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CIRCUIT COURTS AND THE NISI PRIUS SYSTEM:
THE MAKING OF AN APPELLATE COURT*

William Wirt Blume†

Judicial systems organized under the influence of the English tradition have exhibited a tendency to pass through four stages of development. (1) In the first stage the highest court (not taking into consideration legislative bodies) has final appellate jurisdiction and a superior original jurisdiction, civil and criminal. The court is composed of three or more judges who sit in bank for the trial of cases. The judges may sit at a central place or go on circuit throughout the territory. (2) In the second stage the highest court has both original and appellate jurisdiction but does not undertake to try in bank all cases which are brought before it. The judges go on circuit alone to try issues of fact and sit in bank at a central place to consider questions of law raised before and after trial. Cases are commenced in the central court or are removed there before trial, and judgments are there entered. Courts of oyer and terminer and jail delivery take care of much of the criminal business previously disposed of by the court in bank. (3) In the third stage of development the highest court has appellate jurisdiction and some original jurisdiction, and its judges continue to ride their respective circuits. Cases tried on circuit are not, however, cases of the central court but are cases commenced in the circuit courts where judgments are entered. (4) In the fourth stage of development the highest court has appellate jurisdiction only, and its judges no longer go on circuit for the trial of cases. The court sits in bank at a central place to hear the matters which come before it.

*A portion of this paper will appear as part of the introduction to Transactions of the Supreme Court of the Territory of Michigan 1825-1836, now in preparation.

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In this paper the writer will undertake to trace this pattern of development in one area—the area which finally became the state of Michigan—with the object of presenting some of the merits and demerits of the various judicial systems. At the same time we shall see an appellate court in the process of making.

NORTHWEST TERRITORY
1788-1795

The highest court of the Northwest Territory was a court consisting of three judges appointed at first by the Continental Congress, later by the President of the United States. The Congress made no attempt to determine when, where, or how this court should exercise the jurisdiction conferred upon it, intending, it seems, that these matters should be regulated by the court itself or by the legislature of the territory. The legislature, consisting of the governor of the territory and the three judges of the court, on August 30, 1788, published the following law:

"The general court for the territory of the United States northwest of the river Ohio, shall hold pleas, civil and criminal, at four certain periods or terms in each and every year in such counties as the judges shall from time to time deem most conducive to the general good, they giving timely notice of the place of their sitting; that is to say, Upon the first Monday of February, May, October and December. Provided however, that but one term shall be holden in any one county in a year. . . ."

In framing this statute the governor and judges did not attempt to define the jurisdiction of the court created by Congress, and it is only by viewing the statute with the Ordinance of 1787 as a background that we are able to see the court in full outline. By the ordinance the court was given an unlimited common-law jurisdiction and the people of the territory were guaranteed the benefits of judicial proceedings according to the course of the common law. The court was recognized as superior to the county courts established by the governor and judges.

1 Ordinance of 1787, 1 Stat. L. 51.
2 1 Stat. L. 51 at 53.
4 In "An ACT establishing and regulating fees" adopted in 1792 the general court was referred to as the "General or Supreme Judicial Court." N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 108. In the same year Congress referred to the judges of the court as "the supreme or superior judges" of the territory. 1 Stat. L. 286.
and had, as a part of its common-law jurisdiction, power to issue writs of error, certiorari, and habeas corpus to the inferior courts. By means of the writ of error and an appeal specifically allowed from the court of probate the general court was able to review all judgments of the lower courts and by means of the writs of certiorari and habeas corpus could draw to itself before trial any case commenced in the county courts of quarter sessions and common pleas. The court thus had unlimited original and appellate jurisdiction of actions at law, civil and criminal, and appellate jurisdiction of matters of probate. Only in the field of equity were its powers seriously restricted.

By conferring a broad civil jurisdiction on the county courts of common pleas and a criminal jurisdiction except in felony cases on the county courts of quarter sessions of the peace, the territorial legislature

Recognition of the court's common-law power to issue writs of error, certiorari, and habeas corpus to the lower territorial courts will be found in various provisions of the statutes. In the act regulating fees, N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 108, a judge of the general court was allowed forty cents "For allowing a writ of error certiorari habeas corpus or other writ." In an act regulating procedure adopted the same year, ibid., p. 101, it was provided that a writ of execution might be claimed from a court of common pleas at any time within a year after judgment "Provided there be no writ of error certiorari or supersedeas awarded in the cause."

"A LAW establishing a Court of Probate" published August 30, 1788, N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 9, provided that "from every definitive sentence, and from every final decree, rendered by the court [of probate] there may be an appeal to the general court of the territory . . . which appeal shall be entered on the second day of the term of the court appealed to, and next holden for the county in which the appeal was taken."

The practice of removing criminal cases by certiorari before trial from inferior to superior courts was well established in England—Rex v. Lewis, 4 Burr. 2456, 98 Eng. Rep. 288 (1769)—and in Pennsylvania—Commonwealth v. Lyon, 4 Dall. 302 (1804). The practice was recognized by statute in the Northwest Territory in 1795. N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 171. As to the practice of removing civil cases before trial by habeas corpus cum causa, Judge Symmes in 1792 wrote: "Mr. Harrison might have had another legal remedy if he did not choose [sic] to submit himself to the adjudication of the court of common pleas . . . he might have brought his writ of Habeas corpus cum causa which I would have allowed him, to remove the cause altogether into the general court . . ." 2 Territorial Papers of the United States 402 (1934) (U. S. Dept. State; edited by C. E. Carter).


The judges of the courts of common pleas, "or a majority of them," were authorized to hold "pleas of assizes, scire facias, replevins, and hear and determine all manner of pleas, actions, suits, and causes of a civil nature, real, personal and mixed." N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 7. This provision was adopted from "An ACT for establishing Courts of Judicature" for the province of Pennsylvania, passed May 22, 1722. Pa. Acts of Assembly (1775), pp. 112 at 115.

The courts of general quarter sessions of the peace were authorized to "hear, determine and sentence, according to the course of the common law, all crimes and
did not and could not to any extent impair the jurisdiction of the gen-
eral court. The county courts were not authorized by the ordinance—at
least, not expressly authorized—and there is nothing in the ordinance
which indicates that any part of the common-law jurisdiction conferred
upon the general court could be transferred by the territorial legisla-
ture to local courts created by such legislature. The common-law jurisdic-
tion conferred upon the local courts was of necessity concurrent and
not exclusive.

The territorial jurisdiction of the general court, although undefined
by the ordinance, by implication extended throughout the entire district
of the Northwest Territory. This broad territorial jurisdiction was
recognized by a provision in the statute of 1788 that "all processescs
[ sic ] civil and criminal" should be returnable to the court wherever
it might be within the territory. In one respect only was there an
attempt to restrict this broad jurisdiction. The act of 1788 provided:
"All issues in fact shall be tried in the county where the cause of action
shall have arisen."

At the time the above statute was adopted, there was only one
organized county in the territory, yet the statute provided that the
general court was to hold four sessions in each year and not sit more
than once in the same county. Obviously, the statute was designed for
future operation and additional counties were then in contemplation.
By allowing the judges to fix the places at which the various terms
were to be held, the organization of additional counties could take
place without a change in the terms of the statute.

In the year 1790, after three additional counties had been organ-
ized, the judges of the general court proposed that they be vested
with "a discretionary" power to hold courts in two of the new counties.
Acting Governor Sargent was unwilling to alter the existing method of fixing the terms of the general court and would not admit that it was necessary "to adopt a special Law to call" the general court "into Being" in the new counties. Later in the same year (1790) a law was adopted which provided that a session of the general court should be held in each of the four counties at a stated time each year. In addition to these fixed sessions the judges of the court could, it seems, sit as a court of oyer and terminer and jail delivery whenever necessary.

The judicial system first established in the Northwest Territory was too complicated in that there were three county courts instead of one, but otherwise was as well designed to meet the needs of scattered frontier communities as any that could have been devised. The county courts were to sit four times a year in the larger settlements and were reasonably accessible to the people of the respective counties. Although the county judges ordinarily were untrained in law, they received some

15 Letter—Sargent to Symmes and Turner, July 13, 1790. Ibid. In a letter to St. Clair dated August 17, 1790, 2 ibid. 300, Sargent wrote: "Your Excellency, I understand has expected that a General Court would have been held at St. Clair & Knox Counties, but I could not reconcile it to my Ideas of Delicacy to your character to alter the Law upon that Head—and for which I would have adduced no better Reason than the private Accommodation of the Judges— Had it been otherwise they could not have proceeded, for no provision is as yet made by the Contractors for their Escort— ... the Judges are expected here from Vincennes by Water, for Judge Symmes would not be prevailed upon to remain there for the October term—"

16 "An ACT to alter the terms of the General Court," N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 34, published November 4, 1790, provided that the General Court should be held: "In the county of Knox on the first Tuesday in May yearly and every year. In the county of St. Clair on the second Tuesday in June yearly and every year. In the county of Hamilton the first Tuesday in October yearly and every year. And in the county of Washington on the second Tuesday in November yearly and every year."

17 Judge Symmes, in a letter to Acting Governor Sargent dated June 30, 1792, wrote: "I thought it prudent to suspend farther inquiry until the sitting of the Court of Oyer and Termine for the trial of the murderers now in custody, which I intend to hold so soon as I receive from the secretary of state the law which authorises [sic] one judge of the Territory to hold a court." 2 TERRITORIAL PAPERS OF THE UNITED STATES 403 (1934). The law of 1788 which established the courts of quarter sessions and common pleas, N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 5, provided that recognizances taken by the justices of the court of quarter sessions "for suspicion of any manner of crime not tryable in said court" should be "certified before the general court of the territory at their next succeeding term, or before a court of oyer and terminer and gaol delivery for the county, to be holden next after the taking thereof. ..." In a letter to Randolph dated May 9, 1793, 2 ST. CLAIR PAPERS 315 (1882) (edited by Smith), Governor St. Clair after calling attention to "the sentence of the Supreme Court in a case of murder, and the warrant for the execution of it," stated: "The proceedings of the judge were no doubt conformable to those of the Commissioners of Oyer and Terminus, of jail delivery in England, in the country. ..."
guidance and assistance from the trained judges of the general court, and their judgments were reviewable by those judges. The general court, which was required to meet once a year in each county, was designed to exercise at least three major functions: (1) As the supreme court of oyer and terminer and jail delivery, the general court for a particular county was supposed to try all persons charged with felony and to deliver the jails if necessary. (2) As the appellate court of the territory, it was required to hear appeals from the court of probate and proceedings in error from the other county courts. (3) As a superior court of unlimited original jurisdiction, it was designed to provide an avenue of escape from the incompetence and prejudices of the courts of common pleas and quarter sessions of the peace. The court was required to go on circuit so as to make these benefits readily available throughout the territory.

The "escape" referred to under (3) was to operate as follows. A person wishing to commence a civil action could commence it in the county court of common pleas or in the general court. If commenced in the general court, the law required that it be tried in the county where the cause of action arose. If commenced in the county court, the defendant had a right to remove it before trial into the general court by a writ of habeas corpus cum causa; and when so removed, it was supposed to be tried at the next session of the general court in the county from which it was removed. There was a similar choice in criminal cases. Persons charged with crimes below the grade of felony could be prosecuted in the court of quarter sessions of the peace or in the general court at the option of the prosecutor. If prosecuted in the county court, the defendant could apply to the general court for a writ of certiorari to remove the indictment into the general court for trial. Under the common law such removal was not a matter of right but was allowed when it appeared that local prejudices might prevent a fair trial in the lower court.

However well conceived, a judicial system on paper is of no value to the community; it must be put into actual operation. The system set up in 1788 was never fully put into operation due to the frequent failures of the judges to hold the general court at the times and places

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18 See letter—Acting Governor Sargent to Judge Symmes and Turner, July 13, 1790. 3 TERRITORIAL PAPERS OF THE UNITED STATES 317, 318 (1934).
19 See note 17, supra. Professor Bond mentions three indictments filed in the general court at Cincinnati in 1794. BOND, THE CIVILIZATION OF THE OLD NORTH-WEST 499 (1934).
20 See cases cited in note 7, supra.
called for by the statute. The causes of these failures were in the main two: (1) Often two, and sometimes three, of the judges were absent from the territory at a time. Under the ordinance two judges were necessary to "form a court." (2) When the judges were in the territory, they would not or could not, because of the hardships and dangers involved, travel to the western counties to hold a general court.

The first cause of failure was partially removed by the Congress of the United States in 1792. An act approved May 8 provided that any one of the "supreme or superior" judges "in the absence of the other judges" might hold a court. This act, however, probably did more harm than it did good. It lodged too much power in one man, thereby creating public dissatisfaction, and made it possible for one judge to overrule the decisions of the bench of judges when two of the bench were absent from the territory. The other cause of failure was never fully removed and continued to mar the administration of justice even under the nisi prius system established in 1795.

1795-1803

In reorganizing the judicial system of the Northwest Territory in 1795, the governor and judges continued the courts of the previous period, added an orphans' court, and provided for circuit courts to be held by one or more of the judges of the general court. The general court was referred to as "a Supreme Court of record" and was given express authority to issue writs of habeas corpus, certiorari, and error. Express authority also was given for removal before trial of

21 See 2 Territorial Papers of the United States, 224, 226, 246, 385, 406, 416, 430, 432, 433, 444, 446, 449, 450, 452, 486 (1934); 3 ibid., 406. 22 In 1792 a grand jury of St. Clair County complained that the "Judges of the Supreme Court" had never held a court in that county. 2 Territorial Papers of the United States 373 (1934). In 1793 Acting Governor Sargent referred to the fact that the supreme court had "not been yet known amongst" the people of the two western counties. 3 ibid., 406-407. 23 I Stat. L. 286. 24 Governor St. Clair in a letter to the Secretary of State dated December 15, 1794, stated that "many representations" had been made to him concerning the unsafe situation created by allowing one judge to hold the court without the possibility of having his decisions revised. He recommended that the law be repealed and that an appeal be allowed to the Supreme Court of the United States. 2 Territorial Papers of the United States 499 (1934). 25 N. W. Terr. Laws, 1788-1800 (Pease, 1925), pp. 154, 159. 26 Ibid., p. 181. 27 Ibid., p. 156. 28 Ibid. The act further provided that a person aggrieved by the judgment of a court of quarter sessions or other court of record might have his writ of error which should be granted "of course" and made returnable to the general court. Also, that the
cases, civil and criminal, from the county courts into the general court.29

The general court was no longer required to hold sessions in all of the counties but only in Washington and Hamilton. The other counties, established and to be established, were taken care of by the following provision for circuit courts:

"Provided always, That upon any issue in the said General-court, such issue shall be tried in the county whence the cause was removed, before the judges aforesaid, or any one of them, as a circuit court; who are hereby empowered and required, if occasion require, to go on circuit, twice in every year, into the counties of St. Clair and Knox, and such other counties as may hereafter be erected, to try such issues of fact as shall be depending in said General Court, and removed out of either of the counties aforesaid; (when and where they may try all issues joined); or to be joined, in the same General Court, and to do, generally, all those things that shall be necessary for the trial of any issue, as fully as justices of nisi prius in any of the United States may or can do."30

Although the statute did not state that circuit courts should be held in the counties of Washington and Hamilton where the general court was to hold its sessions, we find that clerks for the circuit courts of Washington and Hamilton were appointed in September 1796.31

judges of the general court should "examine and correct all and all manner of errors of the justices of the inferior courts."

29 Ibid. The judges of the General Court were empowered to "hear and determine all and all manner of pleas, plaints and causes, which shall be removed, or brought there, from the respective General quarter-sessions of the peace, and courts of common pleas..." Another law adopted in 1795, ibid., p. 171, provided: "If the defendant shall, by habeas corpus, certiorari, or otherwise, remove any indictment or information from any court of General quarter-sessions before the General Court, the attorney general shall, for his services in drawing the indictment and prosecuting the same, have the sum of eight dollars." An act approved December 9, 1800, provided: "That if any person or persons shall commence and prosecute any action in the general court, or remove into that court by habeas corpus cum causa, any cause of action from the court of common pleas (except the title to real estate shall come in question) and shall recover by the judgment of said court, any sum of money less than one hundred dollars, the person suing and prosecuting shall not be entitled to any costs, unless..." I Ohio & N. W. Terr. Stat., 1788-1833 (Chase, 1834), p. 307. In a letter to Sargent dated December 1, 1796, 2 ST. CLAIR PAPERS 415-416 (1882), Governor St. Clair stated that certain indictments had been "removed into the Supreme Court" where they would be dismissed.

30 The section of the Pennsylvania act of 1722, Pa. Acts of Assembly (1775), pp. 112, 114, from which this section was adopted, concludes: "and to do generally all those Things that shall be necessary for the Trial of any Issue, as fully as Justices of Nisi Prius in England may or can do."

31 3 TERRITORIAL PAPERS OF THE UNITED STATES 464 (1934).
By the terms of the statute it is clear that the general court was no longer to sit in bank for the trial of issues of fact in civil cases. Under the *nisi prius* system as thus established, civil actions commenced in or removed to the general court were there pleaded to issue. If the resulting issue was an issue of law, it was decided by the court in bank, and the appropriate judgment entered. If an issue of fact was formed, the "nisi prius record" was sent to the clerk of the appropriate circuit court who entered the cause in "the judge's book." After trial and verdict the "postea" was returned to the general court where judgment was entered. Criminal cases removed by certiorari from the courts of quarter sessions of the peace could likewise be sent to the circuit courts for trial.

The judges of the general court were authorized to deliver the jails of all persons committed for capital crimes and, for the trial of such cases, to sit as courts of oyer and terminer and jail delivery. This provision had the effect of reserving to the general court exclusive jurisdiction of capital crimes but did not and could not deprive it of the unlimited criminal jurisdiction which had been conferred by the Congress of the United States. This jurisdiction was exercised, it seems, by a judge or judges of the general court when on circuit to try cases at *nisi prius*.

In the year 1800, after the territory had been divided, an act was passed which further regulated the circuit courts and which provided

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82 By an act regulating fees published June 16, 1795, N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 173 clerks of the circuit courts were allowed certain fees for "entering in the judge's book, every cause to be tried," for "filing every nisi prius record," and for "returning every postea," etc.

83 According to 1 Holdsworth, History of English Law 213 (1922), the court of King's Bench, instead of trying at bar criminal cases removed into that court by certiorari, had power "to send them for trial into the counties where the crimes were committed, or to order them to be heard by the itinerant justices sitting at nisi prius." Also see 4 Blackstone, Commentaries, Wendell ed., 309, note 25 (1854). The Ordinance of 1787 required that judicial proceedings be conducted according to the course of the common law.


86 By the fees act of 1795, N. W. Terr. Laws, 1788-1800 (Pease, 1925), p. 174, the clerks of the circuit courts were allowed "in criminal cases" the same fees as were allowed to the clerk of the general court. If the circuit clerk acted as prosecutor, he was entitled to the same fees as were allowed to the attorney general. A law adopted in 1798, ibid., p. 297, authorized justices of the peace to bind persons charged with certain crimes "to appear at the next General court Circuit court or court of General Quarter Sessions of the peace to be held within or for the same county at the discretion of the justice..."
for appeals from the courts of common pleas in certain cases. Provision was made for the holding of an annual circuit court in each of the “districts” of the territory with a proviso that the circuit courts for Washington and Hamilton counties should be held by at least two of the judges of the general court. The prothonotaries of the counties of Washington, Hamilton, Ross, Wayne, and Jefferson were made ex officio clerks of the circuit courts to be held for those counties.

The appeal allowed by the above statute was to the general court and permitted a trial de novo on the pleadings filed in the lower court. Instead of having the record of the county court certified to the general court and by it sent to the proper circuit court for trial, the statute directed that the record be certified to the next circuit court “to be holden” in the district. It was made the duty of the clerk of the circuit court, “after any trial had in the circuit court, to transmit unto the general court next to be holden after such circuit court, the original transcript of the record certified from the court of common pleas, with the postea indorsed thereon, and all proceedings had therein,” as might be “necessary for the rendition of judgment.” The statute further provided:

“This 7. That the circuit court shall try the issue of any cause, that shall or may be certified, from any court of common pleas and entered in said court, in the same manner as though the pleadings had been closed in the general court; and when certified therein, the general court shall proceed to enter up judgment as in other cases.”

This statute established a convenient short-cut from the county to the circuit courts.

The Judiciary Act adopted by the governor and judges in 1795 provided that the general court should be held by at least two of the judges of the court but that circuit courts might be held by the judges “or any one of them.” Under the territorial act of 1800 the circuit courts of Washington and Hamilton counties were not to be held by “less than two of the judges of the general court.” These provisions were of doubtful validity, as the territorial legislature was dealing with
a matter which had been expressly dealt with by the Congress of the United States. Congress had authorized one judge to hold the court when the other judges were absent from the territory, and it was beyond the power of the local legislature to make a different provision. When two or more of the judges were in the territory, it was necessary that at least two of them hold the court. In this situation the acts of Congress and of the local legislature were not in conflict. But if two or more of the judges were in the territory, it would seem that one judge could not hold a circuit court notwithstanding the authority given by the territorial statute. On the other hand, if only one judge was in the territory, he could hold both the general court and circuit courts without regard to the requirements of the local laws.

To reach the above conclusions it is necessary to assume, first, that when the act of Congress spoke of the absence of the judges, it meant absence from the territory; second, that the circuit courts were not distinct courts created by territorial authority but were in reality merely the hands and arms of the general court; and, third, that the act of Congress of 1792 was a valid change in the Ordinance of 1787. The basis of the first assumption is a matter of interpretation and is fairly debatable, but it seems reasonably clear that the statute was passed because a majority of the judges had been for long periods of time absent from the territory. The second assumption is grounded on the fact that the circuit courts were to exercise powers and jurisdiction which had been conferred by Congress on the general court, and which the local legislature could not transfer to another court. The third assumption is fully justified today although at one time it was commonly thought that Congress alone could not change the ordinance because its articles had been declared to be a "compact" unalterable except by common consent.

Of a few matters the general court and the circuit courts were given a concurrent jurisdiction. From the orphans' court established in 1795 an appeal was allowed "to the General or circuit courts." Forcible entry and detainer proceedings were removable by certiorari "into the General Court, or circuit court holden in such county." "The General Court and circuit courts" were vested with jurisdiction of proceedings for divorce, and the judges "thereof" were authorized to "use such kind of process to carry their judgment into effect" as to them should seem expedient. This conferring of a concurrent jurisdiction on the

41 See supra, at note 23.
42 See supra, at note 21.
44 Ibid., p. 250.
circuit courts had the effect of giving them, to the extent of such jurisdic­tion, an existence which was independent of the general court.

The *nisi prius* system as thus established in the Northwest Terri­tory was borrowed from the state of Pennsylvania, which had inherited it from the province of Pennsylvania, which, at an early date, had borrowed it from England. Developed through centuries of experi­ence, it offered certain advantages which have been lost in the later developments of our judicial systems. The principal of these advan­tages were in brief the following:

(1) The circuit or *nisi prius* courts were agencies to which a large part of the business of the central court might be delegated. The judges on circuit were the hands and arms of the central court. As agents of the central court, the *nisi prius* judges were subject to the direction and control of the central court; and, in the Northwest Territory, the judges were directed to make rules to govern the practice of the circuit courts as well as of the court in bank. The principal courts were thus unified and subject to control by a single, central authority.

(2) Under the *nisi prius* scheme the central court was expected to exercise two major functions: (a) As the highest appellate court of the territory, it was charged with the duty of settling and unifying the law. (b) As the highest trial court of the territory, it was responsible for seeing that justice was done in the cases which came before it in bank or before its judges at *nisi prius*. The lodging of both these func-

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46 See note 30, supra.

47 "Under the nisi prius system the relations of the justices of assize to the common law courts had always been very close. ... A trial at nisi prius was in all respects equivalent to a trial before the full Bench—hence the saying 'the day at nisi prius and the day in banc are in consideration of law the same.'" I Holdsworth, History of English Law 281 (1922).

48 An act approved December 9, 1800 provided: "And for the purpose of establish­ing and maintaining an uniformity in the practice of the several courts throughout the territory; Be it further enacted, That it is hereby made the duty of the judges of the general court, to compile a system of rules for the government of the general and circuit courts. ..." I Ohio & N. W. Terr. Stat., 1788-1833 (Chase, 1834), p. 307. A compilation of "Rules & Orders for Regulating the Practice of the Supreme Court, Courts of Common Pleas, and the Circuit Courts in the State of Pennsylvania" was published in 1801. The rules which regulated the practice of the supreme and circuit courts were made by the judges of the supreme court.

49 The English scheme of vesting the legislature (House of Lords) with final appellate jurisdiction was never adopted in the Northwest Territory or in any of the territories and states created out of that territory. The provision of the Ordinance of 1787 which authorized the governor of the Northwest Territory and the three judges of the highest court to adopt laws lodged in the same men (the judges) both legisla­tive power and final appellate jurisdiction. Three of the four men who adopted the laws were charged with the duty of interpreting the laws.
tions in the same men tended to prevent an emphasis of one at the
expense of the other.

(3) For performing its duty of seeing that justice was done in
cases tried before its judges at nisi prius, the court in bank was pro­
vided with a method of review which was thoroughly rational and
which was greatly superior to the ancient proceeding by writ of error.
Before the entry of judgment in the central court on a verdict taken at
nisi prius, the defeated party had a right to move in arrest of judgment
or for a new trial before the court in bank. In passing on this motion
for new trial the court was not expected to comb through a record
searching for errors of law but to examine the verdict in the light of the
evidence to see if right and justice had been done. 110

(4) The scheme of having the judges who settled and unified the
law also try cases with juries in various parts of the territory was de­
gined to keep the highest judges informed as to the views and wishes
of the people of the country. The highest judges were thus qualified
to adapt the law to the needs of a changing society. And the people
were educated in law and government by their contacts with the law­
yers and judges of the central court. 111

(5) The coming together of the judges for sessions in bank
afforded opportunities for informal discussions of questions which
had arisen or might arise on their respective circuits. It is probable that
the law applied by the courts of oyer and terminer and jail delivery
was settled by such discussion, there being no adequate method of re­
viewing cases tried by single judges in those courts.

(6) Issues tried on circuit were issues of fact formed in the central
court. Demurrers to pleadings and all questions of a preliminary nature
were settled by the court in bank before a trial was had in the circuit
court. The decision of these matters by the highest court in advance
of trial eliminated any need for interlocutory review and made it
unlikely that the fruits of the trial would be wasted because of the
erroneous decision of a preliminary question.

(7) As long as it was physically possible for the same judges to
act both as trial and appellate judges, the scheme was attractive because
it saved the expense of hiring two sets of judges. It was especially
attractive to the settlers of the western territories as the federal gov-

110 See 3 BLACKSTONE, COMMENTARIES 391 (1765).
BURNET, NOTES ON THE EARLY SETTLEMENT OF THE NORTH-WESTERN TERRITORY
65 (1847), attorneys residing in one county attended sessions of the general court held
in other counties, and "generally traveled with five or six in company."
ernment paid the salaries of the judges who were appointed to the highest court.

Although highly efficient in design and well suited for a compact and fairly static society, the *nisi prius* system had definite limitations. Three or four judges could hold only a limited number of circuit and general courts in a year; and where long distances had to be traveled, the maximum number was, of course, reduced. There was also a limit to the number of judges who could efficiently hold the central court. When, through the growth of population and the multiplication of counties, the burden placed on the shoulders of the judges became too heavy for them to bear, the system itself was blamed and a change effected.

Another objection that was made to the *nisi prius* system was the fact that the judge who presided over the trial at *nisi prius* was also a member of the court of review. It was feared that his views might be given more weight by the other judges than justly due. Further, it was commonly believed that a system under which three or four judges sitting in bank reviewed their own rulings made individually at *nisi prius* offered too much temptation for judicial courtesy—You overlook my errors and I'll overlook yours! There was objection also to the broad scope of the review indulged on the hearing of the motion for new trial which was made to the court in bank.

It is generally recognized that the judicial systems of the Northwest Territory were poorly operated and failed to meet the needs of the people. This failure was not due to defects in the systems but came about because the systems were never put fully into operation, that is to say, because the circuit courts were never held regularly at the times and places specified by law. Neglect of the circuit courts became a matter of public scandal. Some of the judges were untrained in law and probably incapable of holding a court alone; others were so occupied with land speculations that they had little time for official business. The territory was immense, and there were great hardships and real dangers to be faced in making the necessary journeys. The situation in the latter respect was described by a committee of Congress in 1800:

> “most of the evils which they at present experience are, in the opinion of this committee, to be imputed to the very great extent

52 See Brackenridge, *Law Miscellanies* 253 (1814).
53 See ibid., 549.
54 See Bond, *Civilization of the Old Northwest* 65 (1934).
55 See ibid., 83.
56 20 American State Papers (1 Miscellaneous) 206 (1834).
of country at present comprised under their imperfect Government. The Territory northwest of the Ohio from southeast to northwest fifteen hundred miles, and the actual distance of traveling from the places of holding courts the most remote from each other is thirteen hundred miles. ... In the three western counties there has been but one court having cognizance of crimes in five years; ... The extreme necessity of judiciary attention and assistance is experienced in civil as well as criminal cases. ..."

The committee recommended that the territory be "divided into two distinct and separate Governments, by a line beginning at the mouth of the Great Miami."

Another obstacle which may have interfered with the proper functioning of the nisi prius system was referred to in a letter which was written by Acting Governor Sargent to the judges of the general court in 1798. The three judges were holding the general court at Cincinnati, and the acting governor urged upon them the great need for holding a circuit court in the county of St. Clair. He suggested that one of them "should depart without more Delay for the Mississippi" and concluded his letter by saying:

"If there should be any Doubt of the powers of a single Judge to hold a Court such may be readily established in our legislative Capacity."

The matter was not, however, as simple as the acting governor thought. Congress had provided that one judge might hold a court in the absence of the other judges. The other judges were present, i.e., were in the territory, and one judge had no power to hold a court. On the other hand, if the act of Congress should be considered invalid, the provision of the ordinance which required two judges to form a court was still in force; and the governor and judges in their "legislative Capacity" were powerless to legislate contrary to either provision.

Acting Governor Sargent was never impressed with the excuses made by the judges for not holding the circuit courts and continually urged that the courts be held. Governor St. Clair sought to remedy the situation by issuing commissions which authorized the holding of special courts of oyer and terminer. The executive records show that five such commissions were issued, four in 1798 and one in 1801. The commissions issued in 1798 were addressed to a judge of the

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3 Territorial Papers of the United States 503 (1934).

See supra, at note 23.

3 Territorial Papers of the United States 508, 509; 529 (1934).
general court and two associates. The commission issued in 1801 was addressed to two of the judges of the general court. In 1800 the same judges as were named in the fifth commission were allowed a certain compensation for having held a court of oyer and terminer “at the special request of his excellency the governor.” At the same time the legislature passed an act which authorized the governor to issue a “commission to two or more of the judges of the general court, to hold a court of oyer and terminer and jail delivery” for the trial of any person charged with killing an Indian.

One obvious method of correcting many of the evils which had grown up in connection with the administration of justice in the Northwest Territory was to remove the chief obstacle to the holding of the circuit courts. The territory should be divided into smaller units. In 1800 Congress took a step in this direction by creating a new territory in the west (Indiana Territory) and allowing the old government of the Northwest Territory to function in the east. In 1803 the southern part of the eastern territory became a state (Ohio).

INDIANA TERRITORY

1800–1805

The area which in 1805 became Michigan Territory was organized as a part of Wayne County, Northwest Territory, in 1796. In 1800 the western portion (approximately one-half of the area) was included in the new territory of Indiana. In 1803 the eastern portion, which contained the county seat, also became a part of the new territory.

The Ordinance of 1787 was made applicable to the new territory, and the local legislature as one of its first acts published “A Law establishing courts of judicature” which resembled very closely the Judi-

61 Ibid. See comment by Burnet, Notes on the Early Settlement of the North-Western Territory 324 (1847).
62 3 Territorial Papers of the United States 86 (1934).
63 Note by Carter, ibid., 535.
64 Documents Relating to the Erection of Wayne County and Michigan Territory 6 (1922-1923) (edited by Burton Historical Collection).
65 Ibid., 8.
66 Ibid. 9. A writ of capias issued by the clerk of the Court of Common Pleas of Wayne County, January 20, 1803, was headed: “Territory of the United States north west of the River Ohio.” A libel filed March 1, 1803, was headed: “Indiana Territory.” Records of the courts of Wayne County, 1796-1805 (Legal Research Building, University of Michigan, Ann Arbor).
67 2 Stat. L. 58 at 59 (1800).
cature Act adopted in the Northwest Territory in 1795. The ordinance and the territorial act together had the effect of continuing in operation the principal features of the judicial system of the earlier territory.

Although the judges of Indiana Territory held the circuit courts more regularly than did their predecessors in the Northwest Territory, complaints were still made. A petition signed by Robert Abbott of Detroit as chairman of the “Democratic Republicans of the County of Wayne in the Territory of Indiana,” presented to Congress in December 1804, stated:

“Suffer us to entreat you, to have justice promptly and impartially administered: compel us not to wander seven hundred miles, thro' inhospitable deserts, for the redress of wrongs, which the uncertainty of punishment, and the hopes of impunity, have, perhaps in many instances caused us to suffer.—

“Persons capitally punishable, are seldom prosecuted to conviction. They remain in confinement for the want of competent authority to try them, until they are forgotten, when, with the assistance of their associates in guilt, they break their bonds, and deride, from the opposite bank, the impotence of our Magistrates.—

“In Civil matters, too, the delay and expense are equally fatal.— During the last eight years, we have had but two Circuit Courts.— The Creditor is deterred from an appeal to the laws, under the painful assurance, that altho' justice is not sold, it costs more than, some among us are, able to pay.—”

89 Ibid., p. clviii.

70 Documents relating to the erection of Wayne County and Michigan Territory 34 (1922-1923). In a petition to Congress dated at Detroit, March 29, 1803, citizens of Wayne County had stated (ibid., 14): “Contemplating this Country in a Commercial point of view, the necessity, and we humbly conceive, sound policy, of erecting it into a separate Independent Territory, will appear obvious. Many important commercial questions have already arisen in this quarter, both wherein the United States are interested, as well as between Individual Citizens, several of which have been removed into the General Court, and will continue to be carried up into that Court for a final decision [sic]— Experience has already taught us the ruinous consequence which a procrastination in judicial proceedings, produces to Commerce; for a term of more than Six Years, whilst under the Government of the North Western Territory, but Two Superior-Courts were held in the County of Wayne; notwithstanding the many Actions removed into the General Court by error &ca— Several of which still remain undecided, altho' pending Three or Four years. The ostensible causes which operated to deprive us of regular and stated courts, whilst a part of the late Territory, must necessarily increase, so long as we remain attached to the Indiana, in a ratio, proportionate to the increase of distance, added to the greater hazard, the Judges must encounter in performing a Journey of at least double the distance the late Judges had to travel, and the whole of that immense distance, thro' a continued Indian Country,
The old problem as to the power of one judge to hold a court also persisted. Under the Judicature Act of 1801 one judge might hold a circuit court, but at least two judges were necessary to hold the general court. The act of Congress of 1792 which had authorized one judge of the Northwest Territory to hold a court in the absence of the other judges continued in force and was made applicable to Indiana. By a resolution adopted by the governor and judges in 1803, the two-judge requirement was repealed, thus bringing territorial legislation more into harmony with the laws of Congress. It is only by having in mind the possibility that the act of Congress of 1792 was invalid and had not changed the two-judge requirement of the Ordinance of 1787 that we are able to understand Professor Philbrick when he states that the validity of the resolution of 1803 "is no more doubtful than that of the Congressional act of 1792 which had similarly modified the 'compact' of 1787." The two-judge requirement of the ordinance was not in the articles, which were declared to be a "compact"; and even if it had been there, there is no basis for saying that the ordinance was unalterable by the authority which had continued it in force.

In 1807, after Michigan had become a separate territory, the legislature of Indiana passed "An act regulating the General Courts" which provided that the circuit courts should render final judgment in cases tried at nisi prius and might pass on motions for new trial. This statute destroyed two of the distinctive features of the nisi prius system. In the place of the carefully developed practice of reviewing trial proceedings on motions for new trial made to the court in bank, we find authority for bills of exceptions and for reserving questions for the determination of the general court. The introduction of the proceeding in error was distinctly a backward step; the scheme of reserving ques-

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72 1 Stat. L. 286.
75 Ibid., p. clv.
76 1 Stat. L. 50 (1789).
78 The first Constitution of Ohio did not continue the nisi prius system but provided that a supreme court be held in each county. Evils resulting from this change are described by Burnet, Notes on the Early Settlement of the North-Western Territory 356 (1847).
tions became prominent in the third stage of the development of our judicial systems.]

**Michigan Territory**

1805–1836

When Wayne County of the Northwest Territory was reorganized (with different boundaries) as Wayne County of Indiana Territory in 1803, the county courts were not altered but continued to be held, without interruption, by the same judges. The high court of the territory was vested with the same powers as had been lodged in the high court of the previous territory but was held by different judges. When Wayne County of Indiana Territory was reorganized (with slightly different boundaries) as the territory of Michigan in 1805, there was a complete break with the past in so far as the territorial government was able to effect it. The laws adopted in the earlier territories were ignored; a new judicial system was established and set in motion.

The first governor of the new territory at the beginning of his administration (July 3, 1805) divided the territory into four districts for administrative purposes and declared that the parts of the territory to which the Indian titles had been extinguished should constitute one county—the county of Wayne. A short time later (July 25, 1805) the governor and judges as a legislature combined two of the districts (Huron and Detroit) into one for judicial purposes and established the other two (Erie and Michilimackinac) as separate judicial districts. In two of the three judicial districts a court was to be held twice a year; in the third judicial district (Michilimackinac) a court was to be held once a year on the fourth Monday in June.

"That it shall be the duty of one of the judges of the territory of Michigan, to attend each district court, at their respective terms,

79 "AND the justices of the Court of Common pleas; of the Quarter Sessions of the peace, and of the Orphans Court shall (until otherwise directed) continue to hold their respective Courts at the place and times at which they were accustomed to be held under the Government of the North Western Territory." Proclamation of Governor Harrison, January 14, 1803, Documents Relating to the Erection of Wayne County and Michigan Territory II (1922-1923).

80 I Transactions of the Supreme Court of the Territory of Michigan, 1805-1814, pp. xxxv-xxxvii (1935).

81 Ibid. 5-4; Woodward Code (1805), pp. 151-154 (Laws of Michigan Territory). Although this first country was not officially named "Wayne," it has been assumed that the old name continued. See I Farmer, History of Detroit and Michigan, 2d ed., 120 (1889).


83 Ibid.
and the said judge shall constitute a court for such district; pro-
vided, nevertheless, that if any judge shall not be able to attend
the court, to which he shall be allotted by a majority of the judges
of the territory, in such case any other judge of the territory shall
constitute the said court."

Another law adopted at the same time provided that the same judges
(the three appointed by the President of the United States) should
hold a supreme court once each year at the seat of the government. 84
This law contained a reference to the “laws of the United States”
which authorized one judge to hold the court.

On December 8, 1806, “the principle freeholders of the Northeast
Coast of Detroit” decided to petition the governor “to convene the
Legislature for the purpose of organizing the Court of Common Pleas
and General Quarter Sessions of the Peace” in order that the “ancient
laws of the Territory Northwest of the River Ohio, and Indiana, be
put in force.” 85 Referring to the Ordinance of 1787, the minutes of
their meeting stated: 86

“The third section declares that there shall be established a
Court composed of three judges, any two of which forming a
Court. Instead of that it is composed of Judge Woodward alone;
the other two Judges having private and different Courts in each
district held by one Judge only, from whom there is an appeal to
themselves in the Court of Mr. Woodward in the last resort,
which is unconstitutional and greatly dangerous that the final
decision be made by man of his character, whilst Congress have
decided that there should be two at least to hold the said Court.”

At another meeting held in December, 1806, similar action was taken: 87

“Resolves, That we shall demand of the Legislature to keep
in force our old laws of the northwest and Indiana Territory in
establishing our common pleas and quarter sessions court, so that
the Supreme Court shall be held by three judges, and not less
than two, according to the ordinance of July 13, 1787, which is our
constitution...”

The minutes of these meetings were transmitted to the territorial
government and influenced, no doubt, the abandonment of the circuit

84 Ibid., 9.
85 8 Michigan Pioneer Collection 579, 581 (1886).
86 Ibid.
87 12 ibid., 647 (1888); also see 8 ibid., 578 (1886).
system and a reversion to a scheme of judicial organization of the first type mentioned at the beginning of this discussion. 88

The change referred to was effected by a law adopted April 2, 1807, which repealed so much of the act “concerning district courts” as required “one of the judges to constitute the court of the district” and provided that each district court should be held by three persons “of integrity, experience, and legal knowledge” who should be appointed by the governor and who should reside within the district. 89 As thus constituted, the district courts resembled the older courts of quarter sessions and common pleas and served their respective communities in about the same way. There was, however, this difference: An economy of personnel was effected by conferring on the same judges both civil and criminal jurisdiction and by granting to the clerks of the courts certain powers which previously had been exercised by the judges of probate of the earlier territories.

In the period July 25, 1805 to April 7, 1807 the Supreme Court and the district courts were closely related by personal ties. The judges who sat individually as district courts sat together as a supreme court to review their individual decisions made in the courts below. 90 A majority of the judges determined which judge should hold a certain court. 91 The judges as a group had power to appoint the clerks of their individual courts 92 and, as individuals, were required to observe the rules of practice established by the group. 93

This relationship, however, was not as close as that which had existed between the general and circuit courts of the Northwest and Indiana territories. Cases tried at nisi prius in those territories were cases which belonged to the central court, and the judges who tried the cases were, in a sense, agents of that court and subject to its control. In Michigan the cases tried in the district courts were not cases of the supreme court farmed out for trial but were cases commenced in the district courts where final judgments were entered. 94 Although it was

88 The change may have been influenced also by the fact that Judge Bates, who had held most of the district courts, 1 Transactions of the Supreme Court of the Territory of Michigan, 1805-1814, p. 17, note 15 (1935), was no longer available for this service and that the new judge, Griffin, disliked holding a court alone (infra, at note 119).
90 1 ibid., p. 10.
91 1 ibid., p. 18.
92 Ibid.
93 1 ibid., p. 19.
94 See dockets of “District Court for the district of Huron & Detroit” (Legal Research Building, University of Michigan, Ann Arbor).
beyond the power of the territorial legislature to require the judges appointed by the President of the United States to hold courts other than the supreme court, as long as the judges carried out their self-imposed duties\(^9\) the courts held by them as individuals were separate and distinct from the court in which they sat in bank. In examining the judicial organization of this early period, we catch a brief glimpse of the system which has been described as belonging to the third stage of judicial development.

As the district courts were local courts created by territorial authority, they were not subject to the provision of the Ordinance of 1787 which required two judges to form a court or the act of Congress of 1792 which authorized one of the “supreme or superior judges” to hold a court “in the absence of the other judges.”\(^9\) The supreme court, on the other hand, was governed by these provisions, and an express reference to this fact is found in the act of the governor and judges which purported to establish the court.\(^9\) It is not certain that this reference was understood by the “freeholders” who complained that the supreme court was held by Judge Woodward alone.\(^9\) Either they were unaware of the act of 1792 or thought it inapplicable to the territory or considered it an invalid attempt to change the Ordinance of 1787. There was, however, a real basis for complaint, as the court’s journal shows that fifteen of the sessions of the supreme court held in 1806 were held by a single judge, some of them at times when the other judges were present, that is to say, not absent from the territory.\(^9\)

Due to a controversy which arose over the validity of certain laws which had been signed by the governor alone,\(^10\) the district courts were abolished in 1810, leaving only the justices of the peace of the various districts and the supreme court to constitute the judicial system.\(^10\) A short time later provision was made for registers of probate.\(^10\) This simple plan of judicial organization continued until counties began to be formed in the place of districts in 1815. As each new county was

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\(^9\) As the judges constituted three-fourths of the legislature, any duty imposed on them by territorial statute was “self-imposed.”

\(^9\) 1 Stat. L. 286.

\(^9\) Supra, at note 84.

\(^9\) See supra at note 86.

\(^9\) I Transactions of the Supreme Court of the Territory of Michigan, 1805-1814, pp. 353-374 (1935).

\(^10\) I ibid., xxvi.

\(^10\) I ibid., 12-13.

organized, a county court was established which in personnel and organization resembled the district courts of the second period (1807-1810). Beginning in 1818 a probate court was established in each county.\textsuperscript{108}

By the act which established the county courts in 1815,\textsuperscript{104} the territorial legislature undertook to deprive the supreme court of a large part of its original jurisdiction, civil and criminal. The county courts were given exclusive jurisdiction of all civil cases involving more than the jurisdiction of a justice of the peace and not exceeding one thousand dollars, except actions of ejectment, and of all criminal cases not capital. The supreme court was left with exclusive original jurisdiction of capital crimes, actions of ejectment, and civil actions involving more than one thousand dollars. The courts exercised no concurrent jurisdiction, and there was no appeal from the one to the other for a trial de novo.

In the winter of 1817-18 certain inhabitants of the county of Wayne made the following complaint:\textsuperscript{105}

"Having confidence in the justice, learning & wisdom of the higher Court, it is with pain we perceive its doors closed against almost all investigations made under the criminal law; & its entrance, so frequently shut to applicants for redress against violations of private right, even by appeal. We would humbly submit our doubts whether it be competent to deprive the people of their privilege to apply to that high tribunal in all cases, of which, by the ordinance, it can have jurisdiction."

The petitioners suggested that a law be adopted "providing for the holding, in each County, by one or more of the Supreme Judges, of a nisi prius Court, twice each year. . . ."

Although the request for \textit{nisi prius} courts was not granted, it seems that the governor and judges were impressed by the contention that they had no power to deprive the court created by Congress of any of its Congress-conferred common-law jurisdiction. By an act adopted June 13, 1818, they provided that the supreme court should have "original and concurrent jurisdiction of all civil cases both of law

\textsuperscript{108} ibid., p. 341.
\textsuperscript{104} ibid., p. 184.
\textsuperscript{105} Woodbridge Papers, Undated Acts folder 2 (Burton Collection, Public Library, Detroit). This paper is in the handwriting of William Woodbridge, secretary of the territory, and appears to be a copy although labeled "Form." It was written while the court of "General Quarter Sessions of the peace" was in existence, which was from November 25, 1817 to May 30, 1818. 1 Transactions of the Supreme Court of the Territory of Michigan, 1814-1824, p. 12, note 16 (1938).
and equity, and cognizance concurrent with the county courts of all offenses, crimes, and misdemeanors; and appellate jurisdiction from the county court in all cases in which that court has original jurisdiction." The Court continued to have exclusive original jurisdiction of capital cases, ejectment cases, and civil cases involving more than one thousand dollars.

By an act of Congress approved April 18, 1818, the territory of Michigan was extended westward to the Mississippi, and the territorial government was faced with the duty of providing an administration of justice for scattered settlements hundreds of miles from the seat of the government. The problem presented was not unlike the problem which had troubled the governments of the older territories. In October 1818 the new area was divided into three counties, and provision made for county courts, probate courts, and justices of the peace; but no immediate steps were taken to provide a superior court of supreme or circuit grade that would be reasonably accessible. The supreme court continued to hold its annual session at Detroit, and to it there appeals had to be taken and persons charged with capital crimes brought for trial. There, also, it was necessary to commence all actions of ejectment and civil actions involving more than one thousand dollars. And it was there that the supreme court exercised its broad concurrent jurisdiction of civil and criminal cases.

A superior court sitting at one place once a year served the needs of the territory fairly well prior to 1818 but after that year was clearly inadequate. One court exercising in bank original as well as appellate jurisdiction was not suited to the needs of a growing population. Jury trials before three judges consumed much time, and the court was soon to be overburdened with judicial business. The holding of only one term each year was productive of great delays, as a continuance meant a continuance for an entire year. The holding of the court in only one place was open to at least two objections: (1) The expense involved in attending the court from distant parts of the territory often amounted

108 "From the Sault de Ste. Marie to Mackinaw the distance is nintey [sic] five, or one hundred miles; from Mackinaw to Green Bay, is Two hundred and eighty miles; and from Green Bay to Praire du Chien, is Four hundred miles. There are no roads between the settlements, and the communication is altogether by water . . . The terms of the Supreme Court are held at Detroit, which is Four hundred miles from Mackinaw, the nearest point in the District to that place." Petition to Congress, SIBLEY PAPERS, Aug. 1822 (Burton Collection).
to a denial of justice and gave an unfair advantage to the party who could bear this expense. (2) It was necessary to bring jurors from distant counties or else burden the inhabitants of Wayne County with jury service for the entire territory.\footnote{In a letter dated January 5, 1822, Andrew G. Whitney of Detroit stated that “All the Gentlemen from the other counties” with whom he had conversed thought “it an intollerable [sic] hardship that Jurors—witnesses & parties should be dragged from their own counties to Detroit.” \cite{SibleyPapers71} (Burton Collection). In a letter dated January 31, 1822, he stated that the people of Wayne County were anxious “to get rid of the burthen of doing all the jury business for the whole Territory.” \cite{Ibid.12} Governor Cass said: “The expense and inconvenience, of bringing parties and witnesses, and, in some instances, jurors from other parts of the Territory, will be more and more felt as the population and the business of the country increase, and with them the probable sources of litigation.” \cite{MichTerrLegCouncilJour}} One benefit arising from holding the sittings at only one place was the opportunity afforded the judges to consult their libraries in making decisions of questions of law.

In the fall of 1819 the governor and judges began a general revision of the territorial laws. A report of their proceedings was made by Andrew G. Whitney of Detroit to Solomon Sibley, Delegate to Congress, in a letter dated December 31, 1819:\footnote{Woodbridge Papers, 1819 folder Dec. 24—(no date) (Burton Collection).}

“The Legislative board have Resolved to Revise & publish in a Vol: all the laws of the Territory, and have already printed the Ordinance and the probate system.— I was ordered, sometime since to draft a Judiciary Law Embracing the Jurisdiction—powers and practice of all the courts &c— I spent about a week, in collating our own & the different systems of the states and Drew up 8 or 10 sections.— Among other things making two terms of the Sup. Court— limiting them to 3 weeks each term, appointing a Return day, &c— this I brought in to them for Discussion, and was handsomely abused by Woodward & Griffin for my pains. I declined proceeding any farther.— I have since been ordered to digest simply into One statute all the Existing provisions respecting the organizations of Courts &c—the aforementioned Judges being determined that everything Relating to courts shall remain as it is.”

Whitney’s report as to the determination of Judges Woodward and Griffin to resist any change in the judicial system is supported by the fact that when the Judiciary Law was finally adopted on December 21, 1820,\footnote{1 Mich. Terr. Laws (1871), p. 714.} the scheme of court organization remained the same. The supreme court was still to hold only one term each year at one place.
and its jurisdiction, except for two changes, was to continue as before. Why Judge Woodward was determined to block any change of the judicial system does not appear. As to Judge Griffin, it has been said that he was much opposed to the establishment of a *nisi prius* system as he dreaded the "possibility of being obliged to sit alone on the bench—Without Woodward at his Elbow to think for him." And it may be that he was attempting to forestall any such possibility when, on February 1, 1819, he wrote William Woodbridge at Washington as follows:

"I have always had a very serious doubt, whether one Judge is competent under the Laws and acts of Congress to hold a session of the Supreme Court of Michigan—at any rate it would be more satisfactory to the Bar, and the suitors, that it should be made obligatory upon two—How easily might this be effected by a special act..."

If Congress should provide that in all situations the court should be held by at least two of the judges, a *nisi prius* system would be impossible.

From a letter written by Governor Cass on May 23, 1820, it appears that the judges of the supreme court had expressed an opinion that the secretary of the territory might perform the duties of governor when the governor was absent from the seat of the government. It does not appear, however, that the judges ever agreed on an interpretation of the act of Congress of 1792 which authorized one judge to hold a court in the absence of the others. Judge Griffin doubted whether one judge was ever competent to hold the court, and Judge Witherell was of the opinion that "it was not competent for one judge to hold a Court while either of the other judges were within the Territory,

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113 The act of December 31, 1820, supra, provided that the supreme court should have exclusive jurisdiction of cases of divorce and alimony and failed to provide that it should have concurrent jurisdiction of civil cases.

114 Whitney to Sibley, March 21, 1822, 46 *SIBLEY PAPERS* 187 (Burton Collection).


116 The basis for Judge Griffin's "doubt" does not appear. In a memorial to Congress prepared by the Legislative Council in 1824, *Mich. Terr. Leg. Council Jour. (1924)*, p. 101, attention was called to "doubts" which had arisen as to whether the act of Congress of May 8, 1792, 1 Stat. L. 286, was applicable to Michigan because that act had not been mentioned in the act of January 11, 1805, which had created Michigan Territory.

117 Cass to Woodbridge, *WOODBRIDGE PAPERS*, 1820 folder May 16-30 (Burton Collection).

118 Supra, at note 115.
unless they were necessarily absent by reason of sickness, or interest in
some action then before the court." 119 This difference of opinion seems
to be reflected in the act of December 21, 1820 which provided:

"if one judge shall attend, when the other judges are not, in the
opinion of said judge, absent, in the meaning of the act of con­
gress ... the clerk shall enter such fact, and the court shall be
adjourned ... until the court shall be opened agreeably to the act
of congress. ..."120

The clerk of the court suggested that Congress be requested to revise
the act of 1792 and "tell us what they mean by 'absent' as there
used." 121

The fact that serious doubts and perhaps disagreement existed as
to the meaning of "absence" as used in the act of 1792 is, of itself, an
explanation of the failure of the governor and judges to set up a circuit
or nisi prius system. Unless one judge could hold a court while the
other judges were holding courts in other parts of the territory, one of
the chief advantages of such a system would be unobtainable. Coupled
with this difficulty was Judge Griffin's antipathy to the idea of holding
a court alone.

After it had become certain that nothing was to be done by the
territorial legislature for the relief of the remote settlements, steps
were taken to obtain the necessary relief by act of Congress. As early
as November 1, 1821, James Duane Doty (later Judge Doty of the
western counties) was writing Sibley at Washington urging that Con­
gress establish a separate court for the counties west of Lake Michi­
gan.122 By a letter dated at Washington December 15, 1821, Sibley
advised Woodbridge that he had received from Michilimackinac a
petition requesting that an additional judge be appointed who should
sit with associate judges in the three upper or western counties.128 Similar
petitions, it seems, had been sent to Sibley from Green Bay and Prairie
du Chien.124

While Doty was pushing his plan for the upper or western counties,
a rival plan was being advocated by members of the bar in the five.

119 1 Transaction of the Supreme Court of the Territory of Michigan,
1814-1824, p. 399 (1938).
121 Doty to Woodbridge, January 21, 1820, 114 Woodbridge Papers, "Courts"
(Burton Collection).
122 44 Sibley Papers (Burton Collection). Also see "Gov. Cass Letter & Doty's
remarks re District Court," ibid., 212-218.
128 Woodbridge Papers, 1821 folder Nov.—Dec. (Burton Collection).
124 Hunt to Sibley, Dec. 29, 1821, 45 Sibley Papers 78 (Burton Collection).
counties which lay east of Lake Michigan. At a meeting of the "Gentlemen of the bar from the different counties" held at Detroit December 28, 1821, a committee was appointed to "mature a plan" and to prepare memorials for presentation to Congress. The principle topic of discussion at the Bar Meeting was that of a circuit or nisi prius system for this part of the Territory.  

The plan matured by the committee of the bar was set forth in a petition which requested Congress to provide by law "for the holding of a nisi prius or Circuit Court at least once in each year within each County" and for the appointment of a fourth territorial judge. This plan was designed to meet the needs of the entire territory and was urged as a substitute for the Doty plan.

A third plan involved the establishment of a federal district court which would relieve the territorial supreme court of its United States business and provide a needed admiralty jurisdiction. Secretary Woodbridge was behind this plan.

The various proposals to Congress were not free from personal ambitions. Doty was interested in the creation of a judgeship to which he might be appointed, and it was said that Governor Cass favored his plan as it was "becoming that the brother-in-law of the Governor

125 Ibid.; Whitney to Sibley, Dec. 29, 1821, 45 SIBLEY PAPERS 75 (Burton Collection). Hunt wrote: "We had last evening a meeting of the Gentlemen of the bar from the different counties. The subject of our Judiciary was discussed & a committee appointed to report of the 8th of January a plan for its reorganization, & also to draft a petition to Congress on the subject. From what I can learn from the adjacent counties, by Gentlemen from each, it would be extremely desirable, to have the nisi prius system adopted & have two terms in a year in each county, & a Law Term at this place— We are compelled to move very cautiously to prevent jealousy & a hugh & cry against our poor profession." Whitney wrote: "We had a meeting of the bar last night when I laid before them the subject of your Letter concerning some improvements in our Judiciary.— Lanman & Noble were present from Monroe— & Mr. Beach from Macomb. And our two new lawyers from N. Y.— The subject was discussed at some length— And a Committee, consisting of Woodbridge Hunt— Larned— Beach— Lanman & Noble, appointed to mature a plan for the amendment of our Judiciary and to report a memorial to Congress on the subject, the Report to be made to the Bar the second Tuesday of January. Anderson— & Lee from Monroe— Conner from Macomb happened to be in town yesterday as also some Oaklanders— to whom I mentioned the subject of a Nisi Prius system &c &c and they are all warmly in favor of the plan."

126 Whitney to Sibley, supra.
127 45 SIBLEY PAPERS 101 and 48 ibid., 177 (Burton Collection).
128 Whitney to Sibley, Jan. 5, 1822, 47 SIBLEY PAPERS 71 (Burton Collection).
129 Brown to Woodbridge, Feb. 23, 1823, WOODBRIDGE PAPERS, 1823 folder Jan.—Feb. (Burton Collection); Woodbridge to Brown, March 25, 1824, ibid., 1824 folder March.
130 Hunt to Sibley, Dec. 29, 1821, 45 SIBLEY PAPERS 78 (Burton Collection).
should be a Judge before his marriage”—or at least it would “appear better for the Gov r to boost him up before than after that event.” The same writer stated that Doty had obtained “the recommendation” of the three western counties “backed up by the whole influence of the American Fur Company.” An active member of the bar committee appointed in Detroit was seeking the post of fourth judge even before the committee had made its report. And Woodbridge, a chronic office-holder, hoped for the creation of a federal judgeship so that he might be appointed to that post.

Aside from the creation of new judgeships, the lawyers of Detroit had little or no interest in the development of superior courts for the remainder of the territory. The supreme court sat in their city, and the best law business of the territory was brought to their doors. Whitney advised Sibley that the petitions prepared by the bar committee “were purposely made vague & general” and that the real object was to obtain the appointment of a fourth judge who would “throw the ballance [sic] with Cass and Witherel” and thus end Woodward’s domination of the territorial government.

Doty continued to urge his plan and hastened to Washington when he learned that rival petitions were being circulated in the counties near Detroit. In Detroit, however, public interest soon shifted to a new proposal made in November 1822 that Congress be requested to establish a separate legislature which should have express authority to define and regulate the powers and duties of the territorial judges. By this plan the territory would enter the second governmental stage, and the people in their assembly could establish their own judicial system.

Without attempting to trace the activities of Sibley and Doty at

181 Whitney to Sibley, Jan. 26, 1822, ibid., 218.
182 Ibid.
183 Hunt to Sibley, Dec. 29, 1821, 45 SIBLEY PAPERS 78 (Burton Collection).
184 Woodbridge to Campbell, March 21, 1824, WOODBRIDGE PAPERS, 1824 folder March (Burton Collection).
185 Whitney to Sibley, Jan. 26, 1822, 45 SIBLEY PAPERS 78 (Burton Collection).
186 "Mr Doty left here two days since for Washington, post haste to obtain the passage of the law, petitioned for by the three upper counties, for a separate Judicial District, with no right of appeal to the full Court of the Territory. He also goes to obtain the appointment should the law pass, of Judge.” Hunt to Sibley, Jan. 26, 1822, 45 SIBLEY PAPERS 205 (Burton Collection). Also see Whitney to Sibley, Jan. 26, 1822, ibid., 218, and petitions prepared by Doty in August 1822, 47 ibid., 107 and 207.
Washington or to follow the matters through Congress, it is enough to point out that Doty succeeded in having a superior court set up for the western counties\(^{188}\) with himself as judge\(^{189}\) and that the people of Detroit were successful in having a separate legislature established with express authority to regulate the powers and duties of the judges of the territory.\(^{190}\) The other plans were not approved.

The act of Congress (approved January 30, 1823)\(^{142}\) which established a superior court for the area west of Lake Michigan, transferred to the new court all original jurisdiction which the territorial supreme court had exercised in that area except of cases which concerned the United States; and as to certain of those cases the two courts were given a concurrent jurisdiction. Suits in equity could be appealed to the supreme court, but other cases were not removable from the circuit court to the supreme court except by writ of error. And writs of error could be issued in civil cases only. By one step the area west of Lake Michigan moved from the first stage of judicial development into the fourth or final stage.

The judge of the western circuit was required to hold a term of court annually in Prairie du Chien, Green Bay, and Mackinac, each on a specified date, and was required to reside in one of the western counties. All cases which could be commenced in the county courts could be commenced in the circuit court and if commenced in the county courts could be removed to the circuit court before or after trial. The circuit court possessed all the jurisdiction of the supreme court in cases of divorce and alimony, in capital cases, in ejectment cases, and in all other cases, except a few which concerned the United States. A court of superior jurisdiction was now available in the west.

At the time the Doty plan was discussed at Detroit, an opponent of the proposal pointed out that all of the benefits which would result from it would equally result from the bar plan of having one of the judges of the supreme court go on circuit in the western counties.\(^{142}\) It was insinuated that the separate judgeship was advocated because “should a fourth Judge for the Territory be granted instead of a local Judge for that District, Doty’s Chance of the appointment might be lessened.”\(^{148}\)

\(^{188}\) 3 Stat. L. 722 (1823).
\(^{189}\) 3 Michigan Pioneer Collections 122 (1881).
\(^{140}\) 3 Stat. L. 769 (1823).
\(^{141}\) 3 Stat. L. 722.
\(^{142}\) Hunt to Sibley, December 29, 1821, 45 Sibley Papers 78 (Burton Collection).
\(^{148}\) Whitney to Sibley, January 26, 1822, ibid., 218.
If a circuit or * nisi prius * system had been put into operation in the western counties, the judicial system for that area would have been definitely superior to the scheme set up by the statute of 1823. The judicial system of the entire territory would have been unified, and the judge of the western country could have had the benefit of close association with the other judges of the highest court. Difficult questions of law could have been reserved for the entire bench, and trial proceedings reviewed by the motions for new trial made to the court in bank. As actually put into operation the system was defective in that almost unlimited original jurisdiction was lodged in one man without adequate opportunity for review. Judgments in criminal cases, including sentences of death, could not be reviewed at all, while judgments in civil actions at law were reviewable only by writ of error. In equity, however, there was a full review by means of the equity appeal.

The * nisi prius * systems of the Northwest and Indiana territories proved unsatisfactory largely because the judges of the central court did not go on circuit with regularity into the counties which were far removed from the seat of government. It was well known that some of the judges of Michigan were strongly opposed to a circuit system. If these judges should fail to make the necessary journeys to the western counties, the * nisi prius * system would fail again. It is significant that Congress provided that the "additional judge" should reside in one of the counties in which he was to hold his court.144

The circuit court for the western counties was in operation from 1823 until Michigan Territory came to an end in 1836. Within this period the supreme court issued seven writs of error to the "additional judge" but otherwise had no connection with the business of the court. As to the western country, the supreme court had become, almost entirely, an appellate court.

At the first session of the first Legislative Council (commenced June 7, 1824) steps were taken to exercise the power conferred by Congress to regulate the powers and duties of the territorial judges. Governor Cass recommended that circuit courts be held by single judges of the supreme court in the various "peninsular counties" for the trial of issues of fact.145 "It is far better," said the Governor, "to send the courts to the people, than to bring the people to the courts." Four different bills were introduced 146—three being amendatory of

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144 2 Stat. L. 722 (1823).
146 Ibid., 47, 67, 71, 80.
the existing law and the fourth a "Bill to define the duties and powers of the judges of the supreme court of the Territory." Two petitions concerning the judiciary were filed—one by the inhabitants of Oakland County and the other by inhabitants of Macomb. In both of these petitions the council was requested to provide by law that sessions of the supreme court be held in each of the eastern counties.

The bill enacted by the council (approved August 5, 1824) provided that the judges of the supreme court should hold an annual session at a time specified in each of the counties of Wayne, Monroe, Oakland, Macomb, and St. Clair. While sitting in a particular county the supreme court was authorized to try only cases commenced in that county, unless the venue for a good cause had been changed; and the process of the court could be directed only to the officers of the county, except when otherwise ordered in special cases. The concurrent and appellate jurisdiction of the court was likewise limited to cases of the county in which the court was sitting, except the review of cases tried in the circuit court for the western counties which could take place at the seat of the government in the county of Wayne. The effect of this statute was to set up five separate supreme courts in place of the one supreme court established by Congress, and it is not surprising that the act was promptly declared invalid by the judges of the court. The court, according to an opinion by Judge Sibley, held that the grant by Congress of power to regulate the duties and powers of the judges did not authorize the legislature to deprive the court of any of its jurisdiction and, as the act of 1824 purported to deprive the court of "an undivided general jurisdiction in and over the whole Territory," to that extent the law was void.

At the beginning of the second session of the first Legislative Council (January 17, 1825), Governor Cass called attention to the above

147 Ibid., 32.
148 Ibid., 47.
150 1 Transactions of the Supreme Court of the Territory of Michigan, 1814-1824, p. 457 (1938).
151 A similar opinion had been expressed by one of the judges of Indiana Territory in 1814. 1 Monks, Courts and Lawyers of Indiana 47 (1916). In 1815 Congress provided that two sessions of the general court of that territory should be held in each county and that each court should be "composed of at least two of the judges appointed by the government of the United States." 3 Stat. L. 213. In 1816 Congress authorized the General Court of Indiana Territory "to exercise chancery power as well as a common law jurisdiction." Ibid. 327. These actions no doubt influenced the actions taken ten years later with respect to Michigan.
decision and recommended "an entire re-examination" of the acts which regulated the Supreme Court. He said:

"I think it will be found, on a full consideration of the subject, that a system, which shall provide for the trial of issues of fact, in the various counties, and for the determination of other questions at a court in bank, will operate most beneficially in the present circumstances of the country. The time generally allowed upon a circuit, and the opportunities for consulting authorities, are not favourable to a mature consideration of such questions, as must frequently engage the attention of that important tribunal."

The council, in response to the governor's recommendation, re-examined the acts which regulated the practice of the supreme court and undertook to establish a nisi prius system.

The act passed by the council (approved April 21, 1825) established circuit courts to be held in each of the eastern counties by one of the judges of the supreme court and provided that the three judges should have power to hear and determine all questions of law that might arise in the circuit courts "upon motions for new trial, or in arrest of judgment, bills of exceptions, cases reserved, or writs of error." The circuit courts were given the same original jurisdiction as had been exercised by the supreme court except in cases concerning the United States, equity cases, and cases of divorce and alimony.

The judges of the supreme court were charged with the duty of making rules for "the proper conducting of the business of said court, and in the respective circuit courts." After "every trial had in any circuit court," the clerk was required to make up "the record thereof" in the manner provided in the act. It was also necessary to keep an execution docket. The fact that judgments were entered in the circuit courts and executions there issued shows clearly that the circuit courts set up in 1825 were not true nisi prius courts but were circuit courts of the type found in the third stage of the development of our judicial systems.

While the act of 1825 was being considered in the Legislative Council, an act of Congress was approved (February 5, 1825) which provided that not less than "two judges of the supreme or superior court" of the territory should thereafter "hold a court to transact the business of said court." This provision eliminated the old question

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154 Ibid., 266. As to chancery jurisdiction, see ibid., 517.
155 4 Stat. L. 81. This act provided also for review by the Supreme Court of the United States "where the amount in controversy" should exceed one thousand dollars.
of when one judge might hold the court but raised a new question as
to whether one judge might hold a circuit court under the new ter-
ritorial statute. Were the circuit courts the supreme court with a new name or were they new courts created by the council?

As the matters tried in the circuit courts were cases commenced there or removed there from the county courts, and not merely issues of fact formed in supreme court cases, it would seem that the circuit courts were exercising a jurisdiction of their own. On the other hand, how could locally created circuit courts exercise a jurisdiction which had been conferred by Congress on the central court?

To escape the "doubts" which arose as to the power of one judge to hold a circuit court, the Legislative Council petitioned Congress for express authority to pass laws "requiring one or more of the judges" of the territory "to hold one or more courts yearly in the several coun-
ties within the peninsula of said territory." This request was granted by Congress by an act approved January 29, 1827.

Henry Chipman, editor of the *Michigan Herald* and later a judge of the supreme court, in the first issue of his paper (May 10, 1825) described at length some of the advantages afforded by the act of 1825 and stated that the new law "was designed to secure all the advan-
tages of a nisi prius court, without its fictions." In a later editorial (May 24, 1825) he stated that "Experience has shewn, that courts organized after the manner of the courts of Nisi Prius in England, are the best calculated to answer the purposes for which courts are instituted, and the new judiciary system of this territory is conformed to that plan, in every essential point . . . ."

Although, as pointed out above, the judicial system set up in 1825 was not, strictly speaking, a nisi prius system, because cases were com-
menced in the circuit courts and judgments were there entered, Judge Chipman was not far from the truth in saying that all of the essential features of the nisi prius system had been preserved. The superior courts were unified, the same men were charged with the responsibility of settling the law and seeing that justice was done in individual cases, review could be had on simple motions argued before the court in bank, the judges and people were brought together, and the time of the judges was conserved. In one respect only was there a failure to pre-
serve the substantial advantages of the nisi prius system. The act provided that the court in bank should have power to hear and deter-

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156 See editorial, DETROIT GAZETTE, March 11, 1825.
mine questions of law that might arise in the circuit courts upon motions for new trial, etc. By limiting review to questions of law, the act mutilated the rational scheme of review which had been developed under the English system of nisi prius. By reviewing both law and fact on motions for new trial, the high courts of England were able to examine the proceedings of a trial with the great object of determining whether the right result had been obtained. This rational type of review is impossible where questions of law only are subject to examination. But, even so, all the benefits of review by motion for new trial were not lost by limiting the review to questions of law. The procedural steps involved in making and transmitting a motion for new trial were simple when compared with the proceedings on writ of error, and the doctrine of harmless error which was developed in connection with review by motion for new trial was not destroyed by limiting the review to questions of law.

Under a true nisi prius system pleadings are filed in the central court, and all preliminary questions of law are settled by that court in bank before the issues of fact are made up and sent to the circuits for trial. The preliminary questions having been determined in advance by the highest judges, there is little likelihood that the results of the trial will be lost because of an error made at the preliminary stage. This advantage of the nisi prius system was lost by providing that cases should be commenced and judgments entered in the circuit courts. To compensate for this loss, the act of 1825 authorized the supreme court to determine questions of law upon "cases reserved" by the circuit judges. Under this authority a circuit judge, instead of deciding a difficult preliminary question and risking an arrest or reversal of judgment, could reserve such a question for the court in bank and, having obtained that court's opinion, could proceed with the case without fear of having the results thrown out and his efforts wasted. This practice was designed to accomplish what is accomplished today by the immediate review of interlocutory orders.

189 See rule adopted by the supreme court, December 10, 1825. Journal 4, Manuscript of 2 Transactions of the Supreme Court of the Territory of Michigan, 1825-1836, p. 78.

180 The supreme court was severely criticized by the editor of the Detroit Gazette because it granted a new trial in a case which had been tried by the circuit court of Wayne County, the editor being of the opinion that the supreme court should have applied the doctrine of harmless error. Detroit Gazette, January 8 and 22, 1829. Also see case 1315, Calendar of Cases, Manuscript of 1 Transactions of the Supreme Court of the Territory of Michigan, 1825-1836.

The scheme of judicial organization set up in 1825 was radically changed by an act of the Legislative Council approved July 2, 1828.\textsuperscript{162} This act provided that the circuit courts established in the several counties "lying eastward of Lake Michigan" should be held by the judges of the supreme court, or a majority of them, and that said courts should hear, try, and determine all questions of law which might thereafter arise in said courts "whether upon motions for a new trial, in arrest of judgment, upon writs of error or certiorari, or upon any other writ of process whatever." The act further provided that these questions of law should be decided in the county where the same should arise. If, as Governor Cass had said, "It is far better to send the courts to the people, than to bring the people to the courts," why limit this program to questions of fact? Why not extend it to questions of law?

There were sound reasons based on policy and convenience for establishing superior courts which should try issues of fact in each county, but no corresponding reasons existed for providing that issues of law should be decided in the counties instead of at the seat of the government in Detroit. Neither parties, witnesses, nor jurors need attend the hearings on questions of law, and the only persons who were benefited by the plan of 1828 were the lawyers who resided in the counties away from Detroit. Greatly counter-balancing the benefits derived by the out-state lawyers was the wholly unnecessary burden which was placed on the shoulders of the territorial judges. They were required to sit in bank for the trial of cases, which meant they could not hold courts in different parts of the territory at the same time, and were required to decide questions of law at hurried sessions without access to their libraries, which were in Detroit.

The burdens which were placed on the judges by the act of 1828 were described by William Woodbridge, presiding judge of the supreme court, in a letter dated November 28, 1828:\textsuperscript{163}

\begin{quote}
"Heretofore, & until recently, the Judges of this Territory were required to hold but one Term of the Court annually & that in Detroit. . . . But as the country became more settled, new counties were organized;—and it has been deemed expedient to increase the number of the terms, & places too, of holding Courts. —The Legislative Council of the Territory, under the sanction of an Act of Congress of the 29th Jan' 1827, have, at its late session, directed courts to be holden in each of the organized
\end{quote}

\textsuperscript{162} Ibid., p. 692.
\textsuperscript{163} Woodbridge to Strong, Woodbridge Papers, 1828 folder Nov. (Burton Collection).
counties of the Peninsula,—& giving very ample jurisdiction to them, have required that all or a majority of the Judges attend at each term.—The consequence of this new organization is, that the Judges, collectively, have now to hold fifteen Courts annually, instead of one, & to traverse, mostly on horseback, an immense country, over roads not yet half formed & some of which are exceedingly dangerous.—The principle of this system, is progressive; the number of courts to be holden, will continue to increase with the advancing settlement of the Country.”

In charges to grand juries delivered in the last year that he was judge,^166 Woodbridge called attention to the burdens which had been placed on the judges and stated that a simple remedy was to authorize one judge to hold a circuit court so that two or three courts might “be holden in different counties at the same time.” “Doubtful & difficult questions of law . . . in the decision of which neither Jurors nor witnesses are necessary” could be decided by the judges sitting in bank at the seat of the government.

Immediately after the above act was passed the clerk of the supreme court refused to issue a writ of certiorari to a justice of the peace “conceiving” that the act had “taken from the said Supreme Court its jurisdiction in cases of Certiorari and Writs of Error, and transferred the same to the Circuit Courts of the respective counties.”

The affidavit for certiorari had been filed before the act was passed, and it may not be significant that the clerk issued the writ November 26, 1828. It is significant, however, that despite the statute the supreme court continued to issue writs of error and certiorari to the various courts throughout the remaining period of its existence.^168


^165 Charges to grand juries, Woodbridge Papers, Undated Courts folder 4 and 1830 folder June (Burton Collection).

^166 In 1834 Woodbridge wrote: “In the last year of my continuance on the Bench, I presented the subject of a better organization of our Courts—several times to our Grand Jurors—the observations I made were always, I believe [sic] well received. . . . Out of my presentation of the matter to Grand Juries—I suppose I suppose the subsequent Legislative enactments, organizing the New Courts.” Woodbridge to Lyon, May 24, 1824, Lyon Papers (University of Michigan).

^167 Hurd v. Gordon, file No. 169 of 1828; case No. 1292, Calendar of Cases, Manuscript of 1 Transactions of the Supreme Court of the Territory of Michigan, 1825-1836. Also see case 1356, ibid.

^168 In 1831 William A. Fletcher (later Judge Fletcher) argued before the Legislative Council that it would be useless to attempt to confer on the circuit court any final jurisdiction, as the supreme court had held in a case coming up from Macomb county that the territorial legislature could take away the court's original jurisdiction.
The final reorganization of the judicial system of Michigan Territory was accomplished by an act of the Legislative Council approved April 15, 1833. Thirteen of the fourteen counties east of Lake Michigan were put into one judicial circuit and provision made for the appointment of a circuit judge. This judge and two associate judges appointed for each county were required to hold a court in each county twice each year. The court was given original jurisdiction of all cases, civil and criminal, not cognizable before a justice of the peace and jurisdiction of appeals from justices of the peace. The judges were authorized to hear and determine all questions of law that might "arise before them on motion for new trial, or in arrest of judgment." The act further provided:

"The circuit courts now existing in the several counties in said circuit shall be styled the superior circuit courts of the Territory of Michigan, and they shall have the same powers which they now have to determine questions of law..."

The county not included in the above scheme was the county of Wayne. The circuit court for Wayne County continued to be held by the judges of the supreme court under the provisions of the act of 1828.

The superior circuit courts set up by the above statute were circuit appellate courts held by the judges of the supreme court. As shown by the statute, they were to determine the same questions of law as had been determined by the circuit courts established in 1828, viz., questions arising "upon writs of error or certiorari, or upon other writs or process whatever." Questions of law arising "on motion for new trial, or in arrest of judgment" were not included, as these questions were to be heard and determined by the new trial court set up in 1833. The judges of the superior circuit courts were not required to hold sessions in all of the eastern counties but only in Monroe, Washtenaw, Kalamazoo, St. Joseph, Cass, Oakland, and Macomb. They were authorized to provide by rule where questions arising in the other eastern counties, except Wayne, should be heard.

The superior circuit courts were purely appellate courts but were not in any real sense intermediate appellate courts, because their decisions were never reviewed by the supreme court of the territory. The supreme court, no doubt, had power to issue writs of error to the

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Ibid., 1171.
superior circuit courts, but there was no point in doing so as the judges of the supreme court were also the judges of the superior circuit courts. The result of the scheme was to require the highest judges of the territory to exercise their powers of review at various places throughout the eastern portion of the territory. While this arrangement served the convenience of the lawyers outside Detroit and probably meant more business for them, it was inconvenient for the judges and unnecessarily consumed their time. Furthermore, it was impossible for the judges to establish libraries at all the places at which they were required to sit and, of course, they could not take with them on their circuit all the books they might need in making their decisions. As the court was a court of law only and exercised no original jurisdiction, there was no need of taking the court to the people. The lawyers could come to the court.

The circuit court for Wayne County was not held by the additional judge for the eastern counties but by the same judges who held the supreme and superior circuit courts. Decisions made at the Wayne circuit were recognized as being of as high authority as the decisions of the supreme court. Although the supreme court had power to issue writs of error to the circuit court and did so in several cases, there was ordinarily no point in seeking such review. As the highest judges of the territory sat in bank to hold the circuit court, final review could be had on motions in arrest of judgment and for new trial.

From 1833 to the end of the territorial period (1836), the higher courts of Michigan Territory were held by five judges who were trained in law and who were paid salaries for their services. The court for the western counties was held by the additional judge appointed by the President of the United States commencing in 1823. The court for the eastern counties, except Wayne, was held by the additional judge, appointed by the governor of the territory in 1833, and two local lay associates. The supreme court, the superior circuit courts, and the circuit court for Wayne county were held by the three judges authorized originally by the Ordinance of 1787 and appointed from time to time by the President of the United States. The judgments and decrees of the additional judge for the western circuit were reviewable in the supreme court upon writs of error and equity appeals, while those of the additional judge for the eastern circuit were reviewable by

171 Referring to an opinion of the Circuit Court of Wayne County delivered in 1836, B. F. H. Witherell, district attorney, said: "The decision being made by a majority of the Judges of the Supreme Court, settles the same." DETROIT JOURNAL AND COURIER, Feb. 9, 1836.
the same methods in the superior circuit courts and in the supreme court. In all parts of the territory except in Wayne County the practice of arguing motions in arrest of judgment and for new trial before the highest judges had disappeared. The practice of reserving questions for the court in bank had disappeared. Except in Wayne, the identity of personnel had disappeared. In many respects the judicial system of this final period had come to resemble the judicial systems which, at the beginning of this whole discussion, classified as belonging to the fourth stage of historical development.

STATE OF MICHIGAN
1836–1857

The "judicial power" of the state of Michigan was, by its first Constitution, "vested in one supreme court, and in such other courts" as the legislature might from time to time establish. The "supreme court" contemplated by the framers of the Constitution need not be a court of purely appellate jurisdiction but might be a court of original as well as appellate jurisdiction so long as it exercised the highest judicial authority of the state. A supreme court which was purely an appellate court was still in the process of making.

By two acts approved March 26, 1836, the legislature of the "State of Michigan" undertook to abolish the territorial courts and to establish a judicial system for the new "state." The acts provided that they should take effect and be in force on and after July 4, 1836. In July 1836 Governor Mason appointed the superior judges authorized by these acts, and the new system went into actual operation.

In the closing years of the territorial period the territorial supreme court transacted some appellate business but sat principally as a court of chancery and as a district court of the United States. When the state was organized, the court's federal business was taken over by regular federal courts, and its chancery business transferred to a new superior judge—the chancellor of the state. The appellate jurisdiction of the territorial supreme court as well as that of the superior circuit courts was lodged in a state supreme court which, like the superior circuit courts, was required to go on circuit. In the place of the circuit court for Wayne County and the circuit court for the other eastern counties of the territory, we find new circuit courts vested with the same jurisdiction, except chancery, that had been conferred on the circuit courts by the act of April 15, 1833. In the state four judges were appointed to take the

178 DETROIT DAILY FREE PRESS, July 19, 1836.
places of the five judges of the territory, but this was not a substantial change as one of the territorial judges had devoted most of his time to holding courts in the area west of Lake Michigan which became Wisconsin Territory in 1836.

Commencing in 1818 some of the circuit courts of the territory were held by "an additional judge," and from 1833 on all circuit courts except for Wayne were held by judges who were not members of the highest court. At the beginning of the state, each circuit court was held by a judge of the supreme court and two associate or local judges.

The first judicial system of the state of Michigan was based on the territorial system and, in many respects, resembled the older scheme. The separate court of chancery, while new, was merely the culmination of a territorial trend. The requirement that appellate jurisdiction be exercised on circuit was certainly nothing new. The provision for associate or local judges was not new. The only difference of major importance, aside from the complete separation of law and chancery, is found in the requirement that each of the three judges of the supreme court should reside in a circuit made up of a group of counties and that he should preside over the circuit courts held in the counties of his circuit. The identity of personnel which had largely disappeared by the end of the territorial period was thus restored.

The first judicial organization of the state was often referred to as being a nisi prius system and did resemble the classical scheme in some respects. The judges sitting in bank were invested with "the general superintendence of all courts of law" and were authorized to regulate by court rules the practice of the supreme and circuit courts. There was an identity of personnel, which meant that the same men were charged equally with the duty of settling the law and seeing that justice was done in individual cases. The judges held courts in the various counties and this, of course, provided a means of contact between the people and the highest judges of the state.

On the other hand, there was no provision for review by means of motions made to or transmitted to the court in bank and, at the beginning, no practice of reserving cases for the central court. Motions in arrest of judgment and for new trial were made to the circuit courts and were argued, it seems, before the circuit judge and the two associate or local judges. That this review was deemed to be important is indicated by rule 69 of the circuit court rules of 1839 which provided:

175 Ibid.
"On the argument of motions for new trial, or in arrest of judgment, the party making such motion will furnish the court with a copy of the reasons on which such motion is founded, and also a brief."

The fact that two laymen sat with the circuit judges in hearing motions for new trial meant that matters of fact, if not questions of law, were subject to a real review. Decisions of questions of law were reviewable in the supreme court on writs of error.

Upon appeals from the court of chancery, the supreme court was directed "to hear, try and determine all cases... and execute their decrees thereon, in the same manner as if said supreme court had original jurisdiction thereof."176 This seemingly authorized a trial de novo in the higher court. By the Revised Statutes of 1838 the supreme court was directed to "examine all errors" that might be assigned or found in the appealed order or decree, and was authorized to "reverse, affirm or alter such order or decree."177 In 1843 the supreme court provided by court rule that "the practice of the court" upon appeals from chancery should be "conformable to that of the House of Lords, in England, when sitting as a court of appeals."178 Upon the hearing of an appeal the chancellor was authorized to sit with the judges "to inform the court of the reasons for his decree or order."179 Questions of fact arising upon an appeal from a court of probate could be tried by a jury under the direction of the supreme court.180

In 1838 the judicial system was expanded by adding another judge and another circuit, and the supreme court was required to hold sessions at Detroit, Ann Arbor, Kalamazoo, and Pontiac, each city being in a different circuit.181 While sitting in a particular circuit, the court's appellate jurisdiction was limited to cases originating in that circuit. It was provided, however: "That upon all questions arising under the exercise of such jurisdiction, when argument of counsel may be desired or intended by the parties, or may be requested by the court, the court may order such argument to be had at any of the said terms." Under this proviso the court was authorized to hear arguments at the place best suited for that purpose regardless of the convenience of the lawyers concerned.

Judges working together in a closely-knit judicial organization

178 Rules of the Supreme Court and for the Circuit Courts, of the State of Michigan: Adopted by the Supreme Court, April, 1843, p. 7.
180 Ibid., p. 388.
181 Ibid., pp. 357-358.
derive substantial benefits from their contacts with each other and from their formal and informal discussions of novel and difficult points of law. When sitting together for sessions in bank, problems which have arisen or may arise on their respective circuits can be discussed and are often settled without any formal action. In addition to this informal procedure the circuit judges of Michigan, by a statute passed in 1840, were authorized to report important and doubtful questions of law to the supreme court and to stay “all proceedings, on the judgment below” until the decision of the supreme court should be made and certified back to the circuit court. Similar power had been conferred on the judges of the territory by the act of 1825.

An examination of the first volume of supreme court reports (1843-1845) reveals that the power given to the circuit judges to reserve questions of law for the consideration of the supreme court was exercised in a variety of situations and in a large percentage of the cases. Of the cases reported in this volume, eighteen called for the decision of questions reserved by the circuit judges, while only sixteen presented questions raised by writs of error issued to the circuit courts. In the reserved cases the supreme court was required to decide questions of law arising before, during, and after trial. In three of the cases demurrers to pleadings were reserved, while in six or seven cases the questions reserved arose at the trial. In one case the question presented had arisen on a motion for new trial; in another, on a motion in arrest of judgment. Questions arising on special verdicts were reserved in two of the cases, while in two other cases the questions certified had arisen on motions to quash.

Statistics compiled by Mr. Clark F. Norton, who is making an exhaustive study of the history of the Michigan Supreme Court from 1836 to 1857, show that within the period 1840-1857 the supreme court considered 334 reserved cases and 540 cases carried up from the circuits by writs of error. These figures, alone, demonstrate that the practice of reserving cases was a significant feature of the then existing scheme of judicial administration.

By reserving questions arising before trial, such as on demurrers to pleadings, the circuit judge could avoid the risk of making an erroneous decision and having the results of the trial wasted because of such error. By reserving questions which arose at the trial, he could bring about what in effect was a review of his rulings without first entering a judgment in the case. By reserving motions in arrest of judgment

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and for new trial, he could preserve to some extent the rational review which existed under the older system of *nisi prius*.

The practice of reserving questions was simple and flexible but was, unfortunately, restricted to questions of law. Furthermore, it was a matter of discretion and not a matter of right. The extensive use made of the practice within the period 1836-1857 indicates, however, that the judges were liberal in the exercise of their discretion and that the practice was favored by lawyers and judges alike.

In 1843 the supreme court was authorized "to review, by mandamus" an order of a circuit court denying a motion for new trial in a case where "there is no remedy by bill of exceptions or otherwise," "notwithstanding such motion may have been addressed to the discretion of said circuit court,"184 By the same statute it was provided that a circuit judge might not participate in the decision of a case which had been carried from his court to the supreme court by writ of error or otherwise. This statute was designed to permit a review of the facts as well as the law and to eliminate from this review the adverse influence of the trial judge. The first step was in the right direction, but the second was ill-conceived as judges who review decisions of fact along with questions of law should be informed of the impressions made by the witnesses on the judge who tried the case. In 1844 the legislature repealed the section which authorized the review of orders denying new trials185 but left in force the other section.186

In 1846 Sanford M. Green (a commissioner to revise the statutes appointed in 1844) submitted to the legislature a statute which, if it had been approved, would have set up a true system of *nisi prius* for the state.187 As reported, the statute "provided for the organization of a supreme court, to consist of five judges with a general original jurisdiction" and "for the organization of a circuit court for each county, to be holden by a justice of the supreme court, for the trial of all issues of fact to be joined in the supreme court...." The statute, as reported, also required "all issues of fact joined in the supreme court, to be tried at the circuit court in the proper county, unless ordered to be tried at the bar of the supreme court." The commissioner on revision further recommended that the separate court of chancery be continued. The legislature, however, disapproved all of these proposals and continued the previous system except the court of chancery.188 Chancery jurisdic-

187 Ibid., p. v.
188 Ibid., pp. 349, 356.
tion was conferred on the circuit courts, which were now to be held by
single judges of the supreme court without the aid of associate or local
judges. A county court to be held by an elected county judge was
established in each county.189 While the commissioner on revision was
advocating greater centralization of the judicial system, the legislature
was being influenced by Dr. Denton and others to move the other
way.190

The next struggle over the organization of the courts, and the last
to be described in this paper, came in the constitutional convention of
1850. The great question was whether a new judicial system with an
“independent” supreme court at the top should be established or the
old scheme of having the same judges hold both the supreme and
circuit courts should be continued. The committee “On the Judicial
Department” by a close vote favored the establishment of an “indep­
endent” supreme court,191 but the convention after a long debate
voted to retain the circuit system.192

Arguments in favor of the new plan were based largely on objec­
tions to the old. Proponents of the new plan argued with great earnest­
ness that it would be physically impossible for five superior judges to
continue to try cases on circuit and also sit in bank as an appellate court.
There were now thirty-two organized counties in the state and the
population had arisen to 397,654. The superior judges had already
more business than they could properly attend to; and if the county
courts should be abolished, as was contemplated by the convention, their
business would be greatly increased. If an “independent” supreme
court should be established, additional circuit judges could be ap­
pointed as needed and the system expanded indefinitely.

Proponents of the new plan also stressed the commonly voiced belief
that under the circuit system the judges did or might make trades with
each other or reach understandings by which they would overlook
each other’s errors. “You scratch my elbow and I’ll scratch yours.” The
fact that the judge who tried the case at circuit no longer participated
in the review of his own decisions did not, according to the argument,
remove the evil. Only by a complete separation of personnel could
suspicion be removed from the minds of the people.

Proponents of the circuit plan admitted that some expansion of the
judicial system might be necessary, but argued that it could be accom­

189 Ibid., p. 377.
190 A defense of Dr. Denton’s activities will be found in the REPORT OF THE
PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITU­
TION OF THE STATE OF MICHIGAN, 1850, p. 653 (1850).
191 “The committee reporting the article stood ten to nine.” Ibid. 599.
192 Ibid., 723.
plished by adding circuit judges and suggested eight instead of five. Realizing that a time might come when there would be too many judges to sit together in bank, they proposed a plan under which some of the circuit judges, say four of them, should be selected for service on the appellate bench. As to the suspicion of mutual elbow scratching, the advocates of the circuit system argued that this was a mere surmise unsupported by proof and stated that under the circuit system as actually operated in Michigan there were reversals enough to show that the suspicion had no foundation in fact. When sitting in bank for the review of decisions made at the trial of a case in circuit, the trial judge was the judge who took the lead in correcting any errors made in the hurry of the trial below.

In the course of the debate many references were made to the experience of the federal government and of the other states. New York had established an “independent” supreme court in 1821 but had gone back to a circuit system in 1846. The outstanding judges of England as well as of the United States were products of the circuit system. The judicial opinions most highly respected were produced in states which had that system. On the other hand, according to the argument, the tendency was away from the circuit system, especially in the western states. Great judges could be developed in either system, witness Judge Blackford of the “independent” Supreme Court of Indiana.

In attacking the proposal that there be an “independent” supreme court, the proponents of the circuit system charged that the proposed scheme was undemocratic, that the really important judges—the circuit judges—would be degraded, and that the supreme judges would become isolated from the other judges and from the people.

The last-mentioned point was greatly stressed, some speakers going so far as to say that such a court would become despotic; others that it would lose its “practical character” and become “abstract” and “metaphysical.” “The judges, entirely removed from the conflicts and modifying circumstances which prevail in the trial of causes on the circuits, and being called upon to declare the arbitrary and abstract rule of right, would ... establish a system of ethics altogether too sublimated for the imperfect nature of man.”108

The article on the judiciary, as finally embodied in the Constitution of 1850, established eight circuits, each with an elected circuit judge, and provided that the judges of the circuit courts should be judges of the supreme court, four to constitute a quorum. After six years the legislature might establish an “independent” supreme

108 Ibid., 643.
court; but if it should do so, this court must be continued unchanged for a period of eight years thereafter. After waiting the six years required by the Constitution, the legislature set up an "independent" supreme court to be held at one place and ended finally the circuit system.\textsuperscript{194}

Immediately after the new scheme of separate personnel went into operation on January 1, 1858, difficulties arose over the practice of reserving questions.\textsuperscript{195} For a period of seventeen years this practice had been extensively employed and had caused no trouble. But during that period the judges of the supreme and circuit courts had been the same persons; now they were different. These difficulties were soon ended by a decision of the supreme court to the effect that it was a court of appellate jurisdiction only and as such could not consider questions not previously passed on by the courts below.\textsuperscript{196}

Having traced the judicial systems of the area which became the state of Michigan through the various stages of their development, there remains only the task of summing up.

As Michigan was a large area with an ever growing population, it was inevitable that the circuit system should disappear, but it was not inevitable or even to be expected that all of the advantages of that system should also disappear.

(1) The highly unified system of superior courts which existed in the nisi prius and circuit periods was largely destroyed by the separation of personnel which became effective in 1858. The supreme court became an "independent" court, and each circuit court became a distinct and separate court. Each judge was assigned to a court, and there was no central authority which had power to regulate the assignment of judges or otherwise manage the affairs of the system as a whole. The Constitution of 1850 did provide, however, that the "independent" supreme court, if established, should "establish, modify and amend the practice in such court and in the Circuit Courts" by general rules. Also that it should have "a general superintending control over all inferior courts." By retaining the rule-making power, which had been developed in the nisi prius period, the framers of the Constitution of 1850 continued one of the distinctive features of the older systems.

\textsuperscript{195} See People v. Edwards, 5 Mich. 22 (1858); Bagg v. Detroit, 5 Mich. 66 (1858); English v. Fairchild, 5 Mich. 141 (1858); and Clark v. Dorr, 5 Mich. 143 (1858).
After the establishment of the "independent" supreme court in 1858, the supreme and circuit judges were no longer united as a group and were no longer jointly responsible for the administration of justice. Some of the judges, each acting alone, were charged with the responsibility of seeing that justice was done in individual cases; while other judges, acting as a group, were charged with the duty of reviewing the decisions of the first judges. As each circuit judge acted independently of every other circuit judge, an important function of the supreme court was to settle and unify the law. Although an appellate court is charged also with the duty of seeing that justice is done in individual cases, there is a tendency on the part of "independent" appellate judges to leave this function to the trial courts and to concentrate their attention on the more interesting, if not more important, task of shaping the course of the law. This tendency was avoided under the older systems by lodging both functions in the same men.

By reviewing questions of law and fact together on motions for new trial, the courts in bank of the nisi prius system were able to consider in each case the broad questions: Has right and justice been done? Or has there been such a miscarriage of justice that a new trial ought to be granted? In answering these questions the judges were inclined to ignore all errors which had not affected the result. This valuable method of review was partially lost when the circuit system was established in 1825 and was completely lost when the scheme of separate personnel was introduced in 1858. Attempts to preserve the practice by reserving motions for new trial for consideration by the highest court failed because only questions of law could be reserved. Nor could the motion be brought before the supreme court by excepting to the order made in the court below as such an order was not a matter of exception until made so by statute in 1893. The doctrine of harmless error, which was fully developed in the old motion practice, has been re-introduced by statute but is seldom, if ever, applied by merely testing the result of the trial to see if right and justice has been done.

The importance of contacts between the judges and the people was greatly emphasized in early territorial times, because other means of obtaining information were largely lacking. While it is important today that appellate judges keep themselves informed as to the needs of a changing social order, necessary information need not be obtained by travel throughout the state. The trial experience which the highest judges continually obtained under the older systems was, no doubt,

198 Ibid., §§ 15518, 17354.
of great value to them when they came to act as an appellate court. But it was the burden of this double duty that finally destroyed the circuit system.

(5) While the nisi prius system was in operation in England, questions which arose or might arise on circuit or at courts of oyer and terminer and jail delivery were often settled at informal conferences of the judges.200 Under the circuit system of Michigan, there were opportunities for similar conferences, and it may be assumed that many problems pertaining to circuit duty were settled in this informal manner. After the separation of personnel, the circuit judge was required to act without consultation or advice, and his only official contacts with the appellate judges were by means of formal writs.

(6) One of the most troublesome problems of present-day appellate practice is that of determining when an interlocutory order may be appealed immediately, that is, without waiting for a final judgment. This problem did not arise where the central court of a nisi prius system was the highest appellate court, as in the Northwest Territory. All questions preliminary to trial were settled by the highest court before the trial. The advantages of this practice were preserved in Michigan under the circuit system by reserving such preliminary questions for the court in bank. After the separation of personnel, the practice quickly disappeared. The territorial supreme courts were common-law courts of unlimited original jurisdiction; the “independent” supreme court of the state was almost exclusively an appellate court. The practice of reserving questions was revived in Michigan by the court rules of 1931201 but was abolished again in 1932.202

(7) As long as a few superior judges were able to serve both as circuit and appellate judges, it was economical to have them do so. But as it became necessary to increase the number of judges, the financial advantage began to disappear.

Although there was always suspicion in Michigan that the judges of the circuit system agreed to overlook each other’s errors on review, the system was greatly admired and was abolished only when it became apparent that a few judges could not accomplish the necessary work. When the system was abolished, most of its valuable features vanished with it. We still talk, however, of unified courts, of rule-making power, and of rational review.

Rule-making is a reality in so far as Michigan is concerned and is being restored rapidly in other jurisdictions. Dean Pound’s dream of one great court in which the whole judicial power of the state should

201 Rule 78.
202 Repeal of Rule 78 filed December 6, 1932 (261 Mich. xxxvii).
be vested\textsuperscript{203} has never been realized, but the plan does not seem strange after we have examined the court set up by the Ordinance of 1787. Steps towards rational review have been taken by allowing to some extent the review of facts and by urging a liberal application of the doctrine of harmless error. The difficulty at this point has been that we have tried to develop the proceeding in error instead of abandoning it entirely and going back to the simple practice of moving for a new trial before the court in bank.

If all motions for new trial should be reserved for argument in the supreme court, it might turn out that the court would have no more work to do than it has under the present system. It seems likely, however, that the court would have more business than it could properly take care of and this, of course, would be undesirable.

An alternative plan would be to require each circuit judge to reserve all motions for new trial for hearing at a certain time and to assign two other circuit judges to sit with him on the hearing of such motions. The circuit judges sitting in bank would review the cases to see if justice had been done and all right to review would there end. The supreme court would settle and unify the law by selecting cases for review. Under this plan the burdens of the supreme court would be lessened, and the advantages of the circuit systems, in a large part, restored.\textsuperscript{204}

\textsuperscript{203} See \textsc{Willoughby}, \textsc{Principles of Judicial Administration} 256 (1929); also see \textsc{American Judicature Society}, Bull. 7 (1914) (draft of a state-wide judicature act), and Bull. 9 (1915) (Smith, "A Modern Unified Court").


"Sec. 57a. When the judge or a substitute judge of any judicial circuit in this state, which has but one circuit judge, believes that he has before him for trial a case which presents unusual difficulties, either as to the facts or the law, he may apply in writing to the presiding circuit judge of the state for the assignment of two other circuit judges to sit with him in the trial of said case, and, upon the receipt of such application, the presiding circuit judge of the state may, in his discretion, assign two other circuit judges of his selection to try said cases with the circuit judge of said circuit. Said judges shall sit together in the trial of said cause, the judge in whose circuit such trial is being held presiding. In the event of the failure of said three judges to agree upon a decision in said cause, the decision of any two thereof shall be the decision of the court.

"Any circuit judge so assigned by the presiding circuit judge of the state to assist in the trial of such a case shall receive no additional compensation for his services, but shall be paid his expenses in accordance with sections 59 and 60 of this chapter.

"The supreme court may make such rules, not inconsistent with the statutes of the state, for the conduct of a trial in the manner hereinbefore prescribed, as may be deemed expedient."

It would be a simple matter to alter this statute so as to provide for the argument of motions for new trial before the trial judge and two other judges assigned in the manner set forth in the statute.