



Society Update

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Annual Luncheon Highlights Issue

Otis Smith: A Man from Flint

Donald Rockwell, SBM President



In deciding what “vignette” I wished to present today, it was obvious that the subject matter should be of significant interest to the MSC Historical Society and yet I wanted it to be of significant interest to me as well. I take great pride in being from Flint, Michigan, especially during the current hard times for Flint. I try to take advantage of any opportunity I may have to compliment and endorse Flint in some way in my role as President of the SBM. Genesee County and Flint have a long history of having some of the very best attorneys and judges in the State and I consider Justice Otis Smith certainly fitting this description and that is why he was the subject of my President’s Page article in February’s *Michigan State Bar Journal*. Justice Smith will forever be remembered as the first African-American Justice of the Michigan Supreme Court. However, to me he will be remembered as a person from Flint who made a huge impact on our system of justice and our community. He has paved the way for many, many lawyers and judges and that is why, in significant part, his portrait prominently hangs in the Rotunda of the Hall of Justice.

As a young lawyer, I was always aware of the name Otis Smith, because he was mentioned so often in the legal community. Otis Smith was, at the time, Vice President and General Counsel for General Motors. Everyone took great interest and pride that Otis Smith

was at one time a local lawyer who practiced years in Flint.

He was born in 1922 in the black slums of Memphis, Tennessee. There was a debate over his real name as he thought he was named Otis Milton Smith, but years later he learned from his birth certificate that he was actually listed as Henry Ford Smith. The Henry Ford never took, obviously, and that is just as well because serving as Vice President and General Counsel for GM with that name may not have worked.

His mother never talked about his father much although Otis did see his father occasionally when he would bring the \$80 to \$90 monthly allowance each month and the occasional gold coins for Christmas. His father was a white man and that may have prevented any kind of a close relationship between them. Otis’s older brother told of a time where he was shining shoes with a shoe shine kit and their father did not even recognize him at first.

Otis grew up poor and he recalled many school days where he went hungry, since nothing was available to eat at home. His mother was very religious and he attended church often during the week.

Growing up, Otis worked hard to get along with others. He was always conscious of the lightness of his skin and he resisted anyone recognizing him as a white person. He was a Boy Scout and that experience was very important in his early life as it helped develop his self-esteem.

Otis saw the worst of discrimination in the South. He was mystified why some American white men, particularly southerners, felt it necessary to go out of their way to thoroughly humiliate black men.

After graduating high school at age 17, one of his teachers asked him to consider working for the Democratic Party “machine” in Nashville as a messenger and janitor. Otis accepted and never lived in Memphis again. His time in Nashville was important while he experienced the ropes of the political system.

Otis continued to witness discrimination in Nashville. In 1940, shortly after Otis arrived in Nashville, a half dozen blacks went to the courthouse and asked to be registered to vote. Their leader was 33 year-old Elbert Williams. After they were refused registration, the local NAACP met and protested. Elbert Williams was lynched and his body was found in the river days later. Years later, in 1960, when Otis was campaigning for State Auditor General, he told that story to a gathering in Niles, Michigan. He told them, and I am quoting, “If people will threaten you and even kill you to keep you from voting, it must be important.” He was simply trying to get people to register and to exercise their right to vote.

In 1941, Otis enrolled in Fisk University in Nashville. Of course, the attack on Pearl Harbor changed his plans. He always had an interest in radios and he still remembered seeing Charles Lindbergh flying over Memphis in 1927 even though he was only five at the time. As a result, Otis traveled to Philadelphia to attend a private radio school that was part of the Chamberlain Aircraft Corporation. He was then inducted into the army and he transferred into the Signal Corp. As you can guess he continued to see the results of discrimination and segregation. He was assigned to the 477th Bombardment Group at Selfridge Field in Michigan, just 30 miles from here. He worked at the base newspaper and he was able to meet his childhood idol, Joe Louis, and more importantly he met his

future wife, Mavis, who was from Detroit.

In 1946, Otis went to live with his aunt and uncle in Flint and worked what he described as a “lousy job” at Chevrolet. When considering his future, Otis saw that there were only 1,230 black lawyers among

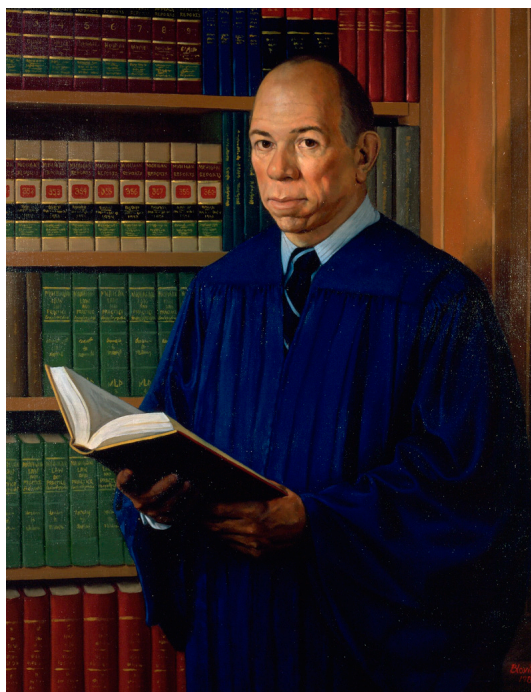
the nation’s 160,000 lawyers. He knew that he wanted to make a difference. He had converted to Roman Catholicism by this time and started taking classes at Syracuse University, a Catholic school, and eventually he applied to Catholic University in Washington, DC., to take law classes.

Speaking of Catholic University, Berrien County Circuit Court Judge Charles LaSata recently contacted me to tell me that his father graduated with Otis Smith from the law school in 1950. Most of the graduates were veterans of WWII. Years later, they would hold class reunions where both his dad and Otis Smith would attend. Everyone attending stayed at the Key Bridge Marriott and Otis, by virtue of his position

at General Motors, would have a fleet of Buicks and Cadillacs available for the use of everyone, the graduates and their families.

While Otis was still in law school, a Flint black attorney, Dudley Mallory, had seen a photo of Otis with Justice William O. Douglas in the *Flint Journal*. Mallory left a message with Otis’s family that he wanted to meet with Otis and he did. He asked Otis to join him in his Flint practice. Mallory was a well respected lawyer who had mostly black clients with several white clients. Otis thrived under Mallory’s tutelage. Otis later joined the Genesee County Prosecutor’s Office where he worked for several years. Otis was active in community work and in Flint politics. He served on a number of boards.

In 1957, Otis learned that Governor G. Mennen Williams wanted to appoint him to the leadership of the Michigan Public Service Commission. Otis accepted. However, he was very conscious of the “pioneering role” he was now undertaking given his race. He did not want to fail because he knew a lot of eyes



The official portrait of Justice Otis M. Smith, painted by Larry Blovits and presented on November 16, 1983.

were now on him. Two years later, Otis found himself appointed as the State Auditor General when an opening had occurred. He ran for the position and won in 1960.

It was in 1961 that Governor Swainson asked Otis to join him in his car for a trip to Grand Rapids. The governor asked Otis who would be a good person to fill the open position on the Michigan Supreme

others fell into place.” Like Justice Smith, Earl Warren believed in the importance of *his* court’s decisions on apportionment issues as he considered those decisions to be more significant than even his *Brown v. Board of Education* decision.

Justice Smith was known to vote more conservatively than many in the Democratic Party and unions wanted. One time when verbally confronted

“
*If people will threaten you and
even kill you to keep you from
voting, it must be important.*”

Court. After Otis dropped some names, the governor said “what about you?” Otis went back to Flint to think it over and he accepted the appointment. Dudley Mallory was his biggest supporter. Otis stood for election the next year, 1962, and won. During his time on the Court he was known for his collegiality and ability to get along with everyone. He was known to have a high “convincing rate;” in other words he wrote several opinions for the majority. Some 83 percent of his opinions were for the majority. His focus was always what was best for the litigants and for the State of Michigan. He was known as an extremely hard worker.

Justice Smith believed the most significant case during his tenure on the Court involved apportionment of the state legislature and the effort to diminish the impact of political opposition by gerrymandering. He felt very strongly about the proposition of “one person, one vote” and that no one’s vote should be diminished by forcing certain people into voting districts where his or her vote would not matter. As it turned out, Michigan became the first State in the country to adopt a “one man, one vote” apportionment plan. U.S. Supreme Court Chief Justice Earl Warren visited Michigan a year after that decision and said, and I quote, “Everyone was watching to see who was going to be the first State and you were the first and all

and politically threatened by union leaders, Justice Smith became angry and told them that his vote on the bench could not be bought at any price. He later was uncertain to what extent that incident led to his election defeat in 1966 where he ended up in third position for the two available seats.

Regarding this 1966 election which Justice Smith lost, I was able to talk to a retired Dow Chemical attorney from Midland several weeks ago. He is Paul Heil. Paul was just graduating from law school in 1966 and he was asked to interview for a possible law clerk position for Justice Smith. Paul has a great memory of the interview and he was struck by Justice Smith’s kindness and humility. According to Paul, toward the end of the interview Justice Smith became apologetic and he indicated that he most likely was not going to hire a new law clerk because he had a sense that he was not going to win the fall election.

Shortly after his defeat in 1966, Otis was contacted by General Motors and he was asked to join the corporation’s legal staff. He immediately received a pay raise from what he was making on the Supreme Court. At first he was uncertain if he would like GM, but he grew to really enjoy working for GM. In 1977, Otis Smith became General Counsel for GM. He saw the legal department at GM grow to double its size and he eventually oversaw 150 lawyers and 175 support

staff.

When on the Supreme Court, a member of a newspaper contacted Justice Smith and called him “heroic” because of his accomplishments as an African-American. Justice Smith had written a response to this and it reads:

“I never saw any great degree of heroism in what I did. In fact, like most of us, my success was in large part an accident of history. I came of age at the right time, and I was grateful for the opportunities that I have had. Anybody who has been allowed to do everything I did—chair of the Michigan Public Service Commission, Auditor General, a Supreme Court Justice, and General Counsel for GM—would have to be grateful. Those opportunities are rare—for whites or African-Americans or anyone else. I am only glad that I was able to justify peoples’ confidence in me by discharging my responsibilities well.”

The remains of Mr. Smith and his former Flint partner, Mr. Mallory, rest in River Rest Cemetery just two miles from my house. River Rest is known to be a black cemetery. It is situated next to a Catholic cemetery which in turn is located next to a Protestant cemetery. We have come far, but we have so far to go.

An SBM Milestone was dedicated to Mr. Smith on the campus of my *alma mater*, The University of Michigan-Flint, in June, 2006. Among those in attendance for the SBM Milestone ceremony were SBM President Tom Cranmer, Mr. Smith’s brother, Hamilton Smith, and, most appropriately, former Justice Dennis Archer who was mentored by Justice Smith.

It is my privilege and great honor to briefly speak about Otis Smith. I mentioned in my February *Bar Journal* article that the opportunity for me to meet Justice Smith just never arose—and that I am the lesser for it.

Thank you so much.

Donald Rockwell is the 83rd President of the State Bar of Michigan. Rockwell is the founder of Nill Rockwell PC in Flint, Michigan, where he devotes most of his time to serving as university counsel for Kettering University. Previously, he served as a judge on the 67th District Court bench in Genesee County.

In His Own Words....

Listen to Justice Otis M. Smith in his own words via his Oral History on our website www.micourthistory.org

In the interview, Justice Smith talks about:

His entrance into politics and the Supreme Court. Growing up in Memphis, Tennessee. Working multiple jobs to save money for college. Enlisting in the armed forces in 1942. His ambition to succeed.

His early employment. Appointments to chair the Public Service Commission, State Auditor General, and finally to the Michigan Supreme Court, including the legislation apportionment case of the early 1960s.

Scholle v Hare, the effect of U.S. Supreme Court case *Reynolds v Simms*, and his loss to Thomas Brennan.

His method of writing decisions and the functioning of the Court. The *Fenstra* case and *Berkaw v Mayflower Congregational Church*. His high prosecution rate in court decisions. Excusing himself from a case involving GM employees.

The judicial selection process, in particular the U.S. Supreme Court hearings for David Souter. The *Mallory* case and the right to counsel. His experience with criminal cases, memorable custody cases, and a case concerning zoning.

Geographical dispersal of his colleagues, selection of Chief Justice, personality of Gene Black, and racial classification in the U.S. His colleagues Harry Kelly, John Dethmers, George Edwards, Theodore Souris, Thomas M. Kavanagh, Mike O’Hara, and Paul Adams.

Some Remarks on Michigan's Reception of the Common Law¹

Vincent Wellman²



Since my project involves the history of the common law I want to begin with a quote from Benjamin Cardozo, a venerable common law judge:

“The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten.”³

The more I investigated Michigan's reception of the common law, the more my research seemed to bear out the wisdom of Cardozo's warning – half truths of one generation have been passed on to future generations, and important qualifications have been disregarded or forgotten. Since my ambition is to understand the history of the common law's reception in Michigan, I think it's important to include the qualifications of that reception that might have been disregarded or forgotten; without them we'll have only half truths, and will risk being misled.

I. Reception?

My topic is Michigan's reception of the common law. A non-lawyer friend, hearing of the topic and my research, observed that in this context the word “reception” could have two quite different meanings. His observation can help me illuminate the story of that reception. In the first place, there's a technical, lawyerly sense of “reception”—referring to the process by which the common law was, in Michigan and elsewhere, adopted and incorporated into the rest of the law. In that sense, we can recognize different formal mechanisms to accomplish that adoption. In many States, the mechanism was some form of a “reception” statute.⁴ The State of Michigan received the common law through its 1850 Constitution, which provides that “The common law, and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature.”⁵

But there's another meaning of ‘reception’ that might apply here. I might go home, for example, and face questions from my family about today's talk, and they might ask about the *reception* that I got from this audience. This second sense, in other words, focuses on the audience's reactions—both intellectual and emotional—to the topic at hand. What I came to understand was that Michigan's reception (in that second sense of the word) included a complicated early set of reactions to the common law, reactions that were already in play before Michigan became a State and adopted a Constitution. The simple nature of the Constitutional provision of 1850, receiving the common law in the first sense, may have obscured Michigan's rather complicated reception, in the second sense, of that law.

To begin with, the Constitution of 1850 was Michigan's second; it replaced an earlier, 1835 adoption. The earlier document made *no* reference to the common law. The analogous section of the 1835 Constitution instead read: “All laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature.”⁶ The 1835 Constitution's silence about the common law stands in sharp contrast to other, even earlier, features of Michigan's legal history. In one sense, Michigan had received the common law before becoming a State, and had

been incorporating it into its law for several decades. What's now the State of Michigan began, of course, as part of the much larger Northwest Territory, created by the Northwest Ordinance of 1787. That Territory was subject to a governor, a secretary, and three judges, all appointed by Congress and, at first, the governor and the judges were to share legislative authority.⁷ That same Ordinance also provided that the judges "shall have a common law jurisdiction," and that the Territory's inhabitants "should always be entitled to the benefits of" writs of habeas corpus, trial by jury, proportionate representation in the Legislature that was to be created, and judicial proceedings "according to the course of the common law."⁸ In 1795, exercising their legislative function, the Territorial judges adopted a reception statute that provided that the common law of England would be part of "the rule of decision" for the Territory, and should be considered "as of full force."⁹

In sum, the founding documents that preceded the 1850 Constitution indicate that the common law's reception was complicated. The common law was first incorporated, then it wasn't, and then, in the 1850 Constitution, it was incorporated again. As we might imagine, a complicated history indicates a complicated reaction to the common law and its purported role and status. To understand the important qualifications and reservations of the time about the common law, we therefore need to understand that complicated reaction of that time, lest we have only half truths about its reception. For today's purposes, I will focus on two qualities, often supposed to be true of the common law, in order to reveal those qualifications and reservations. One supposed quality of the common law is the idea that it is a kind of "birthright" of the colonists, by virtue of their historical and political ties to England. Another is the idea that common law provides a comprehensive set of legal doctrines, rooted perhaps in natural law, that should follow wholesale and without alteration. I will examine these in turn.

II. A Birthright?

In *United States v Worrall*,¹⁰ a 1798 decision by the United States Supreme Court, the majority opinion states:

"When the American Colonies were first settled by our ancestors it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and

inheritance so much of the common law as was applicable to their local situation, and change of circumstances."¹¹

This idea that the common law was a birthright and inheritance seems to square with the provisions of the Northwest Ordinance that treated judicial proceedings "according to the common law" as a *right* of the Territory's inhabitants, in the same vein as rights of habeas corpus, trial by jury, and proportionate representation in the Legislature—all to be cherished and promoted. But if the common law was such a birthright, how did it come to be ignored, or rejected, in the 1835 Constitution? If we dig deeper, we find a more nuanced and interesting picture. I begin with the supposed attitudes and assumptions of English jurists. According to the Supreme Court, in its opinion in *Worrall*, the "judges and lawyers of England" would regard the common law as a birthright, but that can be seen as much too simple a view. Consider, in this connection, the views of William Blackstone. His famous *Commentaries* are often treated as a wellspring for the common law's force and authority in England, and by extension in the New World. But, on inspection, Blackstone took a much narrower and more reserved approach to the question of whether English common law should govern the American colonies. In the *Commentaries*, Blackstone distinguished two situations, depending on whether English colonists were settling in an uninhabited land, or were instead displacing an existing political structure. As Blackstone perceived it:

"Our American plantations are principally of the latter sort, being obtained in the last century either by right of conquest or ... by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent, dominions."¹²

So, as measured by Blackstone, at least, English common law should have no authority in the American colonies; by this measure, it seems, we can doubt whether English jurists would necessarily have regarded the common law as a birthright of the English colonists, or as the backbone of their law in the New World.

Further inspection indicates that questions about the common law's authority sometimes involved a political basis; the significance of that political basis

becomes clearer if we return to Michigan's distinctive history. As I mentioned, the legal structure of the Northwest Territory included a governor and three judges and that foursome shared legislative authority for the Territory. As you can imagine, this structure was fertile ground for disagreements. But, those disagreements exhibited some unexpected contours. The first Territorial governor was Arthur St. Clair, and it was he, not the three judges, who sought prominence for the common law. To make a long story short, St. Clair worried that the territorial judges would exercise too much legislative power, and he hoped to rely on the common law to curtail those tendencies.¹³ In his view, the common law would provide an unchanging framework of legal principles that would then limit the scope of judicial legislation. In contrast, a majority of the territorial bench¹⁴ decried the common law as undesirably tied to the nation's English origins, including its history of monarchical power exercised at the expense of the needs of the Territory's people.¹⁵

This pattern repeats itself. When Ohio was carved out as a State, what was left of the Northwest Territory was reconfigured, and part of the remainder was remade in 1805 to become the Michigan Territory, with a new territorial governor and new territorial judges. One of these, Augustus Woodward, sought to craft a law for the new Michigan territory that was rooted in a sense of justice shared by the **whole** territorial community. Since that community included settlers with both English and French origins, Woodward argued against any wholesale incorporation of English common law. In more modern terminology, this seems to be an argument that one person's birthright might look like cultural imperialism to someone else. Put differently, if the common law was an inheritance, then it was an inheritance only of part of the territory's population, and as such it should be balanced against the inheritance of the others. So, Woodward hoped for laws that would be more appropriate to Michigan's distinct circumstances, and that would be more comprehensible to all its populace, and in his view, English common law wouldn't serve.¹⁶

Woodward's tenure on the bench overlapped substantially with the governorship of Lewis Cass, appointed in 1813 and serving till 1831. Governor Cass, like Governor St. Clair before him, urged the primacy of the common law, because he hoped that its central and stable principles would insulate the new Territory's laws from the disturbances of momentary popular

sentiment. Towards the end of his governorship, Cass wrote:

"But the great principles, which protect the rights of persons and property in our country, are too firmly established and too well understood to require or even to admit frequent or essential alternation. Their application and observation has been settled for ages, and it is the part of the true wisdom to leave them as we have found them, with such changes only, as may be necessary, to remedy existing evils, or accommodate them to the advancing opinions of the age."¹⁷

As measured by our current perspectives, the attitudes of the Territorial governors and judges seem upside down. The governors argued for the primacy of the common law, because they hoped it would provide a check on the legislative activities of the Territory's judges, while those same judges favored a more expansive legislative authority, and denigrated the common law as both doctrinally inappropriate to the Territory's needs and too confining for the job of developing a new body of law that would be more appropriate for those needs.

III. A Comprehensive and Unchanging Body of Law?

The divergent perspectives of governors and judges leads to my second half truth—the idea of the common law as a comprehensive and unchanging body of law—and the important qualifications of that idea that seem to have been forgotten. An extreme version of the birthright idea leads easily to the perspective that the common law, once received, requires thereafter a devoted and continuing loyalty to all its rules. I quoted Lewis Cass earlier with his view that the common law embodied "great principles, which protect the rights of persons and property in our country, [and] are too firmly established and too well understood to require or even to admit frequent or essential alternation". This was a common view in the first half of the 19th century, as reflected in an opinion of the Supreme Court of Mississippi:

"Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of this country must follow

it, until it be repealed by the legislature, as long as there is a subject-matter for the principle to operate upon, and although the reason in the opinion of the court which induced its original establishment may have ceased to exist. This we conceive to be the established doctrine of the courts of this country in every state where the principles of the common law prevail.¹⁸”

Again, this ringing affirmation needs to be understood in light of important qualifications.

Let me return to Blackstone. One would expect that Blackstone was a primary and hallowed source for this picture of the common law as comprehensive and unquestionable. But, I’ve already described how Blackstone didn’t think that the common law had any applicability to the American colonies. As it turns out, his doubts go deeper. Even in those situations outside of England where common law would apply, Blackstone argued that English laws would be in force **only** “with very many and very great restrictions. Such colonists carry with them only so much of English law as is applicable to their own situation.”¹⁹ When I examined the practice of Michigan courts in applying the common law to Michigan cases, I discovered that their practice was rather more like what Blackstone had urged—those courts applied “only so much of English law” as they found applicable to their situation, and with “very many and very great restrictions.”

A salient example of this practice can be found in *Moore v Sanborn*,²⁰ an 1853 case of the Michigan Supreme Court, decided just three years after Michigan’s adoption of the 1850 Constitution and its ‘reception’ of the common law. The Court was called on to determine the “navigability” of the Pine River, a tributary to the St. Clair River. Michigan’s geography—bordering on the Great Lakes and carved by a number of substantial rivers—meant that the navigability of its rivers was an important legal issue. Before *Moore*, navigability—both in England and, it appears, in Michigan—had generally been tested by a traditional standard, according to which a river was navigable only upon evidence of actual commercial navigation. In pursuing the question, the *Moore* court observed that the Pine River was effectively divided into two parts: one above, and the other below, the town of Deer Licks. While the downriver portion allowed for regular use by boats, the upriver portion was only

sometimes usable to float logs. Although the upriver portion had been used this way for fifteen or sixteen years, the evidence indicated that the upriver portion could only be used that way during “periodical freshets” which would usually last for only two to three weeks. Accordingly, when the logs jammed the river and occasioned delay in somebody else’s traffic, the other user complained of injury. The other user’s complaint would lie only if all the public had a right to use the river, and that would hold true only if the upriver portion was navigable. In defense, it was argued that the upriver part was not navigable according to the traditional—i.e. common law—standard of whether it could be used by boat, and thus to be deemed a public highway under English common law.

The Michigan Supreme Court rejected the rule of English common law, and adopted instead a “log floating” test of navigability.

“The true test, therefore, to be applied in such case is, whether a stream is inherently and in its nature, capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs. Where a stream possesses such a character, then the easement exists, leaving the owners of the bed all other modes of use, not inconsistent with it.”²¹

There seems to be an important tension between the Constitution’s reception of the common law, on the one hand, and the Supreme Court’s roughly contemporaneous rejection, on the other, of a well-established rule of English common law, replacing it with a new, and different, rule of decision. So, why did the court reject the traditional common law rule? The Court’s reasoning on this point is instructive:

“The length and magnitude of many of our rivers, the occasions and necessities for their use, and the nature and character of our internal commerce, all require a liberal adaptation of [the common law’s] doctrines to our circumstances and wants, and to a condition of things, both as to capability of our streams for public use, and the occasion for such use, entirely different from, and in many respects altogether new to, those which concurred to establish the common law rule.”²²

The nature of the Court's reasoning, and its corresponding conception of the common law that was received is a complex and intriguing question—too involved for the current context, and I have pursued the question, What kind of “law” is meant in the phrase “common law” so that we can think the law, so defined, was received by Michigan?²³

But, I will close with just a quick summary. The idea that English common law, once received, should be a set of unalterable rules, must be seen as another of the half truths that Cardozo warned us about. Those half truths would hold that the common law was birthright and that accordingly its rules were inviolable, and beyond revising. But, in *Moore v Sanborn*, I would suggest, the Michigan Supreme Court treated the English rule as just the starting point for a decisional process that aimed at providing law that would be well suited to the special characteristics, and needs, of the new State of Michigan. This pattern seems to hold for much of the Court's jurisprudence. In many cases, the Court was prepared to uphold and follow the rules of English common law.²⁴ But this should not be read to imply that it treated the traditional rules as inviolable; instead it seems that those were cases where the Supreme Court concluded that the norms of English common law served the needs of Michigan, and hence that there was no need to alter them. In other words, the Court perceived that it had the proper authority to review and revise English common law, whenever that was necessary; if no change was made, that was because no change was necessary. But, when the English rules no longer suited the experience of Michigan's early days as a Territory and then a state, Michigan's Supreme Court could, and should, produce rules that would serve its people.

Endnotes:

¹ Wayne State University Law School. These remarks were presented on April 19, 2018, to the meeting of the Michigan Supreme Court Historical Society. I build here on the ideas that I presented in Vincent A Wellman, “Michigan's Reception of the Common Law: A Study in Legal Development”, 62 *Wayne L Rev* 395 (2017).

² I want to thank the Michigan Supreme Court Historical Society for inviting me to undertake this project. I also want to acknowledge the important contributions of Judge Avern Cohn. He had already gathered many of the source materials that were relevant to this project and was generous in sharing them with me; he also read an early draft of my paper and provided insightful and invaluable

suggestions.

³ *Allegheny College v National Chautauqua Bank*, 246 NY 369, 373, 153 NE 173, 174 (1927) (Cardozo C.J.)

⁴ See e.g. Virginia's 1776 reception statute, which reads:

...that the common law of England, all statutes and acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first [i.e. 1607], and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with several ordinances, declarations, and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

State Statutes Receiving the Common Law of England, INST. FOR U.S. LAW' http://iuslaw.org/reception_statutes.php (last visited March 22, 2017).

⁵ MICH CONST of 1850, Schedule, section 1.

⁶ MICH CONST of 1835, Schedule, section 2

⁷ Northwest Ordinance, of 1787, section 5.

⁸ Northwest Ordinance, Article II.

⁹ To wit

...The common law of England, all statutes or Acts of the British Parliament in aid of the common law, prior to [1607] and which are general in nature, not local to that kingdom, and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered as of full force.

¹⁰ 2 US 384 (1798)

¹¹ *Id.* at 394.

¹² 1 *Commentaries on the Laws of England* 106 Oxford ed, 1st ed 1765)

¹³ See Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1778-12831*, 4 S. CAL. INTERDISC. L J 161. 162 (1995).

¹⁴ In particular, judges Parsons and Varnum.

¹⁵ *Historical Publications of Wayne County, Michigan. Documents Relating to the Erection of Wayne County and Michigan Territory*, 3 (1922-23)

¹⁶ Cole, *supra* n. 11 at 200-02.

¹⁷ Quoted in *id.* at 182 (1995).

¹⁸ *Powell v Brandon*, 24 Miss 343, 363 (1852).

¹⁹ Blackstone *supra* n. 12.

²⁰ 2 Mich 519 (1853).

²¹ *Id.* at 524-5.

²² *Id.* at 522.

²³ See Wellman, *supra* n.1.

²⁴ *Id.* at 411-423.

Photos *from the* Annual Luncheon



Justice Thomas E. Brennan (MSC 1967–1973) succeeded Otis Smith on the Michigan Supreme Court. Shown here with his son, Thomas Brennan Jr., a retired judge, and Lawrence Nolan, immediate past president of the State Bar of Michigan (center).



Stephen K. Valentine, Jr., Judge Avern Cohn of the U.S. District Court for the Eastern District, and Third Circuit Chief Judge Robert Colombo Jr.



Justice Kurtis T. Wilder, Society treasurer John P. Jacobs, and Rob Kamenec from Plunkett Cooney.



Outgoing Society President Charles Rutherford and John J. Lynch, III.



Justice Marilyn Kelly (MSC 1997–2013) speaks with Prof. Robert Sedler.



Judges Lita Popke and William Giovan, both of the Third Circuit.

All photos from Annual Luncheon by David Frechette

on Thursday, April 19, 2018



Society Board members Peter Ellsworth, Justice Mary Beth Kelly (MSC 2010–2015), and John Fedynsky.



Chief Justice Stephen J. Markman receives the Justice Bird top hat from the Society.



Society Board member Justice James L. Ryan (MSC 1975–1985) speaks with his former law clerk Jeffery Stuckey.



Former Chief Justice Robert P. Young Jr. poses with Professor Gerald Fisher and Martin Fisher.



Society Immediate Past President Charles Rutherford with his wife Patricia and son John.



Justice David F. Viviano and Advocates Guild member Nicholas Ayoub.

Greetings from Society President

Carl W. Herstein



Dear Society Members,

It is an exceptional honor for me to greet you as President of the Michigan Supreme Court Historical Society. It is also humbling to follow two extraordinary men who previously held this position, Charles Rutherford and Wallace Riley; sadly just a short time ago Wally passed away. While terms like “iconic” and “legendary” tend to be tossed about with a bit too much ease these days, in the case of these two gentlemen, they actually fit. Both have served the legal profession for over 50 years in positions of eminence, trust, and responsibility. We all have reason to be grateful for their service to the profession and, in particular, for their keen interest in preserving the legal history of the State of Michigan—especially that of our Supreme Court. I will endeavor to do my best to continue their exemplary legacy with our Society. In addition to our loss of Wally and his 30 years of leadership of the Society, I would also like to recognize the recent passing of our longtime board member and friend, Professor John Reed, another legend in the legal profession and the academy, as well as former Board member Judge Michael G. Harrison. All will be greatly missed.

As I look forward to my tenure as President, it is fortunate for us all that we have an exceptional Board of Directors to help with the leadership of our organization, and a strong executive team with **Larry Nolan as Vice President, John Jacobs as Treasurer,** and **Susan Fairchild as Secretary**, with the ongoing support of Carrie Sampson our Executive Director. We have been discussing a number of interesting new initiatives that we hope to unveil in the next few months. There are many important and fascinating stories to tell about our Michigan Supreme Court, its contributions to the law and public life, and the men and women who have served on it. Thanks to your support, we will be able to continue to document these stories and bring them to the attention of a broader audience. Let me also offer a special note of thanks to our Life Members, who have so generously responded to our request that they voluntarily resume paying dues to the Society—you have made a significant difference.

I thank the Board and the members of the Society for your past and future support, and I look forward to working with all of you to continue to bring the history of the Michigan Supreme Court to life. Sincerely,

Carl W. Herstein

Carl W. Herstein is the Chief Value Partner with Honigman Miller Schwartz and Cohn LLP. A real estate attorney, Herstein has practiced with the firm since 1976. He is based in the firm’s Ann Arbor office. He has served on the Society’s Board of Directors since 2004.

BOARD *of* DIRECTORS

2018–2019



Front row (left to right): Justice James L. Ryan (MSC 1975-1985), Justice Mary Beth Kelly (MSC 2010-2015), Judge Avern L. Cohn, Carl W. Herstein, Charles R. Rutherford, Susan E. Fairchild, Lawrence P. Nolan, Judge Denise Langford Morris, and John P. Jacobs. **Back row (left to right):** Peter H. Ellsworth, Jill M. Wheaton, John G. Fedynsky, Gregory J. DeMars, Janet K. Welch, Bruce A. Courtade, Mary Massaron, Matthew C. Herstein, Julie I. Fershtman, and Stephen K. Valentine Jr. **Not pictured:** Judge Fred L. Borchard, Lori A. Buiteweg, Judge Alfred M. Butzbaugh, Frank J. Kelley, Shenique A. Moss, and Richard D. Reed.



Lori A. Buiteweg has been elected to a three-year term on the Society's Board of Directors.

Buiteweg was the 81st President of the State Bar of Michigan, and spoke at the Society's 2016 Annual Member Luncheon.

Buiteweg practices family law in the Ann

Arbor firm of Nichols, Sacks, Slank, Sendelbach & Buiteweg. Among the many accolades she has received since becoming an attorney in 1990 is the *Citizen of the Year* award from the Michigan Council on Social Studies in recognition of her work on Constitution Day. This commitment to legal education along with her positive attitude and careful financial analysis make her a welcome addition to the Board.



Shenique A. Moss has been elected to the Society's Board of Directors for a three-year term, ending at the Society's annual meeting in 2021.

Moss is Assistant Commission Council for the Wayne County Commission and a former attorney

with the State's Attorney General office.

Moss has been very active in American Bar Association, State Bar of Michigan, Wolverine, and Ingham County Bar activities, in particular as they relate to young lawyers and diversity. We are excited for her to bring this expertise to the Society's Board of Directors.

Bird's Top Hat:

Society Donates Artifact to Michigan Supreme Court



John E. Bird was born on December 19, 1862, in Clayton, Michigan. Educated in the public schools, he attended nearby Adrian College and after a two-year study of law, was admitted to the Bar in November 1888. In 1894, he was elected prosecuting attorney of Lenawee County and served until 1899. In 1905, Bird was elected to the first of three two-year terms as Attorney General for the State of Michigan. During this time “the State of Michigan undertook to deal with the railroad corporations. The Legislature repealed the charter of the Michigan Central Railroad and provided for an ad valorem tax on railroad corporations to replace the tax on income.” The litigation for the State under the direction of Bird was carried to the U.S. Supreme Court, who declared the ad valorem tax to be valid. As a result, fifteen million dollars was paid into the primary school fund of Michigan. In June 1910, following the close of Bird’s third term as attorney general, he was appointed by Governor Fred Warner to fill a vacancy on the Michigan Supreme Court created by the resignation of Justice Robert Montgomery. Bird won the vacancy election in November 1910 to serve out the remainder of Montgomery’s term. He was reelected three times, in 1911, 1919, and 1927; however, he died unexpectedly at home on February 10, 1928, while still a member of the Court.

The **Top Hat** at right was presented by the Society to the Michigan Supreme Court at the 2018 Annual Membership Luncheon. It was purchased by the Society in 2015 from a private collector.

Justice Bird purchased the top hat from Dunlap & Co. through Lansing’s Mifflin Dunlap Hat Store. Dunlap & Co. were considered at the time to be the finest makers of high hats. It is made of beaver pelt.

Unfortunately, the hat was not received until June 4, 1928—nearly four months after Justice Bird’s fatal heart attack.

The Society will work with the Court to display the hat in the Hall of Justice.



Biography excerpted from the Michigan Supreme Court Historical Reference Guide, Second Edition by David G. Chardavoyne with Paul Moreno, published by the MSU Press 2015. The book is available for purchase wherever books are sold.

In Memoriam



*Mr. Riley presents the
Legal History Award to John Reed.*

Ten years ago at the 2008 Annual Membership Luncheon, then-President **Wallace D. Riley** presented the Society's Legal History Award to Professor **John W. Reed**.

Professor Reed passed away in March of this year. He was the last original member of the Board of Directors from the formation of the Society in 1988. Two months to the day after Professor Reed's funeral, Wallace Riley passed away after a brief illness.

We are planning a special tribute issue to be published later this summer dedicated to these two lions of the law who were so important to the creation and continuation of the Michigan Supreme Court Historical Society. If you would like to submit a memory for inclusion, please email it to mschs@micourthistory.org by July 12, 2018.

Retired Ingham County Judge **Michael G. Harrison** who served on the Society's Board of Directors from 2005–2017 passed away on May 20, 2018. A memorial is planned for 1 p.m. Thursday, June 21, 2018, at People's Church in East Lansing, Michigan.



Breakfast of Champions ... for Justice

The Society's newest event for promoting our mission of increasing public awareness of Michigan's legal heritage and engaging our members is a Breakfast, to be held in conjunction with the State Bar of Michigan's NEXT Conference (formerly known as the Annual Meeting). This year the NEXT Conference will be held in Grand Rapids, Michigan, and coincides with that city's ArtPrize Competition.

The Breakfast of Champions ... for Justice will be similar in format to our Annual Luncheon, with the Justices of the Michigan Supreme Court as our special guests of honor. The Breakfast of Champions ... for Justice will take place from 7:30 a.m. to 8:45 a.m. on Thursday, September 27, at the Amway Grand Plaza Hotel.

More details to come! For now, save the date — September 27, 2018!



MICHIGAN SUPREME COURT
HISTORICAL SOCIETY

1st Floor, Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915

Mission Statement

The Michigan Supreme Court Historical Society, a non-profit 501(c)(3) corporation, collects, preserves, and displays documents, records, and memorabilia relating to the Michigan Supreme Court and the other Courts of Michigan, promotes the study of the history of Michigan's courts, and seeks to increase public awareness of Michigan's legal heritage. The Society sponsors and conducts historical research, provides speakers and educational materials for students, and sponsors and provides publications, portraits and memorials, special events, and projects consistent with its mission.

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Hon. Dorothy Comstock Riley

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Society Update is published quarterly by the Michigan Supreme Court Historical Society. Writing submissions, article ideas, news, and announcements are encouraged. Contact the Society at: 1st Floor Hall of Justice, 925 W. Ottawa Street, Lansing, MI 48915 Phone: (517) 373-7589 Fax: (517) 373-7592

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