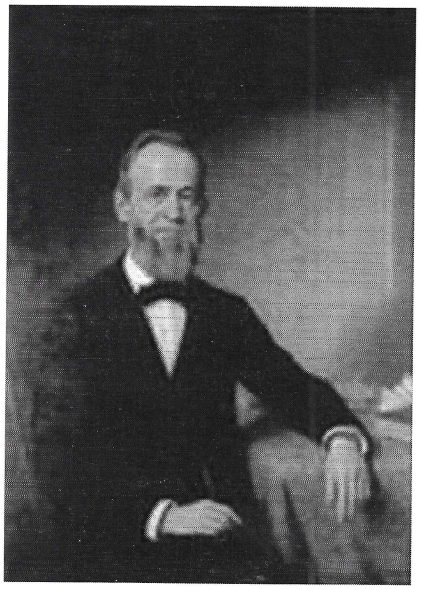
Society Update
FROM THE MICHIGAN SUPREME COURT HISTORICAL SOCIETY SPRING 2007

The Defeat of Thomas M. Cooley in the 1885 Election

A discussion of notable Michigan jurists would not be complete without reference to the life and accomplishments of Thomas M. Cooley. Regarded as one of the most influential justices ever to sit on the Michigan Supreme Court, it would be difficult today to find an informed opinion holding Cooley and his career in anything less than the highest esteem. However, in 1885 an ill-opinion of the justice was formed, apparently based on a mixture of personal, professional, and political criticisms, by a denigrator who enjoyed the power to express his dissatisfaction through widely circulated print.



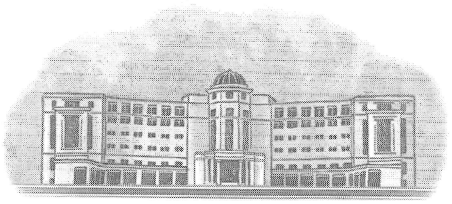
In 1885, a vigorous campaign against Justice Cooley's reelection was undertaken by the *Evening News* of Detroit and the *Detroit Free Press,* apparently as a means to punish Cooley for his ruling against the newspaper's owner in a libel case. The aggressive print campaign resulted in Cooley's election defeat and subsequent resignation from the bench.

The early days of the *Detroit News* were characterized by flamboyant journalism and strong Democratic Party support.[1] The paper's owner and founder, James E. Scripps, ran a story accusing a University of Michigan professor and physician, Dr. Maclean, of inappropriately "making familiar acquaintance" with a married woman from Canada who had come to Ann Arbor seeking cancer treatment from the doctor. In an ensuing libel case, Dr. Maclean convinced a Wayne County jury that not only was the story false, but it had been printed with malice. The jury awarded Maclean $20,000; Scripps appealed the judgment to the Michigan Supreme Court.

The Court's decision to hear the case was itself surrounded by controversy because of the relationships among those involved. Justice Campbell's son was a member of the partnership of attorneys that originally filed the suit on behalf of Dr. Maclean. Additionally, Justice Cooley was a heavily involved faculty member at the University of Michigan and had a personal relationship with Dr. Maclean. Modern procedure conceivably would compel Justice Campbell, and perhaps Justice Cooley, to recuse themselves from the case. Neither justice did, and we must trust that the decision was made correctly within the context of the day. In available records, there exists no indication of objections to Campbell's participation in the appeal before the decision was handed down, but there were plenty afterward.[2]

Regardless of the extracurricular issues, the Court agreed to hear the case and affirmed the lower court's ruling, thus affirming the judgment that the story was

IN THIS ISSUE



false and malicious. Scripps promptly filed a motion for a rehearing, arguing Justice Campbell's decision to sit was improper given his relationship to the plaintiff's attorney's firm. As Chief Justice, Justice Cooley took it upon himself to issue an authoritative response. He wrote:

> *...a number of cases are cited (by the defendant) in which it has been decided that a judge cannot sit in a cause in which he had a personal interest, or where he is nearly related to one of the parties. They have no relevancy to the point made, and the point itself presents no question of law. How little there is to it in fact, will be apparent when it is stated that neither the son nor his partner ever took any part in the proceedings in this Court, or ever appeared before us in this case, and that the record in this Court upon which the case was decided showed very conclusively that the management of the case in the trial court had been in other hands.*[3]

The bench had spoken, and Scripps was left with nothing but a vendetta against the state's highest court and, specifically, Thomas M. Cooley.

The opinion was delivered in January of 1884. Cooley was up for reelection in the spring of 1885, leaving Scripps ample time to inform potential voters of the "injustices" committed by Cooley both in *Maclean v. Scripps* and during his tenure on the bench.

Scripps faced an uphill battle in attempting to sully the reputation of the widely respected Justice. Sinking an incumbent is always a difficult task, especially one who had won three consecutive previous elections. However, Scripps, a resourceful journalist and an out-of-the-box thinker, created his ace in the hole by compiling a numerical comparison between Michigan Supreme Court judgments in favor of large corporations and railroads and those against them. Taking for granted that purely empirical studies never tell the whole story, the results showed that majority opinions written by Cooley in favor of large corporations and railroads greatly outnumbered opinions against them in a preponderance of 49 to 2. The results were presented in an *Evening News* article on February 26, 1885 with this addition:

> *This record hardly needs comment...It is even within the bounds of possibility to imagine that out of the 81 corporation cases in which Justice Cooley wrote the deciding opinion he could find law against the corporations but once, and that in 20 railroad cases written by the same learned jurist, the railroads were right in all but 1 solitary case. We say it is possible to imagine this. Possibly the republican nominating convention which meets next month will exert its imagination to that extent, as the prohibition convention did yesterday in Lansing. We hardly think, however, that the people of Michigan, at the April election, will stretch their imaginative faculties to so dangerous a degree.*[4]

Typical of a mudslinging campaign, the *Evening News* produced similar damning editorials every day for several weeks prior to the election. Atypical of such a campaign, however, was the fact that it was not generated by an opposing candidate (although, as mentioned, the *News* was strongly Democratic during this time period), nor was it fashioned to promote any specific candidate. Rather, it was an attack that sought the defeat of Justice Cooley and not necessarily the election of Allen B. Morse, the Democratic nominee who, by largely staying out of the editorials, benefited from the antithesis of the cliché that any publicity is good publicity.

Despite aggressive criticism of his voting patterns and other "shortcomings" (whether or not they were legitimate or the product of flamboyant journalism) exhibited by Cooley over the extent of his career, the *Evening News* demonstrated that it had not forgotten about the single incident that pitted Scripps against Cooley, and thus exposed its true motive for the campaign against him. On March 16, 1885, about two weeks before the election, this editorial appeared in the *Evening News*:

> *At the close of the famous suit of Maclean against Scripps, after the corrupt and bulldozed jury gave its verdict;...after the Supreme Court - upon which sat two fellow professors of the plaintiff and the father of the plaintiff's attorney – had refused to open the case again;...after Judge Cooley's friend and fellow professor had received the cash from his judgment, and after Judge Campbell's son had received his portion of it as a contingent fee – in a word, after the robbery had been consummated and after the spoils had been divided – there was but one opinion of the transaction among the unprejudiced masses of Michigan. The press of the state almost unanimously condemned the affair as a travesty on justice, as a disgrace to the courts, as an indelible blot upon the highest court.*
>
> ....
>
> *But, we repeat, the motives of THE NEWS are of little concern to the people of Michigan in the mat-*

ter of the judicial election now approaching. What concerns them is the motives, record and character of Mr. Thomas M. Cooley... (This question) is to be determined only by an inquiry into his own acts, and into his own record on the bench. That record is an open page before the people of Michigan. If his defenders and eulogists desire to bring the Maclean-Scripps case into the inquiry, very good. All the details of that case are familiar to the public. They need no rehearsal now. We are confident that, if the voters could only lay aside party for the time being, and cast their votes next month with single reference to their approval or disapproval of Cooley's share in that case, he would be buried out of sight.[5]

> **"Thomas M. Cooley is being pasted unmercifully in almost all sections of the city"**

The influence of the media has always been a force to reckon with. Cooley, not oblivious to this fact, recognized the probable implications of his enemy's efforts. Two days before the election he expressed his concern in his diary, making clear reference to the campaign against him. "I have fear of losing the election. My support has been passive, while the opposition has been extremely active…I am afraid my friends were too confident."[6] On April 6, 1885, Cooley's pessimistic prediction came to pass, as he was soundly defeated in his bid for reelection. "Thomas M. Cooley is being pasted unmercifully in almost all sections of the city," reported the *Evening News* satisfactorily as the votes for Morse began to pour in (apparently, in this case the *News* was more interested in celebrating who was being defeated rather than who was winning). On April 7, with all the votes in and Morse's victory concretely determined, the *Evening News* ran this story with complacency oozing off the page:

Judge Cooley Defeated for Re-election by a Majority of Anywhere from 10,000 to 20,000 – The Fusion Regents Elected by a Much Smaller Vote – The Local Results in the State.

The election in Michigan yesterday resulted in the choice of Allen B. Morse, of Ionia, for supreme judge, and of Charles R. Whitman and Moses W. Field for regents of the university. The Republican ticket, headed by Judge Cooley, was unmercifully slaughtered, so far as he was concerned, and the fact of his being upon it carried defeat to Messrs. Draper and McAlvay, the aspirants for regents. The day was a beautiful one, and the vote polled was remarkably large for a spring election.[7]

An editorial in the same edition entitled "The Election and its Lessons" contained this excerpt: "Morse's majority is supposed to be about 20,000. Just the number of dollars that were given in a celebrated judgment, which was confirmed on appeal by his rival. The mills of the gods, etc."[8] Whether the slow grinding mills of the gods were indeed responsible for Cooley's defeat, or whether it can be attributed to a high-stakes grudge is a matter of personal opinion. Regardless of the cause, Thomas M. Cooley's career on the bench ended on October 1, 1885 when he resigned after his election defeat, opting not to finish out the year.

As dramatic as this event was at the time, today it remains only a marginally known blip in what is widely perceived as an unblemished career. Despite all the bad press, Cooley made a seamless transition from state Supreme Court Justice to Receiver of the Wabash Railroad, and then accepted the Presidential appointment to the Interstate Commerce Commission. He resigned from this position in 1891, but continued to build his legacy by lecturing and writing until his death on September 12, 1898.

Endnotes

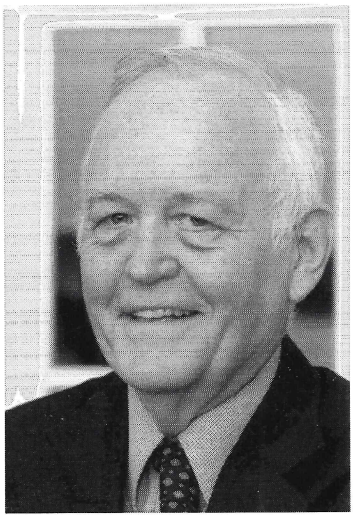
1 Edwards, George (1986-1987). *The Wayne Law Review* "Why Justice Cooley Left the Bench: A Missing Page of Legal History." Volume 33, pg. 1565.
2 Ibid. pg. 1566.
3 Ibid. pg. 1567.
4 Evening News, February 26, 1885, p. 2, col. 1
5 Evening News, March 16 1885, p. 2, col. 1.
6 Personal Memoranda, 1879-1894, Saturday, April 4, 1885
7 The Evening News, April 7, 1885, p.1, col. 1
8 Ibid.

The preceding article was written by the 2006 Coleman Intern, Lance Phillips, as part of his On and Off the Court Project.

For more about the project, go to: http://www.micourthistory.org/resources/electapptmain.php

16th Annual Luncheon to Feature Legal Vignette by Professor Paul D. Carrington

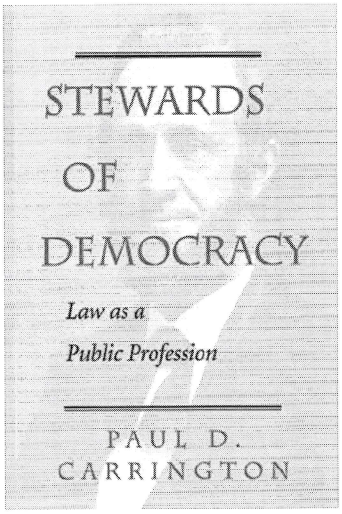
The 16th Annual Membership Luncheon of the Michigan Supreme Court Historical Society will be held on Wednesday, April 18, 2007, at the Detroit Athletic Club. The Luncheon, which will begin with a short reception at 11:30, will feature remarks by Chief Justice Clifford W. Taylor and the presentation of the legal vignette "Chief Justice Cooley" by Professor Paul D. Carrington.



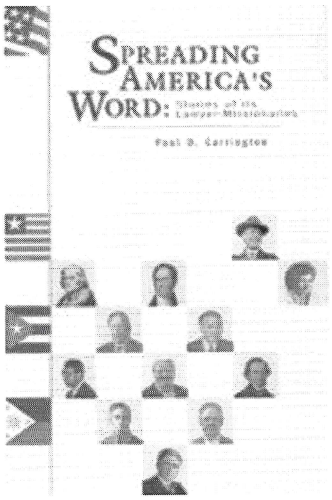
Professor Carrington has been a professor at Duke Law since 1978, serving as dean from 1978 to 1988. Before accepting his position at Duke, Professor Carrington taught at the University of Michigan Law School for thirteen years. Since his teaching career began in 1957, he has taught in fifteen American law schools, as well as the University of Tokyo, Albert Ludwigs Universitat Freiburg, Bucerius Law School in Hamburg, and Doshisha University Law School in Kyoto.

Professor Carrington, a Dallas native, earned his B. A. in 1952 from the University of Texas and his LL.B. in 1955 from Harvard University. His professional experience includes a brief stint in private practice, another in a military law office, and occasional consultations over fifty years, most of them pro bono publico.

He has been active in judicial law reform efforts, particularly with regard to the jurisdiction of appellate courts, the rules of civil litigation, and the selection and tenure of judges in state courts. From 1985 to 1992, he served as reporter to the committee of the Judicial Conference of the United States advising the Supreme Court on changes in the Federal Rules of Civil Procedure.



Since 1988, he has also studied the history of the legal profession in the United States. He teaches appeals, civil procedure, international civil litigation, and lawyers in American history. His recent works are *Stewards of Democracy: Law as a Public Profession* (1999), *Spreading America's Word: Stories of Its Lawyer-Missionaries* (2005); *Reforming the Court: Term Limits for Supreme Court Justices* (2006); and *Law and Class in America: Trends Since the End of the Cold War* (2006).



Luncheon Tickets Still Available!

Join us for the 16th Annual Membership Luncheon on April 18, 2007

Reception at 11:30 a.m. ♦ Luncheon at 12:00 p.m. ♦ Detroit Athletic Club

$35.00 per person
To purchase tickets, contact
Angela Bergman at 517-373-7589

Did you know.....

♦ The Commissioners' Office was created January 1, 1964.

♦ The Joint Committee on Michigan Procedure is mainly responsible for the creation of the Commissioners' Office.

♦ Michigan was the 7th state to utilize a Commissioners' Office—after Idaho, Kentucky, Minnesota, Missouri, Oklahoma, and Texas.

♦ In Kentucky, Missouri, Oklahoma and Texas, the position of Commissioner had a salary while Idaho and Minnesota utilized retired, non-salaried judges for the job.

♦ *The Michigan State Bar Journal* ran an announcement for the position of Supreme Court Commissioner in its April 1964 edition.

♦ The general description of the position in 1964 was to "...perform professional legal work in the nature of study, review, analysis, and recommendation in highly specialized and complex fields of substantive and procedural law as referred to him by the Supreme Court."

♦ Three original requirements for the position included six years of experience as a practicing attorney, membership to the State Bar of Michigan, and the willingness to withdraw from the private practice of law.

♦ The salary for a Commissioner in 1964 was between $17,500 and $21,000.

♦ One of the main problems the original Commissioners took care of were "window matters," motions and applications addressed to the discretion of the Supreme Court (the unusual name came from a previous Supreme Court Clerk who put such materials on his widow sill for Justices to pick up individually).

♦ The first two Commissioners were Howard L. Ellis and Joseph W. Planck.

Joseph W. Planck

♦ Commissioners never make a decision on an issue they are given, they only have the authority to make recommendations.

♦ As a result of the use of the Commissioners' Office, all of the justices are now given reports and summaries of all cases on appeal, so that a collective opinion is more likely to be made rather than an opinion by one justice, which the whole bench accepts, as was often the case before 1964.

♦ To date, there have been a total of 35 Supreme Court Commissioners in Michigan.

♦ Currently, there are 20 Supreme Court Commissioners serving the state of Michigan.

SUPREME COURT COMMISSIONER

The Supreme Court expects to appoint a Commissioner on or about July 1, 1964. The established salary will range from $17,500 to $21,000.

GENERAL DESCRIPTION

This employee will preform professional legal work in the nature of study, review, analysis and recommendation in highly specialized and complex fields of substantive and procedural law as referred to him by the Supreme Court.

Michigan State Bar Journal, April, 1964

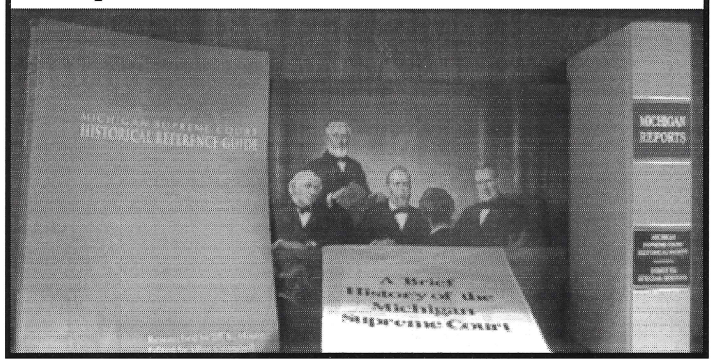
Call 517-373-7589 To Order Your Favorite Historical Society Publication Now!

Michigan Supreme Court Historical Reference Guide $15

Index to Special Sessions $35

A Brief History of the Michigan Supreme Court ..... No Charge

8x10 Color Photograph of the Big Four Compilation Portrait..... $10



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.

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
E-mail ABERGMAN@MICOURTHISTORY.ORG; Website: WWW.MICOURTHISTORY.ORG

MICHIGAN SUPREME COURT
HISTORICAL SOCIETY
1st Floor, Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915