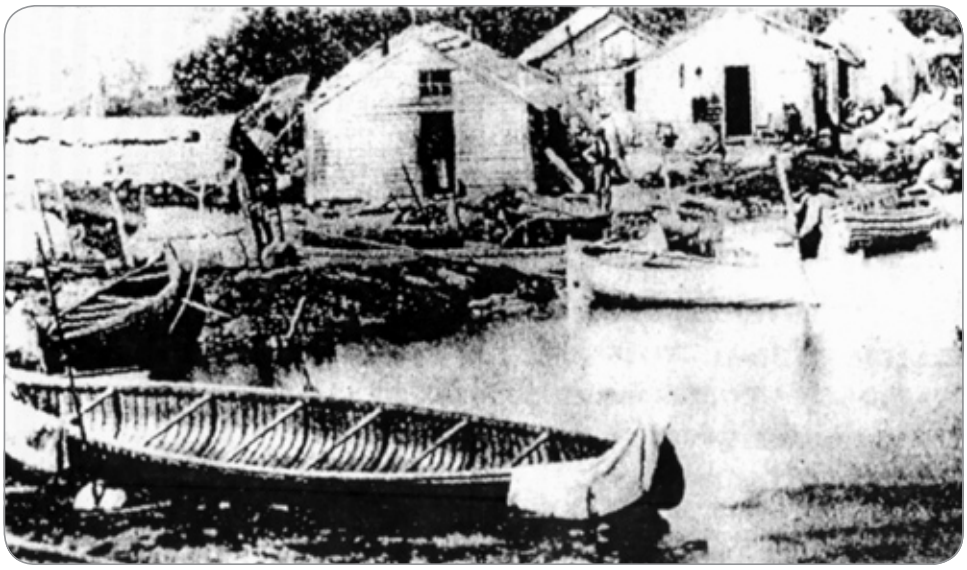
The *Pond* and *Maher* Cases:

Crime and Democracy on the Frontier

8 Mich 149 (1860); 10 Mich 212 (1862)



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Seul Choix Point Fishing Village, 1859.

The earliest significant cases in Michigan Supreme Court history involved frontier justice. The Court made it easier for citizens to defend themselves and mitigated the criminal law of murder. These decisions reflected the conditions of life and politics in Michigan in the 1860s.[1] People were close to the state of nature and believed fiercely in the right of popular self-government. In *Pond v People* (1860), the Court held that a man whose life and property were being attacked could use deadly force to defend them. It recognized the principle that "a man's home is his castle," and affirmed that all citizens had not just the right, but the duty, to combat crime. In *Maher v People* (1862), the Court reinforced the doctrine that crimes committed in the heat of passion could not be judged by the same standard as cold-blooded assaults.

The *Pond* and *Maher* decisions helped the Michigan Supreme Court begin to establish its reputation. Michigan had joined the Union in 1837 and displayed the radically democratic political culture typical of western frontier settlements of the era. Andrew Jackson was the period's symbolic figure, viewing himself as the virtual embodiment of the American people, and he governed according to the principle that "the majority is to rule." Michigan's 1835 constitution placed great faith in the ability of ordinary people to govern themselves, particularly in its extension of the right to vote to all adult white men. The constitution provided for a Supreme Court of three justices, who would be appointed to seven-year terms by the governor with the consent of the Senate.

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Disillusionment with abuses of legislative power, particularly with state promotion of internal improvements (especially railroads), led Michiganders to call for a new constitution within a decade. The 1850 constitution sought to make government still more responsive to popular will, mostly by placing limits on legislative discretion.[2] Michigan Supreme Court Justice James V. Campbell later wrote that the 1850 constitution was based on the idea that "no one is to be trusted"—nobody with governmental power, that is.[3] Perhaps most radical of all, the 1850 constitution made all judgeships elective.[4] Initially, eight judges of the circuit courts constituted a Supreme Court. But the constitution empowered the legislature, after six years, to establish a separate Supreme Court. In 1857, after complaints that the judges were "overworked and underpaid," and that the public "feared that the high tribunal's interrelation with the circuit courts jeopardized the impartial appeals process," the legislature created a new Supreme Court, consisting of a chief justice and three associate justices elected for eight-year terms. The terms of the judges on the new court began on the first day of 1858.[5] This act allowed the newly dominant Republican Party to take control of the Court. Michigan

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Remote as it was, the area already had a remarkable demographic history. The earliest known settlers, Ojibwa (commonly called Chippewa) and Ottawa Indians, had surrendered the territory by treaty in the 1830s and 1840s. The French, the first Europeans in the area, came next and had given it many place-names like Seul Choix (pronounced *shi-shwa* by later settlers), "only choice," capturing the isolation of the point, which was the only shore haven within miles. On Beaver Island, across from Seul Choix, a band of Mormons had established a polygamous "kingdom" in the 1840s. Their leader, James Strang, who called himself "King James, Vice-regent of God on Earth," was elected to the legislature and was able to get a new county (Emmet) created, with its seat on Beaver Island. In 1856, Strang was assassinated and the Mormons were driven off the island. In the years before the Civil War, a large number of Irish had settled in the area, turning Beaver Island into "America's Emerald Isle." Michigan attracted its share of the new immigrants, especially Irish and German, who filled the North and Midwest in the 1840s and 1850s.[1]

Not surprisingly, people often dispensed rough-and-ready justice in this environment. Justice Campbell later wrote that it was difficult to find jurors in the U.P., and "it was inevitable that many irregularities should exist, and that the people winked at things which they could not improve." It proved impossible, for example, to bring to justice those who had driven the Mormons off Beaver Island, but it was widely believed that the Mormons themselves had grasped the island illegitimately. "Speedy and irregular remedies were not much blamed where there was great provocation," Campbell observed. But, "With such temporary variations from the regular process of law, there was a general respect for substantial justice, and for judgments of competent tribunals, and no disposition to lawless wrong."[2] The law would be a potent force for civilization. As Campbell later wrote, "It might be imagined by those who are ignorant of the early western ways that these canoe voyagers led to the temporary abandonment of civilized habits. But no mistake could be greater."[3]

1. Dunbar & May, *Michigan: A History of the Wolverine State,* 3d ed, (Grand Rapids, 1995), p 302; Edwards, *The Castles of Seul Choix,* in Fischer, ed, *Seul Choix Point,* (Gulliver, MI, 2001), p 20.
2. Campbell, *Outlines of the Political History of Michigan* (Detroit: Schrober and Co, 1876), pp 551–553.
3. Campbell, *Biographical Sketch: Charles C. Trowbridge* (State Pioneer Society of Michigan, 1883), p 12. See also Brown, *Judge James Doty's Notes of Trials and Opinions, 1823–1832,* 9 Am J Legal Hist 17 (1965).

Republicans absorbed all the egalitarian democracy of the Democrats and extended it to antislavery and, sometimes, civil rights causes.

The *Pond* and *Maher* cases both came from the Upper Peninsula (U.P.), the least developed part of a newly settled state. Most of the U.P. lay outside of the Michigan territory in 1835, when Michigan wrote its constitution and applied for admission to the Union. Ohio disputed Michigan's possession of the outlet of the Maumee River, and was able to get President Jackson and Congress to prevent Michigan's admission until it gave up the claim. A brief and rather comical border skirmish between the states ensued, showing that commitment to the principle of "popular sovereignty" could lead the people to take the law into their own hands. In the end, Michigan reluctantly accepted the western part of the Upper Peninsula, plus a share of the treasury surplus, in exchange for the Maumee strip. But the legislature expressed its resentment about the bargain, calling the U.P. "a sterile region on the shores of Lake Superior, destined by soil and climate to remain forever a wilderness."[6] In time, after the explorations of the area by geologists Henry Schoolcraft and Douglas Houghton, its huge stores of timber, copper, and iron attracted many settlers and made the state rich.

Fish presented one of the first U.P. attractions. Augustus Pond and his family fished for a living at Seul Choix point in Delta County, about 75 miles west of Mackinac Straits (today part of Schoolcraft County). Settlers there faced harsh, frontier conditions. In 1860, the entire state of Michigan was home to 750,000 people, over half of whom had been born in other states. Only 20,000 lived in the U.P., and fewer than 1,200 in Delta County.

In this environment, Pond lived with his wife and three children, one an infant, in a 16' × 16' rough-hewn wooden house with one room, one window, and one door secured by a leather strap and a wooden peg. He also possessed a similarly constructed "net-house" where his two hired hands, Daniel Whitney and Dennis Cull, slept. For reasons not entirely clear, Pond had run afoul of David Plant. Plant appears to have been a carouser and rabble-rouser, allied with Isaac Blanchard, Jr., the six-foot seven-inch, 240-pound son of a Mackinac Island judge, and another man named Joseph Robilliard. "Plant spoke of the three of them as being an army," court testimony recalls, "and said that he was captain, Robilliard was Bonaparte, and Blanchard was the soldier, and was to do as they ordered." The controversy between Pond and Plant may have arisen out of ethnocultural tensions, for Plant was an Irishman and Blanchard accused Pond of "abusing an Irishman" and "not using his neighbors right," but there is no record of Pond having given offense to Plant or anyone else. Rumor also had it that either Plant or Blanchard was enamored of Pond's wife.[7]

On June 16, 1859, Plant and a group of 15 or 20 men threatened Pond. Plant assaulted him, but Pond walked away and continued to avoid his adversary. That night, Plant came looking for him, so Pond slept at a friend's house. The next day, after a drink together in Pond's net-house, Plant and his allies besieged Pond in his house; Pond hid under the bed and his wife kept his assailants at bay. Plant grabbed her arm through the door and grasped it so roughly that she fainted. Plant and his confederates then went to look for Pond elsewhere.

Meanwhile, Pond got a shotgun loaded with birdshot. Later that night, Plant returned to the Pond home. "Pond has to be abused," Plant said. "I must have a fight with Gus Pond, and if I can't whip him, Isaac will whip him."[8] After again being turned away by Mrs. Pond, they began to tear apart Pond's net-house and attacked his hired hand, Dennis Cull. Pond heard the ruckus and Cull's choking screams and came out with his shotgun. After twice shouting, "Leave, or I'll shoot," Pond fired. He hit Blanchard, who crawled into the woods and was found, dead, after daybreak.

Pond tried to turn himself in to his brother, Louis, but Louis denied that he had authority to take his brother in. Pond then got Whitney and Cull to take him to Beaver Island to surrender himself, perhaps because the Blanchards had less influence there. But Plant, Robilliard, and three others overtook them by boat. Pond was brought to trial in Mackinac Island City Hall. He was convicted of manslaughter and sentenced to 10 years' hard labor at the Jackson state prison. The trial court held that a man could not use deadly force to defend himself against a "mere trespass"; rather, he had a "duty to retreat" to avoid using force. Pond's net-house was not his home; nor did the assault on Cull justify the killing. Pond appealed his conviction to the Michigan Supreme Court.

Michiganders had elected George Martin, Randolph Manning, Isaac P. Christiancy, and James V. Campbell to the newly reorganized Court. Only Martin had served on the old Court, and he was made chief justice, a position that he held until his death in 1867. Justice Campbell wrote the opinion for a unanimous Court, overturning Pond's conviction. Pond, the Court opined, was justified in using deadly force to resist an attack on his home, family, and servants.

Martin "remains a shadowy figure for historians." He was a Vermont native and Whig before he became a Republican, able to win elections in a heavily Democratic state. His colleagues seem to have held Martin in low regard. Described by one historian as "a man of rather easy-going conduct," he wrote few opinions and missed many Court decisions. "He was constitutionally indolent," another history notes, "and, like other indolent judges, too much inclined to dispose of cases on some technical ground that would avoid the labor of disposing of them upon their merits." The son of a tavernkeeper, he became an alcoholic in his later years.

Archives of Michigan Lansing

Justice George Martin

Randolph Manning was a New Jersey Democrat, known for integrity and harshness, who became a Republican in 1854. Isaac Christiancy was the most politically active of the original justices. An antislavery New York Democrat, he often bolted the party to support free-soil candidates and helped form the Republican Party in Michigan. He served on the Court until elected to the U.S. Senate in 1875. Campbell was a New York Whig; he was the wealthiest and most sophisticated of the justices. He served on the Court until 1890. Christiancy and Campbell were two of the "Big Four" who, when later joined by Benjamin F. Graves and Thomas M. Cooley, established the Court's national reputation for greatness.[1]

1. Shelly, *Republican Benchmark: The Michigan Supreme Court, 1858–1875,* Mid-America 77 (1995), pp 97–101; Vander Velde, *The Michigan Supreme Court Defines Negro Rights, 1866–69,* in Brown et al., eds, *Michigan Perspectives: People, Events, Issues* (Dubuque: Hunt Publishing Co, 1974), p 108; Reed, ed, *Bench and Bar of Michigan* (Chicago: Century Publishing and Engraving Co, 1897), p 12; Volpe, *Isaac P. Christiancy,* in Garraty et al., eds, *American National Biography,* 24 vols (New York: Oxford University Press, 1999); Wise, *'The Ablest State Court': The Michigan Supreme Court Before 1885,* 33 Wayne L R 1509, 1529–1532 (1987); Chaney, *The Supreme Court of Michigan,* Green Bag 2 (1890), 388. See generally, *Michigan Supreme Court Historical Reference Guide* (Lansing: Michigan Supreme Court Historical Society, 1998).

The attack presented not a mere trespass, but a felonious assault. "Instead of reckless ferocity, the facts display a very commendable moderation" on Pond's part, Campbell noted. The trial court should have considered the net-house as part of Pond's home, for, "It is a very common thing in the newer parts of the country… to have two or more small buildings, with one or two rooms in each, instead of a large building divided into apartments." Thus, the Court extended the common-law rule that "a man's home is his castle" to frontier circumstances and ordinary citizens.[9]

Most significantly, Campbell maintained that individuals who defended themselves against criminals were performing a public service. "The rules which make it excusable or justifiable to destroy [life] under some circumstances, are really meant to insure its general protection," he wrote. "They are designed to prevent reckless and wicked men from assailing peaceable members of society." Campbell noted that, "It is held to be the duty of every man who sees a felony attempted by violence, to prevent it if possible," and that citizens have "the right and duty to aid in preserving the peace." Indeed, Pond had practically helped to suppress a riot, considering the "rabble" that Plant conspired with. Moreover, Campbell insisted that the Court consider the circumstances as they appeared to the person defending himself—the subjective standard of an ordinary man. Finally, Campbell ruled that all these questions were for the jury's consideration. This reduced the power of the judge and expanded the role of the jury, a tendency that was common in early nineteenth-century criminal law and characteristic of a democratic society that trusted popular institutions.[10] As a result, Pond was entitled to a new trial in which the jury could consider these principles. He seems to have died before the new trial, however.[11]

The *Pond* case established an important principle in criminal law, that there was no "duty to retreat" when one's home was invaded, and extended the basis for self-defense. The federal courts adopted the rule of "no duty to retreat" in 1921.[12] In 1925, Ossian

The *Pond* decision continues to be celebrated by Second Amendment, gun-rights advocates who are very active in Michigan. Of course, there is always the danger that the popular right of self-defense, and the duty to suppress crime, might become an invitation to lawless anarchy. One late nineteenth-century commentator noted that the Court "has been so mighty a bulwark of personal liberty as to provoke the reproach that it really shielded the guilty."[1] Thus, the courts have resisted reckless extension of the "castle doctrine." In 2002, in *Michigan v Riddle,* the Michigan Supreme Court emphasized that the use of deadly force is justified only in extreme circumstances, and that the "home" includes inhabited dwellings, but not areas surrounding them. The 2002 Court also pointed out that Augustus Pond was acting not only in self-defense, but in defense of his servants.[2]

1. Chaney, *The Supreme Court of Michigan,* Green Bag 2 (1890), p 396.
2. *People v Riddle,* 467 Mich 116; 649 NW2d 30 (2002); Crider, *Case Digest,* 81 U Det Mercy L R 129 (2003).

The *Pond* and *Maher* Cases

Sweet, a black physician, moved his family into an all-white neighborhood in Detroit. Shortly thereafter, a mob of whites besieged the house, attempting to drive the Sweets out. One of the occupants shot and killed one of the mob, and the entire Sweet household was tried for murder. Famed civil libertarian attorney Clarence Darrow defended the Sweets, urging that the principle that "a man's home is his castle" applied to blacks as well. Judge Frank Murphy, later Detroit mayor, Michigan governor, and United States Supreme Court justice, presided over the decisions in Michigan circuit court that exonerated the Sweets.

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1881 Drawing of City of Houghton.

In evaluating Pond's decision to use deadly force, Justice Campbell noted, a jury must consider his state of mind, or how dangerous the situation appeared to him. Legal rules, he said, "must be in some reasonable degree accommodated to human character and necessity."[13] Two years after the *Pond* decision, the Court applied this democratic principle in another notable case from the Upper Peninsula. In the village of Houghton, on the Keweenaw Peninsula that juts into Lake Superior (copper country that is even more remote than Seul Choix), William Maher ran, sweating and agitated, into a saloon. He ran up to Patrick Hunt and shot him in the head, causing Hunt to lose his hearing and confining him to bed for a week. Maher was convicted of assault with intent to commit murder. The judge did not allow Maher to present evidence to the jury that he had seen his wife and Hunt emerge from the woods together a half-hour before the assault, and had been told just minutes before the assault that his wife and Hunt had engaged in sexual intercourse there. Nor was the jury allowed to consider Maher's statement of these facts.

Maher, represented by the same defense team that had won Pond's case, Buel & Trowbridge, appealed to the Michigan Supreme Court and had his conviction overturned. Justice Christiancy wrote that the excluded evidence showed that Maher did not, in a cold and calculating way, intend to murder Hunt. The evidence established that the assault was committed "under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control."[14] That is, the crime would have been manslaughter, not murder, if Hunt had died. Again, the Court, citing *Pond* as a precedent, insisted that the situation, the total context as it appeared to an ordinary man, must be presented to the jury. "In determining whether the provocation is sufficient or reasonable, *ordinary human nature,* or the average of men recognized as men of fair average mind and disposition, should be taken as the standard."[15] Again showing its faith in the ability of citizen-jurors to judge these circumstances, Christiancy noted:

> Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life.[16]

In the midst of a civil war that Lincoln described as "essentially a people's contest" and a test of whether free men could govern themselves, the highest court of Michigan added its voice to the chorus that they could, and disclaimed any pretense to establish an aristocracy of bench or bar.

The *Maher* decision mitigated the common law rule that, to claim derangement due to passion, the accused must have witnessed his spouse and lover in the act of adulterous intercourse—

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Charles C. Trowbridge

Charles C. Trowbridge was deeply involved in the early history of Michigan. Like many of the founders of the state, he was born in New York. Trowbridge had accompanied the great geographer Henry R. Schoolcraft in his pioneering explorations of the state, and spoke French and some Chippewa. He ran as the Whig candidate for governor, losing to Stevens T. Mason (the "boy governor" who led the territory in its fight to get into the Union) in 1837.[1]

1. Campbell, *Biographical Sketch: Charles C. Trowbridge* (State Pioneer Society of Michigan, 1883), p 12. See also Brown, *Judge James Doty's Notes of Trials and Opinions, 1823–1832,* 9 Am J Legal Hist 17 (1965).

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in *flagrante delicto*. Justice Manning dissented on these grounds, adding that, since the state had abolished the death penalty for murder, and divided the crime into murder in the first and second degree, "there is not now the same reason, namely, the severity of the punishment, for relaxing the rules in favor of a party committing homicide as before."[17] His dissent suggested that the Court's democratic stance in criminal justice was too soft on criminals.

In these cases, the state Supreme Court reflected the radically democratic political culture of mid-nineteenth century Michigan. It also shaped the law and made policy in a deft and subtle way. One historian observes, "While neither resorting to instrumentalism nor consciously relaxing rigorous standards of jurisprudential methodology"—that is, not boldly and willfully making law—the Court "repeatedly factored considerations of 'sound public policy' into judicial calculations. The justices denied that the courts properly played any active role in policy-making. They invoked 'sound public policy' with the air of stating obvious maxims," but were actually writing Jacksonian democracy and Republican liberalism into state law.[18] They were engaged in a moderate kind of "judicial activism," in keeping with the views of the people, and adjusting the common law to new situations.

By the end of the decade, the Michigan Supreme Court had acquired an enviable national reputation. In 1868, the *American Law Review,* considered the premier legal publication in the country, said that "the Michigan reports are among the best in the country at the present time… the judges are candid, able, and well-informed." Similar praise came from other observers.[19] Few institutions can be said to have reconciled the often conflicting American principles of democracy and the rule of law as well as the Michigan Supreme Court. ■

FOOTNOTES

1. Finkelman & Hershock, eds, *The History of Michigan Law* (Athens, OH: University Press, 2006), p 1 (emphasizes the significance of geography and environment on the law).
2. Hershock, *To Shield a Bleeding Humanity: Conflict and Consensus in Mid-Nineteenth Century Michigan Political Culture,* Mid-America 77 (1995), pp 33, 38, 41.
3. Campbell, *Outlines of the Political History of Michigan* (Detroit: Schrober and Co, 1876), p 535.
4. Mississippi had been the first state to adopt an elective judiciary. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920,* American Bar Foundation Research Journal (1984), p 345.
5. Shelly, *Republican Benchmark: The Michigan Supreme Court, 1858–75,* Mid-America 77 (1995), p 97; Dunbar, *Michigan Through the Centuries,* 4 vols. (New York: Lewis Historical Publishing Co, 1955), I: 235, II: 156.
6. Dunbar, *supra* at II: 314.
7. *Pond v People,* 8 Mich 149 (1860); *The Way It Was: A Man's Home Is His Castle,* Beaver Beacon, November 2002, p 9; Edwards, *The Castles of Seul Choix, in Seul Choix Point,* ed, Marilyn Fischer (Gulliver, MI: 2001), p 28.
8. *Pond, supra* at 158. The Court noted that "we have their language as rendered by an interpreter, who was evidently illiterate, or at least incompetent to translate into very good English, and it is impossible for us to determine the exact force of what was said." *Id.* at 180.
9. *Id.* at 181.
10. *Id.* at 172, 176; Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), p 155.
11. *Edwards, supra* at 17, 27. Blanchard's descendants claim that Pond was released and never tried for what they considered a murder.
12. *Brown v United States,* 256 US 335; 41 S Ct 501; 65 L Ed 961 (1921).
13. *Pond, supra* at 37.
14. *Maher v People,* 10 Mich 212, 218 (1862).
15. *Id.* at 220. (emphasis in the original).
16. *Id.* at 221.
17. *Id.* at 228. Further reflecting its position as a liberal and democratic state, Michigan was the first to abolish capital punishment for murder (though it retained it for treason). Reformers hailed this 1846 move and said that "the sun had risen in the West and its light had finally penetrated the darkness of the East" when other states followed Michigan's lead. Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861,* American Historical Review 63 (1957), 43. See also Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty,* Thomas M Cooley L R 13, 755 (1996).
18. Shelly, *supra* at 106.
19. Wise, *The Ablest State Court,* 33 Wayne L R 1509, 1534 (1987).