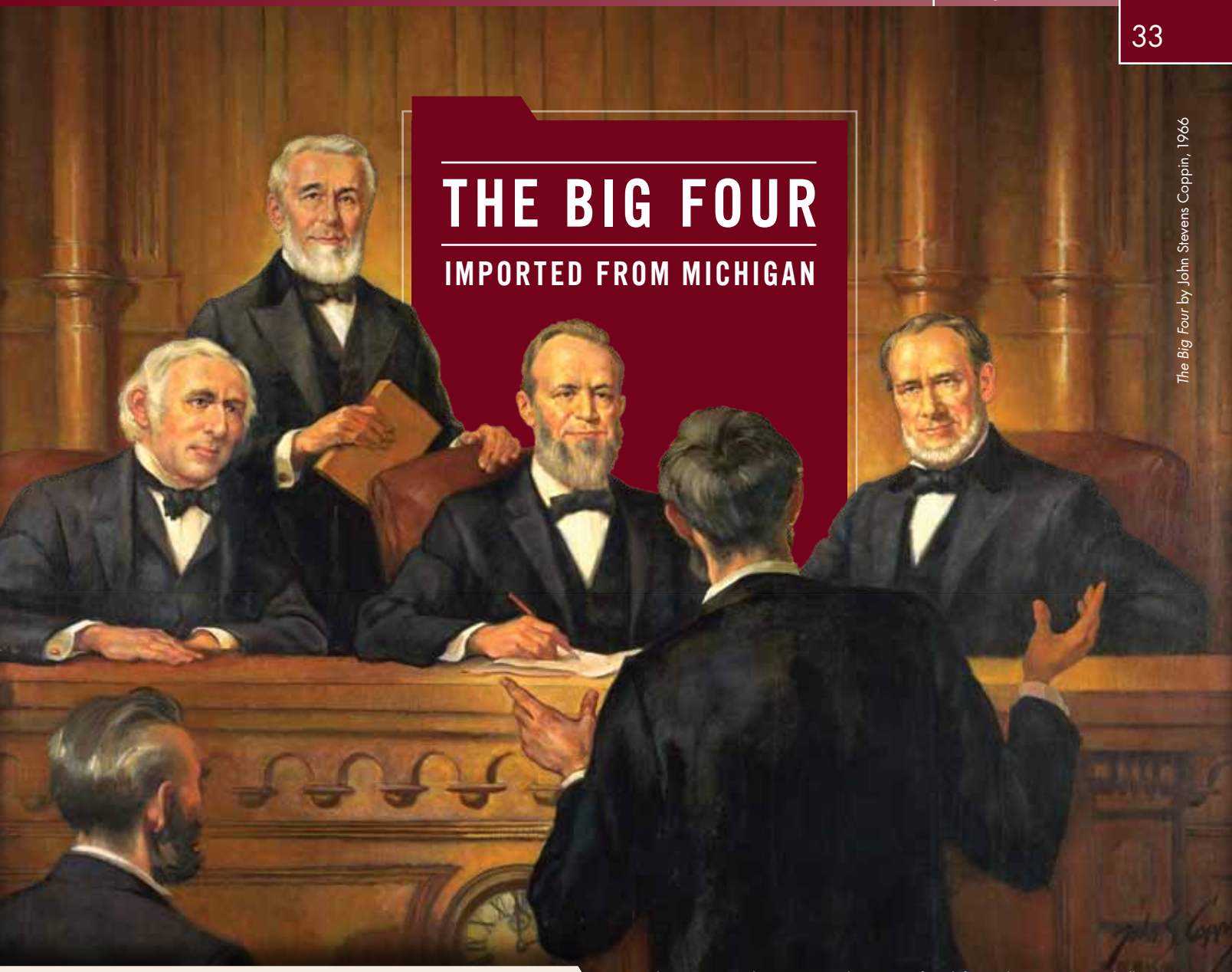
THE BIG FOUR

IMPORTED FROM MICHIGAN



The Big Four by John Stevens Coppin, 1966

The Big Four as they appear in the portrait, from left to right: Justices Campbell, Graves, Cooley, and Christiancy. All four were native New Yorkers and adopted Michiganders.

BY BARBARA H. BEAN AND GEORGE T. ROUMELL JR.

Before this article was finalized, the authors conducted an unscientific survey of 24 members of the faculty, students, and staff of a Michigan law school. Of the 24 respondents, 8 have lived in Michigan their entire lives. The rest have lived in Michigan for periods ranging from 2 years to 40. Not a single respondent could identify the justices pictured on the cover of the April 2011 issue of the Michigan Bar Journal *(and shown above). Clearly, it is a good time to revisit the illustrious careers of Michigan Supreme Court Justices James V. Campbell, Isaac P. Christiancy, Thomas M. Cooley, and Benjamin F. Graves.*

There is little question that between 1865 and 1885, legally speaking, the most outstanding state supreme court in the United States, arguably trumping the United States Supreme Court, was the Michigan Supreme Court. As former law school dean Edward Wise has written: "[T]here was a time when decisions of the Michigan Supreme Court commanded in any jurisdiction nearly the same respect as a decision of the United States supreme court….[T]he bench composed of Cooley, Campbell, Christiancy, and Graves came to be remembered as 'the great court.'"[1]

Migrants to Michigan

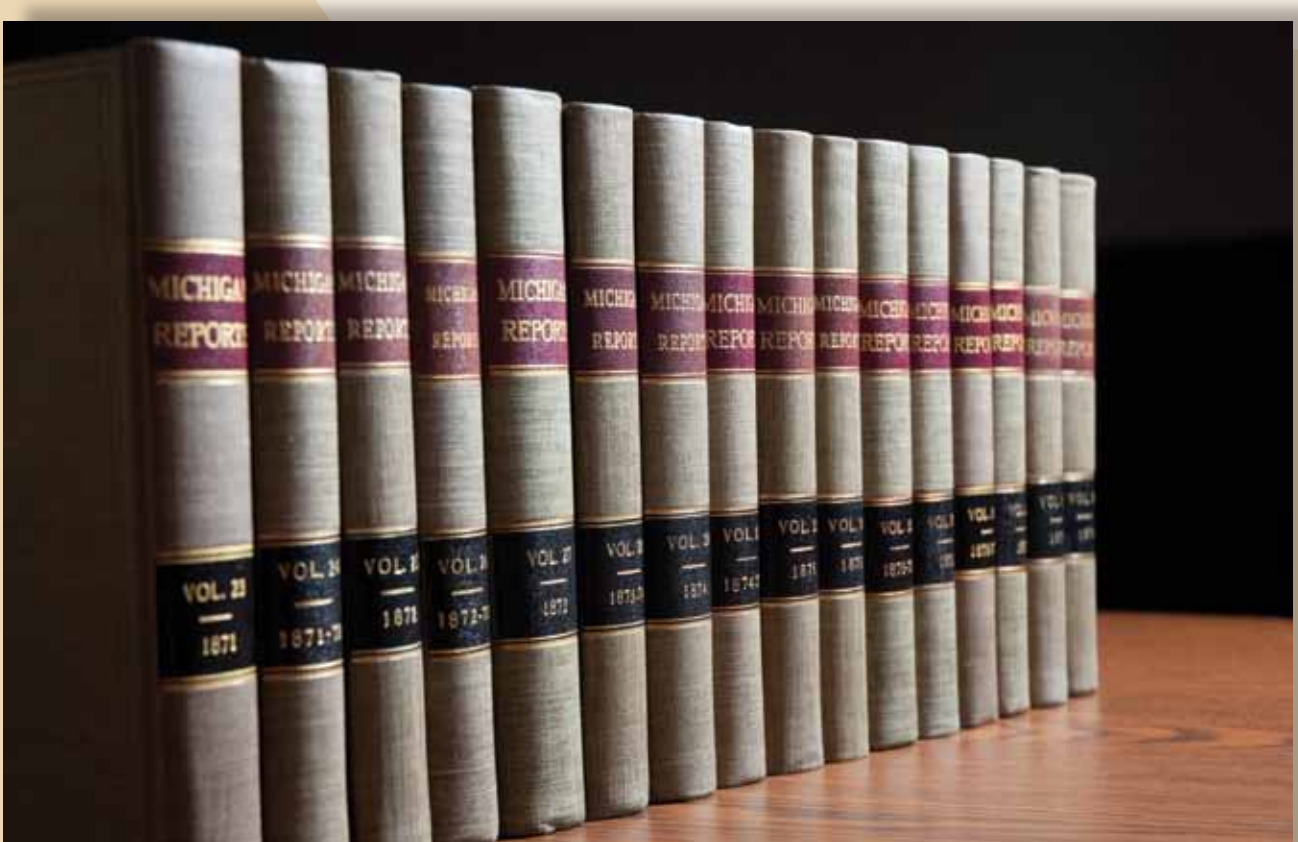
Their years of service on the Court totaled 85; they served together for only 7, from the election of Justice Graves in 1868 to early 1875, when Justice Christiancy resigned to take a seat in

the United States Senate. Cooley, Campbell, and Graves would serve together for 15 years. Cooley, Christiancy, and Graves came to Michigan as young men from western New York, where they had been educated in the public schools. Of the four, only Campbell, who had moved to Michigan as a young child, received a college education.

A member of the first group of justices elected to the Supreme Court when it became an independent appellate tribunal, Isaac Christiancy had read the law in New York and Michigan, to which he moved in 1836. His life has been described as illustrating that the possession of wealth and the opportunity to attend the higher institutions of learning are not essential to the attainment of great influence and eminence.[2] He was one of a pioneering group of men who sought to establish the city of Monroe as a metropolis of the new commonwealth of Michigan.[3] Before his election to the Court in 1858, 10 years of experience as a clerk in the federal land office in Monroe and as a prosecuting attorney in the county provided him with expertise in the areas of real estate and criminal law.

Another original member of the newly constituted Supreme Court, James Campbell, came from a different background than the other three. The son of a wealthy businessman who had moved to Michigan when he was a child, Campbell was educated at a boarding school in New York, where he completed the collegiate course. He then returned to Michigan, where he read the law and was admitted to the bar in 1844. He moved in higher educational and social circles in Detroit. With Cooley, he was appointed to the Law Department at the University of Michigan in 1859. Although the particulars of his early practice are not known, by the time he was elected to the Supreme Court in 1857, he was regarded as one of the leading lawyers of the state. On the Court, the close ties of friendship that bound the other three did not extend to Campbell, and a look at the close to 1,000 decisions they issued reveals that Campbell was more likely to disagree with his colleagues than any of the other three.[4]

Thomas Cooley moved to Michigan in 1843 at the age of 19, having studied the law in New York, and completed his studies in Michigan, where he was admitted to the bar in 1846. The next decade saw him join a number of law partnerships and dabble in politics and journalism. In 1859, he was appointed to the newly opened Law Department at the University of Michigan. For the six-year period before his appointment to the Supreme Court in 1864, Cooley served as the Reporter of Decisions for the Court and published 14 volumes of opinions. This does not seem remarkable today, but the work of Cooley and his immediate predecessor, George C. Gibbs, marked great progress from the early, chaotic days of court reporting in Michigan. The first Reporter of Decisions, who served for five years, was unable to deliver a single volume. Judicial opinions were written by hand and often consisted of little more than notes. The family of one recently deceased Supreme Court justice accused another of stealing the dead man's opinions.[5] It is likely that a number of early opinions of the Michigan Supreme Court were lost altogether. "It was only with Gibbs and Cooley that the court's opinions began to be published on a regular basis; only after 1858, with Cooley, did they begin to appear with sufficient frequency for the court to acquire a definite reputation outside the state."[6] In 1864, Cooley was elected to the Supreme Court, where he joined Justices Campbell and Christiancy.



ALTHOUGH CAMPBELL WAS THE MOST LIKELY TO DISAGREE WITH HIS COLLEAGUES, THE FOUR WORKED WITH UNUSUAL UNANIMITY AND SPEED.

The last of the Big Four to join the Supreme Court in 1868 (although he had previously held a temporary appointment to the Court), Benjamin Graves came from a background similar to that of Christiancy and Cooley. He was first admitted to the bar in New York State and moved to Michigan in 1843. He brought to the Supreme Court 12 years of experience as a trial judge in the circuit courts and specialized in procedure and evidence, issuing highly regarded opinions on those subjects. The years they lived in the same boarding house during the Court's sessions created a close relationship between Graves and Cooley.[7]

When Justice Graves joined the Court in 1868, the Supreme Court had existed as an independent appellate court for 10 years, and Michigan had been a state for just over 30. During this period, many important legal questions came before the Court for settlement. All four justices were conscientious and hard working. Each took his turn as chief justice. Although Campbell was the most likely to disagree with his colleagues, the four worked with unusual unanimity and speed.

When the Court was in session, the justices regularly put in 15-hour days, hearing arguments, reviewing records, and handwriting opinions. The research tools taken for granted by lawyers and judges today were not available; however, "the courts were not so glutted with business as now, and judges had time to acquaint themselves fully with the facts of the cases, and to think over carefully and from all points of view, the principles of law applicable to them."[8] Both Cooley and Campbell were known for the speed with which they produced opinions, to the point that a prominent lawyer complained, "Your Honors have got a high reputation for the celerity of your conveyances and it is now time for you to consider the safety of your passengers."[9] Justice Graves, on the other hand, worked and reworked his opinions; "making no pretense to brilliancy or genius, he made up in patient and persistent labor and thought…."[10]

A Growing Reputation

Writing about the Michigan Supreme Court at the time of Cooley's death, the *American Law Review* said of Cooley, Christiancy, Campbell, and Graves, "These four men raised the fame of the Supreme Court of Michigan throughout the Union….They made the reports of its decisions everywhere sought after."[11] Writing in the *American Commonwealth* in 1889 about the finest state courts in the United States, of which Michigan's was considered the best example among the "western" states, James Bryce observed that the administration of justice of the courts in those states was equal to that dispensed by the superior courts of England.[12]

Let's test this theory. Early in the law school course in property law, students will be reminded that the foundation of property law in at least 49 of the states (Louisiana excluded, being a civil-law jurisdiction) originated from England as part of the common law. After studying the rule against perpetuities, first-year students become exposed to the rule against restraint on alienation, an old theory from the Mother Country. Well, Mr. Justice Christiancy, in 1874, on behalf of a unanimous court (Justice Campbell did not sit), wrote the decision in *Mandlebaum v McDonell,*[13] invalidating a restriction on alienation as violating the rule against restraint on alienation. In doing so, Justice Christiancy concluded:

> We are entirely satisfied there has never been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law. And we think it would be unwise and injurious to admit into the law the principle contended for by the defendants' counsel, that such restrictions should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the court of last resort; and upon what standard of certainty can the court decide it? Or, depending as it must upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void.
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> Certainty in the law of real estate, as to the incidents and nature of the several species of estates and the effect of the recognized instruments and modes of transfer, is of too much importance to be sacrificed to the unskillfulness, the whims or caprices of a few peculiar individuals in isolated cases.[14]

In reaching this conclusion, Justice Christiancy distinguished a previous English case, *Large's Case.*[15]

Across the Atlantic

Back to England—10 years later—in *Rosher v Rosher,*[16] Justice Pearson, for the chancery division, held on the facts presented (according to the headnote) that "[a] condition in absolute restraint of alienation annexed to a device in fee, even though its operation is limited to a particular time, *e.g.,* to the life of another living person, is void in law as being repugnant to the nature of an estate in fee."[17]

Bingo! In reaching this conclusion, the chancery division reached back to the golden era of the Michigan Supreme Court and Justice Christiancy's analysis of *Large's Case.* Justice Pearson wrote in *Rosher:*

> It still remains for me to consider whether there is any decision that a condition absolutely restraining alienation is good if there is a limitation as to time, because, although I have dealt with these cases in order to clear the way with regard to the foundation upon which all the exceptions rest, still, as I hold that the exceptions stand on a principle absolutely removed from that of repugnancy, there may yet exist an exception which can be made to the condition, and which will be good by reason of a limitation of time.
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> The authority cited to shew that this is so is *Large's Case* (1). I am going to cite it from the American case, *Mandlebaum v. McDonell* (2), which contains a very elaborate and able judgment upon this part of the case. The very same point which arises now arose then before the American Court. The judgment of the American Court refers to *Large's Case* thus: "As reported (3) the same devise is stated as follows:— 'A., seised of lands in fee, devised the same to his wife till *William,* his younger son, should come to the age of twenty-two years, the remainder when the said *William* should come to such age, of his lands in *D.* to his two sons, *Alexander* and *John,* the remainder of his lands in *C.* to two other of his sons, upon condition, *quod si aliquis dictorum filiorum suorum circumibit vendere terram suam,* before his said son *William* should attain his said age of twenty-two years, *in perpetuum perderet eam*.'" It seems to have been held by the text-writers that this therefore was a condition attached to a devise, not to sell within a limited time, and that that condition was good, because it was held that one of the sons, who had gone about to grant leases for terms of sixty years in succession, had broken the condition, and that the breach of the condition might be taken advantage of. *But Mr. Justice Christiancy points out, I think with perfect accuracy,* that when you come to look at the case there was no devise of the fee simple of that kind. There was only a contingent remainder limited to the son, upon condition that before he came into possession, that is to say, before he attained twenty-two, he should not sell.[18]

The Mother Country gave Michigan the common law of property regarding restraint on alienation. The Michigan Supreme Court, by Justice Christiancy and his colleagues, confirmed the common law of property and gave it back to the Mother Country, whose chancery division agreed is done with "perfect accuracy."

We are inspired to paraphrase a current popular advertising slogan, "Imported from Michigan." In addition to *Rosher* in the Court of Chancery, *Mandlebaum* has been cited in close to 100 American court decisions, including a decision by the United States Supreme Court,[19] and was most recently cited by the Michigan Court of Appeals in 2006,[20] more than 135 years after it was decided.

The chancery division in *Rosher* saw fit not to rely on any other American case. The Michigan Supreme Court consisting of Cooley, Christiancy, Campbell, and Graves—the three C's and the G with Justice Graves as Chief Justice—represented the golden era of the Court.

Now the reader knows what happens when the legal researchers at Michigan State University College of Law and a labor arbitrator get together. You never know what they will find about the glories of the rich legal tradition of Michigan jurisprudence.

As they say, "Imported from Michigan." ■

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FOOTNOTES

1. Wise, *"The ablest supreme court": The Michigan Supreme Court before 1885,* 33 Wayne L R 1509, 1557 (1987).
2. Moore, *Isaac Peckham Christiancy,* 5 Mich L R 231, 231 (1907).
3. Reed, ed, *Bench and Bar of Michigan: A Volume of History and Biography* (Chicago: Century Publishing and Engraving Co, 1897), p 111.
4. Wise, p 1558.
5. Blume, ed, *Unreported Opinions of the Supreme Court of Michigan 1836–1843* (Ann Arbor, The University of Michigan Press, 1945), p xxiv.
6. Wise, p 1529.
7. Post, *Benjamin Franklin Graves,* 5 Mich L R 409, 413 (1907).
8. Moore, p 235.
9. Kent, *James Valentine Campbell,* 5 Mich L R 161, 171 (1907).
10. Post, p 413.
11. Wise, p 1523.
12. Bryce, *The American Commonwealth* (London: Macmillan and Co, 1889), pp 497–498.
13. *Mandlebaum v McDonell,* 29 Mich 78; 18 Am Rep 61 (1874).
14. *Id.* at 107.
15. *Large's Case* (1687) 74 Eng Rep 376 (KB).
16. *Rosher v Rosher* (1884) 26 Ch D 801.
17. *Id.* at 801.
18. *Id.* at 820–821 (final emphasis added) (citations omitted).
19. *Potter v Couch,* 141 US 296; 11 S Ct 1005; 35 L Ed 721 (1891).
20. *Wengel v Wengel,* 270 Mich App 86; 714 NW2d 371 (2006).