 7, 1841. No copy of this volume has been seen or located by this writer.

Free Press, March 25, 1845.

Governor Barry claimed too optimistically on Jan. 6, 1845, that the second volume of chancery reports was already in press and would be published the ensuing month. "Annual Message of the Governor," Joint Docs., 1845, p. 6. Walker authorized J. V. Campbell to act as his agent in the sale of the volumes. See the power of attorney and the agreements for sale made by Campbell, March 5 and 6, 1845, in H. N. Walker Papers (Burton Coll.).
whose decisions between April, 1842 and March, 1845 were recorded therein, and who personally inspected the work, offered suggestions, and even wrote some of the headnotes.\textsuperscript{85} In addition, it is probable that Harrington before his death had labored to some extent upon the manuscript which later constituted this volume,\textsuperscript{86} but the major credit must be given to Walker. Both volumes of chancery reports were well executed for their time, but they have been superseded for most practical purposes by later annotated editions.\textsuperscript{87} It is not to be supposed that Walker confined himself in his capacity as reporter solely to the decisions of the court of chancery; on the other hand, no reports of supreme court cases were published while he was in that office, and the only discovered contemporary reference located from which could be inferred any intention on his part to publish such reports lacks authoritative support and appears to be erroneous.\textsuperscript{88} 

Upon Walker's transfer to the office of attorney-general, several candidates for the position of reporter appeared and an active campaign was carried on for at least two months before an appointment was made. The three men most prominently mentioned as worthy of holding the post were Samuel T. Douglass, Andrew Harvie, and G. V. N. Lothrop, with

\textsuperscript{85} \textit{Michigan Chancery Reports} (Walker), Preface (1845).

\textsuperscript{86} Harrington wrote that a part of the manuscript for his second volume of chancery reports would be ready by the first of August 1844. E. B. Harrington to Wilcox and Harsha, June 22, 1844, in E. W. Morgan Papers (Burton Coll.).

\textsuperscript{87} In 1872 and 1878 second editions, edited by T. M. Cooley and J. V. Campbell respectively, were published.

\textsuperscript{88} It was stated by Governor Barry on Jan. 6, 1845, that the first volume of reports of supreme court decisions was in the hands of the printer and that there was hope that it would be completed before the session of the legislature ended. "Annual Message of the Governor," \textit{Joint Docs.}, 1845, p. 6. Actually, the first volume was not printed until 1846. It is interesting to note that the governor anticipated "most salutary results" from the publication of the reports, because "A judicial construction will thus be given to the statutes, and a uniformity secured in the administration of justice in the various circuits, and in courts of inferior jurisdiction throughout the state, which could not otherwise be obtained." Id. 7.
Douglass apparently having the greatest number of advocates. Among the prominent supporters of Douglass were George Miles, who soon became a justice of the supreme court, Jefferson G. Thurber, who later was speaker of the house of representatives, and James B. Hunt, a representative in Congress from Michigan (1843-1847); however, Douglass was opposed quite bitterly by the former attorney-general, Peter Morey. Douglass himself was not above soliciting support; following the example of Walker (his law partner) he requested Lucius Lyon, an influential personage in Michigan politics at that time, to recommend him to the justices and to the chancellor for the position. His comments in his letter to Lyon are illuminating:

"The office will necessarily be filled by someone residing here. It is not worth at the most as far as I can judge over $700 & will occupy nearly all of a persons [sic] time for the next two years at least and always a great part of it. My acceptance of it will be a pecuniary sacrifice but a sacrifice which I feel willing to make for the sake of the more active life it would enable me to lead, requiring as it would my attendance upon the terms of the Sup: & Ch: cour[t]'s in the several circuits.—It is my intention in case I receive the appointment to retire from my present business connexion. My health suffers too severely from my present confinement."
Why the reporter would have to reside in Detroit is not clear, unless Douglass meant that the largest share of the business of the supreme and chancery courts was done in the first circuit, but the argument was proved unsound by the fact that both of the next two reporters were not residents of Detroit.92 Presumably Douglass believed that only two hundred dollars in profits could be made annually from the sale of the reports, because the salary of the reporter was still five hundred dollars per year, and, as he stated, anyone who gave up a lucrative business to accept the office of reporter would entail a "pecuniary sacrifice." However, it should be noted that, contrary to his expressed intentions, Douglass did not retire from his law partnership when he received the appointment, but continued in active practice of his profession throughout the period of his incumbency as reporter.93 His appointment, announced in Detroit on July 7, 1845,94 was probably made at the July term of the second circuit of the supreme court held at Ann Arbor.95

Although Samuel T. Douglass was born in Vermont in 1814, his parents moved to New York state when he was still a young child. There he was educated at Fredonia Academy, and later studied law in the offices of James Mullet and of Esek Cowen, both noted attorneys. He came to Michigan in 1837, was admitted to the bar in 1838, and, after a few months spent in Ann Arbor, settled in Detroit, where he

92 Randolph Manning of Pontiac and George C. Gibbs of Marshall.
93 See 8 DOUGLASS, WALKER, and CAMPBELL, LETTERPRESS BOOK, 1847-1850, in the Michigan Historical Collections, University of Michigan.
94 The FREE PRESS, July 7, 1845, commended the appointment highly: "The selection is an excellent one. Mr. Douglass is a sound, well read and industrious lawyer; and both in professional and private life has, in an unusual measure, secured the confidence and respect of his fellow citizens." Justice Ransom called Douglass his "own much esteemed friend . . . to whom I am strongly attached, & whom I regard as one of the most valuable & promising men of his age, in our profession—." E. Ransom to H. N. Walker, Aug. 22, 1846, H. N. WALKER LETTERS (Burton Coll.).
95 Inasmuch as the JOURNAL for the second circuit of the supreme court, 1836-1851, is missing, we have no official record of the appointment.
entered the law firm of Asher B. Bates and Henry N. Walker. When Bates retired in 1840 a partnership was formed with Walker under the name of Douglass and Walker, and in 1845 James V. Campbell was added as a partner. Douglass held the offices of city attorney of Detroit and of president of the Detroit Young Men's Society in 1843. Somewhat interested in science and geology in addition to the law, he accompanied his cousin, Douglass Houghton, the first state geologist of Michigan, on at least two of his journeys to the Lake Superior regions. A Democrat in politics, but not strongly partisan, he was highly regarded both legally and personally, and, until he was elected to the bench in 1851, his law firm ranked among the best and most prominent in Detroit.96

Soon after his appointment Douglass exhibited vigor in the prosecution of his duties as reporter, taking steps to secure and edit the opinions delivered by the justices of the supreme court.97 By October 7, 1845, he wrote that he was so hard at

96 These facts have been gathered from the following biographical sketches of Douglass: Buel, "The Bench and Bar of Detroit," 3 MAG. WEST HIST. 669 at 700-704 (1886); Chaney, "The Supreme Court of Michigan," 2 GREEN BAG 377 at 385-386 (1890); CYCLOPEDIA OF MICHIGAN 170-171 (1890); FARMER, THE HISTORY OF DETROIT AND MICHIGAN, biog. ed., 1115-1116 (1889); 1 MICHIGAN BIOGRAPHIES 249 (1924); 2 W. W. POTTER, COURTS AND LAWYERS OF MICHIGAN 1164-1167 (unpublished MS., 1936); G. I. REED, BENCH AND BAR OF MICHIGAN 24-34 (1897); R. B. Ross, THE EARLY BENCH AND BAR OF DETROIT 48-53 (1907); Walker, "The Detroit Bar," 2 MICH. L. J. 1 at 12-13 (1893); MICHIGAN, NISI PRIUS CASES (Howell) 342-343 (1884); O. Kirchner, 121 Mich. xxxv-xliv (1899). Some discrepancy exists in the dates cited by these as to the year when Douglass was admitted to practice, Farmer, Potter and Reed stating that it was 1837, but the Cyclopaedia of Michigan and a "Roll of Michigan Lawyers" in the Appendix of Reed's Bench and Bar, both cite 1838. The last named source seems to be the best since it supposedly was copied from the original roll of attorneys kept in the office of the clerk of the supreme court.

97 Felch sent his earlier opinions to Douglass on Sept. 29, 1845, but reserved the remainder for use and reference in the circuit courts. A. Felch to S. T. Douglass, Sept. 29, 1845, FELCH PAPERS (Burton Coll.). C. W. Whipple to S. T. Douglass, Pontiac, Dec. 1, 1845, HERBERT BOWEN PAPERS (Burton Coll.). Whipple said that he wrote an opinion in the case of Ketchum v. Pierce, (Sup. Ct. Calendar, 3d circ., No. 72 [1844]) which he was unable to find at
work that he could not find even an hour's leisure time. Douglass seems to have entertained some thought of publishing the opinions of the supreme court which had been written before 1843, but Ransom, chief justice since 1843, counseled against such a move, stating that "a report of them would be neither useful to the publik or the Profession, nor very creditable to the Court. The truth is, that while Judge Fletcher was on the Bench, most of the decisions were announced orally, by him, & the opinions written out—I speak of those held by myself—were but hasty & imperfect sketches of the decision." It is quite probable that Douglass, through his predecessor and law partner, Walker, fell heir to the papers, notes, and opinions gathered by the first reporter, Harrington. At least we know that Walker employed Harrington's manuscript for nearly all of the first, and part of the second, volume of chancery reports, and there is little reason to suppose that Walker did not turn over to Douglass all of the materials pertaining to the office of reporter.

No opinions before 1843 were included in the first volume (1846) of reports published by Douglass, but in his second volume (1849) there are six, one of which had been delivered in 1840, one in 1841, and four in 1842. He himself explained as follows the failure to print more of them:

"No complete series of the decisions of the court prior to 1843 can now be obtained, and the recent re-

a later date. C. W. Whipple to S. T. Douglass, Pontiac, Aug. 21, 1846, HERBERT BOWEN PAPERS. It has never been published or located.


99 E. Ransom to S. T. Douglass, Kalamazoo, Dec. 1, 1845, HERBERT BOWEN PAPERS (Burton Coll.).

100 All six were printed as footnotes to later cases in which similar questions were involved. They were: Davis v. Ingersoll, 2 Doug. 372 (1840); Owen v. Farmers' Bank of Sandstone, 2 Doug. 134 (1841); Caswell v. Ward, 2 Doug. 374 (1842); Chamberlin v. Brown, 2 Doug. 120 (1842); Royce v. Bradburn, 2 Doug. 377 (1842); and Slaughter v. People, 2 Doug. 334 (1842).
vision of the statutes has rendered many of those which have been preserved, of comparatively little value. Some of them, however, are of permanent interest, and these, together with the decisions made subsequently to the time when the above mentioned volume closes, will be published in another volume now in the course of preparation, and which it is hoped will be issued from the press during the next summer.\(^\text{101}\)

Of the six earlier opinions printed in volume two, a manuscript copy of only one of them is known to exist;\(^\text{102}\) this fact suggests the possibility that Douglass might have possessed many more manuscript opinions which never were filed with the clerk of the supreme court. As late as 1848 Douglass wrote that a manuscript opinion in a certain case decided in 1842 “is now before me.”\(^\text{103}\)

Governor Alpheus Felch, who had been a justice of the supreme court from 1842 to 1845, in January 1846 estimated that probably three volumes would be required to report the supreme court cases already decided; in actuality, however, less than a volume and a half were filled by the decisions which, by a strict interpretation, should have been comprehended in the period mentioned by Felch.\(^\text{104}\) Although the

\(^\text{101}\) Free Press, Jan. 20, 1847.
\(^\text{103}\) S. T. Douglass to H. C. Wright, Detroit, Feb. 22, 1848, in 8 Walker, Douglass, and Campbell, Letterpress Book 263 (Mich. Hist. Coll., University of Michigan). The case was that of Moses v. Steamboat Missouri, which was printed in 1852 in 1 Mich. (Manning) 507 Appendix (1842).
\(^\text{104}\) “Annual Message of the Governor,” Joint Docs., 1846, p. 6. Governor Felch also called attention to the great importance of publishing the decisions, and said that Douglass intended to present during the year 1846 the reports of all important cases in both the supreme court and the chancery court. Id. No opinions of the court of chancery between March 1845 and March 1847, when the separate chancery court ceased to exist, have ever been printed. Manning remained chancellor until the Revised Statutes of 1846 (which provided for the abolition of the court in 1847) were adopted, when he resigned; former chancellor Elon Farnsworth was reappointed to the post in June 1846, and served for the remaining months of the court’s existence. Nothing has been found except the reference by Felch that Douglass intended to publish a volume of chancery reports.
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governor may have been mistaken or misinformed, his reputation for accuracy and truthfulness permits one to conjecture upon the possibility of the existence of many other opinions that were not printed. It is certain that when Douglass in 1850 delivered the manuscript opinions to his successor in the office of reporter, Randolph Manning, only those after 1845 and none prior to 1843 were included. Nevertheless, a search of the available Douglass papers has failed to disclose any supreme court opinions.

Douglass had planned to issue a third volume in August or September of 1850, but he retired from the office before that time. It appears that he was instrumental in the selection of Randolph Manning, former chancellor, as the new

Douglass drew up an inventory which listed, according to the year and to the justice who delivered them, all of the manuscript opinions which he was turning over to his successor. When Manning received them on July 11, 1850, he had to acknowledge by his signature that the opinions were in his possession. Although it is not important in the present study, this list is significant because it proves that many supreme court opinions were written after 1843 that were never included in the printed reports. Nearly forty opinions, composed between 1846-1850, that have not been published and are not known to exist in manuscript, were cited by Douglass. WALKER, DOUGLASS, and CAMPBELL, LETTERPRESS BOOK 847-852 (Mich. Hist. Coll., University of Michigan). Douglass himself wrote that he had an opinion for the case of Stowell v. Walker (Sup. Ct., 1st circ., file No. 318) decided in 1844, but that he was not publishing it. See 1 Doug. 524, note (1845).

While searching through a part of Douglass' papers in his old home­stead on Grosse Ile, the writer and Mr. Henry Brown of the Michigan Historical Collections located five of the eight volumes of letterpress books kept between 1837 and 1850 by the law firm of which Mr. Douglass was a member. Volume 8 has proved most helpful.

GRAND RAPIDS ENQUIRER, Jan. 16, 1850, quoting the DETROIT FREE PRESS. There must have been some public interest in the reports, because Douglass wrote the editor that he had received many inquiries as to when the third volume would be published. Douglass offered his resignation at the May 1850 term of court and it was accepted by the supreme court in July. FREE PRESS, July 6, 1850.

Biographical sketches of Manning may be found in the following: AMERICAN BIOGRAPHICAL HISTORY OF EMINENT AND SELF-MADE MEN: REPRESENTATIVE MEN OF MICHIGAN, part VI, p. 49 (1878); Baldwin, "Judge Randolph Manning," 14 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 418-421 (1890) (Michigan Historical Commission); Felch, "Michigan's Court of Chancery," 21 id. 325 at 329 (1894); 2 MICHIGAN BIOGRAPHIES 73-74 (1924); G. I. REED, BENCH AND BAR OF MICHIGAN 12 (1897);
reporter. Manning’s appointment was conferred the first week in July, when the supreme court was in session at Jackson. His first and only volume of reports was not published until 1852. It is important here to note only that in the appendix he included one opinion which had been written and delivered before 1843. Since this opinion had been in the possession of Douglass in 1848 but was not cited in the list of those which Douglass had turned over to Manning in 1850, one might be tempted to draw the hasty conclusion that Douglass had transferred all of the decisions of the supreme court which he possessed, while making a record of only those dating after 1845. However, because inquiries had been made about this particular opinion, it seems more logical to suppose that Douglass himself had determined to publish it in the third volume of reports which he had contemplated issuing in 1850, in consequence of which Manning had acquired it along with any other work Douglass might have done on volume three. The entire matter is highly conjectural and with present sources cannot be determined with finality.

It is not known definitely whether Manning resigned or was removed from the office of reporter; at any rate George C. Gibbs of Marshall was appointed to the position on

R. B. Ross, The Early Bench and Bar of Detroit 131-133 (1907); Michigan, Nisi Prius Cases (Howell) 343 (1884); remarks by A. C. Baldwin, A. B. Maynard, Chief Justice Sherwood, and Justice Campbell in 65 Mich. li-lix (1889).

Manning wrote to Douglass that he knew of nothing “to prevent my accepting the appointment mentioned by you, should the Judges of the Supreme Court think proper to confer it on me.” Pontiac, May 15, 1850, Herbert Bowen Papers (Burton Coll.).

Free Press, July 6, 1850. As the Journal for the second circuit, 1836-1851, is missing, no official record of the appointment has been found.


For a sketch of Gibbs’ life, see 1 Michigan Biographies 323 (1924). A contemporary said of Gibbs that “A discriminating mind, accurate education, habits of thought and industry, and above all a courteous bearing, fully qualify
January 6, 1853. During the four years in which he held the office, Gibbs published as many volumes (three) of supreme court reports as had his four predecessors in twelve years or as had his two immediate predecessors in seven years, but in none of them did he print any opinions that had been written before 1843. There is no evidence that he possessed such material, or that any manuscripts had been transferred to him by Manning. However, the next state reporter, Thomas M. Cooley, obtained and printed in 1860 an opinion in a case that had been decided in 1841. It would seem that until a law of 1855 made it the duty of the reporter to have accurate copies of the supreme court opinions made and the originals returned to the proper offices for filing, the reporters had been in the habit of retaining the original manuscripts in their personal possession, at least until the end of their term.

In view of the fact that the early supreme court records are incomplete and that the available opinions are not numerous, it is to be regretted that the newspapers of the day did not devote more space to the business of the court and to its decisions. Prior to 1847 the discussion in the press of supreme court cases was very spasmodic, limited mainly to decisions which were of great public moment or in which the editors themselves might have had a personal or political interest. Only one instance has been found before that date

117  For a description of the supreme court calendars, journals, and files known to be extant, see Norton, "Missing Supreme Court Documents," \textit{26 Mich. History Mag.} 518 (1942).
118  For example, discussion of individual cases appeared in the \textit{Michigan
in which an attempt was made to list even so much as the names and judgments of all cases decided at a particular term. However, that one article proved most helpful because the journal is not extant for that session of the court. Not until 1845 did any Michigan newspaper, as far as is known, print a copy of a full opinion delivered by a justice of the state supreme court.

If we discount the headnotes of chancery opinions published through the efforts of Harrington in 1842 and 1843, no systematic account of superior court decisions appeared in the newspapers until Samuel T. Douglass, as reporter, undertook the task of providing one in 1847; during his remaining years in office he supplied the *Free Press*, the main organ of the Democratic Party, with abstracts of many of the supreme court opinions, lists of judgments, and names of justices who delivered opinions in the cases not abstracted. This practice was followed by later reporters, while in addition the same newspaper often published synopses of decisions and proceedings in court written by some attorney or staff member who was present at the session.

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119 The Michigan Argus (Ann Arbor), Jan. 24, 1839, listed eight decisions given by the supreme court at its Jan. term, 1839, in Ann Arbor. No other record is known to exist for three of the cases—Culver v. Raney, Carter v. Clark alias Turrill, and Davidson v. Smith—and the exact judgment of the court was not known for three of the others.


121 See note 59 above.

122 Free Press, Jan. 20, 1847.

123 Abstracts of opinions or lists of the justices who delivered opinions will be found in the Free Press for the following dates: Jan. 20, March 24 and 26, April 2, 3, 6, 24, 27, and 30, May 1, June 2, July 22, 23, and 27, Aug. 7, Dec. 7, 1847; Jan. 24, Feb. 14, March 2, 6, and 18, May 3, 4, and 5, 1848; March 23 and 29, 1849; March 7, 19, and 21, May 11, 1850.

124 See the Free Press for Jan. 20, 24, 28, 30, and 31, Feb. 11, April 1,
Some of the weeklies throughout the state occasionally copied the information given in the Detroit papers about the January terms, but rarely did they take the initiative to print such news originally, even when the supreme court was holding its term in their particular localities. It is exasperating to note how, year after year, the journals of Ann Arbor, Jackson, Pontiac, Kalamazoo, and Adrian, all towns in which the supreme court met annually at different times, rarely did more in their pages than to call attention to the fact that the court would soon begin its session, or had just closed its term, or had admitted certain persons to the bar; seldom before 1847 did they print so much as a list of cases on the docket or of the decisions rendered at any particular term.

Conclusion

It should not be supposed that the Supreme Court of Michigan between 1838 and 1843, or between 1843 and 1857, delivered written opinions in the majority, or even one-half, of the causes which they decided during those years. As a matter of fact, opinions are available for but a little more than one-tenth of the total number of cases disposed before 1843, and for about one-fourth of those disposed before

1851; March 13, 1852; March 12 and 14, 1853; Jan. 11, 14, 15, 27, 28, and 31, Feb. 1, 2, 3, 5, 7, 8, and 10, March 5, and 10, 1854; Jan. 3, 9, 13, 16, 18, 19, 20, and 31, Feb. 2, March 8, 9, 14, 16, 17, and 20, July 11, 1855; Jan. 12, 26, 27, Feb. 6, 7, 8, 23, 27, March 14, 15, 1856; Jan. 4, 6, 7, 8, 9, 11, 13, 15, and 31, March 10, 1857.

125 See the Oakland Gazette (Pontiac), Jan. 27, 1847; Pontiac Jacksonian, Dec. 25, 1850; Pontiac Gazette, March 24, 1855, and Feb. 7, 1857; Lansing Republican, March 18 and 26, April 1, 1850; Michigan Expositor (Adrian), July 11, 1857. However, the Adrian Watchtower on July 12, 1853, carried a rather full and very useful account of the court's session held there earlier in that same month.

126 See the State Journal (Ann Arbor), Jan. 12, 1837; Pontiac Jacksonian, Jan. 21, 1842; Kalamazoo Gazette, Sept. 9, 1842; Michigan State Journal, Jan. 25, 1843; Pontiac Jacksonian, Jan. 20, 1843; Oakland Gazette (Pontiac) Jan. 20, 1847.
In the early years it was quite common for many decisions to be given orally or for no formal opinion in addition to the judgment of the court to be rendered. There is proof that as late as 1849, if a case was of no great importance, the court might not direct an opinion to be written for it. Notwithstanding, the evidence seems incontrovertible that many more decisions were written by the justices of the supreme court before 1843 than those which were published or which still remain in the files. Although it is not pertinent to the present inquiry, it might be mentioned that a total of fifty-six other opinions for which no copies are available have been cited in various contemporary sources as having been delivered between 1843 and 1858.

The fate or present whereabouts of these and other opinions which probably were written cannot be answered satisfactorily. Thomas M. Cooley intended in 1858 to publish at least some of them. Although he was forced to relinquish that plan, he did include in one of his later volumes two...
opinions, dated 1841 and 1857 respectively, giving as his reason for doing so the fact that many inquiries had been made about them.\textsuperscript{133} The certainty that Cooley had access in 1860 to an opinion which had been written as early as 1841 may or may not be of great significance. If he obtained it from the official files, there is little cause for worry; but, if it was only one of many more which he might possibly have inherited by virtue of his office as reporter, that fact would be most disheartening and disconcerting to anyone searching for more decisions of the supreme court, because many of Cooley's earlier papers were destroyed about 1894.\textsuperscript{134} There is no doubt that the justices of the supreme court frequently borrowed from the reporter, previous to their publication, various opinions that had been written either by themselves or by their brethren on the bench;\textsuperscript{135} likewise, it is certain that the reporter in turn withdrew the opinions from the files of the court for the purpose of reporting.\textsuperscript{136} With such a system of record-keeping it is conceivable that many original manuscript opinions might have found their way into the private papers of any one of twenty-five or more contemporary dignitaries and have been lost, destroyed, or interred in some unknown depository.

knew about the existence and the location of at least several opinions which, for some reason, he could not obtain for publication.

\textsuperscript{133} Bomier v. Caldwell, 8 Mich. 463 (1841); Jackson v. Evans, 8 Mich. 477 (1857).


\textsuperscript{135} For example, see a series of letters by Justice George Miles to the reporter, S. T. Douglass, requesting the loan of several different opinions. Aug. 11 and 17, Sept. 12, 1847, and Aug. 6, 1849, HERBERT BOWEN PAPERS (Burton Coll.).

\textsuperscript{136} Gibbs in 1856 wrote to E. Hawley, clerk of the court at Detroit, asking Hawley to send him three opinions filed by Justice Copeland "subsequent to the time I [Gibbs] called for the opinions of last Jan. term, I presume. If filed will you have the kindness to forward to me by express." Marshall, Feb. 7, 1856, Sup. Ct., Miscellaneous files.
In respect to the publication of its highest court decisions, the state of Michigan was unfortunate during the first years of its existence. The first volume of reports did not come from the press until 1846, and, during the whole twenty-one year period from the appointment of the first justices to the establishment in 1858 of the so-called "independent" supreme court, there were but six volumes of supreme court cases and two volumes of chancery court cases issued. Only a few supreme court opinions delivered before 1843 have previously been printed, while many of those which were rendered both before and after that date are not available at present. The men who were selected as reporters, all of whom were able, industrious, and well qualified for the position, were not solely at fault for the delay and omissions; the legislature, and even a few of the justices of the supreme court, exhibited at times much lethargy in their support of the reports and the reporter. Furthermore, it must not be forgotten that the history of reporting in many other states had been quite similar to that in Michigan, that often private individuals rather than public officials had undertaken the publication of opinions, and that Michigan is not unique in the lack of full, complete reports. But to any student who is interested in judicial history and the development of law, this deficiency, while possibly excusable, is extremely regrettable.

The long-existing incompleteness in early Michigan court reports has not in the past presented a mere academic question of no practical importance. Ignorance of these formerly unavailable opinions of the supreme court has not been confined to the layman, or even to the attorney; on occasion no less a figure than a member of the highest state bench could have profited if it had been possible for him to examine the unpublished opinions of former justices. For instance, Justice
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Warner Wing, in a decision rendered in 1849, 137 while referring to a case which had been decided more than ten years previously, 138 wrote that "The opinion of the supreme court was not reduced to writing, and, therefore, we can only state the fact handed down to us by tradition." 139 As a matter of fact, the opinion in the earlier case had been written by Justice Ransom, is still extant in the files of the court, and is printed in this volume for the first time. 140 The present publication of all the known supreme court opinions before 1843 will partially fill a heretofore unfortunate gap in Michigan legal records.

September, 1944.

CLARK F. NORTON

138 Calhoun v. Cable, Sup. Ct., 1st circ., Chancery Calendar (1838), case 13, p. 25.
139 1 Mich. at 298 (1849).
JUSTICES OF THE SUPREME COURT

William A. Fletcher, July 1836—April 1842
George Morell, July 1836—July 1843
Epaphroditus Ransom, July 1836—December 1847
Charles W. Whipple, April 1839—October 1855
Alpheus Felch, April 1842—November 1845

Fletcher was chief justice. Upon his retirement Morell became chief justice.
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