UNREPORTED MICHIGAN SUPREME COURT OPINIONS, 1836-1843

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IT IS a commonly known fact that, although Michigan was admitted to the Union in 1837 (many of her citizens had claimed statehood for more than a year prior to her formal admission), few opinions of the state supreme court written before 1843 have ever been published. Why a period of almost ten years should have elapsed before the first volume of state reports was issued in 1846 (with the exception of two volumes of chancery reports), or why the early reporters seem, from a casual examination, to have neglected decisions of the court before 1843, or what happened to the opinions, if any, that were rendered by supreme court justices during the first seven years of the state's existence, are questions which have never been answered adequately. The purpose here, then, is to present information on these obscure topics as well as on other matters closely related thereto, and to provide a brief summary of all the unpublished manuscript opinions of the court that have been located up to the present time.

In order to understand the whole situation, it may be helpful to review briefly the historical background of the subject. During the summer of 1835 a constitutional convention, which had been elected by the people of the Territory of Michigan, drew up and submitted to the electorate for ratification the first constitution of the state. This document was approved by a large majority of the people voting at a surprisingly small election in October of that year. At the same time a governor, lieutenant-governor, and members of the state legislature were chosen, all of whom shortly thereafter assumed office and, without Congressional sanction, attempted to establish a state government and to cast off the territorial government. Of the various measures under-


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1 The total vote was: Yes—6,299; No—1,359. In only one county (Branch) were there more ballots cast against than for the constitution, and that was by the narrow margin of 29 to 32. JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN (hereafter cited as SENATE JOUR.), 1835-1836, Doc. No. 1.

2 For a detailed account of the actions taken by the governor and legislature of Michigan, counter measures carried out by President Jackson and his aides, and the
taken in the interim preceding final entrance into the Union, it is necessary to note here only that the new legislature early in the next year adopted laws which provided for the cessation on July 4, 1836, of the terms and functions of the territorial officers, for the establishment of a peripatetic supreme court whose members were to act singly as presiding judges in the circuit courts of the various counties and jointly as the highest court of review, and for the selection of the new state judges. Subsequently, the governor in July nominated for the positions of chief justice and associate justices of the state supreme court three men who were approved almost unanimously by the senate. Within a week after their appointment these men began to assume control of Michigan's judicial business.

Little emphasis had been placed upon the reporting and publishing of judicial opinions during the thirty-one years Michigan had territorial status. As far as is known, the Supreme Court of Michigan Territory never appointed an official reporter of its decisions, although for two years (1819-1821) a court rule was in force which provided that reports of the judges' opinions should be kept by some person appointed by the court, and James Duane Doty, clerk of the supreme court at that time, appears to have made an attempt to report several arguments presented on both sides in regard to the right of Michigan to proceed as a state previous to approval by Congress of her constitution, see Norton, A HISTORY OF THE SUPREME COURT OF THE STATE OF MICHIGAN, 1836-1857, pp. 68-111 (1940). Also see the treatment of the same subject in 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1825-1836, pp. xlv-liii (1940) (edited by W. W. Blume).

4 Id. 30-35.
5 The three were William A. Fletcher, George Morell, and Epaphroditus Ransom, all nominated and approved on July 18, 1836. EXECUTIVE JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN, 1835-1836, pp. 17-18.
6 Although no session of the state supreme court as a whole was held until January 1837, the individual justices, as required by law, presided in the state circuit courts which were held in several counties during the latter part of 1836. See the STATE JOURNAL (Ann Arbor), Oct. 20, 1836, and the Journal of the Washtenaw County Circuit Court for the session of circuit court held in Washtenaw County; for reports on circuit court terms in Kalamazoo and St. Clair Counties, see Ransom, "Kalamazoo County," 7 MICHIGAN PIONEER COLLECTIONS 469-473 (1886), (Michigan Historical Commission) and 1 W. L. Jenks, ST. CLAIR COUNTY, MICHIGAN: ITS HISTORY AND ITS PEOPLE 196 (1912). In addition there were at least three writs issued before August 1, 1836, which bore the heading "State Supreme Court": a writ of certiorari, dated July 25, in Batty v. Fraser, Sup. Ct., 1st circ., file No. 23; a writ of certiorari, dated July 30, in Lee v. Force, Sup. Ct., 2d circ., file No. 18; and a writ of error, dated July 30, in Mathews v. Howell, Sup. Ct., 1st circ., file No. 8.
In 1825 another private venture at reporting the supreme court decisions at least was projected, apparently without success. The legislative council adopted a resolution in 1828 instructing the committee on the judiciary to inquire whether it would be advisable to require the judges when sitting in bank to file written opinions on the cases disposed. While there were no immediate tangible results of this resolution, in 1831 a law was passed by the legislative council which required the judges of the Territorial Supreme Court and of the Wayne County Circuit Court to write decisions “in such cases and matters as are usually reported in the several States of the United States, where there are reporters provided by law,” such opinions to be filed and preserved by the clerks of the courts. However, no collection of decisions by the Territorial Supreme Court was published until recently, and the few opinions which were printed contemporaneously appeared mainly in newspapers.

In view of these precedents, as well as the examples of similar practices followed by many other states during their early history, it is not surprising that neither the constitution of 1835, nor the acts which established the state supreme court in 1836, provided that the justices should write their opinions or that a reporter should edit and publish them. Some evidence exists that at least Chief Justice William A. Fletcher intended to write some opinions during 1837, which was the first year sessions of the court were held, but no extant opinions have been found which date prior to 1838.

Doty's reportorial activities, as well as his manuscript volume of reports, have been recorded in Transactions of the Supreme Court of the Territory of Michigan, 1814-1824, pp. 365-427 (1938).

Notice was given in 1825 that A. G. Whitney, United States District Attorney, was engaged in taking notes on the arguments of counsel and on the decisions by the supreme court with the intention of collecting materials for a report of cases in that court. Michigan Herald (Detroit), Dec. 13, 1825 (photostatic copy in the Legal Research Library, University of Michigan).

Journal of the Legislative Council of the Territory of Michigan, 1828, pp. 18, 27.


All available opinions which could be located have been printed in the six volumes of Transactions of the Supreme Court of the Territory of Michigan (1935-1940).

In 1842 newly appointed Chief Justice George Morell wrote a notation on the wrapper of a case file that Fletcher had taken the papers in that particular file at the June term, 1837, “to draw up the opinion of the court.” Fletcher did not return the papers until March 31, 1842. United States v. Cornell, Sup. Ct., 1st circ., file No. 62.

There are thirty-seven cases decided before 1843 in which opinions, manuscript and printed, are known to be in existence. By year, these are 1838, six; 1839, four; 1840, two; 1841, eight, and 1842, seventeen. See Appendix, below. Eight of the thirty-seven have been published in full and one in part, while the remainder are extant in manuscript form only.
The latter year marked the earliest statutory provision for a court reporter. According to the revision of the laws made in 1838, this official was to report the decisions of both the supreme court and the court of chancery, and was required to attend all terms of those courts, to make "true reports of their decisions upon all such causes and matters as are usually reported," and to publish every year the decisions of each court separately. His appointment and tenure of office were subject to the action of a majority of the justices and the chancellor, but in the selection of cases to be reported he was given a certain amount of discretion on the basis of their importance. In turn it was made the duty of the courts to give their opinions to the reporter in writing as soon as convenient. Although the compensation of the reporter was fixed at six hundred dollars annually, payable quarterly, he was to receive in addition any profits which might result from the sale of the reports. Under this law the reporter, while nominally a state official, was forced to assume personally the risk and expense of publishing the reports, although, as will be seen, state assistance was sometimes extended.\textsuperscript{14}

Available information indicates that the only two active candidates for the new position were Charles H. Stewart\textsuperscript{15} and Ebenezer Burke Harrington. The latter, a young lawyer, was selected by the court. Much of Harrington's early life is obscure. He apparently left the home of his parents in Michigan while still a youth, learned the trade of a cabinet-maker at Jamestown, New York, then later studied law at Whitestown in the same state.\textsuperscript{16} Before he returned to Michigan in 1836 he had been one of the compilers of Barbour's and Harring-

\textsuperscript{14} Mich. Rev. Stat. (1838), p. 414. For a brief sketch of the office of reporter by Justice James V. Campbell, who was a contemporary and had business connections with at least two of the reporters (Walker and Douglass), see his opinion in People ex rel. Ayres v. State Auditors, 42 Mich. 422 at 431-435, 4 N. W. 274 (1880).

\textsuperscript{15} In soliciting the support of William Woodbridge for the office, Stewart claimed that he had received favorable expressions from most of the Detroit bar, including A. D. Fraser. An inclosure from Fraser stated the opinion that Stewart would make an excellent reporter. Dec. 4, 1838, Woodenbridge Papers (Burton Historical Collection, Detroit Public Library).

\textsuperscript{16} "Daniel B. Harrington," 5 Michigan Pioneer Collections 138 at 141-142 (1884). Authorities differ on whether Harrington's first name was "Ebenezer" or "Edmund." The above article, along with 1 Michigan Biographies 374 (1924) (Michigan Historical Commission) and 1 Jenks, St. Clair County, Michigan: Its History and Its People 196 (1912), use the former name, but the supreme court journal calls him by the latter. Sup. Ct. Journ., 1st circ., vol. 1, pp. 299, 350. In 1836 he signed his name as "Ebenezer" (Fisk v. Leroy, Sup. Ct., 1st circ., file No. 5), which should be conclusive unless he had it legally changed. A short biographical sketch of Harrington can be found in R. B. Ross, The Early Bench and Bar of Detroit 85 (1907).
ton's *Equity Digest* for the state of New York. He was reputed to have been admitted on October 20, 1836, to the bar in the circuit court of St. Clair county, and then to have opened a law office in the village of Desmond, Michigan. During the next few months he edited and published the *Lake Huron Observer* at Port Huron, made a venture in real estate speculation which was a complete failure, and then moved in 1838 to Detroit, where he practiced law as a partner of James A. Van Dyke. Governor Stevens T. Mason appointed him and E. J. Roberts to edit and superintend the publication of the revision of Michigan laws made in 1838. A practical politician, he was a delegate from St. Clair county to the Democratic state convention at Ann Arbor, July 20, 1837, and was nominated and elected state senator from the fourth district in 1838. He continued to hold his senatorship through the 1839 session and was called "as useful a legislator, as any man in the senate." Moreover, he was in 1840, while still state reporter, the prosecuting attorney for Michilimackinac county. These activities, in addition to his continuous services as an attorney and counselor at law, would seem to indicate that the duties of reporting were not then very onerous.

The exact date of Harrington's appointment as reporter has not been determined, but it was probably about February 20, 1839. "To

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17 An article had appeared in the Detroit Advertiser, Sept. 21, 1838, purporting to be an extract from the American Jurist, which charged that Harrington had acted as no more than a clerk in the compilation of the Equity Digest. Harrington replied in a letter to the editor of the Free Press that the charge was false, that a contract had been made by Barbour and by himself, providing that both their names should appear on the title page, and that he had actually done more work on it than had Barbour because the latter was at the same time the chancellor's clerk. See the Free Press (Detroit), Dec. 25, 1838.

18 JENKS, ST. CLAIR COUNTY, MICHIGAN: ITS HISTORY AND ITS PEOPLE 196-197 (1912).

19 Id.; MICHIGAN BIOGRAPHIES 374 (1924); "A Good Chancery Lawyer but Unlucky in Real Estate," newspaper clipping, undated, in 2 C. M. BURTON, SCRAPBOOK 106 (Burton Coll.). Harrington laid out a "paper town" on Lake Huron north of Port Huron in 1837 but failed to sell any lots.


21 Free Press, July 24, 1837; Sept. 19, 1838; Nov. 24, 1838. In the Senate he was a member of the committee on the judiciary. Senate Journ., 1839, p. 7.

22 MACOMB DEMOCRAT, quoted in the Free Press, March 28, 1839.

23 See the notice (July 10, 1840) and the subpoenas (July 20, 1840) in the examination of A. R. Davenport, "... Inspector of Fish for Michilimackinac County." WOODBRIDGE PAPERS, folder July 11-20, 1840 (Burton Coll.).

24 There is no entry in any of the extant Journals of the Supreme Court indicating the date of appointment, but H. N. Walker, Harrington's successor as reporter, stated that it was in February 1839. See the preface to MICHIGAN CHANCERY REPORTS (Harrington). The leading Democratic newspaper of the state did not announce the
handsome talents and much legal learning and experience, Mr. Harrington unites habits of industry which well qualify him for the proper discharge of the duties of the office,” was the comment of the Detroit Free Press. In view of the fact that the only volume of reports which he edited was that of the court of chancery, and that no opinions of the supreme court were published while he was in office, the question whether Harrington adequately fulfilled his duties as reporter may well be raised. Existing manuscript opinions prove without doubt that he did edit several opinions, complete with headnotes, statement of facts, arguments of counsel, and revisions of the original drafts of opinions written by the justices of the supreme court. Included in the files of the court are six opinions in cases decided at the January terms of 1838, held at Detroit and Ann Arbor, all of which are in the handwriting of Associate Justice Epaphroditus Ransom. They are accompanied by other drafts of the same opinions written by Harrington in the form of reports. Some of these contain a penciled annotation, “not to be reported,” written by an unidentified person, probably a later reporter; there are also short memoranda penned by Harrington for both the majority and dissenting opinions delivered in a case decided in 1839. However, the remaining manuscript opinions, most of which were written by Chief Justice Fletcher, show no marks of editing by the reporter.

This paucity of existing opinions reported by Harrington does not by itself constitute sufficient evidence to censure him for neglecting his duties; because of the incomplete status of the files, and the probability that many of his reported opinions were never in the official files, it would be unjust, without more positive evidence, to make such a charge. Moreover, there are strong grounds to believe that he intended as early as 1840 to publish a volume of chancery court and supreme court reports.

appointment until May 22. Free Press, May 22, 1839. However, there is documentary proof that his salary must have begun sometime in February, because on April 23 he was paid $162, more than a quarter of a year’s salary. Documents of the Senate of the State of Michigan (hereafter cited as Senate Docs.), 1840, I, 518.

25 May 22, 1839.


27 Henretty v. City of Detroit, Sup. Ct., 1st circ., file No. 159.

28 A notice appeared in the newspapers requesting the clerks of the several counties to send to Harrington at Detroit the names of attorneys in their counties, because he
Formal notice of the delay in publishing the reports was taken by the state senate in 1841, which adopted a resolution directing Harrington to inform the senate in the near future "the number of cases decided by the supreme court, designating the title of the cause, what judges have furnished him with a written opinion, and the time when furnished, and in what circuit the cause has been decided, and also the same, as near as may be, in the court of chancery, and at what time a volume of reports of the decisions of the supreme court, or of the court of chancery, will be published."^29

Harrington's reply to this legislative request is most instructive. He claimed that since the date of his appointment as reporter he had attended nearly all the terms of both the supreme court and the chancery courts, that he had kept an accurate list of cases with notes on their principal points, and that he had examined the papers in over seven hundred causes. However, it was his contention that the justices of the supreme court had directed him to report only seventy-three decisions. According to Harrington, up to 1841 only one member of the court, Justice Ransom, had sent in his opinions; these, the reporter asserted, he had prepared for the press, but he had been informed by the chief justice that opinions had been written in most of the cases in "schedule B" and were then ready for the reporter. Furthermore, Harrington stated that in September, 1840, he had contracted with Dawson and Bates for the printing of one volume of reports for each court, that this printing had begun in October, and that about three hundred pages of the chancery volume were finished and about one hundred more pages ready to be printed. "The cases in the supreme court will be printed and ready for delivery by the fifteenth of June next [1841]."^30

The following year, when the advisability of maintaining the office of reporter was questioned by the new economy-minded governor, is "now preparing the first number of reports of the cases decided in the court of chancery and supreme court of this state, which will be published during the ensuing winter, and is desirous of ascertaining the number of Attorneys in the State, that he may the better judge how large an edition will be necessary." Free Press, Nov. 28, 1839; Michigan State Journal (Ann Arbor), Jan. 1, 1840.

^29 Senate Jour., 1841, p. 74. Adopted on Jan. 15.

^30 Senate Docs., 1841, No. 38, pp. 147-148. On the last day of the legislative session in 1841, a resolution was offered that Dawson and Bates should be paid the sum of $912 for printing the first volume of chancery reports, provided that the reporter should relinquish all his right and title to any profits from the sale of the reports, but it was not adopted. Senate Jour., 1841, pp. 489-490. However, it appears that Harrington proceeded with his plans and published a pamphlet volume of chancery reports which extended through 1840 and was ready for sale in the summer of 1841. See the Daily Advertiser (Detroit), July 7, 1841.
John S. Barry,\textsuperscript{81} the legislature proceeded to investigate the whole subject. A petition by Harrington asking for relief in return for the printing of three hundred and seventy-two pages of chancery reports was rejected on the recommendation of the house committee on claims, which held that the law giving the reporter a salary and allowing him profits from sale of reports rendered such relief unnecessary.\textsuperscript{82} In reply to inquiries sent by the house committee on the judiciary to the members of the supreme court to ascertain their views upon the subject and to learn the "true reasons" why the reports had not been published, letters were received from each of the four justices.\textsuperscript{83}

Chief Justice William A. Fletcher's answer was a conditional one: "If the present judicial system is to continue, I think some other means of publishing the reports, as they can be prepared, might be adopted which would be attended with less expense."\textsuperscript{84} Justice Ransom stated that the creation of a reporter was entirely premature, that in 1838 there had been few cases pending which, when decided, would settle the law, and that the benefits derived from reporting them would not equal the expense to the treasury. He suggested that instead of abolishing the office, it would be necessary only to repeal the law providing for the reporter's salary, as the incumbent would thereupon resign; by this procedure the office would be left in existence so that when a reporter was needed one could be provided by merely restoring the salary. He also suggested that until a new reporter should be appointed, the opinions of the supreme and chancery courts ought to be filed with the secretary of state, who should publish a synopsis of each

\textsuperscript{81} In his annual address (1842) Governor Barry repeated most of the information which Harrington had conveyed to the senate in 1841, but said that enough opinions had been received from Justice Ransom to make about 100 pages and none from the other justices. "These facts naturally suggest the inquiry whether, under the present legislation upon the subject, the public are likely to receive an adequate benefit for the expense incurred in providing a reporter." He said that the subject required the attention of the legislature, and that either the reporter should be abolished or more effectual means should be provided to publish supreme court decisions. \textit{Journal of the House of Representatives of the State of Michigan} (hereafter cited as \textit{House Jour.}), 1842, p. 48.

\textsuperscript{82} Id., pp. 127, 327.

\textsuperscript{83} \textit{Documents of the House of Representatives of the State of Michigan} (hereafter cited as \textit{House Docs.}), 1842, No. 21, pp. 85-94. The judiciary committee included the letters of the justices in full in their report because of the complete information they contained and because "they so perfectly exculpate those functionaries from what a cursory reader of the governor's message might suppose a censure upon them," but asserted that the only desire of the governor was "to discharge his whole duty to the people of this state." Id., 87.

\textsuperscript{84} Id.
case in the newspapers at no cost to the state.\textsuperscript{35} Justice Charles W. Whipple wrote that

"... under existing circumstances, the office of reporter is of but little practical importance, and might well be dispensed with. In expressing this opinion, I am not insensible of the great importance of perfecting the judgments and opinions of the highest judicial tribunal in the state; but under the present system, this cannot be done."\textsuperscript{36}

Of the four justices, the only one who believed that it was proper for the position of reporter as constituted to be continued was George W. Morell, who stated that the business of the supreme court had accumulated and in the near future would be increasing sufficiently to justify retention of the office.\textsuperscript{37}

Although a majority of the court seemed to have been inclined to doubt the necessity for an official reporter, the fundamental reason for their stand clearly arose from the belief that they did not have enough opportunity (because of their burdensome task of presiding in the circuit courts) to perform the research and to spend the time necessary for the writing of adequate opinions. Each one of them stressed this point emphatically in his letter to the house judiciary committee. For example, Chief Justice Fletcher wrote that

"... we have not time, under the present system, to do that which we think the interest of the public requires, to draw up with care, opinions in the great variety of cases which are presented, many of them involving new and important principles, and which opinions are to become written law."\textsuperscript{38}

Associate Justices Ransom, Whipple, and Morell expressed similar views, all of them blaming the requirement of circuit duty as the chief obstacle to thoughtful consideration and preparation of opinions in the majority of decisions.\textsuperscript{39} With the exception of Ransom, none of them intimated the belief that the quality of causes which had been adjudicated by the supreme court since the appointment of a reporter in 1838 was of so minor a character that written and published opinions were not justified or desirable, at least in many cases. Even the state-

\begin{itemize}
  \item \textsuperscript{35} Id., p. 89.
  \item \textsuperscript{36} Id., p. 91.
  \item \textsuperscript{37} Id., p. 94.
  \item \textsuperscript{38} Id., p. 88.
  \item \textsuperscript{39} Id., pp. 90, 91-92, 93-94. Whipple suggested another justice be added to the supreme court, which would help both the supreme and the circuit courts and allow the members more time to write opinions.
\end{itemize}
mement of Ransom on this point (referred to above) appears to be rather
singular in the light of the fact that he himself had written at least
six opinions for the year 1838.\textsuperscript{40} Moreover, Justice Whipple very
pointedly called attention in a later decision to the handicap that re­
resulted from a lack of published opinions before 1843,\textsuperscript{41} and neither
Fletcher nor Morell was opposed to the principle of printing reports
of the supreme court's decisions. Nevertheless, the judiciary committee
of the house recommended, as Ransom had advised, the repeal of the
law which had provided for the salary of the reporter,\textsuperscript{42} and a joint
resolution to that effect was adopted by the legislature and approved
by the governor on February 16, 1842.\textsuperscript{43}

Perhaps more important than the fate of either Harrington or the
office of reporter is the question how many opinions were written by
the justices of the supreme court prior to 1843 and what happened
to them. To summarize briefly, opinions from thirty-seven cases which
date from that period are known to be in existence.\textsuperscript{43a} All these cases
are digested in an appendix to this article. The opinions in twenty­
eight cases are in manuscript form only and have never been published,
two others for which the manuscripts are still in the court files have
been printed, and the remaining seven can be found only in later
published reports. The assertions by Harrington noted above con­
cerning his intentions to publish a volume of supreme court reports
during 1840–1841 were of a prospective nature and can be relied
upon only as an indication that he expected to have collected enough
opinions by those dates to constitute a volume, but the significance
of his statement that the supreme court had directed him, by 1841, to
report seventy-three cases cannot be waived lightly. If true, it would
mean that nearly two years before 1843 the supreme court had selected
twice as many cases to be reported as now exist for the whole period,

\textsuperscript{40} See note 26 above.

\textsuperscript{41} In the case of Robinson v. Steam Boat Red Jacket, 1 Mich. 171 at 173 (1849),
Whipple wrote: "The learned counsel for the plaintiff was not advised, until the argu­
ment of the case, that a construction had been given to the statute in question by this
court—the opinion never having been published [referring to Moses v. Steam Boat
Missouri, decided Jan. 1842]. Had the fact of its promulgation been known, it must
have narrowed a discussion which assumed a wider range in consequence of the prom­
inence given to a question which it was supposed had not been judicially determined."

\textsuperscript{42} House Docs., 1842, No. 21, p. 94.

\textsuperscript{43} Mich. Pub. Acts (1842), J. Res. 28, p. 168. For legislative proceedings on
this Joint Resolution, see House Jour., 1842, pp. 313, 361, and Senate Jour.,
1842, p. 254.

\textsuperscript{43a} Of these, one case is represented only by a dissenting opinion (Appendix,
Case 10) and another only by a long quotation in a later case (Appendix, Case 16).
In one case (Appendix, Case 18) there is both a majority and a dissenting opinion.
and had, presumably, assigned them to the various members to be written. Even more striking is the fact that of the thirty-seven opinions now extant which were delivered before 1843, seventeen bear the date 1842, so that for the years in which the Supreme Court intended at least seventy-three cases to be reported we have opinions in only twenty cases.\(^44\)

It is certain that as late as 1842 many of the opinions were still in the hands of the justices who wrote them and not in the possession of the reporter. For instance, Whipple stated that all of the opinions which he had delivered were in written form and were ready to be given to the reporter, who had been advised of their availability but had neglected to collect them.\(^45\) Truly mysterious are the circumstances involving the Morell opinions. Justice Morell's own words testify that he wrote them, as well as to the fact that they were mainly dissenting ones,\(^46\) but most of them have completely disappeared. Morell's wife, daughter, and son, after the justice's death in 1845, accused Justice Ransom of having called at their home and taken away the supreme court opinions of their husband and father, but Ransom vigorously denied the charge and countered with the statement that no such opinions ever existed.\(^47\) However, another authority who cannot be entirely disregarded maintained directly the opposite view. He said:

"... Judge Morell always wrote out in full his important opinions, and a full series of his manuscripts was found, but they

\(^{44}\) See appendix.

\(^{45}\) House Docs., 1842, No. 21, p. 92.

\(^{46}\) According to Morell, Chief Justice Fletcher was to have prepared his opinions in the cases he thought proper to report and give a list of them to the reporter, who was to submit it to Morell for his examination. If Morell approved the list he was to give the reporter his own decisions in cases they thought advisable to report, but he claimed that no such list had been furnished him. "The reporter was informed long ago, that my decisions, (which are most all dissenting ones,) would be furnished at a moment's notice, whenever he got the opinions of a majority of the court, for I supposed it would hardly be admissible [sic] to publish a minority decision before publishing that of the majority. The fact is, that I have had so many legal opinions to give and write out, in cases arising alone in the county of Wayne, that I have had but very little time to draw up opinions for publication in the Supreme Court, and as my brethren are willing to spread their opinions upon the record, I was perfectly willing to accommodate them." House Docs., 1842, No. 21, p. 93.

\(^{47}\) Epaphroditus Ransom to S. T. Douglass, Kalamazoo, Dec. 1, 1845, Herbert Bowen Papers (Burton Coll.). Ransom said in this letter that he had at one time examined some opinions delivered by Morell in Wayne Circuit Court, but that he had returned them immediately, and that the only time he had visited the Morell home since 1843 was to attend Morell's funeral in 1845. He claimed that Morell had not drawn up or delivered a written opinion in a single case during the year prior to the expiration of his term, except at Kalamazoo in 1843, when he delivered two or three opinions.
could not well be published without the rest [of the court's opinions]. The Reporter [Douglass] therefore, although his friend and admirer, was reluctantly compelled to begin his work at a time when the materials were more complete; and our series, for this reason, contains but a few of his opinions, and these all belong to the later years of his judicial career.\(^{48}\)

The full significance of these words can be understood better if it is remembered that their author, Justice James V. Campbell, had been from 1845 to 1850 a law partner of Samuel T. Douglass, who was without doubt the “Reporter” to whom Campbell referred, and that a few years later Douglass, by his marriage to Campbell’s sister, became his brother-in-law. These circumstances would make for an intimate acquaintance both in business and personal affairs between the two men and add credence and authenticity to Campbell’s words. Certainly Douglass had made efforts to locate Morell’s opinions, for he wrote to Chief Justice Ransom in 1845 asking for them,\(^{49}\) and, if we are to believe what Justice Campbell said, Douglass found but did not print them. Only two opinions written by Justice Morell are known to exist today, both delivered in 1843, and both have been published.\(^{50}\)

In addition to the above-mentioned six manuscript opinions of 1838 by Ransom, we have but one other of his previous to 1843.\(^{51}\) Nine of Justice Whipple’s opinions before 1843 are extant, five of which have been printed.\(^{52}\) Chief Justice Fletcher before his retirement in 1842 wrote nineteen opinions, or nearly two-thirds of all those prior to 1843 which are still available, but only two of his have been included in later reports.\(^{53}\) Moreover, it should be noted that of Fletcher’s nineteen opinions, only eight were written before the year (1842) he resigned

\(^{48}\) Justice James V. Campbell's address delivered at the acceptance of Judge Morell's portrait by the Supreme Court in 1880, printed in 43 Mich. xvi (1880).

\(^{49}\) See note 47 above.

\(^{50}\) Beach v. Botsford, 1 Doug. 199 (1843); Taylor v. Kneeland, 1 Doug. 67 (1843).

\(^{51}\) Owen v. Farmers' Bank of Sandstone, 2 Doug. 134, note (1841).

\(^{52}\) Davis v. Ingersoll, 2 Doug. 372 (1840); Godfrey v. Beach, Sup. Ct., 1st circ., file No. 188; Caswell v. Ward, 2 Doug. 374 (1842); Slaughter v. People, 2 Doug. 334, note (1842), and also with the By-Laws and Ordinances of the City of Detroit, 1842 in the Burton Historical Collection, Detroit; Royce v. Bradburn, 2 Doug. 377 (1842). In Campbell, Appellant, 2 Doug. 144 (1845), Justice Ransom quoted a long paragraph that supposedly was an excerpt from an opinion written by Justice Whipple in the case of Godfrey v. Brooks. He undoubtedly meant Godfrey v. Beach, above. See Appendix, Case 16.

\(^{53}\) Bomier v. Caldwell, 8 Mich. 463 (1841); Chamberlin v. Brown, 2 Doug. 120, note (1842). A manuscript copy of the latter opinion in the handwriting of Harrington is also extant, but it is not identical with the printed report. See Sup. Ct., 1st circ., file No. 195.
from the bench: two in 1839, one in 1840, and five in 1841. The very fact that Chief Justice Fletcher, in the few months of 1842 during which he was a member of the supreme court, wrote nearly as many opinions as did any one justice during any full year of the whole period between 1836 and 1857 permits the inference that he probably drew up more opinions than eight during the five years he served on the bench prior to 1842. We know that as early as the June term, 1837, he had taken the papers from a certain file with the intention of writing an opinion in that particular case. Although it has been stated that some of Fletcher’s opinions were printed in contemporary newspapers, the present writer has found none in any of the newspaper files which he has searched.

In spite of the fact that his salary as reporter was suspended by the legislature on February 16, 1842, Harrington did not stop his attempts to report the cases of both the supreme and the chancery courts. His interest in the decisions and in their publication was so genuine that he continued his work, providing the public press with abstracts of many chancery court opinions and presumably of some supreme court opinions. In a letter to the editor of the Detroit Free Press he explained his position admirably:

“The Legislature of this state have made no provision for the preservation or publication of the judicial decisions of our Supreme Court or Court of Chancery. Although these decisions form an important part of the law they are only known to the judges themselves, and those who are in constant attendance upon the courts. Many of these opinions have been written out with care and placed in my hands as Reporter for publication, and I have prepared them for the press, but I am unable to publish them without compensation. I will hereafter furnish you with the headnotes for publication from time to time as my leisure will permit.”

54 See Appendix.
55 See note 12 above.
56 Both R. B. Ross and G. B. Catlin, Landmarks of Detroit, Burton rev. ed., 394 (1898), and R. B. Ross, Early Bench and Bar of Detroit 64 (1907), make such statements. The latter quotes Alpheus Felch as having supposedly said the following: “Some of his [Fletcher’s] opinions, however, found their way into the newspapers of the day; and many are treasured up in the memory of early members of the bar. The latter were often cited by them in Court, and even at this late day they are sometimes quoted, and always regarded as high authority.”
57 Their nonexistence in the newspapers is corroborated by another worker who has searched for them. Potter, Address at the Unveiling of a Marker Erected to the Memory of William Asa Fletcher 9-10 (1935).
58 Free Press, Dec. 15, 1842.
The headnotes of at least nineteen chancery court cases were printed in the *Free Press* between December 15, 1842 and July 25, 1843; unfortunately none has been found for supreme court cases.

Early in 1843 Governor Barry formally recognized Harrington's continued services as well as the need for publication of the supreme court and chancery court opinions.60 Apparently the governor's attitude had changed considerably since his first annual message; nevertheless he still expressed hope that "if such reports were judiciously prepared under well digested regulations of law, the proceeds from their sale would nearly, if not altogether, reimburse the expense of their publication."61 The legislature, however, was not willing to carry out completely the governor's recommendations and adopted a compromise scheme. According to the new law it was provided that in any matter adjudicated by the supreme court, the justices therefore must pronounce an opinion and prepare an abstract of it in writing. These abstracts were to be filed by the first Monday in January of each year with the secretary of state, who was to have them published in one newspaper of each judicial circuit with the printing costs borne by the state. When enough abstracts of opinions had been accumulated to compose a volume of about three hundred and fifty pages, the secretary of state was directed to have them edited and to have one thousand copies printed at state expense and offered for sale, any profits derived therefrom to go to the state.62 As a consequence of this statute, the task of reporting what condensed opinions the justices might furnish was added to the regular duties of a state officer who had little connection with the courts and

59 Dec. 15, 1842, four cases; Dec. 29, 1842, five cases; July 25, 1843, ten cases.
60 Barry noted that the salary of the reporter had been suspended but said that the incumbent had continued to discharge the duties of the office. "It seems to me that the best interest of [the] state requires the decisions of its courts to be published, and that much other printing is now required which is of less importance and less beneficial. Indeed I consider the reports of decisions which give construction to the statutes, as important as the statutes themselves, and as necessary to be distributed among the citizens of the state for their information and guidance." *House Jour.*, 1843, p. 16.
61 Id.
62 Mich. Pub. Acts (1843), pp. 169-170. This act was approved by the governor March 9, 1843, and given immediate effect. On Feb. 3, 1843, a statement made by Harrington had been presented to the house of representatives by Justus Goodwin of Calhoun County, and as a result the question what would be the best method and means of procuring reports of the decisions of the supreme court and the court of chancery was referred to the judiciary committee. *House Jour.*, 1843, p. 225. Further action on the bill can be found in id., 1843, pp. 534, 535, 537, and in *Senate Jour.*, 1843, pp. 268, 281, 422, 429, 430, 431. A second bill which provided for the publication of the reports was adopted by the senate but not by the house. See id., 1843, pp. 363, 374-375; *House Jour.*, 1843, pp. 495, 499.
who might not possess any interest in their decisions. It is not surprising
that, as far as can be learned, there were never any tangible results from
this act; certainly it was not an adequate solution of the problem.

Great influence must have been exercised upon the legislators by
the very able report made in the house of representatives by H. N.
Walker, a member of the house from Detroit who, after a few months,
succeeded Harrington as reporter. Petitions by Harrington concerning
publication of the opinions had been presented in both the senate and
the house, and the latter body referred the matter to a select committee
of which Mr. Walker was the chairman. As a result of their deliberations,
the representatives composing this committee concluded that the
decisions of the highest state courts were too important a part of the law
for their publication to be neglected. They believed that the establish­
ment of legal principles, the interpretation of constitutional provisions,
and the construction of important laws, all of which in their reasoning
were essential to the administration of justice, could not be understood
by the people without printed opinions. Other points the committee
emphasized were that requiring written opinions would insure careful
attention and examination by the courts to the questions before them,
and that their publication would create a guide for future courts which
would make for uniformity in practice and procedure.

Rather strangely, the committee adopted the view that published
court decisions would be a means of preserving the separation of powers
 guaranteed by the state constitution, and would thus constitute a “guard
against encroachments by the judiciary upon other departments, and
the assumption of powers which do not belong to them....” The statute
of 1843 which required justices of the supreme court to prepare ab­
stracts of their opinions and which provided for the publication of these
abstracts in various newspapers at the expense of the state was scoffed
at in the committee report. It was pointed out that the cost of such an
undertaking would equal that of the regular form of reports, and that
“the publication of an abstract of an opinion of the court without the
statement of the case, and without the care and attention of a proper
and competent person to correct the proof, would be of no more author­

63 Not one such abstract has ever been found in any of the newspapers searched
by this writer. Moreover, it was stated in the house of representatives in 1844 that
this act had never been complied with and that it never could be “with any benefit
or advantage to the state.” House Jour., 1844, p. 118.

64 S. M. Green, later a justice of the supreme court, presented the petition in the
senate and Mr. Walker presented it in the house, both on Jan. 15, 1844. See Senate
Jour., 1844, p. 50, and House Jour., 1844, p. 52.
ity in legal proceedings than any other article found inserted in a newspaper would be evidence of the facts therein contained. ..." Consequently, the committee introduced a bill to provide for publication of the decisions of the supreme court and of the court of chancery; after much discussion and several amendments, the bill was passed by both houses and approved by the governor on February 29, 1844.

With one exception this new law established the reports and the office of reporter on a basis similar to that set forth in 1838 by the Revised Statutes. By virtue of its provisions the justices of the supreme court and the chancellor, or any three of them, were authorized to select the reporter, who would hold office entirely at their pleasure. For those cases which were considered to be of enough importance, they were directed to send full notes of the decisions to the reporter, who was to prepare them for publication, along with condensed arguments of counsel, in volumes of approximately six hundred pages. Of the one thousand copies ordered to be printed, nine hundred were to be sold at a price not over three and one-half dollars each in Michigan or five dollars each out of the state; the remaining one hundred copies were to be sent to the secretary of state, whose duty it was to distribute two of them to the Library of Congress, one to each of the state libraries of the United States, one to each county clerk in Michigan, and the remaining ones to the Michigan State Library. A very fundamental change, however, was made by the fourth section of the law, which relieved the reporter of the risk of publishing the works at his own expense. This desirable removal of responsibility was to some degree neutralized, however, by the requirement that payment to him for cost of publication was to be made only after completion of a volume. In addition the reporter's compensation was reduced to five hundred dollars annually; however, he was still entitled to any profits from the sale of reports.

Although this act was given immediate effect, the justices and the chancellor, apparently anticipating by one day their powers thus con-

65 The entire report of the select committee is in the House Jour., 1844, pp. 116-119.
66 The greatest amount of controversy over the bill occurred in the house, where the question of salary to be paid the reporter was much disputed, but the senate made several amendments and set the salary at $600 per year. See House Jour. 1844, pp. 119, 195, 209, 279-280, 297, 314-315, 319, 324, 353, 359, 364, 389; Senate Jour. 1844, pp. 230, 245, 246, 251.
68 Id. The act specifically repealed those provisions of the Revised Statutes of 1838 and of the law of 1843 which concerned the reports and the reporter.
ferred, reappointed Harrington as reporter on February 28, 1844. This action constituted definite endorsement of his services as reporter since 1839, but it was not destined that Harrington should live to vindicate himself of the last vestige of suspicion concerning the adequate performance of his duties; he died in early August, 1844, a little over five months after his second appointment and before a single volume of reports, either of the supreme court or of the court of chancery, had been issued to the public.

In addition to the evidence already presented to indicate that the justices of the supreme court before 1843 wrote more opinions than are known to be extant, there is good proof that Harrington himself possessed many more opinions of that period than we now have. For instance, it was said as early as January 2, 1843, that “All the present justices of the supreme court, have furnished to the reporter their written opinions in cases decided by them previous to the January term of 1842, which, together with the opinions now in the hands of the late chief justice for revision, will make a volume of reports of that court.”

Again in 1844 it was stated that the reporter had sufficient manuscript opinions delivered by the supreme court justices to make a volume of about six hundred pages, which, along with the volume of chancery court reports (the publication of which had already been commenced), would “embrace all the decisions of the supreme court and court of chancery, of sufficient importance to report from the organization of the state government down to the present time.” Some time previous to June 22, 1844, Harrington had made overtures and had

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69 Sup. Ct. Jour., 1st circ., vol. 1, p. 299. The appointment was dated Feb. 28, 1844, but the entry does not appear to have been made in the Journal until May 3, 1844. It is possible but not certain that the appointment was not made until the later date, but was effective retroactively to the former. Justices Ransom, Whipple, Felch, and Goodwin and Chancellor Manning signed the appointment.

70 The Proceedings and Resolutions on the death of Harrington, adopted by the Bar of Detroit on Aug. 5, 1844, may be found in Sup. Ct. Jour., 1st circ., vol. 1, 350 (1845), and in the Free Press, Aug. 6, 1844. J. A. Van Dyke, Harrington’s law partner, expressed his great respect for the deceased, and H. N. Walker and G. C. Bates were appointed members of a committee to write the resolutions of the bar. It was resolved in part that “we cherish the highest respect for the professional learning of the deceased, for the purity and uprightness of his public and private character, for his uniformly honorable and correct deportment in every relation of life, and for the many excellent qualities which belonged to him as a man.” Id.

71 Annual Address of Governor Barry, House Jour., 1843, p. 16. The “late chief justice” referred to was W. A. Fletcher, who, it would seem, still had in his possession several opinions to revise. Possibly some or all of them were the eleven Fletcher opinions delivered in 1842 which are now in the files or in later reports.

72 Report of H. N. Walker from the select committee to consider the petition of E. B. Harrington, House Jour., 1844, p. 118.
received a proposition for the publishing of a volume of supreme court reports, but there is no proof that any had been printed before his death. The wide discrepancy between the number of opinions which would have been necessary to constitute a volume of supreme court reports of approximately six hundred pages and the number of opinions which are known to exist—many of which are, indeed, quite brief—makes it appear that, even if the decisions which never came into the possession of the reporter are disregarded and not counted, the justices of the state supreme court wrote opinions in more cases during the first seven or eight years of their incumbency than the thirty-seven which are now in the files or included in later volumes of reports.

In September 1844, Henry N. Walker was appointed by the supreme court justices and by the chancellor to be the second state reporter. Mr. Walker, a graduate of the Academy at Fredonia, New York, came to Michigan in 1835, entered the office of Elon Farnsworth and A. D. Bates as a law student, and was admitted to the bar, becoming Bates’ partner after Farnsworth was appointed chancellor. Walker had been elected to serve in the 1844 session of the legislature, where, it will be recalled, he introduced and supported in the house the bill, which later became law, providing for restoration of the reporter’s salary and for publishing the reports of the supreme court and court of chancery. Quite likely his legislative work on this bill had some influence on his selection by the justices and the chancellor. Walker’s efforts to obtain the position indicate that he desired it and that it was neither unwanted nor thrust upon him without notice. His appoint-

— A memorandum written by Harrington on June 22, 1844, assured the firm of Wilcox and Harsha that they could depend upon publishing the second volume of his chancery reports “according to the proposition to publish the Supreme Court Reports . . . .” E. W. Morgan Papers (Burton Coll.)

— There were nearly sixty opinions, delivered between 1843 and 1845, printed in the first volume of Douglass’ Michigan Supreme Court Reports, and several of them were of great length.

— Free Press, Sept. 10, 1844.

— See the obituary of Walker in 9 Michigan Pioneer Collections 88-89 (1886). This law partnership of Bates and Walker was changed during the late thirties and early forties first to Bates, Walker, and Douglass, then to Douglass and Walker, and finally to Walker, Douglass and Campbell, the two new members being S. T. Douglass and J. V. Campbell, both of whom later became justices of the supreme court.

— See notes 64 and 65 above.

— On Aug. 24, 1844, he wrote to Lucius Lyon that the supreme court was about to appoint a reporter, that his (Walker’s) name had been presented as a candidate, and that he wished Lyon to write to Chief Justice Ransom in his favor because of Lyon’s “strong influence” with the Chief Justice. Lyon Letters (William L. Clements Library, University of Michigan).
ment was approved by the Democratic press of the state and probably by the bar in general. 79

 Undertaking his duties immediately, the new reporter soon brought out the first large volume of reports of the decisions of any court in Michigan's history, those of the court of chancery under Chancellor Elon Farnsworth, 1836-1842. It was fittingly termed Harrington's Chancery Reports, inasmuch as practically all of the work on it had been done by the first reporter and not by Walker. In fact, as early as 1841 nearly three hundred pages of chancery opinions had been printed by Harrington at his own expense. 80 Although the burning of the printing office destroyed a portion of the rest of the manuscript, the volume was prepared almost entirely by Harrington and the last half of it was partly in press when Walker assumed office. 81 A contemporary newspaper notice stated that "A portion of the volume is composed of the pamphlet volume of reports published sometime prior to Mr. Harrington's decease, and the remainder has since been made up from his manuscript and notes," 82 which would indicate that some of the sets of pages printed by Harrington in 1841 and 1842 were perhaps bound into pamphlet form before the full volume was issued. However, no copy has been found, nor even any confirmation that one ever existed.

 Although Walker was appointed attorney-general of Michigan by

 79 "The high legal attainments and untiring industry of Mr. Walker render him peculiarly well qualified for the proper discharge of the duties of the office in question." FREE PRESS, Sept. 10, 1844.

 80 Harrington's bill for printing ($831.43) was not allowed by the legislature because the reporter had been required to publish the volumes at his own expense, although the statute had not been very clear on the question. See HOUSE JOUR., 1843, p. 16, and id., 1844, pp. 117-118. A committee of the house recommended in 1844 that Harrington should be reimbursed for the reports already printed and should be paid reasonable compensation for his services (id., 1844, p. 119), and an act of the same year authorized the state treasurer, auditor general, and secretary of state to settle his claim. Mich. Pub. Acts (1844), pp. 20-21. In the "Annual Report of the Auditor General" dated Nov. 30, 1844, an item shows that the sum of $2,323.66 had been paid for the supreme and chancery courts' reports, including the salary of reporter, but there is no indication of how much of this went to Harrington or his estate, to the printer, or to Walker. JOINT DOCUMENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF MICHIGAN (hereafter cited as JOINT DOCS.), 1845, No. 2, p. 10.

 81 See the preface by H. N. Walker to HARRINGTON, MICHIGAN CHANCERY REPORTS.

 82 FREE PRESS, March 13, 1845. There is evidence that in the summer of 1841 the first portion of the volume, containing decisions through 1840, was bound up in some fashion and offered for sale at three dollars per copy. See the advertisement in DAILY ADVERTISER (Detroit), July 7, 1841. No copy of this volume has been seen or located by this writer.
the governor and the senate on March 24, 1845, this date does not mark the end of his activities as reporter; at least, the preface he wrote to the second volume of chancery reports, published under his auspices, bears the date April 10, 1845, and his successor was not named until the following July. However, in the preparation of this second volume Walker was aided by Chancellor Manning, whose decisions between April 1842 and March 1845 were recorded therein, and who personally inspected the work, offered suggestions, and even wrote some of the headnotes. In addition, it is probable that Harrington before his death had labored to some extent upon the manuscript which later constituted this volume, but the major credit must be given to Walker. Both volumes of chancery reports were well executed for their time, but they have been superseded for most practical purposes by later annotated editions. It is not to be supposed that Walker confined himself in his capacity as reporter solely to the decisions of the court of chancery; on the other hand, no reports of supreme court cases were published while he was in that office, and the only discovered contemporary reference located from which could be inferred any intention on his part to publish such reports lacks authoritative support and appears to be erroneous.

Upon Walker's transfer to the office of attorney-general, several candidates for the position of reporter appeared and an active campaign was carried on for at least two months before an appointment was made.

88 Free Press, March 25, 1845.
84 Governor Barry claimed too optimistically on Jan. 6, 1845, that the second volume of chancery reports was already in press and would be published the ensuing month. "Annual Message of the Governor," Joint Docs., 1845, p. 6. Walker authorized J. V. Campbell to act as his agent in the sale of the volumes. See the power of attorney and the agreements for sale made by Campbell, March 5 and 6, 1845, in H. N. Walker Papers (Burton Coll.).
85 Michigan Chancery Reports (Walker), Preface (1845).
86 Harrington wrote that a part of the manuscript for his second volume of chancery reports would be ready by the first of August 1844. E. B. Harrington to Wilcox and Harsha, June 22, 1844, in E. W. Morgan Papers (Burton Coll.).
87 In 1872 and 1878 second editions, edited by T. M. Cooley and J. V. Campbell respectively, were published.
88 It was stated by Governor Barry on Jan. 6, 1845, that the first volume of reports of supreme court decisions was in the hands of the printer and that there was hope that it would be completed before the session of the legislature ended. "Annual Message of the Governor," Joint Docs., 1845, p. 6. Actually, the first volume was not printed until 1846. It is interesting to note that the governor anticipated "most salutary results" from the publication of the reports, because "A judicial construction will thus be given to the statutes, and a uniformity secured in the administration of justice in the various circuits, and in courts of inferior jurisdiction throughout the state, which could not otherwise be obtained." Id. 7.
The three men most prominently mentioned as worthy of holding the post were Samuel T. Douglass, Andrew Harvie, and G. V. N. Lothrop, with Douglass apparently having the greatest number of advocates. Among the prominent supporters of Douglass were George Miles, who soon became a justice of the supreme court, Jefferson G. Thurber, who later was speaker of the house of representatives, and James B. Hunt, a representative in Congress from Michigan (1843-1847); however, Douglass was opposed quite bitterly by the former attorney-general, Peter Morey. Douglass himself was not above soliciting support; following the example of Walker (his law partner) he requested Lucius Lyon, an influential personage in Michigan politics at that time, to recommend him to the justices and to the chancellor for the position. His comments in his letter to Lyon are illuminating:

"The office will necessarily be filled by someone residing here. It is not worth at the most as far as I can judge over $700 & will occupy nearly all of a persons [sic] time for the next two years at least and always a great part of it. My acceptance of it will be a pecuniary sacrifice but a sacrifice which I feel willing to make for the sake of the more active life it would enable me to lead, requiring as it would my attendance upon the terms of the Sup: & Ch: cour[t]'s in the several circuits.—It is my intention in case I receive the appointment to retire from my present business connexion. My health suffers too severely from my present confinement."  

Why the reporter would have to reside in Detroit is not clear, unless Douglass meant that the largest share of the business of the supreme and chancery courts was done in the first circuit, but the argument was proved unsound by the fact that both of the next two reporters were not residents of Detroit. Presumably Douglass believed

89 In letters to Justice Alpheus Felch, Miles wrote on April 28, 1845, that Douglass had the two very important requisites of accuracy and great industry; Thurber wrote on May 31, 1845, that Douglass was a gentleman of integrity, ability, good legal acquirements, and an irreproachable character; and Hunt on Sept. 23 [?], 1845, wrote that Douglass was a sound lawyer, a good Democrat, and would give general satisfaction. On the other hand, Morey wrote Felch on May 1, 1845, that he believed Harvie was the best fitted for the position; he also protested against "the principle of permitting Mr. Walker to transfer the office of Reporter to his partner [Douglass]" and stated that "Douglass is a Whig every inch of him." These letters may be found under the appropriate dates in the Alpheus Felch Papers (Burton Coll.).


91 Id.

92 Randolph Manning of Pontiac and George C. Gibbs of Marshall.
that only two hundred dollars in profits could be made annually from
the sale of the reports, because the salary of the reporter was still five
hundred dollars per year, and, as he stated, anyone who gave up a
lucrative business to accept the office of reporter would entail a "pecuni­
ary sacrifice." However, it should be noted that, contrary to his ex­
pressed intentions, Douglass did not retire from his law partnership
when he received the appointment, but continued in active practice of
his profession throughout the period of his incumbency as reporter.93
His appointment, announced in Detroit on July 7, 1845,94 was probably
made at the July term of the second circuit of the supreme court held at
Ann Arbor.95

Although Samuel T. Douglass was born in Vermont in 1814, his
parents moved to New York state when he was still a young child. There
he was educated at Fredonia Academy, and later studied law in
the offices of James Mullet and of Esek Cowen, both noted attorneys.
He came to Michigan in 1837, was admitted to the bar in 1838, and,
after a few months spent in Ann Arbor, settled in Detroit, where he
entered the law firm of Asher B. Bates and Henry N. Walker. When
Bates retired in 1840 a partnership was formed with Walker under the
name of Douglass and Walker, and in 1845 James V. Campbell was
added as a partner. Douglass held the offices of city attorney of Detroit
and of president of the Detroit Young Men's Society in 1843. Some­
what interested in science and geology in addition to the law, he ac­
companied his cousin, Douglass Houghton, the first state geologist of
Michigan, on at least two of his journeys to the Lake Superior regions.
A Democrat in politics, but not strongly partisan, he was highly re­
garded both legally and personally, and, until he was elected to the
bench in 1851, his law firm ranked among the best and most prominent
in Detroit.96

93 See 8 DOUGLASS, WALKER, and CAMPBELL, LETTERTRESS BOOK, 1847-1850,
in the Michigan Historical Collections, University of Michigan.
94 The FREE PRESS, July 7, 1845, commended the appointment highly: "The
selection is an excellent one. Mr. Douglass is a sound, well read and industrious lawyer;
and both in professional and private life has, in an unusual measure, secured the con­
fidence and respect of his fellow citizens." Justice Ransom called Douglass his "own
much esteemed friend . . . to whom I am strongly attached, & whom I regard as
one of the most valuable & promising men of his age, in our profession." E. Ransom
to H. N. Walker, Aug. 22, 1846, H. N. WALKER LETTERS (Burton Coll.).
95 Inasmuch as the JOURNAL for the second circuit of the supreme court, 1836-
1851, is missing, we have no official record of the appointment.
96 These facts have been gathered from the following biographical sketches of
Douglass: Buel, "The Bench and Bar of Detroit," 3 MAG. WEST HIST. 669 at 700-704
1886); Chaney, "The Supreme Court of Michigan," 2 GREEN BAG 377 at 385-386
1890); CYCLOPEDIA OF MICHIGAN 170-171 (1890); FARMER, THE HISTORY OF
Soon after his appointment Douglass exhibited vigor in the prosecution of his duties as reporter, taking steps to secure and edit the opinions delivered by the justices of the supreme court. By October 7, 1845, he wrote that he was so hard at work that he could not find even an hour's leisure time. Douglass seems to have entertained some thought of publishing the opinions of the supreme court which had been written before 1843, but Ransom, chief justice since 1843, counseled against such a move, stating that "a report of them would be neither useful to the publik or the Profession, nor very creditable to the Court. The truth is, that while Judge Fletcher was on the Bench, most of the decisions were announced orally, by him, & the opinions written out—I speak of those held by myself—were but hasty & imperfect sketches of the decision." It is quite probable that Douglass, through his predecessor and law partner, Walker, fell heir to the papers, notes, and opinions gathered by the first reporter, Harrington. At least we know that Walker employed Harrington's manuscript for nearly all of the first, and part of the second, volume of chancery reports, and there is little reason to suppose that Walker did not turn over to Douglass all of the materials pertaining to the office of reporter.

No opinions before 1843 were included in the first volume (1846) of reports published by Douglass, but in his second volume (1849) there are six, one of which had been delivered in 1840, one in 1841, one in 1844.

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97 Felch sent his earlier opinions to Douglass on Sept. 29, 1845, but reserved the remainder for use and reference in the circuit courts. A. Felch to S. T. Douglass, Sept. 29, 1845, Felch Papers (Burton Coll.). C. W. Whipple to S. T. Douglass, Pontiac, Dec. 1, 1845, Herbert Bowen Papers (Burton Coll.). Whipple said that he wrote an opinion in the case of Ketchum v. Pierce, (Sup. Ct. Calendar, 3d circ., No. 72 [1844]) which he was unable to find at a later date. C. W. Whipple to S. T. Douglass, Pontiac, Aug. 21, 1846, Herbert Bowen Papers. It has never been published or located.


99 E. Ransom to S. T. Douglass, Kalamazoo, Dec. 1, 1845, Herbert Bowen Papers (Burton Coll.).
and four in 1842. He himself explained as follows the failure to print more of them:

"No complete series of the decisions of the court prior to 1843 can now be obtained, and the recent revision of the statutes has rendered many of those which have been preserved, of comparatively little value. Some of them, however, are of permanent interest, and these, together with the decisions made subsequently to the time when the above mentioned volume closes, will be published in another volume now in the course of preparation, and which it is hoped will be issued from the press during the next summer."

Of the six earlier opinions printed in volume two, a manuscript copy of only one of them is known to exist; this fact suggests the possibility that Douglass might have possessed many more manuscript opinions which never were filed with the clerk of the supreme court. As late as 1848 Douglass wrote that a manuscript opinion in a certain case decided in 1842 "is now before me."

Governor Alpheus Felch, who had been a justice of the supreme court from 1842 to 1845, in January 1846 estimated that probably three volumes would be required to report the supreme court cases already decided; in actuality, however, less than a volume and a half were filled by the decisions which, by a strict interpretation, should have been comprehended in the period mentioned by Felch. Although the gov-

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200 All six were printed as footnotes to later cases in which similar questions were involved. They were: Davis v. Ingersoll, 2 Doug. 372 (1840); Owen v. Farmers' Bank of Sandstone, 2 Doug. 134 (1841); Caswell v. Ward, 2 Doug. 374 (1842); Chamberlin v. Brown, 2 Doug. 120 (1842); Royce v. Bradburn, 2 Doug. 377 (1842); and Slaughter v. People, 2 Doug. 334 (1842).

201 FREE PRESS, Jan. 20, 1847.


203 S. T. Douglass to H. C. Wright, Detroit, Feb. 22, 1848, in 8 WALKER, DOUGLASS, and CAMPBELL, LETTERPRESS BOOK 263 (Mich. Hist. Coll., University of Michigan). The case was that of Moses v. Steamboat Missouri, which was printed in 1852 in 1 Mich. (Manning) 507 Appendix (1842).

204 "Annual Message of the Governor," JOURN. Docs., 1846, p. 6. Governor Felch also called attention to the great importance of publishing the decisions, and said that Douglass intended to present during the year 1846 the reports of all important cases in both the supreme court and the chancery court. Id. No opinions of the court of chancery between March 1845 and March 1847, when the separate chancery court ceased to exist, have ever been printed. Manning remained chancellor until the Revised Statutes of 1846 (which provided for the abolition of the court in 1847) were adopted, when he resigned; former chancellor Elon Farnsworth was reappointed to the post in June 1846, and served for the remaining months of the court's existence. Nothing has been found except the reference by Felch that Douglass intended to publish a volume of chancery reports.
ernor may have been mistaken or misinformed, his reputation for accuracy and truthfulness permits one to conjecture upon the possibility of the existence of many other opinions that were not printed. It is certain that when Douglass in 1850 delivered the manuscript opinions to his successor in the office of reporter, Randolph Manning, only those after 1845 and none prior to 1843 were included. Nevertheless, a search of the available Douglass papers has failed to disclose any supreme court opinions.

Douglass had planned to issue a third volume in August or September of 1850, but he retired from the office before that time. It appears that he was instrumental in the selection of Randolph Manning, former chancellor, as the new reporter. Manning’s appointment was conferred the first week in July, when the supreme court was in

105 Douglass drew up an inventory which listed, according to the year and to the justice who delivered them, all of the manuscript opinions which he was turning over to his successor. When Manning received them on July 11, 1850, he had to acknowledge by his signature that the opinions were in his possession. Although it is not important in the present study, this list is significant because it proves that many supreme court opinions were written after 1843 that were never included in the printed reports. Nearly forty opinions, composed between 1846-1850, that have not been published and are not known to exist in manuscript, were cited by Douglass. 8 WALKER, DOUGLAS, and CAMPBELL, LETTERPRESS BOOK 847-852 (Mich. Hist Coll., University of Michigan). Douglass himself wrote that he had an opinion for the case of Stowell v. Walker (Sup. Ct., 1st circ., file No. 318) decided in 1844, but that he was not publishing it. See 1 Doug. 524, note (1845).

106 While searching through a part of Douglass’ papers in his old homestead on Grosse Ile, the writer and Mr. Henry Brown of the Michigan Historical Collections located five of the eight volumes of letterpress books kept between 1837 and 1850 by the law firm of which Mr. Douglass was a member. Volume 8 has proved most helpful.

107 GRAND RAPIDS ENQUIRER, Jan. 16, 1850, quoting the DETROIT FREE PRESS. There must have been some public interest in the reports, because Douglass wrote the editor that he had received many inquiries as to when the third volume would be published. Douglass offered his resignation at the May 1850 term of court and it was accepted by the supreme court in July. FREE PRESS, July 6, 1850.

108 Biographical sketches of Manning may be found in the following: AMERICAN BIOGRAPHICAL HISTORY OF EMINENT AND SELF-MADE MEN: REPRESENTATIVE MEN OF MICHIGAN, part VI, p. 49 (1878); Baldwin, “Judge Randolph Manning,” 14 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 418-421 (1890) (Michigan Historical Commission); Felch, “Michigan’s Court of Chancery,” 21 id. 325 at 329 (1894); 2 MICHIGAN BIOGRAPHIES 73-74 (1924); G. I. REED, BENCH AND BAR OF MICHIGAN 2 (1897); R. B. Ross, THE EARLY BENCH AND BAR OF DETROIT 131-133 (1907); MICHIGAN, NISI PRIUS CASES (Howell) 543 (1884); remarks by A. C. Baldwin, A. B. Maynard, Chief Justice Sherwood, and Justice Campbell in 65 Mich. li-lix (1889).

109 Manning wrote to Douglass that he knew of nothing “to prevent my accepting the appointment mentioned by you, should the Judges of the Supreme Court think proper to confer it on me.” Pontiac, May 15, 1850, HERBERT BOWEN PAPERS (But­ton Coll.).
session at Jackson.\(^{110}\) His first and only volume of reports was not published until 1852. It is important here to note only that in the appendix he included one opinion which had been written and delivered before 1843.\(^{111}\) Since this opinion had been in the possession of Douglass in 1848\(^{112}\) but was not cited in the list of those which Douglass had turned over to Manning in 1850, one might be tempted to draw the hasty conclusion that Douglass had transferred all of the decisions of the supreme court which he possessed, while making a record of only those dating after 1845. However, because inquiries had been made about this particular opinion, it seems more logical to suppose that Douglass himself had determined to publish it in the third volume of reports which he had contemplated issuing in 1850, in consequence of which Manning had acquired it along with any other work Douglass might have done on volume three. The entire matter is highly conjectural and with present sources cannot be determined with finality.

It is not known definitely whether Manning resigned or was removed from the office of reporter; at any rate George C. Gibbs of Marshall\(^{118}\) was appointed to the position on January 6, 1853.\(^{114}\) During the four years in which he held the office, Gibbs published as many volumes (three) of supreme court reports as had his four predecessors in twelve years—or as had his two immediate predecessors in seven years, but in none of them did he print any opinions that had been written before 1843. There is no evidence that he possessed such material, or that any manuscripts had been transferred to him by Manning. However, the next state reporter, Thomas M. Cooley, obtained and printed in 1860 an opinion in a case that had been decided in 1841!\(^{115}\) It would seem that until a law of 1855 made it the duty of the reporter to have accurate copies of the supreme court opinions made and the

\(^{110}\) \textit{Free Press}, July 6, 1850. As the Journal for the second circuit, 1836-1851, is missing, no official record of the appointment has been found.

\(^{111}\) Moses v. Steamboat Missouri, 1 Mich. 507 (1842).


\(^{113}\) For a sketch of Gibbs' life, see \textit{1 MICHIGAN BIOGRAPHIES 323} (1924). A contemporary said of Gibbs that "A discriminating mind, accurate education, habits of thought and industry, and above all a courteous bearing, fully qualify him for the discharge of the responsible duties of the station." \textit{Free Press}, Jan. 8, 1853. Just why a "courteous bearing" should be important for the office of reporter is not clear. See also the \textit{MICHIGAN ARGUS} (Ann Arbor), Jan. 12, 1853.

\(^{114}\) 2 \textit{SUP. CT. JOUR., 1st circ.,} 260 (1853).

\(^{115}\) Bomier v. Caldwell, 8 Mich. 463 (1841).
originals returned to the proper offices for filing,\textsuperscript{116} the reporters had been in the habit of retaining the original manuscripts in their personal possession, at least until the end of their term.

In view of the fact that the early supreme court records are incomplete\textsuperscript{117} and that the available opinions are not numerous, it is to be regretted that the newspapers of the day did not devote more space to the business of the court and to its decisions. Prior to 1847 the discussion in the press of supreme court cases was very spasmodic, limited mainly to decisions which were of great public moment or in which the editors themselves might have had a personal or political interest.\textsuperscript{118} Only one instance has been found before that date in which an attempt was made to list even so much as the names and judgments of all cases decided at a particular term. However, that one article proved most helpful because the journal is not extant for that session of the court.\textsuperscript{119} Not until 1845 did any Michigan newspaper, as far as is known, print a copy of a full opinion delivered by a justice of the state supreme court.\textsuperscript{120}

If we discount the headnotes of chancery opinions published through the efforts of Harrington in 1842 and 1843,\textsuperscript{121} no systematic account of superior court decisions appeared in the newspapers until Samuel T. Douglass, as reporter, undertook the task of providing one in 1847;\textsuperscript{122} during his remaining years in office he supplied the \textit{Free Press}, the main organ of the Democratic Party, with abstracts of many of the supreme court opinions, lists of judgments, and names of justices.


\textsuperscript{117} For a description of the supreme court calendars, journals, and files known to be extant, see Norton, "Missing Supreme Court Documents," 26 \textit{Mich. History Mag.} 518 (1942).

\textsuperscript{118} For example, see discussion of individual cases in the \textit{Michigan Argus} (Ann Arbor), May 10 and May 31, 1843, and May 27, 1846; in the \textit{Michigan State Journal} (Ann Arbor), Feb. 28, 1844 and Oct. 1, 1845; in the \textit{Free Press}, Oct. 7, 1837, March 3, 1843, and Feb. 12, 16, and 23, 1844; in the \textit{Pontiac Courier}, May 18, 1838.

\textsuperscript{119} The \textit{Michigan Argus} (Ann Arbor), Jan. 24, 1839, listed eight decisions given by the supreme court at its Jan. term, 1839, in Ann Arbor. No other record is known to exist for three of the cases—Culver v. Raney, Carter v. Clark alias Turrill, and Davidson v. Smith—and the exact judgment of the court was not known for three of the others.

\textsuperscript{120} \textit{Free Press}, April 2, 1845, published Felch's opinion in Cahill v. Kalamazoo Mutual Ins. Co., 2 Doug. 124 (1845).

\textsuperscript{121} See note 59 above.

\textsuperscript{122} \textit{Free Press}, Jan. 20, 1847.
who delivered opinions in the cases not abstracted.123 This practice was followed by later reporters, while in addition the same newspaper often published synopses of decisions and proceedings in court written by some attorney or staff member who was present at the session.124

Some of the weeklies throughout the state occasionally copied the information given in the Detroit papers about the January terms, but rarely did they take the initiative to print such news originally, even when the supreme court was holding its term in their particular localities.125 It is exasperating to note how, year after year, the journals of Ann Arbor, Jackson, Pontiac, Kalamazoo, and Adrian, all towns in which the supreme court met annually at different times, rarely did more in their pages than to call attention to the fact that the court would soon begin its session, or had just closed its term, or had admitted certain persons to the bar; 126 seldom before 1847 did they print so much as a list of cases on the docket or of the decisions rendered at any particular term.

Conclusion

It should not be supposed that the Supreme Court of Michigan between 1838 and 1843, or between 1843 and 1857, delivered written opinions in the majority, or even one-half, of the causes which they decided during those years. As a matter of fact, opinions are available for but a little more than one-tenth of the total number of cases disposed before 1843, and for about one-fourth of those disposed before

123 Abstracts of opinions or lists of the justices who delivered opinions will be found in the Free Press for the following dates: Jan. 20, March 24 and 26, April 2, 3, 6, 24, 27, and 30, May 1, June 2, July 22, 23, and 27, Aug. 7, Dec. 7, 1847; Jan. 24, Feb. 14, March 2, 6, and 18, May 3, 4, and 5, 1848; March 23 and 29, 1849; March 7, 19, and 21, May 11, 1850.
124 See the Free Press for Jan. 20, 24, 28, 30, and 31, Feb. 11, April 1, 1851; March 13, 1852; March 12 and 14, 1853; Jan. 11, 14, 15, 27, 28, and 31, Feb. 1, 2, 3, 5, 7, 8, and 10, March 5, and 10, 1854; Jan. 3, 9, 13, 16, 18, 20, 20, and 31, Feb. 2, March 8, 9, 14, 16, 17, and 20, July 11, 1855; Jan. 12, 26, 27, Feb. 6, 7, 8, 23, 27, March 14, 15, 1856; Jan. 4, 6, 7, 8, 9, 11, 13, 15, and 31, March 10, 1857.
125 See the Oakland Gazette (Pontiac), Jan. 27, 1847; Pontiac Jacksonian, Dec. 25, 1850; Pontiac Gazette, March 24, 1855, and Feb. 7, 1857; Lansing Republican, March 18 and 26, April 1, 1856; Michigan Expositor (Adrian), July 11, 1857. However, the Adrian Watchtower on July 12, 1853, carried a rather full and very useful account of the court's session held there earlier in that same month.
126 See the State Journal (Ann Arbor), Jan. 12, 1837; Pontiac Jacksonian, Jan. 21, 1842; Kalamazoo Gazette, Sept. 9, 1842; Michigan State Journal, Jan. 25, 1843; Pontiac Jacksonian, Jan. 20, 1843; Oakland Gazette (Pontiac) Jan. 20, 1847.
In the early years it was quite common for many decisions to be given orally or for no formal opinion in addition to the judgment of the court to be rendered. There is proof that as late as 1849, if a case was of no great importance, the court might not direct an opinion to be written for it. Notwithstanding, the evidence seems incontrovertible that many more decisions were written by the justices of the supreme court before 1843 than those which were published or which still remain in the files. Although it is not pertinent to the present inquiry, it might be mentioned that a total of fifty-six other opinions for which no copies are available have been cited in various contemporary sources as having been delivered between 1843 and 1858.

The fate or present whereabouts of these and other opinions which probably were written cannot be answered satisfactorily. Thomas M. Cooley intended in 1858 to publish at least some of them. Although he was forced to relinquish that plan, he did include in one of his later volumes two opinions, dated 1841 and 1857 respectively, giving as his reason for doing so the fact that many inquiries had been made about them. The certainty that Cooley had access in 1860 to an opinion which had been written as early as 1841 may or may not be of great significance. If he obtained it from the official files, there is little cause for worry; but, if it was only one of many more which he might

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127 See Norton, A History of the Supreme Court of the State of Michigan, 1836-1857, Table XXII, Appendix, p. 31 (1940).
128 E. Ransom to S. T. Douglass, Kalamazoo, Dec. 1, 1845, Herbert Bowen Papers (Burton Coll.).
129 The reporter stated in 1849 that he had been informed by Judge Wing "that no written opinion was delivered by the Supreme Court in the license case, at Jackson, the case having been decided upon a point not deemed of any practical importance. . . ." S. T. Douglass to [?] Smith [?], Detroit, Sept. 14, 1849, 8 Walker, Douglas, and Campbell, Letterpress Book 671 (Mich. Hist. Coll., University of Michigan).
130 See Norton, A History of the Supreme Court of the State of Michigan, 1836-1857, Table XXIII, Appendix, p. 32 (1940).
131 A note in the front of Cooley's first volume of reports (5 Mich.), dated at Adrian, December, 1858, stated: "The unreported decisions of the late Supreme Court, it is hoped, may be collected and included in the next volume. There are, among them, some cases of importance which the profession would doubtless be glad to have preserved in an accessible form."
132 A note in the front of his second volume (6 Mich.) explained why he failed to report them as he had contemplated: "The hope was expressed . . . that the unreported decisions of the former bench could be collected, and included in this volume. It has, however, been found impracticable to obtain the most important of those decisions, and the intention to publish any is therefore abandoned." This statement would seem to indicate that Cooley knew the existence and the location of at least several opinions which, for some reason, he could not obtain for publication.
133 Bomier v. Caldwell, 8 Mich. 463 (1841); Jackson v. Evans, 8 Mich. 477 (1857).
possibly have inherited by virtue of his office as reporter, that fact would be most disheartening and disconcerting to anyone searching for more decisions of the supreme court, because many of Cooley's earlier papers were destroyed about 1894.\textsuperscript{134} There is no doubt that the justices of the supreme court frequently borrowed from the reporter, previous to their publication, various opinions that had been written either by themselves or by their brethren on the bench;\textsuperscript{135} likewise, it is certain that the reporter in turn withdrew the opinions from the files of the court for the purpose of reporting.\textsuperscript{136} With such a system of record-keeping it is conceivable that many original manuscript opinions might have found their way into the private papers of any one of twenty-five or more contemporary dignitaries and have been lost, destroyed, or interred in some unknown depository.

In respect to the publication of its highest court decisions, the state of Michigan was unfortunate during the first years of its existence. The first volume of reports did not come from the press until 1846, and, during the whole twenty-one year period from the appointment of the first justices to the establishment in 1858 of the so-called "independent" supreme court, there were but six volumes of supreme court cases and two volumes of chancery court cases issued. Only a few supreme court opinions delivered before 1843 have ever been printed, while many of those which were rendered both before and after that date are not available at present. The men who were selected as reporters, all of whom were able, industrious, and well qualified for the position, were not solely at fault for the delay and omissions; the legislature, and even a few of the justices of the supreme court, exhibited at times much lethargy in their support of the reports and the reporter. Furthermore, it must not be forgotten that the history of reporting in many other states had been quite similar to that in Michigan, that often private individuals rather than public officials had undertaken the publication of opinions, and that Michigan is not unique in the lack of full, complete reports. But to any student who is interested in judicial his-


\textsuperscript{135} For example, see a series of letters by Justice George Miles to the reporter, S. T. Douglass, requesting the loan of several different opinions. Aug. 11 and 17, Sept. 12, 1847, and Aug. 6, 1849, Herbert Bowen Papers (Burton Coll.).

\textsuperscript{136} Gibbs in 1856 wrote to E. Hawley, clerk of the court at Detroit, asking Hawley to send him three opinions filed by Justice Copeland "subsequent to the time I [Gibbs] called for the opinions of last Jan. term, I presume. If filed will you have the kindness to forward to me by express." Marshall, Feb. 7, 1856, Sup. Ct., Miscellaneous files.
tory and the development of law, this deficiency, while possibly excusable, is extremely regrettable.

Does the deficiency in Michigan court reports present a question of mere academic interest or importance? There would be little difficulty in proving that ignorance of the early opinions of the supreme court has not been confined to the layman, or even to the attorney; that on occasion no less a figure than a member of the highest state bench could have profited if it had been possible for him to examine the unpublished opinions of former justices. For instance, Justice Warner Wing, in a decision rendered in 1849, while referring to a case which had been decided more than ten years previously, wrote that "The opinion of the supreme court was not reduced to writing, and, therefore, we can only state the fact handed down to us by tradition," whereas, as a matter of fact, the opinion in the earlier case had been written by Justice Ransom and is now extant in the files of the court. It is to be hoped that in the future many more unreported decisions of the supreme court may be located and made available in convenient form to the public.

APPENDIX

Chronological Digest of Opinions of the Michigan Supreme Court, 1836-1943*

Prepared by the Law Review Staff in co-operation with the author


Venue—Justice Court—Nonresident of County.

(a) A person may not be sued in a justice's court in a county other than that of his residence except when the action is commenced by warrant and it appears that the defendant is about to remove from the county or the plaintiff is in danger of losing his debt. (Terr. Laws of 1833, pp. 195, 209.)

(b) Where the only basis for issuing a warrant against a nonresident was the fact that he was about to leave the county, the justice erred in not sustaining a plea in abatement.

188 Calhoun v. Cable, Sup. Ct., 1st circ., Chancery Calendar (1838), case 13, P. 25.
189 1 Mich. at 298 (1849).

* This list includes all the opinions known to be in existence, as explained in the preceding article. The original manuscripts of these opinions, together with other records of the court prior to 1857, are now in the Legal Research Building at the University of Michigan.

1 Transferred to the state supreme court from the territorial superior circuit court, Washtenaw county. File No. 1158 (as renumbered in 1902). Judgment Record, 2d circ., pp. 127, 129, 131.

ABATEMENT AND REVIVAL—INTERPRETATION OF CONSTITUTIONAL AND LEGISLATIVE PROVISIONS FOR TRANSFER OF CASES FROM TERRITORIAL TO STATE COURTS.

(a) The schedule of the Constitution of 1835, declaring that all writs, actions, etc., pending in the territorial courts shall continue, preserves these matters until the legislature acts. After the legislature has acted, any matter not provided for abates.

(b) The act of March 26, 1836 (Pub. Acts, 1835-36, p. 30), which provided that civil suits at law and criminal prosecutions be transferred to the state supreme court or to a circuit court of the state, did not authorize the transfer of suits in equity.

(c) The act of March 26, 1836 (Pub. Acts, 1835-36, p. 38), which provided that suits in equity be transferred to the state court of chancery, excluded cases in which the chancellor had served as counsel.

(d) This suit, being one in which the chancellor served as counsel, and no provision having been made for its transfer, has abated.

(e) As the legislature has no power to revive suits which have abated, the act of February 11, 1837 (Pub. Acts, 1837, p. 11) directing that suits in which the chancellor is interested be transferred from the territorial supreme court to the state supreme court is invalid.


ATTORNEY AND CLIENT—PLEADING—VERDICTS—WITNESSES.

(a) The justice did not err in permitting an attorney at law to appear for the plaintiff on the trial, without express authority, the attorney having appeared many times without objection.

(b) Where the defendant has pleaded the general issue and a special plea and the return of the justice states that issue was joined, the appellate court will presume that plaintiff added a similiter to the general issue and traversed the special plea. The omission of a similiter is a mere matter of form which is aided by verdict.

(c) In an action for the escape of a person taken in execution it is not necessary that the jury find specially that the officer consented or was negligent. A general verdict is sufficient.

(d) In an action against a sheriff for an escape, the sheriff's deputy who released the prisoner on an insufficient bond was interested in the event of the action, and, therefore, properly rejected as a witness.

(e) In an action for an escape, it is error to reject as a witness the escaped prisoner when called by the defendant. If interested, his interest is against the party calling him.


2 Transferred to the state supreme court from the territorial supreme court. Case 1491, 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1825-1836, Blume ed., 167 (1940). Chancery Calendar, 1st circ., Case 13. Journal, 1st circ., vol. 1, pp. 28, 31, 40. Later the case was redocketed on transfer from the court of chancery (Case 17, infra). In 1849 the act of February 11, 1837, was held valid. Scott v. Smart's Exrs., 1 Mich. 295 (1849).

3 Transferred to the state supreme court from the territorial superior circuit court, Monroe county. File No. 70, 1st circ.—Law. Calendar, 1st circ., vol. 1, Case 70. Journal, 1st circ., vol. 1, pp. 30, 40.

4 The opinion also appears in a draft of a report by Harrington. File No. 88, 1st circ.—Law. Calendar, 1st circ., vol. 1, Case 88. Journal, 1st circ., vol. 1, pp. 35, 41.
JUSTICES OF THE PEACE—JURISDICTIONAL AMOUNT—SHERIFFS AND CONSTABLES—RENEWAL OF EXECUTION.

(a) In a summary proceeding against an officer for failing to levy or return a writ of execution (Terr. Laws of 1833, p. 200) a justice of the peace does not exceed his jurisdiction by rendering a judgment for more than $100.

(b) A renewal of an execution at the instance of the officer without the request or consent of the plaintiff will not defeat a claim against the officer for failing to levy or return the writ in time.


PLEADING—COMMON COUNTS—TRIAL—FUNCTION OF JURY IN JUSTICE COURT—APPEAL AND ERROR.

(a) Where labor is performed under a subsisting special agreement, recovery may not be had under the common counts. But if the agreement has been fully performed by the plaintiff or rescinded by mutual consent, the rule is otherwise. From the contradictory evidence in this case it is difficult to determine whether the labor was performed under a special agreement, but it is unnecessary to decide because of other error.

(b) In justices' courts jurors are judges of the law as well as of the facts. The justice in this case erred in directing the jury that inasmuch as the defendant had proved that the plaintiff had received one-half of certain crops, the jurors were bound by their oaths to allow credit for the same.

(c) The above direction was not harmless as being in favor of the plaintiff in error (defendant below) because the jury might not have found against the defendant at all but for such direction.


JOINT TENANCY—APPEAL AND ERROR.

(a) Payment of rent to one of three joint owners is a discharge of the joint claim.

(b) Where a justice of the peace had been informed by one joint owner that rent sued for in the names of three joint owners had been paid, the justice erred in rendering judgment against the defendant in his absence at the instance of another of the joint owners.


APPEARANCE—EVIDENCE—WEIGHT AND SUFFICIENCY.

(a) All objections to process are waived by a general appearance.

(b) Testimony by a person claiming to be agent that he was "authorized by the defendants to . . . employ workmen for them" is sufficient basis for inferring that the defendants, sued as "traders under the style of the Detroit Iron Co.," constituted such company. Furthermore, it does not appear that the point was raised in the lower court.


(c) Where there is "some evidence" to support the judgment of a justice of the peace, the supreme court "will not stop to enquire whether it was so full or ample as to render the case entirely free from doubt."


**Evidence—Notary's Certificate.**

(a) In an action against an indorser of a promissory note, the certificate of a notary public that he presented the note for payment, that payment was refused, and that he mailed notice of protest, is not admissible under the common law to prove these facts.

(b) The statutes relative to notaries public (Terr. Laws of 1833, p. 244; Revised Statutes of 1838, p. 50) have not changed the common law in the above respect.


**Appeal and Error—Effect of Agreed Statement of Facts Before Lower Court.**

(a) Where a case is submitted to a trial court on an agreed statement of facts which does not "contain all the facts necessary to turn the case into a question of law," the trial court's determination of the facts is conclusive if the statement contains evidence tending to prove the facts found.

(b) In this case the evidence tended to prove that the plaintiff's agent knew that the money claimed by the plaintiff was being collected by the defendant's former partner after the defendant had retired from the practice of law, hence the finding for the defendant is conclusive.

(c) In the absence of statutory authority, an agreed statement of facts is not a part of the court's record and, therefore, cannot be considered on a writ of error.


**Constitutional Law—Municipal Ordinance—Regulating Sale of Meat.**

-Held: The judgment, in so far as it imposes fine and costs, affirmed; in so far as it orders that the defendant be committed until fine and costs are paid, reversed.

-Dissent: Section 2 of the ordinance under which the defendant was convicted (providing that "no person shall sell meat except in the stalls rented from the corporation") is invalid, being unreasonable and in restraint of trade.


**Forcible Entry and Detainer—Substantive Allegations Necessary.**

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10 File No. 159, 1st circ.—Law. Calendar, 1st circ., vol. 1, Case 159. Journal, 1st circ., vol. 1, pp. 73, 76, 83, 91.

11 Opinion published, with headnotes, etc., in 2 Douglass 372 (1849). File No. 153, 1st circ.—Law. Calendar, 1st circ., vol. 1, Case 153. Journal, 1st circ., vol. 1, pp. 73, 74, 95, 100. The original MS opinion is not in the file.

**Wills—Statutory Requisites—Nuncupative Wills.**

(a) A declaration made by a person in his last sickness, which was read over to him, approved by him, and declared by him to be his will in the presence of five persons who signed as witnesses at his request, is a nuncupative will under section 3 of the statute of 1818 (Terr. Laws of 1820, p. 20) not a written will which is defective because not signed by the testator.

(b) A valid nuncupative will which purports to dispose of both real and personal property does not come within the terms of section 9 of the above statute (providing that a defective will in writing which purports to dispose of both real and personal property “shall not be allowed and approved as a testament of personal estate only”), hence may be allowed to stand as to personalty.

13. **Hill v. Paddock.** January 23, 1841. Question certified by circuit court, Oakland county. Opinion by Fletcher, C. J. Certified that the objection to the vote as evidence on the ground of variance was properly overruled.

**Pleading—Variance in Proof.**

(a) In the absence of evidence, a court cannot presume that a memorandum at the foot of a promissory note (“At 12 per cent int D.P.”) was made when the note was made or that the letters “D.P.” meant David Paddock, one of the makers of the note.

(b) Where it does not appear that a memorandum at the foot of a note is a substantial part of the note, proof of the note and memorandum is not a material variance from a pleading which describes the note without mentioning the memorandum.

14. **Roosevelt v. Gantt.** January 23, 1841. Question certified by circuit court, Oakland county. Opinion by Fletcher, C. J. Certified that the proposed evidence was properly rejected.

**Evidence—Relevancy.**

(a) In an action for libel (that plaintiff and three others had “robbed” a ballot box by taking out ballots for Crary and putting in ballots for Wells, leaving only 157 ballots for Crary), evidence that 200 persons had voted for Crary was inadmissible in mitigation of damages in the absence of evidence connecting the plaintiff with the “robbery.”

(b) The fact that plaintiff was clerk at the polls and had lawful custody of the ballots at the time of the alleged “robbery” does not connect the plaintiff with the “robbery.”


**Trial—Necessity of Proof of Corporate Existence.**

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15 The opinion appears in a footnote in 2 Douglass 134 (1849). File 19 (as renumbered in 1902). The original MS is not in the file.

DOWER—WILD LANDS.

The clearing of wild land not being waste, it is proper to endow a widow in wild land.


EQUITY—BILL FOR SPECIFIC PERFORMANCE OF TRUST AGREEMENT—SUFFICIENCY OF ALLEGATIONS.

(a) A bill in equity which alleges that the plaintiff assigned a land contract to one of the defendants to secure him and another defendant against liability as indorsers on certain notes is not demurrable on the ground that the assignment was made in fraud of creditors, although the bill also speaks of securing a retreat for the plaintiff and his family, refers to a nominal consideration, and alleges that the assignee was to hold the contract subject to the plaintiff's directions.

(b) A bill in equity which directly charges that a person to whom a land contract was assigned for a particular purpose violated his trust by disposing of the contract in a manner not warranted by the terms of the assignment alleges enough to show an equity between the plaintiff and the assignee.

(c) A bill in equity which alleges that the maker of a land contract procured from a trustee, to whom the contract had been assigned for a particular purpose, a wrongful assignment so as to destroy the plaintiff's interest in the land, and then conveyed the land to a third person, alleges enough to show an equity between the plaintiff and the maker of the contract.

(d) A bill in equity which alleges that the purchaser of certain land knew that it had been sold to the plaintiff under a land contract states an equitable claim against said purchaser.

(e) A bill in equity which claims a general right in which all the defendants are interested is not multifarious although each defendant has a separate and distinct interest.


APPEAL AND ERROR—REVIEW OF SUMMARY JUDGMENT OF JUSTICE OF THE PEACE.

(a) Prior to the adoption of the Revised Statutes of 1838, a summary judgment by a justice of the peace against an officer for failure to return an execution could be reviewed by the supreme court on certiorari, even though the statute authorizing the summary judgment expressly prohibited an appeal.

(b) The section of the Revised Statutes which declares that no proceeding before a justice of the peace shall be removed to the supreme court by certiorari or...
otherwise, but may be reviewed on appeal to the circuit court (R. S. 1838, p. 399), is in conflict with the above express prohibition (R. S. 1838, p. 397).

(c) As it can hardly be supposed that the legislature intended to take away all modes of reviewing such a judgment, the circuit court may review such a judgment on an appeal in the nature of certiorari.


SPECIFIC PERFORMANCE—VARIANCE IN PLEADING—PLAINTIFF’S DEFAULT AS TO TIME—STATUTE OF FRAUDS—PART PERFORMANCE. 19


EXECUTION AGAINST THE PERSON—COUNTY OF IMPRISONMENT.
(a) A sheriff, being a ministerial officer, must obey the command of a writ of capias ad satisfaciendum with respect to the county in which the prisoner shall be confined.

(b) A writ of capias ad satisfaciendum issued from the circuit court of Genesee county directing the sheriff of Oakland county to imprison a judgment debtor in Genesee county is void in so far as it fixes the place of imprisonment.


CRIMINAL LAW AND PROCEDURE—VARIANCE IN PLEADING.
(a) Although, in an indictment for perjury, it is not necessary to allege that issue was joined in the action in which the perjury is alleged to have been committed, such an allegation is descriptive and must be proved strictly.

(b) Proof (1) that a plaintiff, in an action on a jail-limits bond before a justice of the peace, filed the bond as his declaration; (2) that the defendants filed no plea; (3) that, on appeal to the circuit court, the transcript of the justice stated “The plaintiff declares on a limit bond on file” which bond was attached to the transcript; (4) that defendants in the circuit court filed a plea of nil debit; and (5) that no similiter was added or other pleadings filed—is not proof that issue was joined in the circuit court.


INDICTMENT AND INFORMATION—JOINER OF COUNTS.
An indictment which charges that defendants killed certain hogs of one Davis and did “thereby” destroy the personal property of said Davis does not embrace two distinct offenses under Revised Statutes of 1838, p. 632, viz., (1) the killing of another’s livestock, and (2) the destruction of another’s personal property.


20 The papers in this matter, which was before a single judge of the supreme court, are with the files of the supreme court, 4th circ.


**FORCIBLE ENTRY AND DETAINER—REGULARITY OF PROCEDURE BEFORE JUSTICE OF THE PEACE.*


**BILLS AND NOTES—LIABILITY OF ENDORSER—NOTICE OF NONPAYMENT.**

(a) The fact that an indorser of a promissory note received security from the maker to indemnify him against liability as an indorser does not make him absolutely liable without demand on the maker and notice to the indorser of nonpayment.

(b) In an action by an indorsee against the indorser of a promissory note, a declaration which alleges that the defendant received from the maker certain property to indemnify him as indorser and that the defendant has not "sustained any damage by reason of his not having received notice of the nonpayment of said note" is demurrable.


**WITNESSES—JOINT TORTFEASORS—COMPETENCY OF CODEFENDANT.**

(a) Where in an action for trespass there is any legal testimony, however slight, against one of the defendants, the court may not direct a verdict for that defendant in order that he may testify in behalf of a codefendant.

(b) The fact that a witness called by the plaintiff on rebuttal testified that one of the defendants had declared during the trial "that he had no hand in taking the property" did not justify a conclusion by the court that the plaintiff had abandoned his action against that defendant.

(c) Whether the declaration of a defendant sued for trespass can be used against a codefendant sued as a joint tortfeasor, quaere.


**ARBITRATION AND AWARD—STATUTORY REQUIREMENTS—WAIVER OF NOTICE AND HEARING.**

(a) Delivery of an award of arbitrators (addressed to the court) to the clerk of the court in vacation is a delivery to the court within the meaning of the statute (Revised Statutes of 1838, p. 532).

(b) Although, ordinarily, an award made without notice of hearing is void, in this case the parties appeared before the arbitrators and agreed that they might, after viewing the land involved, make an award without notice and without hearing evidence.

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23 Opinion published, with headnotes, etc., in 2 Douglass 374 (1849). File No. 209, 1st circ.—Law. Calendar, 1st circ., vol. 1, Case 209. Journal, 1st circ., pp. 127, 146, 147, 150, 151, 155. The original MS opinion is not in the file.


(c) Where an award is silent with respect to notice of hearing, it is fair and reasonable to intend that notice was given.

(d) By making the agreement set forth in (b), supra, the parties did not annul the original agreement for arbitration. They merely agreed upon the means of giving effect to that agreement.


**WILLS—EXECUTION—SIGNING IN PRESENCE OF WITNESSES.**

Although it appeared from testimony that a paper offered for probate as a will had been signed by a person now deceased and by three persons who signed as witnesses at his request, in his presence, and in the presence of each other, one of whom thought he had seen the decedent sign, held the supposed will was not executed pursuant to statute (Revised Statutes of 1838, p. 270) because "All must see the act of signing, or the testator must acknowledge that he had signed it, or declare that it is his will."²⁷

28. *People v. Rose*. March 29, 1842. Questions certified by circuit court, Oakland county.²⁸ Opinion by Fletcher, C. J. Certified that demurrer to indictment should be overruled.

**CRIMINAL LAW AND PROCEDURE—REPEAL OF STATUTE AFTER CRIME COMMITTED—SAVING CLAUSE—PUNISHMENT APPLICABLE.**

(a) Repeal by the Revised Statutes of 1838 (p. 690) of the act for the punishment of crimes which was in force when the offence charged in the indictment in this case was committed did not exempt the defendant from the punishment previously prescribed for his alleged crime, the Revised Statutes having expressly provided against such exemption except to the extent that any punishment was mitigated by the Revised Statutes (p. 616).

(b) Repeal of the punishment for larceny prescribed by the Revised Statutes of 1838 (p. 628) and provision that larceny of property worth less than $100 may be punished by imprisonment in the state prison (Pub. Acts, 1840, p. 42) "does not affect any criminal act committed under the act in force for the punishment of crimes previous to the taking effect of the Rev. Stat."

(c) Repeal of the mitigated provisions of the Revised Statutes of 1838 (p. 628) leaves the defendant under the provisions of the act in force when the crime was committed.


**REPLEVIN—EFFECT OF PRIOR PENDING ACTION.**

(a) Property was taken from B's possession on a writ of execution and sold to S on said writ while being held for P under a writ of replevin issued in an action by P against a receptor who held under a prior writ of execution against B, which action of replevin was pending when the present action of replevin was commenced by S against P. Held, such property was not in the custody of the law at the time the present action of replevin was commenced; hence it was error to instruct the jury that the property could not be replevied in the present action.


(b) In an action of replevin brought under the circumstances set forth in (a), supra, the plaintiff should be permitted to prove that a prior sale, under which the defendant claims, was made in fraud of the seller's creditors.


CONSTITUTIONAL LAW—REQUIREMENT OF INDICTMENT FOR CRIMINAL OFFENSE—VALIDITY OF MUNICIPAL ORDINANCE FOR PROCEEDINGS BY COMPLAINT ONLY.30

31. Taylor v. Beach. March 29, 1842. Question certified by circuit court, Oakland county.81 Opinion by Fletcher, C. J. Certified that a new trial should be granted.

EVIDENCE—SUFFICIENCY.
Testimony by an employee of a bank that it was his uniform practice to demand payment of promissory notes held by the bank on their due dates, and, on the same dates, to give notice of nonpayment to each indorser either in person or by leaving notice at his place of business or dwelling house if residing in the village, or by mail if residing outside the village, plus testimony that the witness knew from a memorandum attached to the note sued on in this case that it was protested on the day it became due, is "no evidence at all" that notice of nonpayment was given to the defendants who are sued as indorsers of said note.


FORCEBLE ENTRY AND DETAINER—NOTICE TO QUIT—FUNCTION OF JURY IN JUSTICE COURT.32

33. Lockwood v. Scudder. March 31, 1842. Question certified by circuit court, Wayne county.83 Opinion by Fletcher, C. J. Certified that motion to quash proceedings should be granted.

ATTACHMENT—JURISDICTION TO ISSUE SUPPLEMENTAL WRIT IN ANOTHER COUNTY.
Although it appears that a writ of attachment directed to the sheriff of another county was levied by summoning a person of that county who appeared and admitted that he had money and effects belonging to the defendants, the court is without jurisdiction to render judgment unless it appears that a writ of attachment was first directed to the sheriff of the county in which the attachment suit was commenced and levied on property in that county. A suit in attachment must be "pending" before a writ may be issued to another county. (Revised Statutes of 1838, p. 511.)

30 Opinion published, with headnotes, etc., in 2 Douglass 335 (1849). File No. 201, 1st circ.—Law. Calendar, 1st circ., vol. 1, Case 201. Journal, 1st circ., vol. 1, pp. 75, 76, 138, 140, 158. The opinion was printed and bound with BY-LAWS AND ORDINANCES OF THE CITY OF DETROIT, 1842 (Burton Collection, Public Library, Detroit). The original MS opinion is in the file.


LIENS—APPLICATION OF STATUTE GIVING LIEN ON BOATS—CAUSE OF ACTION ARISING OUTSIDE STATE. 84


APPEAL AND ERROR—WRIT OF ERROR BY LESS THAN ALL DEFENDANTS WHERE JOINT JUDGMENT—AMENDMENT.

(a) A writ of error sued out in the names of two of three persons against whom a joint judgment was rendered should be quashed unless an amendment is allowed.

(b) At common law a writ of error may not be amended by adding a party.

(c) In Michigan the statute authorizing amendments in substance (Revised Statutes of 1838, p. 461) does not apply to proceedings in error. Such proceedings, in the absence of usage or court rules changing the common law (id., p. 522), may be amended only in form (id., p. 461).


WITNESSES—COMPETENCY.

A person sued as principal, who has defaulted and consents to testify, is a competent witness for the plaintiff against a codefendant sued as secondarily liable on the same contract.


FORCIBLE ENTRY AND DETAINER—PRIVITY OF PARTIES. 87


