



Society Update

The Official Publication of the Michigan Supreme Court Historical Society

Fall 2014

WAR!

Michigan's High Court Says No to Absentee Voting for Absent Civil War Soldiers

by David A. Collins

Republican Daniel Twitchell ran against Democrat Amos Blodgett in the 1864 election for prosecuting attorney of Washtenaw County. Of the total votes cast, Twitchell outpolled Blodgett by a margin of less than 1%. The ballots of absent Washtenaw County soldiers were decisive in the tally. A controversial statute enacted earlier in the year permitted soldiers to vote in the military camps where they were stationed away from home. It was Michigan's first experience with absentee voting, and it meant all the difference in this election.

In relation to the civilian votes cast in Washtenaw County, the absent soldier vote was small—less than 5% of the total. But Twitchell won that cohort in a landslide, 80% to 20%, while Blodgett enjoyed a slender majority of the civilian vote. [See Table 1] Blodgett's supporters asked the county board of canvassers to disallow the soldier votes, arguing that the law permitting them to vote was unconstitutional. The board agreed and declared Blodgett the winner. The case went to the Michigan Supreme Court in *People ex. rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865).

Michigan was one of twenty Union states that changed their laws to permit absent Civil War soldiers to vote. It was a radical novelty; before the Civil War election laws had tethered the act of voting to the community where the voter resided. Now for the first time, one class of voters—soldiers—had the opportunity

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to cast ballots wherever they were stationed, usually outside their home state and hundreds of miles from home.

This innovation sparked sharp political and legal battles in state after state. Politically, the issue was a

TABLE 1

1864 Election for Washtenaw County Prosecuting Attorney

	Daniel Twitchell (R)	Amos Blodgett (D)	Winner
Home Vote	3688 (49.2%)	3803 (50.8%)	Blodgett (D) (+115)
Absent Soldier Vote (4.4% of total vote)	276 (80.7%)	66 (19.3%)	Twitchell (R) (+210)
Overall Total	3964 (50.6%)	3869 (49.4%)	Twitchell (R) (+95)

• County Board of Canvassers excluded the soldier votes and declared Blodgett the winner.

• State of Michigan appealed on behalf of Twitchell.

winner for Republicans and a loser for Democrats. Soldiers from nearly every state voted overwhelming for Republican candidates, just as they did in the election between Twitchell and Blodgett. Democrats resisted the laws, protesting that the Republican administration used its military control to cheat in soldier voting. They had a point. Evidence abounds of army

officers ordering subordinates to vote for Republican candidates, barring distribution of pro-Democratic newspapers in army camps, and (for states where soldiers had to return home to vote) granting furloughs only to soldiers known to favor Republicans. The anti-Lincoln *Detroit Free Press*, to take just one example underlying Democrats' misgivings, published a letter from a soldier who quoted his commanding officer as warning, "Every private in this regiment that votes for [Democratic presidential candidate George] McClellan shall hereafter in every fight be sent as near the front as I can send him, that he may receive the compliments of his friends, the rebels."¹

Democrats acted on these misgivings by opposing soldier-voting legislation. Michigan was typical in its partisanship, passing its law in 1864 on a straight party line vote, with all Republicans in both chambers supporting the legislation and all Democrats opposed.² The wave of new laws hit Democrats with a political double whammy. First, Republican candidates secured hefty majorities of absentee votes that soldiers cast under the new laws. Second, they lambasted Democrats as anti-soldier for opposing the new laws, a potent tactic in the competition for civilian votes.

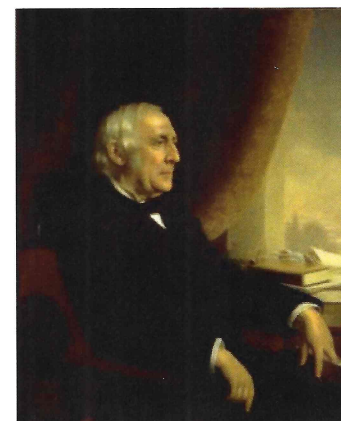
The new laws also generated legal frictions, since the proposition of absentee voting arguably collided with suffrage provisions in every state constitution. Eight states found it necessary to amend their constitutions to authorize absentee voting legislation.³ In other states, when the issue reached state supreme courts, as it did in the election between Twitchell and Blodgett, more high courts (six) struck down the laws than upheld them (three).⁴ Michigan's court was one of the six that found the laws unconstitutional.

At issue in the Michigan case was the 1851 constitution's provision that "no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he has resided in the township or ward in which he offers to vote, ten days next preceding the election."⁵ Blodgett's lawyer argued that this language required the voter's physical presence in his place of residence. Seeking to sustain the new law on Twitchell's behalf, state Attorney General Albert Williams disagreed, contending that a vote is "offered" in the township if the township ultimately receives it. The provision of the constitution, Williams urged, pertained only to the qualifications of the voter—he had

to qualify as a resident of the township where his vote was received—and not to where the elector cast his ballot. Williams argued that the constitution left the legislature free to establish voting sites for qualified electors outside the Michigan township, and outside the state entirely.

By a 3–1 vote, the justices disagreed with Williams and struck down the soldier-voting law. The majority concluded that a voter met the constitutional requirement only by personally casting his ballot in the township where he resided. Each of the three justices reaching this conclusion issued a separate opinion.

Justice James Valentine Campbell compared the 1851 constitution's language to the corresponding provision of the 1835 constitution. The earlier version entitled an elector to cast his ballot only in the "district, county, or township in which he shall actually reside...."⁶ Justice Campbell focused on the conjunction "or."

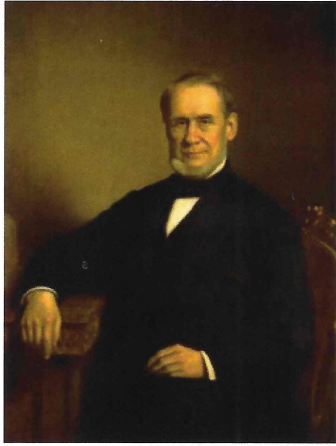


Justice James V. Campbell

It gave the voter the choice of voting anywhere in the county, including polling sites far from his own township. This invited voting fraud, since no one at the polling site might be in a position to challenge the credentials of a stranger arriving to vote from some faraway corner of the county. The constitution was amended in 1839 to tighten the voting requirement, now insisting that the voter cast his ballot in his own "township or ward." The 1851 constitution preserved that requirement, Justice Campbell concluded, and prescribed the *where* of voting, not just the qualifications of who could vote. As Campbell saw it, the framer's intent was fraud prevention through voter identification:

If the voter is required to present himself personally at his own place of abode, his neighbors will know his person, and will be likely to know his qualifications. If he can vote elsewhere, and have his vote transmitted or counted in the township, he may or may not be known personally to those who are where he is found, but they are by no means likely to

know his actual residence, nor, if he violates the law, can his crime be as readily identified or proven. That other means of protection may be devised is possible; but the test by neighboring eyewitnesses has always been the favorite resort of the law, and it is the best.⁷

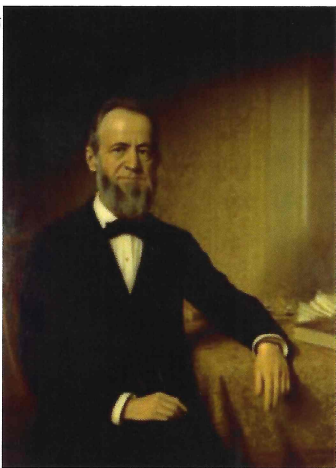


Justice Isaac P. Christiancy

Justice Isaac Christiancy, agreeing with Campbell, also looked to history for guidance about constitutional meaning. He concluded that the term “offers his vote” in a township or ward, as the 1850 framers must have understood the term, meant “personal presentation of the vote at that place

to the inspectors or officers presiding at such election,” since this had been the “uniform mode in all the American states from their first organization.”⁸

Justice Thomas Cooley issued the third opinion in the majority. He agreed with Campbell and Christiancy that, given its history, the constitution’s text should be read as requiring the voter’s personal presence in the township. Then Cooley added an insight born of a particularly tight reading of the statute’s text. Twitchell must lose, Cooley wrote, even if his argument about

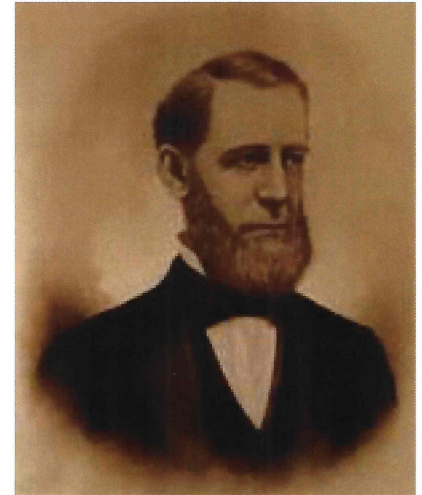


Justice Thomas M. Cooley

constitutional meaning were correct. According to Twitchell’s counsel, a voter met the requirement to “offer his vote” in the township or ward as long as his vote was ultimately received there, even if he cast the ballot elsewhere. But, Cooley observed, Michigan’s new law made no provision for returning soldier voting results or ballots to townships or wards, only to counties and districts. An absent soldier could not be said to “offer his vote” in a township or ward that, by this law, never received it. Whether through drafting

oversight or otherwise, the law did not apply to township or ward elections.⁹

Campbell, Christiancy, and Cooley, three of the Michigan Supreme Court justices who would soon become known as the “Big Four,” all agreed on the bottom line—the 1864 law was unconstitutional—even if they could not agree on a single opinion stating why.¹⁰ Opposing them was Chief Justice George Martin. He believed that the majority improperly intruded on legislative prerogatives. Absent “a *direct* collision between [a statute] and the constitution,” the court’s duty was to defer to “legislative discretion,” wrote Martin.¹¹ By “direct” collision, Martin meant an express and unambiguous prohibition in the constitution against



Chief Justice George Martin

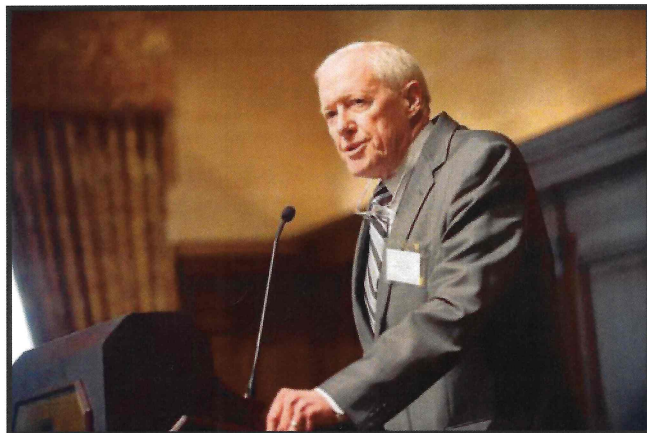
the legislative action; implied prohibitions did not suffice. “I cannot put my finger upon any word or clause of the constitution from which I can conclude that they [i.e., the people of Michigan] have surrendered [their] will” on the subject of setting the place for voting.¹² To the contrary, he read the constitution as leaving it to the legislature to determine where voting could occur. It mattered not at all to Martin that the framers never contemplated absentee voting. The “impressions and intention” of the framers, considered apart from “the language of the instrument,” counted for nothing.¹³ If Campbell, Christiancy, and Cooley approached the issue as modern court observers would call originalists, relying on history for a sense of how the framers would have answered the question, Martin played the role of a “living constitutionalist” who objects to superimposing past understandings on constitutional terminology. “The constitution was framed for the very purpose of adaptation to the progress of the times,” Martin wrote, and a sensible adaptation to a civil war was to allow absent soldiers to vote.¹⁴

Remarkably, all three justices in the majority were Republicans.¹⁵ They certainly understood the party



passions surrounding the issue. Justice Christiancy lamented the law's "unfortunate connection with the party politics of the day."¹⁶ Arguably they rose above partisanship in striking down a law favored by Republicans. Or perhaps party loyalty tugged at the justices less forcefully in January 1865, when they ruled, than it might have in 1864. Michigan Republicans had already enjoyed the benefits of the law in the 1864 elections, and the justices might have supposed that the war would end—and absentee voting with it—long before the next election.

After the war, in 1867, Michigan amended its constitution to authorize the legislature, during wartime, to "provide the manner in which, and the time and place at which" absent servicemen could vote. That provision was incorporated in the state's revised constitution in 1908, and was subsumed in the 1963 constitution's more general grant of legislative authority for all classes of absent voters, not just soldiers.¹⁷



David A. Collins, a Michigan lawyer since 1973, earned his PhD in history in 2014. This article draws on his dissertation, entitled "Absentee Soldier Voting in Civil War and Politics." Mr. Collins also serves as president of the American Bar Foundation, a research institute headquartered in Chicago. He is shown here speaking at the Society's Annual Luncheon on April 10, 2014.

ENDNOTES

¹ *Detroit Free Press*, Nov. 7, 1864.

² Josiah H. Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* (Boston: Priv. Print, 1915), 93-97.

³ The eight states were Connecticut, Kansas, Maine, Maryland, Michigan, New York, Pennsylvania, and Rhode Island.

⁴ The six states where high courts found the laws either wholly or partially unconstitutional were California, Connecticut, Michigan, New Hampshire, Pennsylvania, and Vermont. The three states where high courts sustained the laws were Iowa, Ohio, and Wisconsin.

⁵ MICH. CONST. of 1851, art. VII, § 1.

⁶ MICH. CONST. of 1835, art. II, § 1.

⁷ *People ex re. Twitchell v. Blodgett*, 13 Mich. 127, at 144.

⁸ *Id.* at 155. Christiancy brushed aside as irrelevant the soldier-voting law that Pennsylvania had enacted during the War of 1812. *Id.*

⁹ *Id.* at 170.

¹⁰ The fourth of the "Big Four" was Justice Benjamin Graves, who did not participate in the case.

¹¹ *Twitchell*, 13 Mich. at 175, 177.

¹² *Id.* at 185.

¹³ *Id.* at 181.

¹⁴ *Id.* at 179.

¹⁵ Regarding Campbell, see C.A. Kent, *James Vincent Campbell*, 5 MICH. L. REV. 161, 164 (1907); regarding Christiancy, see "Isaac Peckham Christiancy," Biographical Directory of the United States Congress, ac-

cessed June 10, 2013, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000379>; for Cooley, see the website of the University of Michigan Law School, where he taught for many years, even while on the Michigan high court: "Thomas Cooley," University of Michigan Law, accessed June 10, 2013, www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/Cooley_ThomasM.aspx.

¹⁶ *Twitchell*, 13 Mich. At 149.

¹⁷ MICH. CONST. OF 1851, art. VII, § 1, as amended in 1867; MICH. CONST. of 1908, art. III, § 1; MICH. CONST. of 1963, art. II, § 4.

ADVOCATES GUILD

MICHIGAN SUPREME COURT HISTORICAL SOCIETY



Advocates Guild Executive Committee First Chair Mary Massaron displays the 2014 Pewabic Pottery tile.

An Evening at the Supreme Court

The Advocates Guild Dinner—October 8, 2014

Remarks by Mary Massaron, First Chair

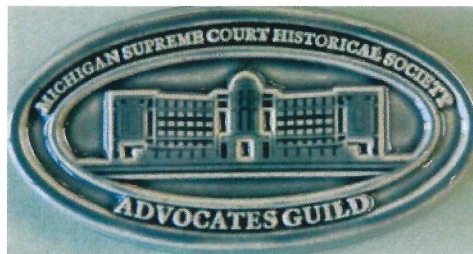
Good evening. Tonight the Advocates Guild, which is part of the Michigan Supreme Court Historical Society, again meets to celebrate the start of a new term of the Michigan Supreme Court. And as is our tradition, we have very little in the way of a formal program. Instead, we are fortunate to spend an evening together, the justices, the advocates who appear before the Court, and the chief clerk of the Court in an informal way, enjoying a rare opportunity to talk to each other outside the courtroom. Tonight, we again commemorate the event with a beautiful Pewabic Pottery tile—part of a collection of tiles now, each with a different glaze.

The Advocates Guild is designed to honor and celebrate the role of the members of the Supreme Court bar in the Court's great work. But tonight, I want to share a thought expressed by Floyd Abrams. He said, "I think lawyers sometimes exaggerate their role in winning and losing. Lawyers do have a role, and a major role, but they're not the only players in this game."

The justices are players too. And tonight is the start of what will be Justice Cavanagh's last term on the Court. When I first came to the Court as a law clerk many years ago, Justice Cavanagh was the Chief. And his integrity, humor, intellectual firepower were all apparent to me as I watched and learned from the justices sitting then. As I look around this rotunda, I can see portraits of many who were here then: Justice Brickley, Justice Griffin, Justice Riley, Justice Mallett. Also serving then was my justice, Justice Boyle, and Justice Levin and of course, the then-Chief, Justice Cavanagh. It was a wonderful experience to watch them work to decide the difficult and important cases of the day. Justice Cavanagh has served as long or longer than any other justice in the Court's history. And it is a wonderful opportunity to recognize his great service to the Court.

2014 PEWABIC POTTERY COMMEMORATIVE TILE

This year's tile has a dark green glaze. It is the fifth in the series. Have you collected all five tiles? A limited number of previous years' tiles are available for individual purchase to Advocates Guild members. Not sure



which tile you are missing? Each tile is date-stamped on the back with the year of its release. Complete your collection for just \$50.00 per tile. Email cpickett@micourthistory.org about availability.

COLLECT THEM ALL

2010: bright blue | 2011: bright green | 2012: golden amber | 2013: watery green | 2014: dark green

The Night in Pictures...

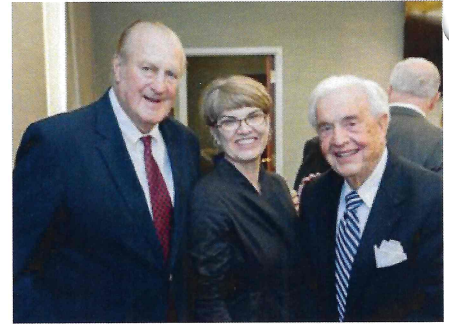
2014

**Advocates Guild Dinner
Wednesday, October 8**

The Reception



Advocates Guild Executive Committee Second Chair Richard McLellan (L) enjoys a moment with Michael Woodworth (R) of the Hubbard Law Firm.



Society President Wallace D. Riley poses with State Bar of Michigan executive director Janet Welch and "eternal" Attorney General Frank Kelley.



Chief Justice Robert Young Jr. and Rosalind Rochkind of the Advocates Guild Executive Committee share a light moment.



Court Clerk Larry Royster (R) speaks with attorney Nicholas Ayoub. Justice Mary Beth Kelly is in the background.

Justice Stephen Markman listens attentively to Dennis Pollard of Secrest Wardle. Also shown are David Landry (L) and Richard Poling Jr. (R)



Justice Bridget McCormack speaks with Honigman attorney June Haas.



Advocates Guild First Chair Mary Massaron with Jim Gross and Nancy Vayda Dembinski.



Justice Cavanagh catches up with former law clerks Mary Chartier (L) and Natalie Alane (R) who now have their own Lansing law firm, Alane & Chartier.



Justice Brian Zahra listens as Cooley Law School professor Gerald Fisher tells him a story.

All photos in this section by Dave Trumpie Photography.

The Night in Pictures...



The Advocates Guild Dinner is hosted in the sixth floor rotunda of the Hall of Justice in Lansing.

2014 Advocates Guild Dinner Wednesday, October 8

The Dinner



Chief Justice Robert Young Jr. addresses the assembled Advocates Guild Dinner attendees.



Justice Markman chats with Larry Nolan before they take their seats for the Dinner.



The view from the rotunda is stunning. Here Charles Rutherford joins a table near the window. Already seated are Deborah Hebert and Scott Grabel



Chief Justice Young chats with Society Life Member Eugene Wanger (R) as John Bursch of Warner Norcross & Judd looks on.



Justice Cavanagh's table at the Dinner. This is the last Advocates Guild Dinner Justice Cavanagh will attend as a justice. He is at the end of his fourth consecutive term on the Michigan Supreme Court.



Justice Viviano greets Scott and Alexis Grabel who sat at his table. Each justice hosts a table of Advocates Guild members at the Dinner. This year members were allowed to bring a guest.



Mark Bendure and Tim Baughman of the Advocates Guild Executive Committee sit together for the meal.



Justice Zahra takes a moment to talk to State Bar of Michigan executive director Janet Welch.



The Justices graciously pose with Advocates Guild members before the event begins. Here is Society Life Member John Allen with the Court.

State of the Society 2014

Report to the Michigan Supreme Court by Wallace D. Riley



Society President Wallace D. Riley addresses the Court before the opening of their 2014-2015 term on Tuesday, October 7, 2014.

The transcript of President Wallace D. Riley's report to the Michigan Supreme Court on October 7, 2014, follows:

“Mr. Chief Justice, Associate Justices, Society Board members, members of the Bar in attendance, ladies and gentlemen. On behalf of the Michigan Supreme Court Historical Society, it is my pleasure to welcome you to the Court's opening session here in the Old Supreme Court Chambers in the State Capitol Building. We thank the Court for permitting the Society this opportunity to briefly report on our activities.



Justice Michael F. Cavanagh served as Chief Justice of the Michigan Supreme Court from 1991–1994. He is shown here seated, with Justice James Brickley (L) and Justice Charles Levin (R). In the back row, left to right, are Justice Patricia J. Boyle, Justice Conrad Mallett Jr., Justice Robert Griffin, and Justice Dorothy Comstock Riley.

Today is not only the start of a new session of the Michigan Supreme Court; it is also the beginning of a new membership drive for the Society. There are nearly 44,000 attorney members of the State Bar of Michigan, but membership in the Society is only one percent of that total. We want and we need more.

Every new member we enlist is a “vote”—if you will—for greater public awareness and appreciation of Michigan's legal heritage. Our members not only fund our work, they bring meaning to it. The legacy of the justices who have decided our state's legal heritage lives on through our members, bringing to life the portraits that hang on the walls of the Hall of Justice.

And in that regard, we anticipate having several new portraits to dedicate in the coming year.

We count those of Justices Kelly, Corrigan, Weaver, and Cavanagh. Tradition dictates that after a Justice

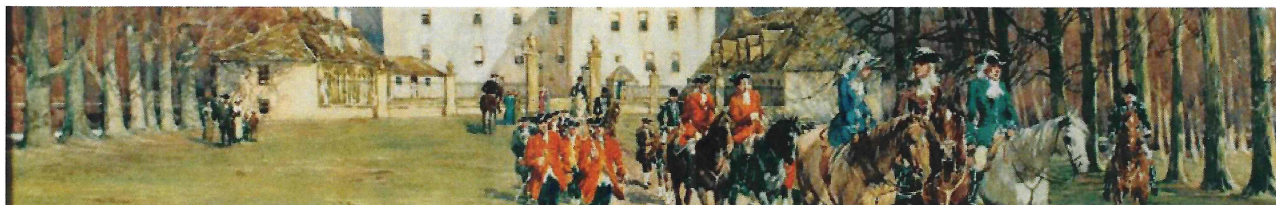


A large reproduction of James V. Campbell's portrait hangs in the old Supreme Court chambers in the State Capitol. It was painted by the artist, L.T. Ives, at the same time as the one in the first floor rotunda of the Hall of Justice.

leaves the bench, they return for one last official act: the dedication of their likeness in a Special Session of the Court. Justice Cavanagh, who is retiring at the end of his fourth consecutive eight year term on the Court, will be part of that special group. His long tenure ties the longevity of former Big Four Justice Campbell, who also served 32 years.

Again, on behalf of the Society Board of Directors, thank you for your support.

Long live Michigan Supreme Court history!



TRAQUAIR

Scotland's Oldest Inhabited House

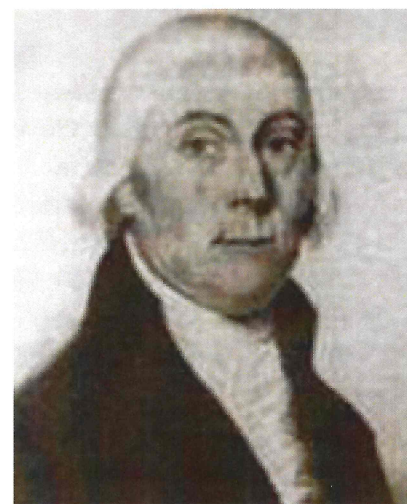
Until recently little was known about Michigan Supreme Court territorial judge John Griffin. His biography in the *Michigan Supreme Court Historical Reference Guide*, published in 1998, said that he was born in Virginia around 1799 and that he died sometime between 1842 and 1845, likely in Philadelphia. He does not have a portrait.

While researching the biographies of the judges and justices for a new edition of the *Historical Reference Guide*, author and Michigan legal historian David Chardavoyne discovered that Griffin was actually born at his mother's family home in Scotland. His grandfather, John, was the sixth earl of Traquair. The family home is the oldest inhabited house in Scotland, having been lived in for over 900 years.



Lady Christina Stuart

Lady Christina Stuart met Cyrus Griffin while he was studying law in Edinburgh. Her brother, a classmate of the American's, invited him to visit Traquair House. The two fell in love and were married despite her family's objections. In 1773, the young family returned to Virginia where Cyrus prospered in politics and the law. He was the last president, or speaker, of the Continental Congress and a U.S. District Judge. John, or little Jack as he was referred to by his mother in letters back to her family in Scotland, was soon joined by sisters, Mary and Louisa, and brother Samuel. John Grif-

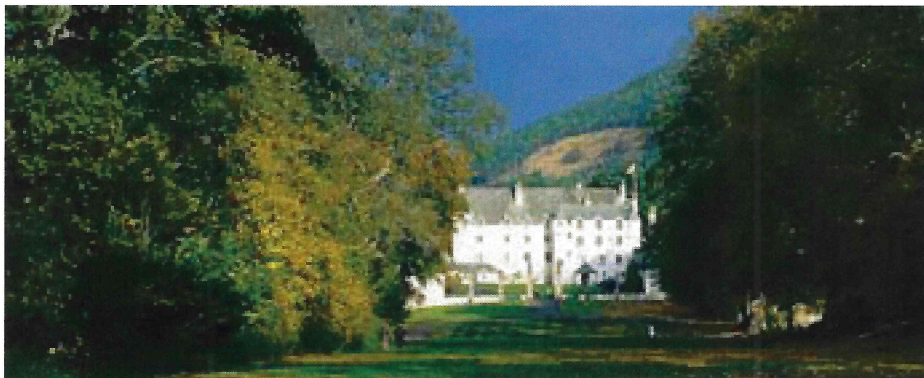


Cyrus Griffin

fin studied law in Edinburgh like his father before him. He died on or about August 1, 1849, and was buried at St. James Church in Kingessing Township, now part of southwest Philadelphia.

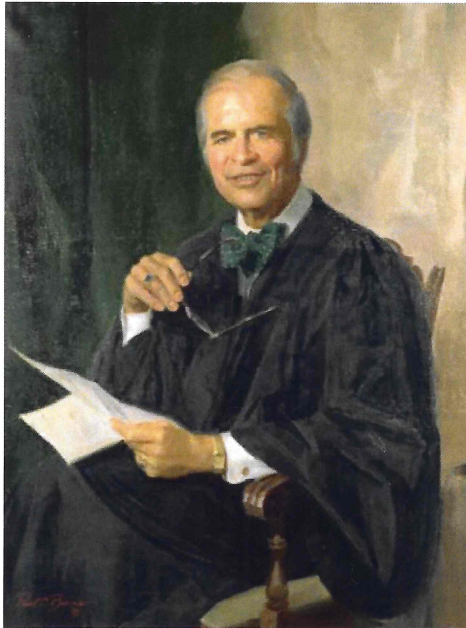
Traquair House remained in the hands of the Stuart family until 1875 when Lady Louisa Stuart died unmarried. And, like a plot line from *Downton Abbey*, the earldom was lost and the house passed to her cousin.

Catherine Maxwell Stuart, 21st Lady of Traquair lives with her family in the house today. What was originally a hunting lodge for the kings and queens of Scotland can now be rented for weddings and other events.



Information via www.traquair.co.uk and *Michigan Supreme Court Historical Reference Guide*, 2d ed., to be released spring 2015.

Governor G. Mennen Williams and the Great Ferris Fire 39th Michigan Legal Milestone

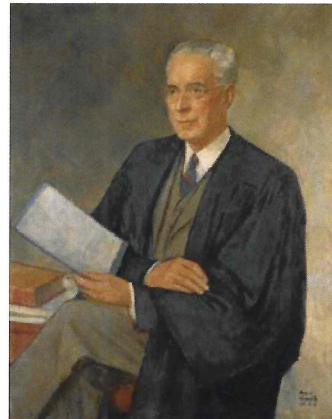
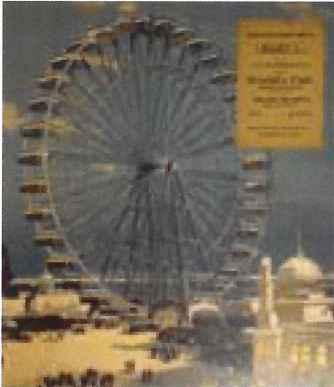


The State Bar of Michigan recently unveiled its 39th Michigan Legal Milestone. It commemorates the bold action of former Governor and later Michigan Supreme Court Justice G. Mennen Williams in the aftermath of a fire that destroyed parts of the campus at Ferris Institute before the school was to become a state college. Soapy's leadership was hailed upholding the rule of law, enabling the school to "rise phoenix-like out of the ashes." To read more about the milestone, please check out the August issue of the *Michigan Bar Journal* for an article by Steve Savickas.

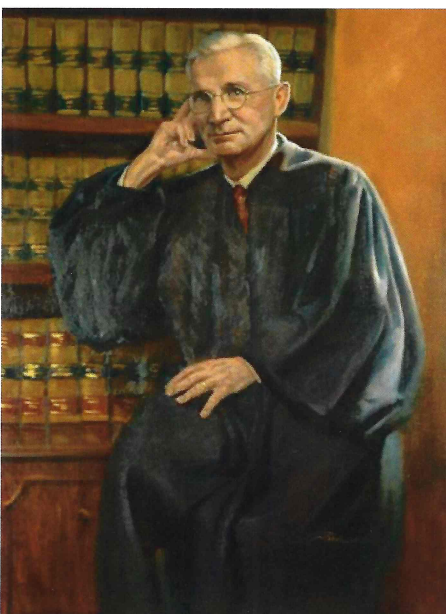
"rise phoenix-like out of the ashes."

G. Mennen Williams' portrait, shown here, was dedicated to the Michigan Supreme Court on May 3, 1990. The portrait hangs in the sixth floor rotunda of the Hall of Justice currently.

Ferris Institute was started by former Michigan Governor and U.S. Senator Woodbridge Nathan Ferris and his wife, Professor Helen Gillespie Ferris. He was the great-nephew of George Washington Gale Ferris, who invented the **Ferris wheel** for the **1893 Chicago World's Fair**.



Justice Raymond Starr graduated from Ferris Institute in 1907. He served on the Michigan Supreme Court from 1941–1946, when he was appointed United States District Judge for the Western District of Michigan by President Harry S. Truman.



Justice Edward Sharpe, who served on the Michigan Supreme Court from 1934–1957, graduated from Ferris Institute in 1911.



And, **Justice John Fitzgerald's** father, Frank D. Fitzgerald, was also an alum of Ferris Institute. He served two terms as Michigan's Governor, and his gubernatorial portrait is featured in the background of his son's judicial portrait.

#TBT



1941 Michigan Supreme Court

The photo above shows the Michigan Supreme Court in 1941. On the bench at that time were Chief Justice Edward Sharpe and associate justices George Bushnell, Henry Butzel, Howard Wiest, Walter North, Bert Chandler, Thomas McAllister, and Emerson Boyles (who was shortly replaced by Raymond W. Starr. Do you have any information about where this photograph was taken or who the other people shown in the photo are? Please send any information to executive director Carrie Sampson at (517) 373-7589 or by email at cpickett@micourthistory.org.

If you would like to donate an artifact or photo relating to one of the Justices of the Michigan Supreme Court, please contact Carrie Sampson at (517) 373-7589 or by email at cpickett@micourthistory.org.

Big Four Reprints



ORDER FORM

The Society is pleased to offer 8x10 inch reproductions of the Big Four painting for sale. They cost \$10.00 each.

Checks should be made payable and mailed to MSCHS at 1st Floor Hall of Justice, 925 W. Ottawa St., Lansing, MI 48915.

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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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The Michigan Supreme Court Historical Society 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

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