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LEGISLATION ON THE AMERICAN FRONTIER†

ADOPTION OF LAWS BY GOVERNOR AND JUDGES—NORTHWEST
TERRITORY 1788-1798; INDIANA TERRITORY 1800-1804;
MICHIGAN TERRITORY 1805-1823

*William Wirt Blume**

THE Northwest Ordinance of 1787 made provisions for legislation by the territorial government in two stages: (1) adoption of laws by the governor and judges from the laws of the original states, and (2) enactment of statutes by a legislature made up of the governor, a council, and elected representatives. The first method was to be followed until the population should reach 5,000 and the second method thereafter. The present study is limited to the first stage.

Jefferson's plan for the "temporary government" of the "western territory," as adopted by the Congress of the Confederation April 23, 1784, provided:¹

"That the settlers on any territory so purchased, and offered for sale, shall, either on their own petition or on the order of Congress, receive authority from them, with appointments of time and place, for their free males of full age within the limits of their State to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states . . ."

An amendment proposing that the settlers be "ruled by magis-

† This is the last of a series of five articles dealing with law on the American Frontier. The first of the series, *Civil Procedure on the American Frontier* (A study of the records of a court of common pleas of the Northwest and Indiana Territories 1796-1805), was published in 56 MICH. L. REV. 161 (1957); the second, *Criminal Procedure on the American Frontier* (A study of the statutes and court records of Michigan Territory 1805-1825) appeared in 57 MICH. L. REV. 195 (1958); the third, *Probate and Administration on the American Frontier* (A study of the probate records of Wayne County—Northwest Territory 1796-1803; Indiana Territory 1803-1805; Michigan Territory 1805-1816) appeared in 58 MICH. L. REV. 209 (1959); the fourth, *Chancery Practice on the American Frontier* (A study of the records of the Supreme Court of Michigan Territory 1805-1836) appeared in 59 MICH. L. REV. 49 (1960). An article by the same author dealing with court organization on the American frontier was published in 38 MICH. L. REV. 289 (1940) under the title *Circuit Courts and the Nisi Prius System: The Making of an Appellate Court*.

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¹ 26 JOURNALS OF THE CONTINENTAL CONGRESS 276 (1928); 2 THE ST. CLAIR PAPERS 603 (Smith ed. 1882). The committee submitting the plan was composed of Thomas Jefferson (Virginia), Jeremiah Townley Chase (Maryland), and David Howell (Rhode Island).

trates" appointed by Congress until the adoption of the constitution and laws of an original state was not adopted.²

A new congressional committee appointed to consider and report "the form of a temporary government for the western States" submitted on May 10, 1786, a plan containing this provision:³

"The laws of—except in such cases as are herein provided for shall be established in such district, and continue in force, subject only to alteration of the General Assembly after it shall be organized, until its admission into the Congress of the United States. . . ."

This provision recognized that statutory law would be necessary for the government of the newly acquired areas, and that availability of a complete body of such law should not be delayed until worked out by local legislatures. But with settlers coming from all the original states what name should be entered in the blank? The proposal, like the provision of 1784, was too controversial, and was omitted from a revision of the plan submitted July 13, 1786.⁴

A plan submitted September 19, 1786, after providing for the appointment by Congress of a governor, a secretary, and a court to consist of five judges, provided:⁵

"That the Judges shall agree on the Criminal Laws of some one State, in their Opinion the most perfect, which shall prevail in said district, until the Organization of the general Assembly, but afterwards the general Assembly shall have authority to alter them as they shall think fit."

This provision appears in the unrevised report of April 26, 1787,⁶ but in a revised report of the same date the following appears:⁷

"The governor and judges, or a majority of them shall adopt and publish in the districts such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Con-

² 26 JOURNALS OF THE CONTINENTAL CONGRESS 259 (1928).

³ 30 *id.* 252, 253 (1934).

⁴ *Id.* at 403.

⁵ 31 *id.* at 670 (1934).

⁶ 2 TERRITORIAL PAPERS OF THE UNITED STATES 43 n.15 (Carter ed. 1934).

⁷ 2 THE ST. CLAIR PAPERS 608 (Smith ed. 1882).

gress from time to time, which shall prevail in said district until the organization of the General Assembly, unless disapproved of by Congress; but, afterwards, the General Assembly shall have authority to alter them as they think fit"

Congress adopted this proposal by incorporating it almost verbatim in the Northwest Ordinance of July 13, 1787.⁸ The Northwest Territory was to be "ruled by magistrates" appointed by Congress until there should be five thousand free male inhabitants of full age in the Territory, when a general assembly might be established.

The scheme of temporary territorial government under which governors and judges appointed by Congress (later by the President of the United States with Senate approval) were to "adopt" laws from the original states, was made applicable to the following territories, and was in operation during the years indicated:

Northwest Territory (1788-1798)
Southwest Territory (1790-1794)
Mississippi Territory (1798-1800)
Indiana Territory (1800-1804)
Michigan Territory (1805-1823)
Illinois Territory (1809-1812)

In Louisiana District and Territory (1804-1812) and in Arkansas Territory (1819) the governor and judges were authorized to "make" or "pass" laws, and were not, as in the other territories listed, limited to "adoption" from original states.

I. THE ORDINANCE AND A MINIMUM OF TERRITORIAL LAWS 1788-1792

The scheme of temporary government established by the Ordinance of 1787 had the appearance of simplicity, and it was no doubt thought that a governor and three judges could adopt such laws as might be "necessary and best suited to the district" quickly and efficiently. But to make sure that there would not be even a short period of time in which the expected settlers would be without law to govern their affairs, Congress included in the Ordinance a substantial body of private property law; conferred

⁸ 1 Stat. 51 n.2; 2 TERRITORIAL PAPERS OF THE UNITED STATES 39 (Carter ed. 1934).

on the judges a "common law" jurisdiction; and guaranteed judicial proceedings according to the course of the "common law."

Acting under the authority given by the Ordinance the governor and judges of the Northwest Territory adopted and published territorial laws in 1788 (10), 1790 (6), 1791 (7), 1792 (13), 1795 (38), and 1798 (11). The officers taking part in these acts of legislation were:⁹

Governor Arthur St. Clair 1788, 1790, 1791, 1795

Acting Governor Winthrop Sargent 1790, 1792, 1798

Judge Samuel Holden Parsons 1788

Judge James Mitchell Varnum 1788

Judge John Cleves Symmes 1788, 1790, 1791, 1792, 1795, 1798

Judge George Turner 1790, 1791, 1795

Judge Rufus Putnam 1792

Judge Joseph Gilman 1798

Judge Return Jonathan Meigs, Jr. 1798

Governor St. Clair was from Pennsylvania and was fully familiar with the laws of that state. Prior to the War he had served as a justice of Quarter Sessions and Common Pleas in Pennsylvania; as recorder of deeds; as probate clerk; and as prothonotary. After the War he was a member of the Pennsylvania Council of Censors elected to inquire whether the legislative and executive branches of the state government had performed their duties.¹⁰

Sargent, who acted as governor in St. Clair's absence, was from New England as were judges Parsons, Putnam, and Varnum. All these officers were or had been closely associated with the group of New England *adventurers* known as the Ohio Company—a group that had influenced, if not dictated, certain provisions of the Ordinance of 1787.¹¹ Putnam was not a lawyer,¹² and seems to have attended sessions of the legislative board only in 1792. Judges Parsons and Varnum, on the other hand, were both well-trained and experienced lawyers. Parsons (Harvard 1756) had served in eighteen consecutive sessions of the Connecticut legisla-

⁹ For dates of the appointment of the judges, see 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY 92 n. (Chase ed. 1833) (hereinafter cited as CHASE).

¹⁰ LAWS OF THE NORTHWEST TERRITORY 1788-1800, xvii (Pease ed. 1925) (hereinafter cited as PEASE). Also see 1 THE ST. CLAIR PAPERS 1-120 *passim* (Smith ed. 1882).

¹¹ For an account of the influence of the Ohio Company, see the fourth article of the present series, 59 MICH. L. REV. 49, 50-52 (1960).

¹² PEASE xxiv.

ture,¹³ while Varnum (Brown 1769) had been "at the very top of his profession" in Rhode Island.¹⁴ Symmes had served as chief justice of the Supreme Court of New Jersey, but was not well trained in law.¹⁵ His chief interest seems to have been in a vast land purchase which he initiated. Although he participated in all the sessions of the legislative board, only one of the forty-seven adoptions made after 1794¹⁶ was said to have been taken from New Jersey. Turner, an officer in the Revolution, was appointed from South Carolina and, though a man of literary attainments,¹⁷ seems to have been more interested in land speculation than in law.

On July 31, 1788 (two weeks after the inauguration of the government of the Northwest Territory), judges Varnum and Parsons wrote Governor St. Clair in part as follows:¹⁸

"The Ordinance of Congress empowers us to adopt such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district. Admitting a strict and literal construction should be given to this clause, the purposes of the Ordinance in general would be defeated. . . . If the clause in question admits of different constructions, we ought to adopt that which will best promote the purposes of the settlement. It was made *pro bono publico*, and therefore ought to be liberally expounded. We think it will admit of two constructions. One, that we can adopt laws of any of the old States *literatim et verbatim, mutatis et mutandis* for their State only. The other that we may admit such *parts* of any particular law as will be necessary, etc. If so, why will it not admit of another construction, that we may adopt a law, consisting of different parts of laws of any two or more States upon the same subject? And if this be granted, surely the diction ought to be rendered uniform. . . . We presume, therefore, with great deference to your Excellency's opinion, that the following is the legal construction of the ordinance: To adopt such laws as may be necessary and best suited to the circumstances of the district; provided, however, that such laws be not repugnant, but as conformable as may

¹³ *Id.* xvii; BOND, *THE CIVILIZATION OF THE OLD NORTHWEST* 56 (1934).

¹⁴ *Ibid.*

¹⁵ PEASE xviii; BOND, *op. cit. supra* note 13, at 65.

¹⁶ Laws published after 1794 recited the name of the state or states from which adopted.

¹⁷ PEASE xxiii.

¹⁸ 2 *THE ST. CLAIR PAPERS* 69-70 (Smith ed. 1882).

be to those of the original States, or of some one or more of them. . . .”

In a reply to the judges dated August 7, 1788,¹⁹ Governor St. Clair agreed that the clause of the Ordinance should receive a liberal construction; that the adoption of an entire law from one of the old states would certainly be proper, and that adoption of parts of a law might be proper, but disagreed with the view that the governor and judges might “make” a law consisting of different parts of laws of different states. He also challenged an assumption made by the judges that a law could be adopted by the three judges without the governor’s consent. In a report to President Washington made in August 1789²⁰ the Governor called attention to the “difference of sentiment” that had arisen between him and the judges re the power of the three judges to adopt a law without the concurrence of the governor, and characterized their contention as “a dangerous Doctrine, and agreeable to neither the Spirit nor the Words of the Ordinance.” In his reply to the judges dated August 7, 1788,²¹ St. Clair suggested that the Ordinance should be interpreted as reading: “The Governor and the judges, or a majority of them, provided that the Governor be one of that majority, shall, etc.”

“But without the proviso, only change the place of a single comma, and the same effect is produced; and it is not improbable that it may have been misplaced in transcribing the Ordinance.”

St. Clair was president of the Congress of the Confederation at the time the Ordinance of 1787 was adopted, and, though not present on the day it was passed, was directly interested in the plan of government. He apparently knew what was intended, and if he had had access to the original journals of Congress he could have supported his position by showing that in the original record the comma was after “governor” instead of after “judges” the provision reading:²² “The governor, and judges or a majority of them shall adopt” According to St. Clair, Congress thought it would be a great impropriety to leave the adoption of laws solely to the

¹⁹ *Id.* at 75.

²⁰ 2 TERRITORIAL PAPERS OF THE UNITED STATES 204, 207 (Carter ed. 1934).

²¹ 2 THE ST. CLAIR PAPERS 74 (Smith ed. 1882).

²² 2 TERRITORIAL PAPERS OF THE UNITED STATES 39, 42 (Carter ed. 1934).

persons who were to expound them, and if to this power were added the power to form laws, the judges would in that case be complete legislators "which is the very definition of tyranny."²³

In his report to President Washington, August 1789,²⁴ Governor St. Clair described the various settlements of the Northwest Territory in these words:

"Upon the Mississippi and Wabash Rivers a considerable Number of People, the remains of the ancient french Colony, who have been accustomed to be governed by the Laws of France, the Customs of Canada, and the arbitrary Edicts of the British Commandants, after they fell under the Power of Britain:—there are also some People there, who migrated from Virginia after the Cession of the country to the United States. A Settlement is begun between the great and little Miami composed of Emigrants from Virginia and New Jersey, but principally from the last. The Reservation, for the Virginia Officers, upon the Scioto River, has turned the Attention of many to that part of the Country, and a Settlement will be made there, so soon as it shall be laid open, by People from Virginia and the District of Kentucky where they have been used to the Laws & Customs of Virginia.—Higher up the Ohio comes the Country purchased by the Ohio Company, which be composed of Adventurers, chiefly, from Massachusetts, Connecticut and Rhode Island, the first Inhabitants are, and will be, from those States—Above that a gain are the Ranges of Townships part of which have been sold, and as they are now the Property of Persons in New York, Jersey and Pennsylvania the Settlements will be made by People from those States—to the north of the last is the Connecticut Reservation, which that State is now disposing of—and to the north of the Ohio Companys Tract one of the Reservations for the late Army lays."

He then observed:

"Laws that are to run thro' so great an extent of country, and are to operate upon People who have very different Habits and Customs require to be very attentively considered; and it would seem that they should be composed rather by an intermixture of those of all the original States, than that the Acts of any one particular State should be adopted."

²³ Note 21 *supra*.

²⁴ 2 TERRITORIAL PAPERS OF THE UNITED STATES 205-06 (Carter ed. 1934).

Difficulties involved in carrying out St. Clair's suggestion were indicated by Governor Hull and Judge Woodward of Michigan Territory in a report to President Jefferson in 1805:²⁵

"To adopt laws from all the original States, the laws of all the original States ought to be furnished; . . . Waiving the difficulty and expense of procuring them, what body of men, under the pressure of immediate business, can acquire a complete acquaintance with them?"

In his report to President Washington (1789)²⁶ Governor St. Clair noted that "the Judges were not possessed of the Codes of the different States," and that "few of the Laws in the Collections they were in possession of would apply." In a letter dated December 22, 1794, the governor, after referring to the position he had taken re the power to make laws, stated:²⁷

"The judges, Parsons and Varnum (the third judge did not accept the appointment), were decidedly of a contrary opinion, and the point was battled, both verbally and in writing, for a considerable time. . . . Neither of those gentlemen were in possession of the codes of the States, although three months of their respective salaries had been paid to them before they entered upon their offices, as a compensation for the time and pains the collecting of those codes would cost them. I had that of Pennsylvania only, to which they were adverse."

That St. Clair brought to the Territory a copy of the laws of Pennsylvania is also shown by a letter to judges Parsons and Varnum dated July 30, 1788:²⁸

"I have taken the liberty to send you the Pennsylvania volume that you may examine the laws referred to above, if you should think proper, at your leisure. You will find them in the folios 30 to 33, and 70 to 73."

A check of the laws referred to against the folios given in the letter shows that the Governor had in his possession "The Acts of Assembly of the Province of Pennsylvania" published by "Order of Assembly" in 1775.

²⁵ AMERICAN STATE PAPERS, Public Lands, Vol. I, 229, 231 (1834); 36 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 109 (1908).

²⁶ 2 TERRITORIAL PAPERS OF THE UNITED STATES 204 (Carter ed. 1934).

²⁷ 2 THE ST. CLAIR PAPERS 334 (Smith ed. 1882).

²⁸ *Id.* at 67, 69.

Commencing in 1795 the governor and judges of the Northwest Territory recited in each adopted law the state or states from which it had been adopted. This was not done prior to 1795, and we cannot determine from the laws as published in 1788-1792 their sources, and to what extent St. Clair's view that they should be composed of "an intermixture of those of all the original states," was carried out. An attempt to answer this by a comparison of the laws adopted with those of the original states would involve difficulties similar to those indicated by Governor Hull and Judge Woodward in 1805:²⁹ To determine whether they were taken from all the original states, the laws of all the original states must be examined. Waiving the difficulty and expense of procuring them, what body of men, under the pressure of immediate business, can acquire a complete acquaintance with them?

When the governor and judges of the Northwest Territory formally inaugurated the government of the Territory at Marietta in July 1788, they had before them the Ordinance of 1787, and certain regulations made and posted by the Ohio Company. Their immediate task was to publish at least a minimum number of statutes necessary for the operation of a territorial government. The areas covered by these statutes and by the Ordinance show the content of the first statutory system.

Militia. The Ordinance had directed that the governor be commander in chief of "the militia," and commission its officers below the rank of general. That it was considered the function of the legislative authority, and not the governor, to establish and regulate the militia is shown by the fact that the first law published by the governor and judges (July 25, 1788) was "A law for regulating and establishing the militia in the Territory of the United States north-west of the river Ohio."³⁰ A law in addition to this law was published November 23, 1788.³¹

Courts. The first concern was military protection; the second, organization and jurisdiction of courts. The Ordinance had provided for a general court to be held by the three judges appointed by Congress, but had not otherwise established particular courts. It was clear, however, that the territorial government was to provide "magistrates, courts and registers" for the probate of wills;

²⁹ Note 25 *supra*.

³⁰ CHASE 92; PEASE 1.

³¹ CHASE 102; PEASE 23.

magistrates and other civil officers necessary for "peace and good order in the territory." An act published August 23, 1788, provided for courts of quarter sessions and common pleas to be held in each county; defined their jurisdiction; and specified what matters might be dealt with by single justices and judges.³² This was followed by a law directing the appointment of a probate judge in each county, and the holding of probate courts.³³

Transfer of Property. The appointment of probate officers was required by the property section of the Ordinance which had made temporary provision for transfer of real and personal property by deed, by will, by delivery, and by descent. This section, according to Carter,³⁴ was first suggested in a report dated April 26, 1787, and when it appeared in amplified form in a report dated July 11, 1787, it closely resembled a Massachusetts law of 1784, except a provision of the latter giving the eldest son two shares. In March 1787 Nathan Dane, a member of Congress from Massachusetts, had been approached by a representative of the Ohio Company, made up of New England "adventurers," for aid in obtaining a purchase from the United States of a million dollars' worth of land in the Northwest Territory.³⁵ Dane, later, claimed that he drafted the property provisions of the Ordinance, taking them from Massachusetts,³⁶ and it seems clear that he did so at the suggestion of the Ohio Company. The inclusion of the property provisions served at least two purposes: (1) The Ohio Company and other purchasers of land in the Northwest Territory could proceed with their real estate developments without waiting for local legislation. (2) Inclusion of the provisions in the organic act would make it certain that the English common law would not govern the title and transfer of land, even temporarily. The New England "adventurers" naturally desired that their real estate transactions be governed by the property law to which they were accustomed. The refusal to give the territorial court chancery jurisdiction, and the novel provision against any laws interfering with contracts, may also have been suggested by the Ohio Company to prevent interference with "the pyramid of contracts

³² CHASE 94; PEASE 4.

³³ CHASE 96; PEASE 9.

³⁴ 2 TERRITORIAL PAPERS OF THE UNITED STATES 40 (Carter ed. 1934).

³⁵ See the fourth article of the present series, 59 MICH. L. REV. 49, 50 (1960).

³⁶ See the third article of the present series, 58 MICH. L. REV. 209, 210 (1959).

which the company was proposing to erect in order to dispose of its large estate."³⁷ Though it was intended that the property provisions of the Ordinance be in effect only until the matters involved could be dealt with by local legislation, their influence was permanent. "In this case," according to Dane, "they were planted in 400,000 square miles of territory, and took root as was intended. . . ."³⁸

The property section of the Ordinance specified how intestates' "estates," real and personal, should descend, and what part a widow should have as dower, these provisions to remain in force "until altered by the legislature of the district." The section further provided that "estates" might be devised or bequeathed by wills in writing, executed in a specified manner; that "real estates" might be conveyed by specified methods, "provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose"; and that personal property might be transferred by delivery. These provisions were to be in force until the governor and judges should "adopt laws as hereinafter mentioned."

Sheriffs and Coroners. The law that established the courts of quarter sessions and common pleas³⁹ also provided for the appointment of a sheriff in each county, and prescribed his duties. A later law, December 21, 1788, made provision for the appointment of a coroner in each county, and prescribed his duties.⁴⁰ The Ordinance had provided that previous to the organization of the general assembly the governor should appoint such magistrates and other civil officers in each county or township as he should find necessary for the preservation of peace and good order; that after organization of the assembly "the powers and duties of magistrates and other civil officers" should be "regulated and defined" by the assembly. Though the power to regulate and define the powers and duties of magistrates and other civil officers seems to have been vested in the governor during the period of legislation by governor and judges (1788-1798), it was in fact exercised by the governor and judges as a legislature. A law prescribing the

³⁷ 2 TERRITORIAL PAPERS OF THE UNITED STATES 47 (Carter ed. 1934).

³⁸ Note 36 *supra*.

³⁹ Note 32 *supra*.

⁴⁰ CHASE 102; PEASE 24.

oath to be taken by civil officers appointed by the governor was published by the governor and judges September 2, 1788.⁴¹

Terms of Court. A law published August 30, 1788, required the judges of the General Court appointed by Congress "to hold pleas, civil and criminal," at four specified times each year in such counties as the judges should "deem most conducive to the general good."⁴² The law did not define the court's jurisdiction, nor did it prescribe the court's procedure other than its terms. The terms of the other courts were fixed by the laws establishing them.

Powers of Justices. The act that established the courts of quarter sessions⁴³ prescribed in some detail the procedure to be followed in taking recognizances out of sessions.

Crimes and Punishments. It will be recalled that one of the plans of government submitted to Congress provided that the judges of the western territory should "agree on the Criminal Laws of some one State, in their Opinion the most perfect."⁴⁴ The plan adopted by the Ordinance of 1787 authorized the governor and judges to adopt laws of the original states, "criminal and civil." "For the prevention of crimes and injuries" the laws to be adopted were to have force in all parts of the district, and "for the execution of process, criminal and civil," the governor was to make proper divisions of the territory. The Ordinance guaranteed the benefits of habeas corpus, trial by jury, and judicial proceedings according to the course of the common law. It provided also that

"All persons shall be bailable unless for capital offences, where the proof shall be evident, or the presumption great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land. . . ."

It was recognized from the beginning that the settlers should start with a fully developed body of criminal law, and one of the first acts of the governor and judges of the Northwest Territory was publication at Marietta of "A law respecting crimes and punish-

⁴¹ CHASE 97; PEASE 12.

⁴² CHASE 97; PEASE 11.

⁴³ Note 32 *supra*.

⁴⁴ 31 JOURNALS OF THE CONTINENTAL CONGRESS 670 (1934).

ments.”⁴⁵ This act, dated September 6, 1788, defined, and provided punishment for, fifteen ordinary crimes; dealt with discipline of children and servants; warned against improper and profane language; and “enjoined” that all “servile labour” be “wholly abstained from” on the first day of the week. Referring to the latter provisions Pease suggests “that in phraseology they were general orders rather than laws.”⁴⁶

“Perhaps that is the clue to part of the legislation in question. The Ohio Company had established itself at Marietta a few weeks before the arrival of St. Clair and the inauguration of territorial government. The Ohio Company had its own military force; it had already created a Board of Police which had passed regulations for the settlement that smack of an armed camp . . . June 13, 1788, the Northwest Ordinance and the commissions of the judges were read and those rules and regulations proclaimed.”

Because of representations that laws published prior to 1795 had been “enacted by the governor and judges, of their own authority,” and not adopted as required by the Ordinance of 1787, the General Assembly in 1799⁴⁷ declared that the law of 1788 respecting crimes, a supplement published in 1791, and “An act for the punishment of persons tearing or defacing publications,” also published in 1791, should be considered in force, except as repealed or altered by subsequent existing law.

Marriages. An undated law published with the laws of 1788⁴⁸ dealt with ages at which persons might marry; who might perform marriage ceremonies; notices to be given; consent of parents; certificates of marriage, and other related matters. Certificates were to be transmitted to “the register of the county,” but provision for such an officer was not made by the laws of 1788.

Limitations. A law published December 28, 1788,⁴⁹ limited the time for commencing specified common law actions, and for

⁴⁵ CHASE 97; PEASE 13.

⁴⁶ PEASE xix.

⁴⁷ CHASE 211; PEASE 337.

⁴⁸ CHASE 101; PEASE 22. For comments on a draft of this law, see letter from Governor St. Clair to judges Parsons and Varnum dated October 21, 1788. 2 TERRITORIAL PAPERS OF THE UNITED STATES 161 (Carter ed. 1934).

⁴⁹ CHASE 102; PEASE 25. For comments on a draft of this law, see letter cited in note 48 *supra*.

prosecution of specified crimes. Referring to this act in 1833 Salmon P. Chase stated:⁵⁰

"This law was disapproved by congress, May 8, 1792. . . . Another law on the same subject was adopted in 1795, . . . which was repealed by the territorial legislature, as unconstitutional, in 1799. . . . The territorial legislature probably supposed the law of 1795, to be repugnant to the clause in the constitution and in the ordinance in relation to the obligation of contracts."

The Ordinance had declared "that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide, and without fraud previously formed."

That other laws were contemplated in 1788 is shown by a letter from St. Clair to Parsons dated December 14, 1788.⁵¹ The governor stated that he had been looking over the "Law for recording Deeds" which in his opinion needed certain changes. He had objections to the "Law for vesting certain Powers in the Inhabitants of towns" that he believed were insuperable. In a letter to judges Symmes and Turner dated July 13, 1790,⁵² Acting Governor Sargent stated with reference to a "Fee Table" that the "hon^{ble} Judges Parsons and Varnum were for a long Time engaged upon the Subject." Both Parsons and Varnum died in 1789, and no further laws were published until 1790.

A Minimum System. From the evidence available it appears that St. Clair and the first judges were concerned with two lines of statutory development: (1) Laws necessary to implement the Ordinance. (2) Laws to supplant the English common law. Evidence of the first line of development is found in the published laws, and in the proposed law for recording deeds. Need for supplanting the English common law was pointed out by Parsons and Varnum in a letter to St. Clair dated July 31, 1788:⁵³

"Were we to be confined for any length of time to the principles of the common law, we are fearful of very precarious consequences. The common law, as adopted in the States, while colonies, entered essentially into the principles

⁵⁰ CHASE 102 (note).

⁵¹ 2 TERRITORIAL PAPERS OF THE UNITED STATES 171 (Carter ed. 1934).

⁵² 3 *id.* at 317, 319.

⁵³ 2 THE ST. CLAIR PAPERS 69 at 71 (Smith ed. 1882).

of monarchical government, and therefore can not, with propriety, be applied here."

In his reply of August 7, 1788,⁵⁴ St. Clair agreed with the judges that if among the laws of the states they could find none to suit them, their legal operations would have to be guided by the common law. It was his opinion that the common law of England insofar as it had not been altered by statute prior to the Revolution, or by the laws of the colonies before that period, or by the laws of the states afterwards, was the common law of the land. As to English statutes which had altered the common law, the governor was of opinion that if such statutes had been adopted in the colonies and had not been abrogated in the states after the Revolution, they continued to be the law.

After legislative activity had been resumed in 1790, judges Symmes and Turner expressed their concern over the lack of territorial laws. In a letter to Acting Governor Sargent dated August 22, 1790, the judges wrote:⁵⁵

"At present the Territory may be said to be, in a manner, without laws; for such as have already been passed are so few in number, that the least possible reflection must convince you, they are extremely inadequate to form a ground work for the full administration of justice. The common law, alone, will not answer."

The only laws that had been published in 1790 prior to the date of this letter dealt with crimes and punishments (liquor to Indians; trade with Indians; liquor to soldiers; purchase of military equipment; every species of gaming; disorderly use of firearms). In 1790 after the date of the letter, laws were published altering the terms of the General Court; augmenting the terms and number of judges of Common Pleas; and giving certain additional powers to the Courts of General Sessions of the Peace. The latter courts were authorized and required to divide the counties into townships; to appoint township clerks, constables, and overseers of the poor. Congress, by providing in the Ordinance for the division of counties into townships, had contemplated a township system which was now established by territorial law.

⁵⁴ *Id.* at 72, 76.

⁵⁵ 2 TERRITORIAL PAPERS OF THE UNITED STATES 303 (Carter ed. 1934).

In their letter of August 22, 1790,⁵⁶ judges Symmes and Turner emphasized the need of territorial laws to implement the Ordinance stating:

"The ordinance providing for the government of this Territory is silent on many points with respect to the powers and duties of the principal officers.—Whenever this happens to be the case, we can only be governed by the obvious implication, or the general usages of the states in similar cases."

That they were also concerned with the need of supplanting, or at least modifying, the common law is indicated by their statement that "The common law, alone, will not answer."

In the letter referred to, the judges asserted that they had frequently urged the necessity of a "fee bill," and called the attention of the acting governor to a "Fence law" which had been amended and engrossed, but not signed. On the back of this letter Sargent noted:

"The Fence Law mentioned to have been engrossed ready for signing was objectionable as not having the Fences particularly enough described & in taking away a Mans Property for private Roads without making for him a proper Compensation which was mentioned repeatedly to the Judges & an alteration consented to, but never having been made it could not receive my Signature."

An elaborate fence law, dealing with partition fences and trespassing cattle, was published in 1791; an act establishing fees, setting forth in full detail the fees allowed public officers and others, was published in 1792.

In the years 1791 and 1792 twenty laws were published, some designed to implement the Ordinance; others, to supplant or modify the common law: Obtaining goods fraudulently; tearing down or defacing official publications; office of legislative clerk; authentication of acts and records; distinction between murder and petit treason; regulation of enclosures; amendment of militia laws; licenses to merchants, traders, and tavern keepers; office of territorial and county treasurer; raising and levying money for counties; opening and regulating highways; building of county court houses and other structures; regulation of prisons; disposition of estrays; amendment of act re legislative clerk; supplement to law

⁵⁶ *Ibid.*

re marriages; admission of attorneys; power to appoint guardians; writs in civil cases; fees for officers and others. These laws plus those adopted in 1788 and 1790 constituted the first statutory system of the Northwest Territory—a minimum system that served to supplement the Ordinance until the laws were fully re-examined in 1795.

II. TERRITORIAL LAWS SUPPLEMENTED BY BRITISH STATUTES 1795-1798

In 1792 Congress provided for printing all laws of the Northwest Territory that had been, or might be, “enacted,” and authorized the governor and judges to repeal “their laws by them made.”⁵⁷ In 1795 judges Symmes and Turner argued that use of the words “enacted” and “made” was an implied, if not a direct, recognition of the power to enact laws previously exercised.⁵⁸ It will be recalled that the first judges of the Territory—Parsons and Varnum—had refused to limit themselves to the *adoption* of laws as distinguished from the *making* of laws, and did not indicate what states, if any, served as the sources of the laws published. Governor St. Clair, however, remained steadfast in his opinion expressed in 1788 that the governor and judges had no power to *make* laws, and received powerful support in the form of a resolution passed by the House of Representatives of the United States in 1795 disapproving the laws, except a repealing act, published by Sargent, Symmes, and Putnam in 1792.⁵⁹ The Senate did not concur, but this did not weaken the governor’s position as he was informed that the failure to concur was because of a belief that the laws in question were nullities.⁶⁰ When the governor informed the judges that their acts of 1792 had been disapproved on the ground that they did not have power to *make*, but could only *adopt*, laws, the judges with apparent reluctance agreed to abandon their earlier views, and expressed a willingness to confine themselves to the principle of adoption alone.⁶¹

In view of uncertainty that existed as to the validity of all laws published prior to 1795, the governor and judges in 1795 undertook a thorough revision of the territorial statutes. More than

⁵⁷ 1 Stat. 285.

⁵⁸ 2 THE ST. CLAIR PAPERS 363 at 364 and 366 (Smith ed. 1882).

⁵⁹ ANNALS OF CONG., 3d Cong., 2d sess., 1214, 1227 (1794) [1793-1795].

⁶⁰ 2 THE ST. CLAIR PAPERS 356-57 (Smith ed. 1882).

⁶¹ *Id.* at 364.

two-thirds of the earlier acts were repealed outright, and others repealed in part. A few were re-adopted and a few left untouched. As to the validity of the latter, doubts persisted until they were finally set at rest by the General Assembly in 1799.⁶² After reciting that it had been represented to the Assembly by the governor that on several occasions laws had been "enacted" by the governor and judges "of their own authority," and that those laws were of very doubtful obligation, and had been so spoken of from the bench, the Assembly confirmed all laws published prior to 1795 which had not been repealed.⁶³

Commencing in 1795 the governor and judges of the Northwest Territory recited in each adopted law the state or states from which it had been adopted. A similar practice was followed in Indiana Territory (1800-1804), and in Michigan Territory (1805-1823). But in some instances in Michigan only a summary was published omitting the state or states from which adopted. Repealing acts and other acts specially authorized by Congress did not involve adoption. Relying on statements made in the laws as published, the following table has been prepared to indicate the extent to which the laws adopted were "an intermixture of those of all the original States."⁶⁴ All parts of a published law said to have been adopted from a named state are counted as one adoption. Many published laws named two or more states, hence were made up of two or more adoptions.

		Number of Adoptions												
Territory	Number of Laws	Conn.	Ga.	Ky.	Md.	Mass.	N.J.	N.Y.	N.C.	Ohio	Pa.	Tenn.	Vt.	Va.
Northwest Territory														
1788-1794	36	..	..	..	..	..	..	..	..	..	..	..	..	..
1795-1798	49	2	..	4	..	8	1	2	..	..	27	..	..	3
Indiana Territory														
1800-1804	23	..	..	5	..	..	..	1	..	..	4	..	..	10
Michigan Territory														
1805-1807	60	3	..	5	9	13	1	23	2	19	12	..	..	24
1808-1809	46	3	..	..	..	15	..	12	..	11	3	..	26	7
1810-1813	24	2	..	..	4	4	..	5	..	7	6	..	8	6
1814-1823	268	5	9	11	5	49	22	93	5	134	26	1	24	17

⁶² PEASE 337.

⁶³ Also see Governor St. Clair's address to the General Assembly, 2 THE ST. CLAIR PAPERS 451-53 (Smith ed. 1882).

⁶⁴ P. 323 *supra*.

Governor St. Clair's victory over the judges in 1795 on the point of interpretation seems to have carried with it a victory for him in his attempts to introduce the laws of Pennsylvania. Of the thirty-eight adoptions made in 1795 twenty-six were from St. Clair's state. Was this because St. Clair dominated the legislative board? Or because a copy of the laws of Pennsylvania was present in the Territory, and copies of other statutes not available? As the latter seems unlikely at this late date, the answer lies elsewhere. According to Professor Bond, the governor was a man of "iron will," "imperious temper," and "ability much above the average."⁶⁵ Professor Paxton states that for ten years he governed as "viceroy" of Congress. "That he was called governor instead of viceroy failed to hide the fact of autocratic control."⁶⁶ It appears, however, that the first judges persistently opposed his views as to the meaning of "adoption," and, being "adverse" to the laws of Pennsylvania, refused to make certain adoptions recommended by him. His victory on the point of interpretation, noted above, was not achieved by some autocratic act, but by persistent persuasion and pressure. While surrendering on the point of interpretation of "adoption" the judges refused to agree with the governor's position that they could not adopt a law without his consent. His apparent success in overcoming the opposition to Pennsylvania laws was probably achieved merely by default. The judges of 1795 were absorbed in the great land speculations of the time and had little interest in the development of a body of statutory law. St. Clair, on the other hand, saw the need for adequate statutes, and pressed for their adoption. His previous experience had been with the laws of Pennsylvania, and for him to turn to them as sources seems only natural. And it may be that his apparent victory was in reality a defeat. There is nothing to indicate that he wanted a wholesale adoption of Pennsylvania laws. On the contrary, in his report to President Washington made in 1789,⁶⁷ he expressed the opinion that laws that were to run through "so great extent of Country," and were to operate upon people of "very different Habits and Customs," should not be adopted from one state, but should be "composed rather by an intermixture of those of all the original States." It is un-

⁶⁵ BOND, *THE CIVILIZATION OF THE OLD NORTHWEST* 56 (1934).

⁶⁶ PAXTON, *HISTORY OF THE AMERICAN FRONTIER* 123 (student's ed. 1924).

⁶⁷ Note 24 *supra*.

fortunate that the governor did not have the assistance of trained lawyers interested in providing the "intermixture" he thought desirable. If judges Parsons and Varnum—both well-trained New England lawyers—had not died in 1789, the whole development might have been different. Referring to the laws published in 1795 Salmon P. Chase, writing in 1833, stated:⁶⁸

"The system thus adopted, was not without many imperfections and blemishes; but it may be doubted whether any colony, at so early a period after its establishment, ever had one so good."

Of the nine adoptions made in 1798 only one was from Pennsylvania. Four laws were adopted from Kentucky; two from Connecticut; and two from Massachusetts. Reasons for adopting laws from Kentucky, if permissible, seem evident: Conditions in that state were similar to those in the Territory; many of the settlers in the Territory had come from the state. Reasons for turning to New England for the other adoptions are not so obvious. The personal factor may be significant. Winthrop Sargent, acting-governor in 1798, was from Massachusetts, and had been one of the group of New England "adventurers" known as the Ohio Company. Return Jonathan Meigs, Jr., appointed judge in February 1798, was also from New England.

The system of laws worked out in 1795 may be taken as an indication of what St. Clair had in mind as necessary in the "great extent of territory" that was being rapidly settled by people of "many different habits and customs." Unlike the original colonists, the settlers did not bring with them any law, and a complete system had to be established for them. They had, of course, the Ordinance of 1787, but, as indicated above, this statute left many details to be supplied by local legislation. The statutory needs supplied by the revision of 1795 included:

1. Laws necessary to put in operation the government established by the Ordinance.
2. Laws regulating officers, courts, and other organs of the established government.
3. Laws necessary to make effective the private property provisions of the Ordinance.

⁶⁸ CHASE 27.

4. Laws in addition to the property provisions of the Ordinance governing real property.
5. Laws in addition to the property provisions of the Ordinance governing wills and settlement of estates.
6. Laws regulating marriage and divorce.
7. Laws easing the collection of debts; limiting imprisonment for debt.
8. Laws giving remedies in equity in certain cases.
9. Laws defining crimes and fixing punishments.
10. Laws declaring what laws shall be in force.

The real property provisions of the Ordinance indicated an intention on the part of Congress to regulate this area of law by statute instead of by common law. And it seems to have been understood from the beginning that crimes should be defined and punishments fixed by statute, instead of by common law. Probate, marriage, and divorce had to be regulated by statute due to the absence of adequate common law. Remedies in equity had to be given by statute, because common law courts proceeding according to the course of the common law could not, or might not, give them. The Ordinance had given the territorial judges a common law jurisdiction, and had guaranteed judicial proceedings according to the course of the common law, but had not indicated what common law should be in force, and if the English common law, of what period. A statute settling these doubts was useful, if not required.

Though it may be argued that it was for the courts to decide what common law was intended by the Ordinance, the governor and judges as a legislature made the decision by the following act adopted from Virginia in 1795:⁶⁹

"The common law of England, all statutes or acts of the British parliament made in aid of the common law, prior to the fourth year of the reign of King James the first (and which are of a general nature, not local to that kingdom) and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority, or disapproved of by Congress."

That the General Assembly of the Northwest Territory looked

⁶⁹ CHASE 190; PEASE 253.

upon the law of 1795 as in effect re-enacting the British statutes referred to in the law is shown by the following acts:⁷⁰

November 15, 1799: Repeals law of 1795 insofar as it enforces 13 Eliz. Ch. 8, and 37 Hen. VIII, Ch. 9, re usury.

December 2, 1799: Repeals law of 1795 insofar as it adopts and enforces 43 Eliz., Ch. 6, Sec. 2, re costs in actions for less than 40s.

December 6, 1800: Repeals law of 1795 insofar as it "adopts statutes that come within the purview of this act" re maintenance and support of illegitimate children.

It must be noted, however, that despite the attempt to make the selection of applicable British statutes a legislative function this was not accomplished, and could not have been accomplished without specifically designating all statutes to be considered in force, or by re-enacting them one by one. The British statutes referred to, but not listed, were made rules of decision, and it was up to the courts to decide in cases before them what British statutes should be applied. Writing in 1833 Salmon P. Chase noted that each law adopted was supposed to be adapted "to the circumstances of a new country."⁷¹

"It was plainly the intention of congress, also, that each law adopted should be published, that every citizen might know the extent and nature of his social obligations. Neither of these purposes could be answered by the adoption of the English law, written and unwritten, in the mass. Its adaptation to the circumstances of the district could not be ascertained; nor could the citizen be acquainted with its nature by publication."

1800-1804

In Indiana Territory laws were adopted in 1801, 1802, and 1803 by

Gov. William Henry Harrison (1801-1803)
Judge William Clarke (1801-1802)
Judge Henry Vander Burgh (1801-1803)
Judge John Griffin (1801-1802)
Judge Thomas Terry Davis (1803)

⁷⁰ CHASE 218; 238; 293. PEASE 353; 401. Also see POLLACK, OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823, 211 (1952).

⁷¹ CHASE 190.

Governor Harrison, originally from Virginia, was delegate to Congress from the Northwest Territory at the time of his appointment, having served as Secretary of that Territory 1798-1799.⁷² Judge Clarke was attorney for the United States in Kentucky at the time of his appointment.⁷³ Judge Vander Burgh had resided in the Northwest Territory since 1790, and, though not a trained lawyer, had served as probate judge and as justice of the peace.⁷⁴ Judge Griffin was son of Cyrus Griffin, last president of the old Congress and a federal district judge in Virginia.⁷⁵ President Adams remarked that he could not "be deficient in Law or the French Tongue, His Fathers Profession would insure him the first and the last is spoken by his Mother like a Paris Lady."⁷⁶ Judge Davis had served in the Kentucky legislature 1795-1797, and represented Kentucky in the Congress of the United States 1797-1803.⁷⁷

Although it was at first doubted that the laws of the Northwest Territory continued in force in the new territory of Indiana,⁷⁸ these doubts were resolved in favor of the view that the older laws continued in force subject to modification and repeal by the new government. Being thus provided with an adequate body of statutory law suited to the conditions of the Territory it is not surprising that only twenty-three laws, involving twenty adoptions, plus a few resolutions were published in the period 1800-1804. Of the twenty adoptions, ten were from Virginia, five from Kentucky, four from Pennsylvania, and one from New York. Professor Philbrick, in his Introduction to *Laws of Indiana Territory 1801-1809*, notes:⁷⁹

"Adoptions from southern states (especially Kentucky

⁷² LAWS OF INDIANA TERRITORY 1801-1809, x, n.1 (Philbrick ed. 1930).

⁷³ 7 TERRITORIAL PAPERS OF THE UNITED STATES 19 (Carter ed. 1934).

⁷⁴ LAWS OF INDIANA TERRITORY 1801-1809, ccxxxv (Philbrick ed. 1930).

⁷⁵ *Id.* at ccxxxvi.

⁷⁶ 7 TERRITORIAL PAPERS OF THE UNITED STATES 20 (Carter ed. 1934). In regard to Judge John Griffin's ancestry, Jenks, in *Judge John Griffin*, 14 MICH. HIST. MAG. 221 (1930), states: "His mother was Lady Christina Traquhair, the daughter of the sixth Earl of Traquhair of Peebles, Scotland. His father was Cyrus Griffin of Virginia, whose family came to the colony about 1650 and established and maintained themselves in influence and property. Cyrus, born in 1748, was educated abroad, studying first Civil Law at Edinburgh where he was in his nineteenth year, and somewhat later he went to London, where, like so many other young Americans of that period, he entered the Middle Temple in May, 1771, in his study of law, qualifying himself for his future career."

⁷⁷ LAWS OF INDIANA TERRITORY 1801-1809, ccxxxvii (Philbrick ed. 1930).

⁷⁸ 7 TERRITORIAL PAPERS OF THE UNITED STATES 18 (Carter ed. 1934).

⁷⁹ LAWS OF INDIANA TERRITORY 1801-1809, cix, n. 3 (Philbrick ed. 1930).

and Virginia) greatly preponderated, whereas the laws of the Northwest Territory had come very largely from northern states. There is no reason to believe that slavery had anything to do with this. Immigration into Indiana Territory was in these years largely from the south. This, and the different origins of the governors and other leaders of the two territories are a sufficient explanation. . . . The extraordinary number of Pennsylvania statutes adopted in the Northwest Territory . . . is partly explainable by the fact that the judges did not have the statute books of the other states . . . , but doubtless also by St. Clair's years of experience in administering Pennsylvania law . . . , and to his greater ability and force in comparison with his fellows."

According to Professor Philbrick, "The law of Indiana Territory was constituted of the English law, adopted by statute of 1795 as of 4 James the First, of all the enactments of the Northwest Territory, and of all the additional legislation of the Indiana Territory."⁸⁰ In 1801 the English statutes of Jeofails as of 1752 were declared to be in force.⁸¹

1805-1807

In Michigan Territory laws were adopted in the years 1805-1823, both inclusive, except 1813 when the British occupied the Territory. The officers participating in the adoptions were:

Governor William Hull 1805-1811

Acting Governor Reuben Attwater 1809, 1811, 1812

Judge Augustus B. Woodward 1805-1807, 1810-1812, 1814-1823

Judge Frederick Bates 1805, 1806

Judge John Griffin 1806-1811, 1814-1823

Judge James Witherell 1808-1812, 1814-1823

Governor Lewis Cass 1814-1822

Acting Governor William Woodbridge 1815, 1817, 1823

In contrast with the early laws of Indiana Territory, the laws first adopted in Michigan Territory contain little, if any, evidence of an assumption on the part of the governor and judges that the laws of the older territory continued in force. No attempt was made to repeal or amend laws previously adopted, and no-

⁸⁰ *Id.* at c.

⁸¹ *Id.* at 7.

where in the laws adopted in 1805, known as the *Woodward Code*, is there an express recognition of any of the older laws. John Gentle, in a newspaper attack on the territorial government published in Pittsburgh in 1807, stated:⁸²

"It is well known that in the month of July, 1805, the laws of the Indiana territory, and all the offices held under said laws, were on one and the same day declared null and void, by the governor and judges of the Michigan territory, in legislature assembled—and the common law of England was declared in force—until a new code of laws, suitable to the circumstances of Michigan should be by them compiled."⁸³

He quoted from a petition to President Jefferson in which certain inhabitants of the Territory complained: "They early stripped us of our code of laws, to which we had been accustomed, and left us without laws, until supplied by their slow and novel mode of adopting them."⁸⁴ In an undated letter written in the Fall of 1806 Judge Bates stated:⁸⁵

"This government has never considered itself bound by territorial Precedents. It is their wish to avoid the errors and profit by the experience of their Sister Districts. The Common Law, the wisdom of which is attested by the consecutive approbation of ages, together with our own adoptions, have been if I mistake not, esteemed by us, a code sufficiently ample for governments so temporary and fleeting as those established by the Ordinance of 1787.—In a word, That the Laws of Indiana, except local Statutes, vesting special rights, have *not* an operation in Michigan is an opinion which has regulated my official conduct, as far as those laws might be conceived, for 12 *Months* past—And that opinion remains unchanged."

By means of this letter Judge Bates was dissenting from a decision made by the Michigan Supreme Court on September 26, 1806, that a certain statute of Indiana Territory (originally

⁸² The Commonwealth, Pittsburgh, Pa., August 19, 1807.

⁸³ In another connection Gentle wrote: "The legislature had just begun their sittings, and their first business after annulling all the ancient laws and offices of the Indiana territory — was. . . ." *Aurora General Advertiser*, Philadelphia, Pa., February 18, 1807.

⁸⁴ The Commonwealth, Pittsburgh, Pa., December 9, 1807.

⁸⁵ 1 THE LIFE AND PAPERS OF FREDERICK BATES 84-86 (Marshall ed. 1926); reprinted in 2 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, 85-87 (Blume ed. 1935).

a law of the Northwest Territory) was in force in Michigan.⁸⁶ Judge Griffin, formerly a judge in Indiana Territory, had just taken his seat on the bench of the Michigan court, and had voted with Judge Woodward, who, at that time if not earlier, was in disagreement with Judge Bates.

The thirty-four laws adopted in 1805, and published in the volume known as the *Woodward Code*, recited that adoptions had been made from the following states: Maryland—4; Massachusetts—11; New Jersey—1; New York—17; Ohio—15; Pennsylvania—4; Virginia—17. Why the adoptions were made from the states named cannot be definitely determined. As already indicated, reasons for adoptions are various. The adopting authority may select a state (1) because a substantial number of the settlers are from that state; (2) because one (or more) of the adopting officers is from that state, and is familiar with its laws; (3) because the conditions of the state are most similar to those of the territory; and/or (4) because the statutes of the state are among the few physically present in the territory. The first possible explanation can be discarded immediately, the settlers in Michigan in 1805 being for the most part persons of French origin who prior to their incorporation into the Northwest Territory in 1796 had been accustomed to French and English law. There is, on the other hand, an obvious correspondence between the states named as sources, and the states of the three officers who made the adoptions in Michigan in 1805. Governor Hull, a graduate of Yale, had been a Massachusetts lawyer of "enviable reputation" and "much ability."⁸⁷ Judge Woodward, originally from New York and a graduate of Columbia College, had resided in Pennsylvania, in Virginia, and in the District of Columbia. He had been admitted to the bar in the District, and had practiced before the courts of Maryland.⁸⁸ Judge Bates, a business man who had resided in Detroit several years, was a native of Virginia. He had studied law but was not a practicing attorney.⁸⁹

In December 1805, the governor and judges of Michigan appropriated a sum not exceeding \$3.62½ "for payment of Peter Audrain, for one volume of the laws of Ohio, and certain articles

⁸⁶ 1 TRANSACTIONS, *op. cit. supra* note 85, at xxxvi.

⁸⁷ BOND, THE CIVILIZATION OF THE OLD NORTHWEST 210 (1934).

⁸⁸ WOODFORD, A LIFE OF JUSTICE WOODWARD 19-21 (1953).

⁸⁹ Jenks, *Frederick Bates*, 17 MICH. HIST. MAG. 15-16 (1933). Also see 1 THE LIFE AND PAPERS OF FREDERICK BATES, *op. cit. supra* note 85.

of stationary purchased by him for the use of the government."⁹⁰ It has been said that Governor Hull brought with him the code of New York.⁹¹ Ohio was an original state insofar as Michigan Territory was concerned, but the conditions existing in Ohio were not closely similar to those existing in the Territory. Professor Bond observed:⁹²

"In many respects the situation in the Michigan region when the United States took it over in 1796 was parallel to the one St. Clair found in Illinois in 1790. The majority of the inhabitants were French, with the remaining made up of Canadian traders and a few American settlers. Like Illinois before the Louisiana Purchase, Michigan was essentially a frontier territory, and it continued to be so."

A reason for adopting laws from Ohio can be found in the fact that its system of laws had been inherited from the Northwest Territory.

In the years 1806 and 1807 the adoptions were from the states noted above, except New Jersey; also from Connecticut—3; Kentucky—5; North Carolina—2. Judge Griffin, originally from Virginia and for some years a judge in Indiana Territory, participated in the adoptions made in the latter part of 1806 and in 1807. Judge Bates did not participate after 1806.

In May 1806 Judge Woodward reported to Secretary Madison the "constructions" which the governor and judges had been "compelled" to give to their powers of legislation. This communication serves as a preface to the *Woodward Code* as originally printed, and reads in part as follows:⁹³

"The operative words of the ordinance are, *the governor and the judges, or a majority of them, shall adopt and publish such laws of the original states, civil and criminal, as may be necessary, and best suited to the circumstances of the district.*

"The provision has been deemed to constitute a kind of legislative board, composed of the governor and the three judges, any three of whom are considered to form a quorum, and of which quorum the votes of any two determine a question.

⁹⁰ 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 88 (1871).

⁹¹ BOND, *THE CIVILIZATION OF THE OLD NORTHWEST* 212-13 (1934).

⁹² *Id.* at 207.

⁹³ Preface to original *Woodward Code*; reprinted in 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, xxi (Blume ed. 1935).

"It has not been unknown that a different construction has obtained in other territories; that the words, *or a majority of them*, have been construed to apply to the judges only; and that without both the *presence* and *concurrence* of the governor, no law can be passed.

"In the territory of Michigan the construction has been *unanimous*, that, in this form of government, the governor is a component member of the legislative board, and is entitled to be president of it; but that the other members may act without the governor, and that their votes carry a question against the concurrence of the governor. On this account the laws are clothed with the signature of all the members of the government, whether unanimously passed or not.

"Under the term *laws*, all *parts of laws* have been deemed to be included. Hence it has not been thought necessary to adopt the whole of a law from one state. It has been deemed sufficient that *all the parts of any law* are sanctioned by the provisions of *some of the states*.

"A doubt arose whether the term *original states* permitted the adoption of laws from states created subsequent to the date of the ordinance.

"On this point the construction has been that the term *original*, as affecting the territory of Michigan, has the same force as if used in the act constituting that territory. The states existing previous to the erection of this territory, have been deemed, with respect to it, *original states*; and the very states which, by their concurrence in this law, *originated* this territory. Laws have, therefore, been adopted from the states created since the passage of the ordinance, and anterior to the erection of the territory; though it has been conceived not proper to adopt the laws of any state which may be created subsequent to the establishment of the territory.

"The *discretion* vested under the term *necessary*, has been construed to impart the power of *omitting any part of a law whatever*; and with respect to all *geographical* designations, all expressions of *time*, and of *number*, all sums of money, all official or personal descriptions, and some other points of a similar nature, it has been indispensibly necessary to change, with perfect latitude, the law adopted, in order to render it, in any respect, *suited to the circumstances of the district*. These terms have, therefore, become a *formula*; which may, in some measure, apologize to the mind of him who after so many mutations is scarcely able to recognize in the *child* adopted, the lineaments of the *parent* which gave it birth.

"An express statutory power is given to *repeal laws*. Hence a *repealing law*, becomes a law *made*, and not a law *adopted*; and after any part of a law has been repealed, the repealing law proceeds to render the remainder of the law consistent with itself.

"So all legislation exercised under express acts of congress, ceases to be the *adoption*, and becomes the *making* of laws.

"Doubts have existed, whether there was authority to adopt a law which had been passed by a state, but afterwards altered or repealed, and how far the repeal of a law by a state, after its adoption by the territory, affected its subsequent validity. But no cases occurred which rendered it necessary to decide these questions."

At a meeting of freeholders held in Michigan Territory in December 1806 a resolution was passed "that in the adoption of laws, for the Territory, one whole law be adopted of one State only, at a time, and not in part, and of several states in one Section, such as they are now."⁹⁴ And John Gentle in a newspaper attack on the territorial government published in Pittsburgh in 1807 took the same position:⁹⁵

"The governor and judges are limited to the adoption of laws from one or other of the original states, but they have uniformly pursued a mode of adopting, novel, and unprecedented, which admits of additions, omissions, and combinations, by which the spirit, and very letter of the originals, pretended to be adopted, are evaded, and entirely perverted.

For example:—They parade the laws of the original states before them, on the table, and cull letters from the laws of Maryland, syllables from the laws of Virginia, words from the laws of New York, sentences from the laws of Pennsylvania, verses from the laws of Kentucky, and chapters from the laws of Connecticut—jumble the whole into such form as they conceive the most suitable to facilitate their schemes of speculation, and call it a law, adopted from the laws of six of the original states, viz The state of Maryland, Virginia, New York, Pennsylvania, Kentucky, and Connecticut, as far as necessary and suitable to the circumstances of Michigan."

In a case before the Supreme Court and the Court of Errors of

⁹⁴ 8 MICHIGAN PIONEER COLLECTIONS 579 (1885); 12 *id.* 647 (1887).

⁹⁵ The Commonwealth, Pittsburgh, Pa., September 16, 1807.

New York in 1830 and 1831⁹⁶ the validity of a Michigan law adopted from New York, Massachusetts, and Ohio was considered at length. Among the questions raised were these: 1. Must a law be adopted *verbatim*, or may names of places, etc., be changed? 2. May portions of a statute be adopted or must it be adopted entire? 3. Must the whole of a law be adopted from one state or may parts be adopted from different states? 4. May a law be adopted from a state admitted after 1787 or only from one of the original thirteen states? Answering these questions, Sutherland, J., speaking for the Supreme Court, stated:

“But this I apprehend is not the sound construction of the ordinance of 1787. The limitation which it imposed upon the legislative authority of the governor and judges was designed to secure to the people of the territories to which it applied a system of laws, each of which had been tried and approved of by the people of some one of the states. It was foreseen that the population of these territories would be composed of emigrants from the original states, who, as citizens of those states, had through their representatives in the state legislatures participated in the making of the laws, which by the ordinance in question, the governor and judges of the territories were authorized to adopt; this, together with the power reserved to congress of annulling such laws as they should disapprove of, was deemed a sufficient guaranty that the interests and wishes of the inhabitants would be regarded in the laws which would be imposed upon them. The object in view was one of substance, not of form. The phraseology of the adopted laws must undoubtedly be preserved in all essential respects, because a change of language might affect their construction; but in the particulars which have already been adverted to, it is manifest that a literal transcript of any law would be an absurdity which never could have been contemplated or designed by congress.”

In a report made by judges Woodward and Bates of Michigan Territory in 1805,⁹⁷ absence of disapproval by Congress was taken as sanctioning the adoption of laws from states admitted to the Union after 1787. Later, however, Woodward denied that ab-

⁹⁶ *Bank of Michigan v. Williams*, 5 Wend. 478 (Sup. Ct. N.Y. 1830); *Williams v. Bank of Michigan*, 7 Wend. 539 (Court for the Correction of Errors N.Y. 1831).

⁹⁷ 8 MICHIGAN PIONEER COLLECTIONS 603 (1885).

sence of disapprobation of an adopted law amounted to a "Species of Negative approbation."⁹⁸

The inference of implied approval has had a long and interesting history. In the New York case previously referred to, Chancellor Walworth concurred in the unanimous decision of the Court of Errors that the Michigan law was valid, relying principally on the fact that the law had been in operation nearly fourteen years "without having been annulled or disapproved of by congress." In *Clinton v. Englebrecht*, Supreme Court of the United States 1871, Salmon P. Chase, who had edited the *Statutes of Ohio and of the Northwestern Territory* in 1833, stated:⁹⁹

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute-book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the Territory to transmit to that body copies of all laws, on or before the 1st of the next December of each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

In *Clayton v. Utah Territory* (1890)¹⁰⁰ the inference relied on by Chase was qualified by the Supreme Court, and in *Berryman v. Board of Trustees of Whitman College* (1912)¹⁰¹ it was repudiated altogether. The matter was re-examined in *Springer v. Government of the Philippine Islands* (1928) and the following views expressed:¹⁰²

"The inference of an approval by Congress from its mere failure to act at best rests upon a weak foundation. And we think where the inference is sought to be applied, as here, to a case where the legislation is clearly void as in contravention of the Organic Act it cannot reasonably be indulged."

In *Domenech v. Havemeyer* (1931),¹⁰³ after attention had been

⁹⁸ 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, 516 (Blume ed. 1935).

⁹⁹ *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 446 (1871); quoted with approval in *Camou v. United States*, 171 U.S. 277, 287 (1898).

¹⁰⁰ 132 U.S. 632 (1890).

¹⁰¹ 222 U.S. 334 (1912).

¹⁰² 277 U.S. 189, 209 (1928).

¹⁰³ 49 F.2d 849, 851 (1st Cir. 1931).

called to the fact that a certain act of Puerto Rico had not been annulled, it was said: "This is entitled to consideration in determining the extent of power granted to the Porto Rican Legislature."

In 1950 Congress settled the matter, at least insofar as Guam is concerned. After directing that laws enacted by the legislature of Guam be reported to Congress, the congressional act of 1950 provided that "If any such law is not annulled by the Congress of the United States within one year of the date of its receipt by that body, it shall be deemed to have been approved."¹⁰⁴

Prior to the decision of September 26, 1806, that a certain criminal law of Indiana Territory (originally a law of the Northwest Territory) was in force in Michigan,¹⁰⁵ the "common law" together with the adoptions made by the governor and judges of Michigan had been "esteemed," at least by Judge Bates, as "a code sufficiently ample" for a government "so temporary and fleeting as those established by the Ordinance of 1787."¹⁰⁶ The legislative objective, apparently, was to adopt a minimum body of statutory law necessary to put in operation the government established by the Ordinance. Most of the needs, mentioned above,¹⁰⁷ supplied by the Northwest revision of 1795 were taken care of in Michigan, except crimes and punishments, and a declaration of what common law, and what British statutes, if any, were in force. After the decision of September 26, 1806, the laws of Indiana Territory (originally adopted in the Northwest Territory) defining crimes and fixing punishment, and declaring that the common law of England and certain British statutes should be rules of decision, were considered in force in Michigan along with all other laws of the Northwest Territory, including acts of the General Assembly passed in 1799, inherited by Indiana Territory, and not repealed or modified by the governor and judges of that territory prior to 1805.

III. A COMPLETE SYSTEM OF TERRITORIAL LAWS 1808-1809

On October 17, 1808, the day before he was to leave the Territory to be gone several months, Judge Woodward laid before

¹⁰⁴ 64 Stat. 389.

¹⁰⁵ Pp. 341-42 *supra*.

¹⁰⁶ *Ibid.*

¹⁰⁷ Pp. 336-37 *supra*.

the Michigan legislative board a number of resolutions including the following:¹⁰⁸

"Whereas, The variety of government and laws through which it has been the fate of this country successively to pass has had a tendency to introduce complexity, confusion, and distraction, therefore,

"Resolved, That it is expedient to revise all the laws which have successively been in force in this Territory, and re-enact such of them as may be found necessary and suitable to its present circumstances, and that after such revision fully made, it will be expedient to provide that the coutume, or common law of France, the ordinances of the government of France, the common law of England, or such parts thereof as have been found inexpedient, acts of the British parliament, the laws of the late Territory of the United States northwest of the river Ohio, and laws of the Territory of Indiana, excepting so far as it will be found desirable to re-enact them under the authority of this government, ought to cease to have operation."

Governor Hull, in a report on the resolutions, recognized that the succession of governments had created perplexities and embarrassments which it was desirable to remove, and was of opinion that the proposed revision of the laws should be undertaken at an early date.¹⁰⁹

While Judge Woodward was absent from the Territory in 1808 and 1809 Governor Hull signed and published forty-four laws designed to supplant all prior Michigan adoptions, and all laws inherited from the earlier territories. Two additional laws were signed and published by Acting Governor Reuben Attwater. Judge Griffin was in the Territory during this period, as was a new judge—James Witherell—and these judges with the governor or acting governor formed the legislative quorum. The first law published November 9, 1808,¹¹⁰ contained this provision:

"[T]he Governor and three Judges appointed and commissioned by the President of the United States shall compose the legislative board of said Territory, three of whom shall be

¹⁰⁸ 12 MICHIGAN PIONEER COLLECTIONS 464-65 (1887). The date "Dec. 31, 1806," which was indorsed on the original manuscript by someone other than Judge Woodward, is not the correct date.

¹⁰⁹ *Id.* at 466-67.

¹¹⁰ 4 LAWS OF THE TERRITORY OF MICHIGAN (Supp.) (reprint) 21 (1884).

necessary for a majority; but any three of them in the absence of the other, shall constitute a quorum for transacting business, in which case two shall be deemed a legal majority on any question, and when any law shall have received the assent of a majority as provided in either of the cases aforesaid, it shall be taken and deemed to have been regularly passed by the legislative board, and shall be signed by the presiding officer thereof at the time of its passage, and attested by the person acting as secretary to the Governor and Judges in their legislative capacity. . . ."

Judge Griffin was in the Territory when this law was published, but whether he joined with Governor Hull and Judge Witherell in passing it does not clearly appear. It does appear, however, that after Judge Woodward's return to the Territory Griffin joined with Woodward in a series of Supreme Court decisions which resulted in voiding all the laws signed by the governor alone. In one of these cases Woodward declared:¹¹¹

"[A] power in the Executive Magistrate to Sign a bill, in order to become a law, in any case where less than a majority of the Whole Number of Governor and judges Consent to his Signing it for that purpose, is an essential Change of the Ordinance, and Can be Conferred only by an act of the Congress of the United States; that no law of the State of Vermont, or of any other State exists of Similar import; that the power attempted to be given by the Second Section of the Said bill is therefore Void, and that the acts done under it are also void."

In Woodward's thinking it was proper for a majority of a quorum of three to adopt a law provided all three signed the law. With three signatures, each law would be clothed with the outward and legally conclusive approval of the majority required by the Ordinance.

The laws published in 1808 and 1809 involved seventy-seven adoptions from seven states: Connecticut—3; Massachusetts—15; New York—12; Ohio—11; Pennsylvania—3; Vermont—26; Virginia—7. The fact that more than half of the adoptions were from New England suggests that origin of the legislators was a

¹¹¹ 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, 515 (Blume ed. 1935).

controlling factor in state selection. That Governor Hull had practiced law in Massachusetts has been noted. Acting-governor Attwater, a first-cousin of the governor, was from Vermont, as was the new judge—Witherell. Attwater had practiced law some fifteen years before his appointment.¹¹² Witherell, originally from Massachusetts, had served as chief justice of a Vermont county court, and was a member of Congress from Vermont at the time of his appointment. A letter recommending him for appointment as territorial judge stated that an objection to his appointment "on account of his not haveing had an early & regular law Education" was "wearing out," as the law had been his study and the exercise of judiciary duties had been his business "ever since."¹¹³ That Judge Witherell took the lead in the legislative program of 1808-1809 is indicated by the fact that the laws adopted came to be known as the *Witherell Code*.

Following the court decisions that nullified the laws published in 1808 and 1809, Governor Hull issued a proclamation in which he declared that no power on earth could disapprove and annul laws adopted and published by the governor and judges, except the Congress of the United States. He further declared that any other construction of the Ordinance would be an absurdity, and called upon all officers, civil and military, to carry the laws into effect.¹¹⁴ In answer to a writ of mandamus one of the district judges declared that the acts signed by the governor were valid; that the Supreme Court had no power to declare them otherwise; and that "he would prefer death to such compliance and act a part so unworthy the Character of an honest man and a Judge."¹¹⁵ Judge Woodward accused the governor of attempting to subvert the judicial authority *by force*, and declared it was his duty to

¹¹² Bradley to the President, December 26, 1807, in 10 TERRITORIAL PAPERS OF THE UNITED STATES 166 (Carter ed. 1934). A list of books "Property Belonging to Reuben Attwater, Taken and Destroyed by the British and Indians, at Detroit Michigan Territory on the 16th August 1812" will be found in 11 *id.* 644-45. Included in the list are: "1 Vol Jacobs Law Dictionary [\$]10.0; 4 Vol. Blackstones Commentaries 12.0; 1 Vol Cowpers Reports 3.0; 1 Vol Bullers Nisi Prius 3.0; 1 Vol Espinass 2.0; . . . 7 Vol. Bacons Abridgement 50.0; 1 Vol Vattell law of nature & Nations 3.50; . . . 1 Vol Kirbys Reports 2.0; 1 Vol Days cases in Error 2.0; 1 Vol Atty Pocket Book 1.0; 2 Vol Montesque 4.0; 1 Vol Peak on Evidence 3.50; 1 Vol Every man his own lawer 2.0; 1 Vol Chipmans Reports 2.0. . . ."

¹¹³ *Id.* at 167.

¹¹⁴ 2 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, 286 (Blume ed. 1935).

¹¹⁵ *Id.* at 299.

oppose the governor by what would "certainly be a *firm* opposition."¹¹⁶

The controversy over the validity of the laws signed by the governor and acting-governor alone brought about a complete cessation of legislative activity until September 1810, when Governor Hull and Judge Witherell agreed to join with judges Woodward and Griffin in an act declaring null as to future operation all bills and acts relating to the manner of authenticating the legislative acts of the government.¹¹⁷ This was followed by an act repealing all laws passed between June 2, 1807, and September 1, 1810.¹¹⁸

The *Witherell Code*, though in effect only a brief period of time, is of interest as showing what two New Englanders and (perhaps) a Virginian thought would constitute a complete body of territorial law suited to the conditions of a frontier territory. Some of the laws included in the *Code* were immediately re-adopted. And it seems clear that the contents of the *Code* suggested the course of later legislation.

1810-1813

Following the repeal of the *Witherell Code* Judge Woodward, aided by Judge Griffin, took the lead in a program to carry out his proposals of 1808. The first step (September 16, 1810) was an act declaring that no British statutes, laws of prior territories, or French laws should have force within the Territory.¹¹⁹ The preambles to the various sections of this act indicated a fear that the "good people" of the Territory might be "ensnared" by laws not published with the territorial laws, or otherwise available in the Territory.

Woodward's proposal, in his resolutions of 1808, that the "common law of England, or such parts thereof as have been found inexpedient" should cease to operate, except as included in published statutes, was not covered by the repealing act of 1810. While it seems probable that Woodward believed himself capable of codifying such parts of the English common law as were suitable to the conditions of the Territory, the practical difficulty of doing

¹¹⁶ 36 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 365-67 (1908).

¹¹⁷ 4 LAWS OF THE TERRITORY OF MICHIGAN (Supp.) (reprint) 92 (1884).

¹¹⁸ 1 *id.* at 902 (1871).

¹¹⁹ *Id.* at 900.

this by adopting laws from original states would prove insuperable. Even the task of re-enacting British statutes would be difficult because of the necessity of finding state re-enactments for adoption. How the common law of England should be adapted to American conditions was indicated by the judge in an opinion delivered in the territorial Supreme Court in 1809:¹²⁰

"In moulding the jurisprudence of the maternal Kingdom to this adolescent republic, it ought to be the primary object to discern the use of every part, avoiding its abuse; and premitting all that is obsolete, inapplicable, or excrescent. While the Solid and Valuable trunk of english jurisprudence is Sustained; its Superfluous and incongruous appendages, ought to be Subjected to a bold, but happy excision."

While in Washington in 1813 he proposed the adoption of a code to supersede the common law in the District of Columbia.¹²¹

It should be noted that the proposals of 1808 and the repealing act of 1810 were not products of prejudice against English law because of past war, or the pending threat of a new war. In his opinion of 1809 Judge Woodward referred to England's "grand System of justice" of which the writ of mandamus was "one of its most Shining features."¹²² He began his opinion by stating:

"The United States of America derive So much of their government and jurisprudence from the Celebrated and potent island on the western Coast of Europe, by Whose enterprise and perseverance the Northern part of this hemisphere has been principally Colonized, that it is difficult, even at this day, to decide ordinary Cases, without a reference to the laws and policy of Britain."

In 1806 Judge Bates remarked that the "wisdom" of the common law was "attested by the consequentive approbation of ages."¹²³

¹²⁰ 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, 500 (Blume ed. 1935).

¹²¹ According to Burton (founder of the Burton Historical Collections, Public Library, Detroit), "It was while Woodward was in Washington in 1813 that he proposed and advocated the adoption of a code to supersede the common law in the district of Columbia, an idea that he attempted to carry out in part, in Michigan by abolishing the laws of all foreign countries." 29 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 656 (1899-1900).

¹²² Note 120 *supra*, at 501.

¹²³ P. 341 *supra*.

It was not prejudice against things English, but a desire to have all law applicable to the Territory identified and available in writing, that led to the repealing act of 1810.

The Michigan plan of adopting a complete body of territorial statutes—one that did not continue in force any British statutes not fully re-enacted—was borrowed from Virginia. The Northwest statute of 1795,¹²⁴ recognized as in force in Michigan as a result of the decision of September 26, 1806,¹²⁵ was taken from the Virginia Ordinance of 1776¹²⁶ which had declared:

“That the common law of ENGLAND, all statutes or acts of parliament made in aid of the common law, prior to the fourth year of the reign of King JAMES the first, and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the General Convention, shall be the rule of decision, and shall be considered in full force until the same shall be altered by the legislative power of this colony.”

But before the adoption of this provision in the Northwest Territory it had been repealed by a Virginia statute passed December 12, 1792, with this preamble:¹²⁷

“[W]hereas the good people of this Commonwealth may be ensnared by an ignorance of acts of parliament, which have never been published in any collection of the laws, and it hath been thought advisable by the General Assembly, during their present session, specially to enact such of the said statutes as to them appear worthy of adoption, and do not already make a part of the public code of the laws of VIRGINIA.”

The General Assembly enacted:

“That so much of the above recited ordinance [of 1776] as relates to any statute or act of parliament, shall be, and is hereby repealed; and no statute or act of parliament shall have any force or authority within this Commonwealth.”

¹²⁴ P. 337 *supra*.

¹²⁵ P. 341 *supra*.

¹²⁶ 1 THE REVISED CODE OF THE LAWS OF VIRGINIA 135 (1819).

¹²⁷ *Id.* at 137.

The Michigan repealing act of 1810, republished in the *Code of 1820*, commenced with this preamble:¹²⁸

“Whereas the good people of the territory of Michigan, may be ensnared by ignorance of acts of the parliament of England, and of acts of the parliament of Great Britain, which are not published among the laws of the territory, and it has been thought advisable by the governor and the judges of the territory of Michigan, hereafter specially to enact such of the said acts as shall appear worthy of adoption.”

The Michigan act declared that “no act of the parliament of England, and no act of the parliament of Great Britain” should have any force within the territory, and recited that it had been adopted “from the laws of one of the original states, to wit, the state of Virginia, as far as necessary and suitable to the circumstances of the territory of Michigan.”

The Virginia revisal of 1792 which undertook to eliminate all British statutes not specially enacted was the end product of an extensive program of statutory reform sparked by Thomas Jefferson. According to his *Memoirs* (1829),¹²⁹ Jefferson left Congress in 1776 “in the persuasion” that Virginia’s whole code must be reviewed, and adapted to its “republican form of government.” As a member of a revision committee appointed by the Assembly in 1776,¹³⁰ Jefferson undertook to draft bills that would modify the common law, and supplant British statutes enacted prior to 4 James I.¹³¹ A suggestion that all the law be codified was given careful consideration, and then rejected for reasons that Jefferson considered valid.¹³² In regard to the final report of the Committee submitted in 1779 Jefferson stated:¹³³

“We had in this work, brought so much of the Common law as it was thought necessary to alter, all British statutes from *Magna Charta* to the present day, and all the laws of Virginia, from the establishment of our legislature, in the 4th Jac. I. to the present time, which we thought should be retained, within the compass of one hundred and twenty-six bills, making a printed folio of ninety pages only. Some

¹²⁸ 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 900 (1871).

¹²⁹ Vol. 1, p. 34.

¹³⁰ *Id.* at 36.

¹³¹ *Id.* at 35.

¹³² *Id.* at 34-35.

¹³³ *Id.* at 36.

bills were taken out, occasionally, from time to time, and passed; but the main body of the work was not entered on by the legislature, until, after the general peace, in 1785, when, by the unwearied exertions of Mr. Madison, in opposition to the endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demi-lawyers, most of the bills were passed by the legislature, with little alteration."

Bill No. 126 provided for the repeal of British statutes except those enacted by the Assembly in express words. This bill was presented by Madison in 1785, action postponed, brought up again in 1786, but never passed.¹³⁴ It was not until after the members of the Assembly had specially enacted during the session of 1792 those statutes originally British that appeared to them "worthy of adoption" that they were willing to cut the ancient moorings. In contrast with the caution displayed by the Virginia Assembly, the governor and judges of Michigan somewhat recklessly repealed all British statutes and all statutes of prior territories without first specially enacting such of the repealed statutes as were needed in the Territory.

Before any substantial progress could be made in filling the vacuum created by the repealing act of 1810, war with Great Britain was declared. The seat of the territorial government was captured by the British August 16, 1812, and held until September 29, 1813. A law was published on August 13, 1812; the next on October 1, 1814. Of the forty-two adoptions made in 1811 and 1812, only fourteen were from New England—Connecticut—2; Massachusetts—4; Vermont—8. The others were from Maryland—4; New York—5; Ohio—7; Pennsylvania—6; Virginia—6. The governor, the acting-governor, and one judge were from New England, but could not make an adoption without the concurrence of one of the other judges. Any scheme that may have existed to give the laws of the Territory a New England character had been effectively checked.

1814-1823

When legislative activity was resumed after the War the Territory had a new governor—Lewis Cass, and a new Secretary—

¹³⁴ 2 THE PAPERS OF THOMAS JEFFERSON 656 (Boyd ed. 1950).

William Woodbridge. The judges remained the same—Woodward, Griffin, and Witherell. Cass, born in New Hampshire, had studied at the Phillips Exeter Academy; had taught school a short time in Delaware; and in 1800 at the age of eighteen had gone with his father to Marietta—the first settlement of the Ohio Company in the Northwest Territory. After a period of study in the law offices of Return Jonathan Meigs and Matthew Backus at Marietta, Cass had been admitted to the bar in the new state of Ohio in 1803, where he practiced law until the War of 1812.¹³⁵ Woodbridge was born in Connecticut in 1780. After approximately three years of study in the law school at Litchfield, he was admitted to the bar in Ohio in 1806, where he practiced law until 1814, when he came to Michigan Territory as Secretary of the Territory, and Collector of Customs at Detroit. He had been a close friend and associate of the new governor, and, according to Woodford, in the governor's absence "functioned like Cass's alter ego."¹³⁶

When Cass took office in the fall of 1813 the only statutes (other than acts of Congress) in force in Michigan were those published in the Territory in the years 1805-1807 and 1810-1812. All British statutes, and all statutes of prior territories, had ceased to operate. The task of building up a complete body of statutory law was indeed a formidable one. A preliminary step was to publish in one volume all laws in force in 1816. This volume, known as the *Cass Code*, was "intended to answer a temporary purpose only."¹³⁷ Some of the laws were published in full; some were digested; and in some instances only the title was given. This so-called "Code" was nothing more than a re-publication of the incomplete system of statutes then in force.

In the fall of 1818 the Supreme Court was called on to decide the validity of service of a civil *capias* on Sunday.¹³⁸ Attorneys for the plaintiff (Whitney and Woodbridge) took the position that service of civil process on Sunday was lawful at common law; that the English statute of 29 Car. 2, c. 7 (1677), prohibiting the execution of process on Sunday, was never in force in "this country"

¹³⁵ WOODFORD, LEWIS CASS, *passim* (1950).

¹³⁶ *Id.* at 150.

¹³⁷ CASS CODE, Preface (1814).

¹³⁸ James Grant v. Thomas, Earl of Selkirk (1818), 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, 431 (Blume ed. 1935).

unless between the years 1763¹³⁹ and 1783;¹⁴⁰ and that the Northwest statute of 1799,¹⁴¹ exempting defendants from civil arrest on Sunday, was not then in force in Michigan Territory. Attorneys for the defendant (Sibley and Whiting) argued that the Northwest statute had continued in force in both Indiana and Michigan territories, and had not been repealed by the Michigan repealing act of 1810, the governor and judges being authorized to repeal only "laws by them made."¹⁴² In an opinion,¹⁴³ referred to by the *Boston Palladium* as displaying "the most extensive erudition and diligent research,"¹⁴⁴ Judge Woodward traced the history of Sunday in both Roman and Canon law from the beginning of the Christian era, after which he stated:

"It remains to enquire how far the regulations of CONSTANTINE, adopted by the Canonical Law, and thence transferred to the Civil Codes of Christendom, are ingrafted into the Common Law of England; and then, more particularly, to examine whether *an arrest, on civil process, on Sunday*, be an infraction of that law.

"That system of regulations and enactments, which bears the grand, and widely circulated, appellation of 'THE COMMON LAW,' receives its date from the third day of September, in the year 1189.

"On that day, being the epoch of the coronation of RICHARD Coeur de Lion; and the first monarch of the name of RICHARD on the English throne; the 'COMMON LAW' became complete, and insusceptible of any additions.

"The Common Law is composed of the *unwritten*, and of the *written*, law of England, anterior to that aera."

After finding that the regulations referred to had become a part of the English common law prior to 1189, and that arrest on Sunday was an infraction of "PAX DEI ET SANCTAE ECCLESIAE," "*The Peace of God and of Holy Church*," the learned judge stated:

¹³⁹ Date of treaty between Great Britain and France by which France ceded to "his said Britannick Majesty, in full right, Canada with all its dependencies," including the area which became the Northwest Territory.

¹⁴⁰ Date of treaty between Great Britain and the United States which recognized the Claims of the States to the area west of the Appalachians which lay east of the Mississippi, north of Spanish Florida, and south of the Great Lakes.

¹⁴¹ CHASE 257; PEASE 445.

¹⁴² The Northwest statute had been passed by the General Assembly, not made by the governor and judges.

¹⁴³ Note 138 *supra*.

¹⁴⁴ Quoted in Detroit Gazette, July 27, 1821.

"Deeming *arrest, on civil process, illegal on Sunday, at common law*, I am not bound to approach any of the ingenious questions which have been raised relating to the local statutes. It may be conceded that the English statute, and that the statute of the North Western Territory, are repealed by the law of the sixteenth of September 1810, entitled 'An Act to repeal all acts of the Parliament of England, and of the Parliament of Great Britain, within the Territory of Michigan, in the United States of America, and for other purposes;' and, yet, the arrest of the Earl of Selkirk, on Sunday, will not remain 'legitimate at the Common Law.'"

By holding that the service on Lord Selkirk was invalid, the court avoided the necessity of deciding whether the United States or Great Britain had jurisdiction over the area in which the events involved had occurred. In a letter concerning the case written to the Secretary of State, December 5, 1818, Judge Woodward reported that Lord Selkirk had stated that "the commissioners, who, on the part of the king, negotiated the treaty by which the boundary was established, were fools."¹⁴⁵ The judge indicated his great interest in having the United States "obtain the whole of the British possessions, on this continent, by negotiation," saying:

"The obstacles will multiply with every successive day; and the Russian interests, at present inconsiderable, may, in no long time, assume a great consequence.

"The present æra is, certainly, not unfavorable for a complete absorption of all foreign claims to our continent."¹⁴⁶

Judge Woodward seems to have been highly pleased with his opinion but whether it was because of its display of erudition and research, or because it enabled the court to get rid of the *Selkirk* case, is difficult to say. That the reasoning of the opinion may not have been wholly convincing is indicated by the fact that a statute substantially the same as the English statute of 1677 was included in the *Michigan Code of 1820*.¹⁴⁷

Determination of what British statutes were needed for a complete system of territorial laws was no easy task, as shown

¹⁴⁵ 10 TERRITORIAL PAPERS OF THE UNITED STATES 791 (Carter ed. 1934).

¹⁴⁶ *Id.* at 792-93. The views expressed are part of the background of the Monroe Doctrine.

¹⁴⁷ 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 645 (1871).

by the Virginia experience referred to above, and it is not surprising that all needs were not foreseen. In a case before the territorial Supreme Court in 1828¹⁴⁸ a controlling question was whether a claim for conversion of personal property had survived the death of the owner of the property. The answer depended on whether the statute of 4 Edw. 3 (1330), giving executors an action against persons who had taken the chattels of their testators in their lifetime, was in force in Michigan as a part of the common law. The English statute had been included in the *Wetherell Code* (1808-09)¹⁴⁹ (repealed in 1810) but not in the *Code of 1820*. The court held the action did not survive, Judge Woodbridge (one of the attorneys in the *Selkirk* case¹⁵⁰) noting that the English statute was "introductive of new law" hence did not "possess any force" within the Territory. According to Judge Sibley (also one of the attorneys in the *Selkirk* case), the common law referred to in the Ordinance of 1787 was the English common law of 1776 as modified by English statutes enacted prior to that date. In a case before the state Supreme Court in 1886,¹⁵¹ Campbell, C.J., after calling attention to the repealing act of 1810 and the fact that it left "no statute or code law in force except that of Michigan territory and the United States," remarked: "Michigan was never a common-law colony, and while we have recognized the common law as adopted into our jurisprudence, it is the English common law, unaffected by statute."

In a letter to the Secretary of State, dated January 15, 1818,¹⁵² Woodbridge, as Secretary of the Territory, called attention to the loss and destruction of government books and records by the late enemy, and suggested "how very desirable it would be if the Office of the Secretary of this Territory could be furnished by the General Government with entire sets of the Legislative Acts of the original States—"

"The want of them is severely felt, as in the first grade of Territorial Government its Legislative Authority are restrained in their power to the *adoption* only of laws from the

¹⁴⁸ 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1825-1836, 305 (Blume ed. 1940) (*Chene v. Campau*).

¹⁴⁹ 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 27-28 (1874).

¹⁵⁰ Note 138 *supra*.

¹⁵¹ *In the Matter of Lamphere*, 61 Mich. 105, 108 (1886).

¹⁵² 10 TERRITORIAL PAPERS OF THE UNITED STATES 713 (Carter ed. 1934).

original States without permission to originate or make them. There is not in the office the code of any one State."

In March 1818 the Secretary of State replied:¹⁵³

"I am sorry that the Territorial Government of Michigan cannot be supplied with the Statutes of the original states, according to your suggestion. This Dept. has failed in its best efforts to procure sets of those statutes for its own use, and it is somewhat doubtful whether there be any law which would authorize the expense, even if it could procure them for the Michigan Government. J.Q.A."¹⁵⁴

As shown by the chart on page 334 *supra*, 268 laws were published by the governor and judges of Michigan in the period 1814-1823, involving 401 adoptions from thirteen states. Since only 119 of these laws were included in the *Code of 1820*, the others, except those repealed, must have been considered as special or temporary, and not suited for publication in a code of general law. Of the 134 adoptions from Ohio, for example, only 57 were of a general and permanent nature, the others being appropriation acts or special or local laws. Although the governor and acting-governor had practiced law in Ohio, there is nothing to indicate a desire on their part to adopt Ohio laws in preference to those of other states.

Judge Woodward's interest in codification seems to have been revived in 1819.¹⁵⁵ In October, November, and December of that year the territorial Supreme Court made and recorded 168 court rules: 33 at sessions of the court held by all the judges; 49 at

¹⁵³ *Id.* at 737.

¹⁵⁴ December 30, 1826, the Legislative Council of Michigan Territory adopted a resolution "That the Governor of this Territory be requested to open a correspondence with the Governors of the several States and Territories for the purpose of procuring the laws of the several States and Territories, for the use of the Legislative Council." 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 303 (1874). The *Journal of the Council*, First Session of the Third Council, pp. 68-69, contains a "Catalogue of Books belonging to the Legislative Council of the Territory of Michigan—May 9th, 1828," and a "Catalogue of Books belonging to the Legislative Council of the Territory of Michigan, missing on the 30th May, 1828." From these catalogues it appears that the Council had been able to acquire one or more pamphlets or bound volumes of the "Laws" of Connecticut, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, New York, Ohio, Pennsylvania, South Carolina, Virginia, United States. Of 131 items listed as belonging to the Council in 1828 over a hundred were put on exhibit by the State Library in 1928. 19 MICH. LIBRARY BULL. 260 (Nov. 1928).

¹⁵⁵ See *Rule-Making Power and Its Exercise*, 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, xi-xxxiii (Blume ed. 1938).

sessions held by judges Woodward and Griffin; one at a session held by judges Woodward and Witherell; and 85 at a session held by Woodward alone. In November 1819 the Court ordered that some proper person should, from time to time be appointed to "digest the Rules of the Court, in such manner as to bring those relating to particular subjects close together; and that the same, thus digested, be, from time to time, printed."¹⁵⁶ In the course of a long communication printed in the *Detroit Gazette*, August 11, 1820, a capable writer, "Xenos," complained:

"That the supreme court, during a great part of a four months' session, held its sittings during the night, instead of the day time; and then without the knowledge of the people, at private offices, where not only the suitors, but even the officers of the court had no *right* to intrude, and could not possibly be accommodated with seats, when they did.

"That at these night sessions, a multitude of rules of court were entered of record, vitally affecting the rights of suitors—some of which annul rights at common law; others are palpably legislative acts, and one, at least, going to alter an act of Congress."

In April 1821 Governor Cass in a letter to Solomon Sibley, Delegate to Congress, reported:¹⁵⁷

"We have nearly closed our legislative labours, and shall present quite a formidable book to the Territory. I hope it will last as long, at least, as we have been preparing it. The Supreme Court is yet in session, and digesting a body of rules. The perseverance of the Chief Judge is equal to every obstacle, which opposes this favourite plan, and I believe he will ultimately push them through. Judge Witherell has seceded from the Court, and takes no part in their deliberations."

Although free from the adoption requirement, and able to make rules at sessions held by fewer than all the judges, the Court recognized that rules made by it should not conflict with laws published by the governor and judges as a legislature. In 1821 after the legislative board had undertaken to regulate by statute many of the matters regulated by the court rules of 1819, the

¹⁵⁶ 2 *id.* 192.

¹⁵⁷ SIBLEY PAPERS, Burton Historical Collection, Public Library, Detroit.

Court rescinded most of the 1819 rules, and stated in an order approving a digest of the rules not rescinded that some of the previous rules had been "enacted into Statute"; others "superceded by statute."¹⁵⁸

The "formidable book" referred to by Cass in his letter to Sibley was published in 1821, but was dated "1820" and known as the *Code of 1820*. Printing of the territorial laws had been authorized by Congress by an act approved April 24, 1820.¹⁵⁹ In a letter to Sibley dated November 24, 1820, Andrew G. Whitney, Sibley's law partner, reported:¹⁶⁰

"Legislation goes on swimmingly, the printed statute book is encreasing in bulk daily.—Most of the important statutes are passed—The Judiciary Law—Chancery Law—Bail Law—Deposition Law—Replevin Law—Sheriffs—Coroners— Constable laws—Entry & Detainer & attachment Law &c—An Ejectment & Mortgage law are under way—& a fee bill—It is expected the whole Code will be revised & printed in a few weeks—Griffin has not been at the board this month, but Woodward has taken his place for the purpose of electioneering for himself against next year."

An anonymous writer, "Tickler," in a letter printed in the *Detroit Gazette*, December 8, 1820, complained:

"When Congress, last winter, made an appropriation for printing the laws of this territory, it was hoped that all the members of the Legislative Board would show industry, and carefully revise the laws already passed, and as soon as possible adopt such others as should be found necessary. Judge Woodward absented himself entirely from the Board during almost the whole of last winter, and all the past autumn until Monday, the 27th ult. Judge Griffin, during the recent revision, has, apparently, taken no interest in it, and has publickly avowed that his only and sole object in attending the sessions, was, to form a quorum, that the other *two* members might transact the business!—Even this duty was too laborious, and a few days ago he withdrew from the Board, declaring 'they had made a mere drudge of him, and had nearly worn his soul out'—that 'it was Judge Woodward's turn

¹⁵⁸ 2 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, 270-71 (Blume ed. 1938).

¹⁵⁹ 3 Stat. 565.

¹⁶⁰ SIBLEY PAPERS, note 157 *supra*.

now'—[*I won't go, Father, it's John's turn*]—and he had 'no idea of one member doing everything, &c.'"

In a letter to Sibley dated December 16, 1820, John P. Sheldon, one of the editors of *Gazette*, remarked that Judge Griffin had "fled from the Legislative Board," and "old Sulphur legislates in his stead."¹⁶¹

Judges Woodward and Griffin were under attack by a group later known as the "anti-court party," and for this reason, if no other, charges made against them in the *Detroit Gazette* or by its editor should be carefully checked. The charge that Judge Griffin had no interest in the preparation of the *Code* is not surprising in view of his past record. As early as 1808 it was said of him that he was "little more than a cipher in our little government."¹⁶² While this appraisal is unfair, it seems that he was always complaining of bad health, and lived leisurely the life of an amiable bachelor. That Judge Woodward did not attend many sessions of the legislative board when it was most active in preparing the *Code of 1820* is shown by the laws published in the *Code*, but this fact alone should not be accepted as indicating that his contributions to the *Code* were negligible. He signed 19 of the 29 older laws republished in the *Code* without change, and 55 of the 92 laws adopted in the period of law revision—September 1819-June 1821. Governor Cass signed all the laws published in the *Code*, except two that had been adopted before he became governor of the Territory. In the fall of 1819 Judge Woodward was absorbed in his "favourite plan" of adopting and digesting court rules, while the governor pushed the revision of the statutes. Judge Witherell "seceded from the Court," and gave full support to the governor. Judge Griffin, always loyal to Woodward, found himself torn between judicial rule-making and the need of his presence to make a quorum for legislation. He may well have felt that they had made "a mere drudge of him, and had nearly worn his soul out."

In January 1822 Governor Cass made a draft on the Secretary

¹⁶¹ *Ibid.* August 18, 1820, Sibley wrote Governor Cass: "We are anxious for your return, as the Hon^l Judge Griffin has declined any further revision of the Laws,—His pretence is that you are still in the Territory & that Mr. Woodbridge of course cannot act in your place — He is off for Philadelphia — The Printing is suspended —" 11 TERRITORIAL PAPERS OF THE UNITED STATES 57 (Carter ed. 1934).

¹⁶² 12 MICHIGAN PIONEER COLLECTIONS 654 (1887).

of State in favor of James D. Doty for \$199.72½ “in full for his services in correcting the press, and preparing marginal notes and an index to the laws of the Territory of Michigan.”¹⁶³ The governor had been commissioned to oversee the printing of the laws, and had employed Doty to do the work referred to in the draft. The Secretary of State had directed that the printing be done in the Territory so any defects found in the “code” might be “immediately corrected” by the local legislature.¹⁶⁴ Although Doty—a young lawyer who had served for a time as clerk of the territorial Supreme Court—had tried his hand at reporting the decisions of the Court, he had had no previous experience in arranging or indexing a code. Appointed “additional” territorial judge in 1823, he presided over a circuit court in the areas of the Territory north and west of Lake Michigan.¹⁶⁵

A memorial to Congress dated November 11, 1822,¹⁶⁶ signed by some seven hundred inhabitants of the Territory (almost all with French names), stated that the signers were opposed to a proposed change in the form of the temporary government. While recognizing the dangers involved in the blending of legislative and judicial powers, the signers reported:

“But many of your Memorialists, having lived seventeen years, under the present form of government, are Satisfied, that the Code of Laws just published, and which has been printed at the expence of the national government, at the cost of Twelve hundred and fifty Dollars, is the most unexceptionable body of Laws, which has ever been given to the people of Michigan.

“And it is but justice to the members of the government, to state, that in every instance where the public will has been expressed, they have manifested a great willingness to gratify the people, by adopting any law that was thought expedient, or repealing or altering other laws, that were deemed inexpedient.—”

The laws published in the *Code of 1820*, as modified and supplemented by the Legislative Council of Michigan (1824-1836), were passed on to the state of Michigan, and to the ter-

¹⁶³ 11 TERRITORIAL PAPERS OF THE UNITED STATES 220 (Carter ed. 1934).

¹⁶⁴ *Id.* at 31-32.

¹⁶⁵ These areas were added to Michigan Territory in 1818.

¹⁶⁶ 11 TERRITORIAL PAPERS OF THE UNITED STATES 278, 280 (Carter ed. 1934).

ritories of Wisconsin, Iowa, and Minnesota. Governor Cass expressed the hope that the *Code* would "last as long, at least, as we have been preparing it."¹⁶⁷ It is unfortunate that his name has been associated with the reprint of 1816, instead of with the complete system of statutory law published in 1821, and known as the *Code of 1820*. His leadership in producing this excellent body of laws should be recognized as one of the major achievements of his long and successful public career.

IV. INFLUENCE OF THE FRONTIER

As the line of continuous settlement moved westward across what is now continental United States, its location was given in census returns through 1880 and shown on contemporaneous maps.¹⁶⁸ This moving line marked the "American frontier," and, according to the "frontier theory," as old social institutions reached the frontier changes were generated by contact with the unsettled areas beyond the frontier. It has been assumed that legal institutions were modified in a similar manner.¹⁶⁹

While it is realistic to visualize a frontier of settlements, to think of this frontier as a line between law and no-law is entirely erroneous. Settlers moving to the western line of continuous settlement brought with them their previous habits and customs, but did not, and could not, continue their previous legal institutions for the simple reason that persons living in a particular geographical area must be governed by a single body of public and private law. Unlike the early English settlers who had a common legal background, the settlers moving westward from the original colonies were accustomed to diverse legal institutions which must be left behind.

Although unable to bring to the frontier their previous legal institutions, settlers in an area traversed by the frontier line had a part in forming a single legal system for the area. It may be of interest to know how far, if any at all, such a system was influenced by the fact that the area was partly within, and partly beyond, the line.

Before permitting settlement in a frontier area, Congress

¹⁶⁷ P. 362 *supra*.

¹⁶⁸ See "Influence of the Frontier" in the first article of the present series, 56 MICH. L. REV. 161, 203 (1957).

¹⁶⁹ *Ibid.*

established in the area a local legislature and a supreme judicial court, charging these agencies with the task of establishing a system of law suitable to the conditions of the area, not inconsistent with the laws of Congress, and the Constitution of the United States. In the earliest territories there were two stages of territorial government—one, in which laws were not “made” by the legislative agency, but “adopted” from one or more of the original states; the other, in which laws were “made” by the local agency, subject to an absolute veto by a governor appointed by the national government, and by the national Congress. As no local legislature was expected to “adopt” or “make” a complete system of law by statute, a source of non-statutory decisional law was designated so the supreme judicial court would always have rules for deciding particular cases. The source designated was the English common law, and the court was called upon from time to time to decide whether a particular rule of common law should be adopted or rejected as a rule of decision in the area. Also involved in this process was the necessity of deciding whether particular English statutes, which had modified the common law, should be considered a part of the common law. Freedom on the part of the court to adopt, adapt, or reject common law rules of decision (including British statutes) made it possible for the court to mould the non-statutory decisional law into a system suited to frontier conditions. The legislative authority in the first stage of territorial government was limited to the adoption of laws from the original states, but even with this limitation laws suited to frontier conditions could be assembled by selecting those passed in the settled areas at a time when they too had a frontier line. The legislative authority of the second stage had an easier task, as it could “copy” or “originate” as it saw fit, subject to the vetoes referred to above. Insofar as statutes and rules of decision, adapted to frontier conditions, were passed on to the states formed from the territories, the frontier influenced the shaping of American law.

The present study has been limited to the first governmental stage of three frontier territories. The source of the non-statutory decisional law during this period was the English common law; the source of statutory law, the statutes of the original states. Property rights acquired under pre-existing French law were recognized, but no attempt made to use the Custom of Paris or other

French law as a source of decisional law, except for the benefit of the French settlers mentioned in the Ordinance.¹⁷⁰ All French law was expressly repealed in Michigan Territory in 1810.¹⁷¹ Indian tribal law was applied in one or two cases involving Indians, but not looked to as a source of law. As the Indian titles were extinguished, the tribal laws disappeared.¹⁷²

In the development of the decisional law there was little room for experimentation. A common law rule of decision might be adopted or rejected, or perhaps adapted, but there was no authority to create entirely new law by court decision, and this was not attempted. Judge Sibley of Michigan observed that the courts were "constantly drawing from the same fountain in aid of their adjudications of questions as they arise," and noted that this practice might be carried to the extent of introducing the "entire body" of the English common law "if the Interest and Convenience of the new society require it."¹⁷³ But to go beyond this, no one suggested. In the development of the systems of statutory law in the first governmental stage there was likewise little room for experimentation. Parts of laws of different states might be assembled in new combinations, but even this was condemned by Governor St. Clair. Judge Bates of Michigan referred to the fact that he and the other members of the legislative agency were "forbidden indeed to make *experiments*," adding: "For indeed it has been our fortunate lot to have those experiments made for us."¹⁷⁴ But it seems clear that another member of the agency—Judge Woodward—did not share the satisfaction expressed by Judge Bates.

Woodward was a person of lively imagination who chafed at, and sought to avoid, the limitations placed on local legislation. He considered it proper to assemble a law by adopting parts from different states, and felt free to change "with perfect latitude" all expressions of time and number; personal descriptions; geographical locations; and other similar "points" to render the

¹⁷⁰ See "Custom of Paris" in the third article of the present series, 58 MICH. L. REV. 209, 210 (1959).

¹⁷¹ *Id.* at 214.

¹⁷² See "Indians and Indian Country" in the second article of the present series, 57 MICH. L. REV. 195, 211, 216 (1958).

¹⁷³ *Chene v. Campau* (1828), 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1825-1836, 305, 311 (Blume ed. 1940).

¹⁷⁴ *Id.* 1805-1814, xxii, n.49.

law adopted "*suited to the circumstances of the district.*" He was frank to admit that "after so many mutations" it might be difficult "to recognize in the *child* adopted, the lineaments of the *parent* which gave it birth."¹⁷⁵

The breadth of Woodward's thinking, his desire to innovate, and his image of America, may be indicated by brief references to some of his varied interests. Shortly before coming to the frontier he published a booklet entitled *Considerations on the Substance of the Sun* in which he declared "that the substance of the Sun is electron."¹⁷⁶ Shortly after his arrival he proposed that the village "Of the Narrows" (D'Eetroit) be replanned on a scale as grand as L'Enfant's plan for the national capital.¹⁷⁷ It was said that the fortifications of the village satisfied all except the chief judge, who, according to Governor Hull, would have cordially approved "a solid wall around the Territory, or indeed from the Earth to the Sun."¹⁷⁸ A bank proposed in 1806 with a capital of \$100,000 and a charter-life of 30 years was, on the judge's

¹⁷⁵ P. 344 *supra*.

¹⁷⁶ WOODFORD, A LIFE OF JUSTICE WOODWARD 145-48 (1953).

¹⁷⁷ *Id.* at 36-52, quoting at p. 48 the following contemporaneous account of Woodward's activities written by John Gentle: "After a few days spent in preparing their apparatus, the judge began his operations on a height contiguous to the fort. There he placed his instruments, astronomical and astrological, on the summit of a huge stone which shall ever remain a monument to his indefatigable perseverance.

"For the space of thirty days and thirty nights he viewed the diurnal evolutions of the planets, visible and invisible, and calculated the course and rapidity of the blazing meteors. To his profound observations of the heavenly regions the world is indebted for the discovery of the streets, alleys, circles, angles and squares of this magnificent city — in theory equal in magnitude and splendor to any on the earth." Also see 1 FARMER, HISTORY OF DETROIT AND MICHIGAN 26 (2d ed. 1889).

¹⁷⁸ Writing to the Secretary of War in 1807 the governor stated: "The fortifications however are on too small a scale, for the expanded Ideas of the learned Judge. Had an attempt been made to have built a solid wall around the Territory, or indeed from the Earth to the Sun it would have met his cordial approbation. It would have astonished wherever it was told, and gratified his ruling passion — . . . He despises every thing tinged with the rust of antiquity, and is enamoured with modern improvements and speculations, whether on the Earth or in the Sun. Unfortunate it is indeed, that a Man of his fine talents, cannot level them to useful & practical purposes —" 40 MICH. HIST. COLL. 242, 243 (1920). In a letter to the President written in 1808 Governor Hull stated: "Judge Woodward, will probably remain here. I respect him, as a scientific man; and he may be useful where he cannot take the lead. He may suggest many brilliant things, which after being pruned, and qualified, may be useful. His Misfortune is, that he cannot level his mind, to the common — ordinary occurrences of life. The experience of past times, is no lesson to him, and his ambition appears to be, to surprise mankind, by the singularity, and novelty of his schemes." 10 TERRITORIAL PAPERS OF THE UNITED STATES 206, 207-08 (Carter ed. 1934). The references to heavenly bodies in Gentle's account (note 177 *supra*) and in the governor's letter to the Secretary of War were inspired, no doubt, by Woodward's "Considerations on the Substance of the Sun."

insistence, enlarged to a capital of \$1,000,000, and a life of 101 years.¹⁷⁹ His interest in the future led him to predict the population of the United States decade by decade for the next 100 years.¹⁸⁰ After publishing a book entitled *A System of Universal Science*,¹⁸¹ Woodward proposed that a university be established at Detroit that would teach all branches of human knowledge.¹⁸² In connection with these projects he undertook to introduce a nomenclature created by him—a scientific terminology that would be universal.¹⁸³ According to Woodward, the laws of the Territory, including the English common law in force there, should be reduced to a single written system.¹⁸⁴ He envisioned settlements as far west as the Pacific coast,¹⁸⁵ and urged the national government to acquire by peaceful means control of the entire continent.¹⁸⁶ Like other frontier promoters, he was a “man of property” who fully expected to become wealthy through real estate investments.¹⁸⁷

179 WOODFORD, *op. cit. supra* note 176, at 55-59; 4 LAWS OF THE TERRITORY OF MICHIGAN (Supp.) (reprint) 7 (1884).

180 The present writer recalls seeing this memorandum but has been unable to locate it for reference.

181 WOODFORD, *op. cit. supra* note 176, at 150-54.

182 *Id.* at 154-64.

183 *Id.* at 150-64. “An Exegesis of the Chrestomathic System of Jeremy Bentham” and a list of “Chrestomathic terms” in Woodward’s hand dated August 21, 1825, will be found among the papers of the Michigan Historical Society (“M.H.S.”), Burton Historical Collection, Public Library, Detroit. In the Jenk’s Collection of Woodward Papers, *ibid.*, there is a copy of a letter from Woodward to Jefferson dated April 21, 1826, enclosing an explanation of “the chrestomathic system of Jeremy Bentham.” Bentham’s “Chrestomathia” was first published in 1816, the year Woodward published his “System of Universal Science.”

184 Pp. 349, 352 *supra*.

185 Charging a grand jury in 1811 Woodward stated: “The face of this fine region of our continent will soon be fairly expanded to the rays of American enterprize; and the day is not distant when we Shall behold the energy of its operation. Perhaps our own era may Witness the extension of our settlements [*sic*] to the pacific, and the standards of our republic reflected from the shores of another Ocean.” 10 TERRITORIAL PAPERS OF THE UNITED STATES 363, 365 (Carter ed. 1934).

186 P. 359 *supra*.

187 See Judge Augustus Brevoort Woodward — *Man of Property* by Elizabeth Gaspar Brown, 40 MICH. HIST. MAG. 190 (1956). In 1825 he described one of his real estate promotions as follows: “Between seven and eight hundred acres of Land situated on both sides of the River Huron, commonly called the River Huron below, and lying in the county of Washtenaw. The great road from the city of Detroit to Chicago, Illinois and the Mississippi, passes through both these tracts. I have, for some time, been planning a Town on these tracts, under the name of Ypsilanti, in honor of one of the Generals distinguished for his services in the cause of Grecian Liberty. It is situated in a high and healthy country, with an atmosphere peculiarly pure, aromatic and salubrious; and is accompanied with a good navigation extending almost from Lake Erie to Lake Michigan. It contains also elegant positions for mills, with abundance of water. The quantity of meadow land, and that of the very finest quality, is also considerable.” *Id.* at 195.

Woodward's attempts to have his principal proposals carried forward by legislation were only partially successful. His grand plan for a city comparable to the capitals of Europe on what he called "this modern Bosphorus," was adopted,¹⁸⁸ but later substantially modified¹⁸⁹ over his bitter and vigorous protest.¹⁹⁰ The bank with a capital not to exceed \$1,000,000 and a life of 101 years was established,¹⁹¹ but the law establishing it was disapproved by Congress.¹⁹² His proposal that all territorial law be reduced to one written system was only partially enacted into law, the English common law being excluded from the scheme.¹⁹³ His proposal that an all-inclusive university be established was carried

¹⁸⁸ 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 283 (1871). An act of Congress approved April 21, 1806, had provided: "That the governor and the judges of the territory of Michigan shall be, and they, or any three of them, are hereby authorized to lay out a town, including the whole of the old town of Detroit, and ten thousand acres adjacent. . . ." 2 Stat. 398. Under this special authority the governor and judges could "make" (not merely "adopt") law, hence were free to experiment.

¹⁸⁹ WOODFORD, *op. cit. supra* note 176, at 50.

¹⁹⁰ 12 MICH. HIST. COLL. 473 (1889). Woodward argued that the governor and judges as a "land board" had no power to sell parts of the city as farms in "square form, and bounded by lines and courses entirely at variance with the lines and courses of the grand avenues, streets, and lanes, or alleys, of the said city." He pointed out that the basis of the city had been established by legislative act, and the plan adopted reported to Congress. "By this plan, drawn on the original principles of the city; that is to say, having for its basis an equilateral triangle of four thousand feet side; with every side bisected by a perpendicular from the opposite angle; with squares, circuses, and other open spaces of ground where six avenues, and where twelve avenues intersect; with all the six sections comprising the triangle uniformly and regularly divided into lots of about five thousand square feet; with an alley or lane coming to the rear of every lot; with subordinate streets of about sixty feet width; with a fine internal space of ground for education and other purposes; with grand avenues to the four cardinal points of two hundred feet width, and with other avenues of one hundred and twenty feet width, thus reported to congress, the governor and judges are bound, and from it they are not at liberty to depart without a violation of the rights of other persons." According to Woodward, "Nature has destined the city of Detroit to be a great interior emporium, equal, if not superior, to any other on the surface of the terraqueous globe. The commerce of seven immense Mediterraneans, — Ontario, Erie, Huron, Michigan, Superior, Guinissique, Arabasca, — connected by noble rivers with the Atlantic ocean at two points, New York and Quebec, and stretching on the other side to the Pacific and even to the hyperborean ocean, must glide along its borders. In such a case the art of man should aid the benevolence of the Creator, and no restricted attachment to the present day or to present interests, should induce a permanent sacrifice of ulterior and brilliant prospects. . . . Are cities built in a day? . . . No, cities are the work of time, of a generation, or a succession of generations. Their original ground-plan must remain, and cannot be changed without the height of inconvenience, trouble, and expense. A proper and prudent foresight can alone give to a great city its fair development. Order, regularity, beauty, must characterize its original ground-plan. It must have a capacious grasp." *Id.* at 476-77.

¹⁹¹ 4 LAWS OF THE TERRITORY OF MICHIGAN (Supp.) (reprint) 7 (1884).

¹⁹² 2 Stat. 444 (1807).

¹⁹³ P. 352 *supra*.

forward by statute,¹⁹⁴ but a later statute¹⁹⁵ did not employ the nomenclature (universal terminology) created by him, and used in the first statute to describe the various professorships and departments. His proposal that the national government acquire by peaceful means control of the entire continent, could not, of course, be carried forward by local legislation, but it seems he was trying to promote this view by his opinion in the *Selkirk* case.¹⁹⁶

Woodward's image of the United States was a vast continent soon to be filled by millions of settlers. Lands acquired from the Indians involved millions of acres, and, in notable instances, land speculators talked in terms of millions of dollars and millions of acres.¹⁹⁷ The excited frontier promoters looked upon each new townsite as the beginning of a great city of the future. Woodward was familiar with L'Enfant's plan for the national capital which had been prepared on a scale that would "leave room for that aggrandisement and embellishment which the increase of the wealth of the nation will permit it to pursue at any period, however remote,"¹⁹⁸ and shared L'Enfant's vision. He has been referred to as "Mr. Jefferson's Disciple,"¹⁹⁹ and it must be remembered that from time to time he visited Jefferson and others in the settled areas of the East. That his grand schemes and legislative proposals were products of his direct contact with the frontier line may well be doubted, but it seems probable that his visions of "bigness" were enhanced by his part in one of the great migrations in human history. The frontier line was moving ever westward, and millions of people would follow. A vast continent was in the process of being occupied. A great nation was in the making.

¹⁹⁴ "AN ACT to establish the Catholepistemiad, or University of Michigania" (1817), 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 104 (1874).

¹⁹⁵ 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 879 (1871).

¹⁹⁶ P. 359 *supra*.

¹⁹⁷ In regard to the Land Ordinance of 1785, Bond (*The Civilization of the Old Northwest*, p. 279) states: "For the purposes of speculative organizations, the Ordinance was quite favorable, and for a time the motive of immediate financial gains to the government, through large-scale transactions, was in the ascendant. The first important grant under this Land Ordinance of 1785 was the one in 1787 to the Ohio Company, which was made up chiefly of Revolutionary veterans, for 1,500,000 acres, with an additional 5,000,000 acres to a group of land speculators, the Scioto Company."

¹⁹⁸ 13 ENCYC. BRITANNICA 94 (1960), under "L'Enfant."

¹⁹⁹ Part of the title of Woodford's *A Life of Justice Woodward* (1953).