

Volume 15 Issue 2

THE JOURNAL OF
THE HISTORICAL SOCIETY
OF THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

STEREOSCOPE



This issue of the Stereoscope is from David Chardavoyne's upcoming book on the history of the Western District of Michigan, and explores Michigan's territorial court, which existed before Michigan became a state, in 1837. The book is expected to be published by Wayne State University Press in 2018.

—David J. Gass, President

*The Historical Society for the U.S. District Court for
the Western District of Michigan*

The First Federal Court in Michigan, 1787 to 1836

By David G. Chardavoyne

From 1805 until 1836, the three-judge territorial Supreme Court, consisting of judges appointed by the President of the United States, with the advice and consent of the United States Senate, presided over the Territory of Michigan. When Michigan became a state in 1837, the territorial court dissolved and Congress created the United States District Court for the District of Michigan, whose single United States district judge, also appointed by the President with the advice and consent of the Senate, was responsible for the entire state until 1863, when Congress split the district of Michigan into two district courts: the U.S. District Courts for the Eastern and Western Districts of Michigan.

The story of the U.S. District Court for the Western District of Michigan, though, begins much earlier, with one singular provision of the treaty between the United States and Great Britain negotiated in Paris to end the American Revolutionary War.

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The 1783 Treaty and the Northwest Territory

Peace negotiations between the United States and Great Britain began in April 1782. They were sponsored by France, which had entered the war as the key ally of the Americans but whose treasury was emptying at a terrifying pace as a result. American delegates included Benjamin Franklin, John Adams, and John Jay, while the French were led by Charles Gravier, comte de Vergennes. After several months of fruitless bickering, a desperate Vergennes proposed a solution in which the U.S. would gain its independence and all territory east of the Appalachians, while Great Britain would retain Canada and all land west of Pennsylvania, north of the Ohio River, and east of the Mississippi River.¹

Feeling that they were being betrayed by the French, the Americans decided to negotiate directly with Great Britain. The British realized that American independence was a *fait accompli*, and so it was useless as negotiating leverage. However, their prime minister, William Petty, Earl of Shelburne, realized that Britain and her merchants could profit by a commercial and trade relationship between the two nations. Consequently, the British offered the Americans what they really wanted: that Great Britain cede any claim to all of the land east of the Mississippi, north of Florida, and south of Canada. The American delegation accepted, Spain got Florida, and France got peace.

Although acquiring vast tracts of wilderness in the west through the treaty was very favorable to the United States, it also created one of the first troubling internal arguments in the new nation. What was to be the treatment of the land ceded by Great Britain, in particular the land north of the Ohio River, constituting what are now the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and the part of the state of Minnesota east of the Mississippi? Relying on their colonial charter or Indian grants, some states claimed all or part of what they called the northwest territories. Virginia, for example, claimed all of the northwest while Massachusetts, Connecticut, and New York made competing claims to large tracts there.² On the other hand, states without western claims feared losing population and power in Congress to the claiming states.

Even after years of debate and negotiation, some states refused to ratify the Articles of Confederation unless they prevailed on this issue. By October 1785, though, the last of the claimant states, Massachusetts and Connecticut, agreed to give up their western claims³ and to allow the northwest to be "settled and formed into distinct republican states which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states"⁴

The Confederation Congress of 1780 did not explain how and when such new states would be formed or how the western lands would be governed in the interim. In 1784, a committee chaired by Thomas Jefferson submitted to Congress "a Plan for Government of the Western Territory,"⁵ most of which the Confederation Congress voted to adopt,⁶ but Jefferson's plan was never put into action. It was not until July 13, 1787, when another session of the Confederation Congress enacted "An Ordinance for the Territory of the United States north-west of the River Ohio,"⁷ which became known simply as the

Northwest Ordinance. Two years later, on August 7, 1789, the U.S. Congress, under the Constitution, re-enacted the Northwest Ordinance practically verbatim.⁸

The Ordinance provided that, instead of starting as a single self-governing state, or several such states, the northwest would begin as a single territory or “district,” with the promise that over time, as populations grew, Congress would divide the northwest into independent territories and ultimately into three to five states to be admitted to the Union on equal terms with the original states. Initially, the northwest and its progeny territories would be governed by officials (a governor, a secretary, and three common-law judges) appointed by the federal government. In addition to their judicial responsibilities, the three territorial judges would also act, with the governor, as the territorial legislature. When any part of a territory achieved a population of “five thousand free male inhabitants of full age,” it could elect a legislature, but its executive and judiciary would still be in the control of the federally appointed officials. Only when its population reached 60,000 “free inhabitants” (not counting slaves or Indians) would the territory be eligible to become a state, with all the privileges of statehood.

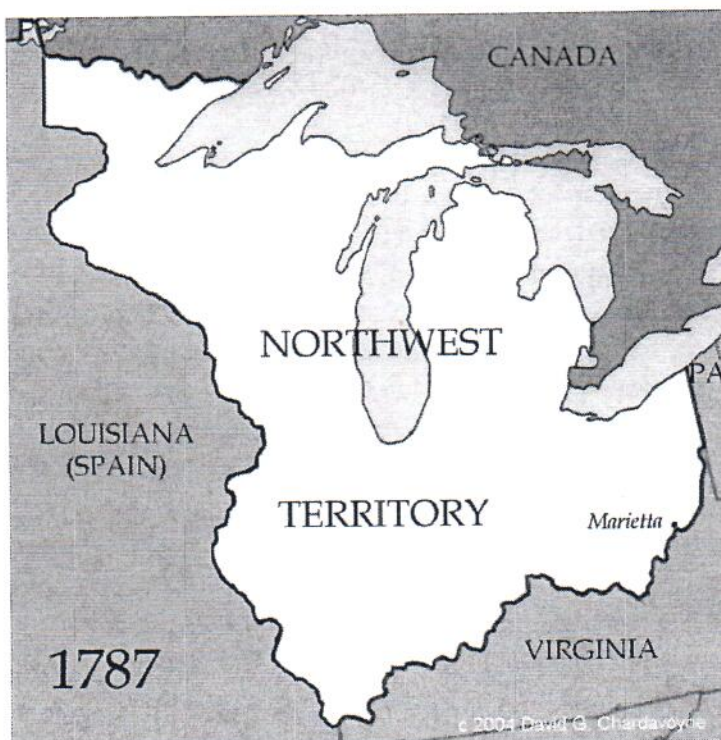
The territorial structure established by the Ordinance was so successful that it was copied in territory after territory as the nation moved west, but even more

significant to the nation’s future were its “articles of compact,” in which the original states made “unalterable” promises to the peoples of the northwest. These articles included guarantees of religious freedom; the protections of the common law, including habeas corpus and trial by jury; prohibitions of slavery and of cruel or unusual punishment; the encouragement of education; and good faith towards Indians.

In 1787, however, and as late as 1796, the details of governmental organization in the northwest were academic. Although it could be included in a map of the United States, the northwest had virtually no American inhabitants, and no American official exercised any practical authority there except for the single settlement at Marietta, near the confluence of the Muskingum and Ohio Rivers. Despite the Treaty of Paris, Great Britain refused to evacuate its troops from the upper northwest, including forts at Detroit and Mackinac. To the contrary, Britain built new forts in northern Ohio to support the plans of Indian tribes to keep the Americans out.

What is now Ohio became the battleground between Indians and settlers. Although they had tolerated the French and British soldiers and traders who set up forts in their tribal lands, the tribes of the lower northwest were aware that the Americans were different. Whereas the French and British who set up forts and trading posts throughout the northwest had prohibited their citizens from settling there, owning land on which to farm and settle, to the exclusion of Indians, was exactly what the Americans coming to Ohio wanted. Although the Ordinance required that Congress buy Indian lands rather than seize them, so that there were no legal American settlements north of Marietta, settlers pushed the boundaries constantly with the excuse that Ohio was now American. The Indians fought back, with British assistance, and won battles with settlers and American troops, but the settlers kept coming.

The end of organized resistance by the Ohio tribes began in August 1794, when Anthony Wayne defeated a force made up of many of the Ohio tribes at the Battle of Fallen Timbers, near Toledo. Three months later, in a treaty negotiated by John Jay,⁹ Great Britain agreed that by June 1, 1796, it would “withdraw all his troops and garrisons from all posts and places within the boundary lines assigned by the treaty of peace to the United States.” Abandoned by the British, and facing a growing American presence, the Ohio tribes gave up. In the Treaty of Greenville,¹⁰ the



United States acquired most of southern Ohio and other strategic locations in the northwest, including Detroit and Mackinac, all of which were now open to legal settlement.

Detroit's British troops and government did evacuate, by moving across the river to Canada, before the Americans arrived there on July 11, 1796. Detroit in 1796 was a different environment from what American officials were used to assimilating when they opened new areas for settlement. Despite the fact that it consisted of just a fort and about five hundred civilian inhabitants, it was an established European community in which the people considered themselves French or British. ¹¹The French population lived by subsistence farming, hunting, and trapping, while the British were mainly merchants and traders. Neither group was required to take an oath of allegiance to the United States and were of doubtful loyalty. There was also an unknown number of slaves.

The lack of a true court continued, however, because the territorial judges were reluctant to travel to Detroit, and they sat in Detroit only twice in five years.¹²

In 1800, Congress divided the Northwest Territory in two, forming the Indiana Territory and what was called the "eastern division" of the Northwest Territory. Their border was a line running from the Ohio River, at a point opposite the mouth of the Kentucky River, north-northeast to Fort Recovery, then north to the Canadian border in Lake Superior.¹³ The eastern half of Michigan's Lower Peninsula and the eastern tip of the Upper Peninsula remained in the Northwest Territory. The rest of Michigan, which had no American settlements, became part of the Indiana Territory, which had its capital at Vincennes on the lower reaches of the Wabash River.

In 1802, Congress authorized the organization of the State of Ohio. The remainder of the eastern division of the Northwest Territory, including the rest of lower Michigan, was added to the Indiana Territory effective February 19, 1803.¹⁴ From the minute they became part of the Indiana Territory, the residents of Detroit complained loudly that they were being ignored and excluded from participating in territorial government by their distance from Vincennes. Because Indiana was still in the first stage of government, Michigan lost its legislative representative and was once more governed by a distant governor and judges. In March 1803, Detroiters petitioned Congress in two languages asking for their own government.¹⁵ When the Indiana Territory passed to the second stage of government in December 1804, Detroit did not hear

about the meeting of the general assembly until it was too late to send a delegate.¹⁶

The distance from Detroit to Vincennes and the seeming disdain of the Indiana government for their northern constituents, caused the people of Detroit and other nearby settlements to petition Congress, often and passionately, for another territorial split, this time severing Michigan from Indiana and affording the new territory its own government. On January 11, 1805, Congress granted their wish and divided the Indiana Territory, effective the following June, and created the Territory of Michigan, described as: "all that part of the Indiana Territory, which lies north of a line drawn east from the southerly bend or extreme of Lake Michigan, until it shall intersect Lake Erie, and east of a line drawn from the said southerly through the middle of said lake to its northern extremity, and thence due north to the northern boundary of the United States"¹⁷

In 1809, Congress created the Illinois Territory by dividing the Indiana Territory (once more) along a line running north from the Ohio River, along the current western border of the State of Indiana, to the U.S. border on Lake Superior.¹⁸ Under this Act, Congress (intentionally or by mistake) left a large portion of the Upper Peninsula, as well as the eastern end of Green Bay, within the defined boundaries of the Indiana Territory but isolated from it by any land route.¹⁹ The western portion of the Upper Peninsula was in the Territory of Illinois, and only the eastern tip of the U. P. was in the Territory of Michigan.

Congress did not alter the boundaries of the Old Northwest for another decade until, in 1816, Congress authorized the inhabitants of the Indiana Territory to form a state.²⁰ The Act described the northern boundary of Indiana as "an east west line drawn through a point ten miles north of the southern extreme of Lake Michigan," a northwards shift done apparently so that Indiana would have direct access to a port on Lake Michigan. As a result, the Indiana/Michigan border was moved ten miles north, while the Indiana Territory's portions of the Upper Peninsula and Green Bay were not included in the state's defined boundaries. Because Congress did not change the boundaries of the Illinois or Michigan Territories to include them, apparently those parts of the U. P. were not part of any territory or state between April 1816 and April 1818.

On April 18, 1818, Congress authorized the inhabitants of Illinois to form a state with the same

boundaries as today.²¹ In the same Act, Congress doubled the size of the Territory of Michigan by transferring to it: “all that part of the territory of the United States lying north of the State of Indiana, and which was included in the former Indiana Territory, together with that part of the Illinois Territory which is situated north of and not included within the boundaries prescribed by this act”²² Thus, the Michigan Territory added all of the rest of the Upper Peninsula and what are now the state of Wisconsin and the part of the state of Minnesota east of the Mississippi.

In 1834, Congress again doubled the size of the Territory of Michigan by extending the territorial borders outside the old Northwest Territory, west to the Missouri and White Earth Rivers and south to the northern border of the State of Missouri.²³ This expansion included all of the present-day Iowa and Minnesota, as well as portions of South and North Dakota. Congress took this western extension as a temporary step in the process of creating the Territory of Wisconsin in 1836, after which the Michigan Territory returned to its permanent state borders.²⁴

After years of dispute, Michigan was admitted into the Union on January 26, 1837.²⁵ Michigan finally agreed to the Ohio Constitution border and retained, as compensation, the Upper Peninsula east of the Montreal and Menominee Rivers.²⁶ The remainder of the Territory of Michigan became the Territories of Wisconsin, which became a state in 1848, and Minnesota, approved as a state in 1858.

The Supreme Court of the Territory of Michigan

Section 4 of the Northwest Ordinance provided for the appointment of three territorial judges, with a common-law jurisdiction, “whose commissions shall continue in force during good behavior.” Because Congress provided in 1805 that the government of the Michigan Territory was to be in all respects similar to that provided by the Northwest Ordinance, President Jefferson had the responsibility and opportunity to appoint a governor, a secretary, and three judges for Michigan. On March 2, 1805, he appointed his friend Augustus Brevoort Woodward as Chief Justice of the Michigan territorial court.²⁷ Woodward arrived in Detroit on June 30, 1805, just three weeks after fire destroyed the town. There, he joined Jefferson’s second appointment to the Michigan

bench, Detroit resident Frederick Bates, originally of Virginia and a family friend of both President Jefferson and Secretary of State James Madison. Bates, just 27 years old, had made his living as an Army quartermaster and as a store-keeper while he studied law. There would not be a third judge until March 1806, but the Ordinance allowed the court to operate with just two judges. Accordingly, Woodward and Bates held the first session of the court, which Woodward christened the Supreme Court of the Territory of Michigan, on July 29, 1805.²⁸ Judge Frederick Bates left the court in 1806 to become the secretary of the Louisiana Territory. Jefferson replaced Bates with John Griffin, the grandson of a Scottish laird and the son of a prominent Congressman from Virginia. Griffin had determined that his post as a judge of the Indiana territorial court in Vincennes was bad for his health and had begged his father to find him a better job. Jefferson chose Michigan, which pleased Griffin even less, but he stayed until 1823. In 1808, the court finally was filled with the appointment by Jefferson of James Witherell of Vermont, a physician, judge, and veteran of the Revolutionary War.

The Inimitable Judge Woodward

Elias Brevoort Woodward was born in New York City in 1774 and graduated from Columbia College, now Columbia University, in 1793. Two years earlier he had changed his first name from Elias to Augustus, thinking it more dignified. When the federal government moved to the District of Columbia, he followed and established a prominent law practice and served on the first city council. In addition to English, he was fluent in Greek, Latin, French, and Spanish, and, like his great friend Thomas Jefferson, he had broad interests in the arts and sciences. With his characteristic energy, Woodward set himself up as the community’s leader, rebuilding Detroit from the ashes.

Judges Woodward, Griffin, and Witherell constituted the court for the next 16 years. They were a disparate and uncomfortable trio. In 1822, Territorial Secretary William Woodbridge wrote to a friend that: “Our chief Judge is a wild theorist, fitted principally for the extraction of sunbeams from cucumbers,” while Griffin was a gentleman, tasteful and polite, “but with a mind lamentably inert.” Griffin relied on Woodward and rarely acted contrary to him.²⁹ Judge Witherell, Woodbridge opined, was honest and intuitive but he had a lamentable

defect for a common-law judge—a “deadly hostility to that common law that he is officially called upon to administer, because of its English descent.”³⁰

With the constant support of the hapless and permanently unhappy Griffin, Woodward controlled both the judiciary and judicial branches of the territorial government, able to count on a majority in the court and at least two of the four votes on the council. This power enraged both governors during Woodward’s tenure in Michigan, William Hull and Lewis Cass. Woodward has come down to us as a “character,” and he may have been eccentric and stubborn, but during the War of 1812 he proved he was also brave. On August 16, 1812, Governor William Hull surrendered all of the state’s armed forces to the commander of the British forces in the west, General Isaac Brock. Brock sent Hull and other military officers to Montreal, while he expelled most civil officials to Ohio and further east. The exception was Woodward, who insisted on remaining in Detroit to protect the rights of the residents. In his own particular way, he became a thorn in the side of Brock’s successor, the much less competent General Proctor, whom Woodward hectoring and complained to about the condition of life in the occupied town. He also managed to send intelligence to the American government and to hide the garrison’s flag so that the British never found it. After months of dealing with Woodward, an exasperated Proctor expelled him from the territory.

University of Michigan law professor William W. Blume transcribed many of Woodward’s legal opinions from official records in his six-volume collection, *Transactions of the Supreme Court of Michigan*.³¹ One of the subjects that Woodward was called to rule on early in his tenure was the status of slavery in the territory.³² One of the articles of compact in the Northwest Ordinance clearly promised that there would never be slavery in the Northwest Territory, but when the Americans arrived in Detroit, they discovered that the British population held dozens of African and Indian slaves. Judge Woodward was aware of the ordinance compact barring slavery, but he also knew that an article of the Jay Treaty that guaranteed that British residents of the Northwest who decided to remain under the American government would “continue to enjoy, unmolested, all their property of every kind.” Did property include slaves, and, if so, which law controlled their fate?

In 1807, Judge Woodward, sitting alone, had to decide if he could reconcile the ordinance and the treaty.



Judge Augustus Woodward

*Courtesy of the Michigan Supreme Court Historical Society,
portrait by Robert Maniscalco*

A former slave who had been freed by her owner sued, asking the territorial supreme court to declare that her four children, whom her former owner still held as slaves, were themselves freed by the slavery compact in the ordinance. The owner responded that her property rights in the children were protected by the treaty. Woodward disliked slavery, but he also believed that he had to interpret the laws as written. After listening to the arguments of counsel, he ruled for the owner because the ordinance did not apply in Michigan until after the United States took control, whereas the treaty applied when it was ratified.

Woodward did limit his ruling, though, holding that the rights of the owner were only those acknowledged under Canadian law. In 1793, the parliament of Upper Canada had passed a law to gradually end slavery by emancipating all children born to slave mothers on their 25th birthday. Woodward used that law to hold that all persons born in Michigan on or after July 11, 1796 were born free, while those born to a slave mother after May 31, 1793, but before July 11, 1796, would be free on the child’s 25th birthday. Thus, slavery ended slowly in the Michigan Territory, and the 1830 U.S. census was the last to record a slave within what are now Michigan’s state boundaries.

Some of the eccentricity in Woodward's opinions might have been an attempt at humor. Michigan's supreme court was described as based on the common law, a set of rules that has developed over centuries and is constantly evolving. In one case before Woodward's court, the issue was which version of the common law the court was bound to follow. One judge said one date, a second said another, and then Woodward, apparently with a straight face, insisted that the proper common law was the one current at the time of the coronation of "Richard, Coeur de Lion", *i.e.*, Richard the Lion Hearted, crowned King of England in the year 1189.

In another opinion, Woodward may have been showing off his scholarship playfully in resolving a simple issue that the attorneys actually agreed on. In an 1818 case,³³ the issue before the supreme court was whether the service of civil process on a Sunday was valid. Both sides agreed that such service was valid at common law, but Woodward disagreed. In what was then a mammoth opinion of approximately 9,000 words, he proved to his own satisfaction that the common law did indeed forbid Sunday service of process. He investigated the special status of Sunday from the time of Jesus, citing, among a multitude of authorities: the Apostles John, Luke, and Paul; Byzantine Emperors Theodosius, Constantine, and Anastasius; Pope Gregory; 6th century kings Childebert of France and Gontran of Burgundy; and English Kings Edward I, III, and VI, William I, Henry II, VI, and VIII, James I, and Charles II. He concluded the opinion with an alphabetical list of more than one hundred authorities, legal, historical, and ecclesiastical, supporting his conclusion. For a judge speaking literally in the wilderness, with no access to a library or college, this was an incredible feat of scholarship, but was it an elaborate joke by a scholar showing off his erudition?³⁴

Capital Punishment in the Territory of Michigan, 1821

Most of the cases brought in Michigan's territorial court arose from failed business transactions and matters related to transfers of real estate. A majority of the relatively few criminal cases dealt with postal theft, smuggling, and other non-violent transgressions. However, three of the court's most remembered cases involved homicides and the last three capital sentences carried out by the territory of state of Michigan. The defendants in two of those

cases were Indians, who in 1821 had killed white men in separate incidents. The third was a white tavern keeper who killed his wife and was hanged in 1830.

On May 11, 1821, Dr. William S. Madison, an army surgeon assigned to the Third U.S. Infantry Regiment stationed at Green Bay, then part of the Michigan territory, left that post on horseback with an escort of three soldiers to travel to Kentucky where his wife had recently given birth. The next day, shortly after the group crossed the Manitowoc River, they encountered Katakah, a Chippewa, standing near the trail. Although one of the soldiers, Elijah McCray, warned Dr. Madison that Katakah was held in low repute by other members of his tribe, Madison allowed him to join the group. A few miles later, they came to a cedar swamp, through which Katakah carried Dr. Madison's saddlebags, and then two deep ravines. The soldiers at the head of the column were descending the second ravine when they heard a shot and, looking back, saw Dr. Madison fall from his horse with a gunshot in his back. As Katakah ran into the woods, Dr. Madison shouted "I have been shot by that Indian." Dr. Madison lived for two days, dying on Monday, May 14, 1821. Some days later, Katakah was arrested and brought to Green Bay, where he gave a statement to justice of the peace Robert Irwin, Jr., in which he admitted shooting Dr. Madison: "After traveling a short distance with the Doct[or] and his party, he the said Katakah concluded he would kill one of the party and the Doct[or] happening at the time he the said Ka-ta-kah formed the resolution to fall in the rear of the other whites, he leveled his gun, fired and discharged its contents, consisting of Duck shot, into the Doct[or's] back somewhere he supposes between the shoulders."³⁵ One of Katakah's court-appointed attorneys, James Doty, later reported that Katakah told him that he shot Dr. Madison just "to see how *pretty* he would fall off the horse."³⁶

At that time, Green Bay was part of the territory of Michigan, in which the sole court with jurisdiction over all capital offenses, whether based on territorial or federal law, was the supreme court of the territory of Michigan. The judges of the supreme court refused to sit anywhere except Detroit, where they held court for only one term each autumn. Therefore, although there was a territorial circuit court that sat at Green Bay, Justice of the Peace Erwin sent Katakah and the witnesses to the murder to Detroit for trial. When he arrived in Detroit, Katakah was remanded to the Wayne County jail with another Indian awaiting trial for murder. Kewabishkim, a member of the

Menominee Nation, had been arrested for the September 1820 murder of trapper Charles Ulrick, also at Green Bay.

So, when Judges Woodward, Griffin, and Witherell convened in Detroit's council house on September 17, 1821, for its annual term, they had two Indians in custody awaiting murder trials. There was, however, a question about which murder law, federal or territorial, under each should be tried, a distinction that the judges found troubling. After some discussion, they decided that Kewabishkim was subject to territorial law because Ulrick had been killed on land that had been ceded to the United States under a treaty with a tribe and that Congress had added to the Michigan territory. Katakah, on the other hand, was charged with shooting Dr. Madison on land that, although also within the boundaries of the Michigan territory, was still owned by a tribe and not subject to the criminal laws of the territory. Instead, his death came under an 1817 federal statute punishing capital crimes committed by Indians on non-Indians "within the United States, and within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians."³⁷ The supreme court decided that different laws required a separate trial for each defendant, with the court sitting as a territorial court in one trial and as a federal court in the other. However, the court also decided that the same grand jurors would consider indictments in both cases.³⁸

On September 19, 1821, the court appointed attorney James Duane Doty³⁹ to represent Katakah, and four attorneys, George Alexander O'Keeffe, Benjamin Franklin Hawkins Witherell (Judge Witherell's son), John L. Leib, and Spencer Coleman, to represent Kewabishkim. Charles Larned, attorney general for the territory, prosecuted in both cases, assisted by Solomon Sibley. The court also appointed alleged experts to translate the court proceedings, from English to French to Menominee for Kewabishkim, and from English to Chippewa for Katakah.

The trial of Kewabishkim was held on September 24, 1821, with all three supreme court judges presiding, as required by territorial law. The trial took less than a day, from jury selection to a verdict of guilty of murder. Three or four witnesses testified for the prosecution and none, it seems, for the defense. Katakah's trial took place on October 2, and although held under federal law, followed the same pattern of a short trial followed by the jury quickly returning a guilty verdict. Neither guilty verdict was a surprise because both of the defendants had admitted to the killings before trial. According to accounts

in Detroit's only newspaper, the *Detroit Gazette*, the defense attorneys in both cases raised every jurisdictional and procedural objection they could, but the attorneys' objections were over-ruled.⁴⁰

The court sentenced both defendants to be hanged on December 27, 1821, and both Katakah and Kewabishkim were hanged in Detroit as scheduled. The local militia regiment and federal troops provided security and an appearance of ceremonial formality. A large audience from Detroit and throughout southeastern Michigan, some of the settlers walking for days to attend what they viewed as one of their few available and entertaining diversions. According to an eye-witness account in the *Detroit Gazette*, the defendants were "perfectly collected" throughout the proceedings. They approached the gallows and climbed its 13 steps "in a manner peculiarly firm," asked the translators to apologize to the crowd, shook hands, and then "they launched into eternity."⁴¹

The Territorial Supreme Court After Woodward

Judges Woodward and Griffin continued in office until 1824. Their original appointments did not mention that their term of office had any limit, and they may have assumed that they were appointed for life, like judges of the U.S. district courts.⁴² However, in March 1823, Congress passed a law imposing a four-year term on Michigan's territorial judges, effective February 1, 1824.⁴³ Michiganders convinced President James Monroe not to re-appoint either Woodward or Griffin. The President did appoint Woodward to a U.S. district court in Florida, where he died in 1827. Griffin anticipated Monroe, left town in the fall of 1823, and resettled in Philadelphia where he remained, still dissatisfied, until his death in 1849.⁴⁴ In their place, President Monroe appointed veteran Detroit attorneys John Hunt and Solomon Sibley.⁴⁵

John Hunt left the territory in late 1826 and died in New York state in 1827. Until then, all of Michigan's supreme court judges had been appointed by Jeffersonian Presidents. However, the elections of 1824 proved to be a short-lived Whig landslide, and John Quincy Adams, a Whig like his father, was elected President. He replaced Judge Hunt with Whig Henry C. Chipman, a Detroit attorney and publisher of the local Whig newspaper.⁴⁶ In 1828, faced with the possibility that President Monroe might not re-appoint him, and worn out by his judicial duties, Judge Witherell switched offices with territorial

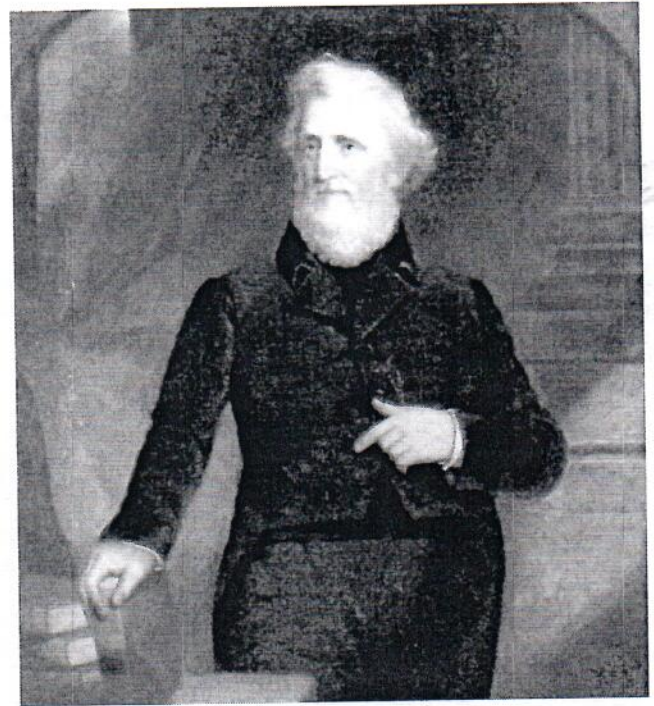
secretary William Woodbridge, a Whig, who was tired of his boring job.⁴⁷

The brief era of Whig ascendancy ended in 1828, when Democratic candidate Andrew Jackson won the presidency. Jackson believed in cementing the loyalty of the federal government by using the spoils system to replace Whig office-holders across the nation. The terms of the judges of Michigan's supreme court ended on February 1, 1832, and Jackson replaced Michigan's two Whig supreme court judges, Woodbridge and Chipman, with Democrats George Morell and Ross Wilkins.⁴⁸ Solomon Sibley, whose political affiliation was always ambiguous, somehow managed to avoid the political rumbles on and off the court, and he remained on the bench until the eve of statehood in 1836.

Capital Punishment in the Territory of Michigan, 1830

Judges Woodbridge, Sibley, and Chipman presided over what is the most memorable trial of the territorial era, the 1830 murder prosecution of Stephen G. Simmons for killing his wife, Levana Simmons.⁴⁹ Stephen Simmons was a tall, burly, 50-year-old who had found no success as a soldier or farmer and had emigrated from New York state to Michigan in 1825. He bought a tavern in what is now the city of Wayne, Michigan, on the Sauk Trail, now Ford Road, the main emigrant settler route from Detroit to the west. Simmons and his wife were no more successful as tavern keepers, largely because they were both alcoholics and violent bullies. In June 1830, Stephen Simmons returned home after winning a civil trial before Judges Woodbridge and Chipman, a victory he celebrated by getting drunk. While drunk, he accused Levana of having an affair with a stagecoach driver whose route brought him to the tavern frequently. When Levana denied Stephen's accusation, he proceeded to beat her to death with his fists.

The Simmons's adult children arrested their father and took him and the body of their mother in a cart to Detroit. The children and some tavern guests testified in front of a grand jury, which issued an indictment charging Stephen with murder. The trial began in the territorial capitol in Detroit on July 6, 1830. Benjamin F. H. Witherell prosecuted and George A. O'Keeffe, Witherell's co-counsel in defending Kewabishkim nine years earlier,



Judge Ross Wilkins

defended. As in his defense of the Menominee, O'Keeffe's defensive options were limited. Simmons had no real defense on the facts: his children and the tavern guests would establish that he had killed Levana. The best O'Keeffe could hope for was a verdict of manslaughter, which might mean a sentence of one or two years in jail. If the jury found his client guilty of murder, the only legal sentence was death by hanging.

O'Keeffe began carrying out his plan during selection of the jury. In most cases tried in Detroit, jury selection took only an hour or so. O'Keeffe knew that the first panels of prospective jurors would be filled with the town's establishment, leading businessmen, politicians, and even law enforcement officers, ready to convict and having no sympathy for a country brawler and drunk. If O'Keeffe could force the sheriff to pull in more jury panels, though, he might be able to fill the jury box with farmers and other rough-hewn men from the country who just might go for manslaughter. So, using his peremptory challenges and challenges for cause, O'Keeffe forced the court to take three days and 128 jury candidates to seat twelve jurors. After this ploy, though, the trial took just one day and a half, and the jury deliberated for just a few hours before finding Stephen guilty of murder.

Stephen Simmons was hanged in front of the county jail, where the downtown Detroit Public Library sits now,

on Friday, September 24, 1830. Like in 1821, the hanging was a major attraction, and some 2,000 people camped out in the nearby fields and then filled the stands erected by the city. A band played as the crowd waited, and then Stephen marched like a soldier out of the jail and up the stairs of the gallows in a new suit and boots. Minutes later he died in the last execution under the law of Michigan as a territory or state.⁵⁰ Seventeen years later, the Michigan legislature abolished capital punishment for murder.



The Territory of Michigan Becomes the State of Michigan

The drafters of the the Northwest Ordinance probably did not imagine that a territory might remain in that status for more than thirty years before becoming a state of the Union when it achieved a population of 60,000 residents. Ohio joined the Union in 1802, just two years after becoming a territory, Indiana waited 7 years after reaching its present borders, and Illinois waited 9 years. The population of the Michigan Territory lagged behind that of its neighbors. This was in part due to the ease with which settlers could reach those other territories via the Ohio River compared to the difficulty in traveling to Michigan before the coming of the Erie Canal and

the steam boat. The other impediment was federal law that mandated that settlers could only buy land in the Northwest from the United States and that the United States could obtain title to that land only by entering into treaties with Indian tribes.⁵¹ Although the 1795 Greenville Treaty opened most of southern Ohio to settlement, in Michigan the United States received basically only Detroit and Mackinac. The Detroit Treaty of 1807 allowed sales by the U.S. in southeastern Michigan, but the War of 1812 delayed any substantial settlement. Finally, from 1819 to 1821, with two treaties,⁵² the United States purchased the rest of the southern Lower Peninsula and the Saginaw River basin as far west as what is now Lansing. Even then, though, most of the northwest part of the Lower Peninsula and all of the Upper Peninsula remained outside of settlement until the Washington and Cedar Point Treaties of 1836 and the La Pointe Treaty of 1842.

Michigan's population did not grow at the rate its neighbors enjoyed until the combination of the treaties opening land for sale and two technological innovations of the mid 1820s, the Erie Canal and the steam boat, ignited the great wave of Yankee immigration from New England and western New York state that transformed Michigan. Beginning in 1820, Michigan's population soared as hundreds of thousands of migrants headed west. Either from New England or from the "second New England" of western New York State,⁵³ they were on their way to settle and farm the southern half of Michigan's Lower Peninsula, which came to be called Yankeeland. Between 1820 and 1860 they added 740,000 people to Michigan's population, becoming a majority in every Michigan county south of Saginaw as well as in Wisconsin, which was until 1836 part of the Michigan Territory.

Michigan first applied for statehood in 1833, when its population was only about 40,000, but growing. A census taken in 1835 found a population of 85,000, and Congress offered statehood in 1836, but only on condition that it give up its boundary dispute with Ohio over the Toledo Strip, an area containing a noisome swamp and few people but also Maumee (then called Miami) Bay, the gateway from the eastern Great Lakes to the Mississippi River. Finally, a convention in Ann Arbor in December 1836 passed a resolution accepting the federal government's condition. Congress formally admitted Michigan into the Union, as the 26th state, on January 26, 1837.⁵⁴

About the Author

David G. Chardavoyne is a veteran Michigan lawyer and a legal educator who teaches at Wayne State University Law School. He is the author of *The United States District Court for the Eastern District of Michigan, People, Law and Politics* (Wayne State University Press, 2012); *A Hanging in Detroit: Stephen Gifford Simmons and The Last Execution Under Michigan Law* (Wayne State University Press, 2003); co-author of the second edition of the *Michigan Supreme Court Historical Guide* (MSU Press, 2015); and he contributed a chapter to *The History of Michigan Law*. 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. Under Vergennes' plan, the western land south of the Ohio would become an Indian nation controlled by Spain.
2. See map, Dunbar & May, 111.
3. However, both Virginia and Connecticut reserved land in what became Ohio to compensate their veterans of the Revolution, the Virginia military district and the Connecticut western reserve.
4. *Journal of the Continental Congress*, 18:915 (October 10, 1780).
5. Revised Report, Plan for Government of the Western Territory, *Thomas Jefferson Papers*, 6:607-09 (March 22, 1784).
6. The Ordinance of 1784, *Journal of the Continental Congress*, 26:275-79 (April 23, 1784), set out the boundaries of numerous new states and proposed that each state's residents would, soon after settling, form a temporary government, based on the constitution and laws of one of the original states. When the state reached 20,000 "free inhabitants," they would form a permanent government, and that population was equal to that of "the least numerous of the thirteen original states," the state would be admitted "into the Congress of the United States, on an equal footing with the said original states." Congress did, however, delete a provision that would have banned slavery in the northwest after 1800.
7. "An Ordinance for the Territory of the United States northwest of the river Ohio," *Journal of the Continental Congress*, XXXII: 334-343 (July 13, 1787).
8. 1 *U.S. Statutes at Large* (hereafter *Stat.*) 50 (August 7, 1789).
9. "Treaty of amity, commerce, and navigation, between his Britannic Majesty and the United States of America, by their President, with the advice and consent of their Senate," Article II, *U.S. Statutes at Large*, 8:116, 117 (November 19, 1794).
10. "A Treaty of Peace between the United States of America and the Tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eelriver, Weeas, Kickapoos, Piankashaws, and Kaskaskias," *U.S. Statutes at Large*, 7:49 (August 3, 1795).
11. At first there was only one American citizen in Michigan, one Peter Audrain from Pennsylvania.
12. *TPUS*, 7:100 (March 20, 1803).
13. *U.S. Statutes at Large*, 2:58 (May 7, 1800).
14. *U.S. Statutes at Large*, 2:173 (April 30, 1802).
15. *TPUS*, 7:99-118.
16. Territorial Papers of the United States (*TPUS*) 7:240-241.
17. 2 *Stat.* 309 (January 11, 1805).
18. 2 *Stat.* 514 (January 31, 1809).
19. The effect of this isolation may have been nil because that part of the Upper Peninsula was still Indian Country and there is no evidence that the Indiana Territory ever exercised its sovereign power there.
20. 3 *Stat.* 289 (April 19, 1816).
21. 3 *Stat.* 428 (April 18, 1818).
22. *Id.* at 431.
23. 4 *Stat.* 701 (June 28, 1834).
24. 5 *Stat.* 10 (April 10, 1836), effective on July 3, 1836.
25. 5 *Stat.* 144 (January 27, 1837).
26. 5 *Stat.* 49 (June 15, 1836).
27. Jefferson actually appointed Samuel Huntington to be a Michigan judge one day earlier than Woodward, but Huntington, a judge on the Ohio Supreme Court, declined the appointment. *TSCM* 1:15.
28. For more on the Northwest Territory and the Territory of Michigan, and the Supreme Court of the Territory of Michigan, see David G. Chardavoyne & Paul Moreno, *Michigan Supreme Court Historical Reference Guide*, 2nd ed. (Michigan State University Press, 2015); David G. Chardavoyne, *The United States District Court for the Eastern District of Michigan: People, Law, and Politics* (Wayne State University Press, 2012); David G. Chardavoyne, "The Northwest Ordinance and Michigan's Territorial Heritage," *The History of Michigan Law*, Paul Finkelman & Martin Herschok, eds. (University of Ohio Press, 2006).
29. As it turned out, Michigan was not much more to Griffin's liking, and he conducted a campaign for a federal job elsewhere during most of his 19-year tenure in Detroit. Like Woodward, he was a life-long bachelor.

30. Charles Lanman, *The Life of William Woodbridge* (Washington, D.C.: Blanchard & Mohun, 1867), pp. 32-34.
31. William Wirt Blume, *Transactions of the Supreme Court of the Territory of Michigan, 1805-1836*, 6 vols. (Ann Arbor, MI: University of Michigan Press 1935-1940) (hereafter TSCM).
32. For more detail, see David G. Chardavoyne, "The Northwest Ordinance and Michigan's Territorial Heritage," *The History of Michigan Law*, Paul Finkelman & Martin J. Hershock, eds. (Athens, OH: The Ohio University Press, 2006), pp. 19-22.
33. *James Grant v. Thomas, the Earl of Selkirk*, 4 TSCM 431-451 (1818).
34. 1 *Stat.* 50 (August 7, 1789).
35. The original statements taken by Irwin from Katakah and the soldiers are in the Solomon Sibley Papers, Burton Historical Collection, at the Detroit Public Library, in the correspondence files for May-July 1821 ("Ka-ta-kah, an Indian of the Chippewa tribe") and August-November 1821 (Barkin Atkinson, George Johnson, and Elijah McCray).
36. Letter, James Duane Doty to Henry R. Schoolcraft, *Territorial Papers of the United States*, XI: 175 (November 17, 1821).
37. "An Act to provide for the punishment of crimes and offences committed within the Indian boundaries," 3 *Stat.* 383 (March 3, 1817).
38. The three judges argued for days amongst themselves and with the defense counsel as to how to swear in the grand jurors. The *Detroit Gazette*, whose owner despised the judges, particularly Woodbridge, later published alleged summaries of the proceedings during those arguments that depicted the judges as pompous, foolish, and pedantic.
39. In 1823, Congress created, and President Monroe appointed Doty to, a federal judgeship covering the Territory's Brown, Crawford, and Michilimackinac counties, which included all of the Upper Peninsula, a large part of the western side of the Lower Peninsula, and what is now the State of Wisconsin. Although Congress provided the "fourth judge" the same powers as the judges of the Michigan supreme court, Doty is not considered to have been a member of that court.
40. *Detroit Gazette*, November 18, 1822-January 3, 1823, in 5 TSCM 484-496.
41. *Detroit Gazette*, December 28, 1821.
42. The status of territorial judges remained in dispute until the U.S. Supreme Court held that such judges were administrative judges created under Article I of the Constitution rather than Article III. Thus, territorial judges lacked jurisdiction over matters exclusive to the Article III courts, including admiralty and bankruptcy. *American Insurance Company v. 356 Bales of Cotton*, 26 U.S. 511 (1828).
43. 3 *Stat.* 769 (March 3, 1823), sec. 3.
44. See David G. Chardavoyne & Paul Moreno, *Michigan Supreme Court Historical Reference Guide*, 2nd ed. (East Lansing, MI: Michigan State University Press, 2015), pp. 20-21.
45. Solomon Sibley (1769-1846), a graduate of what is now Brown University, was the second American attorney to settle in Detroit after the British left. He served as Mayor of Detroit (1806).
U.S. District Attorney for the District of Michigan (1815-1823), and Michigan Territory's Delegate to Congress (1820-1823). John Hunt (c. 1788-1827) arrived in Detroit in 1818 or 1819. Other facts about him are lost except that after his wife died in September 1826, Hunt's mind deteriorated. Hunt left Detroit in late 1826, and he died in New Hartford, New York, in June 1827.
46. Henry C. Chipman (1784-1867) was born in Vermont but spent 15 years practicing law in South Carolina. After his service on the supreme court, he served as a criminal judge in Detroit and then became a writer. A Whig when he arrived in Detroit, he became a Democrat in reaction to the creation of the Republican Party.
47. William Woodbridge (1780-1861), born in Norwich, Connecticut, left a successful law practice in Ohio in 1814, at the urging of Lewis Cass, to become secretary of the Michigan territory, devastated by the War of 1812. After his service on the Michigan supreme court, Woodbridge was elected Michigan State Senator (1838-1839), Governor of Michigan (1840-1841), and U.S. Senator (1841-1847).
48. George Morell (1786-1845) was an attorney, judge, and state assemblyman in New York before President Jackson appointed him as a territorial judge in Michigan. He served as one of the last judges of Michigan's territorial supreme court and the first justice of the supreme court of the state of Michigan. He later was the latter court's chief judge. He left the state supreme court in 1843.
49. Since 1825, murder trials were tried by three judges of the county circuit courts. However, in Wayne County the circuit court judges were the same persons as the supreme court judges. So, technically, the judges presided over the Simmons murder trial as the Wayne County circuit court, not as the supreme court, but in practice the distinction really made little or no difference because appeals from the circuit court were heard by the supreme court.
50. See David G. Chardavoyne, *A Hanging in Detroit, Stephen Gifford Simmons and the Last Execution Under Michigan Law* (Detroit: Wayne State University Press, 2003).
51. Very few of them settled farther north than the Saginaw Valley. The glacier that crawled over northern North America ten thousand years ago not only carved out the Great Lakes, it also scraped up the topsoil from the Upper Peninsula and

the northern Lower Peninsula and then deposited it south of a line from Saginaw Bay to the Grand River, creating a land of rich agricultural potential. North of that line, though, bedrock was left close to the surface and the remaining soil was sandy, resulting in land that was good for pines and other evergreens but poor for crops. Temperature was also a factor in Michigan's migration and crop patterns. For example, the monthly mean temperature from March to October at Ann Arbor (42.2 degrees north), for example, is six degrees higher than at Oscoda (44.4 degrees north), and Ann Arbor is frost-free about two more months of the year than Oscoda. The result was that Michigan's early American population filled in the southern counties and left the north sparsely populated.

52. The Saginaw Treaty of 1819 and the Chicago Treaty of 1821.
53. The descendants of New Englanders who migrated to newly opened land in western New York after the Revolution. For discussions of the roles of both Yankee groups in Michigan's development, see Brian C. Wilson, *Yankees in Michigan* (E. Lansing, MI: Michigan State University Press, 2008); Susan E. Gray, *The Yankee West: Community Life on the Michigan Frontier* (Chapel Hill, NC: University of North Carolina Press, 1996).
54. 5 Stat. 144.

The Trial of Susan B. Anthony

The Court, in cooperation with the United States Attorney's Office and the Federal Bar Association, reenacted, on August 27, 2014, the trial of Susan B. Anthony for unlawfully voting in the presidential election of 1872 in New York. Ms. Anthony (played by the Hon. Janet T. Neff) was ably represented by her attorney, Henry R. Selden (played by Assistant U.S. Attorney Tim VerHey). Prosecuting the case was the relentless Richard Crowley (played by Assistant U.S. Attorney Clay West). U.S. Supreme Court Justice Ward Hunt (played by the Hon. Hugh Breneman, Jr.) presided at the trial in his capacity as a circuit judge of the United States Circuit Court for the District of New York, notwithstanding that the reenactment took place in the Grand Rapids Federal Courthouse. United States Attorney Patrick Miles made a cameo appearance as Frederick Douglass. All of the players were dressed in authentic period garb. The first fourteen men to attend the program as spectators received a surprise jury summons to sit as the all-male jury.

Susan B. Anthony famously advocated and lectured for the abolition of slavery, women's labor organizations, education reform, and the right for women to own their

own property and keep their own savings. She believed the right to vote was paramount in making progress in these areas. At the age of 52 she and several other women, essentially by dint of personality, compelled the election inspectors to place their names on the roll of voters, and then voted for president, despite the law at the time which forbade it.

Notwithstanding some vocal opposition from those assembled, the Judge directed the jury to find a verdict of guilty and, over a spirited allocution from the defendant, fined her \$100.00. She refused to pay the fine, and the judge declined to incarcerate her awaiting payment, thus effectively barring her from appealing her felony conviction to the Supreme Court. The reenactment was taken entirely from the transcript of the actual trial. The production was ably produced and directed by Assistant U.S. Attorney Tessa Hessmiller.

Ms. Anthony died 14 years before the passage of the 19th Amendment, popularly known as the Susan B. Anthony Amendment, in 1920. Her likeness also appears on a one dollar coin.

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In this Issue

| | |
|---|-----------|
| The First Federal Court in Michigan, 1787 to 1836..... | 1 |
| The Trial of Susan B. Anthony | 13 |
| Membership Application | 14 |