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Criminal Procedure on the American Frontier: A Study of the Statutes and Court Records of Michigan Territory 1805-1825

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CRIMINAL PROCEDURE ON THE AMERICAN FRONTIER

A Study of the Statutes and Court Records of Michigan Territory 1805-1825

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The area north and east of Lake Michigan, organized in 1805 as Michigan Territory, was first organized in 1796 as Wayne County of the Northwest Territory.[1] In 1800 the western half of the county,[2] and in 1803 the eastern half,[3] became parts of Indiana Territory, and so remained until July 1805.[4] In 1818 Michigan Territory was expanded westward so as to include all of the area north of Illinois to the Mississippi River.[5]

When Indiana Territory was created out of the Northwest Territory it was assumed that the laws of the Northwest Territory continued in force in the new territory until changed by legislative action.[6] But when Michigan Territory was created out of Indiana Territory there was disagreement as to whether the laws of the prior territories continued in force. This disagreement was settled by the territorial Supreme Court in September 1806.[7] Two British officers, Captain Muir and Ensign Lundie, along with an American officer, Lieutenant Brevoort, had been indicted and tried for an assault and battery committed in an attempt to seize a British deserter, one Morrison, on American soil. After imposing heavy penalties (Muir, $44.40 and 17 days; Lundie, $8,880 and 6 months; Brevoort, $250 and 75 days) the court, two days later, reduced the fines to a few cents, and erased the imprisonment. This startling change of

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1 Documents Relating to the Erection of Wayne County and Michigan Territory (Historical Publications of Wayne County, Michigan, Numbers 1 and 2) 6.

2 2 Stat. 58.

3 2 Stat. 174. This act provided that the eastern part of Wayne County should become a part of Indiana Territory from and after the formation of the State of Ohio.

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

5 3 Stat. 431.

6 1 Transactions of the Supreme Court of the Territory of Michigan 1805-1814, Blume ed., xxxiv (1935).

7 Id. at 58.

position was puzzling at the time and is still difficult to explain. According to Grant, a British lieutenant colonel reporting from Amherstburg in 1806,[8]

> "After this sentence had been passed upon them, and their being given in charge to the Marshall, their Council discovered, that by the Laws of the Territory of Indiana they could not be fined more than one hundred dollars each for an assault, and could not be imprisoned. This was Substantiated by the Council, and Judge Woodward not Concurring (as I am told) that the fine was sufficient to mark the sense he had of the outrage committed on their Government, changed the former sentence on the part of Captain Muir and Ensign Lundie to a few cents. Those officers were then liberated, and they returned to their Quarters."

At the time the above case was tried only two of the three judges who were supposed to hold the Supreme Court were in attendance. On the day the sentences were reduced the third judge, formerly a judge in and for the Territory of Indiana, was in attendance, having on that day exhibited his commission. The part played by the new judge (Griffin) is shown by a letter from Sibley, one of the attorneys in the case, written to Lundie in May 1807:[9]

> "You further state that you have been informed that you are indebted to Judge Griffin for pointing out the statute which was brought forward for your relief—I think proper to correct you in this supposition. Judge Griffin did not point out the statute as you imagine—But in this far you are indebted to Judge Griffin—The two judges were divided in opinion whether that law was in force, and had not Judge Griffin arrived no use could have been made of that law in your favor."

Judge Bates stated his position in an undated letter to Judges Woodward and Griffin, which concluded:[10]

> "This government has never considered itself bound by territorial Precedents. It is their wish to avoid the errors and profit by the experience of their Sister Districts. The Common Law, the wisdom of which is attested by the consequentive approbation of ages, together with our own

[8] 2 id. at 87.
[9] Id. at 84-85.
[10] Id. at 85-87.

> adoptions, have been if I mistake not, esteemed by us, a code sufficiently ample for governments so temporary and fleeting as those established by the Ordinance of 1787.—In a word, That the Laws of Indiana, except local Statutes, vesting special rights, have *not* an operation in Michigan is an opinion which has regulated my official conduct, as far as those laws might be conceived, for 12 *Months* past—And that opinion remains unchanged."

The statute involved in the case of *United States v. Muir, Lundie, and Brevoort,* and held in that case to be in force in Michigan Territory in 1806, was one of the sections of "A LAW respecting Crimes and Punishments" published by the governor and judges of the Northwest Territory in 1788,[11] and ratified by the General Assembly of that Territory in 1799.[12] It was in force when Indiana Territory was created out of the Northwest Territory in 1800, and was deemed to be in force in the new Territory. Following the Michigan decision of 1806 all statutes relating to crimes which were in force in the Northwest Territory in 1800 and not repealed in Indiana Territory before July 1805 were considered in force.

Judge Bates left the Territory almost immediately after the above decision and was replaced by Judge Witherell from Vermont. While Judge Woodward was absent from the Territory in 1808 and 1809 Judge Witherell was instrumental in having adopted a series of forty-five laws sometimes referred to as the "Witherell Code."[13] One of these laws was "An Act for the punishment of crimes and misdemeanors" made up of 48 sections adopted from Vermont.[14] Another provided that all laws of the Northwest and Indiana territories should cease to have force in Michigan.[15] After Judge Woodward returned to the Territory some of the forty-five laws were declared invalid by the Supreme Court, having been signed by the governor alone,[16] and all were repealed in 1810.[17] The repealing law provided:

[11] 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY, Chase ed., 100 (1833); THE LAWS OF THE NORTHWEST TERRITORY 1788-1800, Pease ed., 19 (1925).

[12] Id., Chase ed., 212; Pease ed., 338.

[13] 4 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 21-92.

[14] Id. at 22.

[15] Id. at 84.

[16] 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., xxv (1935).

[17] 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 900.

"That no act of the parliament of England, and no act of the parliament of Great Britain, shall have any force within the territory of Michigan: . . .

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

"That the laws adopted and made by the governor and judges of the territory of the United States northwest of the river Ohio, and the laws made by the general assembly of the said territory, and the laws adopted and made by the governor and judges of the territory of Indiana, shall be of no force within the territory of Michigan: . . .

"That all laws passed between the second day of June, one thousand eight hundred and seven, and the first day of September, one thousand eight hundred and ten, be repealed, saving all legal rights heretofore accruing under them."

After the adoption of the above provisions the only statutes in force in Michigan Territory were the laws adopted by the governor and judges of Michigan on and before June 2, 1807, and on and after September 1, 1810, and the statutes of the United States applicable to the Territory.

The repeal of the act for the punishment of crimes and misdemeanors adopted in 1808 coupled with the declaration that the laws of the Northwest and Indiana territories should be of no force, left Michigan Territory without a general statute defining, and prescribing penalties for, the ordinary crimes. The English common law was considered in force, but since all English statutes were denied any force by the law of 1810, it was the English common law "unaffected by statute."[18]

[18] In Matter of Lamphere, 61 Mich. 105 at 108 (1886). Campbell, C. J., calling attention to the fact that the act of 1810 left "no statute or code law in force except that of Michigan territory and of the United States," stated: "But Michigan was never a common-law colony, and while we have recognized the common law as adopted into our jurisprudence, it is the English common law, unaffected by statute."

Another act "for the punishment of crimes" was adopted in November 1815,[19] after the appointment of a new governor following occupation by the British during the War of 1812. This act was made up of 68 sections taken from New Jersey. Included were provisions abolishing "benefit of Clergy,"[20] and suits or actions of "appeal" for murder, manslaughter, or other offense.[21] A statute adopted in 1820 abolished "the law relating to the *peine forte et dure*."[22] Also in 1820 as a part of the "Code of 1820" the governor and judges adopted in place of the 1815 act "An Act for the punishment of crimes" consisting of 72 sections taken from New Jersey, New York, Vermont, and Pennsylvania.[23] This act provided:

> "That assaults, batteries, false imprisonments, mayhems, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offences, of an indictable nature at common law, and not provided for by this act, or some other act of the territory of Michigan, shall be punished by fine or imprisonment, or both, or by fine, and imprisonment at hard labor, or both, or by fine, or solitary imprisonment at hard labor, or both, at the discretion of the court before whom the conviction shall be had: *Provided,* That such fine shall not exceed one thousand dollars, and such imprisonment one year."

This act, while not completely codifying the criminal law, went far in that direction by prescribing penalties for more than fifty named crimes, and by fixing the maximum punishment for common law crimes not specifically covered.[24] And before the "Code of 1820" was published the process of codification was further advanced by the adoption of separate laws which pre-

19 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 109.

20 Id. at 134. Also see Act of 1820, id. at 586.

21 Id. at 134. Also see Act of 1820, id. at 586, where it is declared that "trials by battle in all cases shall be, and hereby are forever abolished."

22 Id. at 594.

23 Id. at 561, 585.

24 In Matter of Lamphere, 61 Mich. 105 at 108 (1886), Campbell, C. J., stated: "In 1810 an act was passed putting an end to all the written law of England, France, Canada, and the Northwest and Indiana territories, as well as the French and Canadian customs, leaving no statute or code law in force except that of Michigan territory and the United States: 1 Terr. Laws, 900. And while we have kept in our statute-books a general statute resorting to the common law for all non-enumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. There is no crime whatever punishable by our laws except by virtue of a statutory provision. The punishment of all undefined offenses is fixed within named limits, and beyond the unregulated discretion of the courts."

scribed penalties for other common law crimes. One of these laws, "An Act to punish Vendors of unwholesome Liquors and Provisions,"[25] took care of the specific problem raised in Ohio in the *Lafferty Case* in 1817[26]—a case discussed at length in Goodnow's "Historical Sketches of the Principles and Maxims of American Jurisprudence in contrast with the Doctrines of the English Common Law on the Subject of Crimes and Punishment" published in Ohio in 1819.

In addition to the "act for the punishment of crimes," the "Code of 1820" included "An Act regulating proceedings in criminal cases" made up of 31 sections adopted from New York, New Jersey, Virginia and Ohio.[27]

Jurisdiction and Venue

The act of Congress which created the Territory of Michigan in 1805 provided that the new territory should have a government "in all respects similar" to that provided for the Northwest Territory by the Ordinance of 1787, and that the officers to be appointed by the President of the United States should exercise the same powers as conferred on similar officers of Indiana Territory by the Ordinance and laws of the United States.[28] The Ordinance had provided for the appointment of a court to consist of three judges who should have "a common law jurisdiction."[29] While not expressly authorizing the territorial legislature to establish courts inferior to the supreme or superior court established by Congress, the Ordinance provided for the appointment of "such magistrates and other civil officers" as might be found necessary for "peace and good order" in the Territory, and that the powers and duties of "Magistrates and other civil officers" should be regulated and defined by the General Assembly when organized.

Exercising power implied from the Ordinance the legislators of the Northwest Territory established a complex system of courts—the General (Supreme) Court at the top; circuit courts to be held by judges of the General Court in each county; and for each county a court of general quarter sessions of the peace,

25 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 792.
26 TAPPAN'S OHIO REPORTS 80 (1817).
27 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 589.
28 2 Stat. 309.
29 1 id. at 51.

a court of common pleas, an orphans' court, a probate court, and magistrates' courts to be held by one or more justices of the peace. The earliest Northwest statute touching the General Court (1788) fixed terms for holding pleas, "civil and criminal," and provided "that all processes, civil and criminal," should be returnable to the court "wheresoever they may be in the territory."[30] The legislators did not attempt to define the jurisdiction of the court, apparently recognizing that under the Ordinance it had an unlimited common law jurisdiction both civil and criminal. By a statute adopted at the same time (1788) the legislators established county courts of general quarter sessions of the peace to "hear, determine and sentence, according to the course of the common law, all crimes and misdemeanors, of whatever nature or kind, committed within their respective counties the punishment whereof doth not extend to life, limb, imprisonment for more than one year, or forfeiture of goods and chattels, or lands and tenements to the government of the territory."[31] This statute further provided that one or more justices of the peace "out of sessions" might hear and determine, according to the course of the common law, "petit crimes and misdemeanors, wherein the punishment shall be by fine only, not exceeding three dollars." A law adopted in 1795 provided:[32]

> "If any person shall be convicted, either by his or her own confession, or the testimony of credible evidence, before any two justices of the peace, in their respective counties, of having feloniously stolen any money, goods or chattels (the same being under the value of five shillings, now equal to one hundred and fifty cents) the offender shall have judgment, to be immediately and publically whipped, upon his or her bare back, not exceeding fifteen lashes; or be fined in any sum, at the discretion of the said justices, not exceeding three dollars. . . ."

A person charged with larceny under this statute could upon request have his case heard by the Court of Quarter Sessions for the county. Under the heading "Questions upon the laws of the N.W. Territory" Solomon Sibley, admitted to practice in the Territory in 1797, wrote the following in his Notebook:[33]

30 Statutes and laws cited in note 11 supra, Chase ed., 97; Pease ed., 11.
31 Id., Chase ed., 95; Pease ed., 6.
32 Id., Chase ed., 146-147; Pease ed., 151.
33 SIBLEY PAPERS, Burton Historical Collection, Public Library, Detroit.

"4th Has the G. Q. Sessions of the Peace jurisdiction over thefts of more than 1,50? This court cannot proceed to trial agt a Criminal, upon any crime alleged to have been committed, the punishmt of which if proven, would extend to life or limb or more than one years imprisonment—There is no statute in this territory which points out the punishment this crime is subjected to—Therefore we must have recourse to the common law—By the common law of Engd Larceny if above S12, is punished with death—If the common law is to be a rule of decision, then most certainly the Sessions have nothing to do with this offence, but falls exclusively within the jurisdiction of the General Court—"

Another law, adopted in 1798, declared it to be "within the power and duty of every justice of the peace within his county to punish by such fine as is by the statute laws of the territory provided all assaults and batteries that are not of a high and aggravated nature. . . ."[34] The penalty for assault and battery, fixed by statute in 1788, was a fine not exceeding $100 and, in the discretion of the court, recognizance for peace and good behavior not exceeding one year.[35] Whether a justice of the peace could impose the full penalty, his jurisdiction being limited to assaults and batteries "not of a high and aggravated nature," does not appear. All other Northwest statutes expressly limited the criminal penalties to be imposed by justices of the peace, the maximums being: Fine $5.00, stripes 15, stocks 3 hours. A law adopted in 1790 prohibiting sale of liquor to soldiers provided a penalty of $2.00 per gill "to be recovered before any two justices of the peace for the county wherein the offence shall be committed, in case the aggregate sum, so to be forfeited do not exceed twenty dollars, or if otherwise by action of debt or information in any court of record."[36] A law adopted in 1799 provided that certain penalties to $18 might be recovered before any justice of the peace (whose jurisdiction for the purpose was made coextensive with the boundaries of the county), but if over $18 to be recovered by an action of debt in a court of record.[37] In no case was a justice of the peace authorized to render judgment for more than $20.

The Northwest statute of 1788 which first fixed the terms of the General Court, and provided that "all processes, civil and

34 Statutes and laws cited in note 11 supra, Chase ed., 205; Pease ed., 297.
35 Id., Chase ed., 100; Pease ed., 19.
36 Id., Chase ed., 104; Pease ed., 29.
37 Id., Chase ed., 236; Pease ed., 396.

criminal," should be returnable to the court wherever it might be sitting,[38] further provided "that all issues of fact shall be tried in the county where the cause of action shall have arisen." After providing in 1795 that judges of the General Court should go on circuit twice each year to try "issues of fact" in civil cases, the legislators declared:[39]

> "The judges of the general court have power, from time to time, to deliver the jails of all persons who are now, or hereafter shall be committed for treasons, murders and such other crimes as, by the laws of this Territory, now are, or hereafter shall be, made capital, or felonies of death, as aforesaid: and for that end, from time to time, to issue forth such necessary precepts and process, and force obedience thereto, as justices of assize, justices of oyer and terminer, and of jail-delivery, may, or can do within the United States."

According to the law of 1788, referred to above,[40] the jurisdiction of the courts of quarter sessions was limited to crimes and misdemeanors "committed within their respective counties." The law adopted in 1795[41] provided:

> "To the end, that persons indicted or outlawed for felonies, or other offences, in one county, or town corporate, who dwell, remove or be received, into another county, or town corporate, may be brought to justice; it is hereby directed, that the justices, or any of them, shall and may direct their writs, or precept, to all or any of the sheriffs, or other officers of the said counties, (where need shall be) to take such persons indicted or outlawed. And it shall and may be lawful to and for the said justices, and every of them, to issue forth subpoenas, and other warrants, under their respective hands and seal of the county, into any county or place of this Territory, for summoning or bringing any person, or persons to give evidence. . . ."

"An act establishing courts for the trial of small causes" adopted in 1799 provided that the jurisdiction of each justice of the peace, under the act, should be coextensive with the limits of the township in which he resided, and that his writs, precepts, and process should run throughout the township and be executed

[38] Id., Chase ed., 97; Pease ed., 11.
[39] Id., Chase ed., 149; Pease ed., 158.
[40] Id., Chase ed., 95; Pease ed., 151.
[41] Id., Chase ed., 148; Pease ed., 156.

there, and not elsewhere.[42] A supplement to this law, adopted in 1800, provided that subpoenas might be issued to witnesses anywhere within the county.[43] It does not appear, however, that justices of the peace were limited to their respective townships in criminal matters. The few statutes which expressly deal with the territorial extent of a justice's criminal jurisdiction refer to crimes committed within the county.

Under the English common law "the jurors of one county could not inquire of that, which was done in another county."[44] A criminal case might be tried in a county other than the county of the crime, but only when the jurors were summoned from the latter county. In the Northwest Territory all criminal cases were triable only where the facts occurred. The courts of general quarter sessions of the peace, and the justices of the peace, were limited in jurisdiction to crimes committed within their counties. The General Court (in bank and its judges on circuit) had jurisdiction of crimes committed anywhere within the Territory, but was supposed to try them in the counties where committed. The limitation placed on the jurisdiction of the county court, and justices of the peace, caused no great difficulty, the necessary courts being accessible when needed, but the scheme of holding regular sessions of the General Court or circuit courts in all the counties did not meet the needs of the territory, not because of defects in the system, but because of the unwillingness or inability of the judges to make the necessary journeys. As stated by a congressional committee in 1800,[45]

> "most of the evils which they at present experience are, in the opinion of this committee, to be imputed to the very great extent of country at present comprised under their imperfect Government. The Territory northwest of the Ohio from southeast to northwest fifteen hundred miles, and the actual distance of travelling from the places of hold courts the most remote from each other is thirteen hundred miles. . . . In the three western counties there has been but one court having cognizance of crimes in five years. . . . The extreme necessity of judiciary attention and assistance is experienced in civil as well as criminal cases."

42 Id., Chase ed., 236; Pease ed., 396.
43 Id., Chase ed., 308.
44 3 COKE INST. 48 (1797).
45 AMERICAN STATE PAPERS (1 Misc.) 206 (1834).

The committee recommended that the territory be "divided into two distinct and separate Governments, by a line beginning at the mouth of the Great Miami."

After the Northwest Territory had been divided into two governments (1800), and Michigan made a part of the western government (Indiana) (1800 and 1803), the situation in Michigan was worse than before. In a petition to Congress dated at Detroit, March 20, 1803, citizens of Wayne County stated:[46]

> "The ostensible causes which operated to deprive us of regular and stated courts, whilst a part of the late Territory, must necessarily increase, so long as we remain attached to the Indiana, in a ratio, proportionate to the increase of distance, added to the greater hazard, the Judges must encounter in performing a Journey of at least double the distance the late Judges had to travel, and the whole of that immense distance, thro' a continued Indian Country, inhabited by distinct Nations and Tribes of Savages, often at War amongst themselves, as well as hostile to travelers. . . ."

Another petition presented to Congress in December 1804 stated:[47]

> "Persons *capitally punishable,* are seldom prosecuted to conviction. They remain in confinement for the want of competent authority to try them, until they are forgotten, when, with the assistance of their associates in guilt, they break their bonds, and deride, from the opposite bank, the impotence of our Magistrates.—
>
> "In *Civil matters,* too, the delay and expense are equally fatal.—During the last eight years, we have had but two Circuit Courts.—The Creditor is deterred from an appeal to the laws, under the painful assurance, that altho' justice is not *sold,* it costs more than, some among us are, able to pay.—"

In response to these and other petitions, Congress divided Indiana Territory into two governments, designating Detroit as the seat of the eastern government.[48] Almost immediately after this change went into effect (July 1805) Governor Hull of Michigan divided the territory into four districts (Huron, Detroit, Erie, and Michilimackinac) and, at the same time, declared that the parts of the territory to which the Indian title had been extin-

[46] Documents cited in note 1 supra, 14.
[47] Id. at 34.
[48] Note 4 supra.

guished should constitute one county—the county of Wayne.[49] Later in the same month the governor and judges as a legislature combined two of the administrative districts (Huron and Detroit) into one judicial district, and established the other two (Erie and Michilimackinac) as separate judicial districts.[50] In two of the three judicial districts a court was to be held twice a year; in the third judicial district (Michilimackinac) a court was to be held once a year on the fourth Monday in June. The law further provided: "That it shall be the duty of the judges of the territory of Michigan, to attend each district court, at their respective terms, and the said judge shall constitute a court for such district." The courts were given jurisdiction "over all persons, causes, matters, or things" over $20, "except cases exclusively vested in any other court." Charging a grand jury at Michilimackinac in June 1806, Judge Bates stated:[51]

> "Gentlemen of the Grand Jury—This is the first time that the Grand Inquest has been convened in your District, and I meet you on the occasion with sentiments of the most cordial congratulation.—The legislative authority of the Territory have thought it advisable to establish a court on your Island. This court possesses a jurisdiction both equitable and legal. It has cognizance of all matters whatsoever of a civil nature, except in those where the title to real estates may come into question, provided the amount demanded exceed the sum of 20$ and except in cases of divorce and alimony. It has also jurisdiction of all criminal cases, the punishment of which by the laws is less than capital. These exceptions when they arise from magnitude or intricacy, fall exclusively within the jurisdiction of the supreme court. When on account of the inconsiderableness of the demand, they are determinable by a single justice at his chambers. . . . Thus Gentlemen, is justice brought home to your doors."

Another law, adopted by the legislators of Michigan in July 1805,[52] provided that the Supreme Court of the Territory should "consist of the three judges appointed and commissioned by the President of the United States." This court, having been provided

49 Woodward Code 151-154 (1805). Also see 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 3-4 (1935).

50 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 17.

51 Blume, "The First Charge to the Grand Jury in the District Court of Michilimackinac," 14 MICH. ST. B. J. *344, *346 (1935).

52 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 9.

for by the Ordinance of 1787 (made applicable to Michigan), had, under the Ordinance, an unlimited "common law jurisdiction." The territorial act of 1805 provided that the Supreme Court should have exclusive jurisdiction of all capital crimes; that it should hold one term annually at the seat of government, and special sessions when necessary.

A law adopted in April 1807[53] repealed so much of the act "concerning district courts" as required "one of the judges to constitute the court of the district," and provided that each district court should be held by three persons "of integrity, experience, and legal knowledge" who should be appointed by the governor and who should reside within the district. As thus constituted the district courts continued to function, along with the Supreme Court and the justices of the peace of the several districts, until 1810 when the district courts were abolished leaving only the Supreme Court and the justices of the peace to constitute the judicial system. The act of 1810[54] authorized each justice to try "matters of a criminal or penal nature" where the fine or penalty did not exceed $20 or the imprisonment 20 days, and "to apprehend, commit and recognize" all offenders whose offenses surpassed his jurisdiction. All other criminal or penal matters wherever arising were triable before the Supreme Court which sat only at Detroit.

A law adopted in October 1815[55] provided for the establishment of "A County Court . . . to be held by one Chief and two Associate Justices." As each county was created an act was adopted fixing the times for holding a county court for the new county. Within the period covered by this study the following counties were laid out and established:[56] Wayne, November 1815; Monroe, July 1817; Macomb, January 1818; Michilimackinac, Brown, and Crawford, October 1818; Oakland, January 1819; St. Clair, March 1820; Lapeer, Sanilac, Saginaw, Shiawassee, Washtenaw, and Lenawee, September 1822. The counties laid out in 1822 were not organized until after 1824. The act of 1815 provided that the county court should have "exclusive cognizance of all offences, the punishment whereof is not capital." This attempt to limit the unlimited common law jurisdiction conferred on the

[53] 2 id. at 7.
[54] 4 id. at 98.
[55] 1 id. at 184.
[56] Id. at 323-336.

Supreme Court by Congress was challenged by certain inhabitants of Wayne County in the winter of 1817-18:[57]

> "Having confidence in the justice, learning & wisdom of the higher Court, it is with pain we perceive its doors closed against almost all investigations made under the criminal law; & its entrance, so frequently shut to applicants for redress against violations of private right, even by appeal. We would humbly submit our doubts whether it be competent to deprive the people of their privilege to apply to that high tribunal in all cases, of which, by the ordinance, it can have jurisdiction."

The petitioners suggested that a law be adopted "providing for the holding, in each County, by one or more of the Supreme Judges, of a nisi prius court, twice each year."

Impressed, it seems, by the above challenge, the legislators, by a law adopted in June 1818,[58] provided that the Supreme Court should have "original and concurrent jurisdiction of all civil cases both of law and equity, and cognizance concurrent with the county courts of all offenses, crimes, and misdemeanors." As stated in a law adopted in December 1820,[59] the county courts were to have "cognizance of all crimes and offences . . . not capital, concurrent with the supreme court."

By providing in 1815 that the county courts should have "exclusive cognizance" of "all" criminal offenses not capital, the legislators deprived the justices of the peace of the jurisdiction conferred by the act of 1810. Later in 1815, however, it was provided that a person accused of stealing growing vegetables or fruit in the night time might be tried before two justices "where the offence was committed," and fined to $12 or imprisoned to one month or both.[60] By a law adopted in 1818 "every justice of the peace within his own county" was empowered to try certain larceny cases where the value did not exceed $7, fines being limited to $7, and stripes to 10.[61] A larceny statute with similar limitations, enlarged to include malicious mischief, was adopted in 1820.[62] In 1824 the value was increased to $20, the fine to $20,

57 WOODBRIDGE PAPERS, Burton Historical Collection, Public Library, Detroit.
58 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 132.
59 1 id. at 714.
60 Id. at 129.
61 2 id. at 139.
62 1 id. at 571.

and the stripes to 20, but with provision for trial by a jury of 12.[63] In civil cases the maximum jurisdiction of justices of the peace ranged up to $100. The maximum fixed in 1805 was $20.[64] In 1810 the maximum was raised to $100 with trial by jury in cases involving more than $20.[65] In 1815 the maximum for trial was $20 with power to enter confessed judgments up to $100.[66] In 1820 the maximum was $100 with trial by a jury of 6;[67] amended in 1821 to provide for a jury of 12 where the value exceeded $20.[68]

During the period in which the Territory was divided into districts, the district courts and the justices of the peace were limited to their respective districts; after counties were organized, the county courts and the justices of the peace were limited to their respective counties.[69] But at all times the jurisdiction of the Supreme Court extended throughout the Territory. In an opinion delivered in 1824 Judge Sibley declared:[70]

> "The Court created by the ordinance, has at all times and on all occasions, and in every Territory of the United States, where the ordinance of 1787 has been applied, and I think correctly, been considered a Territorial Court of the highest grade and possessed & exercised an undivided jurisdiction, thro and over the whole Territory or district of Country embraced within the Territorial limits—And whenever the Court has been opened for transacting business, it was, necessarily, opened for transacting the Business of the whole Territory that might be properly before it, and that it is not, nor can be confined to the transacting the Business of a County, or other district of Country less than the whole Territory, unless by a positive law of Congress—. . ."

In 1826 the same judge stated:[71]

> "By one of the provisions of the ordinance of 1787 the inhabitants of the Territory are guaranteed in their right to have judicial proceedings carried on and administered according to the course of the Common Law. . . .

[63] 2 id. at 191.
[64] 1 id. at 21.
[65] 4 id. at 98.
[66] 1 id. at 185-186.
[67] Id. at 604, 608, 493.
[68] Id. at 789.
[69] "An Act to regulate and define the duties and powers of Justices of the Peace and Constables in civil cases," adopted in 1820, provided that "no person shall be proceeded against by summons out of the county in which he or she resides." Id. at 605.
[70] 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, Blume ed., 459 (1938).
[71] 1 id., 1825-1836, 294 (1940).

"There is another provision of the ordinance of 1787 that requires the Govr of the Territory, for the purpose of executing process, civil and criminal, to Lay off such portions of the Tery where the Indian title has been extinguished in to Counties, Townships &c

"There was an object to be attained in making this provision. The Govr is required to lay out counties—and when laid out, the doctrine of venue, appears to me attaches,—A person prosecuted in the Supreme Court, who lives in a different County from the one where the Court sits, ought not to lose the Benefit of being tried by Jurors of his own County if he requires it. It is a Common law right & he ought not to be deprived of it."

While wrong in referring to the county of residence instead of where the facts occurred, Judge Sibley was correct in his view that after counties were laid out "the doctrine of venue" became applicable. But it clearly appears that this view was not shared by the judges of the Supreme Court in 1821. In two murder cases tried before the court in that year the court held that crimes committed in any county of the Territory, or in the Indian country within the Territory, were triable in Wayne County where the Supreme Court held its sessions. In one of these cases (*United States v. Kewabishkim*)[72] the defendant had moved in arrest of judgment on the ground that he had not been tried in the county of the crime. In the other case (*United States v. Ketaukah*)[73] the defendant had challenged the array "Because they are not brought from the county or country where it is alleged the crime was committed. We have a right to a jury from the *vicinage.*" In the Northwest Territory an attempt was made to preserve the jury of the vicinage by providing that the Supreme Court in bank or its judges on circuit hold regular sessions in each county. In Michigan Territory the judges of the Supreme Court held their sessions only at Detroit, and resisted all attempts to require them to sit elsewhere. If the Court had held that jurors, as well as the witnesses and the defendant, must be brought to Detroit from the county of the crime, the burdens of the trial would have been increased without any compensating benefit, except, perhaps, the relief afforded the citizens of Wayne County from jury service.

[72] 1 id., 1814-1824, 147, 633.
[73] Id. at 492, 496.

At the time of the above decisions Michigan Territory had been expanded westward so as to include all of the area north of Illinois to the Mississippi River.[74] To meet the judicial needs of the western area, Congress provided in 1823 for the appointment of an "additional judge" who should hold a term of court annually at Prairie du Chien, Green Bay, and Mackinac.[75] The act transferred to the new court all original jurisdiction which the Supreme Court had exercised in the area since 1818, with certain exceptions.[76] Capital and other criminal cases arising in the western counties were no longer to be tried hundreds of miles away at Detroit, but in the counties where they arose.[77]

Indians and Indian Country

The Ordinance of 1787[78] provided:

> "For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof—and he shall proceed from time to time as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships. . . ."

That the legislators of the Northwest Territory understood they had power to adopt laws which would have force in the Indian country within the Territory is clearly indicated. "An act to prohibit the giving or selling intoxicating liquor to Indians, residing in, or coming into the territory of the United States northwest of the river Ohio, and for preventing foreigners from trading with Indians therein," adopted in 1790, among other things, provided:[79]

> "And if any person being a citizen of the United States, or resident within this territory, shall after the first day of January, go to, reside in, or trade with Indians, at or near any of their towns, settlements or habitations, lying within the said territory, without a license for that purpose first duly

74 Note 5 supra.

75 3 Stat. 722.

76 See "Petition to Congress by Inhabitants of Brown County" (1824) 11 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 588 (1943).

77 For conditions prior to 1823, see petitions to Congress (1821), id. 140, 154, 162.

78 1 Stat. 51.

79 Statutes and laws cited in note 11 supra, Chase ed., 103; Pease ed., 27.

obtained, he or she shall forfeit and pay to the use of this territory, the sum of five hundred dollars."

"An act to prevent the introduction of spiritous liquors into certain Indian towns," approved December 6, 1799,[80] recited that the Ordinance made it the duty of the legislature, from time to time, to enact laws "founded in justice and humanity, for preventing of wrongs done to the Indians." "An act providing for the trial of homicide committed on Indians," approved December 8, 1800,[81] recited that the governor had stated, in communications to both houses of the legislature, that difficulties had arisen in prosecuting and bringing to punishment "persons charged with homicide committed on certain Indians within this territory, and that similar difficulties may be expected in the future." In the communications referred to, Governor St. Clair had stated:[82]

> "Situated, gentlemen, as we are, in a country bordering upon many savage tribes, with whom (the principles of religion and justice are out of the question) it is our interest, and should be our policy to be at peace, it is clearly necessary that the treaties made with them by the Government of the United States should not be contravened with impunity by any of the inhabitants of this Territory, and it may be proper that the general regulations that have been established with respect to them, should sometimes, be aided by municipal laws; and this has, by the Ordinance for the government of the Territory, been made a duty."

While it is clear the legislators considered they had power to adopt criminal laws binding on non-Indians within the Indian country, it does not appear they ever considered it within their power to pass criminal laws binding on the Indians who lived in the vast areas where the Indian titles had not been extinguished.

By a statute enacted in 1802 Congress prescribed penalties to be imposed on persons who should go into the Indian country and there do any of the acts forbidden by the statute, or who should there murder an Indian, or do any act which would be punishable as a crime if committed in a state against a citizen of the United States.[83] The federal court or superior territorial court

80 Id., Chase ed., 244; Pease ed., 415.
81 Id., Chase ed., 296.
82 2 THE ST. CLAIRE PAPERS, Smith ed., 502 (1882).
83 2 Stat. 141.

of a district in which an offender might be apprehended, or brought to trial, was authorized to proceed as if the crime had been committed in the district. On the other hand, if an Indian should cross the line, and commit murder or other crime outside the Indian country, he could be apprehended, and, presumably, tried, where the crime was committed. But nothing in the statute indicates that an offense by an Indian in the Indian country, though within the boundaries of a territory, was punishable under federal or territorial law, or in a federal or territorial court.

By a statute enacted in 1817[84] Congress provided that any Indian or other person who should commit in the Indian country any offense punishable as a crime if committed in any place "under the sole and exclusive jurisdiction of the United States" should suffer punishment in the federal court or superior territorial court of the district where first apprehended, or brought for trial, but: "That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary." The punishment referred to was that provided by "the laws of the United States for the like offenses, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States."

Referring again to the cases of the two Indians tried for murder in 1821[85] it should be noted that Kewabishkim was indicted by a grand jury impaneled by the Supreme Court of Michigan sitting as a territorial court; Ketaukah by a grand jury impaneled by the Supreme Court sitting as a circuit and district court of the United States. Although the two grand juries were made up of the same persons, care was taken to have them sworn on the two sides of the Supreme Court. This difference in treatment was thought necessary because one Indian was charged with the murder of Charles Ulrick at Green Bay (where the Indian title had been extinguished); the other, with the murder of Doctor Madison near Manatuwalk (where the Indian title had not been extinguished). The one was indicted for violation of a territorial statute; the other, for violation of the laws of the United States. The court sitting as a territorial court was governed by territorial

[84] 3 Stat. 383.

[85] Notes 72 and 73 supra. Also see 11 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 158, 176, 177 (1943).

procedure, but as a circuit and district court of the United States considered itself governed by federal procedure. While mistaken in believing that because the court had been vested with the same jurisdiction of United States cases as the United States court for Kentucky district and had been provided with the services of a United States attorney and marshal, it was a national as well as a territorial court, the judges were probably correct in holding that an offense by an Indian against a non-Indian in Indian country should be prosecuted as a violation of the laws of the United States, and not as a violation of territorial laws. Sibley, later a judge of the Supreme Court, took the position that under the Ordinance the territorial laws had force in all parts of the territory including the Indian country; that the act of 1817 was not applicable because unceded Indian lands within a territory were not under the sole and exclusive jurisdiction of the United States. In conclusion he observed:[86]

> "A Question may be made touching the sovereign rights of the Indians, as to the Country they inhabit. As an abstract question, it presents difficulties not easily solved, or reconciled, with the principles recognized by civilized nations, as rules But in practice the difficulty vanished—No civilized nation has ever recognized the Indians as possessing national sovereignty—they have proceed[ed] to divide and apportion the wilderness amongst themselves, wholly regardless of the savages who roam thro the forests in search of a scanty subsistence—"

The act of Congress of 1823 which established a circuit court to be held by the "additional judge" in the counties of Michigan Territory north and west of Lake Michigan,[87] provided the court should have the original jurisdiction formerly exercised by the Supreme Court in those counties (except admiralty cases and cases in which the United States should be plaintiff), and concurrent jurisdiction of "all actions arising under the acts and laws in force, or which may be enacted, for the regulating trade and intercourse with the Indians, and over all crimes and offences which shall be committed within that part of the Indian country lying north and west of Lake Michigan, within the territory of Michigan." In 1824 Waushayguany, a Menominee Indian, was

[86] 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1825-1836, Blume ed., 188, 189 (1940).

[87] Note 75 supra.

indicted under a territorial statute for maiming Stanilaus Chapput, by biting off his thumb, at the mouth of the Menominee River, in Indian country, where Chapput was trading with the Indians under a license duly granted by an Indian agent. On trial of the case before the "additional judge" (Doty)[88]

> "The deft. by W. L. Baird his Attorney, filed a plea to the jurisdiction of the court; upon which he argued, 'that by the Proclamation of the Governor of the Territory the *actual* boundaries of this county extend only as far as the Indian title has been extinguished: That the Indians ought not to be bound by law which they had no hand in making: That they punish such offenders by their own laws and customs: and that the Munnomonee's are an independent nation of Indians, claiming the soil, and exercising all the rights of sovereignty, wherever they have not parted with them to the U.S. by Treaty.'
>
> "*Collins,* for the Prosecutor, replied—'there is no part of the U.S. to which the laws do not extend; and it is contrary to the policy of the Govt. to leave any part of the country unprotected by the laws, where offences may be committed with impunity. The jurisdiction of this court must extend to the utmost limits of the county. The 5th. Sec. of the act establishing this court, gives it concurrent jurisdiction with the Supreme Court "*over all crimes* and offences which shall be committed within that part of the Indian country lying north and west of Lake Michigan within the Territory of Michigan." '
>
> "*Baird.* This sec. has reference exclusively to offences under the laws of the U.S. . . .
>
> "*Decision.* The question is, whether an Indian, convicted of having maimed a white-man within the Indian country, at a place where the Indian title has not been extinguished, can be punished by this court under the act adopted by the Governor and Judges, entitled 'An act for the punishment of crimes'? . . .
>
> "I am of the opinion, that the act for the punishment of Crimes adopted by the Governor and Judges does not extend to the Indian country—as against the Territory therefore the prisoner has committed no crime. There being no Statute of the United States for the punishment of the crime of maim-

88 Doty's "Notes of Trials and Decisions" (MS State Historical Society of Wisconsin, Madison) 72.

ing within the Indian country, the prisoner is discharged from the custody of the Sheriff.

"Note. June 1827. I have now rec[d] the copy of an act of congress which was passed in *1817,* by which all offences are punished if committed in the Indian country, in the same manner as they would have been in the State or Territory where the offender is tried. This decision is therefore wrong, and I so instructed the grand jury at this Term."

Judge Doty, as an attorney, had participated in the trial of Ketaukah before the Supreme Court in 1821 and was familiar with the memorandum written by Sibley at that time. His decision in 1824 was in accord with the holding of the Supreme Court, and was, it seems, correct. His change of position in 1827 resulted from a misinterpretation of the congressional act of 1817.

Offenses by Indians against non-Indians outside the Indian country, that is, in parts of the territory where the Indian title had been extinguished, were punishable under territorial laws in the territorial courts. The same was true of offenses by Indians against Indians in those areas, but in two notable cases Indian chiefs were acquitted after having claimed that the acts done were in accordance with Indian law. In November 1806, Governor Hull wrote Secretary Madison:[89]

"A very important event took place here a few days ago. Michorice, or the little Bear, the principal Chief of the Chipewa Nation committed an outrageous murder on one of his Nation at this place. He was immediately arrested by the Marshall and committed to prison. He gives as a reason, that the deceased was a bad man, that he had murdered a number of the Nation, and had last summer given him poison and had lately attempted again to poison him. Being at the head of the Nation, and by their laws and customs having all the powers of government vested in him, he considered that he only did his duty. As soon as he had committed the act, and before he was arrested, he came to me and informed what he had done."

In a later letter the governor reported that the chief had been tried and acquitted "by the verdict of a judge." The records of the Supreme Court show that the chief was indicted for murder, pleaded not guilty, and was found not guilty by a jury made up,

[89] 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 71 (1935).

almost entirely, of persons having French names. Whether the governor wrote "judge" when he meant to write "jury," or was referring to an instruction given by a judge, is not clear. From the records of the other case, *United States v. Oshkosh,* tried before the "additional judge" in 1830,[90] it is clear that the judge made the decision which led to the chief's discharge. A jury returned a special verdict finding that Chief Oshkosh "did kill and slay the said Aukeewas," but that Aukeewas had committed a capital offense under tribal law, and that Oshkosh killed him in pursuance of that law. Judge Doty, after stating his reasons, concluded that the prisoner had not "wilfully and maliciously violated any statute of the Territory of Michigan."[91]

The journals of the Supreme Court (1805-1825) contain entries pertaining to ten criminal cases against persons identified as Indians: *Kiscacon* (commonly called "The Chippewa Rogue"), indicted in 1805 for the murder of Antoine Loson in Indian country, was rescued from the marshal, and never brought to trial.[92] *Wabouse* (a Chippewa Indian), indicted in 1806 for murder, was, after jury trial, found guilty of manslaughter. It was considered by the court that the prisoner "be burnt in the left hand." According to a newspaper account of the case "the sentence of the court was, that he should be branded in the hand with a *cold iron;* —which sentence was solemnly carried into execution in the presence of the court—and the Indian bid to depart for his own tribe."[93] *Maccouse* (a chief of the Chippewa Nation), indicted in 1806 for the murder of a member of his tribe near Detroit, was, after jury trial, found not guilty, and discharged.[94] *Totaganee* (an Indian), arrested for murder in 1807 on a writ issued by a justice of the peace following an inquest on the body of Nantamee, was discharged on habeas corpus for want of evidence.[95] *Petobig* (a Chippewa Indian), indicted in 1811 for the murder of Jean Baptiste Racine, was, after jury trial, found guilty. The record shows he was represented by counsel, and was furnished copies of the indictment and jury panel. His counsel certified that Judge

90 Doty's "Notes of Trials and Decisions" (MS State Historical Society of Wisconsin, Madison) 187.

91 Id. at 207. Some of the papers in this case are reproduced in "A Case of Lex Talionis," 19 A.B.A.J. 145 (1933).

92 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 51 (1935).

93 Id. at 67.

94 Id. at 71.

95 Id. at 97.

Woodward's judicial conduct was "perfectly correct and very humane." After verdict (October 8, 1811) the prisoner was "remanded under the guard of ten citizens who were summoned, as a posse, to attend the marshall." May 15, 1812, the cause was continued until the next term. The "next term" was never held, the British having occupied Detroit in August 1812.[96] *Animensois* (an Ottawa Indian), indicted in 1811 for assault and battery, and for robbery, the attorney general being unwilling to prosecute for robbery, pleaded guilty to assault and battery on John Ward, and was fined $1.00 and costs.[97] *Wabouse* (a Chippewa Indian), arrested in 1815 for the murder of Louis Roi, "was brought from Jail into Court, and proclamation being made, he was discharged."[98] *Kewabishkim* (a Menominee Indian), indicted in 1821 for the murder of Charles Ulrick at Green Bay, was, after jury trial, found guilty. The record shows that interpreters were sworn, four counsel assigned, and copies of the indictment, jury panel, and list of witnesses, furnished. The sentence was that the prisoner be hanged by the neck until dead.[99] *Ketaukah* (a Chippewa Indian otherwise called Wabeequinabe) indicted for the murder of Doctor Madison in Indian country, was, after jury trial, found guilty. The record shows that fetters were removed, interpreters sworn, counsel assigned, and trial by jury explained. A *jury de medietate linguae* was denied. The sentence was death.[100] *Schomah* (an Indian), arrested for murder in 1824, was discharged, a proposed indictment having been indorsed "This bill not found."[101] The Ordinance of 1787 had provided that the "utmost good faith" should always be observed toward the Indians. A review of the court records of Michigan 1805-1825 justifies conclusions that Indians brought before the Supreme Court were dealt with fairly, even leniently, and were accorded all the benefits and protections guaranteed to citizens of the United States.

Use of Indians as witnesses presented a perplexing problem—capacity to take an oath. The following excerpts are from the

96 Id. at 222. Also see 10 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 358, 365 (1942).

97 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 224 (1935).

98 1 id., 1814-1824, at 67.

99 Id. at 147.

100 1 id., 1825-1836, at 188.

101 1 id., 1814-1824, at 329.

notes of the "additional judge," Doty, re the trial of an Indian for murder in 1823:[102]

> "An Indian woman called. Baird, for Prisnr. objects to her being sworn as a witness. She does not believe in the Scriptures—nor in a God—nor in a state of future rewards and punishments—Peake's Ev. 141.
>
> "Baily. Heathens, such as Hindoo's, Mahometans &c are examined in the English courts. Peake, 141.
>
> "Interpreter—inquired whether she had not made feasts in worship of the Great Spirit—Yes. She has heard the Indians speak of him in their feasts, and she stands in fear of him. Believes those who are good go to a *good place* after death, and those who are bad, to a bad one: If she should tell a lie now before these men (the jury) about this matter, she would be punished hereafter—she would go to the bad place.
>
> "Court.—Let her make her statement under this obligation to tell the truth and after being cautioned by the Interpreters, and the jury will give such weight to it as they conceive it entitled to. In such a case, it is thought, there will be no danger in leaving the question of credibility entirely with them. . . .
>
> "Muc-oo-cahn.—Does not know whether there is a Great Spirit or not—he has never seen him—does not know him.—He seldom makes feasts—Does not know where his forefathers have gone—he did not see them go any where—Will not answer whether he would expect to be punished if he should tell a lie about this affair now.—Not admitted.
>
> "An old Indian—Father of the decs[d]—Believes there is a Great Spirit. When he was young he used to pray to him when in trouble, want, &c—but now he is old, he does not think it necessary:—if he was young it might be different.—He does not know there is a good or bad place to which we go after death—rather thinks there is neither—he is an old man—many of his friends have died—and if there was any such place he thinks he should have heard of it from some of them—no one ever came back to tell him.—Not admitted."

As a note to the last excerpt, Doty wrote in 1830:[103]

> "If a witness swears falsely, he is not prosecuted because he impiously appealed to God, but because he told what

[102] Doty's "Notes" cited in note 90 supra, at 6-8.
[103] Id. at 9.

was untrue—The *form of oath* can be of little consequence—the object is to extract *the truth* from the witness; and if he understands that he will be punished if he declares what is untrue, this should be sufficient, for this is the utmost limit of the operation of the law."

Prosecution by Indictment

The legislators of the Northwest Territory assumed, as clearly appears from their legislation, the regular use of grand juries as under the common law. A law adopted in 1792[104] fixed the per diem to be paid to the foreman and other members, and their mileage. Fees of the sheriff "for attending on a grand jury by deputy" were also fixed, as were his fees for summoning a grand jury. An act prohibiting gaming and discharging fire-arms under certain conditions, adopted in 1790,[105] provided "that as well the presiding judge in the general court, as the presiding judge or justice in each and every inferior court of law" shall "severally and from time to time give this act in charge to the grand juries of such courts respectively whenever such grand juries shall be sworn." A law to suppress gaming adopted in 1795[106] provided that the act should be given "in charge to the grand jury as soon as sworn." At no time did the legislators of the Northwest Territory prescribe what offenses should be prosecuted by indictment, or how a grand jury should be constituted, or its business conducted.

"An act concerning grand juries," adopted in Michigan Territory in 1805,[107] provided that the marshal of the Territory should, at every stated sitting of the supreme and district courts respectively, summon 24 of the "most discreet inhabitants" of the Territory (Supreme Court) or district (district court) who, or any 16 of whom, should be a grand jury, and sworn to inquire of and present all offenses and misdemeanors cognizable by the court. The oath to be administered was set out in the statute. An act for the punishment of crimes and misdemeanors adopted in 1808[108] provided that after impaneling a grand jury the court should appoint a foreman who should have power to swear wit-

104 Statutes and laws cited in note 11 supra, Chase ed., 137; Pease ed., 115 ("Grand Juror's Fees").

105 Id., Chase ed., 106; Pease ed., 34.

106 Id., Chase ed., 200; Pease ed., 276.

107 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 33.

108 4 id. at 31.

nesses. This act further provided that any 12 grand jurors might find a true bill; that no person should be held to trial on a capital offense without indictment a copy of which must be furnished at least 24 hours before trial. In 1809 the number required to find a true bill was fixed at 16, and a different oath prescribed.[109] The acts of 1808 and 1809 were repealed in 1810.[110] In 1817 the act of 1805 was extended to the county courts, except the oath which was prescribed anew.[111] A new law adopted in 1820 provided for the summoning of 18 persons having the qualifications of voters for delegate to Congress, any 16 to compose a grand jury.[112] After being sworn, the grand jurors were to appoint a foreman, who should have power to swear witnesses. Any 12 of the grand jurors were empowered to find a true bill. This act was amended in 1821[113] to require a panel of 24 instead of 18, and that all grand jurors in the Supreme Court be freeholders; also that witnesses be sworn in open court. An oath was prescribed by statute in 1821[114] and again in 1824.[115] It was made the duty of grand juries to make inquiries as to violations of the tavern law (1819),[116] to complain of breaches of the act re gambling (1819),[117] and to aid in enforcing the law against selling liquor to Indians (1821).[118]

Difficulties arising from the requirement that grand jurors in the Supreme Court be freeholders in addition to having the qualifications of voters for delegate to Congress, were noted by the "additional judge" in connection with the impaneling of a grand jury at Michilimackinac in 1823:[119]

> "It is not necessary that the jurors in this court should be freeholders in all cases. Some offences were exclusively cognizable before the Supreme Court; and in the exercise of this particular jurisdiction, the jurors must possess the same qualifications as are required in that court. If such a jury cannot be found, this class of offendors cannot be presented.

109 Id. at 66.
110 1 id. at 900.
111 2 id. at 126.
112 1 id. at 490.
113 Id. at 789.
114 Id. at 234.
115 2 id. at 182.
116 1 id. at 411.
117 Id. at 416.
118 Id. at 923.
119 Doty's "Notes" cited in note 90 supra, at 1-2.

"Those persons who were in the possession of land in the Michigan Territory in the year 1796, at the time of the surrender of the Posts in this country, are freeholders. It is understood to have been the intention of the Treaty, to secure to these people such quantities or tracts of land as they occupied and cultivated at that time, and to give them a freehold estate therein. . . .

"If a juror is a freeholder in any County of this Territory, he is duly qualified; and perhaps he is if he possesses a freehold in any State. The statute is vague, and the circumstances of the Country require a liberal construction of the statute in this respect.—Laws of Michigan p. 372."[120]

[120] The following are extracts from "Notes of Trials, Arguments, Decisions, and Proceedings, in the Supreme Court of the Territory of Michigan—September Term, 1821" originally printed in the *Detroit Gazette*, November 1, 1822 (reprinted in 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, Blume ed., 482-484). Woodward, Griffin, and Witherell were judges; the others, members of the bar. "September 18. The Grand Jury was called, when mr. [sic] Russell claimed to be excused, on the ground that he was not a freeholder, and therefore could not legally serve as a grand juryman. He had a U.S. certificate for land in Oakland county, but no deed. *Sibley*—I think he is not a freeholder. *Witherell*—If that is granted, we must go back to *salt water law*, and freeholders must have a certain *quantum* of land. *Sibley*—I think not—one acre or one thousand are the same, for making a freeholder. *Witherell*—No; at common law a certain quantity was necessary—it has been altered by statute in England. *Sibley*—I think it is doubtful as to the *quantum* required by the common law. The qualifications of petit jurors are indefinite, and the law assimilates the requisites of the grand to those of the petit jurors. *Witherell*—If you are right, they could not get a jury in Oakland county. *Woodward*—(to Witherell)—You are of opinion that Russell is a freeholder? *Witherell*—I don't say so. *Woodward*—Then you are of opinion that he is *not* a freeholder? *Witherell*—I don't say so. (all silent for a time) The title to U.S. lands, when the certificate is given, is out of the United States—it is imperitive on the United States to give a deed—not like a bond from an individual. *O'Keeffe*—states the case of a voter in England. A mortgagor who had mortgaged his estate over and over again, beyond all possibility of redemption; yet the fee was in him, and not the mortgagees—and he was a freeholder. *Witherell*—The reason in England for requiring a freehold is, that there shall be none but men of character and standing to pass on the lives and fortunes of their fellows. *O'Keeffe*—Russell is not in possession, he is therefore situated like the mortgagees. The question was now put. *Witherell*—I think he is a freeholder enough for the purposes of the statute concerning the qualifications of grand jurors. *Griffin*—He has not the fee by the certificate; therefore he is not a freeholder. *Larned*—recommends to examine the certificate, to see how it reads. *Woodward*—It is very clear he is not a freeholder: this statute does not apply to Oakland county; only to this court. They ought to be freeholders, but it is a *casus omissus*. [reads the jury act. L. of Mich. 136.] Russell is discharged from the jury. *Larned*—suggested that Chene is not a freeholder; he had sold his farm to Ball for a consideration of *fifty dollars*. *Woodward*. I wish mr. [sic] Chene to state the facts as to his title. *M'Dougall*. Ball bought of Chene. An absolute deed was made; but Chene thinks it was a mortgage. The deed is in my hands. *Larned*. 'Tis an absolute deed. *Witherell and Griffin*. He is not a freeholder. *Woodward*. I am of a diffierent opinion; for if it was the undersanding of the parties that it was a mortgage, it is a mortgage, and Chene is a freeholder. Chene is discharged. . . . *Leib*. I would inform the court that Conelly, one of the tales, is not a freeholder. *Conelly*. I am; Abbott has reconveyed my farm to me. The objection was withdrawn; and eighteen jurors were sworn. There were

That Judge Doty was able to impanel a grand jury is shown by the next entry in his Notes:[121]

> "Twenty two Grand Jurors sworn, and charged, among other things, to notice all offences against the 'act to regulate taverns,' the 'act to prevent Gaming,' the 'act to prevent horse racing,' and the 'act to enforce the observation of the Sabbath.' The general law, as well as the statutory provisions, on the subject of Homicides, was also given them in charge. Laws M. 315, s. 1. & 6. page 192, ib. 200. 4 Bl. C. 177. 3 Chit. C. L. 168.—"[122]

In January 1821 a motion was made in the County Court

several French jurymen who did not understand English—and a pretty long discussion took place as to the proper translation of the word *"envy"* into French. It was finally agreed that *"envie"* was the correct word. . . . *Woodward.* I have many matters to charge on both sides of the court, therefore shall delay the charge till 2 P.M.—as the time of the recess comes.—Day! you will proclaim a recess of the court for one hour. Day repeats the proclamation."

121 Doty's "Notes" cited in note 90 supra, at 3.

122 In his charge to the first grand jury impaneled for Crawford County (May 10, 1824) Judge Doty stated: "It is made, by law, your especial duty, to notice all offences against the 'Act to prevent Gaming,' the 'Act to prevent horseracing,' and the 'Act to enforce the observation of the Sabbath,' which may in any manner have come to your Knowledge. The criminal jurisprudence of this country, although it is apparently defective in some parts, is yet a more perfect system than older governments than this can boast. Without being sanguinary, it is perhaps sufficiently corrective. If properly administered, there can be no doubt that life, liberty and property are amply secured." (Doty's "Notes" cited in note 90 supra, at 39-49) For the full text of a charge given by Judge Bates (June 1806), see Blume, "The First Charge to the Grand Jury in the District Court of Michilimackinac," 14 MICH. ST. B. J. *344 (1935). In continuation of the proceedings set out in note 120 supra, Judge Woodward, according to the *Detroit Gazette* of November 15, 1822, charged the grand jury in part as follows: "The Constitution of the United States provides that no one shall be punished for a capital offence but by indictment found by a Grand Jury. [Reads now the common law at large from 4 vol. Bl'k. com. 14, 176. Before he had concluded his quotation some of the jurors were 'caught napping.'] [Read the section of the statute prescribing the mode of punishment of murder by hanging. and all the sections abolishing appeals, trial by battle, corruption of blood, &c] * * * I have now submitted all of the law, and everything essential, as to the crime and punishment of murder. If anything more is wanted, I refer you to the prosecuting attornies. I will remark on one point more. The same evidence *nearly* will be required by the Grand Jury before an indictment is found, as will be required by a petit jury in trying the offender. You are not to present on probability, merely—[Reads from 4th vol. Bl'k. Com.] And you must find the offence committed within this territory. 'Whoso sheddeth man's blood, by man shall his blood be shed.' These are emphatic words—not as having any divine authority, or containing any thing holy—but as evidence of early and wise opinions—they contain solemn law, solemnly expressed. It is your duty to see that every murderer be put to death; and also that no one is indicted without sufficient evidence. Passions must be quiet. You are not to be influenced by partialities or animosities in finding bills. It is better that 99 criminal should escape, than that one innocent man should suffer. Be not, therefore, too rigorous. * * * The jury will retire and consult of their presentments and indictments." For a charge given by Judge Woodward in 1811, see 10 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 363 (1942).

of Wayne County to quash an indictment (for breach of the law regulating taverns, found by a grand jury of sixteen) on the following grounds:[123]

> "1st. That the Statute of this Territory which provides that Sixteen Grand Jurors shall be competent to find a Bill of Indictment, against an individual, is contrary to the Common Law, and to the articles of Compact between the Original States and this Territory.
>
> "2nd. That the Indict has no caption.
>
> "3rd. That the time of committing the offence is expressed in figures instead of words, and therefore contrary to the Common Law.
>
> "4th. That no specific quantity of liquor is stated to have been sold.
>
> "5th. That the person to whom the liquor was sold is not named.
>
> "6th. That the indorsement of the day of filling the Bill is incorrect, being made by the Deputy Clerk, instead of Clerk, according to the Statute."

It was "Ordered by the Court, that the motion of the Defendant be sustained, and that the Indictment be quashed, on the ground that the date of the commission of the offence is expressed in figures instead of words; and that the Law which provides that sixteen Grand Jurors are competent to find a Bill against an individual, is contrary to the Common Law, contrary to the articles of compact, and consequently unconstitutional."[124] In three other cases prisoners were discharged "on the ground of the unconstitutionality of the law respecting grand juries."[125] The constitution referred to was not the Constitution of the United States, but the Ordinance of 1787 which had ordained that the inhabitants of the Territory should always be entitled to the benefits of "judicial proceedings according to the course of the common law." The law in question had been adopted by the governor and a majority of the judges of the Supreme Court.[126] In September 1821 Woodward, chief judge of the Supreme Court, observed:[127]

123 WAYNE COUNTY COURT JOURNAL 1820-21 (MS Record Room, Circuit Court, Detroit) 96.

124 Id. at 97

125 Id. at 100, 104.

126 Note 112 supra.

127 DETROIT GAZETTE, January 3, 1823 (reprinted in 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, Blume ed., 496).

"The statute alters the common law number of men necessary to compose a jury, from 23 to 16. This is an alteration greatly in favor of liberty, for the less the number of jurors required, the greater is the chance for the prisoner. The legislature may alter the common law in civil and criminal cases by adopting statutes from the states."

The second ground for quashing the indictment referred to above, viz., the want of a "caption," suggests the distinction which existed at common law between the "caption" of an indictment, and its "commencement." A caption was necessary only when the court acted under a special commission, or the case was removed from an inferior court to a superior court.[128] A commencement was a formal part of every indictment. For forms of commencement used in Michigan, reference is made to 29 indictments printed in full in *Transactions of the Supreme Court of the Territory of Michigan* (1805-1814; 1814-1824):[129] Erie District Court—1; Wayne County Court—3; Macomb County Court—2; Monroe County Court—1; Supreme Court—22. The district court indictment (larceny 1806) commences and concludes:

"Michigan Territory
District of Erie to wit
The Jurors of the United States of America, in and for the Territory of Michigan, upon their oath present,

* * * * * *
* * * * * *

against the peace & dignity of the said United States and this Territory"

According to the commencements of five of the six county court indictments, the jurors were "grand jurors of the United

128 In May 1825, Judge Doty made the following entry in his "Notes": "Ind. asslt & bat. Mo. to quash—because the Jurors names are not inserted in the Ind: (1 Chit. 167.)—and because it is otherwise informal. Court.—The motion is overruled—In a court of final jurisdiction the caption to an Indictment is completed by the clerk when he makes up the record of the case, until which time it usually contains nothing but the name of the state & county, and the style and term of the court. In inferior courts, the jurors names must also appear, so that if the case be taken up at any stage of the proceedings, they may be known to the superior court. That where the Indictment is found knows them from the record or Journal which it is required to keep, and can therefore at all times judge them." Doty's "Notes," cited in note 90 supra, at 85.

129 See "Indexes to Pleading and Practice Forms" 1805-1814, vol. 2, 497-498; 1814-1824, vol. 2, 594. An indictment of an Indian for murder in 1811 is set out in 10 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 365 (1942).

States" in and for the particular county; but according to the sixth, they were grand jurors within and for the body of the county. Each of the 22 Supreme Court indictments commences with a statement that the presentment is by "jurors" or "grand jurors" of the United States "in" or "within" or "for" the Territory of Michigan.

In the margins or headings of the 29 indictments will be found (1) venue, (2) name of court, and/or (3) term of court. The venue (United States and Territory; Territory; Territory and County) was always included, but not always the name of the court and the term of court.

A law signed by the governor alone in February 1809 provided that all writs and process should run "in the name of the Territory of Michigan."[130] In October 1809 the Supreme Court arrested judgment after conviction for larceny because the indictment concluded against the peace and dignity of the Territory of Michigan whereas it should have concluded "against the peace & dignity of the United States of America."[131] This adjudication, according to Judge Woodward, settled the following principle:[132]

> "That the territory of Michigan possesses No Sovereignty, and that to Conclude an indictment AGAINST THE PEACE AND DIGNITY OF THE TERRITORY OF MICHIGAN, pursuant to the Stile Contemplated by the Said bills, instead of Concluding it AGAINST THE PEACE AND DIGNITY OF THE UNITED STATES OF AMERICA, is error."

Except two county court indictments which concluded against the peace and dignity of the county, all the above indictments concluded against the peace and dignity of the United States, and also, in most instances, against the peace and dignity of the Territory. In the conclusions of 13 of the 29 indictments no reference was made to statute or statutes, the remainder concluding against the form of a statute or statutes of the United States (3), of the Territory (6), or, in general, in such case made and provided (7). Where no statute was referred to, the prosecution was under the common law.

In two county court cases taken to the Supreme Court by

130 4 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 71.

131 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 493 (1935).

132 Id. at 515.

writ of error in 1817[133] the following, among other, errors were assigned:[134]

> ". . . the supposed indictment was not found a true bill by any regular grand jury of the county of Wayne duly and legally convened according to law, but that the same bill was presented by one Henry B. Brevoort for himself, and in behalf of number of persons promiscuously attending.
>
> ". . . the said supposed indictment contains no such sufficient charge, described in the words of any law, as is indictable or punishable by any Court of Said territory, and more particularly because the facts therein stated are charged to have been committed feloniously, and because the words of no statute are pursued in the description of the said supposed offence.
>
> ". . . said supposed indictment nowhere contains any averment that the supposed facts charged, were committed within the jurisdiction of any County Court, or other Court of said territory.
>
> ". . . it is not stated or found in and by said supposed indictment what person Committed the larceny of the Salt Supposed to have been purchased . . . nor is it found that the person committed the suppose larceny was unknown.
>
> ". . . the offence is charged in the supposed indictment in the disjunctive.
>
> ". . . there is not to Said Supposed indictment any sufficient Caption . . .
>
> ". . . it does not in Said Supposed indictment appear against what Statute the Same Concludes, and particularly whether against a statute made and provided by the United States in Congress assembled, or any Statute in the territory of Michigan adopted and published by the local authority thereof."

The Supreme Court, finding error in the record and proceedings of the county court, reversed,[135] but did not indicate the error or errors found. Commenting on the decision the editor of the *Detroit Gazette* wrote:[136]

> "Now, we do not pretend to LAW KNOWLEDGE, nor

133 1 id., 1814-1824, at 83-84.
134 2 id. at 79-80.
135 Id. at 82-83.
136 1 id. at 84 (DETROIT GAZETTE, October 10, 1817).

> did we witness the trial, therefore, we are wholly unable to tell the people by what *law quibble* this man is again turned loose among them. There is no doubt but the *quibbles* were good—and our Supreme Court Judges are certainly *Judges,* and 'all honorable men.' "

In an opinion delivered in one of the above cases in the county court, Judge McDonell, after calling attention to Blackstone's observation "that in favor of life great strictness has at all times been observed, in every point of an indictment," pointed out that Sir Matthew Hale had complained "that this strictness is grown to be a blemish, and inconvenience in the law, and the administration thereof—for that more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence. . . ."[137] After disposing of three of the grounds of the motion in arrest of judgment, Judge McDonell stated:

> "The arguments urged in support of the arrest of judgment, by the prisoner's counsel, merits approbation for the diligence and integrity manifested to their client, and the decorum and respect shewn to the court during this arduous session—and also the brilliant display of professional talents —but which are more ingenious than solid in the present case—when the groundwork is unsound the most magnificent superstructure is in danger of falling. . . .
>
> "I am well aware that my ideas are not delivered with that precise, technical, lawyer-like manner, that is customary to a professional character—it is merely the result of a close examination of the subject. I give it therefore as my opinion, that the indictment is good, and that the rule ought to be discharged."

Notwithstanding these liberal views, the same court in 1821 (as noted above)[138] quashed an indictment on the ground that the date of the commission of the offense was expressed in figures instead of words.[139]

137 Id. at 566.

138 Note 124 supra.

139 Of the 30 indictments referred to in note 129 supra, 21 contained one count; the remainder, two counts. An indictment for libel presented in the Supreme Court in 1808 (United States v. Gentle), containing three counts, quoted parts of eleven newspaper publications charged to have been contemptuous of Governor Hull and Judge Woodward. This indictment consists of 35 MS pages, and, according to a notation in the handwriting of the clerk, contains "9800 words." John Gentle was the author of almost all, if not all, of a series of 21 articles "On the Evils which have proved fatal to Republics," published

Turning to the laws adopted by the governor and judges of Michigan we find some evidence of an inclination to remedy the complexity of indictments, if not the "great strictness" referred to by Blackstone, and condemned by Hale. A law published in 1808 made it sufficient to set out in an indictment for perjury "the substance of the offense charged upon the defendant, . . . without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed."[140] This provision, repealed in 1810,[141] was re-adopted in 1815.[142] A law adopted in 1820 provided:[143]

> ". . . that no indictment or criminal proceeding shall be quashed, nor the judgment be stayed or arrested for the omission of an addition of the estate or degree of the defendant, or of the place in which he was or may be conversant or resident.
>
> ". . . that from henceforth the words 'feloniously with force and arms,' or any such words shall not of necessity be put in any inquisition or indictment for any crime or misdemeanor, and that no party being hereafter indicted of any crime or misdemeanor shall take any advantage by writ of error, plea or otherwise, to annul or avoid any such inquisition or indictment because the words 'feloniously with force and arms,' or any such like words are not put into the said inquisition or indictment."

It should be noted, however, that an elaborate law concerning amendments and jeofails adopted in the same year[144] provided "that this act, or anything therein contained, shall not extend to any indictment or presentment of murder, or other matter; nor to any process upon any of them; nor to any writ, bill, action

in 1807 and 1808. These articles were also entitled: "History of the government of the Michigan territory from its commencement." Five of the articles appeared in the *Aurora General Advertiser* (Philadelphia) (February 16, 18, 21, 24, and 25, 1807), and all were published in the *Pittsburgh Commonwealth* (May 27; June 3, 10, 17, 24; August 19, 26; September 2, 9, 16; October 7, 28; December 2, 9, 23, 1807; January 13, 27; February 10, 17, 17-extra, and March 2, 1808).

140 4 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 24.
141 1 id. at 900.
142 Id. at 114. Re-adopted in 1820. Id. at 566.
143 Id. at 594, 595.
144 Id. at 757.

or information, upon any popular or penal statute." While no person was to be prejudiced by insubstantial errors in civil proceedings, criminal proceedings must be conducted exactly according to the course of the common law, except as modified by statute. Lawyers trained in the common law participated in the criminal proceedings in all the courts, and saw to it that the technical requirements of the common law were not overlooked.

Summary Proceedings; Qui Tam

Criminal prosecutions in courts above the level of justices of the peace were, in almost all instances, either by indictment or by summary proceedings.[145] Although references were made to coroners' inquests, presentments, and informations, it does not appear that these methods of commencing prosecution were employed to any considerable extent. Three grand jury presentments are listed in the Appendix, infra, but only one of them was made the basis of a prosecution. In a criminal prosecution commenced by information in 1829 Judge Woodbridge, Presiding Judge of the Supreme Court, stated:[146]

> "The mode of proceeding by Information, in cases of crimes, is certainly sanctioned by the Common Law:—and, however unusual in this Territory and opposed to the spirit of our Criminal Code, yet I do not feel myself justified, in this stage of the proceeding, (especially as it is a case not coming within the scope of our local law,) in withholding my assent to the course the Attorney [for the United States] has prescribed for himself."

In another case brought before the Supreme Court by information in 1829[147] the court held that a rule to show cause against attachment for publishing a contemptuous newspaper article may be based on knowledge of the publication obtained through proceedings in other cases and from a "suggestion" filed by the attorney general; that a contempt of court committed by publishing a newspaper article may be punished sum-

145 See Appendix hereto giving all the types of criminal cases and matters appearing in the records of three of the territorial courts, and the method of prosecution employed in each case or matter.

146 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1825-1836, Blume ed., 386 (1940).

147 United States v. Sheldon, id. at 337.

marily without indictment or jury trial. In the course of a long opinion Judge Chipman said:[148]

> "It is admitted that there is an offence against the court which the law calls a contempt, and which may be examined into by the court in a summary way, without the intervention of a grand or petit jury. But it is contended that this is a power which the court is only entitled to exercise as against its officers, or against another committing *disturbance* in its presence, and in a few other specified cases. . . .
>
> "Judge *Blackstone,* 4 Com. 283, distinguishes *contempts* as being either *direct,* which openly insult or resist the powers of the court, or the power of the judges who preside there; or else *consequential,* which (without such gross insolence or direct opposition,) plainly tend to create an universal disregard to their authority. . . .
>
> "*Hawkins,* in his pleas of the crown, 2 vol. 228, distinguishes the different kinds of contempts under the following heads. 1. Contempts of the king's writ. 2. Contempts in the face of the court. 3. *Contemptuous words or writing concerning the court.* 4. Contempts of the rules or awards of the court. 5. Abuses of the process of the court. 6. Forgeries of writs and other deceits of the like kind, tending to impose on the court.
>
> "All the English elementary writers, who treat of the law of contempts, agree essentially with Hawkins and Blackstone, that a contempt of Court may be committed by words or writing. They also agree that the process by attachment is as old as the law itself, and that it was confirmed by *Magna Charta,* among the rights extorted from the English monarchs as an essential security to courts of justice, in the administration of the law."

The decision in the above case, which shortly preceded the impeachment and trial of Judge Peck for making a similar decision in Missouri,[149] was not in accord with the practice which had been established by Woodward and other territorial judges in the period 1805-1825. In an opinion delivered in 1811 Woodward stated:[150]

> "The principles of the common law of England, by

148 Id. at 344, 347.

149 For references see Nye v. United States, 313 U.S. 33, 45 (1941).

150 2 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 339-341 (1935).

which alone the present case is affected, in relation to the powers and rights of judges and justices, and with respect both to assaults and to abusive language, appear to be settled with a very considerable degree of precision. . . .

"Courts of justice may punish an assault taking place before them, and in their own view, or directed against themselves, their members, or officers. . . .

"Courts of justice may punish abusive and disorderly language and conduct, taking place in like manner. . . .

"For abusive language, used to a judge, or justice, personally, or in his presence, *relating to the exercise of his public functions,* though not then engaged in the actual execution of them, otherwise than, generally, as a conservator of the public peace, the offender is *indictable.* For abusive language used of, and concerning, a judge, or justice, when he is not present, relating to the exercise of his office, the offender is not indictable; *but is subject to a civil action.* . . .

APPENDIX

"A list of the authorities resorted to, in framing the preceding opinion.

Lambard. passim.
Dalton. passim.
The commentaries of Blackstone. Vol. III.
Burn's justice of the peace. Title, 'Justice.'
Encyclopedia. Article, 'Justice of the Peace.'
Strange's Reports. 420. 617. 1157. 1168.
Espinasse's Nisi Prius. Action of 'False Imprisonment.'
Salkeld. 396.
Moor. 247."

This case was prosecuted by indictment[151] as were the following cases which came before the Supreme Court in 1808: (1) Indictment for using abusive language to a judge concerning his decision in a pending case.[152] (2) Indictment for using abusive

151 1 id. at 224; 2 id. at 343.

152 1 id. at 123; 2 id. at 256. After citing Blackstone and Burn re abuse of officers of justice, Judge Woodward concluded that the defendant, Major Whipple, should enter into a recognizance for good behavior, and to appear at the next term of the Supreme Court. (2 id. at 253-255) In the course of his opinion he stated: "The Military, like perhaps every other profession, has a tendency to mould into a peculiar form the plastic variety of the human character, and in this, as in other professions, the effect is sometimes usefull, and ornamental to the fabric of Society, while it sometimes presents, on the other hand, an injury and deformity. Politeness adorned even with a romantic excess, a courage mild but firm, a skill in the protection of Society united with a sense of the

language to a justice of the peace while sitting in judgment.[153] (3) Indictment for writing and publishing a libel in contempt of the governor and chief justice.[154] The various matters dealt with by summary proceedings are listed in the Appendix, infra, under "Contempt."

In addition to laws expressly designated as acts for the punishment of crimes, the statutes of the Northwest Territory (1788-1803) prescribed more than 100 penalties for doing or not doing particular acts. More than a third of the statutes provided that a part of the penalty (usually one-half; sometimes, one-third or one-fourth) should go to the informer or person suing. For recovery of eighteen of the penalties "an action *qui tam*" was expressly authorized. In many of the statutes choices were given —debt or indictment; debt or qui tam or indictment.

In making the above summary no attempt was made to eliminate duplications resulting from the repeal and re-enactment of various statutes, and this may explain why the Michigan Code of 1820 provided for only half as many penalties as the older statutes. But this would not explain the reduction of the proportion of penal statutes authorizing recovery of part of the penalty by the informer or person suing, from one-third to one-fifth. Possibly we have here some evidence of a trend away from the scheme of enforcing criminal penalties through civil actions.

Jurors and Right to Jury Trial

A Michigan statute published in February 1809[155] conferred on justices of the peace original jurisdiction of certain civil actions "not exceeding the sum of fifty dollars." This statute and another which excepted these actions from the jurisdiction of the district courts[156] were held valid on writ of error in October 1809, Judge Woodward dissenting.[157] This adjudication,

duties due to it, exhibit the outlines of the former character; while rudeness of demeanor, a courage more ferocious than solid, and a forgetfullness of the superior duties which man owes to his character of citizen in preference to that of soldier, sometimes unfortunately pourtray the features of its opposite. In no part of the United States is it, perhaps, more necessary to enforce a practical conviction that the military is at all times to be subordinate to the civil power."

153 1 id. at 126; 2 id. at 261-262.

154 Note 139 supra.

155 2 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 53.

156 Id. at 69.

157 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 166 (1935).

according to Woodward, "Settles the following principle; *that a law authorizing a Summary trial, Without a jury, in cases where the Value in Controversy exceeds twenty dollars, being adopted from an original State, is good in a territorial government.*" The reference to "twenty dollars" indicates that Woodward was concerned with the Seventh Amendment which had guaranteed jury trial in suits at common law involving more than twenty dollars. The other judges, it seems, considered the federal Constitution inapplicable to the Territory, looking only to the Ordinance of 1787 for limitations on legislative power. The Ordinance had provided that the governor and judges should adopt and publish in the district such laws of the original states as might be necessary and best suited to the circumstances of the district, and the laws in question had been so adopted. Just when it was generally recognized that territorial laws must not conflict with the federal Constitution does not appear.

The Constitution of the United States as amended in 1791 provided:

> "*Article 3, Section 2*: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.
>
> "*Sixth Amendment*: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."

Commenting on these provisions and on the jury provisions of the Ordinance of 1787, Chipman, a judge of the Supreme Court, stated in 1829:[158]

> "The right of trial by jury existed before the adoption of the constitution, and is engrafted upon it. It creates no new right, but is declaratory of that which existed before, and secures that invaluable institution of the common law, from violation or encroachment. . . .
>
> "If we look to the ordinance of congress, which is the

[158] 1 id., 1825-1836, at 345, 346.

> organic law of this territory, we find the title to the 'trial by jury' accompanied by the guarantee of 'judicial proceedings according to the course of the common law.'
>
> "The same instrument provides that 'no man shall be deprived of his liberty or property, but by the judgment of his peers, or *the law of the land.*'
>
> "It has been judicially decided that by 'law of the land,' is intended the *lex terra,* or the common law.
>
> "It is a necessary deduction from the words of the ordinance, that in this territory the right of trial by jury is coextensive with the right as it exists at common law, and that it leaves unrepealed and unimpaired the power which, by the common law, is deposited in the courts of justice, to proceed by attachment against those who disobey the lawful process and orders of the courts, or who indirectly, or consequentially obstruct the free and impartial administration of justice."

While placing chief emphasis on the Ordinance of 1787 the judge recognized that the people of the Territory were protected by two bills of rights—the articles of compact of the Ordinance, and the bill of rights of the federal Constitution.

According to Doty's report of a civil case tried before the Supreme Court in 1819, William Woodbridge, later a judge of the court, moved for a continuance, and, after trial, for a new trial on several grounds, one being "there was no legal constitutional Jury" because summoned pursuant to a verbal order of the court. In the course of his arguments Woodbridge stated:[159]

> "Can the *Court* then *compel* us to have our case tried by this jury? By the ordinance of 1787, we are entitled to have our case proceed, and to have a jury—according to the common Law. It is essential by the common law that a venire be awarded. . . .
>
> "You say you may use your own words in adopting laws: you may put a different construction on those laws from that which is put upon them in the state whence they purport to have been adopted: a particular manner of getting a jury into the box, *it is said,* is a *mere matter of form,* and may be dispensed with, and what do you leave to the unfortunate inhabitants of—MICHIGAN! The laws of his forefathers, the common law, and the sacred trial by Jury, are in

[159] 1 id., 1814-1824, at 376, 385-387.

> a breath annihilated by the authoritative decision of his honorable Court—the last and highest tribunal in this Country. Where is the Security to liberty and to property! A *venire* is mere matter of form—that a juror be a freeholder, is a mere matter of form—and So, may it please Your Honors, is the number of *twelve* for a jury, *but mere matter of form!* Ten men will answer as well as twelve: and So will Six as ten: and so will *three,* as Six! And let these three be, not freeholders, but *vagrants, wanderers,* men fleeing from justice, if you please, and—'matter of form need not be preserved—the provisions of the common law in this respect useless'! . . . And is this the trial by jury, which our fathers bled for? Is this the trial by jury which they interposed between tyranny and their freedom?—"

According to Woodbridge, the Ordinance of 1787 "(our Constitution)" had preserved all features of the common law jury, and rejection of any one as a "mere matter of form" was a denial of jury trial. It should have been obvious to a person of his legal training, if not obvious to him, that this position was untenable. But to sort out the features of jury trial which were essential and could not be dispensed with without destroying the institution, from those which could be dispensed with as mere matter of form was not easy. The court's view that qualifications for jury service, and the manner of getting jurors into the box, were not essential but matters of form, seems correct, as does Woodbridge's contention, not denied by the court, that the number must be twelve. How these, and other features of jury trial sometimes held essential, were dealt with in the Territory will be noted briefly.

"An act providing for the trial of homicide committed on Indians" passed by the General Assembly of the Northwest Territory in 1800 provided that in each case "a *venire facias*" should issue to the sheriff or coroner commanding him to summon "forty-eight good and substantial freeholders of the county" to appear as jurors, and that the attorney general might challenge any who should not swear that he had "a freehold in that county, in one hundred acres of land."[160] This, and a statute requiring freeholders as jurors in forcible entry and detainer cases,[161] were

[160] Statutes cited in note 11 supra, Chase ed., 296.
[161] Id., Chase ed., 188; Pease ed., 246.

the only Northwest statutes dealing with qualifications for jury service. The first jury statute in Michigan (1805) provided that for the trial of all causes in the supreme and district courts the marshal should summon a sufficient number of persons "not being under the age of twenty-one years" to attend as jurors.[162] The statute provided that the courts might direct juries "de medietate linguae," but did not otherwise specify the qualifications which jurors must have. A similar statute published in 1809[163] (repealed in 1810)[164] directed the marshal to summon and return as jurors fourteen to forty-four "sober and judicious persons of good reputation" not under twenty-one years of age who had not served as jurors within a year (cases of special juries excepted). The jury statute of 1820[165] provided that qualifications for serving on grand and petit juries should be those required by Congress of voters for delegate to Congress, viz., every free white male citizen of the Territory above the age of twenty-one, resident in the Territory one year, who has paid a county or territorial tax.[166] This statute further provided that the clerk of the Supreme Court and of each county court should issue a venire to the sheriff of the county to summon thirty-six (Supreme Court) or twenty-four (county court) qualified persons to serve as petit jurors. And where the number in attendance was insufficient to make up a panel, the court was authorized to order the sheriff "with or without a precept" to summon the number needed. In 1821 the act of 1820 was amended to require that grand jurors in the Supreme Court be freeholders,[167] significantly failing to make a similar requirement for petit jurors. According to a newspaper account of the trial of Ketaukah for murder (1821), his attorney challenged the array because the panel contained "but 36 instead of 48 names," "because they are not all freeholders," and because not brought from the "vicinage" of the crime.[168] This challenge was overruled, as was a motion for a jury de medietate linguae. Re the latter motion the newspaper report reads:

162 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 35.
163 4 id. at 67.
164 1 id. at 900.
165 Id. at 490.
166 3 Stat. 483 (1819).
167 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 789.
168 DETROIT GAZETTE, January 3, 1823, reprinted in 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, Blume ed., 496 (1938).

"*Doty*—moved for a jury de mediatate linguae: and read from 4 Blk. Com. 372, to show he was entitled to his motion.

"*Sibley*—Read 1 vol L.U.S. 68. Jurors in District courts to possess the same qualifications as are required in the highest court of law in the state or territory, where the trial is—venire to be issued by the Clerk of the District Court and served by the marshal, &c.

"Juries de med. lin. are given by the statute of Ed.—they were unknown at common law. There would be many difficulties if six Indians were on the jury—the residue of the jurors never could find out when they had agreed on a verdict it would be necessary to have an interpreter in the jury room. Again an Indian cannot be sworn, as he has no ideas of future rewards and punishments. On this and other accounts they are not competent jurors.

"*Witherell*—The prisoner not being a foreigner he is not entitled to the jury.

"*Woodward*—Admitting for argument, that at common law an alien is entitled to a jury of that kind, yet the prisoner is not, for he is not an alien. He and his country are at least under the protection of the U.S.—it therefore cannot be allowed him. To permit an interpreter to be with the jury in their deliberations would vitiate the verdict—it is therefore inadmissible. I think however that an Indian may be sworn—instances Hindoos, &c."

In the discussion of "Jurisdiction and Venue," supra, attention was called to the vicinage requirements of the common law, and to the various Northwest statutes which required that criminal cases be tried where the facts occurred. The act of 1800 re "homicide committed on Indians"[169] provided for trial in the county "where the crime is committed" by freeholders "of the county." In Michigan Territory, however, the Supreme Court sat only in Wayne County, and there tried criminal cases arising in any county of the Territory. To relieve the resulting hardship three courses were suggested: (1) The court should hold sessions in each county. (2) Juries should be summoned from the counties of the crimes. (3) The criminal jurisdiction of the Supreme Court should be vested in other courts. The judges of the Supreme Court resisted the first suggestion, and held that

[169] Note 160 supra.

juries need not be summoned from the counties of the crimes. The only course left was to vest the jurisdiction in other courts, and this was done. Not being required to hold sessions away from the seat of the territorial government, and having resolved not to do so, the court quite properly held that jurors of the vicinage need not be summoned in cases of crimes committed in other counties. Jurors no longer decided cases of their own knowledge, and to require that they be brought to the territorial capital would have been merely an additional burden. The jury of the vicinage, as distinguished from trial at the place of the crime, was obsolete, and no longer an essential of common law jury trial. But what about the provisions of the federal Constitution? Article III required that crimes be tried in the "states" (not counties) where committed, leaving it to Congress to fix the place of trial of crimes "not committed within any State." The Sixth Amendment required that crimes be tried by juries of the "State and district" where committed. While preserving the jury of the vicinage, the vicinages were not counties but states, and federal judicial districts which were in most instances as extensive as states. When applied to a territory the analogous vicinage was the entire territory.

That jurors be "impartial" was required by the Sixth Amendment as well as by the common law. Some of the steps taken to insure impartiality will be noted: The jury statute of 1805[170] provided (1) that sufficient jurors be summoned for a session of court, instead of for each case separately, thus reducing the opportunities for jury packing; (2) that jurors having knowledge of the facts disclose the same in open court; (3) that the marshal not converse with the jurors; and (4) that a person having served as grand juror not serve as trial juror in the same case, if challenged. A statute published in 1808[171] (repealed in 1810)[172] provided that a person accused of crime who should plead not guilty and put himself upon the country might challenge six jurors peremptorily, and any further number for cause. The jury statute of 1809[173] (repealed in 1810)[174] in addition to the above four provisions of the law of 1805, provided that the marshal be sworn not to summon jurors who would be in-

170 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 35.
171 4 id. at 31.
172 1 id. at 900.
173 4 id. at 66.
174 1 id. at 900.

fluenced by "hatred, malice, or ill-will, fear, or affection, or by any partiality whatever," and that a list of the jurors to be summoned be posted in the marshal's office. In 1815 criminal penalties were prescribed for attempts to corrupt or improperly influence a jury, and for the punishment of corrupt jurors.[175] Statutes adopted in 1820 contained provisions similar to (1) and (4) of 1805,[176] and provided that in capital cases the accused should have a list of the jurors summoned to try him, and opportunity to challenge 35 of them peremptorily.[177] Upon the arraignment of Ketaukah for murder in 1821,[178] the jurors were called, and, according to the newspaper account,

> "*Woodward*—to the interpreter—instruct the prisoner that these 12 men are to try him for his life, and if he has any objection even to the countenance of any one, he may challenge him when he comes to the book to be sworn. Tell him he may challenge 35 without assigning any reason—need only say 'he does not like that man.' "

In a case argued before the Supreme Court in 1829[179] it was held that a challenge for cause should be sustained when it appears on voir dire examination that a person summoned as a juror in a criminal case has formed and expressed an opinion as to the guilt of the accused and still retains that opinion even though the opinion was formed on rumors, and the veniremen feels "competent to render justice to the prisoner." Referring to jury trial, Judge Woodbridge declared:[180]

> "It was soon placed at the basis of all our constitutional law:—it was irrevocably established as the *fundamental law of the Territories*.—If there exist a duty then, more imperative upon this Court than any other, it is, that it should preserve, in all its theoretic purity the right of Jury trial. . . .
>
> "In short, it is a mockery of justice to pretend that, *that* is an *impartial* jury, any of whom, had *previously* formed their opinions in the case!"

175 Id. at 116.
176 Id. at 490.
177 Id. at 593, 595.
178 Note 168 supra.
179 United States v. Reed, 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1825-1836, Blume ed., 330 (1940).
180 Id. at 333.

The jury statute of 1809[181] (repealed in 1810)[182] provided that the jurors, after retirement from the bar, should be kept without meat, drink, or candle, unless by permission of the court, until they were "with unanimity" agreed upon their verdict. The statute of 1820 provided that the jurors should be kept together until agreed upon a verdict, or discharged from giving a verdict by order of the court.[183] The common law requirement that verdicts be unanimous was recognized by the statutes, and, so far as the records show, always enforced by the courts.

In the discussion of "Summary Proceedings," supra, it was pointed out that criminal prosecutions in courts above the level of justices of the peace were, in almost all instances, either by indictment or by summary proceedings (contempt). Indictments were always tried with juries; summary proceedings without juries. Criminal cases tried and determined by justices of the peace were without juries, unless special provision for jury trial was made. The propriety of trying contempt proceedings without juries has been discussed, but not the propriety of conferring summary jurisdiction on justices of the peace, except the statute published in 1809 which undertook to confer civil jurisdiction in excess of $20.[184] Limitations on the power of the governor and judges to confer summary criminal jurisdiction on justices of the peace imposed by the Ordinance of 1787 and by the federal Constitution were in effect the same. The Ordinance provided for jury trial as at common law, but authorized adoption of statutes from the original states which had altered the common law. The Constitution guaranteed jury trial as it existed in the original states when the Constitution was adopted. Whether or not it was recognized that the federal Constitution was in force in the territories was not important for criminal cases in the periods when laws were adopted (Northwest Territory 1787-1799; Indiana Territory 1800-1804; Michigan Territory 1805-1823), but was important for civil cases because of the constitutional provision for jury trial in civil cases involving more than $20. Kinds of criminal cases thought suitable for summary trial by justices of the peace in the Northwest Territory were "petit crimes and misdemeanors" (1788),[185] "larceny, under a dollar

181 4 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 66.
182 1 id. at 900.
183 Id. at 492.
184 Notes 155, 156, and 157 supra.
185 Note 31 supra.

and a half" (1795),[186] "assaults and batteries . . . not of a high and aggravated nature" (1795).[187] In Michigan Territory, as shown supra under "Jurisdiction and Venue," no attempt was made to confer on justices of the peace summary power to impose criminal penalties exceeding the following maximums: fines—$20; imprisonment—1 month; stripes—10. These maximums were not in excess of those authorized in the states prior to 1787.[188]

Protection to Persons Accused of Crime

After providing that the people of the Northwest Territory should always be entitled to the benefits of the writ of habeas corpus, trial by jury, and judicial proceedings according to the course of the common law, the Ordinance of 1787 provided

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

Among the protections guaranteed by the federal Constitution were prosecution by grand jury; no double jeopardy or self-incrimination; due process of law; speedy and public trial; information re nature and cause of accusation; confrontation by witnesses; compulsory procees for obtaining witnesses; assistance of counsel; no excessive bail, excessive fines, or cruel and unusual punishments. The protections required by the Ordinance were recognized from the beginning, and were, insofar as the statutes and court records show, never denied. Though it was only gradually recognized that the additional protections called for by the federal Constitution were constitutional rights in the territories, it appears that nearly all, if not all, of these safeguards were provided by statute. The act for punishment of crimes and misdemeanors published in 1808[189] (repealed in 1810)[190]

186 Note 32 supra.

187 Note 34 supra.

188 See summaries of colonial statutes and full discussion by Frankfurter and Corcoran in "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," 39 HARV. L. REV. 917-1019 (1926).

189 4 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 22, 31, 32.

190 1 id. at 900.

required two witnesses to prove treason; prosecution of capital offenses by indictment; furnishing of indictment 24 hours before time to plead; permission to produce witnesses; process to compel attendance of witnesses; death penalty by hanging. The act regulating proceedings in criminal cases published in 1820[191] provided for release on bail; production of witnesses by accused; process to compel attendance of witnesses; assignment of counsel to persons unable to procure counsel; copy of indictment in capital cases 24 hours before trial; indictment and trial at first or second term of court.[192]

Both the Ordinance of 1787 and the Constitution of the United States prohibited excessive fines, and cruel and unusual punishments. The punishments prescribed by the statutes of the Northwest Territory were not excessive, nor were they cruel or unusual. Death was the penalty for treason, murder, robbery with homicide, burglary with homicide, affray resulting in death, and forgery of certain public securities. Fines were authorized, the highest being $1000 for maiming. Terms of imprisonment were prescribed, the longest being 40 years for burglary with violence and for robbery with violence. For some ten offenses whipping was a punishment, the maximum number of stripes allowed being thirty-nine, or, in one case, "to forty." For six offenses the persons convicted could be set in stocks or pillory for various periods, the longest being three hours. Forfeiture of all real and personal estate was prescribed for arson, burglary with violence, robbery, and murder; forfeiture of goods and chattels, for illegally trading with Indians. For second-offense larceny a person could be bound to labor for seven years; for

191 Id. at 589.

192 The provision for bail (§5) reads: "That the supreme court when in session, or any judge thereof in vacation, may let to bail any prisoner for whatever crime or misdemeanor committed, at the discretion of such court or judge, whenever the circumstances of the case shall appear to require it; but no justice of a county court, nor justice of the peace, shall have power to bail in cases where the punishment is capital." In 1822 a grand jury by presentment complained: "The Grand Jury respectfully present to the notice of the court the fifth section of an act of this Territory entitled an act to regulate the proceedings in criminal cases as containing an unconstitutional provision contrary to the spirit of the ordinance of the United States creating this Territory. By the second article of that ordinance it is provided 'That all persons shall be bailable unless for capital offences where the proof shall be evident or the presumption great.' This provision the Grand Jury consider to be a prohibition to the Legislature of this Territory from passing any law by which persons against whom there is great presumption of having committed capital offences shall be admitted to bail. . . ." 11 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 328 (1943).

maiming, sold into service for five years. Whether all of these punishments were actually inflicted in the Northwest Territory cannot be determined from materials now available.

In Michigan Territory within the period under consideration (1805-1825) some thirteen offenses were punishable by death, but the records show that only two death sentences were actually pronounced—both for murder.[193] In these cases the method of execution was hanging. In another murder case (referred to above under "Indians and Indian Country") an Indian having been found guilty of manslaughter was sentenced to "be burnt in the left hand."[194] This was referred to later as an instance of a cruel and unusual punishment. But if we credit the contemporary newspaper account that the defendant was branded with a *"cold iron,"* the act of the court was one of mercy—not of cruelty. An English statute enacted in 1490 had provided that benefit of clergy could be claimed only once, and that clerks convicted of murder should be "marked with a M. upon the brawne of the left thumb."[195] Whipping was prescribed as a punishment for several crimes, the number of stripes limited to thirty-nine. It should be noted, however, that the journals of the Supreme Court show only one sentence of whipping—fifteen stripes for larceny.[196] This sentence, pronounced September 24, 1806, was erased three days later, and a fine substituted. Two sentences of whipping appear in the records of the county court.[197] The "act for the punishment of crimes" adopted in 1815 provided "That the Court, or Justices, before whom, any negro, indian, or mulatto slave shall be convicted of any offence, not punishable with death, shall have authority to impose, in-

193 Notes 99 and 100 supra.

194 Note 93 supra.

195 Plucknett [A CONCISE HISTORY OF THE COMMON LAW, 4th ed., 415 (1948)] states: "In 1490 it was enacted that a clerk convict should be branded, for it had become a rule that the benefit could only be used once; this would make enforcement of the rule easy. The Reformation would at first sight seem to have been a convenient moment for abolishing so troublesome a relic of Rome, but in fact policy fluctuated. It was actually extended in 1547 to bigamists, and to peers of the realm whether they could read or not, and peers were excused the branding, too; it was further extended partially in 1642, and completely in 1692, to women. In 1707 all the world were admitted, by the abolition of the reading test, or 'neck verse.'" A statutory provision abolishing "benefit of clergy" in Michigan was adopted in 1815, and in 1820. Note 20 supra.

196 United States v. Oule, 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, Blume ed., 66, 362, 364 (1935).

197 WAYNE COUNTY COURT JOURNAL 1820-21 (MS Record Room, Circuit Court, Detroit) 126, 130 (39 stripes for larceny).

stead of the punishment by this act prescribed, such corporal punishment, not extending to life or limb, as such Court or Justices, in their discretion, shall direct."[198] No instance of use of this statute has been found. The act of 1815 further provided "That no conviction or judgment for any of the offences aforesaid, or any other offence against this Territory, shall make, or work, corruption of blood, dishersion of heirs, loss of dower, or forfeiture of estate."[199] The only forfeitures authorized by statute were certain disqualifications (to perform marriage ceremonies; to act as auctioneer; to give testimony; to hold office; to serve as juror), and the loss of arms, vessels, etc. used in acts hostile to the United States. Fines up to $7,000, and imprisonment up to twenty-one years, were authorized, but no provision for other servitude. All in all, the protection accorded to persons accused of crime—both by the legislature and by the courts—seems to have been wholly adequate, and strictly within the letter and spirit of the articles of the Ordinance of 1787, and the Bill of Rights of the federal Constitution.

The Law of the Land

Reflecting the language of Magna Carta, the Ordinance of 1787 provided that no man should be "deprived of his liberty or property but by the judgment of his Peers, or the law of the land." As was true of Magna Carta, "the law of the land" was the common law of England,[200] but as of what time and to what extent the common law was to be received, the Ordinance did not say. In 1818, after the Michigan legislature had declared that no English statute should have any force in Michigan, Judge Woodward, in a civil case before the Supreme Court, stated:[201]

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

198 1 LAWS OF THE TERRITORY OF MICHIGAN (reprint) 133.

199 Id. at 134.

200 According to Judge Chipman (note 158 supra) it had been "judicially decided" that by "law of the land" was "intended the *lex terra*, or the common law."

201 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1814-1824, Blume ed., 436 (1938).

> RICHARD Coeur de Lion; and the first monarch of the name of RICHARD on the English throne; the 'COMMON LAW' became complete, and insusceptible of any additions.
>
> "The Common Law is composed of the *unwritten,* and of the *written,* law of England, anterior to that æra."

In 1828 Judges Woodbridge and Sibley were agreed that the common law referred to in the Ordinance was the English common law, but one held it was common law of 1776 unaffected by English statutes, while the other considered English statutes which had modified the common law to be parts of the common law.[202]

When attacked in 1823 on the ground that he had no law books of his own, and read only "books on sciences," Judge Woodward replied that his first library had been "dispersed by the war;" that he had been familiar with the old law books for thirty years, and as new editions came out had compared them with the old to note improvements. He pointed to his opinion in the 1818 case as evidence of his "research and erudition."[203] Judge Woodbridge, who had practiced law in Ohio some nine years before coming to Michigan in 1815, was a graduate of the "famous law school at Litchfield."[204] A "Catalogue" of his law books made in 1806 lists 92 volumes.[205] Judge Sibley, a graduate of Rhode Island College, came to Detroit to practice law in 1797. A list made by him of "Law Books necessary for a Practiceing attorney" will be found in "Civil Procedure on the American Frontier (1796-1805)."[206] At the same place will be found a reference to the law books of Elijah

202 1 id., 1825-1836, at 308-313.

203 11 TERRITORIAL PAPERS OF THE UNITED STATES, Carter ed., 537, 540 (1943).

204 5 MICHIGAN HISTORY MAGAZINE 132 (1921).

205 WOODBRIDGE PAPERS, Burton Historical Collection, Public Library, Detroit: "Notes on law" (4); "Burn's Law Dictionary" (1); "Tuckers Blackstone" (5); "Reeves History of the Com. Law" (4); "Espinasse's Digest" (1); "Bac. Abrid" (7); "Statutes of Connecticut" (1); "Burn's Justice" (4); "William's Abridgt of cases Determined during the reign of George III" (5); "Powel on Mortgages" (2); "Fonblanque on Eqy" (2); "Harrison's Cha." (2); "Roper on Legacies" (1); "Mitfords pls in Cha." (1); "Jones on Bailment" (1); "Evan's Essays" (1); "Kidd on Awards" (1); "Chitty on bills" (1); "Peake on Evidence (1); "M'Nalley's do" (1); "Morgan's Law Es." (2); "Barnes' Notes" (2); "Tidd's Practice" (1); "Civil officer" (1); "Attorney's Pock. Com. the first vol." (1); "Modern Reports" (12); "Salkeld's Reports" (3); "Vernon's do." (2); "Pere Williams do" (3); "Vezcy do" (2); "Atkins do" (3); "Lord Ray. 1st & 2nd" (2); "4th Vol. Brown's Rep." (1); "Strange's Rep." (2); "Wilson's do" (3); "Douglas' do" (1); "Kirby do" (1); "Dallas do" (2); "Chipman do" (1); "Washington do" (2); "Cranch do 1st vol." (1).

206 56 MICH. L. REV. 161 at 167 (1957).

Brush, who was in active practice at Detroit prior to the War of 1812. According to the *Detroit Gazette,* there were twelve attorneys in Detroit in January 1819; fourteen in January 1824. One of them (O'Keeffe) was quoted as having said: "I was educated at two of the best seminaries in England, and I was bred at the Irish bar."[207] Another (Fraser) was referred to as "a very able Scotch lawyer and 'Father of the Detroit Bar' for many years."[208] While it is no doubt true that most members of the Michigan bar (1805-1825) were not well educated, it seems clear that on the bench and at the bar there were men sufficiently learned in the common law to mark its course, and to warn the courts against judgments which might not be in accord with the law of the land.

Influence of the Frontier

In my discussion of "Civil Procedure on the American Frontier (1796-1805)"[209] I called attention to Turner's "Significance of the Frontier in American History," and to suggestions by Paxson, Pound, and others, that Turner's thesis could be used to explain certain developments of American law. Turning from theory and speculation to the factual materials set out in the paper, I found little if anything to suggest that the law of the Northwest Territory as applied in the Court of Common Pleas of Wayne County (1796-1805) was a product of the frontier or that the spirit of the law was "sensibly affected by the spirit of the pioneer." I concluded: "The surviving records of the court bear strong witness that its proceedings, in the main and as guaranteed by the Ordinance, were according to the course of the common law." Having made a similar study of the statutes and court records of Michigan Territory (originally Wayne County of the Northwest Territory) for the period 1805-1825, I have reached a similar conclusion.

As pointed out in the previous paper, the area of continuous settlement had reached the Northwest Territory by 1790, and by 1800 had included a narrow strip along the eastern border, but did not include the Detroit area until sometime between

207 4 MICHIGAN PIONEER COLLECTIONS 353 (1881).
208 31 id. at 319 (1901).
209 56 MICH. L. REV. 161 at 203 (1957).

the census of 1810 and that taken in 1820. Though fully exposed to all the supposed influences of the frontier, the legislature and courts of Michigan (1805-1825) engaged in but little if any experimentation. Judge Bates observed in 1806:[210]

> "In enacting laws for the government of the territory we are confined to the experience of the original states. Our adoptions must be limited to their codes; codes which have raised scattered and indigent colonies into the first grades of independence respectability and opulence. We are forbidden indeed to make *experiments;* For indeed it has been our fortunate lot to have those experiments made for us."

Before referring to what the present writer considers the only significant departure from the course of common law criminal procedure which took place in Michigan Territory (1805-1825), attention is again called to the Appendix in which will be found all the types of criminal cases and matters appearing in the records of three of the territorial courts, and the number of each. No attempt has been made to determine what influence, if any, the frontier had on the occurrence of crime.

The Supreme Court of the Territory, which from 1805 to 1823 had unlimited common law jurisdiction throughout the Territory, sat only at Detroit, and, as noted previously, tried there certain criminal cases which arose in other counties of the Territory. In doing so the court denied the common law right of trial by a jury of the vicinage. This denial, condemned by Judge Sibley in 1826,[211] can be explained, not as a simplification resulting from frontier influences, but as a departure made necessary by the difficulties of travel under frontier conditions. Anyhow, long before this, jurors had ceased deciding cases from their own knowledge, making the jury of the vicinage obsolete, and ready to be discarded. The real question was who should risk the dangers and bear the burdens of frontier travel, the judges, or the accused and their witnesses? The decision of the judges in favor of their own convenience may have been undesirable, but, like other temporary makeshifts induced by frontier conditions, had no influence on the future development of the law. In 1880 the Supreme Court of the State of Michigan struck down as unconstitutional a statute passed in 1857 provid-

210 BATES COLLECTION, Missouri Historical Society, St. Louis.
211 Note 71 supra.

ing that the crime of cutting trees on state lands might be prosecuted "in the county where the offense is committed; or, if it be committed in the Upper Peninsula, in any county in said peninsula; if in the Lower Peninsula, in the county where the offense was committed, or in such other county as the Commissioner of the State Land Office, or the Attorney General, shall, by written instructions to the prosecuting attorney thereof, direct."[212] Judge Cooley declared that the act was not only "tyrannical and oppressive," but in manifest conflict with the Constitution of 1850 which had provided that the "right of jury trial shall remain." What right? "The right as it existed before; the right to a trial by a jury as it had become known to the previous jurisprudence of the State." And how was the "previous jurisprudence of the state" to be discovered? By reading Blackstone's *Commentaries,* Hawkins' *Pleas of the Crown,* Hale's *Pleas of the Crown,* and Chitty's *Criminal Law.*[213]

212 Swart v. Kimball, 43 Mich. 443, 445 (1880).

213 After citing the English authorities, Judge Cooley stated at 449: "It is true that Parliament as the supreme power of the realm made some exceptions [to the rule requiring jurors of the vicinage]. . . . But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written constitutions of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some States whether it was competent even to permit a change of venue on the application of the State, to escape local passion, prejudice and interest. . . . But no one doubts that the right to a trial by a jury of the vicinage is as complete and certain now as it ever was, and that in America it is indefeasible." For a discussion of "Constitutional Vicinage and Venue," see Blume, "The Place of Trial of Criminal Cases," 43 MICH. L. REV. 59 (1944).

APPENDIX

The figures in the columns below are numbers of criminal cases and matters found in the following records of Michigan territorial courts:

Supreme Court: Journals 1-3, July 29, 1805-October 25, 1824. Extant files, 1805 through 1824.

District Court for Huron and Detroit: Dockets 1-2, August term, 1805-August 21, 1810. Extant files, 1805-1810.

County Court for Wayne County: Journal, January 3, 1820-June 30, 1821. Extant files, 1815 through 1824.

Some of the cases and matters in the Supreme Court did not originate in that court, but were transferred there before or after trial. Seven such cases or matters are listed twice in the columns below—under Supreme Court and under County Court.

Each case or matter involved one accused person, except thirteen cases of assault and battery and/or riot, which involved two to seven persons—average five.

In addition to the above records the writer has examined the Journal of the District Court for Erie, September 2, 1806-November 3, 1807, and Notes of Trials and Decisions made by the Additional Judge of Michigan Territory, July Term 1823-October 8, 1824.

The original records of the Supreme Court except Journal 1 (in the Burton Historical Collection, Public Library, Detroit), and the records and files of United States cases after 1815 (in the record room of the federal courts, Detroit) are in the Law Library of the University of Michigan, having been deposited there by the Michigan Historical Commission. The same is true of the original records of the district and county courts noted above, except the Journal of the County Court which is located in the record room of Wayne County, Detroit (microfilm and blow-ups in the Law Library, Ann Arbor). The Notes of the Additional Judge are on deposit with the State Historical Society of Wisconsin, Madison (microfilm in the Law Library, Ann Arbor).

	S.C.	D.C.	C.C.
Abusive language			
Indictment:			
To a judge of the Supreme Court re decision in pending case	1		
To a justice of the peace while sitting in judgment	1		
Adultery			
Indictment:			1

	S.C.	D.C.	C.C.
Assault and battery (Also see Riot)			
Indictment:			
Assault	1		
Assault and battery	51	5	29
Assault, battery, and false imprisonment	1		
Assault with intent to kill, and assault and battery	2		
Assault and battery, and resisting an officer in the execution of his office	1		1
Assaulting and beating a constable while in the due execution of his duty			1
Assault and battery on a deputy marshal in the execution of his office, and assault and battery	1		
Encouraging instead of preventing assault and battery	2		
Preliminary examination:	1		
Presentment:			1
Burglary			
Indictment:			
Burglary and larceny	1		1
Buying U.S. Army equipment			
Indictment:		1	
Contempt (Also see Abusive Language; Libel)			
Appeal from justice of peace:			
Fine by justice for nondisclosure on attachment			1
Attachment to show cause:			
Refusal to serve as traverse juror	1		
Eating, drinking, and speaking to others while a juror	3		
Failure of witness to attend when summoned	2		
Commitment:			
Refusal to testify before grand jury	1		
Refusal to plead to indictment	1		
Habeas corpus cum causa:			
To bring person charged with contempt of a justice of the peace			1
Rule to show cause:			
Suffering jurors to eat, drink, and speak to others	1		

	S.C.	D.C.	C.C.
Contempt (continued)			
Rule to show cause: (continued)			
Attacking a witness out of court to prevent testimony	2		
Failure of grand juror to attend	5		
Letters from attorney to court re case decided by court	1		
Rule for citation to show cause:			
Failure to attend as grand juror when summoned	9		
Failure of traverse juror to attend	3		
Rule for attachment:			
Failure to attend grand jury as a witness when subpoenaed	1		
Attempting to seize and carry away a person within "verge" of court while in session	1		
Motion for attachment for disobeying order of court	1		
Rescue from sheriff of person returned cepi corpus	1		
Rule nisi to pay fine:			
Failure to attend as grand juror when summoned	4		
Failure to attend as a traverse juror when summoned	1		
Rule to pay fine:			
Failure of marshal to attend	1		
Failure to attend as grand juror when summoned			12
Failure to attend as petit juror when summoned			21
Summons to show cause:			
Non-attendance as grand juror			9
Non-attendance as petit juror			16
Witnesses sworn:			
Re detention by military officer of witness under recognizance to appear	1		
Counterfeiting			
Indictment:			
Altering and uttering bank bill			1
Assisting in forging and counterfeiting bill for payment of money			2

	S.C.	D.C.	C.C.
Counterfeiting (continued)			
Indictment: (continued)			
Forging and counterfeiting bill for payment of money			1
Passing counterfeit bank bill			1
Passing counterfeit bank note	1		
Passing counterfeit bill			1
Passing counterfeit money			1
Passing forged bank note	1		
Possession and uttering forged or counterfeit bill			1
Uttering counterfeit bank bill or note			1
Uttering counterfeit coin	1		4
Uttering forged bank note			1
Uttering forged or counterfeit bill			3
No indictment found:			
Passing counterfeit bill; escape from jail	1		
Warrant for arrest:			
Uttering counterfeit bill; note			1
Duelling			
Indictment:			
Sending challenge to fight duel; "posting" (libel)	1		
Challenge to fight duel			1
Accepting challenge to fight duel			1
Encouraging fighting of duel	1		1
Embargo			
Indictment:			
Loading goods with intent to export contrary to embargo law	4		
False census return			
Indictment:	1		
Forgery (Also see Counterfeiting)			
Indictment:			
Altering written instrument	3		2
Forging false writing	1		
Forging false writing; uttering	1		
Gaming			
Indictment:			
Obtaining money at game of cards			2

	S.C.	D.C.	C.C.
Harboring felons			
Indictment:			1
Illegally joining persons in marriage			
Indictment:	1		
Ill-treatment of family			
Presentment:	1		
Larceny			
Commitment on charge of larceny:	1		
Commitment on suspicion of larceny:	1		
Indictment:			
Larceny	13		26
Larceny and receiving stolen goods	3		6
Buying and receiving stolen goods			11
Receiving stolen goods	5		
Libel (Also see Duelling)			
Indictment:			
Writing and publishing libel in contempt of governor and chief justice	1		
Malicious mischief			
Indictment:			
Breaking windows of dwelling			1
Destroying promissory note			1
Killing ram			1
Manslaughter (Also see Murder)			
Indictment:	1		
Murder			
Complaint:	3		
Commitment:	1		
Habeas corpus:			
Implicated as murderer by inquisition; committed by justice of peace	1		
Indictment:			
Murder	10		
Murder and manslaughter	3		
Indictment returned "ignoramus":	2		
Preliminary examination:	1		

	S.C.	D.C.	C.C.
Nuisance			
Indictment:			
Disorderly house	2	1	3
Slaughterhouse			6
Oppression			
Presentment:			
Oppressing citizen by complaining to British commandant	1		
Perjury			
Indictment:			
False oath before justices of peace re sufficiency of property	1		2
Subornation		1	
Rescue from sheriff			
Indictment:			1
Retailing without license			
Indictment:			
Liquors		1	
Summons:			
Goods ("merchandizes")		10	
Liquors		3	
Riot			
Indictment:			
General riot	2		
General riot; assault and battery	1		
Riot	1	11	2
Riot; assault and battery	7		
Riot; offer to commit assault and battery	5		
Riot; assault and battery; false imprisonment	1		
Robbery			
Indictment:			
Assault and battery; robbery	1		
Selling liquor illegally			
Indictment:			
Selling and conveying liquor to Indian	2		
Complaint: (appeal from justice of peace)			
Selling liquor to soldier without consent of commanding officer			1

	S.C.	D.C.	C.C.
Threat to peace			
Recognizance:			
To keep peace	2		
To appear (complaint of threatened injury)			1
Treason			
Indictment:	2		
Unlawful assembly			
Indictment:			
Unlawful assembly with intent to seize and carry away a person; seizing and carrying away said person	1		
Vending at auction illegally			
Summons:		1	
Unidentified	31		12