Michigan Law Review

Volume 59 | Issue 1

1960

Chancery Practice on the American Frontier: A Study of the Records of the Supreme Court of Michigan Territory, 1805-1836

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CHANCERY PRACTICE ON THE AMERICAN FRONTIER†

A STUDY OF THE RECORDS OF THE SUPREME COURT OF MICHIGAN TERRITORY, 1805-1836

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THE act of Congress of January 11, 1805,[1] which created Michigan Territory out of Indiana Territory, provided that the new territory should have a government "in all respects similar" to that provided for the Northwest Territory by the Ordinance of 1787. The Ordinance had provided for the appointment of a court to consist of three judges who should have "a common law jurisdiction."[2] Subsequent to the Ordinances of 1784 and 1785 at least four plans of government were submitted to the Congress of the Confederation before the Ordinance of July 13, 1787, was finally adopted:

> *Plan of May 10, 1786:* "There shall also be appointed a Court, to consist of five Members who shall have a common law and chancery jurisdiction."[3]
>
> *Plan of July 13, 1786:* "There shall also be appointed a Court, to consist of five judges, who shall have a common law and chancery jurisdiction."[4]
>
> *Plan of September 19, 1786:* "There shall also be appointed a Court, to consist of five judges, who shall have a common law and chancery jurisdiction."[5]
>
> *Plan of April 26, 1787,* as amended and ordered to a third reading on May 10, 1787: "There shall also be ap-

† This is the fourth of a series of 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 fifth article of the series dealing with frontier legislation is in the process of being written. 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 2 Stat. 309.

2 1 Stat. 51 (1789) (note).

3 30 JOURNALS OF THE CONTINENTAL CONGRESS 253 (1934).

4 *Id.* at 404.

5 31 *id.* 670.

pointed a Court, to consist of three judges, any two of whom shall form a Court, who shall have a common law jurisdiction."[6]

Why the words "and chancery" were omitted from the plan of April 26 and from the Ordinance, as finally adopted, cannot be established with certainty, but it can be established that the New England "adventurers" who composed the land company known as the Ohio Company were greatly interested in the form of government that was to be provided for the Northwest Territory, and through their agent, Manasseh Cutler, suggested amendments to the plan of April 26 which were readily accepted by Congress.

March 16, 1787, some eight days after he had been chosen one of the three directors of the Ohio Company,[7] Cutler wrote as follows to Nathan Dane:[8]

> "There being a large number of persons who intend to be adventurers in company, in this part of Massachusetts and in New Hampshire, provided a purchase of lands can be made that will be agreeable to them, I beg leave to address you on the subject. General Parsons will make application to Congress, in the name of the other directors, in order to make the purchase for the company, and will propose terms which have been agreed to by the other directors. . . .
>
> "If the lands could be immediately purchased on the terms the Company proposes, we have the fullest assurance that the subscription for one million dollars will be completed in a short time. Many of the subscribers are men of very considerable property and respectable characters, who intend (for the Company admit no other) to become residents in that country. The spirit of emigration never ran higher with us than at this time, owing in a great measure, to the general stagnation of business. If they are disappointed in their expectations westward, will turn their attention to some other quarter. . . .
>
> "We should be happy in obtaining your influence in favor of the Company, and have the fullest confidence of your readiness to second the wishes of so large a number of the inhabitants of the New England States, so far as is consistent with the general interest of the Union."

6 5 WESTERN LAW JOURNAL 535; 2 ST. CLAIR PAPERS 608 (Smith ed.).

7 1 THE RECORDS OF THE ORIGINAL PROCEEDINGS OF THE OHIO COMPANY 12 (Hulbert ed.) (Marietta College Hist. Col. 1917).

8 1 LIFE — JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER LL.D., 194 (W. P. and J. P. Cutler eds. 1888) (hereinafter cited CUTLER PAPERS).

Dane, also a citizen of Massachusetts, was a member of the committee of Congress charged with the task of proposing a plan of government for the western territory. It seems significant that the plan of April 26 was amended and ordered to a third reading just one day after the Ohio Company's purchase proposal was read in Congress May 9, 1787.[9]

The influence of the Ohio Company, and the desire of a financially hard-pressed Congress to establish a government acceptable to the New England adventurers, are shown by the following extracts from Cutler's journal:

> *"July 10, 1787:*[10] This morning another conference with the committee. . . . As Congress was now engaged in settling the form of government for the Federal Territory, for which a bill had been prepared, and a copy sent to me, with leave to make remarks and propose amendments, and which I had taken the liberty to remark upon, and to propose several amendments, I thought this the most favorable opportunity to go on to Philadelphia. Accordingly, after I had returned the bill with my observations, I set out at 7 o'clock.
>
> *"July 19, 1787:*[11] Called on members of Congress very early in the morning. Was furnished with the Ordinance establishing a Government in the Western Federal Territory. It is in a degree new modeled. The amendments I proposed have all been made, except one."[12]

July 16, 1787, Dane gave Rufus King the following account of what had been going on in Congress the preceding 10 or 12 days:[13]

> "We have been employed about several objects — the principal ones of which have been the Government inclosed, and the Ohio Purchase. The former you will see is completed, and the latter will be probably completed to-morrow. We tried one day to patch up M.S.P. systems of W. Govern't. Started new ideas, and committed the whole to Carrington, Dane, R. H. Lee, Smith, and Kean. We met several times,

9 1 RECORDS OF THE OHIO COMPANY, *supra,* note 7, at l-li.

10 1 CUTLER PAPERS 239 and 242.

11 *Id.* at 293.

12 The following are only a few of the accounts of Cutler's activities as agent of the Ohio Company: POOLE, THE ORDINANCE OF 1787, AND DR. MANASSEH CUTLER AS AN AGENT IN ITS FORMATION (1876); CUTLER, THE ORDINANCE OF JULY 13, 1787 (1887); *The Influence Extended by Dr. Cutler in the Formation of the Ordinance,* 1 CUTLER PAPERS 335; Chaney, *Nathan Dane,* 3 THE GREEN BAG 548 (1891); STONE, THE ORDINANCE OF 1787 (1889); The *Ohio Company,* 1 RECORDS OF THE OHIO COMPANY, *supra* note 7, at xlvii et seq.; BROWN, MANASSEH CUTLER AND THE SETTLEMENT OF OHIO 1788 (1938).

13 1 CUTLER PAPERS 371.

and at last agreed on some principles, at least Lee, Smith, and myself. We found ourselves rather pressed; the Ohio Company appeared to purchase a large tract of Federal lands — about 6 or 7 millions of acres; and we wanted to abolish the old system, and get a better one for the Government of the country — and we finally found it necessary to adopt the best system we could get. . . . When I drew the Ordinance, which passed (a few words excepted) as I originally formed it, I had no idea the States would agree to the sixth art. prohibiting slavery, as only Massa. of the Eastern States was present, and therefore omitted it in the draft; but finding the House favorably disposed on this subject, after we had completed the other parts, I moved the art., which was agreed to without opposition. We are in a fair way to fix the terms of our Ohio sale, etc.; we have been upon it steadily for three days. The magnitude of the purchase makes us very cautious about the terms of it, and the security necessary to insure the performance of them."[14]

Many years later Dane stated that the Ordinance had been framed by him mainly from the laws of Massachusetts, especially in regard to titles.[15] He did not, however, explain why the words "and chancery" were omitted from the plan of April 26, 1787. Referring to the colonial charters he wrote:[16]

"And it is not understood that these charters actually forbade courts of equity to be established in any, or that they absolutely prohibited an English chancery code distinct from the common law, or calculated generally to ameliorate the rigour of it to be introduced into their jurisprudence. But those who framed these charters, as well as those who received them, seem to have been in general not much disposed to establish such a code; but some in this respect to do more, some less, and some, as in New England and Pennsylvania, nothing, but only to vest in the law courts, with jealousy, and by little and little, powers in equity to soften the unyielding spirit of the law, as stated briefly in former chapters, especially those in which mortgages, conditions, penalties, forfeitures, and trusts, have been considered. . . . On the whole, there was a court of chancery for a very short time in Rhode Island, but its arbitrary conduct soon caused its discontinuance. Attempts were made to establish such a court

14 For accounts of Dane's activities, see discussions listed in note 12 *supra*, except the last, especially Chaney's article in *The Green Bag*.

15 8 DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 390 (1824).

16 7 *id.* at 518.

in Massachusetts, but failed. . . . No powers in equity were especially provided for in the old confederation."

Arthur St. Clair, the first governor of the Northwest Territory, immediately recognized the significance of the omission of the words "and chancery" from the Northwest Ordinance. In 1788 in a letter to judges Parsons and Varnum he wrote:[17]

> "As Judges, you are clothed with a common-Law Jurisdiction, which is, at once, both descriptive & restrictive; — restrictive of any Powers in Equity."

St. Clair was president of the Confederation at the time the Ordinance of 1787 was adopted, but was not present on the day it was passed. His appointment as governor was due, at least in part, to the support of the Ohio Company given in the hope, if not expectation, that he would support the Company.[18] Having served as a judge of common pleas and quarter sessions in Pennsylvania,[19] St. Clair was fully familiar with the New England scheme, also employed in Pennsylvania, of administering equity through common law forms. Judge Parsons was one of the three directors of the Ohio Company chosen March 8, 1787,[20] and had represented the Company in making its application to Congress in May 1787.[21] He was a graduate of Harvard, and had practiced law in Connecticut.[22] Judge Varnum had been named a director of the Ohio Company in August 1787.[23] A graduate of Brown, he had practiced law in Rhode Island.[24] Rufus Putnam of Massachusetts, one of the three directors of the Ohio Company chosen in 1787,[25] was appointed a judge of the Northwest Territory in 1790.[26] Winthrop Sargent of Massachusetts, secretary of the Ohio Company when Cutler, Parsons, and Putnam were named as directors,[27] was Secretary of the Northwest Territory,

17 3 TERRITORIAL PAPERS OF THE UNITED STATES 277 (Carter ed. 1934); 2 THE ST. CLAIR PAPERS 76 (Smith ed. 1882).

18 According to Hulbert, Cutler, as agent of the Ohio Company, favored General Parsons as governor of the proposed western territory; but when he saw it was good politics to favor General St. Clair "he did so immediately and frankly — for the good of the cause he represented." RECORDS OF THE OHIO COMPANY, *op. cit. supra,* note 7, at lix. St. Clair owned one share in the Company. *Id.* at 49, note 57.

19 LAWS OF THE NORTHWEST TERRITORY 1788-1800, xvii (Pease ed. 1925).

20 RECORDS OF THE OHIO COMPANY, *op. cit. supra,* note 7, at 12.

21 *Id.* at 1-li.

22 LAWS OF THE NORTHWEST TERRITORY 1788-1800, xvii (Pease ed. 1925).

23 RECORDS OF THE OHIO COMPANY, *op. cit. supra,* note 7, at 17.

24 LAWS OF THE NORTHWEST TERRITORY 1788-1800, xvii (Pease ed. 1925).

25 RECORDS OF THE OHIO COMPANY, *op. cit. supra,* note 7, at 12.

26 *Id.* at 1.

27 *Ibid.*

and served as governor whenever Governor St. Clair was absent from the Territory. The governor or acting governor and the three judges, or a majority of them, had power, under the Ordinance, to adopt laws for the Territory from the original states. This method of legislating was in operation in the Territory through 1798.

While it does not appear that the restriction on the exercise of chancery powers set out in the Ordinance was intended to apply to inferior courts established in the territory, the legislative authority of the Territory did not attempt to establish a court of chancery or confer on the common law courts powers similar to equity powers except for enforcement of mortgages,[28] for relief from penalties and forfeitures,[29] for accounting before arbitrators,[30] for speedy assignment of dower,[31] for partition,[32] and for limited discovery.[33] An orphans' court, patterned after that of Pennsylvania, was given such equity powers as were necessary for the exercise of its jurisdiction.[34] At no time in the Northwest Territory was there a system of procedure that could be called chancery practice.[35]

In contrast with the Ordinance, the Constitution of the United States which was being patiently drafted at Philadelphia at the time the Ordinance was being hastily passed at New York, provided that the judicial power of the United States should extend "to all cases, in law and equity" arising under the Constitution, laws, and treaties of the United States.[36] The Federal Judiciary Act of 1789 provided that the circuit courts of the United States should have original cognizance "of all suits of a civil nature at law or in equity" where the dispute should exceed $500 "and the United States are plaintiffs or petitioners,"[37] but that a suit in equity should not be sustained in any case where a "plain, adequate and complete remedy" might be had at law.[38] The

28 LAWS OF THE NORTHWEST TERRITORY 1788-1800, 134 (Pease ed. 1925) (adopted from Pennsylvania).

29 *Id.* at 246 ("A Law giving remedies in equity in certain cases," adopted from Massachusetts).

30 *Id.* at 354.

31 *Id.* at 244 (adopted from Massachusetts).

32 *Id.* at 260 (adopted from New York).

33 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY 341 (Chase ed. 1833).

34 LAWS OF THE NORTHWEST TERRITORY 1788-1800, 181 (Pease ed. 1925).

35 The federal courts had equity jurisdiction, but no such court sat in the Northwest Territory except for a very brief time. See act of Congress approved February 13, 1801; repealed March 8, 1802.

36 Art. III, §2.

37 1 Stat. 73, §11 (1789).

38 *Id.*, §16.

District Court of Kentucky District was given jurisdiction not only of district court cases, but of all other causes, except appeals and writs of error, cognizable in a circuit court.[39] By an act approved March 3, 1805, Congress provided:[40]

> "The superior courts of the several territories of the United States, in which a district court has not been established by law, shall, in all cases in which the United States are concerned, have and exercise, within their respective territories, the same jurisdiction and powers which are by law given to, or may be exercised by the district court of Kentucky district."

Under this statute the Supreme Court of Michigan Territory, which held its first session July 29, 1805, had original jurisdiction of all suits at law or in equity where the dispute exceeded $500 and the United States was plaintiff or petitioner. In all other cases the court had only the jurisdiction conferred by the organic act of January 11, 1805,[41] which was the "common law" jurisdiction provided by the Ordinance of 1787.

Notwithstanding the clear intent of Congress to limit the jurisdiction of the territorial courts created by Congress to a "common law" jurisdiction plus equity jurisdiction in cases in which the United States should be plaintiff or petitioner, the governor and judges of Michigan Territory, as a local legislature, July 24, 1805, adopted a law "concerning the Supreme Court of the Territory of Michigan" which provided:[42]

> "That the supreme court shall have original and exclusive jurisdiction of all cases, both in law and equity, where the title of land is in question; original and concurrent jurisdiction in all cases where the sum, or matter in dispute, exceeds two hundred dollars; and appellate jurisdiction in all cases whatsoever. The said court shall have original and exclusive jurisdiction of all criminal cases, where the punishment is capital, and of all cases of divorce and alimony.
>
> "That the judges of the supreme court shall have power, in term and in vacation, to allow writs of injunction and certiorari.
>
> "That the supreme court in session, or any two judges thereof in vacation, may grant writs of *ne exeat,* to prevent the departure of any person out of the country.

39 *Id.,* §10.
40 2 Stat. 338 (1805).
41 Note 1 *supra.*
42 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 9 (1871).

> "That suits in equity shall not be sustained in any case, where adequate remedy may be had at law; and in the trial of cases in equity, oral testimony, and examination of witnesses in open court, shall be admitted."

Whether by this statute the local legislature intended to confer on the court created by Congress full chancery powers in territorial cases is not entirely clear. But if any doubt existed it was removed by laws adopted in 1812 which purported to confer on the court jurisdiction in all cases of divorce and alimony,[43] and of "all matters in equity."[44]

That the territorial governor and judges as a legislature had power to confer equity jurisdiction on inferior courts established by them is arguable, if not entirely clear. According to Judge Bates, the district courts created by act of July 25, 1805,[45] possessed a jurisdiction "both equitable and legal."[46] County courts, first established in 1815, were given jurisdiction of certain civil cases "both in law and equity."[47] An act adopted June 13, 1818, provided that the county courts should have "jurisdiction in all cases properly cognizable by a court of chancery."[48]

An anonymous writer, "Rousseau," in a communication published in the *Detroit Gazette* December 5, 1817, stated:

> "The ordinance . . . declares 'There shall be appointed a Court, to consist of three Judges, who shall *have a common law jurisdiction.*' Is it not plain that no other but a common law jurisdiction is granted? and that this jurisdiction can only be enlarged by the same authority which granted it? . . . I therefore protest against the right of the legislative board . . . to vest this court with any powers at all. . . . But our Judges, forsooth, not content with legitimate powers — powers adequate to every useful purpose, usurp such as are not granted, erect themselves by a law of their own passing, into a Supreme Court, — by another, giving themselves 'jurisdiction in all cases of divorce and alimony' and by another, 'of all matters of equity.' "

Similar statements by the same writer will be found in the *Gazette* of December 26, 1817. William Woodbridge, Secretary

43 *Id.* at 183.
44 *Ibid.* For text of act see 8 MICHIGAN PIONEER COLLECTIONS 617.
45 *Id.* at 17.
46 Blume, *The First Charge to the Grand Jury in the District Court of Michilimackinac,* 15 MICH. ST. B.J. *344, *346 (1935).
47 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 184 (1871).
48 2 *id.* at 132 (1874).

of the Territory, in a letter to Solomon Sibley, Delegate to Congress, November 11, 1820, remarked: "Judge Griffin now expresses doubts whether, without an act of Congress, the Supreme Court can entertain jurisdiction of Chancery Cases."[49] In 1823, after the territorial judges had exercised equity powers some eighteen years, Congress provided that the judges of Michigan should possess "a chancery, as well as common law, jurisdiction."[50]

The "Three Sides" of the Supreme Court

Rules adopted by the territorial Supreme Court April 24, 1821, provided:[51]

> *"Art. III, Sec. 4:* That there shall be a special docket, comprehending all the civil cases and business depending on the common law side of the court.
>
> *"Art. X, Sec. 2:* That all the cases depending on the equity side of the court, shall be placed upon a separate docket, to be styled the CHANCERY DOCKET; and cases of Divorce and Alimony shall be carried to such docket.
>
> *"Art. XI, Sec. 2:* That the clerk of the court, on the admiralty side, shall make and keep a docket of all the cases depending on that side of the court."

The records of the "admiralty side" of the court were first separated from the other records of the court in 1815;[52] the equity records, in 1819.[53] According to a rule adopted in 1815[54] the court on the "admiralty side" was to be attended by the United States attorney and the United States marshal (appointed by the President under an act of Congress) and by a clerk appointed by the court. The "admiralty side" was to sit on certain days "exclusively for the transaction of business as a circuit and district court of the United States."[55] Though the court on its "admiralty side" was not a court "of the United States,"[56] and the bulk of its business on that side not "admiralty,"[57] the prac-

[49] SIBLEY PAPERS, Burton Historical Collection, Public Library, Detroit.
[50] 3 Stat. 769 (1823).
[51] 2 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, 517, 525, 526 (Blume ed. 1938) [hereinafter cited TRANSACTIONS].
[52] *Id.* at 46.
[53] *Id.* at 162.
[54] *Id.* at 46.
[55] *Ibid.*
[56] 1 TRANSACTIONS (1805-1814) xxxv (1935).
[57] *Id.* at xlviii.

tice of separate sittings and records was continued to the end of the territorial government (1836).[58]

An examination of the records of the Supreme Court sitting as "a circuit and district court,"[59] or, more accurately, sitting as a territorial court for the trial of cases which concerned the United States, discloses an almost complete absence of chancery business. Of 310 cases and matters which concerned the United States only one was for equitable relief — injunction against interfering with the working of a government road.[60] The most numerous United States cases (more than a third of the total) were libels to condemn property seized by the collector of customs. Actions of debt were second in number; criminal prosecutions, third. Many of the seizures of property were on land, and it may be questioned whether the proceedings for penalties and forfeitures in these cases were admiralty business, at all.[61] Maybe "ex-

[58] A court rule adopted May 4, 1831, provided that "the style of the Supreme Court acting under the authority of the act entitled 'An act to extend jurisdiction in certain cases to the Territorial Courts' shall from and after the first day of the present term be as follows to wit: 'At a session of the Supreme Court of the Territory of Michigan sitting as a District Court of the United States held at the Court House in the City of Detroit pursuant to law on the _____ day of _____&c.'" It was further ordered that all process issuing from the office of the clerk of the Supreme Court embracing or relating to the business of the United States by the act above mentioned should be issued "in & under the style aforesaid." 2 TRANSACTIONS (1825-1836) 417 (1940).

[59] When examined, these records were in the Record Room of the federal courts, Detroit. A calendar of all but a few of the United States cases will be found in 1 TRANSACTIONS (1825-1836) 181-236 (1940).

[60] *Id.* at 198.

[61] According to an editorial printed in the *Michigan Herald* (Detroit) March 29, 1826, a committee of Congress had reported doubt whether the judges of the Michigan Supreme Court possessed "admiralty and maritime jurisdiction," adding: "Legally speaking, however, there are no admiralty or maritime causes in the Territory." The editors commented as follows: "The judges of the Supreme Court have at present all the powers intended to be given them by the committee. They have jurisdiction in all cases where the United States is a party, which includes not only 'causes affecting the revenue, navigation and trade of the United States,' but some other classes of cases which it is not necessary to specify. This jurisdiction has always been exercised by the court. The only real extension of the power by the proposed law, is the authority to hold special sessions. The court heretofore refused to hold extra sessions, except where articles seized for a violation of the revenue laws, are represented to be of a perishable nature. We refer those who may have a curiosity to examine into the extent of the powers conferred on the superior courts of the several territories, as District Court of the United States, to the act of Congress of 3d March, 1805, U.S. Laws, vol. 2, p. 664. The act referred to, prescribing the powers exercised by the District Court of Kentucky, will be found in vol. 2, p. 60. We are unwilling to admit the correctness of the position assumed by the committee, that 'legally speaking, no maritime or admiralty causes exist in the Territory.' It is true that no causes of this kind can be created by the operation of a congressional enactment; but it appears to us that a little reflection will shew that such causes do exist and must frequently arise upon our inland seas, although there may be no court authorized to take cognizance of them. The same contracts will be made, and the same relations exist between those concerned in the commerce and navigation of the lakes as of the ocean. These fresh water seas are bordered by a foreign nation, and by different states of the Union, possessing jurisdictions independent of each other, and are actually 'navigable from the sea by vessels of ten or more tons burthen.' This lat-

chequer" instead of "admiralty" would have been a better term to use in designating the United States business of the territorial court.

By a rule adopted November 5, 1819, the Supreme Court ordered that the clerk of the court "on the common law side" be register of the court "sitting in chancery;"[62] and that the register keep the transactions of the court "sitting in chancery" in a separate book.[63] According to a rule adopted in 1821 every counsellor and attorney "on the common law side" was "of course" a solicitor on the "chancery side."[64] The transactions of the court "in chancery" were recorded in a separate journal from November 5, 1819, through 1822.[65] Not counting divorce and alimony, a total of 240 cases and matters "in chancery" appear in the records.

The Supreme Court on its "common law side" started out as a court of unlimited common law jurisdiction, and ended up as a court of errors and appeals. The first step in this development was the establishment of district courts in 1805.[66] These courts were authorized to try at designated places cases not involving title or capital punishment, the Supreme Court to have "exclusive" jurisdiction of the excepted cases, and "appellate jurisdiction in all cases whatever."[67] When county courts were established in 1815[68] an attempt was made to give these courts "exclusive" jurisdiction of certain cases but power to deprive the Supreme Court of any of the common law jurisdiction conferred by Congress was challenged,[69] and the "exclusive" provision eliminated.[70] The Supreme Court continued to have "exclusive" original jurisdiction of certain cases, and "appellate jurisdiction" in county

ter circumstance may be no otherwise material than to show the extent and variety of the *maritime* transactions which do and may exist in relation to the commerce of the lakes. It is easy to conceive that seamen, ship builders, freighters, part owners, and others, including foreigners as well as citizens, may have rights and claims requiring the aid of a maritime and admiralty court. Among the numerous causes requiring the same aid, we will mention that of *salvage,* which it is easy to conceive may arise on the lakes as well as on the ocean. . . . We respectfully submit to the consideration of the committee the propriety of reconsidering the subject, and if it should not be thought expedient to give us a District Court, at least to extend to the present judges maritime and admiralty jurisdiction, and leave them to decide what causes do and what do not come within that power."

62 2 TRANSACTIONS (1814-1824) 191 (1938).
63 *Id.* at 192.
64 *Id.* at 525.
65 *Id.* at 461-480.
66 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 17 (1871).
67 *Id.* at 10.
68 *Id.* at 184.
69 See Blume, *Circuit Courts and the Nisi Prius System: The Making of an Appellate Court,* 38 MICH. L. REV. 311 (1940).
70 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 132 (1874).

court cases. In 1823, after Michigan Territory had been expanded westward to the Mississippi, Congress provided for an "additional judge" to try cases in the area north and west of Lake Michigan.[71] Judgments of the "additional judge" in civil cases were reviewable by the Supreme Court on writ of error or equity appeal. For this area the Supreme Court became almost entirely an appellate court. Schemes under which judges of the Supreme Court were to try cases in the several counties east of Lake Michigan were adopted by the territorial legislature in 1824,[72] 1825,[73] 1828,[74] and 1833.[75] The act of 1825 provided that the circuit courts should have the same original jurisdiction as the Supreme Court except cases concerning the United States, equity cases, and cases of divorce and alimony. But in 1827 it was provided that the circuit courts should have "concurrent" chancery jurisdiction subject to appeal. The following are totals of Supreme Court cases and matters that show up for the first time in the records for 1833-1836:

United States cases	100
Chancery cases	74
Petitions for divorce	9
Certiorari and error	33
Miscellaneous	9

To the end of its existence the Supreme Court sat as a district and circuit court for the trial of United States cases, and as a court of chancery for the trial of territorial chancery cases, but after the establishment of circuit courts did not sit for the trial of territorial common law cases. It is not surprising that it was sometimes referred to as "the court of chancery," and that a separate court of chancery was established after Michigan became a state.

Divorce and Alimony

The court rules of 1819 that ordered the keeping of a separate equity docket provided that causes of divorce and alimony should be placed on the same docket.[76] An act of the Legislative Council

71 3 Stat. 722 (1823).
72 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 217 (1874).
73 *Id.* at 265.
74 *Id.* at 692.
75 3 *id.* at 1020.
76 Note 53 *supra.*

approved April 12, 1827, provided that proceedings for divorce should be commenced by "bill."[77] In the margin of the *Code of 1827* ("published by authority") the compilers digested this provision as authorizing an application "to chancery for a divorce." This act was repealed in 1832 by an act which provided for jury trial, and that proceedings for divorce should be commenced by "petition."[78] After the passage of this act proceedings for divorce were entered in the general calendar, and were no longer classified as chancery cases. In the years 1828-1831 some seventeen divorces were granted by the Legislative Council.[79]

In eighteenth century England divorces *a mensa et thoro* were granted by ecclesiastical courts; divorces *a vinculo matrimonii* only by act of Parliament. The absence of ecclesiastical courts in America led to considerable experimentation. "A Law respecting divorce" adopted in the Northwest Territory in 1795[80] specified the causes for divorce, and provided that the General Court and circuit courts should have sole cognizance of divorce cases. The validity of this attempt to confer ecclesiastical jurisdiction on the common law court established by Congress has been questioned,[81] but if judicial divorce was to be had instead of legislative divorce, where was the power to be vested? The Northwest law was adopted from Massachusetts, and there is nothing to indicate that the proceeding was considered chancery in nature. A contrary implication arises from use of the term "libel" to describe the complaint.

Acts "concerning divorces" or "divorce" were adopted in Michigan Territory in 1819,[82] 1827,[83] 1832[84] and 1833.[85] All these statutes authorized the granting of both types of divorce (*a mensa et thoro* and *a vinculo matrimonii*) for specified causes; made provision for notice to the defendant; and prescribed the methods of trial. The act of 1819, adopted from New York, provided that if adultery should be denied, a feigned issue should be submitted to a jury, but if not denied the proof should be submitted to a "master in chancery" for opinion and report. Proof of "cruel and

77 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 363 (1874).
78 3 *id.* at 931.
79 *Id.* at 1481.
80 LAWS OF THE NORTHWEST TERRITORY 1788-1800, 258 (Pease ed. 1925).
81 1 MARSHALL, A HISTORY OF THE COURTS AND LAWYERS OF OHIO 218 (1934).
82 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 494 (1871).
83 2 *id.* at 363 (1874).
84 3 *id.* at 931.
85 *Id.* at 1005.

inhuman treatment" was to be "taken in the cause in the usual manner." Similar provisions will be found in the act of 1827. The acts of 1832 and 1833 authorized the court "to hear witnesses in open court on the stand, or to receive depositions taken with notice to the adverse party." Jury trial, if claimed by either party, was to be had of all facts except "impotency."

The uncertainty that existed in Michigan Territory as to the place of divorce and alimony in the judicial system is reflected by the records. In the first two journal entries made in the first divorce case (1809)[86] the case was referred to as "in chancery;" in the third journal entry the words "in chancery" were lined out; in the fourth (the decree) no reference to chancery was made. The complainant's pleading was designated "bill of complaint." In the second case (1812)[87] the complainant filed a "petition" which was referred to in the journal as "petition and bill of complaint" and as "bill of complaint." In a case commenced in 1815,[88] and in one commenced in 1816,[89] a "bill of complaint" was filed. But in October 1819 Sibley as "attorney & proctor" filed a "libel."[90] According to the clerk this case was "in chancery," and a prayer to withdraw a plea was addressed to the judges "sitting as a court of chancery." Sibley was an experienced lawyer, and, later, a very able judge of the Supreme Court, and his choice of terms should not be attributed to either ignorance or carelessness. He may not have known that six days earlier the court had ordered that cases of divorce and alimony "be placed on the same docket with the cases depending on the equity side of the court,"[91] or he may have doubted the effect of the rule. After 1819 until the statute of 1832[92] divorce cases were "in chancery." The statute of 1832 provided that an application for divorce should state "the cause" on which the prayer of the "petition" was founded. Contrasted with "bills" for divorce employed in the period 1819-1832, "petitions" for divorce were relatively brief

86 1 TRANSACTIONS (1805-1814) 186 (1935).

87 *Id.* at 277. The papers in the file are printed in 2 *id.* at 381 (1938).

88 1 *id.* (1814-1824) 70 (1938).

89 *Id.* at 73. The bill of complaint is printed in *id.* at 551.

90 *Id.* at 350. The "libel" was filed October 22, 1819.

91 2 *id.* at 162. The rules were adopted October 16, 1819. Referring to the rules adopted in 1819, "Xenos" in the *Detroit Gazette* of August 11, 1820, wrote: "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. . . . That at these night sessions, a multitude of rules of court were entered of record. . . ."

92 Note 84 *supra.*

and simple. The following totals are from the Supreme Court's records and the statutes:

1805-1819 Bills; petition; libel	5
1819-1832 Bills in chancery	7
1828-1831 Special legislative acts	17
1832-1836 Statutory petitions	9

In a suit in chancery commenced in the Supreme Court in 1836[93] the complainant prayed for maintenance and support; to restrain the defendant from interfering with her or her child; and for a writ of *ne exeat.* Writs of injunction and *ne exeat* were allowed, and a decree entered requiring the defendant to pay a certain sum to enable the complainant to defray the expenses of the suit, and a further sum each week for her maintenance and support. After Michigan became a state, the state court of chancery dismissed the bill,[94] the chancellor stating:

> "The bill in this case is filed not for a *divorce,* but for *alimony* merely. . . . The whole current of authorities goes to show that courts of chancery have never entertained jurisdiction in cases of this kind, except in aid of some other court, or to carry into effect a marriage contract, or in the execution of a trust. . . . In England, when the court of chancery succeeded to the jurisdiction of the *spiritual* courts during the usurpation, it entertained suits of this kind, but not since the restoration. . . . I am satisfied that, exclusive of any statutory provision upon the subject, this court has no jurisdiction to entertain proceedings of this kind."[95]

The procedure of granting legislative divorces can be traced in the journals of the Legislative Council. Public notice was required,[96] but consideration was in committee. The special acts did not state facts or even the grounds of divorce. Bills of chancery, on the other hand, contained detailed statements of fact, and

93 1 TRANSACTIONS (1825-1836) 159 (1940).

94 Harr. Ch. Rep. (Mich.) 19 (1836-42).

95 The Chancellor, Elon Farnsworth, had been admitted to practice before the territorial Supreme Court in 1825, and had appeared as attorney in that court in more than eighty cases.

96 Notices of intention to apply to the Legislative Council for divorce will be found in the *Detroit Gazette* of April 8 and 22, 1830. Notice of intention to contest a petition for divorce before the Legislative Council appears in the *Gazette* of April 22. No search has been made for other similar notices. In 1831 the committee to which a petition had been referred reported that notice of the petition had not been given. JOURNAL OF LEGISLATIVE COUNCIL 129. The *Detroit Gazette* of March 4, 1830, contained a clipping from the *Cincinnati Gazette* re legislative divorces in Ohio. For a discussion of the powers of territorial legislatures to grant divorces, see Maynard v. Hill, 125 U.S. 190 (1887).

usually included special interrogatories calling for a full discovery of the facts of the case.[97]

Injunctions. Ne exeat

The act of Congress of March 3, 1823, that conferred on the judges of Michigan Territory "a chancery, as well as a common law jurisdiction," provided that the tenure of the judges should be limited to four years, the offices of the incumbent judges to become vacant February 1, 1824.[98] This change from the provision of the Ordinance of 1787 that the commissions of the judges should "continue in force during good behaviour" was significant in showing that Congress did not consider the Ordinance "unalterable, unless by common consent," nor did it consider the territorial judges United States judges who, under Article III of the Constitution, were to "hold their offices during good behaviour." Whatever may have been the broad purposes of Congress in making this change, it seems clear that in Michigan Territory the change was promoted by a Detroit group interested in having judges Woodward and Griffin removed from office. Woodford, in his *Life of Justice Woodward,*[99] calls attention to a letter written by James D. Doty to Henry R. Schoolcraft October 25, 1822:

> "The good work has commenced here. Woodward & Griffin are likely to have something happen to them. If you take the Detroit Gazette you will perceive their conduct for years past is presented to them for their inspection — A petition will probably be presented to Congress for a repeal of the Ordinance under which they hold their offices. This is a modest way of turning a man out of office."[100]

In 1829 John P. Sheldon, editor of the *Gazette,* boasted that he had "scourged" one set of judges out of office, and most of them out of the Territory, stating that he considered it the business of his newspaper to call "the people's servants to account."[101]

97 The full text of a "bill of complaint" for divorce "in chancery" filed in 1825 will be found in 1 TRANSACTIONS (1825-1836) 449 (1940).

98 3 Stat. 769.

99 P. 174 (1953).

100 This letter appears also in 11 TERRITORIAL PAPERS OF THE UNITED STATES 270 (Carter ed. 1943). In 1832 Doty wrote the Secretary of State that he had "taken the advice of legal gentlemen" who concurred in his opinion that his commission as "additional judge" which was to be in effect during "good behaviour" was not affected by acts of Congress subsequently passed. 13 *id.* at 521. In a footnote to this letter Carter calls attention to a resolution proposed in the Senate, March 2, 1832, calling upon the President for an explanation of the displacement of the territorial judges for Michigan, Florida, and Arkansas.

101 1 TRANSACTIONS (1825-1836) 357 and 366 (1940).

Sheldon's statements of 1829 were in defense of a charge of contempt made against him in the Supreme Court for publishing an editorial which began:[102]

> PROGRESS OF "THE PERFECTION OF REASON" IN MICHIGAN
>
> The Supreme Court of this Territory terminated its December session last week. As usual, there was but little business done, and a portion of that little, we are led to believe, was but poorly done.

The editor then called attention to the case of *United States v. Reed* in which the Supreme Court had held that a new trial should be granted because of the erroneous denial of a challenge of a juror for cause, even though the defendant used one of his two peremptory challenges to remove the disqualified juror, and did not use his remaining peremptory challenge. The editor ridiculed a statement made by Judge Woodbridge in his opinion that deprivation of a "fixed & positive right" was reason enough for a new trial, observing:

> "To men of plain common sense, we think the above decision of the learned majority of the Supreme Court will be thought a curious thing; they will wonder at the little knowledge which the *people in general* possess of the science of *law* — they will wonder, too, that *law* should differ so widely from *common sense* and *justice*. We think, too, that many a poor plodding attorney, in the *States,* when he shall read the above decision of the Supreme Court of Michigan, will kick his Blackstone out of his office and acknowledge himself a nincom."

While it seems unlikely that much public interest could have been excited by the technical question of harmless error involved in *United States v. Reed,* the attack on the court was, as Judge Woodbridge feared, "calculated to elicit all the slumbering rancour of former times."[103] Judges Woodbridge and Chipman be-

[102] *Id.* at 338.

[103] *Id.* at 370. In a letter dated January 27, 1829, addressed to Austin E. Wing, Delegate to Congress, Woodbridge wrote: "An occurrence has taken place which, for aught I know — or can anticipate — may leave no alternative but to quit — We have on hand a case of contempt — It is a matter which in its march is calculated to elicit all the slumbering rancour of former times — The question is likely to come fully up — Shall the law bend to John P. Sheldon? — or Shall John P. Sheldon bend to the law? — Should the decision of the law be against John P. Sheldon — will Thomas Sheldon [sheriff] execute the law? . . . One thing only I am free now to say concerning it — that when the Supreme Court shall be found too feeble or too timid to protect itself from scandalous contempts — it will be too contemptible for me — to remain a member of. . . ." *Ibid.*

came again the targets of the "anti-court party," and were not re-appointed in 1832. When their failure to be re-appointed was attributed to political differences with the administration at Washington, a spokesman for the "anti-court party" in a communication signed "Consistency" asked these questions:[104]

> "Did his late honor [Judge Woodbridge] intend to include among his 'judicial acts' his despotic assumption of power and gross perversion of official authority in the memorable canvassing of 1825? Did he suppose the public had forgotten his tyrannical punishment of Mr. Sheldon in 1829? Is it necessary to refer to the case of the United States against John Reed or that of Cole and Porter against John Hendree, or the injunction which he made dog-cheap in Michigan . . .?"[105]

The charge implied in the last question that a New-Englander who had attended the law school at Litchfield, Connecticut, and whose father had gone to Marietta with the Ohio Company,[106] had made injunctions "dog-cheap in Michigan" is sufficiently incongruous to be intriguing. It will be examined even though, because of its source, it is not sufficiently trustworthy to be relied on to any extent.

Of the 240 chancery cases commenced in the territorial Supreme Court, 111 involved prayers for injunctions either as the principal or sole relief (column A), or in connection with other relief (column B):

1. To stay proceedings at law:		A	B
Allowed:	Bates (1805-1807)	1	
	Woodward (1805-1824)	4	
	Witherell (1808-1828)	1	
	Sibley (1824-1836)	7	2
	Hunt (1824-1827)	5	
	Chipman (1827-1832)	9	2
	Woodbridge (1828-1832)	1	1
	Morell (1832-1836)	2	1
	Court (1805-1836)	5	2
		1	1
Denied:	Witherell (1808-1828)	1	
	Sibley (1824-1836)	1	
	Chipman (1827-1832)	1	

104 DEMOCRATIC FREE PRESS AND MICHIGAN INTELLIGENCER, March 15, 1832.

105 Reprinted in part in 28 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 166, where "Consistency" is identified as Ebenezer Reed who was associated with Sheldon in editing the *Detroit Gazette* when it was destroyed by fire in 1830.

106 2 FARMER, HISTORY OF DETROIT AND MICHIGAN 1076 (2d ed. 1889) Also see Stocking, *New England Men in Michigan History*, 5 MICHIGAN HISTORY MAGAZINE, 123, 132 (1921).

		A	B
2. To stay waste:			
Allowed:	Woodward (1805-1824)		1
	Sibley (1824-1836)		1
	Woodbridge (1828-1832)		1
	Morell (1832-1836)	2	
	Court (1805-1836)	1	
			4
3. To restrain trespass:			
Allowed:	Woodward (1805-1824)		1
	Witherell (1808-1828)	1	
	Sibley (1824-1836)		1
	Chipman (1827-1832)		1
	Woodbridge (1828-1832)	1	
	Morell (1832-1836)	1	
	Court (1805-1836)	1	
		2	
Denied:	Wilkins (1832-1836)	1	
4. To restrain interference with person:			
Allowed:	Woodbridge (1828-1832)	1	
	Morell (1832-1836)		1
5. To restrain nuisance:			
Allowed:	Morell (1832-1836)	1	
6. To restrain diversion of water:			
Allowed:	Morell (1832-1836)	1	
7. To restrain collection of taxes:			
Allowed:	Chipman (1827-1832)	1	
8. To restrain patent infringement:			
Allowed:	Sibley (1824-1836)	1	
9. To restrain transfer of property:			
Allowed:	Woodward & Griffin		1
	Sibley (1824-1836)	1	2
	Chipman (1827-1832)		1
	Woodbridge (1828-1832)		2
	Morell (1832-1836)	1	7
	Court (1805-1836)	1	
		1	1
Denied:	Wilkins (1832-1836)		1
			2
10. To restrain purchase of property:			
Allowed:	Chipman (1827-1832)		1
11. To restrain incumbrance of property:			
Allowed:	Sibley (1824-1836)		1
	Morell (1832-1836)		5
		1	1
12. To restrain claim to property:			
Allowed:	Court (1805-1836)		2

		A	B
13. To restrain payment of money:			
Allowed:	Sibley (1824-1836)		2
	Woodbridge (1828-1832)		1
	Morell (1832-1836)		2
	Court (1805-1836)	1	1
Denied:	Wilkins (1832-1836)		1
	Court (1805-1836)		1
			2
14. To restrain receipt of money:			
Allowed:	Sibley (1824-1836)		1
	Chipman (1827-1832)		1
	Morell (1832-1836)		1
	Court (1805-1836)	1	
			3
15. To restrain departure (ne exeat):			
Allowed:	Woodward & Griffin		1
	Witherell (1808-1828)	1	
	Morell (1832-1836)		1
			1
16. To restrain_____:			
Allowed:	Woodbridge (1828-1832)		1
	Court (1805-1836)	1	
		5	
			1

All injunctions allowed by a single judge were temporary in the sense that action was restrained only until the matter could be heard by the full court. The allocatur, usually written at the foot of the bill of complaint, fixed the bond required, and directed the issuance of a writ of injunction. Writs of injunction were issued by the clerk of the court under its seal, and tested in the name of the presiding judge. That one judge had no power to grant an injunction "in term time" was argued in 1830:[107]

> "Motion to set aside Injunction granted during the last term by his honor Judge Woodbridge — A single Judge has no power to grant an Injunction in term time either by any act of Congress — or of the Legislative Council. 1. The Acts of Congress require two Judges at least to the exercise of Judicial authority. 2. The act of Council authorises a single Judge to grant an injunction only in vacation —"

The motion to dissolve was overruled. In 1825 Woodbridge as counsel for complainant argued in a letter to Judge Witherell that a single judge should allow an injunction to stay proceedings

[107] Case 1316, 1 TRANSACTIONS (1825-1836) 108 (1940).

at law whenever any doubt exists as to the justice of those proceedings, adding:[108]

> "Like the allowance of a writ of error no rights are committed by it, nor does the allowance imply any the least commitment of opinion in the Judge making that allowance."

While it appears from the above table that at least six prayers for injunction were denied by one of the judges, the impression given by the records is that in the mine run of cases the injunction prayed for was allowed merely upon a reading of the bill.

Although it is impossible to show with any degree of completeness how the various prayers for injunction were finally disposed of by the Supreme Court, it does appear that two of the six prayers denied by a single judge were also denied by the court; that 12 of the temporary injunctions were made perpetual, and 27 dissolved. In a brief submitted to Judge Woodbridge in 1828 in support of a motion to dissolve an injunction on the ground that the answer had denied "all the equity set up in the bill" the following appears:[109]

> "This Injⁿ was obtained in 1824 to restrain the def. from collecting the amount of a Judgment obtained before a Justice of the peace — The defts answer denies all equity set up in the Bill and the Injⁿ should be dissolved of course. . . . Blake 404.5 1 Johns C.R. 211.444. 2 Do. 205. Hamᵈ 495. Eden 86."

In one of the cases cited,[110] Chancellor Kent pointed out that "plaintiff is not permitted to traverse and contradict the answer by affidavits; but the injunction is dissolved, of course, if the answer denies all the equity in the bill." Relying on another of Kent's opinions,[111] Blake, in his *Historical Treatise on the Practice of the Court of Chancery of the State of New-York* (1818), stated:[112] "An injunction, will in general, be dissolved when an answer comes in, and denies all the equity of the bill." According to Eden (Baron Henley) "if the answer contains a sufficient defence to the case stated in the bill, the injunction will be dissolved."[113] Relying on these or other similar authorities the Su-

108 *Id.* at 247.
109 *Id.* at 54, Case 1130.
110 Hoffman v. Livingston, 1 Johns. Ch. R. (N.Y.) 211 (1814).
111 Boyd v. Anderson, 2 Johns. Ch. R. (N.Y.) 202, 205 (1816).
112 At p. 405.
113 A TREATISE ON THE LAW OF INJUNCTIONS BY THE HON. ROBERT HENLEY EDEN 86 (1st Am. ed. 1822).

preme Court dissolved the injunction previously allowed in the above case, and, in other cases, stated in the record that the reason for ordering the injunction dissolved was the fact that an answer had come in denying all equity in the bill. The practice thus established was followed by the first chancellor of the state.[114]

Any answer to a bill for injunction involved discovery to some degree. When the injunction sought was to stay proceedings at law, both injunction and discovery were often necessary — "useless one without the other." In a case commenced in 1835[115] Woodbridge as attorney for complainant argued that a motion to dissolve on the ground that the answer had denied all equity in the bill should not be "enforced" until exceptions to the answer had been disposed of, citing 4 Paige 111. The bill in this case had alleged that the complainant, John Allen of Ann Arbour, had been sued by John Harford in the Washtenaw Circuit Court in an action of covenant; that Allen had pleaded that the agreement sued on had been obtained by fraud; that the action was pending, and ready for trial. In addition to a detailed statement of the events which led up to the signing of the agreement sued on in the Circuit Court, the bill contained an extensive charge of confederation followed by an allegation that relief was available only in chancery where discovery and full disclosure under oath could be coerced. After demanding that the defendant answer the premises "as fully as if the same were herein again interrogated," the complainant set out some 35 special interrogatories with a prayer that the defendant be required to answer them distinctly "according to the best of his remembrance, information and belief."[116] Although defendant's answer, some 17 pages in length,

114 Connor v. John Allen, Harr. Ch. Rep. (Mich.) 371 (1836-42) (Farnsworth, Chancellor).

115 1 TRANSACTIONS (1825-1836) 155, Case 1460 (1940).

116 This part of the bill demands that the defendant answer "whether in the month of August or fore part of the month of September A.D. one thousand eight hundred and twenty four, he did not visit Ann Arbour in the County of Washtenaw, Michigan Territory and put up at the House of E. W. Rumsey late of said village, now deceased, and whether at the time of his arrival he did not state to your Orator and others that he was from Rochester in the State of New York and whether at that time your Orator and him said Harford were not entire strangers to each other, and whether he did not offer and profess to want to buy an interest in said Village of Ann Arbour from your Orator, and that he state fully and without evasions or equivocation, whether during the time he was negociating for a part of your Orators interest in said village, he did not represent himself to your Orator or to others in your Orators presence, to be a man of property and influence, and whether he did not state to your Orator or to others in your Orators presence, that he was the owner of a large property in Rochester, and whether at the same time and before the agreement referred to was concluded he did not state to your Orator or to others in the hearing of your Orator, that he was interested in the large Flouring Mills of said Rochester and was aquainted with the building of Mills, and

contained detailed answers to all the charges and interrogatories set out in the bill, complainant's solicitor was not satisfied, and filed exceptions. Whether the injunction should be dissolved before the exceptions were disposed of involved a problem of choice between New York and English chancery practice which was unresolved as the period of the Territory came to a close.

Another suit involving discovery and injunction pending when the territorial period came to a close may be of interest.[117] Complainants, against whom judgments had been recovered in a justice's court, alleged that they had been prevented from making a defense in the justice's court by repeated discontinuances until the death of their only witness. It was argued in the state Court of Chancery, to which the case was transferred, that as complainants could have sought discovery while the cases below were still pending, they were not entitled to an injunction. Chancellor Farnsworth, reflecting no doubt his long experience as a solicitor in the territorial Supreme Court, overruled the objection, saying:

> "A court of chancery was formerly the only tribunal which could afford adequate relief. But recently courts of law have also given effect to defenses of this kind. The court of chancery, having originally exclusive jurisdiction, still retains it. . . . The only doubt in the case is, were the parties bound to apply to this court before judgment rendered in the court below. It has been urged that the defendants below could have taken appeals to the circuit court, and could have then applied to this court for a discovery, and would have been entitled to their remedy. I have entertained much doubt whether this case comes within the exceptions to the general rule as stated in *10 Johns., 590, and 3 Pet., 214*. Was it necessary? was it incumbent upon the parties to adopt this more expensive and circuitous proceeding to make their defense, after having, on two several occasions, appeared, in both suits, made their defense, and produced their witness? I am inclined to think not."

whether he did not state, as aforesaid, that if he could purchase at Ann Arbour to suit him he would bring them on to that place and that he would build a large store house and immediately erect Flouring Mills, and whether he did not hold himself out to the then citizens of Ann Arbour as able to build up said Village and having influence with wealthy and respectable citizens of Rochester who could be influenced by him said Harford to remove to that place, and whether he did not generally insinuate either directly or indirectly to the citizens that he was a man of wealth. — And that he state whether on the eighteenth day of September A.D. 1824 he did not make a contract with your Orator for the premises described in the article of agreement herein before set forth, and whether . . ." and so on and on.

117 1 TRANSACTIONS (1825-1836) 158, Case 1478 (1940); Harr. Ch. Rep. (Mich.) 366.

The earliest territorial statute dealing with *ne exeat* (1805) provided that the Supreme Court in session or any two judges thereof in vacation might grant writs of *ne exeat* to prevent the departure of any person "out of the country." This law,[118] said to have been adopted from Virginia, further provided:

> ". . . but such writ shall not be granted, but on bill filed and affidavits made to the truth of its allegations, and then such writs may be granted, or refused, as shall seem just; and if granted, it shall be endorsed thereon in what penalty, bond and security shall be required; and when the court or judges shall be satisfied that there is no reason for the restraint, or sufficient security shall be given to perform what may be decreed, the writ may be discharged."

"An Act directing the mode of proceeding in chancery" adopted in 1820[119] authorized one judge in vacation to issue writs of *ne exeat* to prevent departure "out of the territory" subject to limitations similar to those set out in the law of 1805. These provisions were re-enacted by the Legislative Council in 1827[120] and in 1833.[121]

One of the last cases considered by the territorial Supreme Court before it went out of business at the end of June 1836 was the suit for alimony discussed above[122] — a suit which involved not only the payment of money for complainant's maintenance and support, but writs of injunction and *ne exeat.* The allocatur indorsed on the bill of complaint reads:

> "On reading and considering the foregoing bill I allow the Writ of Ne Exeat within prayed for, and the Clerk of the Supreme Court is directed to issue the same, to be directed to the Sheriff of the County of St. Clair, directing security to be taken under it in the sum of five thousand dollars conditioned according to law. I also allow the writ of Injunction as within prayed for. GEO: MORELL"

The writ of *ne exeat,* after reciting the nature of the complaint, commanded the sheriff to require the defendant to give security in the sum of $5000 that he would not attempt "to go to parts beyond the Seas nor out of the jurisdiction of this Court" with-

118 Pp. 55-56 *supra.*
119 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 697 at 709 (1871).
120 2 *id.* at 525 (1874).
121 3 *id.* at 1188.
122 Note 93 *supra.*

out its consent, and should he refuse to give such security to commit him to prison until he should "do it of his own accord." The sheriff's return shows that the defendant was arrested June 6, 1836, and gave bond as required. According to a journal entry inserted after the transactions of June 20 had been written up, the defendant "by Woodbridge and Backus his solicitors" moved "for reasons now filed" that the writs of *ne exeat* and injunction be dissolved. Woodbridge later insisted that neither he nor Backus appeared as solicitor for the defendant, but that he, Woodbridge, appeared as *amicus curia* because of what he "deemed a most unwarrantable usurpation of the Court — & a most *oppressive* deprivation of the *rights* of an American citizen." In his brief Woodbridge stated:

> "That as Writs of Ne Exeat affect so vitally the personal liberty of the citizen — they are never granted, except reluctantly. 3 John Cha. 412-415 — & the Books generally. That they *never* are — except in aid of some other Tribunal — or where some definite & certain sum — has been decreed — or sworn to: — nor then — unless the claim grow out of the prosecution of some other principal matter (e.g. application for a Divorce) — depending before itself — or some other court — or unless there be imminent danger of its loss. — See Har Cha. 161.—1 Vez[j] 49-94. 2 Atk. 210."

June 29, after hearing arguments of counsel on behalf of both parties, the court ordered the payment of $40 to enable complainant to prosecute her suit and $4 per week for her support, and by saying nothing with respect to the writs of *ne exeat* and injunction, left them in force to be dealt with by the court of the chancery of the state. By a letter dated August 6, 1836, the defendant reported to Woodbridge that he had had another interview with Mr. Farnsworth, but had "come off rather unfavorably impressed as to his *efficiency* in taking hold of matters pertaining to his duties, as Chancellor." Although beyond the period of the present study, it may be of interest to note that Woodbridge drafted a petition to the state legislature in behalf of the defendant, and a *projêt* of a statute regulating the use of *ne exeat*.[123]

[123] The papers referred to (originals or photostats) are in the file of Case 1482, Territorial Supreme Court, Law Library, University of Michigan. For final disposition of the case, see Peltier v. Peltier, Harr. Ch. Rep. (Mich.) 19 (1836-42) (Farnsworth, Chancellor). In connection with an earlier case Woodbridge had been requested to "look over" defendant's answer as "Mr. Farnsworth acknowledges himself to be very young in chancery cases." 1 TRANSACTIONS (1825-1836) 384. As shown by *id.*, p. 31, Farnsworth was admitted to practice before the territorial Supreme Court in 1825. Originally from

How Judge Woodbridge made the injunction "dog-cheap in Michigan" does not appear.[124]

Foreclosure of Mortgages

"An Act concerning mortgages" passed by the Legislative Council in 1827[125] provided in detail for the registration of mortgages, and for foreclosure by advertisement and sale without court decree. That many mortgages were foreclosed in this manner is shown by the files of the current newspapers. In one issue of the *Detroit Journal and Michigan Advertiser* (October 23, 1833) advertisements of sales under six different mortgages will be found. Our interest, however, is not in foreclosure without court action, but in the records of more than 70 cases in the territorial Supreme Court in which foreclosure or foreclosure and sale was the principal or only relief sought.

Before outlining the practice followed by the court in a typical foreclosure case attention should be called to some provisions of "An Act to prescribe the mode of proceeding in Chancery" passed in 1833:[126]

> "Sec. 34. Whenever a bill shall be filed for a foreclosure or satisfaction of a mortgage, the court shall have power to decree a sale of the mortgaged premises or such part thereof as may be sufficient to satisfy the mortgage.

Vermont (born 1799), he was a graduate of Middlebury College, and had commenced the study of law before coming to Detroit in 1822. He continued the study of law in the office of Sibley & Whitney. According to Woodbridge, "few in any country have passed a better examination than he did." *Ibid.* He was appointed chancellor of the new state of Michigan July 18, 1836. According to James V. Campbell's unpublished *Judicial History of Michigan* (1886) (copy in Law Library, University of Michigan), "Elon Farnsworth was admirably fitted for his office. He was a thorough scholar as well as lawyer, with cool judgment and an intuitive knowledge of men, and an enlightened sense of justice. Under his careful administration the equity system became well adapted to the necessities of the Community, and divested of unreasonable conditions and vexatious delay. Very few of his decrees were reversed, and still less ought to have been. He belonged to the same class of wise and sensible jurists as Chancellor Kent whom in character and attainments he closely resembled."

[124] Judge Chipman, the other target of the anti-court party (*supra* note 104), allowed almost twice as many injunctions as Judge Woodbridge. Chipman, born in Vermont in 1784, had this to say about himself in 1827: "I was admitted to the bar in Vermont in 1806. Soon after I removed, or rather wandered, to South Carolina where I resided seventeen years in the practise of my profession. My acquisitions in that state consisted of an amiable wife, a moderate competence, and some reputation as a lawyer, & the friendship & respect of some of the most estimable & distinguished men at the south. Three years since I removed to this territory. . . . I have continued the practise of law here. . . ." 11 TERRITORIAL PAPERS OF THE UNITED STATES 1112 (Carter ed. 1943).

[125] 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 431 (1874).

[126] 3 *id.* at 1179.

"Sec. 35. All sales of mortgaged premises under a decree of a court of chancery shall be made by the sheriff of the county in which the premises are situate, or a master in chancery, unless otherwise directed in the decree of sale.

"Sec. 36. Deeds shall thereupon be executed by the sheriff, master, or person conducting such sale, which shall vest in the purchaser the same estate that would have vested in the mortgagee by a foreclosure of the equity of redemption; . . .

"Sec. 37. The proceeds of sale, after deducting the amount adjudged due on the mortgage and the costs awarded, shall be brought into court for the use of the person who may be entitled thereto, subject to the order of the court. And if the proceeds shall not be sufficient to satisfy the debt and costs, then the officer or person conducting the sale shall state the balance so remaining, in his return to the court of the proceedings on such sale; and thereupon execution may issue against the goods and chattels, lands and tenements of the mortgagor in whose hands soever they may be."

Sections 38 and 39 of the statute prescribed procedures to be followed when only interest or a portion of the principal sum is due.

Why it was thought necessary to confer power to decree sale as well as foreclosure does not appear. It does appear, however, that the Supreme Court had decreed sale in many cases, and some doubt may have existed as to its power to do so, *vide* brief by Woodbridge in 1835:[127]

"The law & current of Eng. decisions does not give *even to Courts of Chancery* the power to sell—in *ordinary* circumstances—but only the power to foreclose."[128]

The Legislative Council had provided that where not regulated by statute chancery proceedings were to conform "to the rules and proceedings established by courts of chancery in England."[129]

127 1 TRANSACTIONS (1825-1836) 143 (1940).

128 MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 453 (1952), states: "By the normal practice of the English chancery, the suit to foreclose a mortgage envisaged a decree providing for the ascertainment of the amount of the mortgage debt, allowing the mortgagor a stated time, commonly six months, to pay it, and ordering that in default of payment of the indebtedness and costs, he stand foreclosed of all right of redemption, the mortgagee in that event becoming the absolute owner of the land, legal title to which had been vested in him by the mortgage. Only in exceptional instances did the court exercise the power of ordering a sale. This course of practice was not departed from in England until the Chancery Practice Amendment Act of 1852."

129 An Act directing the mode of proceeding in Chancery" passed in 1827 and an act with the same title passed in 1833, 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 517 (1874); 3 *id.* at 1179.

The conferring by statute of the power of sale settled any doubts, and may have had the effect of validating past sales. A similar effect may have resulted from the act of Congress of 1823 which conferred on the Court "a chancery, as well as a common law jurisdiction" after it had exercised equity powers some eighteen years.

The Ordinance of 1787, applicable to Michigan Territory, had declared that the inhabitants should always be entitled to "trial by jury," and "judicial proceedings according to the course of the common law." The Constitution of the United States, also applicable to Michigan Territory, had preserved "trial by jury" in suits at common law involving more than $20. Where after a judicial sale of mortgaged property it was found that money was still due on the debt secured by the mortgage, was the mortgagee entitled to a decree for the deficiency? Or must he bring an action for the deficiency in a court of common law where trial by jury might be had? Under the then English chancery practice only the second alternative was available.[130] The Michigan statute of 1833 did not authorize a deficiency decree, but did provide that execution might issue upon the "return" of the officer making the sale. Whether the Legislative Council had power to make this provision may be questioned. It seems significant that in no case where a deficiency was reported did the Supreme Court enter a deficiency decree.

The procedural course of a typical suit to foreclose a mortgage will be indicated by noting the steps taken in *Rucker v. Macomb* —a suit in chancery commenced in the territorial Supreme Court in 1816.[131] One reason for selecting this case is the fact that the pleadings as well as the court's orders and decrees are set out at length in the court's journals, hence are readily available in print.[132] Another reason is that it was the first foreclosure case prosecuted to a conclusion in the court. The case is also of interest because of the amount of money secured ($9,700) and the

130 MILLAR, *supra* note 128, at 455 states: "In the case of mortgage foreclosure, if a deficiency is left after application of the proceeds to the amount due the mortgagee, and the mortgagor is personally liable on the promissory note or other obligation secured by the mortgage, the earlier rule, following that of the English chancery, relegated the mortgagee to his action at law for the recovery of such deficiency. But now statutes generally authorize the court in the foreclosure proceeding to render judgment for the amount of the deficiency."

131 1 TRANSACTIONS (1814-1824) 72 (1938).

132 Since publication of the journal cited in note 131, the court's file has been found, and is available (in the Law Library of the University of Michigan) for study along with the journal entries and printed papers.

extent of the land covered by the mortgage (an undivided one-third of "Hog Island," later known as "Belle Isle;" of "Grosse Isle;" of a farm "next below the town of Detroit;" and of a farm "fronting on the Grand Marais"). The mortgage, also set out in the record, was executed in New York City in 1809 and acknowledged before Brockholst Livingston, a justice of the Supreme Court of the United States.

The above suit was commenced by filing a bill of complaint which alleged execution of the mortgage; death of the mortgagor leaving a widow and four minor children; and assignment of the mortgage to the complainant. It contained, also, a charge of confederation, typical of the old chancery bills, and some 38 interrogatories to be answered by the defendants on oath. The relief prayed was sale of the mortgaged property as provided in the mortgage; the appointment of some master commissioner to effect the sale; further relief agreeable to equity and good conscience; writs of subpoena to residents of the Territory, and other process or notice to defendants residing outside. Upon the filing of the bill the court ordered subpoenas served on the widow and minor children, and that notice be given to such defendants as might be absent from the Territory by inserting a notice in the *Spectator* or other New York City newspaper three successive weeks. Some three weeks later Charles Larned entered his appearance as counsel for the defendants. This was followed by a petition by the widow that she be appointed guardian ad litem for her minor children, and it was so ordered by the court. A year later, the cause coming on to be heard, the complainant, having obtained leave to amend his bill, filed a supplement which set out in great detail proceedings before the Register of Probate resulting in a partition of the tracts of land covered by the mortgage—one part going to Governor Cass. The court then recorded the appearance of the defendants and the filing of their several answers, and adjourned the case until the following year. The answer of the original mortgagee (who assigned to complainant) was sworn to in New York City before Justice Livingston; the answer of the minors by their guardian, and of the widow, before a justice of the peace in Detroit. At the term to which the case was adjourned (1818) "the said matters in said amended bill being by said answers sufficiently shewn and admitted," and the partition "sufficiently appearing of record," the court decreed that the mortgaged premises as partitioned be sold at public auction on the first Monday of the following May; that notice of

the sale be published in the *Detroit Gazette* three successive weeks; and that George McDougall be appointed commissioner to conduct the sale. After finding that principal and interest due amounted to $11,658.72, the court decreed that complainant recover this sum, and that the avails of the sale be first appropriated for this purpose, any excess to be paid into court. The court further decreed that McDougall execute deeds to the purchasers at the sale, and report his proceedings to the court. A year later the court noted in its journal that the master commissioner had filed his report of the sale of the mortgaged property, and his account for selling the same, which, a week later, was allowed by the court. These entries were followed by a decree reciting that by the report of the master the property had been sold for $6,314.48½ at which time the principal and interest due amounted to $12,812.62, and that costs totaled $205.21½. The decree further recited that complainant had paid the costs, and was willing to receive the amount obtained from the sale in full satisfaction of the debt due him on the bond and mortgage. And the said "Bills, Answers, Exhibits and proceedings having been read, heard and fully understood, and the arguments of the Counsellors and solicitors of the parties having been heard thereon," it was decreed that the sales made by the master be confirmed, and that he deliver to the purchasers good and sufficient deeds; that "all equity of redemption" and "all claim of Dower" in the widow, and "all equity of redemption" in the minor children, "be forever foreclosed, taken away, and barred."

In a foreclosure case commenced in 1822, concluded in 1831, the widow of the mortgagor claimed a half interest in the land under the Custom of Paris. The court decreed that sale be made " (subject to the right of Dower of the said Agatha Visger widow of the said Jacob Visger deceased according to the *Coutume de Paris*)."[133]

In a foreclosure case commenced in 1824[134] the complainant prayed (a) that defendant be required to answer the bill of complaint; (b) that the matter be referred to a master for an account of the sums due; (c) that defendant be decreed to pay the amount found due; (d) that, in default of payment, all equity of redemption be foreclosed; (e) that the property be decreed sold, and all

133 See photostats in file of Case 898, 1 TRANSACTIONS (1814-1824) 233 (1938). For a discussion of the Custom of Paris, see Blume, *Probate and Administration on the American Frontier,* 58 MICH. L. REV. 209, 210 (1959).

134 Case 1104, 1 TRANSACTIONS (1814-1824) 327 (1938).

arrears paid out of the money received; (f) that any money remaining stand subject to the further orders of the court; (g) that persons renting the mortgaged property be enjoined from paying rent to defendant; (h) that a receiver be appointed to receive rents, issues and profits from the mortgaged premises; (i) that further relief be given agreeable to equity; and (j) that subpoena issue under a certain penalty. The prayers of the bill except (g) and (h) are similar to those found in the run-of-the-mill foreclosure cases commenced in the court. The prayers for injunction and receiver were unusual, and were not included in later cases most likely because of the decision of the court in this case. Notes in the handwriting of Judge Sibley in part read:

> "The Bill charges—the nonpa[t] of the annuity and prays &c. No suggestion that the Property is inadequate to secure the Debt—M[o] to appoint a receiver of the rents and Profits &c reasons Court has the power—Blac. Com. 1. 61.—91—Fonblanc. 5—Fonblanc 9 10 note—Powers of the Court to appt a receiver 2 Harrison 107.—Blake 451—2 Madox 232 is a discretionary power Authorities referred to by M[r] Hammons digest—title receiver—at M[r] Fletchers—Equity digest—604. 654 . . . If the annuity had been made dependent on the rents and profits of the mortgaged premises, then there would have been a forceable claim on the Court to protect the rights of the Pltff and would in such a Case, sustain such a motion and on affidavit, appoint a receiver—But in the present Case, I can discover, no fraud charged by the Bill—nor any other cause sufficient to deviate from what appears settled Law—Eden on injunctions 218. 2 Madox 232 & 233."

Complainant's motion for a receiver was overruled.

A law adopted by the governor and judges of Michigan in 1818[135] authorized the governor of the Territory to appoint for each court having chancery jurisdiction

> ". . . a master commissioner in chancery, whose duty it shall be, under the order and direction of the court, to take down testimony in writing, either in or out of court, and do all such other matters and things as are usually done and performed by masters commissioners in chancery, according to the usages and customs of chancery courts."

The commission to be charged by a master on a sale of mortgaged property was fixed by court rule in 1821.[136] The form of bond

[135] 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 133 (1874).
[136] 2 TRANSACTIONS (1814-1824) 526 (1938).

to be given by a master was prescribed in 1824 by a statute which also provided for a special appointment by the court if the regularly appointed master was unable to act.[137] This statute also declared that no master in chancery should practice as a solicitor in the court in which he was to act as master. "An Act to provide for the appointment of Masters in Chancery" passed in 1828[138] divided the Territory into eleven districts, and directed the governor to nominate, and "by and with the advice and consent of the legislative council," appoint one or more masters for each district—two for the first district composed of Wayne County—to hold office for three years. Acting under this statute Governor Cass appointed Robert Abbott and Charles W. Whipple for the first district.[139] His choice of Whipple was questioned by "CATO" in a letter published in the *Detroit Gazette,* October 9, 1828. After pointing out the importance of the office in the administration of justice, why, he asked, had the Governor appointed

> "a youth, scarce arrived at the years of manhood, who has but just commenced the study of law, who can have no pretensions to any knowledge of chancery law or practice, and wholly ignorant of the business incident to the office."[140]

In a reply published October 16 Whipple called attention to the limited scope of the duties involved:

> "The business of a master, has been limited to the taking down of testimony, drafting reports on references made to him, with a view of ascertaining the amount due on mortgages and the like, and making sale of real estate under the decrees of the court."

A similar letter signed "N" appeared in the same issue of the *Gazette.* Other letters followed, but after a month the matter was dropped. If the territorial Supreme Court lacked confidence in Whipple's ability to serve as a master, it does not appear from the records of cases involving foreclosure of mortgages, more cases of this kind being referred to him than to any other master.

137 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 186 (1874).

138 *Id.* at 668.

139 July 2, 1828. JOURNAL OF THE LEGISLATIVE COUNCIL, 1st session, 5th Council, p. 35. William W. Petit was appointed "master commissioner in chancery, supreme, and Wayne County courts" June 22, 1818. *Id.* at 19.

140 A son of Major John Whipple who came to the Northwest Territory shortly after 1796 and resided in Detroit until 1830, Charles W. had been a student at West Point 1822-1827; dismissed July 15, 1827, "deficient in Engineering and Artillery" (records United States Military Academy).

And it may be of interest to note that he became a member of the state Supreme Court in 1839.

Specific Performance. Trusts

The final journal entry in the first chancery case heard by the territorial Supreme Court (1807)[141] is brief enough to be quoted in full:

> "The bill of the complainants charges that they had sold a lot and house in the old town of Detroit to the defendant, and states the consideration, and prays a specific performance to be enforced; the answer states that previous to the transfer of the property by a conveyance the house was consumed by the fire, which destroyed the town of Detroit, and that the complainants had not even at that time the legal title. The case having been fully heard on the bill, answer, exhibits, and testimony of the parties, and on the arguments of their respective counsel it is thereupon ordered and decreed by the Court that the bill be dismissed, and that the defendant recover his costs."

The fire referred to had occurred in 1805 shortly before Detroit was to become the seat of the new territorial government, and, because of a decision to lay out the town according to a new plan, ownership of particular lots was uncertain until the plan could be put into effect. It was not this uncertainty, however, that was referred to by the defendant, but a lack of legal title at the time of the fire. Whether specific performance was denied because a substantial part of the property had been destroyed, or because of lack of legal title, or both, does not appear. That both reasons for denying specific performance were relied on in argument is shown by briefs in the handwriting of Solomon Sibley, counsel for defendant, found among his papers.[142] Pointing out that plaintiffs' claim to title was based on a judicial sale of attached property, which under the Northwest statutes should have been sold for the benefit of all creditors, Sibley argued that a plaintiff praying for specific performance

> "1. Must shew that he is able to make a perfect deed— Powel 2d 34 Marlows Case — 2d P. Williams 198 & 199 —
> "2d Must shew that he has done every thing on his part 2d of Powel 19. 21. & 22 —

141 Case 80, 1 TRANSACTIONS (1805-1814) 102 (1935). See also Case 44, *id.* at 75.
142 Burton Historical Collection, Public Library, Detroit.

"3d The transaction must be fair & without deception —
"4th If any thing hapen to the subj[t] matter of contract after the sale and before conveyance altering the value, it will be at the risk of the seller 1 P. Wil 61 & 62. 2 P. Wil 220 — Powel 2d 34 —"

Sibley was willing to concede that "if the vendor had a good title at the time of the agreement made, then court of equity will consider as executed," but insisted that the agreement in present case was not "a complete contract," hence the property remained at the "risk of the vendor."

The usual suit for specific performance was not to compel the acceptance of a conveyance,[143] but to compel the performance of an agreement to convey. A suit of this type commenced in 1817, but not decided until 1826, involved an agreement by a partner to transfer to the partnership two city lots, a memorandum of the agreement being entered in the partnership books.[144] The partnership was dissolved in 1809, and the partner who made the agreement died in 1813 without making a conveyance. In an action by the surviving partner against the administrator and heirs of the deceased partner for a conveyance to him of a half interest in the lots, the court decreed "in favour of Complainant." Notes in the handwriting of Judge Sibley contain references to *Watson on Partnership, Newland on Contracts,* and to Reeve's lectures on "Baron and Femme" and other topics including "the Powers of the Courts of Chancery." The reference to Watson was to the rule in equity that where partners are joint tenants the right of survivorship does not prevail, the partners being tenants in common in equity; that the legal title is held in trust for those beneficially interested regardless of lapse of time. The decree, though ordered filed, is not with the numerous papers in the file, making it impossible to refer to the exact language used in decreeing the conveyance. In a suit for specific performance decided in 1821[145] the court decreed that the defendant (executrix)

". . . make, sign, seal & have ready to deliver a good and sufficient deed of conveyance of and for the said lot & tract of land & premises . . . as an estate of inheritance in fee simple forever, to the said Complainant . . . on or before the expiration of six months . . . & that the said defendants who are

143 Only one other case of this type appears in the records, Case 1246, 1 TRANSACTIONS (1825-1836) 87 (1940).
144 Case 567, 1 *id.* (1814-1824) at 85 (1938).
145 Case 599, *id.* at 99.

> . . . under the age of twenty one years do join in said deed of conveyance by their said guardian And that the said Defendants do then deliver to the said Complainant the said deed of conveyance."

The decree further provided that the parties appear at the next term of the court, at which time the complainant might except to the deed of conveyance or to the title conveyed.

In a suit to enforce an implied trust commenced in 1816, decided in 1830, the court decreed that the defendant make a conveyance to the complainant within three months, and upon his failure to do so

> "That then this DECREE shall of itself operate as a conveyance unless and untill the said Complainant shall thereafter Elect to take such further and other measures as may coerce the Execution thereof—"[146]

Authority to make this type of decree was given by "An Act directing the mode of proceeding in Chancery" approved April 12, 1827,[147] section 35 of the Act providing:

> "That a court of chancery shall have power to pass the title to real estate, by a decree, without any other act to be done on the part of the defendant or defendants, when, in their judgment, it shall be the proper mode to carry their decrees into effect; and such decree being recorded in the records of the register of the county where such real estate is situated, shall, while in force, be as effectual to transfer the same, as the deed of the defendant or defendants."

A decree entered in 1833, reciting non-compliance with a decree for specific performance entered in 1828, ordered

> "that the aforesaid decree shall be considered and taken in all Courts of Law and Equity to have the same operation & Effect & be as available, as if such releases and conveyances had been Executed conformably to such decree."[148]

The "implied trust" enforced in the suit referred to above[149] was, according to complainant's brief, created when complainant's property, levied on in 1807 to satisfy a judgment in favor of the United States, was bid in by an attorney for defendant's brother

146 Case 546, *id.* at 76.
147 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 517 (1874).
148 Case 600, 1 TRANSACTIONS (1814-1824) 99.
149 Note 146 *supra.*

who had advanced money to pay the judgment, the attorney later conveying to the brother who conveyed to defendant. The bill of complaint alleged that complainant suffered the sale for the better security of the money borrowed; that defendant took the property without consideration and with knowledge of the original arrangement; that defendant is now indebted to complainant in a sum greater than that owed by complainant. The brief, found among the papers of the Judge Woodbridge[150] and no doubt submitted to him at the time the case was argued, states:

> "1. That in this transaction there was an implied trust, and this Court will enforce it — . . . The property having been purchased with the [money of] Complainant, he in whose name the deed was taken, is a mere trustee for the complainant even in the absence of an agreement to that effect: and it may be proved that the money was so paid by any mem[m] or note of the nominal purchaser, or by parol.
>
> "2. John Hoffman coming into property bound by a trust with notice shall be considered a trustee — Whoever so comes into possession, is considered as Trustee, with respect to that special property —
>
> "3. The possession of complainant is notice to John Hoffman of the interest and the extent of that interest which the complainant had in the same property, and the purchaser is bound to admit every claim of the tenant which he could enforce against the vendor. . . ."

In support of these propositions complainant's solicitor, Fraser, cited *Maddock, Practice of the High Court of Chancery; Abridgment of English Equity Cases;* reports of English chancery cases (Atkyns, P. Williams, Vernon, Vesey Jr.); reports of Irish chancery cases (Schoale and Lefroy); reports of New York chancery cases (Johnson).[151] The court "considered that the conveyance

150 Burton Historical Collection, Public Library, Detroit.

151 Complainant's solicitor, Alexander D. Fraser, was admitted to practice before the territorial Supreme Court in 1825. Writing in 1870, Charles Lanman (THE RED BOOK OF MICHIGAN 441) sketched Fraser's career: "He was born in Inverness, Scotland, January 20, 1796, and was educated at the Inverness Academy. In 1813 he began the study of law; two years afterwards he removed to Edinburgh, and prosecuted his studies in the office of the Writer to the Signet, and attended the law lectures of the University; and in 1819 he sailed for America and landed at Savannah, Georgia; came to the bar in Alabama, where he spent two years, and then removed to Vincennes, Indiana. He practiced his profession for two years in Indiana and Illinois; and in 1823 he arrived at Detroit. . . . By common consent, he is to-day looked upon by his colleagues at the bar as the leading lawyer of Michigan."

of the premises to George Hoffman in his life time and the subsequent conveyance by him to John Hoffman his brother for a good consideration only & with a knowledge of the rights of the Complainant are to be taken as conveyances in trust for the use of the Complainant." After a master in chancery reported that the sum originally advanced exceeded complainant's account against defendant by a small amount, the court decreed that on payment of this amount the defendant should make a conveyance to the complainant.

Of the 28 suits for specific performance commenced in the territorial Supreme Court, 20 were for specific performance alone; the others for specific performance plus additional relief such as accounting, cancellation, injunction, and receiver. In all of these cases discovery to some extent was sought, and in some, the enforcement of a trust. Suits in which the principal relief was the establishment and enforcement of a trust (9 in number) did not involve merely a claim to the trust property, but included prayers for accounting, annulment, cancellation, injunction, receiver, and so on. A reader interested in seeing the pleadings in a typical suit for specific performance will find a complete set recorded at length in the Chancery Journal, now available in print.[152] Opinions in two of the cases, one by Judge Sibley in 1829 and the other by Chancellor Farnsworth after Michigan became a state, are also available in print.[153]

Accounting and Other Relief

In many of the 240 chancery cases commenced in the territorial Supreme Court an accounting was prayed for, but in only

[152] 2 TRANSACTIONS (1814-1824) 489-508 (1938). In this case the court, after "mature deliberation," decreed that the "Bill do from henceforth stand absolutely *dismissed.*" In opposition to a petition for a rehearing Fraser filed an elaborate brief citing Maddock, *Chancery Practice;* Harrison, *Chancery Practice;* Mitford (Redesdale), *Chancery Pleading;* Cooper, *Equity Pleading;* Fonblanque (Ballow), *Equity;* Blake, *New York Chancery Practice;* Phillips, *Evidence;* Roberts, *Statute of Frauds; Equity Cases Abridgment;* English chancery reports (Atkyns, Vesey Jr.); Irish Chancery Reports (Schoale and Lefroy); United States Reports (Wheaton); Virginia Reports (Mumford). Notes in the handwriting of Judge Sibley summarizing Fraser's arguments will be found in 1 TRANSACTIONS (1814-1824) 289 (1938).

[153] Case 903, 1 TRANSACTIONS (1814-1824) 235 (1938); opinion printed in 1 TRANSACTIONS (1825-1836) 370 (1940). Case 1409, *id.* at 137; opinion printed in Harr. Ch. Rep. (Mich.) 31 (1836-42). Sibley's opinion was concerned with the notice required to bind heirs, and purchasers from heirs. Farnsworth's opinion dealt with the statute of frauds, and the effect of inadequacy of price. In his unpublished *Judicial History of Michigan* (1886) (copy in Law Library, University of Michigan), Campbell referred to Judge Sibley as "a man of great ability and wisdom" who had "universal confidence." For Campbell's appraisal of Farnsworth, see *supra* note 123.

a few — about a half dozen — was accounting for principal or only relief demanded. An amended bill in a suit of the latter type, commenced in 1822, will be outlined to serve as an illustration:[154]

AMENDED BILL

Complainants: Robert Abbott and five others, children and devisees under will, of James Abbott, and under will of his wife, Mary. Defendant: James Abbott, Jr.

1789. James Abbott formed a partnership with son Robert—two-thirds and one-third.

1798. New partnership—James, Sr., Robert (orator), and James, Jr. (defendant)—one-third each. For his share James, Jr. owed James, Sr. $4,557.95.

1799. James, Sr. made will; one-third to wife, Mary; two-thirds to six children—one-sixth each.

1800. James, Sr. died. James, Jr. became executor of will, and took possession of estate. Has never accounted, and still has property, books, papers, etc.

1813. Wife, Mary, made will giving her one-third to same children. James, Jr., named as one of her executors, refused to act as *such*, but on her death took possession of all her property.

Prayer

1. For answer to bill and numerous special interrogatories.
2. That will of James, Sr. be established and carried into execution by decree of Supreme Court.
3. For account of rents, profits, interest, debts, funeral expenses, etc., so residue may be ascertained and one-sixth of two-thirds paid to each orator.
4. For accounting of money owed partnership—one-sixth of two-thirds of $4,557.95.
5. That defendant set forth and discover all real estate, so fair division may be made by Court.
6. That defendant produce all books of account, papers, deeds, bonds, etc., relating to estate, and deposit same with a list thereof.
7. That defendant set forth and specify amounts of bonds, mortgages, accounts, etc.
8. That defendant set forth and partition land under decree of this Court—one-third to Robert and one-sixth of two-thirds residue to each orator.
9. That all and every the discovery and relief prayed for re estate of James, Sr. be decreed re estate of his wife, Mary.
10. Further relief as may seem proper.
11. Subpoena under a certain penalty.

August 26, 1829. ALEX D. FRASER Solicitor

154 Case 905, 1 TRANSACTIONS (1814-1824) 237 (1938).

Prior to the filing of the amended bill the court had sustained a demurrer to the original bill, after overruling a plea which had challenged the propriety of compelling discovery. The grounds of demurrer appear in the defendant's brief and in an opinion written by Judge Sibley, both found among his papers and now available in print.[155] The briefs and the opinion fairly illustrate the care with which complicated chancery cases were considered, and the broad range of the authorities relied on as precedents.

Among the grounds of demurrer argued in the above case was one which challenged the jurisdiction of the Supreme Court to deal with matters relating to wills and the administration of decedents' estates — matters exclusively within the jurisdiction of the probate courts. After pointing out that courts of chancery had jurisdiction concurrent with courts of law "in matters of account," Judge Sibley was "not prepared to say that there are not facts charged in the present Bill proper for the consideration of a Court of Chancery over which a Court of Probate could not sustain jurisdiction or grant complete relief." In 1807, before jurisdiction over persons mentally incompetent was vested in the probate courts,[156] the Supreme Court "sitting in chancery" appointed a guardian for a person found to be "a lunatic;" and, in a later proceeding, decreed that the person had been "restored to his senses."[157] In the second proceeding the Supreme Court "sitting in chancery" ordered that a jury be called "in the Supreme Court, sitting at law" to inquire into the matter and that the inquest be returned to the Supreme Court "sitting in chancery."

In addition to the types of chancery relief previously referred to in this paper (accounting, determination of sanity, divorce, enforcement of trusts, injunction against tort, injunction against proceedings at law, mortgage foreclosure, *ne exeat,* specific performance) prayers will be found for appointment of receiver, cancellation of deed, conveyance and re-conveyance of land, delivery of papers, dissolution of partnership, quieting title, rescission of commercial instruments, rescission of conveyance, and so on. Except where jurisdiction of matters previously chancery had been conferred on the probate courts,[158] the territorial Supreme Court

155 *Id.* (1825-1836) at 378, 380.
156 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 376 (1871).
157 Case 87, 1 TRANSACTIONS (1805-1814) 106 (1935).
158 See Blume, *Probate and Administration on the American Frontier,* 58 MICH. L. REV. 210, 230 (1959).

exercised all the jurisdiction of a full-fledged court of chancery, and conducted its affairs accordingly.

Conformity to Rules and Proceedings of English Chancery

The Ordinance of 1787, applicable to Michigan Territory, assured the inhabitants of "judicial proceedings according to the course of the common law." In 1827, after Congress had provided that the judges of Michigan should possess "a chancery, as well as common law, jurisdiction," the Legislative Council enacted that the Supreme Court of the territory should have jurisdiction "in cases properly cognizable by a court of chancery, in which a plain, adequate, and complete remedy cannot be had at law," and that the proceedings in the court, where not regulated by the statutes of the Territory, should be regulated "by the judges thereof, conforming to the rules and proceedings established by courts of chancery in England, so far as the same shall be consistent with the laws and constitution of the United States, and the laws of the Territory of Michigan."[159] This reference to English chancery practice was similar to that made in the Federal Equity Rules of 1822.[160]

> "XXXIII. In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court shall be regulated by the practice of the high court of chancery in England."

After 1810 no English statute was in force in Michigan except, perhaps, as a part of the common law.[161] Judge Woodward was of opinion that the common law in force was the English common law of 1189.[162] Judge Woodbridge noted that the common law had been "lopped off" by the Revolution.[163] In his opinion the common law of the Territory was the English common law of 1776 unaffected by English statutes. According to Judge Sibley the common law referred to in the Ordinance of 1787 was the

159 "An Act directing the mode of proceeding in chancery," 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 517 (1874).

160 20 U.S. (7 Wheat.) xxi.

161 See "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." (1810), 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 900 (1871).

162 1 TRANSACTIONS (1814-1824) 436 (1938).

163 *Id.* (1825-1836) at 308.

English common law of 1776 as modified by English statutes enacted prior to that date.[164] In contrast with these and other conflicting views as to what common law was in force, stands the clear guide to chancery practice set out in the Federal Equity Rules of 1822, and in the territorial statute of 1827. Chancery practice not regulated by statute or court rule was to conform to the current English practice — not to the practice of some earlier period. To have access to the designated source, it was necessary to have the latest English texts and cases. The result was supposed to be a system of chancery practice closely paralleling that of contemporary England.

Determination of whether the chancery practice of Michigan Territory actually paralleled that of England would require a study far more extensive than the one presented here. Determination of whether the judges and lawyers had access to the latest English texts and cases has been attempted, but, due to difficulties in compiling a complete list of authorities cited and in establishing what books were actually in the Territory, has been only partially accomplished. The list of authorities set forth below has been compiled from the few chancery opinions and briefs found in the Court's files, and from a greater number found among the personal papers of individual judges and lawyers. As we must assume that other authorities were cited in chancery opinions and briefs not now known, the list is enlightening but most likely not complete.

English abridgments and digests

Bacon, Bridgment, vol. 2
Comyn, Digest, vol. 2 (chancery)
Condensed Reports (chancery) vols. 2, 4
Cruise, Real Property Digest, vol. 1
Equity Cases Abridgment, vols. 1-2
Fitzherbert, Natura Brevium
Hammond, Digest of Equity Reports
Jacob, Dictionary of English Law, vol. 5
Viner, Abridgment (law and equity) vol. 4

American abridgments and digests

Dane, Abridgment of American Law, vol. 1
Ingersoll, Abridgment of Acts of Congress
Johnson, Digest of New York Cases, vol. 1
Swift, Digest of Connecticut Laws, vols. 1-2

[164] *Id.* at 311.

English reports

Ambler (chancery)
Atkyns (chancery) vols. 1-3
Bosanquet and Puller, vol. 1
Brown (chancery) vols. 1, 3
Burrow, vols. 3-5
Douglas, vol. 1
East, vol. 8
Espinassi, vol. 2
Moseley (chancery)
Peere Williams (chancery) vols. 1-3
Salkeld, vol. 1
Strange, vol. 1
Vernon (chancery) vols. 1-2
Vesey, Sr. (chancery) vols. 1-2
Vesey, Jr. (chancery) vols. 1-16, 18-19
Vesey and Beames (chancery) vols. 1-2

American reports

Binney, Pennsylvania, vol. 5
Caines, New York, vols. 1-2
Cowen, New York, vols. 2, 9
Cranch, United States, vols. 1, 7
Dallas, United States, vol. 1 (Pa.)
Desaussure, South Carolina, vols. 2-3
Hening and Mumford, Virginia, vols. 1, 3-4
Johnson, New York (chancery) vols. 1-7
Johnson, New York (law) vols. 1, 3, 4-5, 7, 9-10, 12-15, 18-19
Massachusetts, vols. 1, 3-4, 6, 11
Mumford, Virginia, vols. 1, 4-5
Paige, New York (chancery) vols. 1-2, 4
Peters, United States, vols. 1, 3, 7
Randolph, Virginia, vol. 2
Sergeant and Rawle, Pennsylvania, vol. 7
Wheaton, United States, vols. 1-4, 7, 9, 12

English treatises

Blackstone, Commentaries, vols. 1-4
Chitty, Practice, vol. 2
Clancey, Husband and wife (law and equity)
Coke, Commentary upon Littleton, vol. 1
Cooper, Equity Pleading
Eden (Baron Henley), Injunctions
Equity Draftsman (F. Van Heythuysen)
Fonblanque, Equity, vols. 1-2
Francis, Maxims of Equity
Gow, Partnership
Harrison, Chancery Practice, vols. 1-2

English treatises (Continued)
Hinde, Chancery Practice
Kyd, Awards
Maddock, Chancery Practice, vols. 1-2
Mitford (Redesdale), Chancery Pleading
Montagu, Set-off (law and equity)
Newland, Contracts (equity)
Newland, Chancery Practice
Phillips, Evidence
Powell, Contracts, vols. 1, 2 (equity)
Powell, Mortgages
Reeves, History, vols. 3-4
Roberts, Statute of Frauds
St. Germain, Doctor and Student (chancery)
Sugden, Vendors and Purchasers
Toller, Executors and Administrators
Watson, Partnership

American treatises
Blake, New York Chancery Practice
Cowen, Civil Jurisdiction of New York Justice of Peace
Kent, Commentaries, vol. 2
Reeve, Baron and Femme, Powers of Courts of Chancery, etc.

In addition to these authorities, references in at least five chancery cases were made to Schoales and Lefroy's reports of cases determined in the High Court of Chancery in Ireland (vols. 1-2), and in at least one case to Erskine's *Principles of the Law of Scotland.*

Some writers have asserted that judges and lawyers on the American Frontier relied almost entirely on Blackstone's *Commentaries,* and may be inclined to question the actual presence on the Frontier of the books listed above. As a check against the possibility that some or all of the citations referred to might have been made without physical access to the books cited, Research Associate Elizabeth Brown has made a preliminary investigation of sources other than the opinions and briefs to ascertain what law books were present at or near the seat of the territorial government within the period of the present study. Her preliminary report reads in part as follows:

In my attempt to discover what law books were physically present at or near the seat of government of Michigan Territory within the territory period (1805-1836), no weight was given to citations found in attorneys' notes and briefs, or in the notes and

opinions of judges. This policy was adopted in the interest of accuracy, although in many instances the citations strongly suggest that the writer had actual access to the books cited. Proof of physical presence has been sought in sources such as the following:

1. Inventories of estates of deceased lawyers and judges;
2. Invoices and other evidence of book purchases;
3. Contemporary references to books said to be present;
4. Newspaper advertisements for the return of missing books;
5. Extant books containing the autograph of a territorial attorney or judge.

Prior to 1840 it was usual to include in the inventory of a decedent's estate a list of the books found among his effects.[165]

The two territorial lawyers said to have had the largest law libraries, William Woodbridge and Alexander D. Fraser, died after 1840 and, unfortunately, the titles of their books were not included in the inventories of their estates. Judge Woodward died before 1840, but had disposed of most of his books before his death.[166]

Illustrative of a contemporary reference to books said to be present is the following letter dated at Monroe, Michigan, December 14, 1827:

> "We have in town most of the elementary works in ordinary use. Esp[inasse] & Selwyns Digests the Digest of Mass & N. York Reports — books on Evidence Chitty, Saunders, Wentworths, Pleading, Tidd Seldon & Archibald Practice — Chitty on Crim Law and some of the English reports."[167]

An illustration of an advertisement for the return of a missing book will be found in the *Detroit Journal and Courier* of April 29, 1835.

From a fairly complete card file kept by the Law Library of The University of Michigan of books catalogued or recatalogued after 1927, it is possible to locate those books in the Library which contain autographs of previous owners. This group contains several books once owned by lawyers of the territorial period.

165 For an example of such an inventory, see Blume, *Probate and Administration on the American Frontier*, 58 MICH. L. REV. 209, 230, n. 86 (1959). For an example of an invoice of a book purchase, see Blume, *Civil Procedure on the American Frontier*, 56 MICH. L. REV. 162, 166-7 (1957).

166 See BROWN, *Augustus Brevoort Woodward, Man of Property*, 40 MICHIGAN HISTORY MAGAZINE 190-202 (June 1956).

167 WOODBRIDGE PAPERS, Burton Historical Collection, Detroit, Michigan, cited in 1 TRANSACTIONS (1814-1824) 35 (1938).

Relying on sources of proof such as the above, I have made a preliminary list of law books actually present at or near the seat of the territorial government between 1805 and 1836. As it has been impossible in the time available to examine all the sources, of necessity the list is tentative and incomplete, but all books not clearly identifiable as law books have been omitted.[168]

In comparing my list with the list of citations made by Professor Blume at pp. 89-91 *supra,* it is necessary to bear in mind that his list is limited to citations in chancery cases, while mine includes all law books found to have been physically present. The following table shows the comparison:

	Books Cited in Chancery Cases	*Books Cited Present in Territory*	*Books Not Cited Present in Territory*
Treatises			112[169]
Scottish	1	1[170]	
English	34	24[171]	
American	4	3[172]	
Reports			
Irish	2	2[173]	
English	43	15[174]	28[175]
American	56	21[176]	13[177]
Abridgments and digests			
English	11	3[178]	27[179]
American	5	3[180]	3[181]
Statutes and other legislative materials			
Federal			94[182]
State			21[183]
Territorial			34[184]
Foreign			1[185]

[168] The inventories and book orders contained references to at least thirteen legal treatises which cannot be identified positively. In some cases, no author was listed, and the title was so vague as to prove of little assistance. Examples of this type of listing include *Civil Officer* and *Notes on Law* (4 vols.) ordered by William Woodbridge in 1806, *Law Marine* listed in the inventory of the estate of Cyprian Stevens who died in 1830, *Maritime Law* (2 vols.) and *Theorie des Loix* owned by Father Gabriel Richard, a treatise on *Certiorari* and four volumes of the *Newgate Calendar* listed in the estate of Henry C. Cole who died in 1836, and *Lawyer's Guide* listed in the inventory of the Andrew G. Whitney estate in 1826. Another type of inadequate reference is found where some information as to author and title are noted, but full bibliographical data for sufficient identification cannot be established. For example, the Andrew G. Whitney estate listed Cooper's *Justinian,* Clark's *Commentaries,* and Proctor's *Practice.*

[169] AMERICAN CLERK'S MAGAZINE, vol. 1; ATTORNEY'S COMPLETE POCKET BOOK, vol. 1; ATTORNEY'S MANUAL; ARCHBOLD, PRACTICE, vols. 1-2; BECK, MEDICAL JURISPRUDENCE; BACHE, JUSTICE'S MANUAL, vols. 1-2; BURNS, REGISTRUM ECCLESIAE PAROCHIALIS; CAINES, PRACTICE;

If the proportion of the iceberg which shows above water to that which is underneath the surface should be even partially applicable to the proportion of law books known to be present

CALDWELL, ARBITRATION; CHITTY, BILLS OF EXCHANGE; CHITTY, CRIMINAL LAW, vols. 1-3; CHITTY, PLEADING; CHITTY, PRACTICE, vols. 1-3; CLANCY, EQUITABLE RIGHTS OF MARRIED WOMEN; COMYN, CONTRACTS, vols. 1-2; CONDUCTOR GENERALIS; CROMPTON, PRACTICE, vols. 1-2; CROMPTON, PRACTICE COMMON-PLACED, vols. 1-2; CURRY, BLACKSTONE'S COMMENTARIES; ERSKINE, SPEECHES; EVANS, ESSAY; EVERY MAN HIS OWN LAWYER; FELL, MERCANTILE GUARANTIES; FESSENDEN, PATENTS; GILBERT, EVIDENCE; GOULD, PLEADING; GRAHAM, ESSAY ON NEW TRIALS; HALE, COMMON LAW, vols. 1-2; HALE, PLEAS OF THE CROWN, vols. 1-2; HAWKINS, PLEAS OF THE CROWN, vols. 1-2; HIGHMORE, BAIL; HOFFMAN, CHANCERY PRACTICE; HOWARD, TREATISE ON EXCHEQUER IN IRELAND, vols. 1-2; HULL'S TRIAL; IMPEY, PRACTICE; JEFFERSON, PARLIAMENTARY PRACTICE; JEREMY, LAW OF CARRIERS; JONES, BAILMENT; JUSTINIAN, INSTITUTES; KAMES, LAW TRACTS; KENT, COMMENTARIES, vols. 1, 3-4; KYD, BILLS OF EXCHANGE; LIVERMORE, PRINCIPAL AND AGENT; MACOMB, MARTIAL LAW; MACNALLY, EVIDENCE; MONTAGU, LAW OF LIEN; MONTAGU, LAW OF PARTNERSHIP; MONTEFIORE, COMMERCIAL AND NOTARIAL PRECEDENTS; MONTESQUIEU, SPIRIT OF LAWS, vols. 1-2; MORGAN, LAW ESSAYS, vols. 1-2; NECKER, EXECUTIVE POWER; NEW YORK JUSTICE; OLIVER, PRACTICAL CONVEYANCING; PAINE, WRITINGS; PEAKE, EVIDENCE; POWELL, CONTRACTS, vols. 1-2; POWELL, DEVISES; POWELL, MORTGAGES, vols. 1-2; REEVES, ENGLISH LAW, vols. 1-4; ROBERTS, FRAUDULENT CONVEYANCES; ROPER, LEGACIES, vols. 1-2; RUNNINGTON, EJECTMENT; RUSSELL, CRIMES, vols. 1-2; SAUNDERS, PLEADING, vols. 1-2; SELLON, PRACTICE, vols. 1-2; SERGEANT, CONSTITUTIONAL LAW; STARKIE, EVIDENCE, vols. 1-2; STORY, CHITTY'S BILLS OF EXCHANGE; STORY, PLEADINGS; STUDY OF THE LAW; SUGDEN, POWERS; SULLIVAN, LECTURES, vols. 1-2; TIDD, PRACTICE, vols. 1-2; TUCKER, BLACKSTONE'S COMMENTARIES, vols. 1-5; VATTEL, LAW OF NATIONS; WATERMAN, JUSTICE'S MANUAL; WENTWORTH, PLEADING; WHITE, PROBATE PRACTICE; WOODFALL, LANDLORD AND TENANT.

170 ERSKINE, PRINCIPLES OF THE LAWS OF SCOTLAND.

171 BLACKSTONE, COMMENTARIES, vols. 1-4; EDEN, INJUNCTIONS; EQUITY DRAFTSMAN; FONBLANQUE, EQUITY, vols. 1-2; HARRISON, CHANCERY PRACTICE, vols. 1-2; KYD, AWARDS; MADDOCK, CHANCERY PRACTICE, vols. 1-2; MITFORD (REDESDALE), CHANCERY PLEADING; MONTAGU, SET-OFF; NEWLAND, CONTRACTS; PHILLIPS, EVIDENCE; POWELL, CONTRACTS, vols. 1-2; POWELL, MORTGAGES; REEVES, HISTORY, vol. 4; ROBERTS, STATUTE OF FRAUDS; TOLLER, EXECUTORS AND ADMINISTRATORS; WATSON, PARTNERSHIP.

172 COWEN, CIVIL JURISDICTION OF NEW YORK JUSTICE OF PEACE; KENT, COMMENTARIES, vol. 2; REEVE, BARON AND FEMME, POWERS OF COURTS OF CHANCERY.

173 Schoales and Lefroy, Reports, 2 vols.

174 Douglas, vol. 1; East, vol. 8; Espinasse, vol. 2; Peere Williams (chancery), vols. 1-3; Salkeld, vol. 1; Strange, vol. 1; Vesey, Jr. (chancery), vols. 1-5; Vesey, Sr. (chancery), vols. 1-2.

175 Douglas, vol. 2; East, vols. 1-7, 9-16; Espinasse, vols. 1, 3-6; Salkeld, vols. 2-3; Shower, vols. 1-2; Strange, vol. 2; Vernon (chancery), vols. 1-2.

176 Johnson, New York (law) vols. 1, 3, 4-5, 7, 9-10, 12-15; Massachusetts, vol. 1; Peters, United States, vols. 1, 3, 7; Wheaton, United States, vols. 1-4, 7, 9, 12.

177 Johnson, New York (law), vols. 2, 6, 8, 11; Peters, United States, vols. 2, 4-6; Wheaton, United States, vols. 5, 6, 8, 10-11.

178 BACON, ABRIDGEMENT, vol. 2; COMYN, DIGEST (chancery), vol. 2; JACOB, DICTIONARY OF ENGLISH LAW, vol. 5.

179 BACON, ABRIDGMENT, vols. 1-7; COMYN, DIGEST, vols. 1, 3-6; CRUISE, DIGEST OF THE LAWS OF ENGLAND, 7 vols. in 4; ESPINASSE, DIGEST; JACOB, DICTIONARY OF ENGLISH LAW, vols. 1-4, 6; SELWYN, ABRIDGMENT, vols. 1-2; VINER, ABRIDGMENT, 3 vols.

180 JOHNSON, DIGEST OF NEW YORK CASES, vol. 1; SWIFT, DIGEST OF CONNECTICUT LAWS, vols. 1-2.

181 BIGELOW, DIGEST OF MASSACHUSETTS REPORTS; JOHNSON, DIGEST OF NEW YORK CASES, vols. 2-3.

in the Territory of Michigan to that which in all probability was present, it is clear that the lawyers in and near Detroit during this period had and used an adequate and even extensive working law library. There is every reason to believe that when they cited references, they had checked the sources, and the appositeness and relevancy of the citations to the statements supported lends additional credence to the belief that they not only had the tools of their profession available but employed them with skill and discrimination.

As in the other studies of this series an effort has been made to discover what influence, if any, the Frontier had on the development of American law. When the court involved was organized (1805) it was beyond the line of continuous settlement; was on the line in mid-existence; and barely within it at the end (1836). The records of the 240 chancery cases examined are not complete in all instances, but sufficiently complete to give a fair picture of the procedure followed. One looking for Frontier influence will find instead of evidence of "rough and ready justice" long and complicated equity bills many of them containing all the features of the classical English bills, and one, at least, running more than 100 pages; complicated answers under oath many giving full discovery; extensive use of masters in chancery; carefully-drawn chancery decrees. Instead of Blackstone, he will find numerous references to the principal chancery authorities of the time; instead of experimentation, a close adherence to precedent. Instead of summary justice he will find instances of long delays, some cases pending many years before final disposition. He may, as he explores the intricacies of the records, forget that he is examining the records of a frontier court.

182 ACTS OF CONGRESS, 5 numbers; AMERICAN STATE PAPERS, 8 vols.; CONSTITUTION OF THE UNITED STATES; DEBATES IN THE SENATE ON THE REPEAL OF THE JUDICIARY ACT; FEDERALIST, 2 vols.; JOURNAL OF THE FEDERAL CONVENTION, 7 vols.; LAWS OF THE UNITED STATES, 28 vols.; STATE PAPERS, JOURNALS, REPORTS OF COMMITTEES, 37 vols.; SECRET JOURNALS OF THE CONGRESS OF THE UNITED STATES, 4 vols.; SECRETARY OF STATE'S REPORTS.

183 STATUTES OF CONNECTICUT; CIVIL CODE OF LOUISIANA; MASSACHUSETTS LAWS; NEW YORK LAWS, 15 vols.; NEW YORK STATE CONVENTION; RULES OF THE SUPREME COURT OF NEW YORK; LAWS OF RHODE ISLAND.

184 LAWS OF MICHIGAN, 17 vols.; LAWS AND JOURNALS OF MICHIGAN, 16 vols.; LAWS OF THE NORTHWEST TERRITORY.

185 CONSTITUTION OF THE REPUBLIC OF COLOMBIA.

With only two or three exceptions, the judges of the territorial Supreme Court were well-educated lawyers, and at times, especially the last eight years, the entire bench was highly competent. At all times adequately trained lawyers were members of the bar. While, as noted before, it is not possible in a study of this brevity to show in detail how closely the chancery practice of the Territory paralleled that of England, or that of New York, it can be said that the practice was carefully developed in apparent conformity to the rules and proceedings of English chancery, and served as a solid foundation for the chancery practice of the state.