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WESTERN DISTRICT OF MICHIGAN

# STEREOSCOPE



*This article is excerpted from the upcoming book on the history of the Western District of Michigan, by David Gardner Chardavoyne, a Michigan attorney and author. Mr. Chardavoyne expects to complete the manuscript of the book this year.*

—David J. Gass, President  
*The Historical Society for the United States District Court  
for the Western District of Michigan*

## The Western District of Michigan, 1863 to 1900

**T**he Judiciary Act of 1789, which created the U.S. judicial districts, established just one district and one district judge for each of the states then in existence. As new states were admitted to the Union, Congress created for each a single district and a single district judge. In 1814, the volume of work in the District of New York caused Congress to split that district in two, each with its own district judge. Four years later, Congress did the same for Pennsylvania and in 1819 for Virginia. More splits followed so that, by 1862, a total of 16 of the 34 states had more than one district, although three of those states still had only one district judge.<sup>1</sup>

On December 19, 1845, Michigan Congressman John Smith Chipman from Centreville, St. Joseph County, gave official notice that he would introduce a bill “to divide the state of Michigan into two United States judicial districts and the organization of the courts therein.”<sup>2</sup> Instead, on February 24, 1846, Chipman submitted a petition by the bar of western Michigan “praying for a division of the State, and the organization of federal courts for the western part of said State.”<sup>3</sup> On March 27, the house judiciary committee reported adversely to the petition, stating that “such a division is inexpedient.”<sup>4</sup> Thirteen years later, the Michigan legislature sent a joint resolution to Congress requesting a new judicial district, but once again, on April 17, 1858, the house judiciary committee reported adversely,<sup>5</sup> stating, “There is no necessity at this time for a division of the state into two judicial districts,” and there was no further action that term.

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In 1862, Michigan's congressional delegation began another concerted campaign for legislation granting their state a second district court with its own judge. With Republican Abraham Lincoln in the White House, his close friends and supporters Zachariah Chandler and Jacob Howard in the U.S. Senate, and a solid Lincoln-Republican delegation in the House of Representatives<sup>6</sup> (one of whom, Kent County's Francis W. Kellogg, had raised three volunteer infantry regiments at the outset of the war), the time was ripe for a political reward. Besides, the proponents could point to a strong set of facts to justify a second district. Since the state's birth, its population had more than tripled, from fewer than 200,000 in 1837 to 750,000 in 1860. Much of that growth was in the western counties. The state's industrial heart and most populated county, Wayne County, might have a population of 75,500 in 1860 (on its way to 120,000 a decade later), but western counties such as Kent (30,700 in 1860), Kalamazoo (25,000), St. Joseph (21,000), and Van Buren (15,000) were becoming important population centers as well.

At the same time, the amount of shipping on Lake Michigan soared, as did the number of collisions, mariners' wage disputes, and contract claims. Proponents of a western district argued that, in addition to relieving Judge Wilkins of some of his overloaded district and circuit dockets, the presence of a district court conveniently close to Lake Michigan would surely divert many admiralty libels that now went to U.S. district courts in Chicago or Milwaukee. Among themselves, proponents smiled at the additional patronage a second district would provide: an additional district judge and staff as well as another U.S. marshal and U.S. district attorney, and more cases for western attorneys, particularly those in Grand Rapids, to litigate. The only negative, it seemed, was that it would also be another circuit court that the Sixth Circuit's circuit justice would have to attend. On February 10, 1862, Michigan's entire delegation to the 37<sup>th</sup> Congress supported House Bill 267, introduced by Representative Kellogg, to split the district of Michigan into eastern and western districts, each with its own judge.

The bill easily passed in the House on July 17, but ran into resistance in the Senate, despite being sponsored by the formidable Senator Howard. The Senate Committee on the Judiciary opposed the bill on principle. For over a decade, the Senate had been bombarded with bills seeking a division from practically every state with just one district, and the Senate committee had opposed them all. Only Illinois, Missouri, Ohio, and Texas had eventually been successful. The Senators expressed concerns over the cost of funding another judge, set of court officers, district attorney, and courthouse. Another argument against the bill was that more districts would result in more civil cases based on diversity and thus more decisions that, under the law at that time, the loser had an absolute right to appeal to an over-worked U.S. Supreme Court that was already two years behind in deciding appeals.

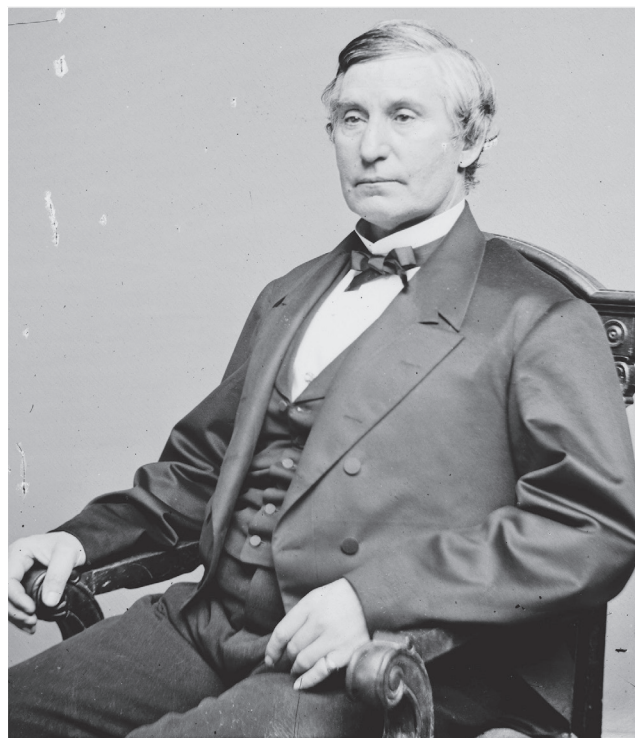
Disappointed in 1862, Senator Howard brought a new bill to the floor on February 17, 1863. This bill, like its predecessor, was referred to the Senate judiciary committee, chaired by Senator Lyman Trumbull of Illinois. Although the bill "was reported adversely" by the judiciary committee, Senator Howard brought it forward in the full Senate. Trumbull expressed his continued

opposition, sneering that: "I suppose it will be very convenient to have a court at Grand Rapids, which is a very flourishing town or city, on the western side of the State of Michigan. There is a railroad running right through there to Detroit. You may pass at any time from Grand Rapids to Detroit in ten hours. But still they urge that there is a great deal of maritime business and a great necessity for a court there. They always urge these considerations in every State."<sup>7</sup> Trumbull noted again the question of the cost of a second district as well as the likelihood that attorneys living near a new district court would find ways to bring cases there that should have been filed in a state court, to the detriment of the Supreme Court.<sup>8</sup> Senator Howard responded by pleading for help for Judge Wilkins:

I know quite well . . . that the excellent and learned district judge of that district is literally occupied the whole year, early and late, in hearing and determining cases, and in other matters concerned with the discharge of his duties, in which he is as faithful a man as ever I have met with in my life. He spends his whole time in the discharge of his duties; and the business is perpetually accumulating on his hands; and he does all this service learnedly, faithfully, and well, for the small pittance of \$2,500 a year. I ought not to say that he does all the business of both of the courts, for the circuit judge comes and assists in holding a circuit court there ordinarily twice a year, but frequently only once a year, and remains there not to exceed a week or ten to twelve days. The great mass of business is thrown on the district judge. He ought to be relieved in some degree from the multitude of cases he is called upon to decide, admiralty cases as well as civil cases.<sup>9</sup>

Senator Morton S. Wilkinson of Minnesota voiced his support, but the Senate delayed consideration of the bill.

When Howard brought the bill forward again a week later, other Senators joined the debate. Lafayette S. Foster of Connecticut declared that although the people of Michigan were the "bone of [New England's] bone and flesh of our flesh," he had to oppose the bill, fearing that its passage would result in New York and Pennsylvania each demanding a third district and other states demanding a second.<sup>10</sup> William Pitt Fessenden of Maine offered his opinion that dividing districts was "rather a matter to make offices than to subserve any other



*Senator Jacob M. Howard*

purpose."<sup>11</sup> Senator Fessenden also doubted the need for a second court: "I cannot conceive how it is possible that the maritime business and the business peculiar to the United States courts in the State of Michigan should require anything like another court in that State."<sup>12</sup> New York City, he pointed out, had four times the business of all of Michigan, yet it got by with just one district court. Iowa Senator James Wilson Grimes joked that if the new court was meant to serve citizens unable to get to Detroit easily, then it ought to be located at Copper Harbor on Lake Superior.<sup>13</sup>

However, enough other Senators, who might have been anticipating their own state's needs for multiple federal courts,<sup>14</sup> supported the bill to make a majority. On February 21, the bill passed on a vote of 25 to 11. It was signed by the President and became law on February 24, 1863.<sup>15</sup> Congress divided the District of Michigan into the Eastern and Western Districts of Michigan, and assigned Judge Wilkins and his court officers to the eastern district.<sup>16</sup> The act bisected the Lower Peninsula by a line running roughly north and south from Mackinac, which assigned Ingham County and the state capital, Lansing, in the eastern district. The Upper Peninsula was allocated to the eastern district except for Delta County

on the north shore of Lake Michigan. The logic of this division was to assign Lake Michigan and its Michigan coastline on both peninsulas to the western district so that its hoped-for large number of admiralty cases could be heard in Grand Rapids instead of more distant Detroit.<sup>17</sup> On February 26, President Lincoln nominated Grand Rapids attorney, state senator, and former probate judge Solomon Lewis Withey as the western district's first district judge. The Senate confirmed his appointment on March 11.<sup>18</sup>

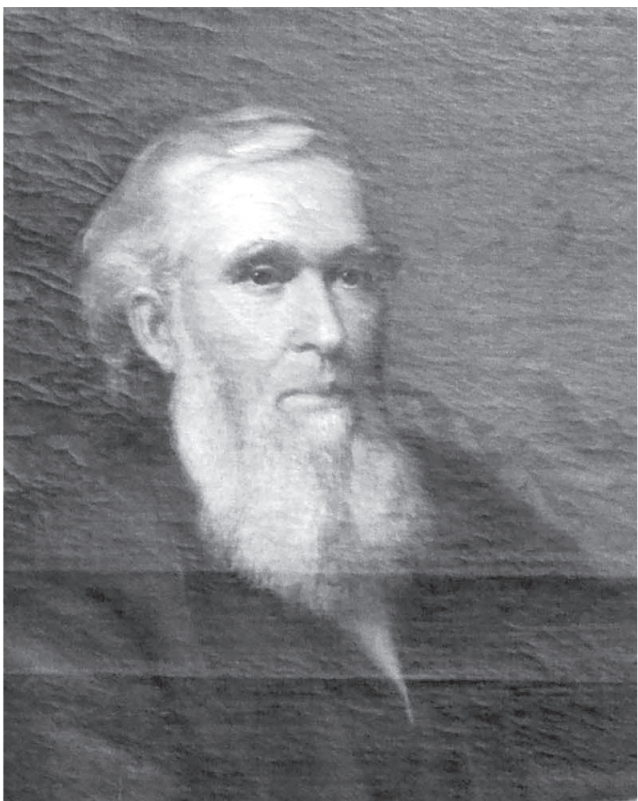
Not everybody in Michigan approved the district split, particularly eastern Michigan Democrats. On March 14, 1863, the *Detroit Free Press*, that city's ferociously Democratic, anti-Lincoln, and anti-African American newspaper, asserted that, in fact, there was no need for a second district, that there were few cases, "not one in fifty," that arose in what was now the western district. Instead, the western district "was created for the purpose of carrying out a contract made among politicians, and giving certain men office, and was "one of the most corrupt political jobs ever carried through Congress."<sup>19</sup> The *Free Press* also intimated that Solomon Withey owed his new judgeship not to his legal skills, his judicial temperament,

or even his services to the Republican party, but instead to a desire "to pension him off so he would not interfere politically with some of the ambitious men in this part of the State." Further, the newspaper went on to assert that "there is not a single truth" in Senator Howard's assertion that Judge Wilkins was over-worked and claimed that it had information from "one of the officers of the court, that all the business which comes before either the circuit or district can easily be performed by his Honor Judge Wilkins in three months."<sup>20</sup> Whatever the truth, the western district was in existence, and Solomon L. Withey was its district judge.

One last opposition attempt took place a year later, on February 5, 1864, when Congressman Augustus C. Baldwin, a Democrat from Pontiac, submitted a resolution asking for an inquiry by the Committee on the Judiciary into "whether the public interests would not be best subserved by abolishing said district and incorporating the territory embraced therein with the eastern district of Michigan."<sup>21</sup> The House sent the resolution to the committee, but nothing more was heard of it. Later that year, on June 20, Congress made one adjustment, assenting to resolutions submitted by the supervisors of Branch County and citizens of Calhoun County to transfer their counties back to the eastern district.<sup>22</sup>

### District Judge Solomon Lewis Withey

Judge Solomon Lewis Withey was born to Solomon and Julia (Granger) Withey<sup>23</sup> on April 21, 1820, in St. Alban's Point, Vermont, near Lake Champlain. His father was also named Solomon, and so Judge Withey was called Lewis by his family and friends. Julia Withey died in March 1825, when Judge Withey was not quite five years old. In 1828, the family moved to St. Albans Bay, Vermont, where Judge Withey grew up and attended school. This was the period of the great exodus of New Englanders towards new lands in the west, and in September 1835 the Withey family joined that migration and moved to Cuyahoga Falls, Ohio, where the eldest son, William, was living. The following May, the family moved once more, this time to Grand Rapids, Michigan, via Detroit.<sup>24</sup> In Detroit, Judge Withey, then sixteen years old, left the others to take a job as mercantile clerk at Auberry's general store near



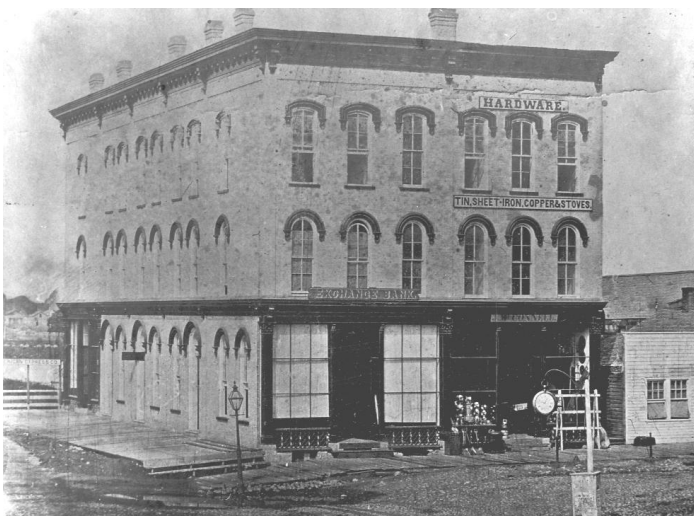
*Judge Solomon Lewis Withey*

Chatham in Upper Canada. Several months later, he returned to Michigan and took a similar position in a grocery store in Ann Arbor. In March 1837, he rejoined his family briefly in Grand Rapids, but, deciding that he needed more education, he returned to Ohio to enroll in the Cuyahoga Falls Institute. In August 1839, he returned again to Grand Rapids where he taught at a “select” school located on the east side of Kent Street near the corner of Kent and Bridge Streets.

In the fall of 1839, Judge Withey began his study of the law in the Grand Rapids offices of Alfred Day Rathbone, Kent County’s first prosecuting attorney, and George Martin, a future chief justice of the Michigan Supreme Court. Their office was in the same building as the U.S. Post Office, and Withey worked as assistant postmaster to support himself during his period of studies. On May 17, 1843, he was admitted to the bar of Kent County and entered into a partnership with John Ball; in 1846 they were joined by George Martin as Ball, Martin, & Withey.

On December 24, 1845, Withey married Marion Louise Hinsdill, the daughter of another emigrant family from Vermont. The Witheys had six children, five of whom reached adulthood. As was common in those days, Withey practiced with a succession of lawyers over the next several years, always prospering. In addition to his private practice, he served as probate judge for Kent County (1848–1852). He was against liquor sales and he campaigned for prohibition in the 1850s, but he later became convinced that enforcement was impossible and that taxing sales was a better strategy to limit drinking.<sup>25</sup> In 1860 he was elected to a two-year term in the state senate as a Republican, beginning January 1, 1861, just three months before the Civil War began. The war brought a multitude of railroad companies to the Legislature seeking to be financed by a grant of state lands. Many of the companies were speculative and took title to the land grants without ever laying any track. Withey became prominent state-wide for pushing through a law that transferred title to the land only after the railroad was completed.

Following his federal appointment, Judge Withey remained active in local and state affairs. From 1869 until his death, he was president, and later a director, of the First National Bank of Grand Rapids and its successor Old national Bank. In 1867, he was a delegate from



*First federal Western District courtroom in this building—  
at 2 Ball's Block (1865)*

Kent County to that year’s convention called to draft a replacement for Michigan’s 1851 constitution. He also served as chair of the convention’s judiciary committee. When the electorate rejected the convention’s proposed constitution, he was one of 18 commissioners appointed by Michigan Governor Henry H. Crapo in 1873 to investigate proposals for amending the 1851 constitution. Again, he chaired the judiciary committee.

Judge Withey was described as having a frail physique and suffered from poor health for much of his life. As a young man, soon after settling in Grand Rapids, he was afflicted by “a severe and painful illness,”<sup>26</sup> possibly malaria or erysipelas, both of which were then endemic in Michigan and afflicted most immigrants. During his last years, however, he suffered from a “physical infirmity”<sup>27</sup> affecting his heart. In March 1885, “Judge Withey was, while on the bench, taken with a sinking feeling caused by some degeneration of the heart and had been unable since then to attend to the private duties of his office. In January 1886, the judge in company with his wife, daughter, and several friends went to California in the hopes that it would improve his health.”<sup>28</sup> The party wintered in Pasadena, then traveled on to San Diego. At dinner on the night of Easter Sunday, April 25, 1886, he complained of chest pains and had to be carried to his hotel room; there he died, at the age of 66.<sup>29</sup> Judge Withey’s body was returned to Grand Rapids where he was buried, survived by his wife and five children.

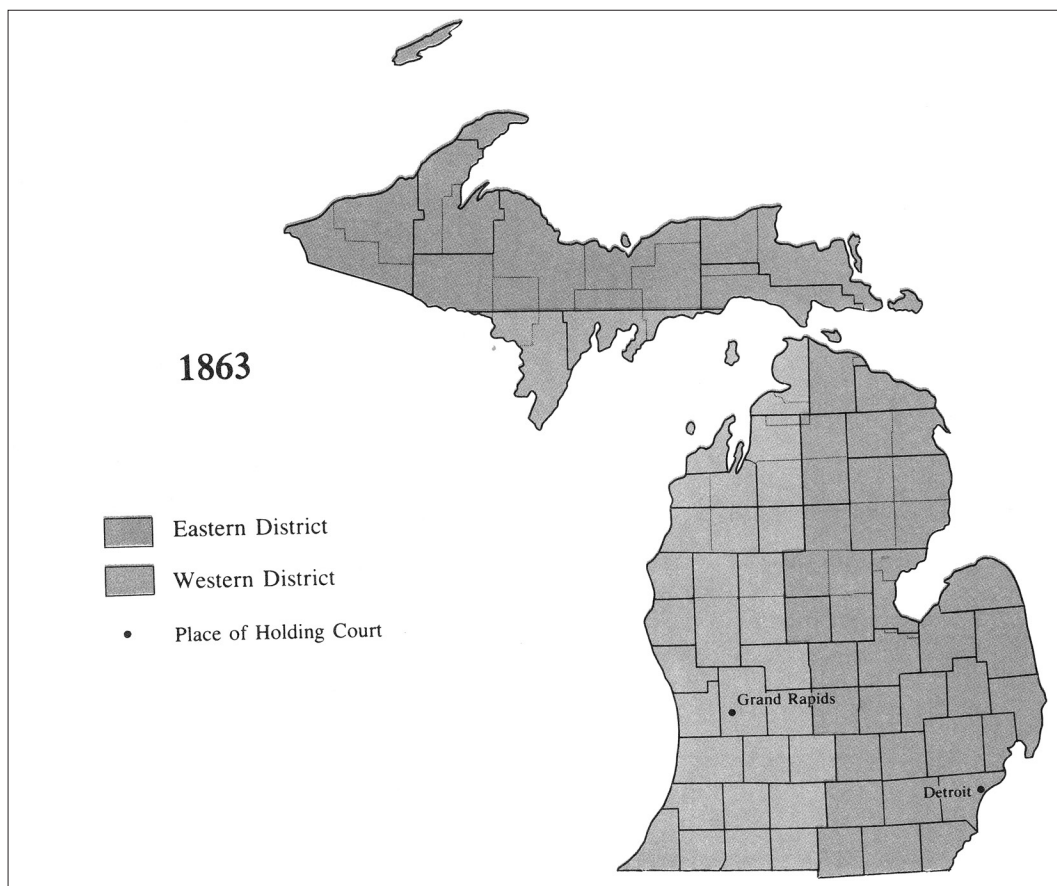
## The First Terms of Court

The statute creating the Western District of Michigan provided that the district and circuit courts would hold two terms together each year, beginning on the third Mondays in May and October in Grand Rapids. Consequently, Judge Withey opened the first term of the district and circuit court Monday, May 18, 1863. It had been intended that court would be held in a new courtroom being constructed in Ball's building, also known as Ball's block, a three-story commercial building on the northwest corner of Pearl and Canal (now Monroe) Streets that also housed Daniel Ball's bank and McConnell's hardware store. However, that room was not ready when the first term was to begin, so Judge Withey held court during the three days of the first term (May 18–20) across the street at Mills and Clancy's Hall, on Canal Street, between Lyon and Pearl Streets.<sup>30</sup>

On the first day, court was opened by the district's U.S. marshal, Osmund Tower. Withey appointed a clerk of the court, Lewis Porter, who, after being sworn

in and giving his bond, read out loud Withey's own appointment. After directing Porter to obtain a seal and record books and swearing-in 20 attorneys to the bar of the court, Judge Withey adjourned for the day. On May 19 and 20, the court was opened, but there was no business and Withey promptly adjourned court on both days.

On July 1 and 2, 1863, Judge Withey called a special term to show off the district court's finally completed courtroom in Ball's block.<sup>31</sup> The *Grand Rapids Daily Eagle* described it as "[a] large, convenient and well lighted room . . . in splendid style. . . . The walls, doors, window frames, etc., have been painted and grained in the best style of the painter's art. Tasty inside blinds, matching the walls in finish, have been put upon the windows, and a finely finished elevated bench for his Honor, Judge Withey, has been erected at one end of the hall, with a desk for the Clerk, to match in appearance, in front of it. To make the room complete in appearance and comfort, the floor has been covered with grass or hemp carpeting, and the room is to be provided with



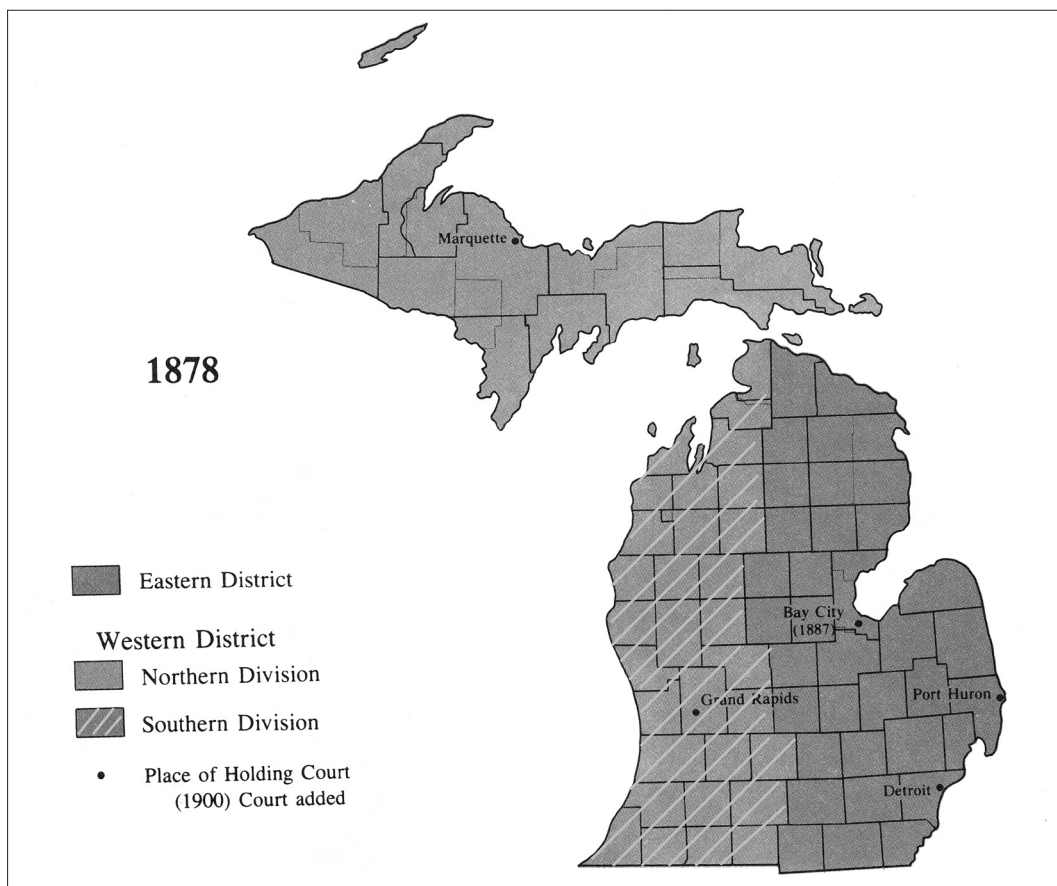
*How the Court Districts Looked in 1863*

arm or office chairs.”<sup>32</sup> However, as in May, there was no business on either day.

The district court reopened for another one-day special term on September 7 to deal with its first hearing, a petition for a writ of habeas corpus brought by Herman Champlin to have Provost Marshal Norman Bailey produce in court his son, George W. Champlin. George was a deserter from the 21<sup>st</sup> Michigan Volunteer Infantry Regiment, which had been recruited from Michigan’s western lower peninsula in 1862. The regiment had fought in major battles at Perryville and Stone’s River, Kentucky, and in early 1863 had recruited replacements in several towns including Ionia where George enlisted. A few months later he deserted and returned home, where Bailey arrested him. The petitioner’s attorney, D. W. Jackson, argued that George’s enlistment was illegal because he had been only 17 years old when he enlisted without his father’s consent. Judge Withey heard the arguments and denied the petition. He held that the father had given implied consent based on his knowledge that George had enlisted and had received a bounty,

regular pay, and decorations, not objecting until George was arrested.<sup>33</sup> This was Judge Withey’s only military habeas case as, a week later, President Lincoln suspended the writ of habeas corpus for soldiers. Withey did hear several cases of civilians who were charged with assisting or encouraging soldiers to desert.

The initial lack of cases was not surprising as Congress had held that all cases pending in the district of Michigan at the time of the split would remain in the eastern district’s courts in Detroit. Business in Grand Rapids did pick up in the 1863 October term, which ran from October 19 until October 31, and then from November 11 to 17. All but two of the 17 cases considered during that term were criminal. Judge Withey seated a grand jury, which produced 15 indictments, including charges of postal theft, incitement of soldier desertion, and failure to pay the license fees that had been imposed on nearly everything in order to pay for the war. Two of the license cases involved charges of practicing law without having paid the federal license fee. One of the defendants was Franklin Muzzy, a former Democratic



*How the Court Districts Looked in 1878*

state senator from Berrien County who was fervently against the war and may have refused to pay the fee as a matter of principle.

## **The Judiciary Act of 1869 and the Creation of Circuit Judges**

During the first half of the 19<sup>th</sup> century, the Justices of the U.S. Supreme Court were increasingly overwhelmed by the volume of appeals they were called upon to decide and by their duty to attend circuit courts in each of the districts in their assigned judicial circuits. Congress took one step in reducing their circuit riding in the Judiciary Act of 1844 by reducing circuit riding to one term per district.<sup>34</sup> In order to decrease these burdens on the justices, Congress passed the Judiciary Act of 1869,<sup>35</sup> which added two justices to the court and established a new judicial position, a separate “circuit judge” for each judicial circuit, who was to have the same power and jurisdiction as a Supreme Court justice when holding a circuit court. Now circuit courts could be held by the circuit judge and the district judge, and each justice need only attend one term in each district in his circuit every two years instead of two or more terms annually.

On December 17, 1869, President Ulysses S. Grant nominated Judge Withey to be the first circuit judge for the Sixth Circuit, and the Senate confirmed his appointment on December 22. However, Judge Withey had second thoughts about the time and discomfort involved in holding multiple circuit court terms in Michigan, Ohio, Tennessee, and Kentucky each year. Although the annual salary of a circuit judge was twice that of a district judge (\$5,000 instead of \$2,500), Withey notified President Grant that he had decided to decline the appointment and remain a district judge. On January 10, 1870, Grant nominated instead Detroit attorney Halmer Hull Emmons as circuit judge for the Sixth Circuit.<sup>36</sup>

### **Circuit Judge Halmer Hull Emmons**

Circuit Judge Emmons was born on November 22, 1814, in the Village of Sandy Hill (now Hudson Falls), New York, to Adonijah and Harriet S. Emmons. Halmer grew to be a spare 5 feet 8 inches tall, energetic and impulsive with straight black hair, “keen black eyes

overhung by beetling brows,” and a gift for “vituperative profanity.” He read law in New York and practiced in Keeseville and Essex, New York as well as in Cleveland, Ohio. In 1840, he joined his father and brother in practice in Detroit, where he soon became known as one of the leading railroad attorneys in the Midwest.<sup>37</sup> He married Sarah Williams in 1845; they had four children. The stress of work, however, affected his health, and in 1853 he reduced his caseload and sought the peace of rural Wyandotte, Michigan, which remained his home for the rest of his life. During the Civil War he volunteered to spy and report on Confederate activities in Ontario, Canada.

Emmons’s nomination to replace Judge Withey as circuit judge for the Sixth Circuit was confirmed by the United States Senate on January 17, 1870, and he received his commission the same day. U.S. Supreme Court Justice Henry Billings Brown remembered Emmons as “one of the greatest minds I ever came into contact with,” but also noted that “he was considered too erratic to be popular as a politician.” Attorneys trying cases before Emmons found that he was knowledgeable in the law and patient with long arguments but that he would not allow wasted time. According to Brown, “Counsel who had been accustomed to trying cases their own way, and consuming all the time they desired, were greatly surprised and shocked when confronted by a judge who insisted upon their trying them in *his* way, and consuming no more time than was necessary for the proper disposition of the case.”<sup>38</sup> Judge Emmons served as circuit judge for seven years until his death, on May 14, 1877, in Detroit.

### **Circuit Judges for the Western District After Emmons**

The circuit judges who succeeded Emmons before the office was effectively merged with the judges of the U.S. Circuit Court of Appeals in 1891<sup>39</sup> had little history in or contact with Michigan and left scant trace of their attendance in the western district. John Baxter of Tennessee was appointed by President Rutherford B. Hayes and served from December 6, 1877, until his death on April 2, 1886. Justice Henry Brown described Baxter as honest and brave but totally lacking in judicial temperament because he was “absolutely

inflexible” and overly convinced of the infallibility of his first impressions.<sup>40</sup> Howell Edmunds Jackson, also of Tennessee, was appointed circuit judge by President Benjamin Harrison and served from April 12, 1886, until he was assigned to the U.S. Circuit Court of Appeals for the Sixth Circuit on June 16, 1891. In 1893, President Harrison appointed Jackson to the U.S. Supreme Court.

## Judge Withey and Changing the Law

Judge Withey was diligent, hard working, and not afraid to change his mind if convinced that justice required him to do so. Although he was usually described as conservative, he did not hesitate to interpret the law in innovative ways if he felt the need. In a century in which most lawyers saw the common law as a fixed and perfect body of knowledge based on logic, Withey took a more practical approach, consistent with the observation of future Supreme Court Justice Oliver Wendell Holmes, Jr.: “The life of the law has not been logic; it has been experience.”

In addressing the graduating class of the University of Michigan Law Department in 1871, Withey warned the graduates:

It is well to remember . . . that much of the common law reaches back to times of extremely arbitrary and austere views, both in social life and in government; to those periods in history when the image of justice was rude or but dimly seen. Its rules and maxims are supposed to stand upon reason, but in the light of enlarged common sense and juster views exceptions have been found and many old ideas have been discarded. Statutes and decisions will continue to make changes in the future as in the past; so that it will not do to conclude that all you have learned as law is either absolute perfection or as unchallengeable as the laws of the Medes and the Persians. . . . While we venerate the Common Law, and regard it as eminently the embodiment of human wisdom, and that the law should remain as it ever has, a conservative science, it is nevertheless justly subject to such modifications as are demanded by the altered conditions of the world and of the emancipatory ideas of the age, for then, and then only, can the law be made properly to touch the

rights, obligations and relations of persons in social and business affairs.<sup>41</sup>

Two of Judge Withey’s ground-breaking decisions show how he acted on this principle.

## Federal Eminent Domain on White Lake

Before the Civil War, there was a common assumption among lawyers and judges that, in the absence of a specific statute, the power of eminent domain, the power to take private property for public uses, resided only in the state governments and not in the government of the United States.<sup>42</sup> In *Avery v. Fox*,<sup>43</sup> a case Withey decided on January 1, 1868, he took an important step in dispelling that assumption.

White Lake in northern Muskegon County is about four miles long and one mile wide. It stretches from its eastern end at the mouth of the White River, at the towns of Whitehall and Montague, to a strip of land at its western end about 250 yards wide, which separates White Lake from Lake Michigan.<sup>44</sup> Today, ships pass from one lake to the other through an artificial channel of about 400 yards at its western end. At the time of this case, however, water from White Lake reached Lake Michigan through its natural narrow channel that ran northwest from the western end of the lake for almost three quarters of a mile, parallel to the Lake Michigan shore, and then turned and ran about 200 yards west to Lake Michigan about 3,550 feet north of the current outlet.<sup>45</sup> This channel was at best only 4 to 10 feet deep and was subject to wind-blown sand that had to be dredged every year at great cost to keep the channel barely navigable. Various groups petitioned Congress, asserting that White Lake would have provided an excellent harbor for large freight and passenger ships except for the narrow and shallow natural channel. After studying the matter, Congress decided that maintaining the old channel was not economically viable and, in March 1867, appropriated \$57,000 to cut the current direct channel, 200 feet in width and 12 feet deep, between the lakes.<sup>46</sup>

Avery was a timber merchant who owned 70 acres of land fronting on the old channel. He brought logs from the interior through the White River to White Lake and then through the natural outlet, where he ran a sawmill and had a dock on Lake Michigan for shipping

his timber. When he learned of the project to abandon his channel and dig a new one, he sued in the district court for the western district, seeking an injunction to prevent the defendants--contractors and employees acting for the federal government--from constructing a new channel on the grounds that the proposed channel would destroy the value of his property and business and thus constituted a taking of the value of his property. He asserted that if a new, shorter channel were opened, water from White Lake would "prefer," by the laws of nature, to flow to Lake Michigan that way. In addition, if the government no longer dredged the old channel, it would silt up. Both consequences would make his land and business valueless. He also made the conventional argument of that time that the defendants could not claim eminent domain as a justification because the federal government had no such power.

Judge Withey, sitting as the circuit court, heard arguments on Avery's request for an injunction. In an opinion dated January 1, 1868, he rejected the argument that the United States lacked the power of eminent domain:

The United States have a right to make the cut between White Lake and Lake Michigan—the land, where the proposed cut is to be, having first been secured—provided thereby private interests are not seriously impaired or private rights destroyed. It is an incident to the sovereignty of the United States, and a right recognized in the constitution, in that clause which prohibits the taking of private property without just compensation, that it may take private property for public use—of the necessity or expediency of which congress must judge, but the obligation to make compensation is concomitant with the right.<sup>47</sup>

The key facts to be determined, then, were whether Avery would suffer any compensable loss and, if so, how much. Essentially, would the new channel reduce the future navigability of the old channel once the proposed new channel opened?

Both parties submitted affidavits of experts whose conclusions, naturally, differed totally. Because this was a request for an injunction to stop work ordered by Congress instead of a suit for compensation under the doctrine of eminent domain, Judge Withey emphasized that he had to be cautious. In the end, he denied the injunction request because the fact of loss was questionable. Not

only was the effect of the new channel on the old unclear, plaintiffs might even benefit from the new channel by the likelihood that they could rearrange their production facilities to allow larger ships to load timber from a dock on White Lake.

### Judge Withey and the *Daniel Ball*<sup>48</sup>

Sometimes important cases that revolutionize constitutional law emerge from momentous events, but often they emerge from events that are relatively commonplace. The latter describes the case of the steamboat *Daniel Ball* and a decision by Judge Withey, which, as affirmed by the U.S. Supreme Court, began the long judicial expansion of the extent of the power granted to Congress by Article I, section 8 of the Constitution, "to regulate Commerce . . . among the several States."

The *Daniel Ball* was a side-wheel steamboat owned by Jesse Gano, Byron Ball, and Demetrius Turner. Launched in 1861, the vessel was 141 feet long, capable of carrying 123 tons of passengers and freight. It was designed and built to navigate on the Grand River, between Grand Rapids and Lake Michigan at Grand Haven. Because it had a draft of only two feet, the *Ball* could not navigate on Lake Michigan safely, so passengers and freight going further were unloaded from the *Ball* at Grand Haven.

The case began when a steamboat inspector appointed by Judge Withey boarded the *Ball* and demanded to see the vessel's license and safety certificate. Finding that the *Ball* had neither, the inspector imposed a mandatory fine of \$500 on both the vessel and its owners. The inspector's authority came from two federal statutes<sup>49</sup> that established a system for licensing all steamboats carrying passengers and freight "in or upon the bays, lakes, rivers, or other navigable waters of the United States" and for inspecting and certifying each boat's hull annually and its steam boilers every six months. These statutes were passed to regulate an industry and a technology that were crucial to commerce across the nation as well as terribly dangerous. From the first steamboat, Fulton's *Clermont*, launched in 1807, their number grew exponentially, and they became the nation's primary carrier of goods and people. By 1825, steamboats began to transit the Great Lakes and were a key to the great migration of New Englanders to Michigan during the following decade. However, like new technology in other times, steam power had outpaced safety. Poorly designed and

manufactured steam boilers exploded at a terrifying rate, killing every person aboard ship by scalding or burning. Governments, both state and federal, saw the need for some kind of action, but the young nation's *laissez-faire* principles made them pause. Finally, in 1838, Congress passed a law for licensing and inspecting most steamboats, although it did not establish safety standards until 1852.<sup>50</sup>

The owners of the *Daniel Ball* did not pay their fine. They apparently relied on an opinion by District Judge Wilkins pronounced in the District of Michigan a decade earlier that vessels that did not cross state lines were engaged in "internal" commerce and subject to state laws only.<sup>51</sup> On April 2, 1868, U.S. District Attorney for the Western District Augustus D. Griswold<sup>52</sup> filed a libel in the District Court for the Western District in Grand Rapids seeking to confiscate the vessel and sell it to pay the fine. The owners objected on two grounds: first, that the Grand River was not a "navigable water of the United States," and second, that power given to Congress to regulate commerce between the states did not extend to a vessel operating entirely within a single state. The parties agreed to submit the case to the court on the pleadings and proofs rather than have a trial in open court. On Saturday, July 25, 1868, the district court's journal noted that Judge Withey had ordered the libel dismissed but that he had also held that the government had probable cause to seize the ship and begin the libel. He later issued a written opinion explaining his decision.<sup>53</sup> In that opinion he held, first, that the Grand River clearly was, in fact and in law, a navigable water of the United States and, second, that the inspection statute was constitutional as it applied to the *Ball*: "The carriage between Grand Rapids and Grand Haven was internal, but the commodity carried was proceeding to another state, and such other state, as well as Michigan, was interested in the trade and traffic of that commodity from the time it left Grand Rapids. As an article of export from the latter and of import to the former, both states were interested in the traffic, trade or exchange of that commodity; hence it was commerce among the states." Nevertheless, he dismissed the libel as a matter of fairness because the owners had relied on Judge Wilkins's earlier opinion and so had no notice that they were violating the law.

Both parties appealed to the Circuit Court for the Western District, causing Circuit Justice Noah Swayne to

make one of his rare appearances in the western district. On November 5, 1868, after counsel for the parties argued, the court took the appeal under advisement. The next day, the circuit court reversed the judgment below as noted by the clerk in the circuit court journal: "[T]he said steamer is greatly of a [sic] violation of the laws of the United States as said libel charged whereby the said steamer became and was and still is liable to the United States in the penalty prescribed by law being the sum of five hundred dollars which said sum is a valid lien on the said steamer . . ."<sup>54</sup> Although Justice Swayne did not explain his reasoning further, the only logical conclusion is that he agreed with Judge Withey's interpretation of the inspection statutes but disagreed on his view on reliance.

The owners then sought review by the U.S. Supreme Court, which heard the appeal on December 5, 1870. The U.S. Solicitor General, Benjamin H. Bristow, appeared for the government and Andrew T. McReynolds for the ship and owners.<sup>55</sup> The Court, in an opinion by Justice Stephen Johnson Field, affirmed the ruling of the Circuit Court.<sup>56</sup> Like Withey, the Court had no trouble finding the Grand River to be "navigable" and also agreed with his interpretation of the Commerce Clause. Justice Field acknowledged that: "commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States" was not subject to federal control. However, as to the *Ball*, he also concluded that, "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress."

The owners paid their fine, but the era of steamboats on the Grand River was ending, replaced by railroads. The owners moved the *Ball* to Lake Huron, where, on the afternoon of October 18, 1876, she caught fire while approaching Bay City. All of the passengers and crew were rescued, but the ship sank, a loss to the owners estimated at \$15,000.<sup>57</sup>

## The 1879 Grand Rapids U.S. Court House

Although elegantly laid out, the courtroom in Ball's block did not turn out to be a long-term solution for housing the federal courts in Grand Rapids. In 1869, the

owners of Ball's block tripled the length of the building and turned it into Sweet's Hotel, effectively evicting the courts. Judge Withey moved his operations to the Ramsey Block, 14-16 Pearl Street, at the southwest corner of Pearl and Campau Streets, and listed as his office his residence, 3 College Avenue, "north from Cherry Street, next east of Prospect."<sup>58</sup> Meanwhile the post office and the growing number of other federal agencies continued to be housed in other buildings around the city.

On December 5, 1872, Michigan's U.S. Senator Thomas White Ferry "asked and, by unanimous consent, obtained leave to bring in a bill (S. 1199) for the construction of a court house, post-office, and other government offices at Grand Rapids, Michigan." The bill passed the Senate on January 8, 1873, passed the House of Representatives on February 10, and was signed into law by President Ulysses S. Grant on February 21.<sup>59</sup>

As enacted, the statute authorized the Secretary of the Treasury to purchase in Grand Rapids a "suitable lot of ground" and to erect on it "a building of brick suitable for the accommodation of the court-house, post-office, and other government offices in that city." The cost, for the land and building, was not to exceed \$200,000. In 1874, the Secretary used Michigan's condemnation law to acquire for the new building a central block in Grand

Rapids, bound by Lyon, Division, Pearl, and Ionia Streets, at a condemnation price of \$68,064.85, which, "with attendant legal expenses," brought the total to a round \$70,000.<sup>60</sup> Over the next four years, as construction took place, Congress authorized another \$142,000 to complete the building, resulting in an impressively modest over-run on the original budget of \$12,000.<sup>61</sup> During construction, Judge Withey continued to hold court in the Ramsey Block. The new building, known colloquially as the government building, was completed in 1879 and the district and circuit courts sat there until 1909 when it was demolished to construct its successor.

The original design for the building was by William Appleton Potter, the Treasury Department's Supervising Architect from 1874 to 1877. Potter's design was illustrated in an architectural drawing in the July 1876 edition of the *American Architect and Building News*.<sup>62</sup> The drawing shows the exterior of a three-story building in the Romanesque Revival style, with a steep hipped roof, Gothic style ornamentation, windows and entrances with arch surrounds, and two sets of multiple chimneys on either side of the central portion of the building. The exterior walls were faced with pressed brick, with stone belts and cornices. However, at some point someone, probably James G. Hill, Potter's successor in 1877, made some changes. The interior layout remained essentially the same: the court room and offices for the judge and staff were still on the third floor, the first floor held the post office, and the second floor was occupied by other government officers.<sup>63</sup> The basic structure of the exterior also remained the same, but the Gothic ornamentation was replaced and the pitch of the roof was lowered. These changes transformed the government building from Gothic Revival to a simpler and more modern Italianate style.

### Nepotism in the Clerks' Offices

Lewis Porter was sworn in as the western district's clerk for both the district and circuit courts from the first session in May 1863, but he left two years later in May 1865. He was replaced by attorney Isaac H. Parrish, who served both courts for ten years, until December 30, 1875. After Parrish, Judge Withey engaged in some nepotism, which was not unusual in those days. First, in January 1876, he hired one of his wife's brothers, Chester B. Hinsdill as clerk for both courts. Then, as business



*The Grand Rapids Courthouse —1879*

grew, a decision was made to have a clerk for each court. In October 1878, Withey kept Chester as the district court clerk, and, with the concurrence of Circuit Judge John Baxter, hired his wife's other brother, Henry M. Hinsdill, as clerk of the circuit court. Chester Hinsdill resigned as of January 1, 1886, and Judge Withey entered an order the next day appointing deputy clerk John McQuewan to replace Chester as the district court clerk. Henry Hinsdill continued as circuit court clerk for another year until February 1, 1887, when Withey's successor, District Judge Henry F. Severens, appointed Charles L. Fitch as the new circuit clerk. McQuewan served until his death on December 18, 1900, and Fitch until the dissolution of the circuit courts on January 1, 1912.

## The Southern and Northern Divisions of the Western District

Only a few years after the creation of the western district in 1863, there was talk of further dividing the western district. On March 22, 1869, Michigan Congressman William L. Stoughton from Sturgis, St. Joseph County, submitted to the House a bill (H. R. 209) to divide the western district into a southern and northern division.<sup>64</sup> The southern division would include the counties of St. Joseph, Cass, Kalamazoo, Berrien, Van Buren, and Allegan, "and all that lies to the south and west thereof." A single annual term of the district and circuit courts of the southern division would be held in Kalamazoo, while a single term of the courts of the northern division (including the rest of the western district) would continue to be held in Grand Rapids. On December 10, 1869, Michigan Congressman Randolph Strickland, from DeWitt, Clinton County, submitted his own bill (H. R. 487) to create a third district, the northern district of Michigan, that would include all of the Upper Peninsula. The bill also proposed that the northern district would have its own district judge who would hold two terms of its district and circuit court annually in Houghton.<sup>65</sup>

Neither bill passed, but a decade later Congress recognized changes in Michigan's population patterns and adopted part of each. On June 19, 1878, Congress redrew both the external and internal boundaries of the western district.<sup>66</sup> The portion of the Upper Peninsula previously part of the eastern district was reassigned to



*The Courthouse in Marquette—1888*

the western district, so that all of the upper peninsula came within one court's jurisdiction. The statute did not go so far as to make the Upper Peninsula a northern district, but it did assign all of the U.P. to a new northern division of the western district. The counties in the lower peninsula assigned to the western district became the district's southern division. District and circuit courts in the southern division would continue to be held in Grand Rapids, beginning on the first Tuesday of March and October, while courts in the northern division would be held, not in Houghton, but in centrally located Marquette, on the shores of Lake Superior, beginning on the first Tuesdays of May and September.

Congress may have doubled the number of terms of court to be held in the western district, but it did not authorize another judge. The district's sole judge, at that time, Judge Withey, was henceforth required to make round trips from Grand Rapids to Marquette twice each year.

## District Judge Henry Franklin Severens

From 1861 until 1915, only one Democrat, Grover Cleveland, served as President of the United States. Likewise, Michigan, a Democratic stronghold until the 1850s, had become and remained a Republican fortress for

the rest of the 19<sup>th</sup> century. The relatively few Democratic attorneys in western Michigan had to believe that they had little or no chance of becoming a federal district judge. However, such an appointment seemed to be attainable when Judge Withey died in April 1886, just over a year after President Cleveland was sworn in as President. The question was who would get the nomination.

Although Withey's nomination in 1863 had been uncontested, in 1886 several candidates were rumored to be in the running, including Edward F. Uhl,<sup>67</sup> and Lyman D. Norris,<sup>68</sup> both of Grand Rapids, John Lewis of Greenville in Montcalm County, and Henry Franklin Severens of Kalamazoo. All four were considered superior attorneys.<sup>69</sup> The selection of a judicial candidate to be appointed by the President was usually a gift in the hands of a state's U.S. senator or senators who belonged to the President's political party. But because both of Michigan's U.S. Senators at that time were Republicans, the rules of selection were somewhat vague. Norris was supported by two of Michigan's Democratic U.S. congressmen, Charles C. Comstock of Grand Rapids and William C. Maybury of Detroit. However, the others also had champions, including, for Severens, Republican Congressman Julius C. Burrows, Severens's former law partner in Kalamazoo, and Democratic National Committeeman Donald M. Dickinson of Detroit, the President's close friend and early backer.<sup>70</sup> Norris was an early leader, according to the newspapers, but there were whispers that, at the age of 62, he was too near retirement to stay on the bench long. With the strong possibility that Norris's successor would be appointed by a Republican President, the opportunity to cement a Democratic judge, as well as other court officers, for the long term was too good to waste. Uhl's name was "pressed upon the President" next, even though Uhl continued to express his support for Norris. Ultimately, Severens's friends prevailed. Cleveland nominated him on May 14, 1886, and he was confirmed by the U.S. Senate on May 24, 1886.

Like Judge Withey, Judge Severens was a native Vermonter who came to Michigan as part of the great Yankee exodus. Judge Severens was born in Rockingham, in southeastern Vermont, on May 11, 1835, to Franklin and Elizabeth Stowell (Pulsipher) Severens. Like many children of that time, he attended school only three months of the year and spent the rest of his time working on his parents' farm. Determined to attend college,

he worked as a teacher to pay for preparatory studies. He entered Middlebury College in 1854, graduated in 1857,<sup>71</sup> and began his career as a school principal in Bellevue, Iowa.

In August 1858, he married Rhoda Ranney of Westminster, Vermont, and after a year they returned to Vermont, where he studied law. He was admitted to the Vermont bar and soon after moved to Three Rivers, St. Joseph County, Michigan, where he was admitted to the bar in 1860, began a law practice, and was elected to a term as county prosecutor in 1861.<sup>72</sup> Rhoda Ranney Severens died in childbirth on August 21, 1862, followed five days later by their newborn son, Franklin C. Severens. Both were buried in Riverside Cemetery in St. Joseph.<sup>73</sup> In December 1863 Henry Severens married Sarah Clarissa (Whittlesey) Ryan, a widow and a relation of his mother; they had two daughters, Catherine and Mabel.

In 1865, the family moved to Kalamazoo, where Severens practiced law with U.S. Senator Charles Stuart. He had great success for twenty years, including arguing eleven cases in the Michigan Supreme Court and one case before the U.S. Supreme Court.<sup>74</sup> However, he suffered periodically from ill health and abandoned his practice for several years before returning to the bar. Like many other attorneys then and now, Severens became interested in politics, but he was a Democrat in a solidly Republican state, and he lost races for Congress in 1866, for the state senate in 1868, and for the Michigan Supreme Court in 1877, losing to Justice Thomas Cooley.

Severens served on the district court for almost 14 years, but he remained anchored in Kalamazoo, often holding court business at his home there. Grand Rapids attorneys complained that Severens, "in his continued absence from the seat of justice has frequently delayed litigation and in many instances put litigants to added expenses and great inconvenience. Attorneys from distant parts of the district and from other states have come to Grand Rapids to do business in the United States court and have been obliged to carry their business to the home of the judge to have it attended to."<sup>75</sup> Despite such local concerns, Severens was highly regarded among federal judges in the states of the Sixth Circuit, particularly by Circuit Judge William Howard Taft. When President William McKinley appointed Taft to head the Philippine Commission,

Taft recommended that Judge Severens be appointed to replace him as circuit judge. Thus, on February 6, 1900, with the recommendation of a Republican circuit judge, a Republican President nominated Democrat Severens to become a judge of the U.S. Court of Appeals for the Sixth Circuit and of the U.S. Circuit Courts for the Sixth Circuit. The U.S. Senate confirmed those appointments on February 20, 1900.

Judge Severens served as a federal circuit judge until he retired on October 3, 1911, at the age of 76.<sup>76</sup> He lived another 12 years and died on Friday, June 8, 1923, in Kalamazoo's New Borgess Hospital, at the age of 88. He was buried in the city's Mountain Home Cemetery.<sup>77</sup> At a memorial service held by the Michigan Supreme Court, he was warmly remembered:

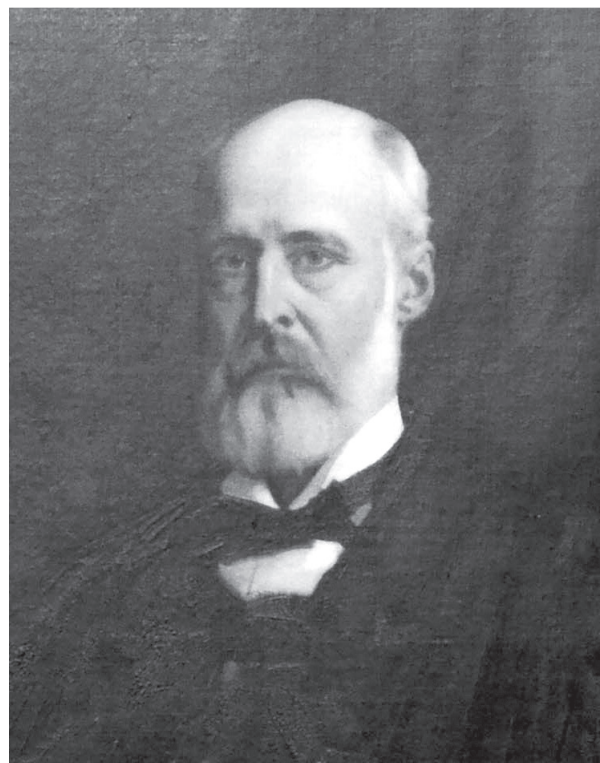
As judge of the courts of which he was a member, he occupied an eminent position and his associates in the Court of Appeals regarded his knowledge of the law and his good, clear judgment as of much value, in deciding the many intricate questions which came before that court for determination. His desire to do exact justice to all the parties whose claims were submitted for his decision, his clearly defined reasons for the conclusions which he reached and the confidence which all had in his absolute integrity of purpose in all his judicial actions marked him as one of the leading jurists of his time and he justly secured the reputation which he gained as one of the leaders of the profession of law in the Nation.<sup>78</sup>

## Judge Severens and Mail Fraud

### The Case of the Spirit Postmaster

Although cases involving the post office have been a regular part of the district court's docket since its inception, during the 19<sup>th</sup> century most of them were relatively mundane charges of theft of mail or stamps. One case brought before Judge Severens in 1890 is an oddity worthy of individual note: the case of "Doctor" W. E. Reid, the Spirit Postmaster.<sup>79</sup> A federal grand jury for the western district indicted Reid, a resident of Grand Rapids, for mail fraud based on a confidence scheme he ran.

According to trial testimony, over a period of years Reid, describing himself as the Spirit Postmaster, had used the U.S. mail to distribute advertisements promising that



*District Judge Henry Franklin Severens*

he could obtain advice from peoples' "spirit friends" on the subject of any matter bothering them, be it "financial matters, sickness of any description, family troubles, or . . . what to do about any special matter." All one had to do was follow Reid's instructions:

First. Write the full name or names of your spirit friends on slips of paper. Second. Address them by terms of relationship or friendship. Third. Ask your question. Fourth. Sign your own name in full. When this is done, place your question in an ordinary envelope, and seal it. Write a few lines on another sheet of paper, giving instructions to whom the replies should be sent, and place your sealed letter and note of instructions in a larger one, and address, Dr. W. E. Reid, 28 Canal St., Grand Rapids; 'Personal' in one corner. Dr. Reid has answered several thousand letters during the past two years, and has been uniformly successful.

Reid's fee for his service was just one dollar, plus six cents for postage, although he charged five dollars if the letter to the spirit friend was sewn shut or sealed with wax.

At trial, the prosecution, led by U.S. District Attorney Lewis G. Palmer, presented evidence that Reid had received a large number of responses to his ads with the requested fees, that Reid had made statements “tending to prove the business to be a fraud,” and that he had learned the “trick of opening a sealed letter.” The increased fee for some envelopes was apparently to discourage marks from sending any letters sewn shut or sealed with wax, which were harder to open covertly.

Reid’s defense was simple—that this was not a scheme to defraud because he did indeed have supernatural powers. His counsel proposed to prove his defense through the testimony of marks still convinced of Reid’s *bona fides* and by having Reid “give an exhibition or test of his power in open court.” The court refused to admit either type of evidence. In his charge to the jury, Judge Severens admitted that “every man has an absolute right to believe what he will. It is a phase of religious privilege which is guaranteed by the fundamental law of the land to every citizen.” However, he warned,

A man may not carry his belief into conduct which is injurious to the public, and contrary to law. . . . The interests of society require that every man’s conduct should conform to the law; and while it protects him in his freedom of opinion and belief in all religious or spiritual matters, it will not permit him, under the guise of that belief, to do a thing which the laws of the country condemn. To permit this (to employ the language of the supreme court of the United States in dealing with an analogous question) would be to make the professed doctrines of religious belief superior to the law of the land. . . .

As to Reid’s defense of supernatural powers, Severens told the jury, “No man has a right to embark in a business, and insist that the legality of it shall be tested by principles beyond the understanding of others, and not by the apprehension of the courts and juries of the country.” The jury found Reid guilty as charged.

### **The Case of the Counterfeit Blueberries**

Another case of mail fraud that may also have been of more than routine interest to Judge Severens involved a defendant who advertised to sell blueberry plants that turned out to be wild huckleberries. For relief from the stress of his judicial duties, Judge Severens returned to

his agricultural origins with a farm south of Fennville in Allegan County. According to one authority, Judge Severens introduced mint farming to that region and in 1896 owned “the largest peppermint field in the world,’ nearly a mile long on the Severens Marsh, reclaimed swamp land.”<sup>80</sup>

The defendant in *United States v. Staples*<sup>81</sup> was charged with mail fraud for sending through the U.S. mails brochures and circulars advertising for sale superior wheat seeds and berry plants, including blueberries, even though “defendant intended giving no plants of any value for the money received.” Instead, according to the indictment, when he received orders and money, he sent no wheat seeds at all. As for the blueberry orders, “defendant shipped the common wild huckleberry, which he gathered in the woods, while his advertisement described what would be understood as a cultivated plant, and carried the ideas that he was engaged in its culture; that many hundreds of these huckleberry plants were set out and cared for by purchasers, and entirely failed to live.” Trial began on December 11, 1890, and went to the jury three days later. In his instructions to the jury, Severens, himself a seller of produce, noted:

Now, gentlemen, you are familiar, as the public generally are, with the fact that seedsmen and nurserymen, as well as all other parties who have anything to sell, have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell; and within any proper reasonable bounds such a practice is not criminal. It must amount to more substantial deception in order to be subject to cognizance by the courts. A certain degree of praise and commendation of one’s goods in business is allowable; but when that is carried to the extent of obtaining the public’s money by means of actually fraudulent representations, then it comes under the condemnation of the law. You will consider all of these charges without losing sight of this very prevalent practice, and in reference to this second subject—that is, the sale of these blueberry plants, and the advertising of them—you will see whether this is within the range of an ordinary and legitimate business, or whether it goes beyond those bounds, and is a downright deception.<sup>82</sup>

The jury acquitted Mr. Staples as to the wheat but convicted him on the charge of counterfeit blueberries. He was convicted of a third count in using the mails to defraud newspapers that he did not pay for publishing his fraudulent advertisements. On January 27, 1891, Judge Severens sentenced Staples to 14 months in prison.

## The 1889 Marquette U.S. Post Office and Court House

When Congress created the northern division of the western district of Michigan in June 1878, Marquette did not have a federal facility to use as a court. Judge Withey held the northern division's first term there, on September 3 to 5, 1878, in borrowed space, as the judges did for the next several years. Congress did not authorize a federal building and courthouse for Marquette until July 1882,<sup>83</sup> and directed the Secretary of the Treasury "to purchase a site for, and cause to be erected thereon, a suitable building, with fireproof vaults therein, for the accommodation of the United States courts, post-office, and internal revenue, and other government offices, at the city of Marquette, in the State of Michigan," at a maximum cost for the site and building of \$100,000.<sup>84</sup>

The Treasury Department purchased a suitable site at the corner of West Washington and North Third Streets at a cost of \$7,276.60, on May 9, 1883. But as often happened with projects for federal buildings, further progress was slow and, by September 30, 1885, construction still had not begun and just over \$1,000 had been spent on the building.<sup>85</sup> The exterior was complete by December 1888, but the interior was not complete and occupied until July 3, 1889, just under seven years after Congress authorized it and more than a decade after Judge Withey first traveled north to hold court there. The construction cost, \$92,273.06, brought the total cost of the project to \$99,549.66, a whisker under the original appropriation limit.<sup>86</sup> The result was a three-story brick building with a five-story tower, all in a mixed Italianate/Romanesque style, designed by the staff of Mifflin E. Bell, Supervising Architect for the Treasury Department from 1883 to 1886.

## The U.S. Circuit Courts of Appeals

On March 3, 1891, Congress passed the Evarts Act, which established the United States Circuit Courts

of Appeals. These circuit courts of appeals consisted of nine intermediate appellate courts, one in each circuit, to hear all appeals from decisions of the District Courts.<sup>87</sup> In each circuit, the sitting circuit judge was also assigned to the circuit court of appeals and was joined by a newly-appointed second circuit judge. Each session of a circuit court of appeals was to be heard by a three-judge panel consisting of the circuit justice and the two circuit judges. Congress recognized that the circuit justices would rarely attend, so the law allowed one of panelists to be replaced by a district judge, which turned out to be what usually happened.<sup>88</sup> Henry Billings Brown was the first Circuit Justice of the Circuit Court of Appeals for the Sixth Circuit, and the other circuit judge seat was filled (very snugly) by U.S. Solicitor General William Howard Taft, the future President and Supreme Court Chief Justice.

Even though the Evarts Act ended their appellate function, the old circuit courts remained in existence. In addition to the old problem of having two trial courts in each district, the name of the new appellate courts and the fact that circuit judges sat on both the old circuit courts and the new appellate circuit courts caused confusion. The House of Representatives had voted to abolish the circuit courts. The Senate, however, in a nod to "extremists who still thought of the pioneer days when the Justices were active on circuit and thus, supposedly, kept the common touch,"<sup>89</sup> along with circuit court clerks who lobbied feverishly to save their jobs, and district court clerks who feared that they would be replaced by their circuit court colleagues, convinced Congress to retain the old circuit courts, which bumbled on, with decreasing dockets, for another 20 years.

## About the Book's Author

David G. Chardavoyne is a veteran Michigan lawyer and a legal educator who teaches at Wayne State University Law School and the University of Detroit-Mercy School of Law. He is the author of *A Hanging in Detroit: Stephen Gifford Simmons and The Last Execution Under Michigan Law* (Wayne State University Press, 2003), *The United States District Court for the Eastern District of Michigan: People, Law, and Politics* (Wayne State University Press, 2012). He is the co-author of the *Michigan Supreme Court Historical Reference Guide*, 2nd Ed. (Michigan State University Press, 2015), and he contributed a chapter to *The History of Michigan Law: Law Society & Politics in*

*the Midwest* (Ohio University Press, 2006). *A Hanging in Detroit* and *The History of Michigan Law* were named Michigan Notable Books by the Library of Michigan. He is also a frequent contributor to *The Court Legacy*, the journal of the Historical Society for the United States District for the Eastern District of Michigan.

## Endnotes

- 1 The states with more than one district and district judge in 1862 were: Alabama (1824), Arkansas (1851), Florida (1847), Georgia (1848), Illinois (1855), Louisiana (1849), Mississippi (1838), Missouri (1857), New York (1814), Ohio (1855), Pennsylvania (1818), Texas (1857), and Virginia (1819). Three states had more than one district but just one district judge: North Carolina, South Carolina, and Tennessee.
- 2 U.S. House Journal, 29<sup>th</sup> Cong., 1st Sess., p. 143. At the same time, he gave notice that he would introduce a bill to limit the jurisdiction of the United States courts to cases arising under the laws and constitution of the United States, abolishing diversity jurisdiction but granting the federal courts jurisdiction over cases arising under the constitution.
- 3 U.S. House Journal, 29<sup>th</sup> Cong., 1st Sess., p. 450.
- 4 U.S. House Journal, 29<sup>th</sup> Cong., 1st Sess., p. 595.
- 5 U.S. House Journal, 35<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 639.
- 6 Michigan's Congressmen at that time were Bradley F. Granger, Fernando C. Beaman, Francis W. Kellogg, and Rowland E. Trowbridge, all Republicans.
- 7 *Congressional Globe*, 37<sup>th</sup> Congress, 3<sup>rd</sup> session, p. 1018 (February 17, 1863).
- 8 *Id.*
- 9 *Id.*, p. 1019.
- 10 *Congressional Globe*, 37<sup>th</sup> Congress, 3<sup>rd</sup> session, p. 1155 (February 21, 1863).
- 11 *Id.*, p. 1156.
- 12 *Id.*
- 13 *Id.*
- 14 Kentucky did not receive a second district until 1901.
- 15 12 Stat. 660 (February 24, 1863): "The western district shall embrace all the territory and waters within the following boundaries, to wit: Commencing at the southwest corner of Hillsdale county, in the State of Michigan, and running from thence north, on the west line of said county, to the south line of Calhoun county; thence east, on the south line thereof, to the southeast corner of said last-named county; thence north, on the east boundary of said county, to the south line of Eaton county; thence east, on said south line, to the southeast corner of Eaton county; thence north, on the east boundary of Eaton county, to the south line of Clinton county; thence west, on the south boundary of said county, to the southwest corner thereof; thence north, on the west boundary of Clinton and Gratiot counties, to the south boundary of Isabella county; thence west, on its south boundary, to the southwest corner of said last-named county; thence north, on the west line of Isabella and Clare counties, to the south boundary of Missaukee county; thence east, on its south boundary, to the southeast corner of Missaukee county; thence north, on the east line of Missaukee, Kalamazoo [sic], and Antrim counties, to the counties, to the south boundary [of] Emmet county; thence east to the southeast corner of Emmet county; thence north, on the east boundary of Emmet county, to the Straits of Mackinac; thence north to midway across said straits; thence westerly, in a direct line, to a point on the shore of Lake Michigan where the north boundary of Delta county reaches Lake Michigan; thence west, on the north line of Delta county, to the northwest corner of said Delta county; thence south, on the west boundary of said county, to the dividing line between the States of Michigan and Wisconsin in Green Bay; thence northeasterly, on the said dividing line, into Lake Michigan, and thence southerly, through Lake Michigan, to the southwest corner of the State of Michigan, on a line that will include within said boundaries the waters of Lake Michigan within the admiralty jurisdiction of the State of Michigan; thence east, on the south boundary of the State of Michigan, to the intersection of the west line of Hillsdale county."
- 16 12 Stat. 660.
- 17 The original division allocated Calhoun and Branch Counties to the western district, but, after complaints from those counties, Congress returned them to the eastern district in June 1864. 13 Stat. 143.
- 18 Senate Executive Journal, 37<sup>th</sup> Cong., 3<sup>rd</sup> Sess., p. 282 (March 11, 1863).
- 19 *Detroit Free Press*, March 14, 1863.
- 20 *Id.* From the article it seems that this source was the eastern district's long-time clerk, John Winder, who doubtless feared losing some of his income which depended on the number of cases filed.
- 21 U.S. House Journal, 38<sup>th</sup> Cong., 1st Sess., p. 264.
- 22 13 Stat. 143.
- 23 The family name was originally McWithey, but Judge Withey's grandfather, a veteran of the Revolution, dropped the "Mc."
- 24 The elder Solomon Withey would eventually become Kent County sheriff and a hotel landlord. He became known as "General" Withey because of his appointment as an honorary brigadier general of the state militia.
- 25 In 1869, he tried another tactic. Sitting as circuit judge in the eastern district, he ruled, that under Michigan law, a promissory note used to buy liquor was void and unenforceable. *St. Joseph (Michigan) Herald*, July 3, 1869.
- 26 Solomon L. Withey Memorial, Michigan Supreme Court, 59 Mich. xxiii (1886).

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- 27 *Id.*
- 28 *Grand Rapids Daily Democrat*, April 27, 1886; *Grand Rapids Daily Eagle*, April 26, 1886. In the absence of Judge Withey, court was held by judges from other districts, principally District Judge George Reed Sage from the Southern District of Ohio. *Id.*, May 5, 1886.
- 29 *Grand Rapids Daily Democrat*, May 4, 1886.
- 30 *Grand Rapids Daily Eagle*, May 16, 1863.
- 31 David J. Gass, "Our First District Judge and the Civil War," *The Stereoscope*, Vol. 5, issue 4 (Winter 2007), pp. 7–8.
- 32 *Grand Rapids Daily Eagle*, July 1, 1863.
- 33 *Grand Rapids Daily Eagle*, September 8, 1863.
- 34 5 Stat. 676.
- 35 16 Stat. 44.
- 36 Withey's change of mind upset an intricate political deal between the President and the state's Republicans. With Judge Wilkins about to retire and Withey made a circuit judge, the way would be open to reward two Republicans with a district judgeship, with Emmons fingered for the eastern district judgeship. Instead, Emmons "settled" for the circuit judgeship which involved much more travel and work even if more pay. The circuit judges assigned to the Western District of Michigan prior to the creation of the U.S. Circuit Court of Appeals in 1891 were Emmons (1870–1877) and two judges from Tennessee, John Baxter (1877–1886) and Howell E. Jackson (1886–1891).
- 37 *New York Times*, May 15, 1877.
- 38 Charles A. Kent, *Memoir of Henry Billings Brown: Late Justice of the Supreme Court of the United States* (New York: Duffield & Company, 1915), pp. 25–26.
- 39 The Judiciary Act of 1891, also known as the Evarts Act, 26 Stat. 826, created nine United States Circuit Courts of Appeals, one for each circuit, as an intermediate appellate court, with each session to be held by two new circuit judges and one district judge. The Judiciary Act preserved the old circuit courts, but abolished their appellate jurisdiction as well as what was left of the obligation of Supreme Court justices to ride circuit.
- 40 Kent, 26–27.
- 41 Solomon L. Withey, *Address to the Graduating Class of the Law Department of the University of Michigan, March 29, 1871* (Ann Arbor: E. B. Pond, 1872), p. 13.
- 42 See Christian R. Bursetal, "The Messy History of the Federal Eminent Domain Power: A Response to William Baude," 4 California Law Review Circuit 187 (December, 2013).
- 43 *Avery v. Fox*, 2 F.Cas. 245 (C.C. W.D. Mich. 1868).
- 44 A century later, federal district judge Noel P. Fox would sometimes hold court at his cottage on White Lake.
- 45 U.S. Lake Survey, *Bulletin of the Northern and Northwestern Lake Survey*, Issues 19–20, p. 206.
- 46 14 Stat. 418, 419 (3/2/1867).
- 47 *Avery v. Fox*, 2 F.Cas. 245 (C.C. W.D. Mich. 1868).
- 48 For more on this case see Michael W. Puerner, "The Taxing Journey of the Daniel Ball," *Stereoscope* (Vol 2/Issue 1. Summer 2004).
- 49 5 Stat. 304 (July 7, 1838) and 10 Stat. 61 (August 30, 1852).
- 50 See Barbara Voulgaris, *From Steamboat Inspection Service to U.S. Coast Guard: Marine Safety in the United States from 1838–1946*
- 51 Identified by Withey as a "manuscript" opinion involving The Forest Queen and The Pontiac "pronounced in 1856 or 1857."
- 52 Augustus Griswold (1823–1890) served as District Attorney for the Western District from 1865 to 1869 except for six months in 1866–1867 when he was removed and then reinstated by President Andrew Johnson.
- 53 *The Daniel Ball*, 1 Brown Admin. 193, 6 F. Cas. 1161 (D.C. W.D. Mich. 1868).
- 54 *The United States v. the Steamer Daniel Ball*, Circuit Court Journal A, pp. 268–270 (C.C. W.D. Mich. November 6, 1868). Justice Swayne apparently considering his duty completed, did not tarry but left the district and did not appear again on the circuit court that term.
- 55 Benjamin H. Bristow (1832–1896) was the nation's first solicitor general and a relentless prosecutor of the Ku Klux Klan. He was also known for his advocacy of the rights of African Americans. Andrew T. McReynolds (1808–1898), a cavalry officer decorated for his reckless charges in both the Mexican and Civil Wars, was District Attorney for the Western District from 1866–1867.
- 56 *The Daniel Ball*, 77 U.S. 557 (1870).
- 57 *New York Times*, October 18, 1871.
- 58 *Grand Rapids Gazetteer* (1873).
- 59 17 Stat. 470.
- 60 18 Stat Part 3, 204, 228 (June 23, 1874); *Grand Rapids in 1874*, p. 15.
- 61 Payments authorized by 18 Stat. Part 3, 395 (March 3, 1875); 19 Stat. 110 (July 31, 1876); 19 Stat. 351 (March 4, 1877); 20 Stat. 210 (June 20, 1878).
- 62 *American Architect and Building News*, Vol. 1, February 12, 1876, p. 49.
- 63 *American Architect and Building News*, Vol. 1, July 22, 1876, pp. 236–237.
- 64 U.S. House Journal, 41st Cong., 1<sup>st</sup> Sess., p. 88.
- 65 U.S. House Journal, 41st Cong., 2<sup>nd</sup> Sess., p. 47.
- 66 20 Stat. 175, sec. 9, p. 177.
- 67 Born in New York State in 1841, Uhl came to Ypsilanti with his family in 1844, graduated from the University of Michigan in 1862, and read law in Ypsilanti where he partnered with Lyman Norris and then followed Norris to Grand Rapids in 1876. A staunch Democrat, Uhl served as mayor of Grand Rapids (1890–

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- 1891) and Ambassador to the German Empire (1896–1897). He died in Grand Rapids in 1901. *Grand Rapids and Kent County, Michigan : historical account of their progress from first settlement to the present time*, Ernest B. Fisher, ed. (Chicago: Robert O. Law Company, 1918), pp. 377–378.
- 68 *Grand Rapids Daily Democrat*, April 28, 1886; Id., May 2, 1886.
- 69 *Detroit Free Press*, May 5, 1886.
- 70 *(Chicago) Inter-Ocean*, May 15, 1886.
- 71 Middlebury College, *Catalogue of Officers and Students of Middlebury College in Middlebury, Vermont, and All Others Who Have Received Degrees, 1800 to 1889*, p. 110.
- 72 *History of St. Joseph County, Michigan, with illustrations descriptive of its scenery, palatial residences, public buildings . . .* (Philadelphia: L. H. Everts & Co., 1877), p. 39.
- 73 St. Joseph County Genealogical Society, *Cemeteries of St. Joseph County* (n.p., n.d.), Vol. 4, p. 206.
- 74 *Township of New Buffalo v. Cambria Iron Co.*, 105 U.S. 73 (1881).
- 75 *Grand Rapids Herald*, February 10, 1900.
- 76 Letter, William Howard Taft to Henry F. Severens, July 11, 1911, Severens Papers, Bentley Historical Library.
- 77 *The Grand Rapids Herald*, June 10, 1923.
- 78 226 Mich. xxxi (1924).
- 79 *United States v. Ried*, 42 F. 134 (W.D. Mich. 1890).
- 80 <http://fennville.memorieshop.com/History/Maps/Todd-Farm.html>
- 81 *U.S. v. Staples*, 45 F. 195 (W.D. Mich. 1890).
- 82 *United States v. Staples*, 45 F. 195, 198 (W.D. Mich. 1890).
- 83 22 Stat. 177.
- 84 22 Stat. 177.
- 85 *Report of the Supervising Architect of the Treasury Department for 1885*, pp. 34, 75.
- 86 *Report of the Supervising Architect of the Treasury Department for 1903*, p. 208.
- 87 26 Stat. 826. The Evarts Act also established a uniform annual salary of \$5,000 for all U.S. District Judges. Previously, Congress set the salary for each District Court separately.
- 88 The main purpose of the Evarts Act was to relieve the Supreme Court of its historic duty of hearing every appeal of a civil case decision from every district, a burden which, in 1890 alone, added 623 new appeals to the Court's docket. The Act did this by providing that decisions of the Circuit Courts of Appeals were to be final for diversity, patent, and admiralty cases unless that court or the Supreme Court certified the case for further appeal. This change reduced the appeals filed in the Supreme Court to 275 in 1892.
- 89 I. Scott Messinger, *Order in the Courts: A History of the Federal Clerk's Office* (Federal Judicial Center, 2002), pp. 36–37, quoting Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: MacMillan 1928), p. 100.