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Civil Procedure on the American Frontier

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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)

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THE Treaty of Greenville (1795) by which Indian tribes of the Northwest Territory ceded to the United States the eastern and southern parts of the area which later became the state of Ohio, provided that certain small areas north and west of the treaty line should also be ceded.[1] Among the small areas were:

> "(12.) The post of Detroit and all the land to the north, the west and the 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.
>
> "(13.) The post of Michillimackinac, 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 the streight between lakes Huron and Michigan, and to extend three miles back from the water of the lake or streight, and also the island of De Bois Blanc, being an extra and voluntary gift of the Chipewa nation.
>
> "(14.) One piece of land six miles square at the mouth of

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1 7 Stat. 49. For a map showing the Greenville Treaty line, see 1 DUNBAR, MICHIGAN THROUGH THE CENTURIES 60 (1955).

> Chikago river emptying into the south-west end of Lake Michigan where a fort formerly stood."[2]

At the time of the above cessions, the posts of Detroit and Michilimackinac were held by the British, and had been since their surrender by the French in 1760.[3] Although situated in territory recognized as belonging to the United States by the Treaty of Paris of 1783,[4] the posts were not surrendered to the United States until after Jay's Treaty was proclaimed in 1796.[5] In August 1796, following the surrender of Detroit in July 1796,[6] Secretary Sargent of the Northwest Territory, acting as governor in the supposed absence of Governor St. Clair, laid out a new county (Wayne) north of the Greenville Treaty line with boundaries ample enough to include all of Lake Michigan, the water-shed west of the Lake, and all the area east of the Lake.[7] After referring to authority given by the Northwest Ordinance of 1787 to lay out counties, and stating that it appeared "expedient that a new County should immediately be erected, to include the settlements at Detroit &c[a]," the acting governor proclaimed that the new county should have and enjoy "all and singular the Jurisdiction, rights, Liberties, Privileges and Immunities whatsoever to a County appertaining and which any other County that now is, or hereafter may be erected and laid out shall or ought to enjoy conformable to the ordinance of Congress before mentioned." It should be noted that the new county was not limited to the small areas in which the Indian title had been extinguished, but included a vast Indian country to which the government of the Territory could not properly extend.

Continuing to act in the supposed absence of the governor,

2 Descriptions of these and other cessions will be found in ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, 18th Annual Report of the Bureau of American Ethnology, vol. II, 654-657 and accompanying maps.

3 RIDDELL, MICHIGAN UNDER BRITISH RULE—LAW AND LAW COURTS—1760-1796, 13 (1926).

4 1 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1776-1909, 586 (1910).

5 Id. at 590; BEMIS, JAY'S TREATY (1923).

6 BALD, DETROIT'S FIRST AMERICAN DECADE 1796-1805, 16-19 (1948).

7 DOCUMENTS RELATING TO THE ERECTION OF WAYNE COUNTY AND MICHIGAN TERRITORY (Historical Publications of Wayne County, Michigan, Numbers 1 and 2) 6. A facsimile of Sargent's proclamation appears in 1 FARMER, HISTORY OF DETROIT AND MICHIGAN 118 (1889). For a drawing showing the boundaries of the new county see Farmer, at p. 119; also see Downes, "Evolution of Ohio County Boundaries," 36 OHIO ARCHAEOLOGICAL AND HISTORICAL PUBLICATIONS 353 (1927). Governor St. Clair was absent from the Territory when the new county was proclaimed, but returned before its organization was complete.

Sargent proceeded with the appointment of all county officers called for by the statutes of the Northwest Territory.[8] The names of the appointees (except officers of militia) are listed here to show (1) the county organization, (2) the number of offices held by one person, and (3) the proportion of English and French names:

At Michilimackinac

Justices of the peace: Adhimar St. Martin, George Young, Henry Burbeck
Notary public: Adhimar St. Martin

At Detroit

Justices of the peace: Robert Navarre, James Abbott, Lewis Beufait, James May, Joseph Voyer, Francis Navarre, Nathan Williams, Joseph Jaubin, Jean Marie Beubien
Notary public: Francis Bellecour
Recorder: Peter Audrain
Treasurer: Chabert de Joncaire
Surveyor: Patrick McNiff
Sheriff: George McDougall
Coroner: Herman Eberts
Justices of Quarter Sessions: Robert Navarre, James Abbott, Lewis Beufait, James May, Joseph Voyer, Francis Navarre, Nathan Williams
Clerk of Quarter Sessions: Peter Audrain
Justices of Common Pleas: Louis Beaufait, James May, Patrick McNiff, Charles Gerardin, Nathan Williams[9]
Prothonotary of Common Pleas: Peter Audrain[10]
Judge of Probate: Peter Audrain

Difficulty experienced by the acting governor in finding suitable persons for appointment to the civil offices of the county was noted in the *Executive Journal* as an excuse for appointing Peter Audrain to so many offices.[11] In a letter to the Secretary of State dated September 29, 1796, Sargent stated:[12]

[8] See Executive Journal reprinted in 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 447-460 (1934).

[9] Justices of the Court of Common Pleas appointed after 1796 were Mathew Ernest, James Henry, George McDougall, Jacob Visger, Chabert Joncaire, William McD. Scott, James Abbott, John Dodemead.

[10] Peter Audrain served as prothonotary of the Court of Common Pleas from its beginning in 1796 to its end in 1805.

[11] 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 454 (1934).

[12] Id. at 457.

> "You will find I have put a military Officer at michilimackinac in the Commission of the peace—The few people constantly resident there (twenty Families only) the *very little* ability amongst them—The great Concourse of persons at certain Times (from fifteen hundred to two thousand) made it necessary that I should at least name three Conservators of the peace, and two proper Characters *only* could I find amongst the Inhabitants—one of which is occasionally at the Falls of St. Mary's and sometimes at the grand portage in Lake Superior—indeed Sir my Difficulties have been very great in selecting suitable Characters to Fill the civil offices in this County—more particularly for the Court of Common Pleas. . . . It will however be extremely to be lamented that so very few men of legal Ability or even common Education were to be found in the County—"

Insofar as the court of Common Pleas at Detroit was concerned, Sargent solved his problem by appointing persons who had been justices of the peace under the preceding British government,[13] though doubtful of the loyalty of local Englishmen, and critical of their "tyrannical sway" over the French inhabitants of the area.

What the judges lacked in legal training and experience was supplied, at least in part, by the attorneys who practiced before the court. The records show that at least two attorneys were in attendance throughout the nine years of the court's existence. From the records of some eleven hundred cases, it appears that the following persons served as attorney for the plaintiff or for the defendant in the number of cases indicated:

Ezra F. Freeman	For plaintiff 108;	for defendant 31
John S. Wills	For plaintiff 30;	for defendant 4
David Powers	For plaintiff 35;	for defendant 20
George W. Burnet	For plaintiff 1;	for defendant 1
Jacob Burnet	For plaintiff 0;	for defendant 2
Solomon Sibley	For plaintiff 150;	for defendant 63
Elijah Brush	For plaintiff 423;	for defendant 45

These men were Americans who had not practiced before the British courts, but came to Detroit after the change of government in 1796. Some resided in Detroit; others came to attend particular sessions of the courts.

Before a person could be admitted to practice as an attorney before any of courts of the Northwest Territory he was required,

[13] BALD, DETROIT'S FIRST AMERICAN DECADE 1796-1805, 56 (1948).

by a law adopted in 1792,[14] to show he was of "good and moral character" and "well affected" to the government of the United States and of the Territory. In addition, he was required to "pass an examination of his professional abilities" before one or more of the judges of the General Court. Under a statute passed in 1799[15] an applicant for admission to the bar was required to produce "a certificate from a practising attorney residing within the territory, setting forth that such applicant is of a good moral character, and that he hath regularly and attentively studied law, under his direction, within the territory, for the space of four years, and also, that he believes him to be a person of sufficient abilities and legal knowledge to discharge the duties of an attorney at law." The statute required that an examination be conducted by two or more of the judges of the General Court, or in their presence by a person or persons appointed by them, after notice given in open court. All attorneys were required to take an oath to support the Constitution of the United States, to execute faithfully the duties of an attorney. To be admitted to "a counsellor's degree" a further examination was required, and could be taken only by attorneys whose names had been on the roll for more than two years. A counsellor's degree was required for practice before the General Court. In 1800 the period of law study required for an attorney was reduced from four years to three.[16]

The papers of Solomon Sibley contain three certificates showing license to practice law in the Northwest Territory—two issued in 1797, his first year in the Territory; the third issued in 1800.[17] A fourth certificate shows that he had been admitted to the bar in Rhode Island in April 1797.[18] A copy of a certificate showing that David Powers had been admitted to the bar in Tioga County,

[14] THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY, Chase ed., vol. I, 126 (1833); THE LAWS OF THE NORTHWEST TERRITORY 1788-1800, Pease ed., 88 (1925). Also see similar law adopted in 1795, Chase ed., vol. I, 159; Pease ed., 181.

[15] Id., Chase ed., 212; Pease ed., 340.

[16] Id., Chase ed., 295. In 1801 the governor and judges of Indiana Territory "RESOLVED, that so much of the act passed at the first session of the general assembly of the territory of the United States north-west of the Ohio, entitled 'an act regulating the admission and practice of attornies and counsellors at law,' as makes a residence of one year in the territory necessary to persons desirous of obtaining licenses to practice as attorneys, previously to the issuing such licenses; and so much of the second section of the said act as makes it necessary for an applicant to the general court for a license, to produce to the court a certificate of his having studied law for the space of four years, shall be, and the same is hereby repealed." THE LAWS OF INDIANA TERRITORY 1801-1809, Philbrick ed., 2 (1930).

[17] SIBLEY PAPERS, Burton Historical Collection, Public Library, Detroit.

[18] Ibid.

New York, in 1791, will be found in the deed records of Wayne County.[19] Jacob Burnet, a leading lawyer of the Territory, remembered as the author of *Notes on the Early Settlement of the Northwestern Territory,* stated that Sibley was a lawyer of "high standing" who possessed "a sound mind, improved by a liberal education."[20] Sibley's liberal education was at Rhode Island College where he received the degree of Bachelor of Arts.[21] Freeman had been appointed, and presumably had served, as an attorney for the United States in Hamilton County before coming to Detroit.[22] Wills resigned as sheriff of Hamilton County in 1796;[23] was appointed Prothonotary of Common Pleas and Clerk of Quarter Sessions for Adams County in 1797;[24] Register of the Land Office for Adams County in May 1798;[25] Recorder of Deeds and Register of the Land Office for Ross County in September 1798.[26] Brush continued to practice in the courts at Detroit until shortly before his death in 1813.[27]

In an inventory of Brush's property filed in his estate in 1814[28] will be found the titles of 113 law books: English reports—50; texts—33; digests and abridgments—17; statutes—11; dictionaries—2. How many of these books were in Brush's library in the period 1796-1805 cannot readily be ascertained. From an invoice signed by Brush it appears that the following were ordered in 1803:[29]

"The latest edition of Bacon's Abridgment
Hawkin's pleas of the crown if to be had if not Hailes
Doherty's crown circuit companion
Burrows Reports
Cowpers Dº Dº
Durnford & East's Reports up to the present time
Sir Henry Blackstone Reports
Espinasse's Reports"

Titles of law books borrowed by Sibley in 1798 and 1799 are listed in his Note Book:[30]

19 1798, p. 206.
20 NOTES ON THE EARLY SETTLEMENT OF THE NORTH-WESTERN TERRITORY 291 (1847).
21 SIBLEY PAPERS, note 17 supra.
22 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 412 (1934).
23 Id. at 464.
24 Id. at 473.
25 Id. at 507.
26 Id. at 512.
27 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 41 (1935).
28 Probate File PN108, Wayne County, Michigan.
29 SIBLEY PAPERS, Burton Historical Collection, Public Library, Detroit.
30 Id., MS. pp. 179, 182.

"From James Henry[31] June 25, 1798:
Durnford & East 1st 2d 3d
Burrows Reports 1-5 incl.
Buller on Trials
"From O. Wiswell (property of E. F. Freeman) April 13, 1799:
Espinasse's Reports, Vol. 1
Crown Circuit Comp.
First Vol. Attorneys Vade Mecum
Two vols Impey's Practice
Fitz Herbert"

Also in the Note Book is a "List of Law Books necessary for a Practiceing attorney." This list (set out in a footnote below)[32] is of interest, not as showing what law books were available on the Frontier, but as showing what a frontier lawyer considered necessary for practice in a frontier court.

Although the non-Indian population of Wayne County was largely French,[33] and, for almost a century, had been governed by the Custom of Paris,[34] there is nothing to indicate that the law to be applied in the Court of Common Pleas at Detroit was to be different from that applied in the other courts of the Northwest Territory. Referring to the surrender of the Post by the British on July 11, 1796, Judge Woodward of Michigan Territory stated in 1807:[35]

"On the morning of that day the British officers and troops abandoned the Country, the flag of their nation was lowered,

31 Henry was commissioned a justice of the Court of Common Pleas for Wayne County, August 21, 1798. 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 511 (1934).

32 SIBLEY PAPERS, Burton Historical Collection, Public Library, Detroit, MS pp. 179-180. "Vol. Blackstone's Com.—4 Bacon's Abridgmt—5. Espinass' New edition—1 Gilbert's law of Evidence 1 Buller on Trials—1 Lovelass on wills—1 Orphan's Legacy—1 Coke on Littleton—1 Cunningham's Law Dictiy—2 Powell on Contracts—1 Do. on Mortgages—2 Do. on devises—1 Sayer's law of Costs—1 Do. damages—1 System of Pleading—1 Cunningham's on do—1 Polk on insurance—1 Grotius on law and peace 1 Puffendoffs law of nations 1 Leache's Hawkins C. Law 1 Lillies entries—2 Maleroy's Entries—2 Leach's edition of Mod. Repts 12 Do. Crown Law—1 Dunford & East-Reports—Burrow's Rep. & settlmt cases 5. Wilson's Reports—Coke's Reports—Henry Blakston's Rept 1 Wm Blackson's Repts—2 Cowper's Repts—1 Croke's Repts—Elizabeth Jas. & Car. Tidd's Practice—2 Comyn's Digest—5 Sir John Strange's Repts 2 Salkelds Repts—1 Sullivans lectures—1 Vattels law of Nations—1 Montesque's Spirit of Laws—1 Kyd on bills of exchange—1 Hawkins abdt of Coke's Littleton 1 Lord Raymond's Repts 3. Impeys Practice—2."

33 BALD, DETROIT'S FIRST AMERICAN DECADE 1796-1805, 32 (1948).

34 RIDDELL, MICHIGAN UNDER BRITISH RULE—LAW AND LAW COURTS—1760-1796, 35 (1926).

35 In re Denison, 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 385 at 394 (1935).

> and that of the United States of America 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 establishment of the american System of jurisprudence in it immediately followed, and effected the first political alterations. These were promptly Succeded by Statutory regulations, applicable to the Country, and Superseding the ancient laws. . . . From the date of the actual 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."

If by "the american System of jurisprudence" Woodward meant a system of American law which was complete in itself, it is clear that no such system was ever in force in the Northwest Territory. That the Ordinance of 1787,[36] which provided a government for the Territory, did not contemplate such a system is not so clear. The two provisions for local legislation indicate that all local statutes were to be American in origin: (1) The governor and judges shall adopt and publish in the district such "laws of the original states" as may be necessary and best suited to the circumstances of the district. (2) The general assembly shall have authority to "make laws in all cases for the good government of the district." The two provisions for non-statutory law are ambiguous in that they do not specify the law intended: (1) The judges shall have "a common law jurisdiction." (2) The inhabitants of the Territory shall always be entitled to judicial proceedings "according to the course of the common law." Some of the ambiguities were pointed out in a memorial to Congress submitted by the Legislature of Indiana in 1814:[37]

> "We beg leave to suggest the propriety of pointing out, by law, what common law the ordinance refers to, whether the common law of England, or France, or of the Territory over which the ordinance is the constitution. If it should be determined that, by the expression of the ordinance, a common law jurisdiction should be located on the common law

[36] 1 Stat. 51, note.

[37] Annals of Congress, 13th Cong., 3d Sess., cols. 400-401; LAWS OF INDIANA TERRITORY 1809-1816, Ewbank and Riker eds., 809-810 (1934).

of England, it is essential to define to what extent of that common law the judges shall take cognizance; whether the whole extent of feudal and gothic customs of England; whether the customs, or unwritten law shall be taken with the statute law, and that to form the common law to govern the judges; or whether the unwritten and statute law is to be taken in contradistinction to the laws, customs, and rules of chancery; or whether it includes that law which is common to all."

Governor St. Clair considered the provision granting "a common law jurisdiction" as both descriptive and restrictive—"restrictive as to any powers in Equity."[38] That "common law" was used in contradistinction to "chancery" is shown by earlier drafts of the Ordinance in which the judges were given "a common law and chancery jurisdiction." But as stated by St. Clair, the grant of power was descriptive as well as restrictive, and it was necessary to determine what was meant by "common law." For the courts of the Northwest Territory a working definition was provided by the governor and judges in 1795 in the form of a law adopted from Virginia:[39]

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

Whether validly adopted or not (and its validity has been challenged by able critics),[40] the above law was in force when Wayne County was established in 1796, and served as a guide for the judges and lawyers of the Court of Common Pleas. The "System of jurisprudence" of the Territory was not an American system, but was a hybrid made up of the following elements:

The Ordinance of 1787 as adapted to the Constitution of the United States in 1789;[41]

The Constitution of the United States;

38 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 277 (1934); 2 THE ST. CLAIR PAPERS, Smith ed., 76 (1882).

39 Statutes and laws cited in note 14 supra, Chase ed., 190; Pease ed., 253.

40 See comment by Salmon P. Chase in his edition of the NORTHWEST STATUTES at p. 190.

41 1 Stat. 50.

Laws of the United States applicable to territories;
Laws adopted by the governor and judges from original states;
Acts of the British Parliament made in aid of the
common law before 1607 (of a general nature,
not local to that kingdom);
The common law of England as aided by the above
acts of the British Parliament.

By 1796 the governor and judges had adopted and published a substantial body of statutory law. Many additions were made by the General Assembly, commencing in 1799.

One of the earliest laws adopted by the governor and judges—1788—provided for the appointment by the governor of three to five persons in each county to hold a court of record to be styled "the County Court of Common Pleas."[42] The judges were empowered to hold "pleas of assizes, scire facias, replevins, and hear and determine all manner of pleas, actions, suits, and causes of a civil nature, real, personal and mixed, according to the constitution and laws of the territory." The judges were further empowered to grant "replevins, writs of partition, writs of view, and all other writs and process upon pleas and actions" cognizable in their court. Power to issue subpoenas for witnesses was also conferred. Similar provisions will be found in "A law establishing courts of judicature" adopted from Pennsylvania in 1795.[43] A law adopted in 1790 fixed the terms of the courts of common pleas of the counties then established, and provided that upon the erection of a new county the governor should specify the times and places at which the court should meet.[44]

Upon the erection of Wayne County in 1796 Secretary Sargent, acting as governor, proclaimed that the court of Common Pleas for the county should be held at Detroit on the first Tuesdays of December, March, June, and September of each year.[45] The files of the court show that writs were made returnable to the December Term 1796 and to each succeeding term to and including the June Term 1805. Writs returnable to the June Term 1803 show a change in the status of the court from a court of the Northwest Territory to a court of Indiana Territory. This change resulted from a transfer of the eastern half of Wayne County to Indiana

42 Statutes and laws cited in note 14 supra, Chase ed., 95; Pease ed., 7.
43 Id., Chase ed., 147; Pease ed., 154.
44 Id., Chase ed., 107; Pease ed., 35.
45 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed. (1934).

Territory, the western half having been transferred in 1800. By a proclamation issued January 14, 1803, Governor Harrison of Indiana Territory laid out a new county of Wayne which included most of the area of the older county.[46] This proclamation provided:

> "AND each and every person within the bounds of the said County of Wayne who held commissions Civil or Military under the Government of the North Western Territory at the time of the formation of the State of OHIO, shall continue to exercise and enjoy their respective Offices.—AND the Justices of the Court of Common Pleas; of the General Quarter Sessions of the peace, and of the Orphans Court shall (until otherwise directed) continue to hold their respective Courts at the place and times at which they were accustomed to be held under the Government of the North Western Territory."

Under this proclamation the court was able to continue its business unaffected by the transfer of its area of activity from one territorial government to another. But when the area was re-organized in 1805 as the county of Wayne, Michigan Territory, the old courts disappeared. It should be noted, however, that the break with the past was in no sense complete:

The laws of the Northwest and Indiana Territories continued in force.[47]

A resident of the area, Frederick Bates, became a judge of the new Supreme Court.[48]

Some of the judges of the earlier courts became judges of the new district courts.[49]

Solomon Sibley and Elijah Brush continued to practice as attorneys before the new courts.[50]

Peter Audrain, prothonotary of Common Pleas and clerk of Quarter Sessions throughout the entire period of those courts, became clerk of the Supreme Court and of the District Court for Huron and Detroit.[51]

The records of the Michigan District Court for Huron and Detroit show that at least two cases pending in the old Court of

46 DOCUMENTS RELATING TO THE ERECTION OF WAYNE COUNTY AND MICHIGAN TERRITORY (Historical Publications of Wayne County, Michigan, Numbers 1 and 2) 10.

47 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., xxxv-xxxviii (1935).

48 Id. at 14; BALD, DETROIT'S FIRST AMERICAN DECADE 1796-1805, 236 (1948).

49 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 10-11 (1935).

50 Id. at 41.

51 Id. at 15, 18.

Common Pleas were transferred to the District Court.[52] From this it may be assumed that the records of the older court passed to the District Court in 1805. When the district courts were abolished in 1810 a statute provided that pending cases involving more than $100 could be brought to trial in the Supreme Court,[53] thus making the Supreme Court a successor of the district courts. When it is recalled that Audrain was prothonotary of the Court of Common Pleas from 1796-1805; clerk of the District Court for Huron and Detroit from 1805-1810; and clerk of the Supreme Court from 1805-1818, it seems likely that the records of Common Pleas were in his custody throughout this entire period. If so, he deserves credit for protecting the records from the fire which destroyed Detroit in 1805, and from the British who captured the city in 1812.

The nature and extent of the records as originally kept cannot be ascertained from sources known to the present writer. A newspaper story written in the 1870's on the "Resurrection of Ancient Documents in the County Clerk's Office"[54] refers to the existence of certain "books":

> "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 oldest of these books yet resurrected bears date 1797, in which year the justices were Louis Beufait, James May, Charles F. Girardin and Patrick McNiff. The amount of litigation seems to have been small. Among the verdicts entered occurs the following: 'We, the jurors, find for plaintiff that defendant shall give to the plaintiff 16 days' work without other pay than his victuals."

The writer suggested that some of the documents, being of historical interest, "should be preserved in the archives of the Historical Society." In response to this suggestion, or at some other time, a substantial number of Northwest court papers were removed from the County Clerk's office, and are now in the Burton Historical Collection, Public Library, Detroit. But the "books" seen in

52 Docket 1, p. 1.

53 4 LAWS OF THE TERRITORY OF MICHIGAN 98. For cases transferred from "late" District Court, see 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 217, 219 (1935).

54 See clippings in Burton Historical Collection (Wayne County Court Papers SB/ZUG Vol. I, p. 19) Public Library, Detroit.

the 1870's are not with the papers in the Burton Collection, nor are they with the papers which remained in the Clerk's office. The latter were turned over to the Michigan Historical Commission in 1934,[55] and are now on deposit in the Law Library of the University of Michigan.[56] The extant records of the Court of Common Pleas for the period 1796-1805 consist almost entirely of papers filed in approximately eleven hundred cases. An analysis of these papers, arranged to show the nature and extent of the business of the court, will be found in an appendix, infra.

Commencement of Action

A law adopted by the governor and judges of the Northwest Territory in 1792 provided that "every original process in the court of common pleas shall be by summons capias or replevin."[57] It will be noted that writs which would have been classified as "mesne process" under the English common law, have become "original process" due to the non-use of the old "original writs." Forms of the three kinds of original process are set out in the statute. Each has the same style and teste:

> "*(Seal)* Territory of the United States northwest of the river Ohio ..... county ss.
> The United States to the sheriff of our said county of ..... greeting
> * * * * * * *
> * * * * * * *
> Witness E. F. Esquire, first judge of our said court at ..... the .... day of ..... in the year of our Lord .....
> H. I. Prothonotary"

[55] The transfer was made pursuant to an order dated December 14, 1933, signed by Ira W. Jayne, Presiding Circuit Judge, Wayne County.

[56] The records transferred to the Historical Commission in 1934, and by it deposited in the Law Library include: (1) Files of the courts of Wayne County, Northwest and Indiana Territories, 1796-1805; (2) Files and dockets of the District Courts of Michigan Territory 1805-1810; (3) Files of the County Court of Wayne County, Michigan Territory, 1816-1824. In addition, the Library houses: (1) The original records of the Supreme Court of the Territory of Michigan 1805-1836, and of the state of Michigan prior to the court's establishment as an independent court in the 1850's. (2) Some of the original records of the Additional Judge of Michigan Territory 1823-1836 supplemented by a large collection of photostats and microfilms. (3) Microfilms of the records of the Circuit Court of Wayne County, Michigan Territory 1825-1836.

[57] Statutes and laws cited in note 14 supra, Chase ed., 129; Pease ed., 93.

By the summons the sheriff was commanded to summon *A.B.* to appear to answer *C.D.* By the capias he was commanded to take *A.B.* into custody and have him in court to answer *C.D.* By the writ of replevin he was commanded to take into his custody certain (described) articles or things in *C.D.'s* possession, and deliver them to *A.B.;* also to summon *C.D.* to appear and put in his plea. According to the forms, each party's "addition" (business, profession, official or social position) was to be inserted after his name.

Although the above statute was repealed in 1795,[58] printed forms of summons and capias used by the prothonotary of the court of Wayne County in and after 1796 were almost identical with the forms set out in the statute.

By a statute approved October 29, 1799, the Legislative Assembly provided that "all attorneys and counsellors at law, judges, prothonotaries, clerks and sheriffs, and all other officers of the several courts within the territory, shall be liable to be arrested and held to bail, and shall be subject to the same legal process, and may, in all respects, be prosecuted and proceeded against, in the same courts and in the same manner as other persons are; any law, usage, custom or privilege to the contrary notwithstanding."[59] This statute was followed by "An act defining and regulating privileges in certain cases" approved December 6, 1799, under which members of the legislature, electors, judges, clerks, attorneys, suitors, witnesses, jurors, and others were privileged from arrest while attending sessions of the legislature, elections, and sessions of courts.[60] Arrests on certain days and in certain places were also prohibited. The statute further provided "That nothing herein contained shall be construed to privilege any person herein named from being served, at any time, with a summons, or notice to appear."

Prior to the enactment of the privilege statutes, supra, a question had arisen in Wayne County as to whether a judge of the Court of Common Pleas was privileged from arrest. In a case commenced by capias in 1797 the defendant assigned as error:

> "Afterwards, to wit in the same Term of December Cometh the said Patrick McNiff and saith that in the record and process aforesaid and also in the giving of Judgment

[58] Id., Chase ed., 192; Pease ed., 257.
[59] Id., Chase ed., 214; Pease ed., 343.
[60] Id., Chase ed., 257; Pease ed., 444.

> aforesaid there is manifest error in this, to wit, that when by the record aforesaid it appears that the said Patrick McNiff was arrested and held to bail contrary to the usual and established practice of the Laws and custom of this Territory, He the said Patrick being at that time one of the associate justices of the Court of Common Pleas within and for the body of the County of Wayne, and not liable to be arrested and held to bail on a *Cepi corpus* in civil process—"

That officers of courts were considered privileged from civil arrest prior to the statutes of 1799, is indicated by the fact that three actions against attorneys and one against the sheriff were commenced by "bill of privilege" instead of capias in the Wayne court in 1798 and 1799. To commence an action against a justice of the court in 1800 both capias and bill of privilege were used.

As shown by the analysis attached hereto as an appendix, the court's files (including photostats) contain 955 writs of capias, 26 writs of summons, and five bills of privilege. Use of the capias usually meant actual arrest and jail unless bail was given. A summons was available when arrest was not allowed, or was unnecessary to protect the plaintiff's demand and might give offense.[61] Under a law adopted in Indiana Territory in 1803 a plaintiff was required to endorse the true "species" of his action on the original process so the sheriff would know whether to require appearance bail.[62] Where bail was not required by the nature of the claim or by court order, the action was commenced by capias without arrest.

The law adopted in 1792 provided[63]

> "That where the process is by summons the service shall be made by the officers reading the summons in the hearing of the defendant or some of his or her family and giving a copy thereof if demanded and when the party is not to be found by the officer and has no family the service shall be made by the officers leaving an attested copy of the summons at the last and usual place of the defendants abode."

61 The French Canadians at an earlier period had protested against arrest on civil process: "We have seen with grief our fellow-citizens imprisoned without being heard, and this at considerable expense ruinous alike to the debtor and creditor." RIDDELL, MICHIGAN UNDER BRITISH RULE: LAW AND LAW COURTS 1760-1796, 66 (1926). It appears that they considered such arrests "dishonourable." Id. at 67.

62 LAWS OF INDIANA TERRITORY 1801-1809, Philbrick ed., 33 (1930).

63 Note 57 supra.

The practice followed in the court of Wayne County is indicated by the returns to summons summarized in the Appendix, infra. The proper Latin to be used in returns to writs of capias was indicated by a statute approved in 1799:[64]

> "And the said sheriff, coroner or elisors shall make return of such process, by endorsing thereon 'cepi corpus,' as to the defendant, or 'cepi corpora,' as to the defendants, on whom the same hath been served in the manner aforesaid; and by also endorsing thereon 'non est inventus,' as to the defendant, or 'non sunt inventi,' as to the defendants, who are not to be found in his or their bailiwick."

In the returns indorsed on the writs of capias found in the files of the court of Wayne County (see Appendix, infra) the Latin terms were abbreviated as "C.C.," "C.C.C.," and "non est." What was done with a writ was not always shown by a formal return. The summaries given in the Appendix are made up from returns and other indorsements on the writs.

So far we have noted that actions in the courts of Common Pleas of the Northwest Territory could be or were commenced by writs of capias, summons, replevin, and bills of privilege. It should now be noted that actions against non-resident and absconding defendants could be commenced by attachment of property; that special types of actions could be or were commenced by writs of dower, trespass and ejectment, and scire facias (to enforce mortgage); by service of declaration (ejectment); by petition for partition; and by libel to condemn property seized by collector of customs.

Writs of attachment were allowed and fully regulated by three laws adopted from Pennsylvania and New Jersey in 1795,[65] and by an act of the General Assembly which replaced these laws in 1802.[66] By the laws adopted in 1795 a "domestic" attachment could be issued when it appeared that the defendant did not reside within, or was about to remove or escape from, the Territory; or, in a justice's court, when the defendant should absent himself out of the Territory, or abscond from his usual place of abode. A

64 Statutes and laws cited in note 14 supra, Chase ed., 217; Pease ed., 351.

65 Id., "A law allowing domestic attachments," Chase ed., 141; Pease ed., 137. "A law regulating domestic attachments," Chase ed., 141; Pease ed., 139. "A law allowing foreign attachments," Chase ed., 197; Pease ed., 269.

66 Id., Chase ed., 310.

"foreign" attachment was authorized when the defendant was a non-resident of the Territory. The act of 1802 authorized an attachment when it should appear that the defendant absconds to the injury of his creditors. A "domestic" attachment could be levied on "goods and chattels" or other effects; a "foreign" attachment on "lands and tenements, goods, chattels and effects, rights and credits." The act of 1802 authorized the attachment of "lands, tenements, goods, chattels, rights, credits, moneys, and effects."

The seventeen writs of attachment now in the files of the Court of Common Pleas of Wayne County, and other papers found with them, indicate careful compliance with the attachment statutes, though in some of the cases it appears the defendant was out of the "county," or had absconded from the "county." Types of papers other than writs and returns are listed in the Appendix, infra, under "Miscellaneous."

A law adopted from Pennsylvania in 1795 provided in detail the procedure to be followed in cases of default by mortgagors of lands.[67] At any time after twelve months from date payment of mortgage-money or performance of other condition was due, the mortgagee was authorized

> "to sue forth a writ of scire facias; which the clerk of the court of common pleas, for the county where the said mortgaged lands or hereditaments lie, is hereby empowered and required to make out and dispatch, directed to the proper officer; requiring him, by honest and lawful men of the neighborhood, to make known to the mortgagor or mortgagors, his, her or their heirs, executors or administrators, that he or they be and appear before the magistrates, judges or justices of the said court or courts, to shew, if any thing he or they have to say, wherefore the said mortgaged premises ought not to be seized and taken in execution, for payment of the said mortgage-money, with interest; or to satisfy the damages which the plaintiff in such scire facias, shall, upon the record, suggest for the breach or non-performance of the said conditions."

The law further provided that after sale of the mortgaged property the buyer should hold and enjoy the same "clearly discharged and freed from all equity and benefit of redemption." "An act providing for the recovery of money secured by mortgage," enact-

[67] Id., Chase ed., 138; Pease ed., 131.

ed by the General Assembly in 1802,[68] also provided for use of scire facias to commence actions to enforce mortgages.

As shown by the Appendix, infra, the files of the Court of Common Pleas of Wayne County contain eleven writs of scire facias used to commence actions against mortgagors. These writs closely follow the statutes, but in some instances the returns do not. The practice prescribed by the statutes, and illustrated by the papers which have survived, is of unusual interest as showing how relief usually considered available only in equity can be given by common law courts through common law writs and proceedings. It was recognized that the General Court of the Northwest Territory had no chancery jurisdiction, and there is nothing to indicate that the legislative authority of the Territory intended to confer this type of jurisdiction on the courts of common pleas.

An act passed in 1792, establishing and regulating fees,[69] provided that prothonotaries of common pleas should have 25 cents "for every writ of trespass and ejectment"; that the clerk of the supreme judicial court should have 50 cents for every writ of "trespass and ejectment"; and that the sheriff should have 60 cents for serving an original "writ of ejectment." A law regulating fees adopted from New York and Pennsylvania in 1795 provided that attorneys in the General Court should have for "service of a declaration in ejectment, the same as service of process by sheriff."[70] This law specified the fees allowed the clerk of the circuit court for "entering confession of lease, entry and ouster," and the fees allowed prothonotaries of common pleas for "altering the declaration in ejectment, and admitting the defendant." A statute enacted by the General Assembly in 1802 specified the sheriff's fees for serving a declaration in ejectment, and prothonotaries' fees for "entering confession of lease, entry and ouster."[71]

A law adopted from Pennsylvania in 1795 recited:[72]

> "Whereas great inconveniences may frequently happen to landlords by their tenants secreting declarations in ejectments which may be delivered to them; or by refusing to ap-

68 Id., Chase ed., 346.
69 Id., Chase ed., 133; Pease ed., 102.
70 Id., Chase ed., 155; Pease ed., 172.
71 Id., Chase ed., 320.
72 Id., Chase ed., 201; Pease ed., 281.

pear to such ejectment; or to suffer their landlords to take upon them the defence thereof."

Following this recital, the law provided that every tenant "to whom any declaration in ejectment shall be delivered" shall forthwith give notice to his landlord under penalty of forfeiting two years' rent. The law provided for judgment against the "casual ejector" in certain situations.

Whatever may have been the practice before 1795, it seems clear that after that date actions of ejectment were commenced by serving a copy of the plaintiff's declaration on the person occupying the land involved. Three copies of declarations in ejectment served with notices from the "casual ejectors" are in the files of the Court of Common Pleas of Wayne County. One of these notices reads as follows:

> "To Mr. René LeBeau SIR I am informed that your in possession of, or claim title to the premises mentioned in this declaration of ejectment, or to some part thereof, and I being sued in this action, as a casual ejector, and having no title to the same, do advise you to appear at next September Term in the County Court of Common pleas to be holden at Detroit in the County of Wayne aforesaid on the first Tuesday of September next by yourself or some attorney of that court and then & there by a rule of the same court, to cause yourself to be made defendant in my stead, otherwise, I shall suffer judgment to be entered against me, and you will be turned out of possession Your loving friend RICHARD FENN

> "I certify that I have served to René LeBeau the copy of the within declaration, and notice, and that I have explained to him the nature and contents of the same, in french, Detroit 5th August 1797 in presence of Gabriel Godfroy.
> F. D. BELLECOUR"

A rule under which the names of the parties to an action of ejectment, and "lease," "entry," and "ouster," could be alleged as fictions was devised by Chief Justice Rolle (1649-1660). The notice quoted above was in precisely the same form as notices given under English law.

"A law for the speedy assignment of dower," adopted from Massachusetts in 1795,[73] provided that upon failure of the heir, or

[73] Id., Chase ed., 187; Pease ed., 244.

other person having the next immediate estate of freehold or inheritance, to assign and set over to the widow her dower, the widow might

> "sue for and recover, the same, by writ of dower, to be brought against the tenant in possession, or such persons as have or claim right or inheritance in the same estate, in manner and form as the law prescribes."

The "manner and form" of suing was not prescribed by the statute, and no case has been found in the records of Wayne County illustrating the use of this procedure. A law adopted in 1792 had fixed the sheriff's fees for serving an "original" writ of dower.[74]

An act of the General Assembly approved December 23, 1801, provided that any joint tenant, coparcener, or tenant in common of land within a county might petition the court of Common Pleas of that county for partition of the land.[75] The statute further provided

> "That when any petition shall be presented and filed as aforesaid, the petitioner shall cause notice thereof to be published for six weeks successively, in some newspaper printed within the territory, which notice shall state the court in which the petition is filed, the substance of the petition, and the time allowed by this act to any person or persons to file his, her or their reasons why such partition ought not be made; and if it shall appear to the court, that any of the parties concerned, reside out of, or in any distant part of the territory, it shall be lawful for them to direct such other and further notice to be given, as to them shall or may appear reasonable and proper."

Personal service of the notice on all parties concerned forty days before the sitting of the court was sufficient notice without further publication.

In 1802 and 1803 actions were commenced in the Wayne court by filing libels to forfeit to the United States certain goods described in the libels. A draft or copy of the libel in the second case prayed

> "that the usual process and monition of the s^{d} Court in this behalf may be made and that all persons interested in the said

74 Id., Chase ed., 136; Pease ed., 112.
75 Id., Chase ed., 330.

goods & merchandizes so seized may be cited in General and special to answer the premises"

What notice was actually given to interested persons does not appear from the file. On appeal of the case to the Supreme Court of Indiana Territory a question arose as to whether the Wayne court had jurisdiction of this type of case. Writing from Vincennes, March 12, 1804, John Rice Jones, an attorney at that place, stated:[76]

> "The only difficulty in my mind in establishing the Judgment ag[t] Lassalle, will be, to shew that the Common pleas had cognizance of the Cause—On examining the Revenue law I find that all penalties &c accruing by breach of that law are to be sued in any Court proper to try the same, which court by the whole tenor of the act applies to the *judicial district* (of the Federal Court) in which the penalty shall have accrued —this seems to imply an exclusive Jurisdiction in that Court; if that should be the case, the *Court of Common Pleas* can have none."

That Jones was right in his opinion is indicated by the fact that Congress in 1805 provided that the superior courts of the territories should have jurisdiction of seizures under laws of impost, navigation and trade of the United States, and of suits for penalties and forfeitures under the laws of the United States.[77]

Forms of Action

Although, as noted above, "original writs" of the type issued by the English Chancery were not in use in the Northwest Territory, the practice of classifying actions as they were classified under the old system of writs was regularly employed. In the statutes of the Territory provisions will be found regulating to some extent actions of:

Account	Ejectment
Case	Replevin
Covenant	Trespass
Debt	Trespass on the case
Detinue	Trover
Dower	Waste

[76] MS/S. Sibley, Vol. 20, p. 121, Burton Historical Collection, Public Library, Detroit.
[77] 2 Stat. 338.

Some statutory attention is given to assumpsit (a type of case or trespass on the case), and to trespass on the case for slander; also to common counts in assumpsit: money had and received, quantum meruit, and quantum valebant. But nowhere in the statutes do we find express authority for using or not using particular forms of action, other than replevin and dower, and no provision is found modifying the scope of the English forms.

As shown by the Appendix, infra, the surviving files of the Court of Common Pleas of Wayne County (1796-1805) contain 370 common law declarations. Each of these declarations, except one, names the form in which the action is brought, and contains language appropriate to the particular form, and, when the form is general, appropriate to the particular type of action within the form. From these papers the forms of action in use, as well as particular types of actions within forms, can be readily ascertained. From other papers, principally writs, in all but a few of the remaining files, it is possible to discover the name of the form in which a particular action was brought; but when the form named is a general one, such as trespass on the case, it is in many instances impossible to identify the particular type of action within the form. The following information is drawn from all the files—1100 cases, one or two more or less:

Form of Action	*Number of Cases*
Covenant	33
Debt	68
Sealed obligation	27
Simple contract	5
Judgment record	7
Statutory penalty	6
Escape (ca.sa.)	1
Settlement	1
Mortgage	2
Unidentified	19
Ejectment	5
Replevin	1(?)
Trespass (vi et armis)	66
Assault and battery	11
De bonis asportatis	3
Quare clausum fregit	13
Unidentified	39
Trespass on the case	868
Assumpsit	496

Deceit	1
Escape	2
Libel	1
Slander	14
Trover	23
Unidentified	331
	1041

Though the number of files showing no more than the name of the form of action is unfortunately large, the files containing additional information reveal a striking familiarity with the common law practice. With the possible exception of a series of writs returnable to the first term of the court (December 1796), the English common law was followed with unusual fidelity. In the series referred to, the newly-appointed prothonotary inserted "trespass" in the writs when, it seems, the actions were in assumpsit, and should have been designated "trespass on the case."

In addition to the 1041 cases brought in the old forms of action, there were eleven writs of scire facias to enforce mortgages, and two libels to forfeit goods seized by the collector of customs, forty-four cases remaining unidentified. From the information available it appears that the community served by the Wayne court was mercantile in character, and its civil litigation largely concerned with the collection of debts.

In contrast with the extensive use of assumpsit, the little or no use made of detinue and replevin is striking, and not explained by the files. The only evidence of the use of either form of action is a draft or copy of an unsigned writ of replevin found with the papers of Solomon Sibley.[78] The form of this writ differs from that given in the statute of 1792.[79] The form in the statute refers to an article or thing "wrongfully taken and withheld" from the plaintiff. Sibley's form does not contain this recital, but adds a provision authorizing replevin only if the article or thing "is not detained by virtue of execution or attachment." The defendant is summoned to answer why he "took" the article or thing, and unjustly "detains" it against sureties and pledges.

In his introduction to the *Laws of Indiana Territory* 1801-1809, Professor Philbrick states:[80]

[78] MS/S. Sibley, Vol. 14, p. 219, Burton Historical Collection, Public Library, Detroit.
[79] Note 57 supra.
[80] P. cxc.

> "What is truly remarkable is that no single instance was noted, in Randolph County, of replevin, detinue, or ejectment. . . . The nonuse of replevin is, indeed, understandable, since the territory took its practice acts from states where that action had not been liberalized. But detinue, which has always been used in the southern states, whence so many of the immigrants and (at least some of the leading) lawyers came, one would have expected to find. Trover was used instead."

That it was proper to use replevin to recover goods and chattels distrained for rent is shown by a law dealing with "distress for rent" adopted in 1795.[81] Whether the action was limited to distress does not appear.

It is also noteworthy that very little use was made of the action of debt to recover simple contract debts. No declaration in this species of the debt action is found, and while five cases are identified as simple contract debt, this number is indeed small when compared with the number of cases brought in the form of indebitatus assumpsit. Possibility of "wager of law" in both debt and detinue is suggested by two statutory provisions authorizing the recovery of certain debts without "wager of law."[82]

Pleading Forms and Fictions

According to *Impey's Practice* (King's Bench and Common Pleas), copies of which were owned by Freeman and borrowed by Sibley in 1799,[83] declarations in the two English courts were commenced as follows:

> "LONDON (ss.) A.B. complains of C.D. being in the custody of the marshal of the *Marshalsea,* of our lord the now king, before the king himself, of a plea of . . . . . , *For that whereas,* . . . . . .[84]

81 Statutes and laws cited in note 14 supra, Chase ed., 200; Pease ed., 278.

82 Id., Chase ed., 152 and 201; Pease ed., 166 and 281-282. A law adopted in Michigan Territory in 1820 provided that "no *essoin* shall be allowed in any suit, and no person shall be permitted to wage his law in any case, except that of non summons in real actions." 1 LAWS OF THE TERRITORY OF MICHIGAN 728 (1871).

83 Note 30 supra.

84 THE NEW INSTRUCTOR CLERICALIS, STATING THE AUTHORITY, JURISDICTION, AND MODERN PRACTICE OF THE COURT OF KING'S BENCH, 2d ed., *120 (1785).

"LONDON (ss.) A.B. late of *London,* yeoman, was attached to answer C.D. in a plea of . . . . . .; and where-upon the said C.D. by E.F. his attorney, complains, *For that whereas* . . . . . ."[85]

The statement in the King's Bench form that the defendant was in the custody of the marshal was not a statement of a factual, but of a fictional, custody. Originally, this was necessary to show that the court had jurisdiction of the case. The statement in the Common Pleas form that the defendant had been "attached" (or "summoned") to answer the plaintiff was a statement of a fact.

From the 370 declarations found with the surviving papers of the Court of Common Pleas of Wayne County (1796-1805) it appears that at the beginning, and through most of the period of the court's history, the King's Bench form of commencement was employed, but toward the end a shift was made to the form used in the English Court of Common Pleas. The reason for the shift does not appear.

In all but a few of the 199 cases in which the King's Bench form of commencement was used the statement as to custody was abbreviated: "In custody &c." In the few (14) cases, the statement was expanded to show that the defendant was in the custody of the sheriff of Wayne County. In one of these cases the words—"sheriff of our said county of Wayne"—were interpolated above the line. In another, it was said the defendant was "in actual custody of the sheriff of the said County of Wayne &c." This last statement seems to have been an attempt to distinguish "actual" custody from the "fictional" custody of the English form. In 136 cases the defendant was "attached" to answer; in 11 cases he was "summoned" to answer. This shift to the English common pleas form eliminated the confusion of fictional custody with factual custody.

In actions commenced otherwise than by capias or summons the manner of commencement was regularly stated at the beginning of the plaintiff's pleading. Where commenced by attachment of property, the declaration stated that the defendant had been attached by his monies and effects, goods and chattels, rights and credits, to answer the plaintiff. In actions against attorneys by

85 THE NEW INSTRUCTOR CLERICALIS, STATING THE AUTHORITY, JURISDICTION, AND MODERN PRACTICE OF THE COURT OF COMMON PLEAS *224 (1785).

bill of privilege the plaintiff complained of the defendant, one of the attorneys of the court present here in his own proper person. A similar commencement was used in bills against other officers of the court. Three of the four extant declarations in actions commenced by scire facias start with a recital of the writ. The two libels to condemn property seized by the collector of customs were commenced with a statement that the plaintiff "files this his libel" against specified goods. In only one of the 370 declarations was there no attempt to follow the English forms. In this case the plaintiff, acting without an attorney, addressed his pleading "To the Honorable Court of Common Pleas for the County of Wayne."

Declarations in the English courts of King's Bench, Common Pleas, and Exchequer usually concluded with a statement of the plaintiff's damages "and therefore he brings his suit &c." The "suit" referred to was the *secta* (followers) of the plaintiff required at an early period to support the plaintiff's case. Though a meaningless fiction by 1796, this form of conclusion or a variant was employed in all but five of the 370 declarations referred to above. That the fiction was meaningless is indicated by the fact that in more than 40 percent of the extant declarations it was stated that the plaintiff brings or produces "this" suit instead of "his" suit. In a few, the plaintiff concludes "and therefore he sues."

Another English fiction—pledges to prosecute—will be found in all but thirty of the above declarations. The pledges were always "John Doe" and "Richard Roe."

In actions commenced by attorney the attorney usually signed the declaration and added a statement of his authority to act as attorney. The following is from a declaration filed in 1796:

> "Wayne County ss. Meldrum & Park put in their place E. F. Freeman their attorney against Paul Bellair in a plea of debt aforesaid."

Statements of this kind are found in 90 percent of the declarations.

In actions brought by executors and administrators profert was made of the plaintiff's letters testamentary or of administration. The following is from a declaration filed in 1799:

> "And the said Elenor brings here into Court the letters testamentary of the said Nathan Williams whereby it fully appears that she is executrix of the last will and testament of the said Nathan Williams, and hath the administration thereof &c."

This was in accord with the English practice of the time, but not in accord with the usual practice of some states, for instance Connecticut.[86]

In the English common law courts the venue of an action was stated in the margin of the declaration, e.g., "Middlesex, towit." The plaintiff was said to "lay" his action in the county named. This practice was carefully followed in the Court of Common Pleas of Wayne County (1796-1805) as was the English practice of stating in the body of the declaration the place at which each traversable fact occurred. The place stated in the body was supposed to agree with the venue stated in the margin. In early England the parish, vill, or hamlet was named so jurors knowing the facts might be summoned. By the time of Fortescue's *De Laudibus* (1468-1471) only four jurors need be of the hundred in which a fact occurred;[87] after 1705 a jury from the county named in the margin was all the law required.[88]

By 1705 a distinction had been developed between "local" and "transitory" actions. A local action must be "laid" in the county in which the facts actually occurred; a transitory action might be "laid" in any county. But where the venue of a transitory action was "laid" in one county and it appeared from the body of the declaration that the facts had occurred in another county, or country, a fiction was used to avoid a variance.[89] For example, it could be alleged that a bill of exchange was drawn "in *Minorca,* to wit, at *Westminster,* in the county of *Middlesex.*" The following illustration is from a declaration filed in the Wayne County court in 1796:

> "Wayne County ss: . . . For that whereas the said Maldrum & Park on September 30, 1795, in the District Court of Upper Canada recovered judgment before the same court for the sum of . . . towit at Detroit aforesaid in the said County of Wayne, and within the jurisdiction of this court. . . ."

A variant of the venue fiction will be found in 24 of the extant declarations—the plaintiff alleging that the fact occurred at a named local place (River Raisin, Gros Isle, Michilimackinac, Hamtramck, River Huron, Harsen's Island, Rocky River, St. Clair,

86 Champlin v. Tilley, 3 Day (Conn.) 303 (1809).
87 DE LAUDIBUS LEGUM ANGLIE, Chrimes ed., c. 25, p. 59 (1942).
88 3 BLACKST. COMM. 360, Cooley, 4th ed. by Andrews (1899).
89 See Blume, "Place of Trial of Civil Cases," 48 MICH. L. REV. 1 at 22 (1949).

River Rouge) "towit at Detroit." It should be noted, however, that whenever it appeared in a declaration that a traversable fact had occurred in another county or outside the Territory, the pleader was careful to follow the English forms.

The English practice of stating a single cause of action in different ways in separate counts in order to meet the exigencies of proof was carefully followed by the attorneys of Wayne County (1796-1805). The number of counts used in the 265 declarations in assumpsit set out in the Appendix hereto is likely to surprise any reader, especially one who has been led to expect simplicity and informality in the procedure of frontier courts. At the beginning of each count, after the first, words were used to indicate that the new count was on a different cause of action. While, because of this practice, it is impossible to know from a declaration that counts after the first are restatements of the same claim, it must be understood that in practically all instances the words indicating a different cause of action are mere fictions as were similar words in the English forms.

In actions on sealed obligations and on judgment records the English practice of making profert of the instrument sued on was followed in most of the Wayne County cases. Two forms were used—a short form: "now here shewn to the court;" and a long form:

> "And they bring hereinto court the said writing obligatory of the said Abner Prior sealed with his seal which testifies the debt in form aforesaid on the said day and year aforesaid."

In one case profert was made by copying the sealed instrument at the end of declaration. In two other cases a copy of the sealed instrument was appended to the declaration, but labeled "Oyer." In one case "oyer" appears in the defendant's plea:

> "And the said Ebenezer by Elijah Brush his attorney comes and defends the force and injury when &c and prays oyer of the said writing obligatory and to him it is read &c he also prays oyer of the condition of the said writing obligatory and to him it is read in these words to wit [condition copied into plea] which being read and heard the said Ebenezer says. . . ."

Profert and oyer, actual steps in an action on a sealed instrument in the days of oral pleading, though largely fictional by 1796, still served a useful purpose.

Turning briefly to forms and fictions peculiar to declarations in particular forms of action we find the familiar fictional allegations of promise and deceit in assumpsit; losing and finding in trover; lease, entry, and ouster in ejectment; force and arms, and against the peace, in trespass.

Before *Slade's Case* (1602) an action of assumpsit could be maintained to recover a debt only when, after creation of the debt, the debtor made an express promise to pay it. The plaintiff alleged that at a specified time and place the defendant was indebted to the plaintiff in a specified sum of money for a specified benefit (such as work and labor, goods sold and delivered, money lent, money had and received), and being so indebted undertook and faithfully promised to pay the plaintiff said sum when requested. After it was decided in *Slade's Case* that relief for breach of an unsealed promise to pay for benefits might be obtained in an action of assumpsit as well as in an action of debt, a promise to pay a pre-existing debt was no longer necessary for an action in assumpsit. Nevertheless, lawyers continued to use the old form which became a common assumpsit count known as indebitatus assumpsit. That this count was a favorite of the lawyers of Wayne County is shown by the fact that 86 percent of the 265 extant declarations in assumpsit contain an indebitatus count, each alleging a fictional promise to pay a pre-existing debt. The extent to which the other common assumpsit counts (quantum meruit, quantum valebant, and account stated) were used is shown by the summary set out in the Appendix, infra.

Whether actions referred to herein as "assumpsit" were called "assumpsit" in Wayne County in 1796-1805 does not appear. According to the declarations still extant the form of action was "trespass on the case." Although classified as a contract action in England after 1610, the fact that the action was at one time a tort action based on deceit is shown by language such as the following taken from a declaration filed in the Wayne County Court, December Term 1796:

> "YET the said Francois not regarding his said promises as aforesaid, but contriving & fraudulently intending craftilly and subtilly to deceive & defraud the said John in this respect hath not yet paid."

Similar statements of fictional deceit will be found in 92 percent of the 265 assumpsit declarations still extant.

An English declaration in trover, after alleging the plaintiff's

possession of specified chattels, stated that at a specified time and place the plaintiff "casually lost" the chattels out of his hands and possession; that they came to the hands and possession of the defendant "by finding"; that the defendant, "contriving and fraudulently intending craftily and subtly to deceive and defraud," converted the same to his own use. Although by 1796 all a plaintiff need prove was his right to possession and the defendant's wrongful conversion, each of the seventeen extant trover declarations of the Wayne County court contains the fictions of losing and finding, and the fictional intent to deceive and defraud.

The action of ejectment was developed in the late 1400's to enable forcibly evicted lessees to recover possession of the leased land. Any person entitled to the immediate possession of land could have the benefit of the action by first making a lease to a friend, and having him, after eviction by the person in possession, sue for possession. To avoid the necessity of being actually evicted by the person in possession, the friend might have another friend do the evicting. The action was then by friend number one (the lessee) against friend number two (the ejector), but in reality was between the claimant (the lessor) and the person actually in possession of the land, who was given a notice and an opportunity to be heard. Rules of court adopted in the middle 1600's provided that fictitious names might be substituted for the lessor's collusive friends. They further provided that lease, entry, and ouster need not be proved, turning these allegations into fictions. Before the person in possession was allowed to defend, he was required to enter into an agreement (consent rule) not to dispute the fictions.

How many actions of ejectment were brought in the court of Wayne County (1795-1805) we do not know, but among the papers which have survived there are three declarations with notices to the person in possession, and one consent rule, all drafted in accordance with the English practice. The first of these declarations, September Term 1797, is entitled as follows:

John Denn on the demise of Jean Batiste Beaugrand v Richard Fenn, & René LeBeau tenant	In Trespass & Ejectment for 300 acres on the River Ecorces

The notice given in this case by the "casual ejector," Richard Fenn, to the person in possession, Mr. LeBeau, advising him to appear in court on a specified day, is set out, supra, under "Com-

mencement of Action." The consent rule, referred to, was filed in a later case (1800): Ordered by consent of the parties that the person in possession be made defendant in place of Richard Fenn; that he plead not guilty; that he confess lease, entry, and ouster, and insist on his title only.

English declarations in trespass, whether in trespass to the person (assault and battery), to personal property (de bonis asportatis), or to land (quare clausum fregit), alleged that the defendant "with force and arms" did the act complained of, and other wrongs then and there did "against the peace of our lord the king." At an early period, say in the 1400's, "force and arms" meant armed force "towit, with swords, bows and arrows, etc." By 1796 the force required for trespass was no longer armed force, but any physical force directly applied to person or property. In the seventeen declarations in trespass found with the papers of the Wayne County court (1796-1805) the old allegation of "force and arms" regularly appears. The old allegation that the act was against the peace also appears, though the peace referred to is no longer the king's peace but the "peace and dignity of the United States," or, in most instances, the "peace and dignity of the United States and this Territory."

An English plea in bar which formed one or more issues of fact by denying some or all of the material allegations of a declaration, concluded to the country, that is, with a statement by the defendant "and of this he puts himself upon the country." This was followed by a similiter—a statement by the plaintiff that he did the same. With an issue or issues formed, and each party calling for a jury, the case was ready for trial. When, instead of traversing matters alleged by the plaintiff, a defendant set up new matter by way of confession and avoidance, the plea concluded with a statement "and this he is ready to verify." This was not followed by a similiter, but by another pleading called a replication. If the replication formed an issue the pleadings were complete; if not, further pleadings (rejoinder, surrejoinder, rebutter, surrebutter) were necessary until an issue was formed. Use of this scheme of pleading in the court of Wayne County (1795-1805) is clearly shown by the papers which have survived. (See Appendix, infra, under "Plea.")

As was true in England, extensive use was made of generalized denials called "general issues," notably non assumpsit, not guilty, and nil debet. The following illustration is a plea filed in a case commenced in 1796:

"And the said Defendant by his atty comes and defends the wrong & injury when &c and says that he did not undertake & assume upon himself in manner & form as the said John hath complained of him and of this he puts himself on the county.

John S. Wills
atty for Deft."

And the plaintiff
doth the like
Freeman atty

The similiter is in a different hand, and appears to have been added by the plaintiff's attorney.

Although there is evidence indicating that use of the similiter was becoming obsolete (omitted in 22 instances; added by defendant's attorney in 11 others), that it was still in general use is shown by the fact that similiters added by plaintiffs' attorneys will be found appended to 72 percent of the extant pleas which conclude to the country.

The English demurrer was in effect a motion for judgment on the pleadings. When any pleading was demurred to, the court considered all the pleadings up to that point, and, assuming the truth of all matters well pleaded in all the pleadings, decided which party should have judgment. A general demurrer merely charged that the pleading attacked was insufficient in law; a special demurrer pointed out in what respect the pleading was insufficient. Although only seven demurrers are among the surviving papers of the Wayne County court (See Appendix, infra.), they illustrate the use of both general and special demurrers, and use of demurrers in attacking both declarations and pleas. By a joinder in demurrer the party whose pleading was attacked denied that his pleading was insufficient (by stating that it was sufficient), and prayed for judgment. Three joinders in demurrer are in the files.

Not knowing how many papers are missing from the Wayne court's original files, it is not possible to determine the extent to which demurrers and other technical procedural objections, such as pleas in abatement, were used. But finding only seven demurrers and four formal pleas in abatement among several hundred pleadings suggests that the lawyers who practiced before the court, while fully acquainted with the English pleading forms and inclined to follow them closely, were not inclined to be excessively technical in insisting on their use.

Equity Through Common Law Forms

A committee of the Continental Congress, appointed to draw up a plan of government for the Northwest Territory, recommended in 1786 that a court be established to consist of five judges who should have "a common law and chancery jurisdiction."[90] The provision for a "chancery jurisdiction" appeared in a later plan,[91] but still later was dropped out, and was not included in the Ordinance of 1787 which provided for the appointment of a court to consist of three judges who should have "a common law jurisdiction."[92] The first governor of the Territory, St. Clair, at once recognized that this grant was "restrictive as to any Powers in Equity," and so advised Judges Parsons and Varnum in 1788.[93] And though the Ordinance did not prescribe what local courts might be established by the legislative authority of the Territory, neither the governor and judges in the adoption of laws (before 1799) nor the members of the general assembly in the making of laws (after 1798) saw fit to establish courts of chancery or confer general equity powers on the county courts of common pleas. They did, however, from time to time, provide that specified types of relief usually obtainable only in courts having chancery jurisdiction might be given by the common law courts. This was how equity was being dealt with in Massachusetts and Pennsylvania, and it may be significant that Judges Parsons and Varnum were from New England, and especially significant that Governor St. Clair was from Pennsylvania and thoroughly familiar with the Pennsylvania practice of administering equity through common law forms.[94]

Use of the writ of scire facias to commence actions to enforce mortgages has been discussed in some detail supra, and was there referred to as an interesting illustration of how relief usually considered as available only in equity can be given by common

90 30 JOURNALS OF THE CONTINENTAL CONGRESS 253.

91 Id. at 404.

92 1 Stat. 51.

93 3 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 277 (1934); 2 THE ST. CLAIR PAPERS, Smith ed., 76 (1882).

94 See Fisher, "The Administration of Equity Through Common Law Forms in Pennsylvania," 1 L. Q. REV. 455-465 (1895); 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 810-823 (1908).

law courts through common law writs and proceedings. As there stated, authority for this use of scire facias was given by a law adopted from Pennsylvania in 1795.[95]

Another law adopted by the governor and judges of the Northwest Territory in 1795 provided for "giving remedies in equity, in certain cases." This law, adopted from Massachusetts, reads:[96]

> "In all causes brought before the general or circuit courts, or before any court of common pleas, to recover the forfeiture annexed to any articles of agreement, covenant or charter party, bond, obligation or other specialty; or for forfeiture of real estate upon condition, by deed of mortgage, or bargain and sale with defeasance (when the forfeiture breach, or non-performance shall be found by a jury, by the default or the confession of the defendant, or upon demurrer) the court before whom the action is, shall make up judgment therein, for the plaintiff to recover so much as is due in equity and good conscience; and shall award execution for the same, by writ of capias ad satisfaciendum, fieri facias, or other judicial writ, as the case may require."

Under this law the policy of equity to relieve against penalties and forfeitures was to be applied in common law actions through common law forms. After judgment in 1799 on a bond for $500 conditioned for the payment of $287.48, three judges of the court of Common Pleas signed the following memorandum which had been written on the bond:

> "Judgment given in court for the sum of Two Hund^{d} Ninety five dollars and five cents the same being chancerd under the statute in that case made and provided."

In this case judgment was rendered on a warrant to confess judgment, and the court "chancerd" the bond. In a later case (1801), tried with a jury, the jury "chancerd" the bond. In this case the bond sued on was for $2400 conditioned that the maker deed to the payee in fee simple certain land described in the bond. The jury brought in a verdict for $1800 "debt and damages." The judgment was for "debt and damages" amounting to $1800 plus costs. It does not appear that any attempt was made to obtain specific performance instead of damages.

A law enacted by the General Assembly of the Northwest Ter-

[95] Note 67 supra.

[96] Statutes and laws cited in note 14 supra, Chase ed., 187; Pease ed., 246.

ritory in 1799 provided that persons having a controversy "(for which there is no other remedy but by personal action, or by suit in equity)" might agree to arbitrate, and have their submission "made a rule of any court of record."[97] A law adopted in 1792 had provided fees for granting a reference; for entering a rule of reference; for approving and entering referees' report.[98] In a case commenced in the Wayne court in 1797 the plaintiffs alleged that the defendant had agreed in writing to serve as plaintiffs' clerk "in trading and merchandizing," and by virtue of the agreement had received a large quantity of goods for which he agreed "to render an exact account." It was further alleged that the defendant was to care for property "confided to his charge" and "to do the utmost of his endeavors" to promote the interests of the plaintiffs. These allegations were followed by allegations of breach including a charge that defendant had not "rendered a true & faithful account, as a faithful clerk." This count, which was in special assumpsit, was accompanied by two common counts—indebitatus assumpsit for goods sold and delivered, and for money laid out and expended. After the declaration was filed the parties entered into an arbitration bond, and obtained a rule for decision by referees. The award of the referees, and written evidence submitted to them, are with the papers in the case. The proceedings in this case illustrate how an accounting could be had in a common law court without a jury. If the parties had not agreed to the reference, the advantages of an accounting in equity would have been lost.

"A law for the speedy assignment of dower," adopted from the statutes of Massachusetts in 1795,[99] provided for use of the writ of dower, but also provided for partition of rents and profits of "entire" estates, and for recovery of damages resulting from refusal to assign dower when demanded. After issuance of a writ of seizin three disinterested freeholders were to make the assignment. Although dower was to be assigned by common law courts through common law forms, some of the procedural advantages developed by the courts of chancery were made available by the statute.

From the time of their establishment in 1788 the courts of

[97] Id., Chase ed., 218; Pease ed., 354.
[98] Id., Chase ed., 133; Pease ed., 102.
[99] Id., Chase ed., 187; Pease ed., 244.

common pleas of the Northwest Territory were expressly authorized to issue "writs of partition."[100] But after 1795 two elaborate statutes, the first adopted from New York in 1795, prescribed in detail how real estate might be partitioned.[101] These statutes, like the statute for assignment of dower, made available for use in the common law courts some of the procedural advantages developed by the courts of chancery.

A Northwest statute enacted in 1802 provided:[102]

> "That all courts of record shall have power in any action depending before them, on motion and sufficient cause shown, by affidavit, and due notice thereof being given to the adverse party, by the party praying for such order, to make an order requiring the parties, or either of them, to produce books or writings in their possession or their power, which contain evidence pertinent to the issue; and if either party shall fail to comply with such order and to produce such books or writings, or to satisfy the court why the same is not practicable, it shall be lawful for the said court, if the party so refusing be plaintiff, to give judgment for the defendant as in cases of non-suit; and if the party so refusing be defendant, it shall be lawful for the court to give judgment for the plaintiff by default, as far as relates to the plaintiff's demand or the defendant's defence, to which the books or papers of the party are alleged to apply."

This statute further provided that any two justices of the court of common pleas might take the deposition of any resident "to perpetuate the remembrance of any fact, matter or thing."

While it is impossible from the materials now available to determine how far the judges of the court of Wayne County went in the application of equity principles, it is evident from the above that they were authorized to give, and did give, some types of equitable relief. Jacob Burnet, after a long experience as lawyer and judge, including active practice in the Northwest Territory, stated in his *Notes*:

> "The course of the Common Law was relied on, which was tedious, and, in most cases, difficult and expensive; and the more so, as there was not any tribunal in the Territory vested with Chancery powers. The Courts of Common Law,

100 Id., Chase ed., 95; Pease ed., 7.
101 Id., Chase ed., 193 and 330; Pease ed., 260.
102 Id., Chase ed., 341.

> as far as their forms and modes of administering justice would permit, assumed those powers from necessity, by which partial relief was obtained."[103]

Jurisdiction of guardianships and the administration of estates, originally the business of courts of chancery, was not vested in the courts of common pleas, but in special probate and orphans' courts, though in some instances two judges of common pleas were to sit with the probate judge.

Imprisonment for Debt

As previously noted, the community served by the Court of Common Pleas of Wayne County (1796-1805) was mercantile in character, and its civil litigation largely concerned with the collection of debts. The usual first step in an action to collect a debt was to have the defendant arrested on a capias ad respondendum. In some cases a summons, a writ of attachment, or a writ of scire facias was used, but only in exceptional situations. After arrest the defendant was held in custody unless he gave an appearance bond or paid the debt. The effectiveness of arrest in forcing payment is indicated by the large number of writs marked "settled," "satisfied," or "discontinued." (See Appendix, infra.) Though, at first, lawyers and other court officers were considered privileged from arrest, this privilege was negatived by a statute passed in 1799.[104] The statute referred to, and another, "defining and regulating privileges in certain cases,"[105] are discussed supra under "Commencement of Action."

A law adopted by the governor and judges of the Northwest Territory in 1792 provided:[106]

> "That no person imprisoned upon mesne process shall be held in prison upon such process more than thirty days next after entering up final judgment upon the writ whereby he or she is committed unless he or she shall be continued

[103] NOTES ON THE EARLY SETTLEMENT OF THE NORTH-WESTERN TERRITORY 304-305 (1847). That Burnet's recollections were not always accurate is shown by the paragraph following the one quoted supra: "On the subject of the partition of real estate—assignment of dower—relief of insolvent debtors—settlement of disputes by arbitration—divorce, and alimony—equitable set off, and execution of real contracts, the territorial code was entirely silent."

[104] Note 59 supra.

[105] Note 60 supra.

[106] Statutes and laws cited in note 14 supra, Chase ed., 132; Pease ed., 99.

there by having his or her body taken anew in execution nor shall the prison-keeper discharge any such prisoner unless judgment is given in his or her favor until thirty days next after the said judgment is entered up unless the party at whose suit such prisoner was committed shall give order in writing for the prisoner's discharge and the jailer be paid his legal fees."

The law further provided that execution might be claimed at any time after twenty days and within one year from entry of judgment. According to a form of execution set out in the statute the following direction was to be given the sheriff:

"We command you therefore that of the goods and chattels of the said C.D. within your bailiwick you cause distress to be made and thereof levy and pay unto the said A.B. the aforesaid sums being —— dollars —— cents in the whole with —— cents more for this writ and thereof also to satisfy yourself of your own fees and for want of goods or chattels of the said C.D. to be by —— shewn unto you or found within your bailiwick we command you to take the body of the said C.D. and —— commit to our jail in said county and —— detain in your custody within our said jail until —— pay the full sums above mentioned with your own fees or that —— be discharged by the said A.B. the creditor or otherwise by order of law."

A similar form of execution was prescribed for "small causes."

It will be noted that execution was first against the debtor's personal property, and second, for want of such property, against his body. A law for the recovery of "small debts" (under $5.00) adopted from Pennsylvania in 1795 reversed the order. This law[107] provided for execution against the debtor's body but if he should produce effects sufficient to satisfy the execution his body was not to be held "any longer." For want of such effects he was to be kept in jail until satisfaction made.

Another law adopted from Pennsylvania in 1795 provided:[108]

"No person shall be kept in prison, for debt or fines, longer than the second day of the sessions next after his or her commitment; unless the plaintiff shall make it appear, that the person imprisoned hath some estate that he will not disclose:

107 Id., Chase ed., 143; Pease ed., 144.
108 Id., Chase ed., 203; Pease ed., 286.

> then, and in every such case, the court shall examine all persons suspected to be privy to the concealment of such estate; and if no sufficient estate be found, the debtor shall make satisfaction, by personal and reasonable servitude, according to the judgment of the court where such action is tried (but only if the plaintiff require it) not exceeding seven years, where such debtor is unmarried, and under the age of forty years; unless it be the request of the debtor, who may be above that age; but if the debtor be married, and under the age of thirty six, the servitude shall be for five years, only; and with which the married man, upwards of thirty six shall be privileged, if it be his request. Should the plaintiff refuse to accept such satisfaction, according to the judgment of the court, as aforesaid, then the prisoner shall be discharged, in open court, and the plaintiff be forever barred from any further or other action for the same debt."

Professor Philbrick has remarked that "this was a law truly remarkable for its time," interpreting it to require servitude only of those found guilty of hiding assets.[109] Although no case has been found in which the law was applied, it seems that servitude was intended for those who had no assets, while those found guilty of concealment were to remain in jail. The views of the time may be reflected by the following verdict quoted from a source no longer available: "We, the jurors, find for plaintiff that defendant shall give to plaintiff 16 days' work without other pay than his victuals."[110]

The preamble of "an act for the relief of poor persons imprisoned for debt" passed by the General Assembly of the Northwest Territory in 1799 reads:[111]

> "Whereas the detention in prison of persons destitute of property can be of no advantage to their creditors, but their release from confinement, duly guarded, may be of service to society, by placing the unfortunate in a situation, by honest industry, to support themselves and families, as well as to discharge their just debts; therefore. . . ."

The relief provided by the statute was release of all persons imprisoned on execution who, after examination by the Court of

109 LAWS OF INDIANA TERRITORY 1801-1809, cxxxiii (1930).

110 See newspaper clippings in "Wayne County Papers" SB/ZUG Vol. I, p. 19, Burton Historical Collection, Public Library, Detroit.

111 Statutes cited in note 14 supra, Chase ed., 258.

Quarter Sessions, should be permitted to take the following oath:

> "I, A.B. do in the presence of Almighty God, solemnly swear (or affirm as the case may be) that I have not any estate, real or personal in possession, reversion or remainder sufficient to support myself in prison, or to pay prison charges, and that I have not, since the commencement of this suit against me, or at any other time, directly or indirectly sold, leased, or otherwise conveyed or disposed of to, or entrusted any person or persons whatsoever, or any part of the estate, real or personal, whereof I have been the lawful owner or possessor, with an intent or design to secure the same, or to receive, or to expect any profit or advantage therefor, or have caused or suffered to be done any thing else whatsoever whereby any of my creditors may be defrauded, so help me God; (or, and this I shall answer to God at the great day)."

The act further provided that no person liberated under the act should be subject to imprisonment on final process "for any debt contracted, or for any damages accrued, for the breach of any contract entered into prior to such liberation, unless such liberation shall have been fraudulently obtained."

Two notices issued under the above statute will be found among the surviving papers of the courts of Wayne County.

The shift in the Northwest Territory from a rigid scheme of imprisonment which favored creditors to a more humanitarian scheme which took into account the misfortunes of honest debtors, is reflected by the bill of rights of the first Constitution of Ohio (1802):

> "The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law."

Up to this point we have had a brief account of the principal statutes of the Northwest Territory which dealt with the power of a creditor to have a debtor arrested and held in prison until payment of the debt. In the paragraphs which follow, two of the other problems involved in imprisonment for debt will be given brief consideration: (1) Treatment to be accorded imprisoned debtors. (2) Liability for an escaping debtor's debt.

A law adopted by the governor and judges in 1792 provided that every county jail should consist of "two apartments" one for "the reception of the debtors" and the other "for the safe keeping

of persons charged with or convicted of crimes."[112] Another law adopted at the same time provided:[113]

> "That in every case where any person is committed to prison in a civil action either on mesne process or in execution for debt trespass slander or other cause of action . . . it shall be the duty of the sheriff to provide only the daily bread and water of such prisoner and he is hereby directed to furnish the same regularly to every such prisoner who is not of sufficient ability in point of property to provide for his or her own support while in prison and the expense and charges accruing to the sheriff or jailer herein shall be repaid to him by the prisoner so soon as the prisoner shall be liberated from the jail for the recovery of which the sheriff or jailer shall have his action . . . and when any prisoner shall be committed to jail in a civil action as aforesaid and shall provide for his or her own support in a way wherein the sheriff or jailer shall have no concern it shall be the duty of the jailer or prison-keeper to admit to the wicket grate or small window of the prison in which such prisoner is confined any person who may come to administer to the wants of such prisoner by furnishing him or her with meat and drink which shall be conveyed through such small window or grate that the security of the prison shall be not too frequently exposed by opening the doors thereof."

Upon the release of a "poor" debtor under the act of 1799[114] the execution creditors became liable to pay the debtor's prison fees, "and for the diet of the said prisoner, not exceeding twelve and a half cents per day, in proportion to their several demands." After such payment the creditors were entitled to reimbursement from the prisoner.

After 1799 an imprisoned debtor's contact with the outside world was not limited to communications through the "wicket grate" if he gave a bond conditioned that he would remain a true prisoner within the prison bounds—an area to be laid out adjacent to each prison extending not more than 200 yards from the prison. The act allowing prison bounds[115] provided that in any action for breach of a prison limits bond "judgment shall be entered up for the penalty, and no relief in chancery shall be allowed therein." This act was amended in 1800 to make the sureties on a limits bond

[112] Id., Chase ed., 122; Pease ed., 77.
[113] Id., Chase ed., 124; Pease ed., 83.
[114] Note 111 supra.
[115] Statutes and laws cited in note 14 supra, Chase ed., 279; Pease ed., 494.

liable for the debt, interest, and costs, "and no more"; to allow prisoners the benefits of the bounds at night as well as in the daytime; and to permit extension of the bounds 80 rods in any direction.[116]

Liability for an escaping debtor's debt was dealt with in some detail by one of the laws adopted in 1792.[117] For an escape due to the insufficiency of the jail or the negligence of the sheriff or jailer, the sheriff was "chargeable" to the creditor. But if the escape was violent, and the debtor was recaptured within three months, the sheriff was not liable for more than the costs of any action brought against him for the escape. A person aiding a debtor to escape was liable to pay all sums for which the debtor stood committed. When it appeared that an escape was due to the insufficiency of the jail, the Court of Common Pleas had power to assess the sums for which the debtor stood committed against the county. If it failed to do so, the sheriff was authorized to sue the inhabitants of the county. Referring to this provision in 1826, Burnet, J., of the Supreme Court of Ohio stated:[118]

> "In every instance, within my knowledge, in which a county has been held liable for an escape, it has been made so by statute. It is by statute, the hundred in England, is made liable for robberies, in certain cases, and under our territorial government, a statute was adopted by the governor and judges, in August 1792, declaring the counties liable for escapes that should happen through the insufficiency of the jail. The act pointed out the manner in which the money should be assessed and paid, and also the mode of commencing and conducting suits for the recovery thereof, in case the courts should not order it assessed and paid. The frauds that were practiced on the counties, under the law, by collusions between plaintiffs and defendants, when no debts were really due, and when defendants were utterly insolvent, became so apparent and oppressive, that the first territorial legislature in 1799, repealed the act, and no subsequent legislature has seen proper to revive it.
>
> "Prior to the adoption of that law, I believe no attempt was made to charge a county in such a case, and this being the first suit that has been brought for that purpose, within my knowledge, since the repeal of the law, although escapes

116 Id., Chase ed., 291.
117 Note 113 supra.
118 Commissioners of Brown County v. Butt, 2 Ohio 358.

have been numerous, for which the sheriffs have been answerable to the persons injured. The natural inference is, that it has been the prevailing opinion that such actions could not be sustained at common law."

As noted at the beginning of this paper, the non-Indian population of Wayne County was largely French, and for almost a century had been governed by the Custom of Paris. When arrest on civil process was introduced into the Canadian areas by the British in 1764 the practice was strongly protested by the Canadian French,[119] and was modified to some extent to meet their demands. There is nothing, however, to indicate that these developments affected in any way the course of events in the Northwest Territory after its surrender to the United States.

Influence of the Frontier

The definitive Treaty of Peace between Great Britain and the United States concluded at Paris September 3, 1783, and ratified by Congress January 13, 1784,[120] recognized the claims of the States to the area west of the Appalachians which lay east of the Mississippi, north of Spanish Florida, and south of the Great Lakes. States having claims to parts of the western area north of the Ohio ceded their interests to the United States on the following dates: New York—March 1, 1781; Virginia—March 1, 1784; Massachusetts—April 19, 1785; Connecticut—September 13, 1786. Virginia's western territory south of the Ohio (known as the District of Kentucky) was not ceded to the United States, but became a state of the United States in 1792. North Carolina's western territory (later known as Tennessee) was ceded to the United States February 25, 1790. Georgia's interests in the western area south of Tennessee and north of Spanish Florida were ceded to the United States April 24, 1802. South Carolina's interests in this area had been ceded in 1787. The area known as Vermont was self-governing until admitted as a state in 1791. It thus appears that within a relatively short time after the independence of the United States was recognized by the treaty of 1783 all the western area referred to in the treaty, except Kentucky and Vermont, had become the property of the United States subject only to the claims of the various Indian tribes. Colonies fresh from success in a

[119] See note 61 supra.
[120] Note 4 supra.

fight for freedom from colonialism found themselves a colonial power faced with the task of governing their colonies. And this task became more difficult with acquisition of territories previously governed by Spanish law—Louisiana in 1803; Florida in 1819; New Mexico in 1848. With the exception of Kentucky, Vermont, Texas, and California, all of the United States west of the original colonies came under colonial rule, various areas being governed from Washington for different periods of time.

As new territory was acquired the "frontier of settlement" moved steadily westward until, as shown by the census of 1880, it formed an irregular north and south line half way across the continent.[121] Settlements west of this line after 1880 were so scattered that a frontier line ceased to exist.[122] The fact there was such a line before 1880 with settled communities on one side and primitive conditions on the other has led to many speculations as to its influence on the development of American institutions. In a notable paper on "The Significance of the Frontier in American History," first presented in 1893, Professor Frederick Jackson Turner stated:[123]

> "American social development has been continually beginning over again on the frontier. This perennial rebirth, this fluidity of American life, this expansion westward with its new opportunities, its continuous touch with the simplicity of primitive society, furnish the forces dominating American character."[124]

That the frontier had an influence on the development of American law was suggested by Professor Roscoe Pound in "The Pioneers and the Common Law" published in 1920.[125] After quoting Professor William Graham Sumner as saying "There are features of American democracy which are inexplicable unless one understands . . . frontier society" and that "Some of our greatest

121 See SCRIBNER'S STATISTICAL ATLAS OF 1883, plate 17.

122 1 TURNER, THE FRONTIER IN AMERICAN HISTORY 39 (1937), quotes the following from an announcement made by the Superintendent of the Census of 1890: "Up to and including 1880 the country had a frontier of settlement but at present the unsettled area has been so broken into by isolated bodies of settlement that there can hardly be said to be a frontier line. In the discussion of its extent, the westward movement, etc., it cannot therefore any longer have a place in the census reports."

123 Reprinted in TURNER, THE FRONTIER IN AMERICAN HISTORY (1937) as Chapter I.

124 According to Paxson (History of American Frontier, p. 7, note 3), "All American historians have reshaped their views of the meaning of our history since the publication of his 'Significance of the Frontier in American History' in the proceedings (1893) of the State Historical Society of Wisconsin."

125 27 W. VA. L.Q.1 (1920); THE SPIRIT OF THE COMMON LAW 112 (1921).

political abuses have come from transferring to our now large and crowded cities maxims and usages which were convenient and harmless in backwoods country towns," Professor Pound stated:

> "This is no less true of many of our more serious legal abuses. In particular many crudities in judicial organization and procedure are demonstrably legacies of the frontier. Moreover the spirit of American law of the nineteenth century was sensibly affected by the spirit of the pioneer."

Writing in 1921 on the "Influence of Frontier Life on Development of American Law" Professor Frederick L. Paxson stated:[126]

> "In older settled, established communities we put up with obsolete conditions, with laws that cease to fulfill a useful purpose, with institutions that have become cumbersome instead of profitable. We keep putting up with them, because to change would be an annoyance and a nuisance, and because one can never be quite sure in lopping off a governmental appendix that something else won't be lopped off with it that will leave the sytem weaker instead of stronger for the operation. But in these new communities, where they started with a great long table and a big white sheet of paper and abundance of ink, with no solicitation as to what they should write or not, it was easy to cut out institutions of government and to substitute others that they desired and approved. The 13 colonies did this, and then after independence they allowed every new colony to do the same."

Turner's speculations on the influence of the frontier on the development of American character are plausible and seem supported by historical data. Whether Pound's generalizations can be supported is much more doubtful. That Paxson's assumptions cannot be supported is crystal clear.

Statistical maps based on the first census, 1790, and on the census of 1800[127] show the settlements of Wayne County (1796-1805) as isolated areas west of the frontier line. The area of continuous settlement had reached the Northwest Territory by 1790, and by 1800 had included a narrow strip along the eastern border, but did not include the Detroit area of Wayne County until sometime

126 13 REPORTS OF STATE BAR ASSOCIATION OF WISCONSIN 477 (1919-1920-1921); quoted in part in AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES 15 (1940); not included in PAXSON, HISTORY OF THE AMERICAN FRONTIER (student's edition 1924).

127 SCRIBNER'S STATISTICAL ATLAS of 1883, plate 13.

between the census of 1810 and that taken in 1820.[128] Isolated settlements beyond the frontier line, according to Turner, gave "a new and important character to the frontier," their isolation increasing their "peculiarly American tendencies."[129]

Turning from theory and speculation to the factual materials set out in the preceding parts of this paper, one will find little if anything to suggest that the law of the Northwest Territory as applied in the Court of Common Pleas of Wayne County (1796-1805) was a product of the frontier or that the spirit of the law was "sensibly affected by the spirit of the pioneer." Anyone seeking Paxson's "great long table and a big white sheet of paper and abundance of ink" will find instead the Ordinance of 1787 with its carefully-guarded grants of legislative power, and its guarantee of judicial proceedings according to the course of the common law. For a key to the development of law in the period of westward expansion, one should not look for the influence of the frontier, but to the various schemes of colonial government provided by Congress for the areas over which the frontier line was expected to pass.

The first plan of "temporary government" for the "western territory," adopted by the Continental Congress in 1784, provided for the adoption of "the constitution and laws of any one of the original states."[130] A new plan proposed in May 1786 provided that the "laws of ....." should be established in the district.[131] According to a plan submitted in September 1786 the judges were to "agree on the criminal laws of some one state."[132] The plan finally adopted for the Northwest Territory by the Ordinance of 1787[133] contained this provision:

> "The governor, and judges or a majority of them shall adopt and publish in the district such laws of the original states criminal and civil as may be necessary and best suited to the circumstances of the district and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit."

128 Id., plate 14.
129 THE FRONTIER IN AMERICAN HISTORY 6 (1937).
130 26 JOURNALS OF THE CONTINENTAL CONGRESS 118, 275.
131 30 id. at 252.
132 31 id. at 670.
133 1 Stat. 51.

The governor and judges were to be appointed by the Continental Congress; the assembly was to consist of the governor, a council to be appointed by Congress, and representatives to be elected locally. After 1789 the appointments were to be made by the President of the United States with the advice and consent of the Senate.[134]

The scheme of legislation by governor and judges was in operation in the Northwest Territory from 1788 to 1799, and in seven of the later territories for varying periods of time. In two of the later territories the governor and judges could "make" or "pass" laws, but in all the others they were limited to adoptions from the statutes of the original states. In the exercise of this legislative power the following, among other, questions arose: What states were "original" states from which laws might be adopted? The first thirteen states? States forming the United States when the particular territory was organized? When the particular law was adopted? Under authority to adopt "laws" did the governor and judges have power to adopt a part of a law? Could they adopt parts of different laws from the same or different states, and combine them into one law? Must a law be adopted verbatim, or may names of places, etc., be changed?[135] Instead of providing the people of the Northwest Territory with a "great long table and a big white sheet of paper and abundance of ink," Congress appointed the persons who should do the legislating, limited their legislative power to the selection of laws from the statutes of the old, settled communities, and provided that laws adopted be reported to Congress where they might be disapproved.[136]

With the organization of the General Assembly in 1799 the people of the Northwest Territory had a voice in legislation, but were not free to legislate as they saw fit. No law could be given effect without the approval of the governor, and all laws passed were subject to disapproval by Congress. In 1799 the governor approved thirty-one acts, but withheld his approval from eleven

134 Id. at 50.

135 For a discussion of these and other similar questions, see 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., x-xxxi (1935).

136 Charging a grand jury in Michigan Territory in 1806, Judge Frederick Bates of the Supreme Court stated: "In enacting laws for the government of the territory we are confined to the experience of the original states. Our adoptions must be limited to their codes; codes which have raised scattered and indigent colonies into the first grades of independence respectability and opulence. We are forbidden indeed to make *experiments;* For indeed it has been our fortunate lot to have those experiments made for us." Charge dated May 5, 1806, Bates Collection, Missouri Historical Society, St. Louis, Mo.

more.[137] The governor was an appointee of, and responsible to, the national government which sat well east of the frontier line.[138]

As pointed out in the first section of this paper, the judges of the Northwest Territory were vested with a "common law," as distinguished from a "chancery," jurisdiction, and the people of the Territory were guaranteed the benefits of judicial proceedings according to the course of the "common law." In an attempt to show what common law was intended, the governor and judges adopted a law declaring that "the common law of England" and English statutes made in aid of the common law prior to 1607, along with the laws in force in the Territory, should be "the rule of decision."[139] But even with this attempt at clarification, much was left to the decisions of the courts. It was for them to decide what English statutes and what parts of the English common law were to be applied. In the absence of reports of Northwest decisions it may be of interest to note some generalizations made by judges in the area at later times. *In the Case of Moses David,* decided by the Supreme Court of Michigan Territory in 1809, Woodward, C.J., stated:[140]

> "The United States of America derive so much of their government and jurisprudence from the celebrated and potent island on the western coast of Europe, by whose enterprise and perseverance the northern part of this hemisphere has been principally colonized, that it is difficult, even at this day, to decide ordinary cases, without reference to the laws and policy of Britain. . . . In moulding the jurisprudence of the maternal Kingdom to this adolescent republic, it ought to be the primary object to secern the use of every part avoiding its abuse; and pretermitting all that is obsolete, inapplicable, or excrescent. While the solid and valuable trunk of English jurisprudence is sustained; its superfluous and incongruous appendages, ought to be subjected to a bold, but happy excision."

In *Ohio v. Lafferty,* decided in 1817, Tappan, presiding judge of the Fifth Circuit of Ohio common pleas, stated:[141]

137 LAWS OF THE NORTHWEST TERRITORY 1788-1800, Pease ed., XXX (1925).

138 "Here, for ten years, General Arthur St. Clair had governed as viceroy of Congress. That he was called governor instead of viceroy failed to hide the fact of autocratic control." PAXSON, HISTORY OF THE AMERICAN FRONTIER (student's edition 1924), 123.

139 Note 39 supra.

140 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 497 (1935).

141 Tappan's Ohio Rep. 80.

> "When North America was colonized by emigrants who fled from the pressure of monarchy and priestcraft in the old world, to enjoy freedom in the new, they brought with them the common law of England, (their mother country) claiming it as their birth-right and inheritance. . . . The common law of England has thus always been the common law of the colonies and states of North America; not indeed in its full extent, supporting a monarchy, aristocracy, and hierarchy, but so far as it was applicable to our more free and happy habits of government."

At the time Woodward delivered his opinion the frontier of continuous settlement had not reached Detroit, where the Supreme Court of Michigan Territory held its sessions. And although most of Ohio was within the area of continuous settlement by 1817, the northwest corner of the state was still beyond the frontier line. Both judges were subject to all the influences of the frontier, yet seem unaffected by them. These judges were concerned with the broad problem of adapting the law of the "mother country" to the needs of the new republic. To suggest that they felt free to decide cases according to their own notions of right and justice would be absurd.

Turning finally to the records of the Court of Common Pleas of Wayne County (1796-1805) we find almost no evidence of the informality often supposed to be a characteristic of frontier justice. Instead, we find a strict compliance with applicable statutes, and, where the procedure was not governed by statute, with the English common law. English law books were available and trained lawyers practiced before the court. English forms, including the various pleading fictions, were closely followed. Of the many pleadings listed in the Appendix, infra, only two are listed as "informal." While the scheme of administering equity through common law forms was a departure from English precedent, this departure was not a product of the western frontier, but was in effect required by the provision of the Ordinance of 1787 which vested the judges with a common law, as distinguished from a chancery, jurisdiction. Statutes designed to make the scheme effective were adopted from states behind the frontier line. The surviving records of the court bear strong witness that its proceedings, in the main and as guaranteed by the Ordinance, were according to the course of the common law.

APPENDIX

The following papers pertaining to the business of the Court of Common Pleas of Wayne County (Northwest Territory 1796-1803; Indiana Territory 1803-1805) have been deposited in the Law Library of the University of Michigan, Ann Arbor:

Original Process; Bail	Historical Commission originals	Burton Collection photostats
Capias ad respondendum (including alias; pluries)	948	7
Sheriff's (coroner's) return and other indorsements:		
Served (service)	7	
Served; bail	13	
Served; bail bond	36	
Served; in custody	10	
Served; settled	5	
Served; satisfied	2	
Served; bail; settled	2	
Served; bail; satisfied	2	
Served; bail bond; settled	2	
Served; bail bond; satisfied	3	
Served; in custody; satisfied	5	
Served; jail fees; settled	1	
Body taken	1	
Body taken; bail	7	
Body taken; in custody	1	
Body taken; satisfied	1	
Executed; bail	1	
C C (cepi corpus)	131	
C C; bail	111	
C C; bail bond	121	
C C; in custody	12	
C C; settled	29	
C C; satisfied	9	
C C; bail; settled	3	
C C; bail; satisfied	4	
C C; bail bond; settled	5	
C C; discontinued	6	
C C; bail; discontinued	2	
C C; in custody; bail	12	
C C; in custody; escape	1	
C C; escape; in custody	1	
C C; in custody; discontinued	4	
C C; in custody; settled	1	

C C; in custody; satisfied	6		
C C; jail fees	1		
C C C (cepi corpus in custody)	30		
C C C; bail	13		
C C C; bail bond	9		
C C C; settled	7		
C C C; satisfied	1		
C C C; discontinued	9		
C C C; jail fees	9		
C C C; bail; jail fees	3		
C C C; bail bond; jail fees	3		
C C C; escape	1		
C C C; bail bond; settled	2		
Appearance	1		
Service acknowledged	1		
Mother and brother served; bail	1		
Mortuus est; father served; discontinued	1		
Bail	3		
Settled	22		
Satisfied	4		
Discontinued	15		
Non est (non est inventus)	212		
Summons (ad respondendum)		26	0
Sheriff's (coroner's) return and other indorsements:			
Signified	4		
Signified in presence of 2 witnesses	2		
Signified to clerk; defendant absent	1		
Served	4		
Served in presence of 1 witness	3		
Read in hearing of defendant	3		
Notice given	1		
C C	3		
Served; bail bond	1		
Attachment (garnishment)		17	0
Sheriff's (coroner's) return and other indorsements:			
Chattels attached	2		
Chattels attached; witnesses	2		
Served and returned	1		
Chattels attached; bail	1		
Money attached; bail	1		
Chattels attached; garnishee summoned	3		
Chattels attached; bail; satisfied	1		
House and lot attached (levied on)	1		
Two houses attached	1		
Discontinued	1		

Scire facias on mortgage	11	0
Sheriff's (coroner's) return and other indorsements:		
Signified; 2 witnesses	4	
Served; 2 witnesses	1	
Served; notice by letter	1	
Left with wife; defendant absent	1	
Wife served; 3 witnesses	1	
Read and explained; 3 witnesses	1	
Non est; no property whereby to summon	2	
Replevin (draft or copy)	0	1
Bill of privilege (listed under "Declaration")		
Against sheriff	1	
Against attorney	3	
Against justice of Common Pleas	1	
Bail required (indorsed on capias)	5	0
Affidavit for bail	4	0
Bail bond	18	2
Bail piece	31	0
Exoneration of bail	3	0
Habeas corpus from General Court re release on bail	1	0
Pleading		
Declaration	370	7
Assumpsit (trespass on the case):		
Special (promissory note)	41	
Special (promissory note); indebitatus (goods sold)	4	
Special (promissory note); indebitatus (money paid)	4	
Special (promissory note); indebitatus (money received)	9	
Special (promissory note); indebitatus (goods sold; money paid)	1	
Special (promissory note); indebitatus (goods sold; money lent)	1	
Special (promissory note); indebitatus (goods sold; money received)	1	
Special (promissory note); indebitatus (goods sold); quantum meruit	11	
Special (promissory note); indebitatus (goods sold); quantum valebant	1	
Special (promissory note); indebitatus (goods sold); account stated	1	
Special (promissory note); indebitatus (money paid; money lent)	2	
Special (promissory note); indebitatus (money paid; money received)	4	

Special (promissory note); indebitatus (money lent; money received) 1
Special (promissory note); indebitatus (money received); account stated 3
Special (promissory note); indebitatus (goods sold; money paid; money received) 2
Special (promissory note); indebitatus (goods sold; money paid); quantum meruit 1
Special (promissory note); indebitatus (goods sold); quantum meruit; account stated ... 1
Special (promissory note); indebitatus (money paid; money lent; money received) 17
Special (promissory note); indebitatus (money lent; money received); account stated 2
Special (promissory note); indebitatus (goods sold; money paid; wheat received); quantum meruit 1
Special (promissory note); indebitatus (goods sold; money paid; money lent); quantum meruit 1
Special (promissory note); indebitatus (goods sold; money lent; money received); quantum meruit 1
Special (promissory note); indebitatus (money paid; money lent; money received); account stated 5
Special (promissory note); indebitatus (goods sold; money paid; money lent; money received); quantum meruit 3
Special (promissory note); indebitatus (goods sold; money paid; money lent; money received); quantum meruit; account stated 4
Special (due bill) 1
Special (due bill); indebitatus (money received) 1
Special (order to pay) 1
Special (order to pay); indebitatus (money received); account stated 1
Special (bill of exchange); indebitatus (money paid; money lent; money received) 1
Special (bill of exchange); indebitatus (money paid; money lent; money received); account stated 1
Special (sale of corn); indebitatus (money received); quantum valebant 1

Special (sale of grain); indebitatus (money received); quantum meruit	1
Special (sale of sheep); indebitatus (goods sold; money received); quantum meruit	1
Special (sale of skins); indebitatus (goods sold; money received); quantum valebant	1
Special (for services); indebitatus (work and labor); quantum meruit	2
Special (for services); indebitatus (money paid); quantum meruit	1
Special (for services); indebitatus (goods sold; money paid)	1
Special (for services); indebitatus (money received); quantum meruit; account stated	1
Special (for care of children); indebitatus (food furnished; money paid; money received)	1
Special (breach of warranty); indebitatus (money received); account stated	1
Special (breach of agency); indebitatus (goods sold; money paid)	1
Special (failure to perform services)	1
Special (failure to convey land); indebitatus (money lent; money received)	1
Special (failure to indorse sum on bond); indebitatus (goods sold; money received); account stated	1
Special (failure to indorse sum on bond); indebitatus (money paid; money received)	1
Indebitatus (goods sold)	2
Indebitatus (goods sold; goods lent)	1
Indebitatus (goods sold; money paid)	3
Indebitatus (goods sold; money lent)	1
Indebitatus (goods sold; money received)	5
Indebitatus (goods sold; work and labor)	1
Indebitatus (goods sold); quantum meruit	5
Indebitatus (goods sold); quantum valebant	5
Indebitatus (goods sold; money paid; money received)	2
Indebitatus (goods sold; money paid); quantum meruit	2
Indebitatus (goods sold; money paid); quantum valebant	2
Indebitatus (goods sold; money received); quantum meruit	3

Indebitatus (goods sold; money received); quantum valebant 2
Indebitatus (goods sold; money received); account stated 1
Indebitatus (goods sold; work and labor); quantum meruit 1
Indebitatus (goods sold; money paid; money lent; money received) 1
Indebitatus (goods sold; money paid; money lent); quantum meruit 4
Indebitatus (goods sold; money paid; money lent); quantum valebant 1
Indebitatus (goods sold; money paid; money received); quantum meruit 1
Indebitatus (goods sold; money paid); quantum meruit; account stated 1
Indebitatus (goods sold; money lent; money received); quantum meruit 1
Indebitatus (goods sold; money lent; money received); quantum valebant 1
Indebitatus (goods sold; money received); quantum meruit; quantum valebant 1
Indebitatus (goods sold; money received); quantum meruit; account stated 1
Indebitatus (goods sold; money received); quantum valebant; account stated 1
Indebitatus (goods sold; use of boats; money received); quantum valebant 1
Indebitatus (goods sold; money paid; money lent; money received); quantum meruit 26
Indebitatus (goods sold; money paid; money lent; money received); quantum valebant 1
Indebitatus (goods sold; money paid; money received); quantum valebant; account stated 2
Indebitatus (goods sold; work and labor; money paid; money received); quantum meruit 1
Indebitatus (goods sold; work and labor; money received); quantum valebant; quantum meruit 1
Indebitatus (goods sold; money paid; money lent; money received); quantum meruit; account stated 6

Indebitatus (goods sold; work and labor; money paid; money received); quantum valebant; quantum meruit 1
Indebitatus (goods sold; food furnished; horses stabled; horses hired; money assumed to be paid; money paid; money lent; money received); quantum meruit 1
Indebitatus (work and labor); quantum meruit 2
Indebitatus (work and labor; money received); quantum meruit 3
Indebitatus (work and labor; money paid); quantum meruit 1
Indebitatus (work and labor); quantum meruit; account stated 1
Indebitatus (work and labor; money paid; money lent); quantum meruit 1
Indebitatus (work and labor; money paid; money lent; money received); quantum meruit 1
Indebitatus (money paid; money received) 5
Indebitatus (money lent; money paid); quantum meruit 1
Indebitatus (money lent; money received); account stated 1
Indebitatus (money paid; money lent; money received); 8
Indebitatus (money received) 1
Indebitatus (food furnished; money paid; money received); quantum meruit; account stated 1
Indebitatus (land sold); quantum meruit 1
Indebitatus (use and occupation of land); quantum meruit 1
Indebitatus (use and occupation of land; goods sold; money paid); quantum meruit 1
Account stated 3

Covenant:
Breach of sealed—
Warranty 1
Lease (by lessee) 3
Agreement to perform services 1
Agreement to pay for services 1
Agreement to furnish servant 1
Agreement to assign interest in farm 1

Debt:
- Writing obligatory (sealed) 25
- Judgment record 6
- Statutory penalty 5
- Penalty for breach of sealed agreement 3
- Rent due on sealed lease 1
- Escape 1
- Mortgage 1

Ejectment:
- Copy; notice to person in possession 3

Trover (trespass on the case):
- Conversion of promissory note 3
- Conversion of horse 4
- Conversion of cow 3
- Conversion of cow; calf 1
- Conversion of merchantable flour 1
- Conversion of stove 1
- Conversion of furs; peltries 1
- Conversion of copper stills; wheat 1
- Conversion of batteau 1
- Conversion of batteau; plough; chains; seine; bull 1

Trespass:
- Assault; battery 5
- De bonis asportatis 1
- Quare clausum fregit 6
- Quare clausum fregit; battery 1
- Quare clausum fregit; de bonis asportatis 2
- Quare clausum fregit; ejectment 1
- Injury to land (informal) 1

Trespass on the case (also see assumpsit; trover):
- Deceit 1
- Escape 2
- Libel 1
- Slander 9

Scire facias:
- To enforce mortgage 3
- To recover from bail 2

Plea 145 2
- Non assumpsit 61
- Non assumpsit; payment 18
- Non assumpsit; tender 2
- Non assumpsit; tender; res judicata 1
- Non assumpsit; set off 1
- Payment 6

Covenant not broken	3		
Non est factum	3		
Nil debet	6		
Nil debet; set off; abatement (informal)	1		
Nul tiel record	1		
Release	1		
Set off	2		
Notice of set off	1		
Oyer; performance tendered	1		
Demurrer to one count; non assumpsit to other counts	1		
Not guilty	28		
Not guilty; liberum tenementum	2		
Truth of words spoken	1		
Justification of escape	1		
Misnomer (abatement)	3		
Variance (abatement)	1		
Replication		21	1
Rejoinder		1	0
Demurrer		7	0
General (to declaration)	1		
General (to plea)	2		
Special (to declaration)	2		
Special (to one count of declaration)	1		
Special (to plea)	1		
Joinder in demurrer		3	0
Libel to condemn goods seized by collector of customs		2	1
Claim to goods seized by collector of customs		1	0
Claim to property seized on writ of attachment		1	0
Consent rule in ejectment		1	0

Confession of Judgment; Default; Writ of Inquiry

Confession of judgment (plea relinquished)	6	0
Confession of judgment	10	0
Warrant of attorney to confess judgment	13	0
Prayer for judgment for damages confessed	1	0
Record of confessed judgment	(10	0)
Record of default judgment	(17	0)
Memorandum of entry of default	0	1
Writ of inquiry	4	0
Notice of writ of inquiry	1	0
Award of jury on inquisition	3	0
Acknowledgment of execution of warrant to confess judgment	1	0
Reasons for setting aside award on inquisition	1	0

Precipe for subpoena for witness on reasons for setting aside inquisition award	1	0

Referees; Awards

Agreement to submit to referees	1	0
Bond for arbitration	2	0
Rule for reference (to referees; arbitrators; umpire)	16	1
Notice of meeting of referees	1	0
Certificate of swearing witness	2	0
Rule for decision of referees	1	0
Award (report) (of referees; arbitrators; umpire)	18	1
Outline of judgment record (leaving spaces for agreement to refer; rule of reference; award of referees; reasons for setting aside award)	(1	0)

Jurors; Verdicts

Venire facias (special)	3	0
Venire facias	1	0
Verdict (special)	4	0
Verdict (general)	46	2
Form of verdict (unsigned)	4	0
Verdict in unidentified case	4	0

Witnesses; Written Evidence

Subpoena ad testificandum	190	0
Commission to take deposition	5	2
Notice of taking deposition	0	1
Letter transmitting deposition	1	0
Deposition	17	5
Memorandum of witnesses sworn	1	0
Habeas corpus ad testificandum	1	0
Affidavit re absence of witnesses (continuance)	3	0
Written evidence:		
Account stated	1	0
Affidavit	5	1
Articles of agreement	8	0
Business correspondence	7	1
Certificate of protest	3	1
Copy of foreign capias ad satisfaciendum	1	1
Due bill	18	0
Mortgage	1	0
Order or request to pay money	10	1
Order or request to deliver goods	5	0
Promissory note (sealed or unsealed)	128	2
Receipt (of money or property)	18	0
Statement of charges or sum due	143	2
Transcript of foreign judgment	3	1

Unsworn statement (certifies)		3	0
Writing obligatory (bond)		4	0
Written evidence in unidentified cases:			
Affidavit		1	0
Articles of agreement		2	1
Business correspondence		1	1
Order or request to pay money		1	0
Promissory note (sealed or unsealed)		10	1
Receipt (of money or property)		2	0
Statement of charges or sum due		15	2
Unsworn statement (certifies)		5	0

New Trial; Arrest of Judgment

Prayer for leave to file reasons for new trial		1	0
Reasons for new trial		5	0
Reasons for arrest of judgment		2	0

Judgment Record

Outline or draft		2	0
Record of proceedings		29	2
Memorandum of judgment rendered		95	2

Execution of Judgment

Capias ad satisfaciendum (including alias; pluries)		45	1
Sheriff's (coroner's) return and other indorsements:			
Served; committed	1		
Cepi corpus	1		
C C; satisfied	1		
C C C	9		
C C C; discontinued	1		
C C C; satisfied	2		
C C C; settled	1		
Satisfied	2		
Satisfied; receipt acknowledged	2		
Settled	1		
Settled; receipt acknowledged	1		
Not to be found by deputy	1		
Non est	19		
Escaped from jail	1		
Fieri facias		40	0
Sheriff's (coroner's) return and other indorsements:			
Seized and attached firewood	1		
Seized and attached plantation; payment	1		
Caused to be levied of goods and chattels	1		
Levied on and sold property (listed)	1		
Took and sold property (listed)	1		

C C 1
Satisfied 6
Satisfied; receipt acknowledged 1
Settled 5
Settled; receipt acknowledged 1
Receipt acknowledged 3
No property found 2
Nulla bona 1
Non est 7
Withdrawn from service 1

Levari facias 3 4
Sheriff's (coroner's) return and other indorsements:
Seized lands; public sale 3
Levied on lands; sale 1
Attached the property 1
Served in presence of 2 witnesses; execution stopped by plaintiff 1

Habere facias possessionem 5 0
Sheriff's (coroner's) return and other indorsements:
Gave plaintiff possession 1
Put plaintiff in possession 1
Put plaintiff in possession in presence of two witnesses by delivering key 1
Delivered possession to plaintiff's attorney 1

Scire facias against bail 3 0
Sheriff's (coroner's) return and other indorsements:
Caused notice to be given by two good and lawful men 1
Explained in presence of two witnesses 1
Settled 1

Scire facias to execute judgment 3 0
Sheriff's (coroner's) return:
Non est 2

Finding of jury on fieri facias 1 0
Venditioni exponas 1 0

Writ of Error; Appeal

Form of writ of error 0 1
Assignment of errors 1 0
Bill of exceptions 6 0
Copy of habeas corpus cum causa 0 1
Appeal from Common Pleas to General or Circuit Court:
Prayer for entry of appeal 8 0
Bond to prosecute appeal 8 0
Transcript of C.P. record (3 ..... 0)

Judgment of affirmance	0	1
Judgment of reversal	0	1
Procedendo	0	1
Fieri facias (appellate court)	0	2
Levari facias (appellate court)	1	0
Appeal from justice's court to Common Pleas:		
Prayer for entry of appeal	1	0
Precipe to enter appeal	1	0
Bond to prosecute appeal	1	0
Transcript of J.P. record	2	0
Defendant's plea on appeal	1	0

Costs; Fees

In particular cases:		
Security for costs	1	0
Security for costs (indorsed on writ)	97	1
Bill of costs (fees) (excluding indorsed on writs)	31	0
Taxed by justice or justices	15	
Certificate of taxing costs	1	0
Memorandum of judgment and costs	1	0
Fieri facias against plaintiff for costs	1	0
Scire facias against plaintiff for costs	1	0
Capias ad satisfaciendum against plaintiff for costs	2	0
Note: Fees for serving writs are indorsed on all but a few of the writs listed above.		
In general:		
Statement of fees due each justice of Common Pleas for particular term	0	13
Statement of fees due one justice of Common Pleas	0	1
Statement of fees due Prothonotary	0	1

Attorney's Papers

In particular cases:		
Brief of law and/or facts	0	8
Correspondence	0	2
Draft of assignment of judgment	0	1
Memorandum of sums proved	0	1
Miscellaneous:		
Notice to one justice of Common Pleas that others will not sit with him	0	1
Letter re absences and suspension of justices of common pleas	0	1
Attorney's opinion re stationing sentinel at court-house door	0	1
Letter suggesting removal of prothonotary of Common Pleas from office	0	1

Letter charging justices of Common Pleas with misconduct	0	1
Remarks of a justice of Common Pleas re charges against him	0	1
Letter charging sheriff with misconduct	0	1
Attorney's opinion re allowance of fees to justices and prothonotary of Common Pleas	0	1
Letter (from a judge of General Court) re duty of sheriff to serve precepts	0	1
Attorney's opinion re power to require plaintiff in trover action to receive back converted property	0	1
Letter re removals from office	0	1

Note: Some "Attorney's Papers" (drafts or copies of court papers) are listed under other headings, supra.

Miscellaneous

Affidavit		
Re agreement to pay attorney's fee	1	0
Re service of notice in ejectment	1	0
Attachment		
Affidavit for attachment	5	0
Return to writ of attachment	1	0
Bond for appearance of attached goods	1	0
Inventory of attached goods	2	0
Receipt for attached goods	2	0
Expenses of caring for attached goods	2	0
Account of sales at public auction	1	0
Deputation		
Authority to serve writ (indorsed on writ)	122	0
Habeas corpus ad subjiciendum		
Allowance (by judge of General Court)	1	0
Return (have body before justice of Common Pleas)	1	0
Order for release on bail	1	0
Libel to condemn seized goods		
Bond for appearance of claimant	1	0
Inventory of seized goods	1	0
Appraisal of seized goods	1	0
Receipt by collector of duties and fees	1	0
Notice		
Of trial	5	0
Of set off	1	0
Of application to Quarter Sessions for relief as poor debtor	2	0
To tenant in ejectment	3	0
Petition		
To Common Pleas re care of children	0	1

Precipe		
To prothonotary for capias	7	0
To prothonotary for fieri facias	1	0
To sheriff (Billet de reconnoisment)	1	0
To sheriff to discontinue	2	0
To sheriff to discharge from prison	1	0
Profert		
Of writing obligatory	1	0
Receipt		
By plaintiff of amount of judgment or claim	8	0
By plaintiff of papers filed in prothonotary's office	1	0
By juror of jury fees	1	0
Similiter		
Written at end of 72% of pleas concluding to country		
Substitution of attorney	1	0
Tender of sum claimed and costs	1	0