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the Probate Records of Wayne County- Northwest Territory
1796-1803; Indiana Territory 1803-1805; Michigan Territory
1805-1816

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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

William Wirt Blume*

THE Ordinance of 1787, after providing how the estates of persons dying intestate should descend and be distributed, enacted:¹

"And until the governor & judges shall adopt laws as herein after mentioned estates in the said territory may be devised or bequeathed by wills in writing signed and sealed by him or her in whom the estate may be, being of full age, and attested by three witnesses, and real estates may be conveyed by lease and release or bargain and sale, signed, sealed and delivered by the person being of full age in whom the estate may be and attested by two witnesses provided such wills be duly proved and such conveyances be acknowledged or the execution thereof duly proved and be recorded within one year after proper magistrates, courts and registrars shall be appointed for that purpose and personal property may be transferred by delivery saving however to the french and canadian inhabitants & other settlers of the Kaskaskies, Saint Vincents and the neighbouring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them relative to the descent & conveyance of property."

Referring to the provisions for descent and distribution Swayne, J., speaking for the Supreme Court of the United States in 1866, observed that in them were to be found "the type and reflex of the action of many of the States at that time" but "not a trace of the

† This is the third of a series of five articles dealing with law and its administration 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 remaining articles of the series, one dealing with chancery practice and the other with legislation, are in the early stages of preparation.

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1 1 Stat. 51.
common law.” Comparing the English scheme of descents with the American system reflected in the Ordinance, he stated:

“The spirit and aims of the two systems are wholly different. One seeks to promote accumulation — the other diffusion. One recognizes and cherishes the exclusive claim of the eldest son — the other the equal rights of all his brothers and sisters. The latter makes no distinction on account of age, sex, or half blood.”

In 1829 Nathan Dane noted that by the Ordinance titles to property were made “more purely republican and more completely divested of feudality than any other titles in the union were in 1787.”

After pointing out in 1824 that the Ordinance had been framed (“by the author”) mainly from the laws of Massachusetts, especially in regard to titles, Dane wrote:

“Thus the laws of Massachusetts laid the foundation of titles to real and personal estate, by deed, by will, and by descent, in all the territories of the Union, northwest of the river Ohio; — and substantially in other territories to which this ordinance has been extended.”

Writing on the same subject in 1829, he said:

“Here it may be observed that titles to lands once taking root are important, as they are usually permanent. In this case they were planted in 400,000 square miles of territory, and took root as was intended. . . .

“On the whole, if there be any praise or any blame in this ordinance; especially in the titles to property and in the permanent parts; so the most important, it belongs to Massachusetts; as one of her members formed it and furnished the matter. . . .”

**Custom of Paris**

The saving clause of the section of the Ordinance of 1787 quoted above was intended to meet the requirements of Virginia’s land cession of 1784 which stipulated “That the French and Canadian Inhabitants and other Settlers of the Kaskaskies St Vincents and the neighbouring Villages who have professed themselves Citizens of Virginia shall have their possessions and titles con-

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3 9 DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 74, appx. (1829).
4 8 id. at 390 (1824).
5 9 id. at 74-76, appx. (1829).
firmed to them and be protected in the enjoyment of their rights and liberties.” It will be noted that whereas the deed required protection of “possessions and titles” and “rights and liberties,” the Ordinance saved “laws and customs.”

The laws and customs referred to in the Ordinance included those saved to the people of the Northwest area by the Quebec Act of 1774 which provided:

“... in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same; and all Causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province . . . shall, with respect to such Property and Rights be determined agreeably to the said Laws and Customs of Canada, until they shall be varied or altered by any Ordinance that shall, from Time to Time, be passed in said Province . . .

“. . . it shall and may be lawful to and for every Person that is Owner of any Lands, Good, or Credits, in the said Province, and that has a Right to alienate the said Lands, Goods, or Credits, in his or her Lifetime, by Deed or Sale, Gift, or otherwise, to devise and bequeath the same at his or her Death, by his or her last Will and Testament; any Law, Usage, or Custom, heretofore or now prevailing in the Province, to the Contrary hereof in any-wise notwithstanding; such Will being executed, either according to the Laws of Canada, or according to the Forms prescribed by the Laws of England.”

The “Laws and Customs of Canada” referred to in the act included those parts of the Custom of the Viscounty and Provostship of Paris, which were received and practiced in the Province of Quebec at the time of the French government.

Writing to the President in 1789, Arthur St. Clair, Governor of the Northwest Territory, reported:

“There are upon the Mississippi and Wabash Rivers a considerable Number of People, the remains of the ancient

6 2 Territorial Papers of the United States, Carter ed., 8 (1934).
7 14 Geo. 3, c. 83 (1774).
8 "An Abstract of those parts of the Custom of the Viscounty and Provostship of Paris, which were received and practised in the Province of Quebec, in the time of the French Government. Drawn up by a select committee of Canadian Gentlemen, well skilled in the Laws of France, and of that Province. By the desire of the Honourable Guy Carleton, Esquire Governor in Chief of the said Province." (London, 1772). See Neatby, The Administration of Justice under the Quebec Act 4-13 et seq. (1937).
9 2 Territorial Papers of the United States, Carter ed., 205 (1934).
french Colony, who have been accustomed to be governed by the Laws of France, the Customs of Canada, and the arbitrary Edicts of the british Commandants, after they fell under the Power of Britain: — there are also some People there, who migrated from Virginia after the Cession of the Country to the united States.”

Reporting to the Secretary of State in 1791, the Governor stated: 10

“By the Ordinance for the Government of the Territory the Laws and Customs which had prevailed among the ancient Settlers are to be continued so far as respects the Descent and Conveyance of real property — the mode of conveyance was an Act before a Notary, and filed in his Office, of which an attested Copy was delivered to the Party — to fulfill that part of the Ordinance it was necessary that Notaries public should be appointed, and one was commissioned at Kaskaskia, one at Prairie du Rocher, and one at Cahokia.”

A law regulating enclosures adopted by the governor and judges of the Northwest Territory in 1791 contained this proviso: 11

“Saving always nevertheless to the French inhabitants of Kaskaskias, La Prairie du Rocher, St. Phillips, Cahokia and Vincennes, and to all persons claiming under them their several rights and customs respecting the fencing and enclosing their lands in common as far as the same are reserved and confirmed by the constitution of this territory or any act of the United States. . . .”

The provisions of the Ordinance relative to descent and dower were to remain in full force until altered by “the legislature of the district;” those relating to probate and deeds, until the “governor and judges” should adopt laws. But the reservation in favor of the French inhabitants was without limitation, and may have been intended to be unalterable. The governor’s views as to this, and as to the powers of notaries to deal with testamentary matters appear in a letter addressed by him to the probate judges of St. Clair and Randolph counties in 1795: 12

“Having been informed that the Notaries public take upon themselves to settle all testamentary affairs of the French Inhabitants and the Estates of such persons among them as happen to die intestate, I have been led attentively to consider

10 Id. at 329.
the rights reserved to those Inhabitants by the Ordinance of Congress for the Government of the Territory, and it is very clear that the ancient mode of Conveying real Estates and the manner in which such Estates descend to Heirs by the french Laws are all that are reserved: but it is not so clear how long that reservation is to continue in force—that is—whether it was to continue a distinct right to them only until the Organization of the Government and the Adoption of Laws by the Governor and Judges to regulate the Descent and Conveyance of real property or until a Legislature by representation was formed—In either Case however the Notaries have nothing to do with Testamentary affairs."

The claims of the States to the Northwest area (later organized as the Northwest Territory) were recognized by Great Britain in 1783, but for one reason or another certain military posts along the northern boundary (Michilimackinac, Detroit, Niagara, and others), although within the lines fixed by the treaty, were not surrendered by the British until after Jay's Treaty (concluded in 1794) was proclaimed in 1796. This treaty provided:

"All settlers and traders, within the precincts or jurisdiction of the said posts, shall continue to enjoy, unmolested, all their property of every kind, and shall be protected therein."

Referring in 1807 to the surrender of the post of Detroit by the British on July 11, 1796, Judge Woodward of Michigan Territory stated:

"On the morning of that day the British officers and troops abandoned the Country, the flag of their nation was lowered, and that of the United States waved over this modern Bosphorus. Up to this last day the laws of the province of upper Canada were those by which the inhabitants were governed. The erection of the County of Wayne, and the

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14 Id. at 591; Bemis, Jay's Treaty (1923).
15 In re Denison, 1 Transactions of the Supreme Court of the Territory of Michigan 1805-1814, Blume ed., 385 at 390, 394 (1935).
16 Riddell, "Some Marriages in Old Detroit," 6 Michigan History Magazine 111 (1922), states that an act of the Province of Upper Canada passed in 1792 "introduced the laws of England in matters of property and civil rights." A suggestion that the French Canadians at Detroit be allowed their own laws was rejected. Riddell discusses the French Canadian law of marriages prior to 1792. Also see Riddell, Michigan Under British Rule—Law and Law Courts—1760-1796, 266 (1925). For a discussion of "The French-Canadian or Quebec Laws" in the "Third Period of British Rule: 1774-1788," see id.
establishment of the American system of jurisprudence in it immediately followed. . . .

"From the date of the acquisition the American government has promptly, steadily and uniformly manifested its disposition to introduce its own forms of government, and to apply its own laws. In this country it has recognized, even in a temporary point of view, neither the previous laws of France, nor those of Great Britain, in any one, even the smallest degree."

A Michigan statute adopted in 1810 provided: 17

"That the Coutume de Paris, or ancient French common law, existing in this country, the laws, acts, ordinances, arrests and decrees of the governors or other authorities of the province of Canada, and the province of Louisiana, under the ancient French crown, and of the governors, parliaments, or other authorities of the province of Canada generally, and of the province of Upper Canada particularly, under the British crown, are hereby formally annulled, and the same shall be of no force within the territory of Michigan. . . ."

Woodward's statement that upon the erection of Wayne County (which included French settlements at and near Detroit and Michilimackinac) "the American system of jurisprudence" was immediately introduced was unquestionably correct. In a letter at 35. A marriage contract made at Detroit in 1770, set out in 4 MICHIGAN PIONEER COLLECTIONS 75 (1908), provided that the espoused couple should be "one and common in their goods, movable and immovable, and their acquisitions according to the usage and customs of Paris." Also see Miscellaneous Documents, 8 id. 449-457 (1907). The following "Extract from the first act of the first Session of the first Parliament of Upper Canada, between the 17 Sept & 15 Oct 1792 abolishing the Coutume de Paris" is in Probate File 82: "Whereas by an act passed in the 14th year of the Reign of his present Majesty entitled 'An Act for making more effectual provision for the Government of the province of Quebec, in North America' it was among other things provided 'That in all acts of Controversy relative to property & Civil Rights resort should be had to the Laws of Canada as the Rule for decision of the same' such provision being manifestly and avowedly intended for the accommodation of his Majestys Canadian subjects &c Be it enacted &c that from & after the passing of this Act, the said provision contained in the said act of the 14th year of his present Majesty, be & the same is hereby repealed and the authority of the said Laws of Canada & every part thereof as forming a rule of decision in all matters of controversy relative to property & civil rights, shall be annulled, made void & abolished throughout this province; and the said Laws, nor any part thereof as such, shall be of any force or authority within the said Province, nor binding on any of the inhabitants thereof—PROVIDED always, that nothing in this Act shall extend to extinguish, release or discharge or otherwise to affect any existing right, lawful claim or incumbrance, to & upon any Lands, tenements or hereditaments within the said Province, or to rescind or vacate or otherwise to affect any Contract or security, already made & executed conformably to the usages prescribed by the said Laws of Canada—"

17 I LAWS OF THE TERRITORY OF MICHIGAN (reprint) 900 (1871).
to the Secretary of State dated August 9, 1796, the acting governor of the Northwest Territory (Sargent) wrote:\(^{18}\)

"I am really sorry that the Governour was not in the Territory to perform the Duties essential at and about Detroit — the Uncertainty of his Arrival and the pressing Application of Gen\(^1\) Wayne with a knowledge that our Laws &c\(^a\) ought immediately upon Evacuation of the Country to be promulgated amongst the people, have induced me to come forward —"

Though "our laws" were introduced immediately, Sargent did see fit to accommodate the French settlers by appointing a notary public at Michilimackinac and another at Detroit.\(^{19}\) In a letter to the Secretary of State dated September 30, 1796, after the county had been organized, Sargent observed:\(^{20}\)

"The people of Wayne County — those upon the Aubashe and Mississippi are descendents of the Canadians, the ancient French — upright and docile in their Dispositions — equal in their mind and manners and tolerably contented and happy but not enough however industrious particularly upon the Mississippi and Aubashe —"\(^{21}\)

In a petition to Congress referred January 23, 1809, a group of French inhabitants of Michigan Territory (originally a part of Wayne County of the Northwest Territory) requested that the territorial code as well as the more important laws of the United

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\(^{18}\) 2 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 564 (1934).
\(^{19}\) 3 id. at 453 and 455.
\(^{20}\) 2 id. at 578.
\(^{21}\) Twenty years later, in a letter to the Secretary of War, Lewis Cass, Governor of Michigan Territory, reported: "The views of the first settlers of this Country have deeply marked the moral character of their descendants, and have yet a very perceptible effect upon the customs and manners of the present generation. The Indian trade originally furnished the only employment of the people of this country and their only resource against want. As traders, as Engagees and as Voyageurs, they spent one half of the year in Labour, want and exposure, and the other in indolence and amusements. Associated with the Indians, they contracted their manners, and gain'd their confidence. As a necessary consequence their farms were neglected. . . . The spinning wheel and the loom are unknown in the country. . . . The wool of the sheep was thrown away and even now I presume a pound of wool is not manufactured in the Territory by any person of Canadian descent, and four fifths of its inhabitants are that class of population. . . . I could go on pointing out to you their ignorance of the most common acts of domestic life, were I not apprehensive you would think my imagination heightened the colour of the picture. But I assure you, the facts are stated in 'sober rudness' and without exaggeration—" 10 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 642 (1942). Cf. Christianity's recollections of Monroe County, 6 MICHIGAN PIONEER COLLECTIONS 373 (1907), where the virtues of the French are extolled.
States be published in the French language for their convenience. They pointed out "that outside of the garrisons and their neighborhoods nineteen-twentieths of the inhabitants of this country speak only the French language and that most of them are completely ignorant of the English language." The petitioners viewed "with appreciation and approbation" the care which had been taken for the welfare of their local government, and expressed their desire to be worthy citizens of the "young and splendid republic." They did not ask for a change in the laws; only for an opportunity to refer to them "in their mother tongue."

While refusing to recognize the continuance of French laws and customs, "in any one, even the smallest degree," the Supreme Court of Michigan Territory was careful to recognize and protect property rights created by French law at the time it was in force. For instance, property rights acquired under a French ordinance which had declared in 1709 that "all Panis and Negroes, who have been, or shall hereafter be bought, shall belong, in full property, to those who have acquired them, or shall acquire them, in quality of slaves," were recognized in Michigan Territory in 1807.

The provision of Jay's Treaty that settlers should continue to enjoy

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22 10 Territorial Papers of the United States, Carter ed., 266 (1942).
23 It does not appear that the French inhabitants of Wayne County ever claimed that "their laws and customs . . . relative to the descent and conveyance of property" were saved to them by the Ordinance of 1787. How long "the French and Canadian inhabitants and other settlers of the Kaskaskies and Saint Vincents and the neighbouring villages," referred to in the Ordinance, continued to follow the Custom of Paris, I do not know. Judge John Law in The Colonial History of Vincennes stated in 1858: "Their titles have been regulated as well by the 'Coutume du Paris,' the 'Customs of Paris,' as the Common Law of England, and the Statutes of the United States. . . . There being no public records here, whenever grants and concessions were made, (for not one in a hundred could probably read or write,) they passed by delivery, and possession or their land or lot was at least prima facie evidence of their title. . . . By the law which governed these titles, the 'Customs of Paris,' they were considered 'a family inheritance,' and often descended to women and children." (pp. 106, 107, 108). Dembitz, in A Treatise on Land Titles in the United States 12 (1895), made this statement: "During the war of the Revolution, George Rogers Clarke, a citizen of Virginia, started with a few hundred men from the falls of the Ohio (now Louisville), and captured several of the French settlements in the present states of Indiana and Illinois. This lucky stroke gave the American negotiators of the peace of 1783 a basis for demanding the lakes as the boundary of the new republic, and, in a fit of generosity, the British negotiators assented. Thus the 'Old Northwest,' containing now a population of more than 15,000,000, in which, until then the French law (as far as there was any law) had prevailed, became American. But the French settlers were so few in number, and, moreover, so poor, so illiterate, so lacking in spirit and enterprise, that they left no trace whatever of their institutions among the teeming millions who crowded into the great West after the Ordinance of 1787 opened it to the settlement of American citizens." Dembitz found "no traces of French law entering into the laws of the states." (Ibid., footnote).
24 In re Denison, 1 Transactions of the Supreme Court of the Territory of Michigan 1805-1814, Blume ed., 385 (1935).
their property of every kind was given precedence over the article of Ordinance which prohibited slavery in the Territory.\textsuperscript{25}

_Probate Officers and Records_  
1788 - 1796

One of the first concerns of the government of the Northwest Territory after its inauguration on July 15, 1788, was the establishment of offices for the probate of wills. Commenting on a law drafted by two of the territorial judges, Governor St. Clair, in a letter to the judges dated July 30, 1788, stated:\textsuperscript{26}

"The Establishment of Probate Offices in the Territory is a Matter that requires the most deliberate Consideration, as the whole Property of the People is eventually involved in their being duly executed. The Powers & Duties of the Officers should be defined with the greatest Precision, and, in my Opinion, their Jurisdiction laid under some Limitations & Restrictions which the Law you have been pleas' d to frame does not contain — . . .

"In the Code of Pennsylvania under the Titles, Register of Wills, Intestates Estates, & Orphans Courts there are many excellent Regulations; by striking out such Parts as do not apply to the Circumstances of the District, & adopting the rest I believe we might publish a very excellent Law upon the Case before us; — that would be within our Powers. . . .

"I have taken the Liberty to send you the Pennsylvania Volume that you may examine the Laws refered to above if you should think proper, at your Leisure — you will find them in the Folios 30 to 33 & 70 to 73 —"

The judges, however, did not see fit to copy the Pennsylvania statutes. Instead, with the reluctant concurrence of the governor, they published on August 30, 1788, a law which provided:\textsuperscript{27}

\textsuperscript{25} The probate files of Wayne County contain many legal instruments written in French. For papers in a suit in chancery involving a French marriage contract made at Montreal in 1761 and a conveyance of land made before a Notary at Detroit in 1803, see Veronique Campau v. Charles Poupard (1807), 1 _Transactions of the Supreme Court of the Territory of Michigan_ 1805-1814, Blume ed., 107 (1935); 2 id. at 188-212. According to the marriage contract, the intended spouses were to be one and common "in all property, purchases real and personal, agreeable to the Custom of Paris, under which their future Community (Communantë) shall be governed." The conveyance recited that it was executed "Before the Notary Public for the County of Wayne." Probate Records, vol. I, p. 18 (January 22, 1814): The widow produced a marriage contract dated October 1, 1792, by which she claimed 300 livres as her dower and 150 for her preciput "agreeably to the Coutume de Paris." The court ordered that the contract be filed.

\textsuperscript{26} See _The St. Clair Papers_, Smith ed., 67 (1882); _Territorial Papers of the United States_, Carter ed., 270 (1934).

\textsuperscript{27} Statutes and laws cited in note 11 supra, Chase ed., 96; Pease ed., 9.
There shall be appointed one judge of probate in each county, whose duty it shall be to take the proof of last wills and testaments and to grant letters testamentary and letters of administration and to do and perform every matter and thing that doth, or by any law may appertain to the probate office, excepting the rendering definitive sentence and final decrees. . . .

In all cases wherein it shall be necessary to render a definitive sentence, or to render a final decree, and upon a point contested, the judge shall call to his assistance, two of the justices of the court of common pleas of the same county; who, together with the judge shall constitute the court of probate; . . .

The judge shall record last wills and testaments, and make entries of the granting of letters testamentary, and letters of administration; he shall receive, put on file, and carefully preserve all bonds, inventories, accounts, and other documents, necessary to be perpetuated in his office. . . .

In 1795, after changes in judicial personnel, the judges joined with the governor in the adoption of a law which established for each county an orphans court, in addition to the probate judge and probate court, to be held by the justices of the Court of Quarter Sessions. A comparison of this law, which recites it was adopted from Pennsylvania, with the law set out on folios 70 to 73 of the 1775 Pennsylvania statutes referred to by St. Clair, shows it was almost a literal transcript of "An ACT for establishing Orphans Courts" enacted in Pennsylvania March 27, 1713. The governor doubted that anything more was given to the new court than "a concurrent jurisdiction with the Probate Court." The Supreme Court of Ohio, speaking in 1827, observed:

The orphans' courts were peculiarly domestic. They were established in each county, and were supposed to, as they did in fact, possess peculiar facilities for acquiring correct information of the condition of intestates' estates, within their jurisdiction. Much was intended to be confided to their discretion, because their proceedings were ex parte, and, in most cases, operated upon and affected the rights of infants.

1796 - 1803

Wayne County as laid out by Acting Governor Sargent on August 15, 1796, included the upper and lower peninsulas of Mich-
igan, a strip west of Lake Michigan, and an area south of Michigan's present southern boundary. The seat of the county government was Detroit. On August 16, 1796, Peter Audrain was commissioned "Recorder" of the county, and instructed that he should "obtain and keep all Records of Lands &c (agreeably to the Laws of the Territory) within the same." On August 19, 1796, Audrain was appointed clerk of the General Quarter Sessions of the Peace, and, on September 29, 1796, prothonotary of the Court of Common Pleas, and Judge of Probate. "Difficulties of finding suitable Characters to fill the civil Offices of the County" explained the appointment of one man to so many offices. Peter Audrain was a Frenchman, but not a descendant of any of the "ancient" Canadian French. Born in Paris, he had emigrated to the United States, and had become an American citizen. His arrival in Detroit coincided with that of the acting governor and General Wayne. Although seventy years of age, his writing was firm and almost as clear as print. His ability to speak and write both English and French marked him as a man who would be most useful in the establishment of an English-speaking government in a French-speaking community.

"As events proved, this factotum of the county of Wayne had a hand for many a year in all the legal business of the little community. Although he was seventy years old in 1796, Audrain continued to hold public office until 1819, when he was removed because of his advanced age. He died on October 6, 1820."

In the six-year period from March 1797 to March 1803 proceedings were had before the judge of probate of Wayne County, Northwest Territory, in at least thirty-seven estates. In many of
the extant files will be found but one paper, most often the administrator's or executor's bond, but in some of the files there are many papers, in two instances more than forty. In one of these files there is in Audrain's hand a list of "Claims against the Estate" numbered 1 to 18, inclusive. Papers supporting all eighteen of the claims are still in the file, a fact that gives some assurance that the files are sufficiently complete to be worthy of study.

In a newspaper account of the "Resurrection of Ancient Documents in the County Clerk's Office" published in the 1870's reference is made to court records in the form of stitched books.37

"The oldest of these books yet resurrected bears date 1797. . . . The oldest of these books is supposed to be in the handwriting of Peter Audrain, which is a cramped feminine hand, though very legible. The courts mentioned are court of General Sessions, Orphan's Court. . . ."

That a probate record in addition to the files was kept as early as 1803 is shown by a paper in one of the files containing two entries (renunciation of executorship and proof of will by subscribing witnesses) certified by Audrain "to be a true copy from the record in my office." A requirement that a record in addition to files be kept appears in the law establishing courts of probate adopted by the governor and judges of the Northwest Territory in 1788. It is unfortunate that records of the "book" type prior to 1814 have disappeared.38

1803 - 1805

The courts established in Wayne County, Northwest Territory in 1796 continued to operate without interruption as courts of Wayne County, Indiana Territory, from March 180339 to July

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37 See clippings in Burton Historical Collection (Wayne County Papers SB/ZUG, Vol. I, p. 19), Public Library, Detroit.
38 For reference to a story that a "patriotic judge actually used the files on one Fourth of July for cannon-wadding," see The Wayne County Probate Court, 1 Michigan Pioneer Collections 494 (1877). Also see 12 id. at 556.
39 The act of Congress of April 30, 1802, which authorized the inhabitants of the eastern division of the Northwest Territory to form for themselves a constitution and state government, provided that the part of the territory north of an east-west line drawn through the southerly extreme of Lake Michigan should be attached to and made a part of
1, 1805, when the county, with some change of boundaries, became Michigan Territory. The laws of the Northwest Territory continued in force, and Audrain continued to serve as probate judge.

1805 - 1809

As a first step in the re-organization of Wayne County, Indiana Territory, as Michigan Territory, Governor Hull of the latter territory proclaimed on July 3, 1805, that the parts of the territory in which the Indian titles had been extinguished should constitute

Indiana Territory "from and after the formation of the said state." Ohio's first constitution was promulgated November 29, 1802, but at least eight different dates have been assigned as that on which Ohio became a state. According to 1 OHIO JURISPRUDENCE (p. xli), "many authorities agree on March 1, 1803, as the date on which Ohio took her place in the sisterhood of states." Our concern, however, is not with the admission of Ohio as a state, but with the date of "the formation of the said state," because on that date the part of Wayne County north of the east-west line became a part of Indiana Territory. By a proclamation issued January 14, 1803, Governor Harrison of Indiana Territory organized the area as Wayne County of Indiana Territory, reciting the act of Congress of 1802, "and WHEREAS the Inhabitants of the said Eastern division have formed themselves into an independent state by the name of the State of Omo." The proclamation declared that persons within the county who held civil or military commissions under the Northwest government "at the time of the formation of the State of Omo" should continue to exercise and enjoy their respective offices, and that the justices of the court of common pleas, of the general quarter sessions of the peace, and of the orphans court should (until otherwise directed) continue to hold their respective courts at the accustomed times and places. The only indication of the change of government found in the court records is the adding of "Indiana Territory" commencing in March 1803.

The act of Congress (January 1805) (2 Stat. 309) which created Michigan Territory out of Indiana Territory became effective July 1, 1805.

The following was certified by Audrain as a true copy from his records (Probate File 40):

Indiana Territory—Wayne County ss.
On the eighteenth day of May in the year of our Lord one thousand eight hundred and three before me Peter Audrain Esqr Judge of the Court of Probate in & for the said County of Wayne, personally appeared Chs Fs Girardin and Fs Dx Bellecour Esqr two of the subscribing Witnesses to the annexed Will, who, after being sworn on the holy Evangelist of almighty God, declared that they saw Catherine Barois Cosme deceased make her mark and seal the said Will, and also that their names subscribed to the said Will, as Witnesses, are really their signatures. IN TESTIMONY whereof I have hereunto subscribed my name and affixed my seal of office.

PETER AUDRAIN

L: S:
Judge of Probate

The will referred to, written in French, was signed and sealed at Detroit, before surrender by the British, in the presence of the resident notary (Bellecour) and three subscribing witnesses. The swearing of only two of the subscribing witnesses instead of three as required by the Ordinance of 1787 was permissible under a territorial law adopted from Pennsylvania in 1795 which had provided that wills in writing ("being proved by two or more credible witnesses upon their solemn oath") should be good "in law" for devising lands and bequeathing chattels. Insofar as the records show, proof of wills was not in common form, that is by oath of the executor, but by swearing the subscribing witnesses. In 1814 a Register of Probate of Michigan Territory noted in his records: "NB. The said Will has only been proved in the common form, by the Executor's oath, a copy of which is also annexed." (Wayne County Probate Records, vol. I, p. 78)
one county. He did not give a name to the county, but a contemporaneous map labels it Wayne. At the same time the governor divided the territory into four civil districts: Detroit, Michilimackinac, Erie, and Huron. A law adopted by the governor and judges on July 25, 1805, provided that the districts of Erie and Michilimackinac should each constitute a judicial district and that the districts of Huron and Detroit should together constitute a third judicial district. Peter Audrain was appointed clerk of the territorial supreme court, and of the District Court for Huron and Detroit.

A law "concerning wills and intestacies" adopted by the governor and judges of Michigan Territory August 31, 1805, provided:

"That the courts of the several districts of the territory of Michigan, or any judge of the said territory, or the clerk of the court of the district, shall have power to take the proof of a will, and grant a certificate of such probate. . . . All original wills shall be recorded in the office of the clerk of the court of the district, and shall remain there, except while they may be in any superior court, after which they shall be returned to said office."

This act, stated to have been adopted from Virginia, required that in case of contest an issue should be made "whether the writing be the will of the person, or not" for trial by a jury, reserving to the court power to grant new trials. In practice, as shown by the probate records kept by the clerk of the District Court for Huron and Detroit, the clerk probated wills, issued letters testamentary or of administration, and took the necessary bonds. The bonds were conditioned that the executor or administrator should exhibit an inventory when required by "the court of the district," and account when required by "the court of the district." Guardians of minors were appointed by the district courts.

1809 - 1810

"An act for the probate of wills, and the settlement of testate and intestate estates" was signed and published by "WILLIAM
HULL, Governor of Michigan, and President of the Legislature” January 31, 1809.48 This act, made up of ninety-seven sections, recites that it was adopted from the laws of Vermont, the home state of Judge Witherell. Acting under authority supposed to have been given by the act, the governor appointed George McDougall judge of the court of Probate of Wills for the Probate District of Huron, Detroit, and Erie.49 McDougall, a long-time resident of Detroit who spoke French as well as English, had served as chief judge of the District Court for Huron and Detroit from April 1807 to April 1809.50 Following his appointment to the district court, Peter Audrain referred to him as “a most singular character” whose appointment astonished “the whole Territory.”51 McDougall was admitted to the bar by the supreme court in 1811.52

May 7, 1810, Solomon Sibley, one of the executors of the will of George Hoffman, presented a petition to the District Court for Huron and Detroit praying that the will might be proved before the court.53 The petition was denied, the court holding that it had no jurisdiction. In response to a rule to show cause why a writ of mandamus should not be issued by the territorial supreme court, the judges of the district court expressed as their opinion that the law of 1809 re probate of wills was valid, and pointed out that a judge had been appointed under that law to whom the power had been given to take the probate of a will. This showing was unsatisfactory, and the supreme court issued an alternative writ of mandamus to which Jacob Visger, chief judge of the district court, responded that the law of 1809 had been properly adopted, but if it had not been, Sibley in proceeding under the law of 1805 had other alternatives, i.e., could have applied to any judge of the territory or to the clerk of the district court for probate of the will.

“Why the Honorable Judge aforesaid did not adopt the alternative but prefer’d this mode of forcing the Consciences of the aforesaid Judges of the District Court is much to be lamented. And your respondent solemnly avers before God and this Honorable Court that he would prefer death to such

48 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 13 (1874).
50 Id. at 28, ¶ [63].
53 Id. at 189-190; 2 id. at 292-299; Probate File 74. For an account of this case by W. L. Jenks, see 18 MICH. L. REV. 27-28 (1919).
complyance and act a part so unworthy of an honest man and a Judge. . . .

Detroit 21st August 1810"

No further attempt was made to force the consciences of the district judges. Instead, by a legislative act dated September 16, 1810, the governor and judges abolished the district courts, and at the same time repealed all laws passed between June 2, 1807, and September 1, 1810, including the probate law adopted from Vermont. That the law from Vermont was actually put in force is shown not only by the appointment of McDougall as judge, but by the fact that earlier probate files were delivered to McDougall by Audrain on July 18, 1809, and by the further fact that McDougall acted as probate judge in several matters—at least six.

1810-1811

From September 16, 1810, to January 19, 1811, the only probate agency in the territory was the territorial supreme court which sat only at Detroit. In this period Hoffman's will and three others were presented for probate.

1811-1812

"An act to adjust the Estates and affairs of Deceased persons, testate and intestate, and for other purposes" was adopted and published by the governor and judges of Michigan on January 19, 1811. This law is made up of several elaborate sections each reciting the state or states from which adopted: Sec. 1: Vermont and Virginia; Sec. 2: Pennsylvania, Vermont, and Virginia; Sec. 3: Maryland, Massachusetts, Ohio, Vermont, and Virginia; Sec. 4: Virginia; Sec. 5: Virginia, Maryland, Massachusetts, Ohio, and New York; Sec. 6: Massachusetts and Pennsylvania; Sec. 7: Vermont and Virginia; Sec. 8: Maryland, Massachusetts, New York, Ohio, Vermont, and Virginia; Sec. 9: Vermont. Provision was made for a register for each district of the territory, a person of "honesty, ability, and sound mind," who should "receive proof of,

54 1 Laws of the Territory of Michigan (reprint) 186 (1871).
55 Id. at 900, 902.
56 The law abolishing the district courts (note 54 supra) provided: "And the original jurisdiction of the Supreme Court shall extend to all matters, above the value of one hundred dollars, & to the Probate of wills."
58 1 Laws of the Territory of Michigan (reprint) 160 (1871).
and record all wills and writings, relating to the estates and affairs of deceased persons testate and intestate, and all deeds and other writings, relating to the conveyance or alienation of land; and all deaths, births, marriages, adoptions, guardianships, indentures, naturalizations, dowers, jointures, partitions, escheats and marriage contracts;” and who should “perform all other duties required by law.”

McDougall faithfully records that he delivered certain probate files to Harris H. Hickman on February 2, 1811, Hickman having been appointed Register for the District of Huron and Detroit. On August 12, 1811, Hickman was appointed Register for the Northern District. “A Counsellor and attorney at law in the state of Virginia,” Hickman had been admitted to practice before the territorial Supreme Court on June 19, 1807. In 1808 Governor Hull (his father-in-law) had referred to him as a young man of “Good talents” and “much Legal information” who could speak and write the French language. Hickman served as register until the outbreak of the War of 1812. In his brief period of service he acted as probate officer — in reality probate judge — in more than a dozen estates. On December 26, 1813, shortly after the recapture of Detroit, he handed his records to his successor — George McDougall.

1812 - 1813

War with Great Britain was declared on June 17, 1812. Michilimackinac was occupied by the British on July 17, 1812, and not restored to the United States until July 1815. Detroit was taken on August 16, 1812, and held until September 29, 1813. On August 16, 1812, General Brock of the British forces issued a proclamation announcing that the laws of the territory should continue in force until further notice. On August 21 Colonel Procter made and established regulations for the civil administration of the territory

60 36 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 240 (1908). On the same day the registers districts of Detroit and Huron, and Michilimackinac were consolidated into one district called the Northern District. Ibid.
which provided that the civil officers remaining in the country should exercise the functions of their offices without new commissions, and that the courts of justice should be held as usual. 65 Before making these regulations Colonel Procter inquired of Judge Woodward, chief judge of the Territorial Supreme Court, whether the persons who had occupied the civil offices of the government would be willing to continue in their offices, their allegiance not being otherwise affected. 66 In reply Judge Woodward gave it as his opinion that persons holding commissions directly under the government of the United States would not, in view of Article I, section 9, paragraph 7 of the Federal Constitution, be willing to hold and exercise offices under a foreign power without the approval of the federal government, but that local officers might, perhaps, act without impropriety. 67 No sessions of the supreme court were held during the period of occupation, 68 but it does appear that some of the justices of the peace — notably Peter Audrain — performed the duties of their offices until February 4, 1813, when martial law was declared, and the civil laws suspended. 69 Notwithstanding the presence in the probate files of a few papers dated during the period of enemy occupation, 68 but it does appear that some of the justices of the peace — notably Peter Audrain — performed the duties of their offices until February 4, 1813, when martial law was declared, and the civil laws suspended. 69 Notwithstanding the presence in the probate files of a few papers dated during the period of enemy occupation, it seems clear that the probate work of the register was suspended during that period, and not resumed until January 1814. A letter of attorney to McDougall in McDougall's handwriting dated at Detroit July 28, 1813, authorized him to apply for letters of administration "whenever a Registers Court or Court of Probate may be re-established within the Territory." 70

1813-1816

A will offered for probate in January 1814 was accompanied by a document in the handwriting of Peter Audrain certifying that the will had been proved before him, "one of the justices of the peace for the District of Detroit," November 22, 1813. 71 This irregular act on the part of the aging Audrain indicates that the

66 Id. at 404.
67 Id. at 405.
69 Id. at 23.
70 Probate File 130. September 29, 1813, General Harrison issued a proclamation directing all civil officers to resume the exercise of their offices. 10 Territorial Papers of the United States, Carter ed., 449 (1942).
71 Probate File 97.
register's court had not, at that time, been re-established. That it had been re-established by December 26, 1813, is shown by notations on numerous file papers that they were delivered by Hickman to McDougall on that date. A record book kept by McDougall as register showing his day by day transactions, commencing January 4, 1814, contains this preliminary entry: 72

"Mem\textsuperscript{0} of Bonds & other papers appertaining to the Registers Office which I handed over as Judge of Probate at Detroit on the 2\textsuperscript{d} Feby 1811 to Harris H. Hickman then Register of the District of Detroit & Huron . . . & which were returned to me as Register of the Districts of Erie Huron and Detroit on my app\textsuperscript{t} filed Dec\textsuperscript{t} 26\textsuperscript{th} 1813 —" 73

As late as 1815 there was only one county in Michigan Territory — Wayne County — made up of parts of the territory to which the Indian titles had been extinguished. 74 As other counties were organized beginning in 1817, Wayne County was reduced to its present size. A law adopted July 27, 1818, provided that a probate court should be held in each county. 75 By a proclamation dated October 2, 1818, Acting Governor Woodbridge declared it was "no longer expedient to continue the present subdivisions of this territory into districts" for probate purposes; instead, each county should be "a separate District and County" for the purposes of the law establishing courts of probate. 76 A law adopted August 26, 1819, directed the "now register of wills, administrations, etc., in and for the county of Wayne" to transmit "forthwith" to the respective registers in and for the counties of Monroe, Macomb, and Mackinaw "all wills, inventories of estates, returns of administrators or executors, bonds, decrees, orders, and all other documents, papers, and vouchers whatsoever, remaining on file in his office" relating to the estate of any testator or intestate who at the time of his death resided within the limits of the counties named. 77 That McDougall then Register of Wills (not judge of

73 Lewis Cass was commissioned governor of Michigan Territory October 29, 1813. 10 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 453 (1942). October 5, 1814, Governor Cass proclaimed: "Be it Known, that for the execution of the Act, entitled 'An Act to adjust the Estates and affairs of deceased persons, testate, and intestate, & for other purposes' . . . I do hereby constitute the Territory of Michigan into one general District, excepting so much thereof as is included in the District of Michilimackinac. . . ." Id. at 714.
74 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 323 (1871).
75 Id. at 341.
77 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 160 (1874).
probate) of Wayne County was slow in complying with the command of the statute is indicated by the fact that a motion was made in the territorial supreme court on November 16, 1819, for a rule requiring him to show cause why a mandamus should not issue to him, commanding him to obey the requisitions of the statute. 78

McDougall’s “Records of the Registers Court in & for the Judicial District of Erie, Huron & Detroit” ends with October 18, 1816. The next entry is by Charles Larned, Register, dated December 16, 1816. Larned became probate judge of Wayne County in 1818. 79 In 1825 McDougall advertised himself as “President of the Bar of Michigan.” 80 He was later referred to as the “quandam father of the bar” by a writer who stated it was customary to stand while drinking to the “Nestor of our Bar.” 81 That he was thus honored on convivial occasions was, no doubt, for convivial reasons and not because of his ability as a lawyer. In the fall of 1825 he was appointed lighthouse keeper at Fort Gratiot, 82 and retired from active practice. 83 Whatever may have been his eccentricities 84 and however lacking he may have been in ability as a lawyer, McDougall was not an uneducated frontiers-

78 3 Transactions of the Supreme Court of the Territory of Michigan 1814-1824, Blume ed., 129 (1938). According to a petition to the Register of the District of Erie, Huron & Detroit dated July 10, 1815, the Erie records were lost during the war. In this petition Solomon Sibley stated: “Shortly after the War commenced James Henry the Co-Executor died, and at a time when your petitioner was absent from the Country. Your petitioner further states that he is informed, that the records of the Registers Office of Erie were lost & destroyed by the Enemy.” Probate Records Wayne County, vol. I, 134.


80 Detroit Gazette, February 18, 1825.

81 22 Michigan Pioneer and Historical Collections 358 (1894).

82 Detroit Gazette, November 22, 1825. In an account of the first election of a probate judge for St. Clair County it was stated that “Squire Smith was opposed by an old Detroit lawyer named George McDougal. The lawyer received the French vote, but was defeated.” 4 Michigan Pioneer Collections 342 (1906).

83 A letter in Probate File 108 (Elijah Brush’s estate) dated “Fort Gratiot’s Light House Nov. 20, 1828,” reads in part: “I now distinctly remember his calling on me, a short time after I, as Register of Probate for the District of Erie Huron & Detroit, had decreed Letters Testamentary to Mrs Brush, on your deceased Fathers Estate & ordered her to advertise the fact; that I assisted your said Uncle in drafting the proper notices in English & translated them into the French Language for him to Copy & post up. I have taxed my memory severely & cannot remember any more on the subject of the notices.” An affidavit that he had assisted in the preparation of the notices signed by McDougall November 29, 1828, is also in the file. The records kept by McDougall usually included his order for giving notice. Illustration (Vol. I, p. 6, May 26, 1814): “Ordered that . . . administrator . . . give notice of his said appointment within one month from the date hereof, by causing the same to be posted up at Currys Corner & at Mr Richards Chappel, in the District of Detroit & published in the English & French Languages.” The record sometimes shows that “the usual instructions to advertise” were given.

84 13 Michigan Pioneer Collections 336 (1907). . . . 35 id. at 210-211.
man administering cracker-barrel justice. There is much evidence that he made a sincere effort to follow the law applicable to the matters before him, and had he not used great care in keeping his records the difficulties of tracing the course of probate through the somewhat bewildering changes which took place in the years 1809-1813 would have been insuperable.

Among the estates administered in the period 1813-1816 was that of Elijah Brush, esquire, attorney at law, who died in December 1813 after some twelve years of active practice. The available records show that he appeared as attorney in at least 468 cases in the Court of Common Pleas of Wayne County (Northwest and Indiana territories); 294 cases in the District Court for Huron and Detroit; and 163 cases in the Michigan Supreme Court. He was attorney general of Michigan Territory 1807-1809. The inventory of his estate as appraised by persons appointed by McDougall is of considerable interest as showing the economic status of a successful frontier lawyer:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Personal estate&quot;</td>
<td>$2,166.66¼</td>
</tr>
<tr>
<td>&quot;Cash&quot;</td>
<td>500.00</td>
</tr>
<tr>
<td>&quot;School &amp; other Books appertaining to the profession of the deceased&quot;</td>
<td>452.00</td>
</tr>
<tr>
<td>&quot;Implements and instruments of education and instruction&quot;</td>
<td>2.12½</td>
</tr>
<tr>
<td>&quot;Wearing apparel of the deceased&quot;</td>
<td>150.25</td>
</tr>
<tr>
<td>&quot;Wearing apparel of the widow&quot;</td>
<td>133.40</td>
</tr>
<tr>
<td>&quot;Childrens wearing apparel&quot;</td>
<td>69.62</td>
</tr>
<tr>
<td>&quot;Real Estate&quot;</td>
<td>6,768.73</td>
</tr>
<tr>
<td>&quot;Notes of hand&quot;</td>
<td></td>
</tr>
<tr>
<td>&quot;Good&quot;</td>
<td>299.62</td>
</tr>
<tr>
<td>&quot;Sperable&quot;</td>
<td>122.50</td>
</tr>
<tr>
<td>&quot;Uncertain&quot;</td>
<td>455.00</td>
</tr>
<tr>
<td>&quot;Desperate&quot;</td>
<td>73.28</td>
</tr>
<tr>
<td>&quot;Book of Accounts&quot;</td>
<td></td>
</tr>
<tr>
<td>&quot;Good&quot;</td>
<td>4,279.46</td>
</tr>
<tr>
<td>&quot;Sperable&quot;</td>
<td>226.35½</td>
</tr>
<tr>
<td>&quot;Uncertain&quot;</td>
<td>1,017.27</td>
</tr>
<tr>
<td>&quot;Desperate&quot;</td>
<td>847.92</td>
</tr>
</tbody>
</table>

The executrix of his will was required to give bond in the sum of $18,000.

In the list of books "appertaining to the profession of the deceased" there are 113 law books: English reports — 50; Texts —

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85 Probate File 108.
33; digests and abridgments — 17; statutes — 11; dictionaries — 2. Because of the importance of knowing, in any study of law on the American frontier, what law books were actually present at a given place and time, the titles of the books possessed by Brush are listed below.86

Chancery Courts and Jurisdiction

In eighteenth century England the administration of a decedent's estate, made up of both real and personal property, might require proceedings in three different types of courts. If the decedent left a will, probate of the will, and administration of his personal property took place in an ecclesiastical court; the validity of the will as a devise of land could be tested only in the courts of common law in actions brought for that purpose such as trespass or ejectment; administration of both real and personal property might be had in the court of chancery when the more flexible procedure of that court was needed.87 The Northwest Terri-

86 Raymonds Reports—3; Kidd on Bills—1; Jones on Bailment—1; Highmore on Bail—1; Burrow's Reports—5; Salkelds Do—1; Viner's Abridgment—3 odd; Espenasses Reports—1; Swifts system—2; Attorneys Vade Mecum—2; Impey's Practice—1; Laws of United States—1; Pamphlets Do Do—5; Sherridens Dictionary—1; Hawkins Pleas crown—2; Blackstone commentaries—4; Montifores Commercial precedents—1; Law of Partnership by Wm Watson—1; Leaches crown law—1; Gilberts Law of Evidence—1; Powell Devises—1; Adams defence of the American Constitution—3; Powell on Mortgages—2; The Federalist—2; Dougherty's crown circuit—1; Remarks on murder &c—1; Wilsons Reports—3; Jacob's Law Dictionary—1; Laws of the United States—5; Hail's common Law—2; Easts Reports—6; Durnford & Easts Reports—8; Comyne's Digest—6; Plowdens Reports—2; Coke's Do—4; William's Do—3; Bacons abridgment—5; Do Do—1 odd; Do Appendix—2; Atkin's Reports—3; Kaines Law Tracts—1; Runningtons ejectment—1; Strainge's Reports—2; Henry Blackstone's Reports—2; Douglas' Reports—1; Veysey Junr.'s Reports—5; Coopers Do—1; Powell on Contracts—1.

87 See Simes and Bayse, "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 and 43 Mich. L. Rev. 113 (1944), reprinted in Problems in Probate Law (including a Model Probate Code) 385 (1946); Murphy, "Early Forms of Probate and Administration: Some Evidence Concerning Their Modern Significance," 3 Am. J. Legal History 125 (April 1959). Simes and Bayse state (at 972-973): "While the writs of prohibition crippled the jurisdiction of the ecclesiastical courts, the common-law courts from which they issued had no machinery adapted to the administration of estates. The net result was that chancery, with its more flexible procedures, tended more and more to take over matters of administration. Though the will would be admitted to probate and the personal representative appointed by the ecclesiastical court, a creditor or distributee might file his bill to have the estate administered in chancery. This jurisdiction might be sought for the purpose of discovering assets, because a trust was involved, or, though no actual trust was involved, because the estate was regarded as a kind of trust fund and the personal representative as a kind of trustee. But, for whatever reason jurisdiction was assumed, chancery ordinarily continued with the administration until it was complete." Murphy states (at p. 158): "The powers of the ecclesiastical courts in matters testamentary decayed after the Reformation and throughout the seventeenth and eighteenth centuries until the abolition in 1857 of their testamentary jurisdiction all they did was to grant probate and administration. The common law and equity courts had eaten away all their other jurisdictions, even to ordering accounting in estates. Chancery with
tory had no ecclesiastical courts, and no court of chancery. The only court established by the Northwest Ordinance was a general court to consist of three judges who should have "a common law jurisdiction." In plans of government reported to the Congress on May 10, July 13, and September 19, 1786, provision was made for the appointment of a court which should have "a common law and chancery jurisdiction." In a plan submitted April 26, 1787, the words "and chancery" were omitted. Mr. Dane of Massachusetts was a member of the committee which submitted this plan, and may have, in view of his claims of authorship, influenced the change so as to introduce the Massachusetts scheme of administering justice without courts of chancery.

The governor of the territory (St. Clair) was familiar with this type of judicial system having come from Pennsylvania. In Pennsylvania, as in Massachusetts, equity was administered in common law courts through common law forms. It has been said, however, that the Orphans Court of Pennsylvania, so far as its jurisdiction extended, was always "a court with full equity powers."

With the establishment of orphans courts for each county of the Northwest Territory in 1795 questions arose as to the jurisdiction of these courts vis-à-vis the probate judges and courts provided for each county by the law of 1788. In a letter to the

its concepts of accountability and trusteeship had been widely used by distributees to secure distribution of an estate from an executor who sought to retain his authority. An ordinary could only accept the executor's accounts given; nor could the creditors question it or the inventory. But such matters could be raised in chancery, though it was slower to protect legatees except where they were cestui que trust.'

88 1 Stat. 51.
89 30 JOURNALS OF THE CONTINENTAL CONGRESS 253 (1934).
90 Id. at 404.
91 31 id. at 670.
93 Notes 4 and 5 supra.
95 According to Pease, THE LAWS OF THE NORTHWEST TERRITORY 1788-1800, xvii (1925), "Major General Arthur St. Clair, the governor, had attended the University of Edinburgh before entering the British army. By 1770 he had been appointed justice of the Court of Quarter Sessions and Common Pleas, and in 1771 recorder of deeds, clerk of the Orphan's Court, and prothonotary of the Court of Common Pleas in Bedford County, Pennsylvania.
97 "The Orphans Court, which may be described in a general way as a court having control of everything relating to decedents' estates, has always been, so far as its jurisdiction extends, a court with full equity powers." Id. at 461.
98 Note 28 supra.
99 Note 27 supra.
justices of the Orphans·Court of Hamilton County (copy to the probate judge of that county) dated September 8, 1796, Governor St. Clair stated:*100

"By the Law establishing a Court of probate, a Judge with power to take the probate of Wills &c is to be appointed in every County and to do everything that appertains to testamentary Affairs according to Law except the rendering of definitive Sentences and final Decrees—those are reserved for the Court of Probate. . . . The Cases wherein definitive Sentences and final Decrees are requisite are, the Validity of Wills—the Legality of the probate, as if an Executor has obtained probate of a Will, and the Heir or other person interested suggests that it is not the Testator's last Will—Fraud or Irregularity, in these, the matter having been already before the Judge, it is most proper his proceedings should be reversed or confirmed elsewhere; also Claims to administration by sundry persons, to determine in which of them the right is—the Distribution of intestate Estates and some others. . . . The power to call Administrators to Account &c is now vested in the Orphans Court, and so far the powers of the Court of Probate would seem to be annulled: but, as those powers are not expressly taken by the Law constituting the Orphans Court, it may be doubted whether anything more was given to that Court than a concurrent Jurisdiction with the probate Court: and an appeal to the General Court lies from each of them: so that the same Business may be done in either of them. . . ."

Referring to the English practice the governor stated:*101

"By the Laws of England and particularly 22d & 23rd Cha: 2d the Judges of the Prerogative Courts, to which the Judges of Probate with us are similar, have power to call Administrators to Account, as well as to grant Administrations and to settle and decree Distributions according to Law, and to Compel Administrators to comply, and those powers would all have been in the Judges of Probate but for the Exception above mentioned."

The governor in his letter of September 8 called attention to the fact that appeals were allowed from the probate and orphans courts to the general court, but did not discuss the scope of review. Were the appeals in the nature of writs of error? Or were

*100 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 461 (1934).
*101 Ibid.
they appeals which required a rehearing or trial de novo in the appellate court? The term "appeal" seems to have been used in its technical sense indicating a scope of review similar to that in chancery. But how could judges vested by Congress with "a common law jurisdiction" which, according to St. Clair was "restrictive as to any Powers in Equity,"\textsuperscript{102} deal with appeals from courts which exercised broad chancery powers?

The provision of the Ordinance of 1787 that land might be devised by will, "provided such wills be duly proved," was clearly a departure from the English law which at that time not only did not require probate of a will devising land before it could be introduced in evidence, but which gave no effect to a probate made prior to the trial in which the land title was being tried. By a law adopted from Pennsylvania in 1795 the governor and judges of the Northwest Territory liberalized the Ordinance as follows:\textsuperscript{103}

"All wills in writing, wherein or whereby any lands, tenements or hereditaments have been, or shall be devised (being proved by two or more credible witnesses, upon their solemn oath, or affirmation, or by other legal proof in this territory; or being proved before such as have, or shall have, power in any of the United States, or elsewhere, to take probates of wills, and grant letters of administration, and a copy of such wills with the probate thereof annexed or endorsed, being transmitted hither, under the public or common seal of the courts, or offices, where the same have been or shall be taken or granted, and recorded or entered in the judge of probate's office in this territory) shall be good and available, in law, for the granting, conveying and assuring of the lands or hereditaments, thereby given or devised, as well as the goods and chattels thereby bequeathed: and the copies of all wills and probates . . . shall be good evidence, to prove the gift or devise thereby made. . . ."

Under "A law for the settlement of intestates' estates" adopted in 1795\textsuperscript{104} it was "lawful" for administrators, when authorized by the orphans court, to sell lands of decedents "for defraying their just debts, maintenance of their children, and for putting them apprentices, and teaching them to read and write, and for improvement of the residue of the estate." To obtain approval by the orphans court it was necessary to show that the personal

\begin{flushright}
\textsuperscript{102}Id. at 277; 2 ST. CLAIR PAPERS, Smith ed., 76 (1882).
\textsuperscript{103}Statutes and laws cited in note 11 supra, Chase ed., 182; Pease ed., 232.
\textsuperscript{104}Id., Chase ed., 163-164; Pease ed., 191.
\end{flushright}
estate was insufficient to pay debts and take care of children. Accor-
ding to Salmon P. Chase,105 "This was the earliest provision on
the subject of the sale of the real estate of decedents by their
personal representatives."106

In the files of the thirty-seven estates administered in Wayne
County, Northwest Territory,107 in the period from March 1797
to March 1803 there are thirty bonds, ranging in amounts from
$50 to $12,000, all payable to "Peter Audrain, Esq'r Judge of the
Court of Probate in and for the County of Wayne." Twenty-
eight of the bonds were given by administrators; one by an execu-
tor; and one by persons described as executors and administrators.
An administrator was bound to make an inventory of the de-
cedent's goods and chattels, rights and credits (or goods, chattels
and credits); to exhibit the inventory in the office of the court of
probate on or before a specified time (first day of the next term);
to administer the goods, etc., according to law; to make an ac-
count of administration on or before a specified time (same as
above); to pay and deliver (after account examined and approved
by orphans court) goods, etc., found remaining to persons decreed
by the orphans court; and, if will exhibited and proved, to render
and deliver the letters of administration, if required. These con-
ditions were exactly as required by the "law for the settlement of
intestates' estates" adopted in 1795.108 The practice of making the
bonds payable to Audrain was in accord with the statute of 1788109
which provided:

"All bonds that by this law are, or by law shall be directed
to be given in the court of probate, or probate office, shall be
made to the judge, and shall be in trust, to and for the use of
all persons concerned, or having interest therein: And the
benefit thereof, shall be extended from time to time, to and for
the relief of the party injured."

The extant files for the period March 1803 to July 1805 con-
tain papers pertaining to thirteen estates of decedents. The bonds
found in these files are in the same forms as those previously filed
except by some of them an administrator is bound to list in the

105 Id., Chase ed., 164 (note).
106 Whether an orphans court sitting in one county could authorize the sale of lands
situated in another county was considered at length by the Supreme Court of Ohio in case
cited in note 29 supra.
107 See note 36 supra.
108 Note 104 supra.
inventory “lands and tenements” along with “goods and chattels, rights and credits.”

Among the miscellaneous papers remaining with the files of the Supreme Court of Michigan Territory is a guardian’s bond dated June 14, 1804, payable to “Peter Audrain esqr. clerk of the Court of General Quarter Sessions of the Peace in and for the County of Wayne,” conditioned that the guardian “appointed by the Court of Orphans” take care of the “children and estate” of a named decedent, and render a true and just account when called upon by order of the orphans court. A Northwest statute adopted in 1792 had empowered the judges of probate to appoint guardians of minors and others, but this law had been repealed in 1795, and power to appoint guardians conferred on the orphans court.

On April 3, 1802, after the Western half of Wayne County had been incorporated into Indiana Territory, justices of the court of common pleas of Knox County petitioned the House of Representatives of the United States that the Ordinance of 1787 “be so far revised and amended by law, as to give chancery powers to the judges of the said Territory.” A committee directed to inquire into the expediency of vesting the powers usually exercised by a court of equity “in the judges of the United States, within the Indiana and other Territories,” reported that it was “expedient,” stating:

“The courts without equitable jurisdiction will inevitably, in some instances, become the instruments of iniquity, instead of the administrators of justice. Fraud, accident, and hardship, ingredients in many of those transactions of human life, which constitute the basis of litigation; entrenched within

110 In an opinion recorded in his Notes, James Duane Doty, Additional Judge of Michigan Territory, stated in 1825: “The condition of an administrator’s bond is that he make a true inventory ‘of all and singular the goods, chattels, rights and credits’ of the intestate. L.M. 32. Administrators are not bound by the form of the administration bond prescribed by the statute, to inventory the real estate of the intestate.” Henshaw v. Blood, 1 Mass. T.R. 35. “The bond has relation to the personal estate only.” Prescott v. Tarbell, ib. 204.” Doty’s “Notes of Trials and Decisions” (MS State Historical Society of Wisconsin, Madison) 86. In the case first cited by Doty an attorney “said that the condition of administration bonds, as prescribed by the statute of this commonwealth, was copied from the English form, enacted and provided by the 22 and 23 Car. 2, c. 10,—which related to personal estate only—that it was well known an administrator in England had nothing to do with the real estate of his intestate in any case—”

111 Statutes and laws cited in note 11 supra, Chase ed., 127; Pease ed., 89.

112 Id., Chase ed., 192; Pease ed., 255.

113 Id., Chase ed., 159; Pease ed., 181.

114 ANNALS OF CONGRESS, 7th Cong., 1st sess., 1131 (1801).

115 Id., 8th Cong., 2d sess., 1577-1579 (December 29, 1803).
legal forms and veiled with specious, but deceitful appearances, are many times not within the reach of a tribunal, vested with common law powers only. To develop, and relieve against them, an equitable jurisdiction is necessary."

What action, if any, was taken on this report does not appear, but it does appear that by an act approved March 3, 1805, the superior judges of all the territories were vested with the same jurisdiction and powers, including chancery, as had been conferred on the federal District Court of Kentucky District. It should be noted, however, that the jurisdiction given the territorial courts was limited to "cases in which the United States are concerned." On August 25, 1805, after Wayne County had been re-organized as Michigan Territory, the governor and judges of Indiana Territory established in that territory a territorial court of chancery.

The courts established in Wayne County while a part of the Northwest Territory continued uninterrupted while the county was a part of Indiana Territory, but when the county became Michigan Territory new territorial courts were established by the governor and judges of the new territory. And the supreme court, made up of the judges appointed by the President, was given jurisdiction in addition to, and different from, the "common law jurisdiction" authorized by the Ordinance of 1787. A law published July 24, 1805 provided that the supreme court should have "original and exclusive jurisdiction of all cases in law and equity, where the title of land is in question;" "appellate jurisdiction in all cases whatsoever;" power to issue writs of injunction and ne exeat. It was provided that suits in equity should not be sustained where an adequate remedy might be had at law. Three district courts, each to be held by a judge of the supreme court (later, by three judges to be appointed by the governor), were established — one to be held at Michilimackinac, one in the Erie district, and the other at Detroit. According to Judge Bates (1806) these courts possessed a jurisdiction "both equitable and legal."

In the period July 1805 to January 1809 Peter Audrain as clerk

118 Woodward Code 17; 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 9.
119 Woodward Code 27; 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 17.
120 Blume, "The First Charge to the Grand Jury in the District Court of Michilimackinac," 15 MICH. ST. B.J. *344 at *346 (1935).
of the District Court for Huron and Detroit, acted as probate officer in at least sixteen estates. All bonds taken were payable to the United States of America. Beginning in June 1807 the bonds were conditioned that the administrator make a true inventory of the "goods & chattels, rights & credits, & effects" of the decedent and "exhibit the same when required by the court of the district;" that he "make and render a true & just account of his actions & doings therein, when required by the court of the district." In one of the probate files (No. 58) there is an application in Audrain's handwriting "To the Honble The Judges of the district court of Huron & Detroit" for appointment of a guardian for two very young female children. That this court appointed Solomon Sibley guardian of a minor is shown by a document with his personal papers.121 Proceedings in chancery to determine sanity were had in the territorial Supreme Court in 1807.122 A guardian appointed in this matter gave bond conditioned that he "render a true and faithful account of his guardianship" whenever required.

In 1810, after a probate law adopted from Vermont had been declared invalid,123 the district courts were abolished.124 The jurisdiction of the supreme court was extended "to the probate of wills;"125 also to "all matters in equity."126 Here we find all probate jurisdiction, chancery jurisdiction, and common law jurisdiction vested in one court. But this arrangement lasted only to January 19, 1811, when provision was made for the appointment of a "Register" in each of the districts of the Territory.127 This officer was authorized to issue letters testamentary and of administration; to issue letters to collect and preserve estates; to try will contests with juries; to compel production of wills; to remove executors and administrators for refusing or neglecting to account; to appoint, remove, and control guardians; to commission persons to make partition of land; to establish "equitable proportion" when partition cannot be made without prejudice; to authorize

121 Sibley Papers 23-931, mss. 128, Burton Historical Collection, Public Library, Detroit.
122 1 Transactions of the Supreme Court of the Territory of Michigan 1805-1814, Blume ed., 106 (1935).
123 Id. at 189, 329.
124 Note 54 supra.
125 Note 56 supra.
126 Cass Code 87; 1 Laws of the Territory of Michigan (reprint) 183 (1871). Also see 8 Michigan Pioneer Collections 617 (1907) where text of law is given.
127 Note 58 supra.
the sale of estate lands; to examine upon interrogatories persons suspected of embezzlement; to make equitable distribution of insolvent estates; to issue commissions for the taking of testimony; to compel representatives to account; and so on. The act further provided:

"Upon all contested points arising before the Register, he shall first give his opinion, and if the party be not satisfied therewith, he may appeal. Any person, conceiving himself aggrieved by the opinion or decision of the Register in any action, matter or conduct whatsoever, if the matter in controversy be of the value of one hundred dollars, may appeal, on giving bond and security within a reasonable time, to the Supreme Court."

It seems clear that the Register was not merely a probate officer and the keeper of the probate records but was the judge of a court that had an extensive jurisdiction over the estates of decedents and minors, and full equity powers within that jurisdiction. When probate courts were established in place of the registers' courts in 1818 the supreme court, still vested with full chancery jurisdiction, was designated "the supreme court of probate within this territory." The exercise of chancery power by the supreme court was regularized by an act of Congress approved March 3,

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128 Commencing with 1814 printed forms of administrators' oaths and bonds were regularly used. The form of bond was as follows: "Know all men by these presents that We ______ residing within the Registers District of Erie, Huron and Detroit, in the Territory of Michigan, are held and firmly bound unto the United States of America, in the penal sum of ___________ Dollars, current money of the said United States; to the payment of which, well & truly to be made, we bind ourselves, our & each of our Heirs, Executors & Administrators, jointly & severally, firmly by these presents, sealed with our seals, & dated this ___ in the year of our Lord one thousand eight hundred and ______. The CONDITION of the above Obligation is such, that whereas the above bounden ______ hath been appointed by the Register of the District of Erie, Huron & Detroit aforesaid Administrat____ of the estate of _________ deceased: — Now therefore if the said _________ shall make a true & perfect inventory of all and singular the Goods Chattels & Credits of the said deceased, which have or shall come to the hands, possession or knowledge of the said Administrat____ or into the hands and possession of any other person or persons, and exhibit the same when required, and the same Goods, Chattels & Credits, well & truly Administer according to Law, and make and render a true & just account of ______ actions and doings therein when required, and that all the rest of the Goods, Chattels & Credits, which shall be found remaining, the said Administrat____ shall render and deliver up ______ letters of Administration; Then & in these cases, the above obligation shall be void, otherwise shall remain in force. Signed and Sealed in the presence of _________".

129 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 341 (1871).
130 Id. at 342.
1823, which provided that the Court should have "a chancery, as well as common law jurisdiction." 131

Whether the granting of chancery powers to probate courts in matters pertaining to estates limited in any way the chancery jurisdiction of the supreme court was discussed by Sibley, J., in Robert Abbott et al. v. James Abbott, Jr., a suit in equity for an accounting and other relief decided by the supreme court in 1829: 132

"The 4th Cause alleged is that the Court of Probate of the County of Wayne has Jurisdiction of the Cause, and that the jurisdiction of that court is exclusive of the original jurisdiction of the Court of Chancery in matters relating to wills and administration, on the estates of deceased persons — In support of this exception, the statute Laws establishing and regulating the proceedings of the Courts of Probate have been relied on by the Defendants Counsel — The jurisdiction of a Court of Chancery is in its nature Broad and somewhat difficult to define — It is to be sustained where it is not evident on the face of the proceedings, that a Court of Law can give full and adequate relief — Nor is its jurisdiction taken away in all cases where relief at Law may be had, as in matters of account, where it sustains a concurrent jurisdiction and there are other instances laid down in the Books of like exception — The Court must decide on their jurisdiction by the facts set forth & charged in the Bill, and I am 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 — I am aware of the great inconvenience and hardship that would be imposed on the Citizens of the Territory, to be called before this Court, instead of the Courts of probate, which are located in every County of the Territory, for the settlement of decedents estates — And I am not, as at present advised, prepared to sustain that broad proposition — I am inclined to the opinion, that our probate laws do restrain the jurisdiction of the Court of Chancery, and that it was the evident intention of the Legislature that the Judge of probate should have exclusive original jurisdiction, in cases made cognizable before him, wherein he is vested with sufficient powers to give by his Decrees adequate relief — I am fortified in this opinion, by the provision of the Law which gives an appeal from the decrees of the probate to the Supreme Court, where

131 3 Stat. 769 (1823).
132 5 Transactions of the Supreme Court of the Territory of Michigan 1825-1836, Blume ed., 382 (1940).
his acts and proceedings may be revised, and if found erroneous rectified—”

In 1863 Campbell, J., of the state Supreme Court, was “very strongly inclined to the opinion that under our probate system the Court of Chancery has only jurisdiction in those cases in which an adequate remedy does not exist in the Probate Court.”133 Similar views were expressed by Cooley, J., in 1871.134 Considering in 1909 a statute which had provided that the conferring of jurisdiction on probate courts should not be construed “to deprive the circuit court in chancery, in the proper county, of concurrent jurisdiction as originally exercised over the same matters,” Blair, C. J., stated:135

“To hold that the amendment had the effect to confer upon the court of chancery full concurrent jurisdiction ‘of all matters relating to the settlement of the estates of such deceased persons, and of such minors and others under guardianship,’ as originally exercised by the court of chancery in England, would be to revolutionize our practice as understood by the bench and bar throughout the history of our State.”

The judge’s examination of the statutes took him back to the territorial laws of 1818. Sibley’s well-considered opinion of 1829 was not cited for the simple reason it was unreported, and, presumably, unknown. Query whether it contributed to what was understood by bench and bar throughout the history of the state.

**Michigan Probate Code of 1818**

On October 17, 1808, Woodward, chief judge of the territorial Supreme Court, laid before the governor and judges in their legislative capacities the following resolution:136

“Resolved, That it is expedient to revise all the laws which have successively been in force in this Territory, and re-enact such of them as may be found necessary and suitable to its present circumstances, and that after such revision fully made, it will be expedient to provide that the coutume, or common law of France, the ordinances of the government of France,

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133 The People v. The Circuit Court for the County of Wayne, 11 Mich. 393 at 403 (1863).
the common law of England, or such parts thereof as have been
found inexpedient, acts of the British parliament, the laws of
the late Territory of the United States northwest of the river
Ohio, and laws of the Territory of Indiana, excepting so far
as it will be found desirable to re-enact them under the author-
ity of this government, ought to cease to have operation."

Governor Hull recognized that the succession of governments had
created perplexities and embarrassments which it was desirable to
remove, and was of opinion that the proposed revision of the laws
should be undertaken at an early date.137

On November 9, 1808, after Judge Woodward had left the
Territory to be gone several months, Governor Hull signed the
first of the forty-five acts known as the *Witherell Code*. These laws,
which included the "act for the probate of wills, and the settlement
of testate and intestate estates" published January 31, 1809,138
were intended to be a complete revision of the laws previously
adopted in Michigan, and to supersede the statutes of the older
territories. It was held, however, that these laws had not been
properly adopted and published, and all were repealed Septem-
ber 16, 1810.139 Also declared of no force were the statutes of the
Northwest and Indiana territories, the previous French law, and
all acts of the parliaments of England and Great Britain. Although
Woodward's resolution of 1808 called for a revision of "the com-
mon law of England, or such parts thereof as have been in-
expedient," the repealing act of 1810 made no reference to the
common law.140 The common law remained in force, but as noted
by a justice of the Michigan Supreme Court in 1886, it was the
"English common law, unaffected by statute."141

After the adoption of the repealing act of 1810 the only statutes
in force in Michigan were the laws adopted by the governor and
judges of Michigan on and before June 2, 1807, and on and after
September 1, 1810, and the statutes of the United States applicable
to the territory. Laws were adopted from time to time after Sep-
tember 1, 1810, but no attempt was made to make a complete

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137 12 MICHIGAN PIONEER COLLECTIONS 466 (1908).
138 Note 48 supra.
139 Note 54 supra.
140 According to Burton, "It was while Woodward was in Washington in 1813 that
he proposed and advocated the adoption of a code to supersede the common law in the
district of Columbia, an idea that he attempted to carry out in part, in Michigan by
abolishing the laws of all foreign countries." 29 MICHIGAN PIONEER AND HISTORICAL COL-
LECTIONS 656 (1901).
revision of the law — common and statutory — as suggested by the Woodward resolution of 1808, and it was not until 1820 that a systematic attempt was made to fill the gaping holes left by the rejection of the earlier territorial and British statutes. The *Cass Code* of 1816 was merely a reprint or listing of the territorial laws then in force.¹⁴²

Prior to the legislative activity which culminated in the *Code of 1820* the governor and judges adopted a series of laws which may be referred to as the *Probate Code of 1818*. These laws and the states from which they purport to have been adopted are as follows:¹⁴³

"An act for establishing courts of probate"
— Massachusetts

"An act prescribing the manner of devising lands, tenements and hereditaments"
— Massachusetts

"An act for the filing and recording of wills proved without this Territory, and for taking affidavits in writing for the probate of wills in certain cases"
— Massachusetts

"An act directing the descent of intestate estates, and for empowering the judge of probate to make partition, in certain cases"
— Massachusetts; Virginia; Vermont

"An act directing the settlement of the estates of persons deceased, and for the conveyance of real estates in certain cases"
— Massachusetts

"An act empowering the judges of probate to appoint guardians to minors and others"
— Massachusetts

"An act for the distribution of insolvent estates"
— Massachusetts

"An act to compel executors living without the territory to settle their accounts; and to oblige administrators and

¹⁴³ The titles of the laws (except the last two) are the same as found in The Perpetual Laws of the Commonwealth of Massachusetts (1801) pp. 26, 31, 37, 47, 72, 74, 83, 84, 86, 102, 104, 106, 456, 474, cf. 296; Laws of the Commonwealth of Massachusetts (1789-1795) pp. 10, 411, cf. 1, 523; Laws of the Commonwealth of Massachusetts (1796-1800) p. 568. Of the eighteen sections of the fourth law, only the first, dealing with descent, was modified by adoptions from Virginia and Vermont.
guardians not being inhabitants of this territory, to give bonds with proper sureties for the performance of their trust”
— Massachusetts

“An act to authorize the courts of law to enter up judgment against the goods and estate of persons deceased, when the executor or administrator neglects or refuses to prosecute or defend”
— Massachusetts

“An act for regulating the proceedings on Probate Bonds in the courts of common law; and directing their form in the supreme court”
— Massachusetts

“An act authorizing executors and administrators to make sale of real estate mortgaged to their testators or intestates, and such as they shall take in execution in certain cases”
— Massachusetts

“An act for limiting the time within which suits may be prosecuted against Executors and Administrators, and for perpetuating the evidence of notice given by them and by Guardians and others respecting the sale of real estate”
— Massachusetts

“An act authorising the settlement of the claims of Executors and Administrators in the Probate Court, by Referees”
— Massachusetts

“An act giving a remedy in law against the Executors and Administrators of deceased debtors in joint contracts”
— Massachusetts

“An act regulating the fees of the Judges of Probate, and Registers of Probate in the several counties of this territory”
— New York; Massachusetts

“An act repealing an act entitled ‘An Act to adjust the Estates and affairs of deceased persons, testate and intestate,’ and also an act in addition thereto”
— Massachusetts

The laws listed were all published July 27, 1818, and constitute a part of the Code of 1820. They became effective October 1,
By an act of Congress approved April 18, 1818, Michigan Territory was extended westward to the Mississippi River; by an act approved June 28, 1834, to the Missouri and White Earth rivers. In the period of its greatest extent (1834-1836) the territory included the present areas of the states of Michigan, Wisconsin, Minnesota, Iowa, and the eastern half of the Dakotas. When the western areas were added Congress provided that the inhabitants should be entitled to the same privileges and immunities, and subject to the same laws, rules, and regulations as the other citizens of Michigan Territory. The system of probate courts inaugurated in 1818 was continued throughout the remaining period of the territory. A judge of probate and a register of probate were appointed in each county until January 29, 1835, when the office of register was abolished.

The first constitution of the state of Michigan (1835) provided that "All laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature." In 1919 W. L. Jenks of Port Huron, Michigan, referred to the sixteen laws of 1818 as constituting, "with minor variations, our Probate law today." The act of Congress which, in 1836, organized Wisconsin Territory in that part of Michigan Territory which lay west of the new state of Michigan, provided that "the existing laws of the Territory of Michigan shall be extended over said Territory." According to Reisinfeld, "most of the (revised) Statutes of the Territory of Wisconsin of 1839 are substantially identical with the (revised) Laws of the Territory of Michigan of 1833 and the acts passed until the separation in 1838." The act of 1838 which divided Wisconsin Territory, thereby creating the territory of Iowa, provided that "the existing laws of the Territory of Wisconsin shall be extended over said Territory." A similar provision extended "the laws in force

145 3 Stat. 431 (1818).
146 4 Stat. 701 (1834).
147 3 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 1360.
149 5 Stat. 10 (1836).
in the Territory of Wisconsin at the date of the admission of the State of Wisconsin" to Minnesota Territory in 1849. Reisinfeld states:

"When Wisconsin acquired statehood she proceeded instantly to a revision of her laws. The Wisconsin draftsmen in turn relied on the Michigan Revised Statute of 1846 as a model. . . . The Wisconsin Revised Laws of 1849 finally served as foundation for the Revised Laws of the Territory of Minnesota of 1851. . . . In some instances they preferred to retain the law as it had been inherited from the Territory of Wisconsin. . . ."

Reisinfeld refers to the development of law in Michigan, Wisconsin, and Minnesota as "a good illustration of the weight of legislative precedent and the extent to which the codification of older states influenced the legislation of the younger territories and states."

Under the Treaty of Greenville (1795) all of the area later organized as the Territory of Michigan was Indian country except:

"The post of Detroit and all the land to the north, the west and south of it, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and so much more land to be annexed to the district of Detroit as shall be comprehended between the river Rosine on the south, Lake St. Clair on the north, and a line, the general course whereof shall be six miles distant from the west end of lake Erie, and Detroit river.

"The post of Michilimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on lake Huron, or to the strait between lakes Huron and Michigan, and to extend three miles back from the water of the lake or strait, and also the island of De Bois Blanc, being an extra and voluntary gift of the Chipewa nation."

As additional areas were acquired from the Indians the "frontier of settlement," that is, the line of continuous settlement, moved steadily westward until, as shown by the census of 1880, it formed.

152 9 Stat. 403 (1849).
153 Note 150 supra, at 142.
154 Id. at 141.
155 7 Stat. 49 (1795).
an irregular north and south line half way across the continent.\textsuperscript{156} At the time of the adoption of the Probate Code of 1818 the line was at or near Detroit having reached that point between the census of 1810 and that taken in 1820. In 1815 General McArthur reported that "every house in the Territory of Michigan is a frontier."\textsuperscript{157}

Although adopted on the frontier by men who had long resided on the frontier, the Probate Code of 1818 was not a product of the frontier. Nor was any attention paid to the laws and customs of the Canadian French. The governor and judges were required to adopt laws from the original states, and this they did without deviation. Their selection of Massachusetts was in line with what Dane tells us about the Ordinance of 1787.\textsuperscript{158} By adopting the Massachusetts scheme of combining powers formerly exercised by the ecclesiastical, chancery, and common law courts of England,\textsuperscript{159} the governor and judges of Michigan helped to establish, and transmit westward, a distinctively American legal institution — the probate court.

\textsuperscript{156} See SCRIBNER'S \textsc{Statistical Atlas} of 1883, plate 17.
\textsuperscript{157} 10 \textsc{Territorial Papers of the United States}, Carter ed., 503 (1942).
\textsuperscript{158} Notes 3, 4, and 5 supra.