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**THE JUDICIARY.**

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under the supervision of

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A sketch of the Judicial History of New York naturally divides itself into the following heads: The Dutch Colony; the English Colony; the Revolutionary Period and the Constitution of 1777; the Constitution of 1823; the Constitution of 1846; the Judiciary Article of 1870.

*The Dutch Colony.*

The Dutch Colony of New Netherland was established at New Amsterdam, on Manhattan Island, in 1623. Of the administration of justice under the first Governors, May, Minuit and Van Twiller, no records have been preserved. In 1630 large grants of land were made by the Dutch Government to the Patroons who were invested with the feudal privileges of manorial lords, and authorized to erect courts of justice, with unlimited jurisdiction, both civil and criminal, within their respective territories. The Patroon possessed the power of inflicting capital sentences. In civil cases his judgment, when exceeding fifty guilders, was subject to an appeal to the Director-General and Council of New Amsterdam. This right of appeal was practically defeated by exacting from the tenants in the leases a stipulation to waive it. Kieft, appointed Governor in 1638, carried matters with a high hand, reducing his "Council" to one, and reserving two votes to himself. Under his misrule the colonists unsuccessfully demanded the establishment of courts of justice like those in the mother country. He was recalled and supplanted by Peter Stuyvesant in 1647. Under Stuyvesant, at first the administration of justice was vested in certain of the company's officials, subject to the Governor's opinion in important matters; and afterward, in nine Councillors elected by the Commonalty, with an appeal to the Governor and his Council of State. The Governor and these popular Councillors agreed but illy, and in 1650 the States-General ordered the establishment of a new court, consisting of two burgomasters, five schepens and a schout, according to the home custom, with an appeal to the Supreme Council. These magistrates at home were elected by the commonalty, but Stuyvesant usurped the appointment of them in his Colony. This body exercised not only judicial, but legislative and executive functions, and although appointed by the Governor, seem to have discharged the duties of their office independently and incorruptly. A tolerably complete record of their proceedings is preserved. Judge Charles P. Daly, in his excellent sketch of the Judicial Organization of this State, says of these magistrates: "It is impossible not to be struck with the

comprehensive knowledge they display of the principles of jurisprudence, and with the directness and simplicity with which legal investigations were conducted. In fact, as a means of ascertaining truth and of doing substantial justice, their mode of proceeding was infinitely superior to the more technical and artificial system introduced by their English successors."

To illustrate the direct and practical way of settling litigations which prevailed under the Dutch administration, Mr. James W. Gerard, in his interesting paper on "The Old Streets of New York under the Dutch," read before the New York Historical Society in 1874, gives an account of the lawsuit of *Jan Haeckens v. Jacob Van Cowenhoven*. The action was brought to recover pay for beer. The defendant pleaded that the beer was bad. The plaintiff replied, denying this allegation, and asking if people would buy it if it were not good? The defendant requested that after the rising of the court, the magistrates should come over to his place and try the beer, and then decide. The parties having been heard, it was ordered, that "after the meeting breaks up the beer shall be tried, and if good, then Cowenhoven shall make payment according to the obligation; if otherwise, the plaintiff shall make deduction." Mr. Gerard does not give the result of the "view."<sup>[1]</sup>

None of these Dutch magistrates were of the legal profession. They were all engaged in agricultural, trading or other pursuits,<sup>[2]</sup> and yet they appear to have been well versed in the Dutch law, and to have been thoroughly acquainted with the commercial usages, customs and municipal regulations of the city of Amsterdam. This is the more remarkable, as a knowledge of the Dutch law at that period was by no means of easy acquisition. The vacancies in this court were supplied by Stuyvesant until 1658, when he yielded to the demand of the people, and made a selection from a double list of names submitted to him by them. From 1660 until the English took control an annual nomination and appointment was thus made. Judge Daly says : " All these magistrates, as far as can be gathered, were men of intelligence, of independence, and with one or two exceptions, of high moral character, evincing in the discharge of their duties, and especially in those of a judicial nature, that unswerving adhesion to established rules and customs, that sterling good sense and strong love of justice which constitutes so marked a feature in the Dutch national character."

This court regularly sat once a fortnight, and sometimes once a week. At the oral request of the plaintiff the court messenger summoned the defendant to appear at the next court day. If he did not appear, the summons was repeated, twice if necessary, but on the third summons the court pronounced judgment. The parties orally stated their case. They might be sworn, and witnesses might be examined. References by the court to arbitrators were very frequent. Indeed, the court seems to have been largely one of conciliation. Written pleadings could be exacted upon the demand of the defendant. The evidence was taken by deposition, and the court issued commissions. This mode of trial, however, was rare. The summary method, or the resort to arbitration, was the most usual. Shop books were receivable in evidence, and in some instances hearsay evidence was tolerated. The mode of executing the judgment was peculiar. One-half could be paid in fourteen days, the remainder in a month. On default, the messenger exhibited to the defendant a copy of the judgment, together with his official wand—a bunch

of thorns<sup>[3]</sup>—and demanded payment in twenty-four hours. On non-compliance, this formality was repeated. If the defendant still neglected to comply, the messenger took possession of his goods, holding them six days for redemption. At the end of that time, if not redeemed, he sold them at auction, after notice on a Sunday and on a law-day. Greater indulgence was allowed on an execution against real estate. On the sale of real estate, the officer lighted a candle, and the bidding went on "while the lamp held out to burn," and the property was knocked down to the last and highest bidder.<sup>[4]</sup> The civil business of the court was considerable. Promise of marriage was enforced by imprisonment. In case of separation between husband and wife, the children and property were equally divided between the parties. What was done in case of an odd number of children, unless an execution of Solomon's judgment in the case of the disputed ownership of a child, does not appear. No pecuniary compensation for injuries to person or character was allowed, but they were punished by fine or imprisonment, or by requiring the offender to recant in court, sometimes kneeling and asking pardon of God and the complainant.<sup>[5]</sup> Complaints of defamation were very numerous, while actions for the recovery of debts were comparatively infrequent—a state of affairs notably the converse of that now prevailing. The court summoned parents or guardians to give assent in proper cases to the marriage of children or wards, and exercised probate and admiralty jurisdiction. In criminal cases the schout acted as public complainant and prosecutor. The offender was arrested or summoned in the discretion of the magistrate, after production of evidence. In extreme cases the schout might cause arrest without this formality; but in such cases he was bound to have the charge investigated within twenty-four hours. Bail was allowed except in murder, rape, arson or treason. The prisoner was usually tried publicly upon evidence. Sometimes the trial was by secret examination before two schepens, on written interrogatories propounded to the prisoner, which he was compelled to answer. The prisoner might be tortured, to extort confession, but the records of the Colony contain only one instance of its being done.<sup>[6]</sup> Punishment was by fine, imprisonment, whipping, the pillory, banishment, or death. The capital sentence could not be executed without the approval of the Governor and Council. Similar courts were established in several localities on Long Island. In 1652 Stuyvesant established a court at Beverwyck (Albany), independent of the Patroon's court of Raensellervyck. Dr. O Callahan informs us that it was held at the house of the Vice-Director, on the second floor, in a room next to the roof and without any chimney, and accessible only by a trap-door and ladder. These burgomaster and schepen courts, the patroons courts, and the Appellate Court of the Governor and Council at New Amsterdam, constituted the tribunals of justice until the Colony came into possession of the English, in 1664.

The student will find great entertainment in Mr. James W. Gerard's paper, entitled "The Old Stadt Huys of New Amsterdam," read before the New York Historical Society in 1875, and published in pamphlet. A glance at these "trivial fond" records will show us our ancestors in a simple and amiable light and the peculiar character of the lawsuits waged by that peaceable and simple-hearted people. The reader will be struck with the informal and patriarchal administration of justice, with the triviality of many of the disputes, and the ease with which the parties were reconciled. The love of fair play was evidenced by the refusal of the authorities to permit Adrian Van der Donck, the first lawyer in the Colony, to plead, on the ground that "as there was no other lawyer in the Colony, there could be no one to oppose him." The

early litigants consequently advocated their own causes, or were represented by relatives or friends. The compensation of the arbitrators, under the system in favor, consisted in a "treat," the expense of which was equally shared by the parties, unless otherwise directed in the order of reference or the judgment. There being no State prison, the usual punishments were by fines, banishment, the pillory, flogging, or confinement in a tavern or one's own house, or for a limited period with the town jailer in the city hall. Imprisonment was sometimes accompanied by a diet of bread and water or *small beer*. Branding on the cheek was occasionally inflicted, and so was sitting on the wooden horse. It was unlawful to go nutting or picking strawberries on Sunday, and one person, caught with an axe on his shoulder on Sunday, escaped with a reprimand only by showing that he had been cutting a *bat* for his little boy. Sometimes the nature of the offense was indicated by the punishment, as when one who had stolen cabbages was condemned to stand in the pillory with cabbages on his head. One individual was scourged and banished for stealing spoons at a marriage feast to which he was invited. The merciful disposition of our Dutch ancestors is illustrated by their reluctance to inflict capital punishment. On one occasion, nine negroes being convicted of murder, they were ordered to draw lots to determine which one should suffer for the rest ; the lot falling on a prisoner of gigantic frame, he was suspended by two halters, but broke them both, and then he and the spectators begged so hard for mercy, that he was let off. Although thus lenient, the magistrates insisted on being respectfully addressed. Mr. Gerard says: "Ill fared it also with Jan Willemsen Van Iselsteyn, commonly called Jan of Leyden, who, for abusive language and for writing an insolent letter to the magistrates of Bushwyck, was sentenced to be fastened to a stake at the place of public execution, with a bridle in his mouth, rods under his arms, and a paper on his breast with an inscription, 'Lampoon writer, False accuser, and Defamer of Magistrates.' He was afterward to be banished." Among the causes of action we find, throwing a glass of wine at the plaintiff, calling him a "black-pudding," a "muff," or a "Dutch dough-face," tearing a woman's cap off her head, etc. Among the distinguished litigants we note Mrs. Anneke Jans Bogardus, who sued for the rent of the Bouwery. The defendant answered that he was not indebted, because he had bought off the rent for two hogs, and had delivered one of the hogs. The court very properly ordered him to deliver the other. The defendant was afterward sentenced to be flogged and have his right ear cut off, for selling his wife. Jacob Leisler, subsequently dictator of New York, was sued by a servant-girl for a year's wages, he having dismissed her before the expiration of the time. "The defendant answered, that inasmuch as plaintiff had consumed almost a bottle of strawberry preserves, also biscuit of his; moreover, as it came to his ears that she had two fellows climb over the wall to her while he was in church with his wife, and received no service from her, he had nothing to do with her." Plaintiff denied having had the fellows climb over the wall, and claimed that the children ate the preserves. The court finally decreed that the defendant pay plaintiff a quarter's wages. Rose Goele sued Francois Soleil, the gunsmith, for breach of promise, the defendant having refused to marry her, although the bans had been published and cohabitation had ensued. In addition to uncongeniality of temper, the defendant pleaded that the plaintiff had a bad breath. A certain decision respecting the disposition of a stray pig, claimed by two different persons, neither of whom pretended to be the owner, was worthy of Solomon, namely, that "the pig shall be proclaimed by the deacons for eight days, and that they shall take her in default of right." Mr. Gerard warmly defends the Dutch Colony against the representations conveyed in Mr. Irving's caricatures. He refers to the undoubted fact that New Netherlands was the true home of religious and political freedom on this

continent. When the Puritans were hanging witches and Quakers, and whipping and banishing Baptists, the unhappy refugees found a safe asylum among our much-ridiculed Dutch ancestors. There was but one trial for witchcraft in New Amsterdam, and that resulted in acquittal. Slavery existed only in the mildest form; we read of a master applying to the court for leave to chastise his negro wench for misconduct. The Jesuit fathers, fleeing from the Indians, were welcomed and protected. "The Indians too were protected from outrage."

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*The English Colony.*

The Colony fell into the hands of the English in 1664, and New Amsterdam and New Netherland then became New York, so called after the Duke of York. A code of laws was framed by Lord Clarendon, for the government of the Colony, called "The duke's laws." This code prohibited slavery; forbade religious persecution of professing Christians, but decreed death for atheism; and denounced death to any child who should strike its parent except in self-defense. It established justices of the peace, and town courts composed of overseers and constables, with jurisdiction to five pounds in actions of debt and trespass. The Province was divided into three "ridings." An appeal lay to the Court of Sessions, which consisted of all the justices living within the "riding," and was held twice a year. All causes were tried before a jury, consisting of the overseers of the towns in the "riding." In civil cases seven constituted a jury, and a verdict was pronounced by a majority. In criminal cases the jury was twelve in number, and the verdict was required to be unanimous. It had jurisdiction above five pounds, and exclusive jurisdiction up to twenty pounds. An appeal lay to the Court of Assize, the ultimate court. It was held annually in the city of New York, and was constituted of the Governor and Council, and such justices of the peace as chose to attend. It had original civil jurisdiction above twenty pounds, and criminal jurisdiction. All cases, both original and appellate, were tried by a jury, originally of six, afterward of twelve. The Governor had power to call a special session, and to summon a court of oyer and terminer for the trial of criminal offenses when no Court of Assize was appointed to sit within two months. The latter power seems to have been used but twice. The Court of Assize ultimately grew into a legislature. The court of burgomaster and schepens continued for ten months after the conquest, when Governor Nichols abolished the Dutch government, and substituted for burgomaster, schepens and schout, the mayor, aldermen and sheriff,—a change nominal rather than substantial—and called the court the Mayor's Court. The records were kept in English and Dutch, and civil causes were to be tried by a jury of twelve. Otherwise causes continued to be tried by the summary proceedings of the Dutch, and indeed jury trials did not come much into vogue for many years. There was no distinctive Court of Chancery until 1683. The town court had equitable jurisdiction to five pounds, and in the Court of Sessions this jurisdiction was unlimited. This court granted a divorce for adultery in 1671. The court of burgomaster and schepens had exercised the same power. This power was vested in the Court of Chancery by act of the Legislature in 1787. It seems that no absolute divorces were granted from 1683 until after that act.

In 1673 the city was retaken by the Dutch, and remained in their hands a year, when it was again surrendered by treaty. During the interim the old court of burgomaster and schepens was re-established. On the surrender, the English mode of administration was resumed. There were two Courts of Sessions on Long Island, one at Esopus (Kingston) and one at Albany. A Court of Assize was held at New York

in 1682, with twenty-nine members. English special pleading was introduced about the latter date, but the English procedure did not supplant the Dutch until between 1704 and 1718. Special pleading seems to have driven out the custom of arbitration, but actions of account continued to be arbitrated or referred until 1772, when the practice was settled by statute. Governor Andros was authorized by the King to erect a court of admiralty, but he simply issued a few special commissions for such trials, and otherwise the Mayor's Court entertained them.

In 1683 a General Representative Assembly was convened by Governor Dongan, and constituted four courts:—a petty court for towns; a county court of sessions; a court of oyer and terminer or general jail delivery; and a court of chancery for the whole Province. The Town Court was held monthly, by three commissioners appointed by the Governor, without a jury, and had jurisdiction of debt and trespass not exceeding forty shillings. The Court of Sessions was held by the mayor and four aldermen, quarterly, in the city of New York; and by three justices of the peace, three times a year, in Albany, and semi-weekly in other counties. Its jurisdiction, both civil and criminal, was unlimited; it had no jury; and it had a clerk, a marshal and a crier. The Court of Oyer and Terminer was composed of two judges, appointed by the Governor, each holding a circuit semi-annually in every county, and associating with him four justices of the peace of the county, and in the city of New York the mayor, recorder and four aldermen. This court had general original and appellate jurisdiction, at common law, both civil and criminal. The Court of Chancery was held by the Governor or Council, the Governor having power to depute a chancellor. The Court of Assize was abolished by the General Assembly in 1684. The first judges of the Court of Oyer and Terminer were Matthias Nicholls and Thomas Palmer.

The King, displeased with the acts of the General Assembly, vested all legislative power in Governor Dongan and his Council, in 1686, and specially authorized him to erect courts and appoint judges. This new commission also provided an appeal to the Governor and Council in all cases involving more than £100, with a further appeal to the King and Privy Council where the amount at issue exceeded £300. Dongan made no changes in the judicial organization, except to constitute himself and his Council a "court of judicature," sitting monthly, to determine all matters of difference between the King and the inhabitants concerning lands, rents, rights, profits, and revenues. The Governor and Council were thus a court of chancery, a court of exchequer, and a final provincial court of appeal. The first session of the Court of Chancery was on the 16th of February, 1683, and it was to be held six times a year thereafter.

In 1686 Dongan granted a charter to the city of New York, empowering the inhabitants to elect mayor, recorder and aldermen, any three of whom,—the mayor or recorder always making one,—were constituted a court of common pleas, to sit weekly, in personal actions, and to hear and determine all complaints of petty criminal offenses. The latter court sat every two or three weeks, and soon practically superseded the Court of Sessions in the trial of such criminal complaints.

On the accession of William and Mary, a representative assembly of the Province was authorized, which organized the judicial department anew. <sup>[7]</sup> This act changed the town courts into courts of justices of the peace ; made a court of common pleas for each county, except New York and Albany, to be held by a

judge appointed by the Governor; made courts of general sessions for each county ; and continued the Court of Chancery, as under the act of 1683. The General Sessions had only criminal jurisdiction; the Common Pleas only civil. The former were held twice a year except in Albany and New York, where they were held respectively three and four times a year. The jurisdiction of the Common Pleas was the same as of the former Court of Sessions, and its term began the next day after the close of the Sessions, each being limited to two days — a significant commentary on the amount of litigation and crime, and the preparedness of the lawyers, in those days as compared with these.

By this act also was created the Supreme Court in the city of New York, composed of a chief justice and four assistants, to be appointed by the Governor, and having unlimited jurisdiction of all actions, civil and criminal, as fully and amply as the Courts of King's Bench, Common Pleas, and Exchequer in England, with power to make rules and ordinances and regulate its practice. The Court of Oyer and Terminer was abolished, but its name was bestowed on the criminal side of the Supreme Court. Joseph Dudley was the first chief justice, with Thomas Johnson as second judge, and William Smith, Stephen Van Cortland and William Pinthorne as associates. The act was but for two years, but it was continued by successive renewals until 1698. By the renewal of 1692 the court was required to sit twice a year in the city of New York, and one of the justices to go the circuit and hold court once a year if necessary in every other county. Owing to dissensions between the Assembly and Governor Bellamont in 1698, the act was not renewed, and the Province was without courts for a short period; but in the next year the Governor, by virtue of the power to erect courts, specified in his commission, re-established all the courts as they had lately existed, except the Court of Chancery. This was re-established by his successor, Lieutenant-Governor Nanfan, in 1701, by order of the English lords of trade. About this time William Attwood came out, commissioned by the King as chief justice, and authorized to act as judge in admiralty.

At this early day the Court of Chancery excited the opposition of the colonists. They complained of its arbitrary decrees and its exorbitant fees. Mr. Butler says, in his *Outline of the Constitutional History of New York*: "The Court of Chancery, as held by one man, and that man generally a stranger to the country, and always the immediate representative of the Crown, was especially obnoxious to public prejudice." Lord Cornbury, in 1702, suspended the court, and referred the matter of fees to Chief Justice Attwood, and De Puyster, second justice of the Supreme Court, who two years afterward reported a table of fees. Cornbury then re-established the court, ordering it to be conducted according to the practice of the English Chancery. He also ordered four sessions of the Supreme Court, of five days each, to be held in the city of New York, and by virtue of this order that court was held down to the Revolution.

The opposition to the Court of Chancery continued, and became more radical. The Assembly, in 1708, resolved that the establishment of that court by the Government, without consent of the Legislature, was illegal, unprecedented, and dangerous to the liberty of the subjects. The court fell somewhat into disuse; but Governor Hunter, in 1710, revived it, assuming the office of chancellor, and appointing two masters, two clerks, an examiner, and a register. The opposition intensified. One source of it grew out of the

subject of rents, the feeling of anti-rent being thus early exhibited. On the sale of lands by the Crown, quit-rents were reserved, which had been negligently suffered to accumulate in arrear, and the Court of Chancery was used as an instrument in their collection. Thus the small land-holders were hostile to the court. On the other hand, the great land-holders, who had received inordinate grants from the Governors, and in return had conferred "gratuities" on them, feared that the Crown officers might seek to invalidate these corrupt dealings in that court, and thus they were hostile to it.

The court was regularly continued till 1727, when the Assembly having adopted violent resolutions against its corruption and oppression, the Council passed an ordinance correcting many of the abuses, and materially reducing the fees. The consequence of the latter expedient was, as the historian Smith says, that "the wheels of the Chancery have ever since rested upon their axis—the practice being contemned by all gentlemen of eminence in the profession."<sup>[8]</sup>

Up to Hunter's time the court seems to have been composed of the Governor and one or more members of his Council, or when the Governor did not act, of the chief justice and some of his associates, who were generally members of the Council. But Hunter and most of his successors generally sat alone as chancellors down to the Revolution. An early but unsuccessful attempt was made by the justices of the Supreme Court to assume equity jurisprudence on the Exchequer side. The records of the Court of Chancery before the Revolution are few and scanty. The Assembly in 1737, however, declared that "few of the Governors had talents equal to the task of chancellor, and so it was executed accordingly—some of them being willing to hold the court, others not, according as they happened to be influenced by those about them."<sup>[9]</sup>

The hostility to the Court of Chancery extended to the Court of Exchequer, the colonists insisting that the Crown had no right to erect courts to adjudicate their affairs except such courts as the colonists should approve. This theory was just as fatal to the Supreme Court as to the Courts of Chancery and Exchequer, for all alike sprang from the warrant of the Crown. The dispute between the Assembly and the Governor reached its climax in the conflicting claims of Van Damm and Cosby to the Governor's salary in 1733, when a bill having been filed in the Supreme Court on the equity side, that court held that it had no jurisdiction, the chief justice, Morris, dissenting. Out of this grew the famous accusation of libel, against the printer, Zenger, in which Andrew Hamilton, of Philadelphia, urged the doctrine that in such cases the jury were judges of the law as well as of the facts, and procured an acquittal.<sup>[10]</sup> This dispute became a party question, but at length subsided in the more absorbing interest of the Spanish and French and Indian wars. From 1735 to the Revolution the business of the Chancery was very small and unimportant.

The judges of the Supreme Court at first were appointed by the Governor, and held office during his pleasure. The chief justices, however, after Smith, with one exception, were appointed in England by warrant requiring the Governor to issue letters patent. Thus the chief justices held during the pleasure of the Crown, the *puisne* judges during the pleasure of the Governor. This precarious tenure led to

removals for party reasons. The exception in the appointment of chief justices above alluded to was the case of De Lancey, to whom Governor Clinton, in 1746, without warrant from the Crown, issued a commission to hold during good behavior. On his death, in 1760, the other judges demanded new commissions upon the like tenure, but this being refused by the Crown, they resigned. The demand never was acceded to. After 1758 the number of judges was reduced to four.

The colonial chief justices were Joseph Dudley, William Smith, Abraham De Puyster, William Atwood, John Brydges, Roger Mompesson, Lewis Morris, James De Lancey, Benjamin Pratt, and Daniel Horsmanden. They were nearly all men of ability. Smith, however, was not bred to the law, and Atwood was removed within a year by Lord Cornbury for corruption. The judges salaries were meagre, varying at different periods from £100 to £500. Neither judges nor lawyers wore any official costume. The *puisne* judges were generally selected from the great landowners, and generally knew but little law and were men of small capacity.

In 1753 the appeal to the Governor and Council was limited to cases involving over £300, and the further appeal to the King and Privy Council to cases involving over £500. In 1730, by Governor Montgomery's charter, the Court of Sessions in the city of New York was ordered to sit quarterly, and the Mayor's Court every Tuesday. The mayor, recorder and aldermen, or any one of them, might hear cases up to forty shillings, with or without a jury. Eight specified attorneys were appointed to practice in the Mayor's Court, and their successors were nominated by the court and approved by the Governor. These courts continued thus until the Revolution.

Probate jurisdiction, originally vested by the Duke's laws in the Court of Sessions, gradually fell exclusively into the hands of the Governor. In counties distant from New York, however, the proofs were taken in the Common Pleas and transmitted to the secretary's office at New York. The Governor appointed a delegate at that place for this business, and this court was called the Prerogative Court. <sup>[11]</sup> Subordinate delegates were appointed by the Governor for other parts of the Colony, who were called surrogates. In 1754 a judge of probate for the Province with general powers was appointed, with the title of the Court of Probate. Thereafter the Prerogative Court seems to have been directed by the Governor's secretary, and continued until the Revolution.

The lawyers of the early English period do not appear to have been a very admirable body. The first on record was John Tudor, who was recorder from 1704 to 1710, and died in 1715. Lord Bellamont, in 1698, said, as Judge Daly informs us, that "nearly all who then called themselves lawyers, and practiced in the colony, were men of scandalous characters; that none of them had ever been barristers, or aimed at any thing higher in England than the duties of an attorney; that one had been a dancing master, another was by trade a glover, and that a third, one Jamison, had been condemned to be hanged in Scotland for burning a Bible and blasphemy; that it was grievous to see the miserable way in which they mangled and profaned 'the noble English law, and that in addition to their ignorance they were all, with one or two exceptions, violent enemies of the government, and were doing a world of mischief by infecting the people with an ill disposition toward it." The bar at a later period improved in tone. In the

time of Chief Justice De Lancey, "as a body they could have done no discredit to Westminster Hall." Distinguished among them were William Smith, father of the historian; William Murray, and James Alexander; and just before the Revolution, flourished William Smith, the historian; Samuel Jones, father of the chief justice; John Morin Scott, Richard Morris, William Livingston, Benjamin Kissam, John Jay, James Duane, Gouverneur Morris, Peter R. Livingston, Jr., Egbert Benson, and Peter Van Schaick. Mr. Robert Ludlow Fowler says (Observations on the Particular Jurisprudence of New York, 20 Albany Law Journal, 330): "The dexterity of the pre-revolutionary lawyers, both in the court and in the Legislature, the studied decisions of the colonial courts, the splendid opinions of the colonial jurists and publicists, collected by the tory, Chalmers, all demonstrate the attainment of the colonial bar, and convince one that the law of English origin came in systematically and accurately. This conviction is supported by the respectful way in which Sir Henry Maine lately spoke of the education of the bar of America anterior to the Revolution of 1775. \* \* \* \* The chief reason we know so little of the colonial bar and its professional work is the utter absence of colonial reports; but he who reads the elaborate briefs of the colonial lawyers will have no cause to regret his study. In many respects, the industry, the intelligence, and the vigor of thought of many a colonial lawyer now stamps the character of American legislation, and in many respects does their work survive."




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*The Revolutionary Period and the Constitution of 1777.*

On the outbreak of the Revolution in 1775, all the colonial judges, except Robert R. Livingston, adhered to the cause of the Crown. Chief Justice Horsmanden continued to administer justice in the city of New York, under the Crown, until his death, in 1778. Justice Ludlow succeeded him, and two years after was appointed master of the rolls, and acted as judge in admiralty. He continued thus to act until the close of the war, when he removed to Canada and became chief justice of New Brunswick. Governor Robertson held a Court of Chancery in the city of New York monthly from January, 1781, until June, 1783. During the revolutionary period the royalists maintained possession of the city, of Long Island, and of part of Westchester, and exercised judicial functions in that territory.

During the first two years of the revolutionary period the republicans exercised judicial functions in the rest of the territory by means of district committees. Of these committees Judge Daly says: "They were usually composed of two or three persons; their proceedings were entirely *ex parte*, and consisted mainly in arresting and imprisoning all who were supposed to be favorable to the interests of the royalists, or who spoke disrespectfully of the republican cause, its leaders or adherents. The slightest suspicion or any expression of unfriendliness was sufficient to justify an arrest, and imprisonment without bail, for an indefinite period; and where, as was frequently the case, individuals were arrested without cause, they had not only to suffer imprisonment before they could obtain their discharge, but were compelled, upon receiving it, to pay all the costs and expenses that had been incurred by the unfounded proceedings against them. In fact, in the disturbed state of affairs, these tribunals were resorted to and made use of to gratify the private malice or the vindictive feelings of individuals; and their unjust and arbitrary proceedings gave rise to loud and general complaint."

In 1777 a convention of representatives, assembling at Kingston, adopted the first Constitution of the State. John Jay was its chief author, and it was adopted with only one dissenting vote. This Constitution recognized the Supreme Court, the Court of Chancery, and the County Courts already existing, <sup>[12]</sup> but added a court of last resort and for the trial of impeachments, called the Court for the Correction of Errors, formed on the principle of the English House of Lords and of the Colonial Council, and consisting of the Lieutenant-Governor, the senators, the chancellor, and the judges of the Supreme Court, the chancellor having no vote in the determination of appeals from his decrees, nor the judges in that of writs of error. (The chancellor and judges, however, might deliver opinions or arguments in support of their judgments.) The chancellor, the judges of the Supreme Court, and the first judges of counties were to hold office during good behavior until the age of sixty, and the other judges and the

inferior magistrates at the pleasure of the appointing power. The appointing power was vested in a council of appointment, consisting of four senators selected annually by the Assembly, and the Governor. This council had power to appoint and remove at will all officers of the State except as above specified. The chancellor and the judges of the Supreme Court, with the Governor, also formed a council of revision of laws, with the power of veto over acts of the Legislature, absolute unless such acts should be passed over the veto by a two-thirds vote of each house. By this Constitution three important provisions were made relating particularly to the administration of justice, namely: the right of trial by jury was to be preserved inviolate; parties impeached or accused of crime were to be allowed counsel as in civil cases; and the Legislature was forbidden to institute any new court except such as should proceed according to the common law. It was also provided that such parts of the common law of England, and of the statute law of England and Great Britain, and of the Colony of New York, as together formed the law of the Colony on the 19th day of April, 1775 (the day of the battle of Lexington), should continue, subject to alteration by the Legislature, to be the law of New York; except that all such parts of the common and statute law as might be construed to establish or maintain any particular denomination of Christians, or their ministers, as well as those which concerned the allegiance before yielded to, and the sovereignty claimed by, the King of Great Britain, or were otherwise repugnant to the Constitution, were expressly abrogated and rejected. It was also provided that legal process and proceedings should run in the name of the People of the State.

It is outside the province of this sketch to consider the provisions of this Constitution in other branches, but there can be little dissent from the views expressed by Mr. Butler in his *Outline of the Constitutional History of New York*: "When the unfavorable circumstances under which it was formed, and the little experience of its authors, or of the world, in free representative government, are duly considered, it will be regarded by every candid mind as a noble monument of the wisdom, the justice, and the patriotism of its founders." And Mr. Butler's criticism, that "It violated, in some material respects, the fundamental maxim which calls for the separation of the legislative, executive, and judicial powers," will also find general concurrence.

Under this Constitution Robert R. Livingston was appointed chancellor. He served until 1801, when he was succeeded by John Lansing, who in time was succeeded in 1814 by James Kent. John Jay was appointed first chief justice of the Supreme Court, and resigning in 1779, was succeeded by Richard Morris. The subsequent chief justices under the Constitution of 1777 were Richard Morris, Robert Yates, John Lansing, Jr., Morgan Lewis, James Kent, Smith Thompson, Ambrose Spencer. The first *puisne* judges were Robert Yates and John Sloss Hobart, who were succeeded by John Lansing, Jr. , Morgan Lewis, Egbert Benson, James Kent, John Cozine, Jacob Radcliffe, Brockholst Livingston, Smith Thompson, Ambrose Spencer, Daniel D. Tompkins, William W. Van Ness, Joseph C. Yates, Jonas Platt, John Woodworth. The early judiciary shows a resplendent list of names, which furnished a signer of the Declaration of Independence, a chief justice of the United States, an associate justice of that court, a foreign minister and several Governors.

In 1779 a legislative act was passed, creating a council or committee for the southern district of the

State, then in possession of the royalists, consisting of the Governor, the two houses, the chancellor, the Supreme Court justices, the attorney-general and the county judges, with governmental authority, and with power in any seven, including the Governor, to act for sixty days after convening in that part of the State. After the evacuation by the British in 1783, this committee was organized in New York city, and continued in session until the assembling of the Legislature. After this period the Supreme Court was held at New York and at Albany, the judges going on circuit as before. In 1792, a *puisne* judge was added, and in 1794, another, and the court, with the chief justice and four *puisne* judges, continued from the latter date until 1823.

There are no reports extant of the equity decisions of Chancellors Livingston and Lansing. An official reporter is as essential to the usefulness and reputation of a judge as a poet is to a hero, according to the Horatian maxim. So we may believe that there were capable judges before Kent, but reporters came in with him, and the judges who went before him suffer from the comparison.<sup>[13]</sup> It has been declared by a high authority, Chief Justice Duer, that Chancellor Kent rescued the Court of Chancery from a condition of utter inefficiency. Story was of the same opinion. On the other hand, an equally high authority, Chancellor Jones, has declared "that this august tribunal, though since covered with a halo of glory, never boasted a more prompt, more able, and more faithful officer than Chancellor Livingston." Mr. Fowler also says (Observations on the Particular Jurisprudence of New York, 23 Albany Law Journal, 287): "Those decisions of Chancellor Livingston bearing on jurisprudence, and preserved in the records of the council of revision, indicate the same qualities which so distinguished his career as a statesman and diplomat." The reports give Lansing's opinions as a member of the Court of Errors and the Supreme Court, but the most important of his remains are seventy-four rules of the Court of Chancery, the first adopted for that court, some of which, like that enabling bills to be taken as confessed for want of answer, were innovations, and all of which, as Mr. Fowler justly observes, "as they conduced to simplicity, indicate a philosophic conception of administrative jurisprudence."

But it is to James Kent that our jurisprudence owes most of our equity jurisprudence and large part of our common law, The name of this great lawyer is authority to-day in Westminster Hall almost as unquestioned as in our own country. Wirt said Kent knew more law than most of the other judges in the United States put together. He may reasonably be called the founder of the equity jurisprudence of this country. Following the great Chancellors Hardwicke and Eldon, he did not servilely imitate them, but he adapted the universal principles of equity to our young and novel institutions, and the legislation which defined them. Writing the first expositions of this great branch of the law, he naturally united the commentator with the judge. Nothing can surpass the learning, the patience, the acuteness, the sound sense, and the humanity of this most modest and most useful of the many great citizens to whom our State stands indebted for its prosperity. He is more generally known to fame by his Commentaries, which are quoted in every court and country by the side of Blackstone's, but the lawyer will always put even a higher value on his judicial opinions, so carefully wrought, and so well preserved in the official reports of Caine and Johnson. It is a circumstance of significance, in studying the Constitution of 1777, that the judicial services of this most eminent of our judges were lost to the State by his retirement, under the constitutional provision, at the age of sixty, and that he afterward wrote his Commentaries, an

edition of which he prepared after he became eighty years of age. <sup>[14]</sup>

The jurisdiction of the Court of Chancery was vague and unsettled until the Revised Statutes of 1828. In the celebrated case of *Yates v. People*, Chancellor Lansing assumed to supersede a writ of error to the Supreme Court, but this power was denied by the Court of Errors. Herein it is apparent its power was more limited than that of the English Chancery. But Chancellor Kent at a later day regarded its power as co-extensive with that of the English courts. But under the administration of Kent the Court of Chancery was one of the most influential courts that ever sat in this country. Mr. Fowler says (Observations on the Particular Jurisprudence of New York, 23 Albany Law Journal, 287): "It is probably not an exaggeration to state that the decisions of the Court of Chancery of New York have been of more value to the domestic jurisprudence of this country than those of any other tribunal, excepting the Federal Supreme Court."

Although we have no reports of the adjudications of the Supreme Court until 1799, <sup>[15]</sup> yet it is probable that its abilities were equal to the exigencies. The chief justices, Jay, Morris, Yates and Lansing, were eminent lawyers, and the *puisne* judges, except Hobart, were all bred to the law. Benson drew the rules adopted in 1796. Of him Kent said he did more to reform the practice of the court than any member before or after, and Chief Justice Duer said that as a master of special pleading he was hardly surpassed by Chief Justice Saunders himself. But the true formative period of the Supreme Court was from 1798 to 1823, under the lead of Kent, Spencer <sup>[16]</sup> and Thompson. Before the former date the proceedings, arguments and opinions were only promulgated in occasional private pamphlets, and lawyers and judges relied on English reports for precedents. But with the accession of Kent to the Supreme Court in 1798, we began to have precedents of our own, and our bench and our bar began to walk independently. <sup>[17]</sup>

The weak point of the Constitution of 1777, namely, the association of judicial and executive functions in the same persons, has already been touched upon. Additional emphasis may be gained by recalling the party abuse heaped on Kent and Spencer in those days. Kent was compared, in the constitutional convention of 1821, to the poisonous upas tree of Java, which destroyed all that came beneath its shade, and Spencer was told that he might have been a Holt or a Mansfield if he had kept away from the political arena. The most common political adventurers could not have been more openly assailed. So Fitz Greene Halleck, in "The Croakers," suggesting to Mr. Simpson, "manager of the theatre," the employment of the New York politicians in the dearth of actors, wrote:

" How nicely now would Spencer fit

For 'Overreach' and ' Bajazet.'"

Mr. Fowler says (Observations on the Particular Jurisprudence of New York, 23 Albany Law Journal, 389): "Yet these gentlemen were doubtless the victims of the ill-assorted alliance between the Legislature and the supervising power of the Council of Revision, or of that mistake in the original Constitution which vested the judicature, as a sort of third estate, with the negative on legislation in all

cases. Oftentimes the majority of the Legislature were unable to pass a bill over the veto of the Council and then their indignation would be visited on the judges who defeated them; the votes of the judges in the Council were attributed to political bias and not to conviction, and they were denounced with all the accompaniments of mere political virulence. This denunciation came ultimately to affect the usefulness of the Supreme Judiciary under the first Constitution and to tarnish their otherwise splendid administration of the law."

*The Constitution of 1823.*

A constitutional convention was held in 1821. The main inducement was a public desire to amend the suffrage law, by dispensing with the freehold qualification; but in the result important modifications of the judiciary system were effected. The structure of the Supreme Court was altered by increasing the number of judges and in the assignment of their duties. By the new Constitution and the consequent legislation the State was divided into eight senatorial districts and as many correspondent judicial circuits, in every one of which there was a circuit judge for the trial of causes, to hold the Court of Oyer and Terminer, and perform the duties of a justice of the Supreme Court at Chambers. From these judges there was an appeal to the Supreme Court, which was composed of a chief justice and two associates. Thus the Supreme Court judges were relieved of circuit duty, and "deprived of the political advantages conferred on them, as it was supposed, by an official tour in the name and under the authority of the majesty of the law." This was also invested with an appellate jurisdiction over the judgments of the inferior courts. The Court for the Correction of Errors was preserved as under the Constitution of 1777. The new Constitution provided that equity powers might be vested in the circuit judges. Accordingly in 1823 an act was passed erecting equity courts in the several circuits, to be held by the circuit judges. Shortly after, however, these distinct equity courts were abolished, and general equity jurisdiction was given to the chancellor, while on the circuit judges were conferred equity powers as vice-chancellors. "In 1831, owing to the great increase of equity business in the city of New York, the offices of vice-chancellor and circuit judge were disunited, and a separate vice-chancellor created for the first circuit. In 1839, in consequence of the further increase of business, an assistant vice-chancellor for the first circuit was created for the period of three years; but in the following year, 1840, the office was made permanent, and the assistant vice-chancellor authorized to hear any cause pending before the chancellor, or before any vice-chancellor, and the Court of Chancery continued thereafter, composed of a chancellor, a vice-chancellor of the first circuit, an assistant vice-chancellor, with the circuit judges acting as vice-chancellors in the other circuits, until the court was abolished by the Constitution of 1846."<sup>[18]</sup> The Courts of Common Pleas outside the city of New York were reorganized, and consisted of a first judge, of the degree of counsellor-at-law, and four associate judges. In 1828 the Superior Court of the city of New York was created, with a chief justice and two associates, with unlimited jurisdiction in actions at law commenced by the service of process in the city of New York, and appellate jurisdiction over the judgments of the Marine Court and the courts of assistant justices in that city. The number of justices was subsequently increased to six, and the appellate jurisdiction was transferred to the Common Pleas. The Common Pleas of the city of New York was constructed out of the Mayor's Court, with a first judge, the mayor, recorder and aldermen being still empowered to sit in it, but never

doing so, except to form the so-called County Court for the impeachment and trial of municipal officers. By the new Constitution the higher courts were empowered, as by the Constitution of 1777, to appoint their own clerks.

The Constitution of 1823 wrought two other changes of the first importance to the judiciary;—it abolished the Council of Revision and the Council of Appointment, and vested the veto power in the Governor, and the power of appointment of all the higher judicial officers in the Governor with the approval of the Senate. Thus the judges were separated from legislative functions and duties, and their own appointment was rendered less dependent on a clique of senators. These two changes were undoubtedly beneficial. Of the mode of appointment provided in the Constitution of 1777 Governor Clinton said: "If the ingenuity of man had been exercised to organize the appointing power in such a way as to produce continual intrigue and commotion in the State, none could have been devised with more effect than the present arrangement. "The investing of the judges, appointed to construe and administer the laws, with power to annul them by the veto was contrary to well-recognized principles of government. Under the new Constitution justices of the peace were to be appointed by the boards of supervisors and the county judges, but in 1826 this provision was changed by making them elective. The tenure of the higher judicial officers continued as under the Constitution of 1777, during good behavior until the age of sixty; but they were removable by joint resolution of the Senate and Assembly, by a concurrence of two-thirds of the latter and a majority of the former.

The chancellors during this period were Nathan Sandford, Samuel Jones and Reuben H. Walworth. The most celebrated name among these is that of Walworth, who as chancellor is even better known than Kent as chancellor. He was appointed chancellor in 1828, at the age of thirty-eight, and held the office until the court was abolished in 1848.<sup>[19]</sup> Possessing a less original and creative mind than Kent, it has been said he "widened, beautified and made solid the paths which his predecessor hewed out." He "brought to his office a marvellous industry, a keen intelligence, wide and various learning, keen humor, and an irreproachable integrity."<sup>[20]</sup> His rare judicial qualities are exhibited in the ten volumes of Paige's and the three volumes of Barbour's Chancery Reports, wholly taken up with his decisions, and in the decisions of the Court of Errors, reported by Wendell, Hill and Denio. In every important appeal from the Supreme Court we find an opinion of the chancellor."<sup>[21]</sup> Judge William Kent, son of the great chancellor, chief justice and commentator, said, "No court was ever under the guidance of a judge purer in character or more gifted in talent than the last chancellor of the State of New York;" and Murray Hoffman, in the last days of the court, declared that "the patriot can breathe no more useful prayer for his native State than that the future administration of justice may be distinguished by intelligence, learning and integrity, such as have illustrated the Court of Chancery from the days of Robert R. Livingston to the present hour." There were upwards of ninety appeals from this chancellor's decisions, and his decrees were reversed in thirty cases. He was also frequently in the minority in the decision of appeals from the Supreme Court. Still, it may be doubted whether the chancellor is not now a greater legal authority than the Court of Errors. The first vice-chancellor was William T. McCoun, who was succeeded by Lewis H. Sandford. The assistant vice-chancellors were Murray Hoffman, Lewis H.

Sandford and Anthony L. Robertson. In 1839 the duties of circuit judge and vice-chancellor in the eighth circuit were separated, and Frederick Whittlesey was appointed vice-chancellor for that circuit.

The chief justices of the Supreme Court during this period were John Savage, Samuel Nelson, Greene C. Bronson and Samuel Beardsley; and the associate justices were Jacob Sutherland, John Woodworth, William L. Marcy, Samuel Nelson, Greene C. Bronson, Esek Cowen, Samuel Beardsley, Freeborn G. Jewett, Frederick Whittlesey, Thomas McKissock. It would be difficult to parallel these names, for public virtue, professional learning, and successful administration of the law, in the history of any other community. The name of Marcy is of national reputation, as Senator of the United States and Secretary of State; a man of the highest quality of native powers, our State recognizes him as perhaps the greatest of her statesmen. Judge Nelson served his country, in our State and on the Federal supreme bench, for half a century; a man of leonine strength and sagacity. The reputation of Judge Cowen is also a national possession. It is doubtful that any other State judge, excepting Kent and Shaw, is so well and widely known throughout the country. He was possessed of great native acuteness, displayed an unparalleled industry, and acquired prodigious learning. His Treatise on Justices' Courts and his Notes on Phillips Evidence, written in association with Nicholas Hill, stand on the shelves of nearly every lawyer in the land—a mine of professional learning. The nine volumes of his reports are among the best.<sup>[22]</sup> Judge Bronson was a man of marvellous brilliancy and power. Seldom has any court been composed of three such legal giants as Nelson, Cowen and Bronson, and seldom have they been succeeded by such men as Beardsley and Jewett. Our Supreme Court, under these eminent men, may be declared the finest fruit of the system of an appointed judiciary.

During the same period the circuit judges were Ogden Edwards, Samuel R. Betts, William A. Duer, Reuben H. Walworth, Nathan Williams, Samuel Nelson, Enos T. Throop, William B. Rochester, John Birdsall, James Emott, Esek Cowen, Daniel Moseley, James Vanderpoel, Addison Gardiner, Charles H. Ruggles, Robert Monell, Hiram Denio, Isaac H. Bronson, Greene C. Bronson, John Willard, John P. Cushman, Philo Gridley, Nathan Dayton, William Kent, Amasa J. Parker, Bowen Whiting, John W. Edmonds, John B. Skinner, Hiram Gray, Seward Barculo. Many of these received eminent recognition and promotion in the next period.

The Common Pleas of the city of New York was represented during this period by such men as John T. Irving, Charles P. Daly, and Lewis B. Woodruff; and the Superior Court, under the administration of Thomas J. Oakley, John Duer, Lewis H. Sandford, Murray Hoffman, and their successors, has acquired a degree of authority and respect throughout this country, especially in matters of commercial law, scarcely second to our Supreme Court.

In the Court for the Correction of Errors, during its earlier period, the senators pronounced comparatively few opinions. At a later date senatorial opinions became more frequent. The chancellor and one or more of the law judges generally led off, and the senators followed with opinions or contented themselves with those delivered by the magistrates. In the early part of this century Attorney-General Woodworth, at the same time a senator, is recorded in a few instances as having delivered an

opinion. The senators who most frequently pronounced written opinions were DeWitt Clinton, William H. Seward, Gulian C. Verplanck, Alonzo C. Paige, Luther R. Bradish, William Ruger, Erastus Root, Harvey Putnam, John A. Lott, Lyman Sherwood, Elijah Rhoades, Henry W. Strong, Abraham Bockee, John Porter, Addison Gardiner, Hiram F. Mather, Nathaniel P. Tallmadge, John W. Edmonds, Albert H. Tracy, Leonard Maison, Samuel L. Edwards, David Wager, Gabriel Furman, John Crary, Charles Stebbins, Cadwallader D. Colden, John Sudam, John C. Spencer. Senators Putnam, Verplanck, Spencer, Colden, Edmonds, Edwards, Tracy, and Maison gave numerous opinions, very generally characterized by extensive learning and careful elaboration. Senator Verplanck's were among the most numerous, and are among the most learned and elegant judicial essays ever written in this State. Mr. Verplanck was a man of remarkable scholarship, and has left behind him an enviable reputation both in law and letters.

Pausing now on the eve of a great judicial revolution, that swept away old courts and still more venerable procedures, and introduced novel substitutes which have since set the legal fashion for a large portion of the English-speaking communities, we may usefully spend a few moments in reviewing the alleged defects of the old order of things.

Foremost and most general was the complaint against the mode of appointing the judges. The people, by the exercise of half a century of freedom and independent judgment, and a sense of personal responsibility, had grown to have such confidence in their own discrimination that they deemed themselves better qualified to select their own judges than a single agent, or several agents, of their own appointment could possibly be to select their judges for them; that the inhabitants of a particular locality could more wisely choose between candidates residing among them, than a Governor, who living at a distance could generally know of them only by rumor; that the open strife of popular canvass and election was less to be dreaded than the secret intrigues of the Governor's Council Chamber; that the favorite of the people of his district was more to be trusted than the favorite of the Governor and his band of advisers; that a feeling of responsibility to the people was a better guaranty of fidelity in a judge than a sense of personal obligation to a single man; in short, that if the people could be trusted to choose their own rulers, they were quite fit to select their own judges. Against these views was urged the impolicy of bringing the bench within the domain of political strife, and the wisdom of preserving its occupants free from any sense of party obligation and any danger of party favoritism. This is not the place for the discussion of this serious question,— in respect to which the most enlightened Commonwealths of this country still radically differ, and which can never be settled for any community except by practical results. One thing was evident: the appointing system did not uniformly secure judges who were not politicians, nor save some of them from the popular belief and accusation that they continued to be politicians after reaching the bench.

*Second:* The people were dissatisfied with the constitution and workings of some of the courts. The ultimate court, the Court for the Correction of Errors and Appeals, although copied from the House of Lords of the mother country, differed materially from that body. The lords held place mainly by inheritance, and always for life; the senators held by popular ejection and for short terms. The one was aristocratic and permanent, the other democratic and fluctuating. It may be noted in passing that the

advocates of the practice of appointing judges could not very consistently cleave to the Court of Errors, for that body was mainly elective, and so the most important legal interests of the State were put within the arbitrament of judges springing from and responsible to the people. Specific objection was made to this court, because it was essentially a political and legislative body; and the union of judicial functions with legislative was contrary to our theories of government; because in practice the court was too numerous, and its judgments, if not partisan, were too apt to partake of the nature of a town meeting vote; because a considerable number of the court were laymen without any knowledge of law, and yet not apt, like the lay lords, to defer to and be ruled by the judgments of the lawyers;<sup>[23]</sup> because the senators had no time, apart from their legislative duties, to examine and reflect upon legal questions and pronounce deliberate and intelligent opinions; because the senators too often divided upon party lines; and because the court for all these reasons did not command popular confidence and respect. After this lapse of time it is easy to see that the judgments of this court do not possess the authority which ought to attach to the judgments of the ultimate court of a great Commonwealth.

*Third:* The people were dissatisfied, as they had always been, with the Court of Chancery. It was regarded as tedious, costly, and capricious, and as frequently announcing a worse rule of law, while professing to utter a higher and better, than the common-law courts. The extreme inconvenience and the frequently ruinous consequences of the distinction between equitable and legal remedies excited great hostility. The suitor was frequently driven to and fro between the two courts, each insisting that the other was his appropriate tribunal. Between the two stools of law and equity he came to the ground. Essaying to enter the temple of justice he was expelled for coming in at the wrong door, and frequently was utterly denied admission because the guardian of each portal thought he should apply at the other. The popular discontent with this court was deeper than with the Court of Errors, but its decisions have proved of far greater value, and have become a homogeneous part of our present jurisprudence, thanks to the abilities and virtues of two chancellors, Kent and Walworth, whose names are scarcely less conspicuous and splendid than those of Hardwicke and Eldon. Under the Constitution of 1823 the successful administration of both legal and equitable powers by the circuit judges demonstrated the practicability of dispensing with a distinctive equity court, and paved the way for that decisive change.

*Fourth:* The people were dissatisfied with the constitution of the Courts of Common Pleas, by reason of the large infusion of laymen and lawyers of inferior attainments. The worst results of the appointive system, it was alleged, were visible here. Grave objection was also made to the number of judges on this bench, which seemed to answer no useful purpose save to enable the Governor to reward his friends with office. It may pretty safely be said that the system was susceptible of improvement in this point.

*Fifth:* The people were dissatisfied with the tenure of the judicial office. On the one hand, the rule that the judge must descend from the bench at the age of sixty, seems now strangely short-sighted. It lost the State twenty of the best and most honorable years of her greatest judge, Kent, as we have seen, although what was the loss of the State was the gain of the world. On the other hand it was urged and believed, that it was unwise to give the judges so long a single lease of office as holding till sixty would generally imply, and that it would be better to bestow a term of moderate and certain duration, to be repeated or

not, at the will of the people.

Finally, it was discovered by experience that the circuit system was entirely inadequate to the business of the greatly increased population. Mr. Butler says, very justly, that this "formed one of the chief necessities for calling a new convention.



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*The Constitution of 1846*

"The Convention of 1846," says Mr. Butler, "had its origin in the failure of certain amendments on the subject of State debts and liabilities, proposed in 1844, to obtain, in the following year, the assent of two-thirds of each house, though they commanded that of a majority of each." So general was the conviction, however, that the judiciary department needed thorough reorganization, that the most important result of the deliberations of the convention was in this direction.

The Constitution of 1846 abolished the Court for the Correction of Errors and the Court of Chancery, and reorganized the Supreme and Circuit Courts, and the County Courts except in the city of New York. In place of this it created, *first*, a Court of Appeals of eight judges, four to be chosen by the electors of the State, and four to be selected from the class of justices of the Supreme Court having the shortest time to serve, and to sit one year each; *second*, a Supreme Court, with general jurisdiction in law and in equity, consisting of thirty-two justices, to be chosen by the electors, in eight separate districts, the electors of each district choosing four, the justices first chosen to be classified so that one justice in each district should go out of office every two years, but every justice afterward chosen to hold for eight years; general terms of the court to be held in the several districts by three or more of the justices; special terms and circuits to be held by any one or more of the justices, any one or more of whom were also to preside in Courts of Oyer and Terminer; *third*, a County Court, of limited civil jurisdiction, original and appellate, in every county (except in New York, where the General Sessions, the Common Pleas and the Superior Court were left subject to the direction of the Legislature), to be held by a single judge to be chosen by the electors of the county, for four years, and to be invested with equity jurisdiction in special cases by the Legislature, and in certain counties to be charged with the duties of the surrogate, and in all counties, with two justices of the peace, to hold Courts of Sessions of criminal jurisdiction.

The radical changes wrought by the new Constitution were therefore as follows: *First*, the judges were to be chosen by popular election instead of gubernatorial appointment; *second*, they were to hold for terms of eight years, but no limitation by reason of age was provided; *third*, the Equity Court was abolished, and jurisdiction both at law and in equity was centered in the Supreme Court; *fourth*, the Court of Appeals, wholly of lawyers, was substituted, as the ultimate court, for the Court for the Correction of Errors, composed in part of the senators, among whom were laymen; *fifth*, the county judges were substituted for the Courts of Common Pleas.

The new Constitution further provided that admission to practice in all the courts is secured to every

male citizen of good moral character, possessing the requisite learning and ability; that parties were to be enabled to waive a jury trial in civil causes; that testimony in equity cases should be taken in the same manner as in cases at law; that witnesses should not be unreasonably detained, and no person should be incompetent as a witness on account of his opinion on religious subjects; that the statute laws should be speedily published and the judicial decisions reported; that tribunals of conciliation for the decision of controversies voluntarily submitted may be established; and that commissioners should be at once appointed to simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts. In addition, as Mr. Butler said in 1847, the convention "contemplated a bold, and in the judgment of some, a startling innovation in our system of jurisprudence, for the Legislature are also directed to appoint commissioners, to reduce, into a systematic code, the whole body of the law; or so much, and such parts thereof, as they may think practicable or expedient."<sup>[24]</sup> But, as the same eminent lawyer further observed, "the instrument exhibits an earnest desire, on the part of its framers, to reform and simplify the practice of the law, and to render the administration of justice less dilatory and expensive than heretofore."

In accordance with the injunctions of the Constitution the Legislature appointed commissioners to revise the practice. The appointees were Arphaxad Loomis, David Graham, and David Dudley Field. These gentlemen prepared the instrument known as the New York Code of Procedure, which was adopted in this State in 1848, and with amendments, modifications and additions, still forms our law of practice, and the principles of which have been adopted in many other of our States and in England, to a greater or less extent. The leading provisions of this Code are as follows: Writs and forms of actions are abolished; actions are commenced by summons issued by the attorney; the pleadings consist of a complaint containing "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition," an answer, which in addition to denials may set up counter-claims, "in ordinary and concise language, without repetition," and a reply to such counter-claims; there may also be a demurrer for certain specified causes; the plaintiff may compel a sworn answer by verifying the complaint; in considering pleadings for the purpose of determining their effect, they "shall be liberally construed, with a view of substantial justice between the parties;" if pleadings "are so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court may require them to be made definite or certain by amendment; sham, false, or frivolous answers may be struck out on motion; no variance between pleadings and proof is material, "unless it actually have misled the adverse party to his prejudice," and even then "the court may order the pleading to be amended, upon such terms as shall be just;" the party may amend his own pleading under certain circumstances and in certain particulars, as a matter of course; and the court may always, on motion, amend the pleading "in furtherance of justice" and on proper terms; and "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party." The jurisdiction of the several courts was defined; the four provisional remedies of arrest and bail, attachment, injunction, and claim and delivery of personal property, were established and regulated; the course of trials and appeals was pointed out, and several convenient provisions of evidence were made.

This act cut out for the judiciary a vast amount of arduous work. It is within the memory of comparatively few how great a storm of opposition and abuse it raised, both at the bar and on the bench.

[25] Looking back at this day, it is difficult to believe that provisions apparently so simple could necessarily have involved so much debate, contradiction, and adjudication. but a period of construction and alteration, lasting a third of a century, was at once entered upon. It may truly be said that no judiciary ever had a more onerous task thrust upon it. So accustomed were the judges at the adoption of the Code to the intricate and artificial system of pleading at law and in equity, that the change seemed to stun and bewilder them as it is with one who comes out from the clatter of machinery into the stillness of nature. It would be difficult to give a layman an adequate idea of the discrepancy between the two systems. There is now little difference of opinion as to the merits of the new system. Under the old system pleading was a precarious and difficult science. "Justice was a jealous God, deaf to the entreaties of her suitors, unless they prayed according to established forms." "The most skillful pleader was he who most deceitfully and ingeniously concealed from his adversary, until the moment of trial, all suggestions of the real nature of the action." Many a suit was decided and many a suitor was ruined upon the pleadings and against the merits. Slight variance between pleadings and proofs was fatal. The lawyers got pay in proportion to the extent of the web of words which they spun. It is unquestionable that the old science of pleading did much to defeat justice, to render lawyers hateful to the community, and to bring the courts into disrepute. [26]

Listening to the complaints of bench and bar, the Legislature did much, by amendments, to render the task of construction the more difficult and perplexing. Hardly was the meaning of a provision adjudged when the Legislature would change the phraseology, thus necessitating new construction. It is due to the Legislature, however, to admit that much of their subsequent legislation was in deference to the demands of reformers who were in advance of the Code. The subject of the competency of parties to testify in their own behalf will illustrate this thought. As the law stood before 1847, no party to a civil action, and no person having any interest in the event of the action, however remote, could be allowed to testify. He might, however, compel his adversary to testify, by filing a bill in chancery to that end and paying the expenses of both sides. In 1847, a law was passed allowing a party to call and examine his antagonist as a witness. In 1848 it was enacted that "no person offered as a witness shall be excluded by reason of his interest in the event of the action," but this did "not apply to a party to an action." In 1857 it was enacted that parties to civil action might be sworn and examined as witnesses in their own behalf, upon giving ten days notice in writing of the particular points of proposed examination. In 1860 the necessity of the notice was dispensed with. In 1867 the restriction upon the competency of husband and wife to testify for or against one another was to a very large extent removed. In 1869 persons accused of crime were made competent witnesses in their own behalf at their option. But the Legislature have hardly yet ceased to enlarge and restrict, amplify and condense these provisions and their phraseology. The radical change wrought by this alteration of the law of evidence and the construction of the successive amendments has given our courts a vast amount of labor. [27] The same may be said to be true, to even a greater extent, of the amelioration of the legal status of married women in respect to pecuniary rights, and the numerous changes of the statute law upon that important subject. In the matter

of evidence above pointed out this State was a pioneer, and in the other matter, if not the originator of the new and beneficial doctrines, she was one of the earliest disciples, and always a steadily advancing reformer.

The first chief judge of the Court of Appeals was Freeborn G. Jewett, and his associates were Greene C. Bronson, Addison Gardiner and Charles H. Ruggles. The first Supreme Court justices selected- to sit in that court were Samuel Jones, William B. Wright, Charles Gray, and Thomas A. Johnson. Chief Judge Jewett was succeeded by Greene C. Bronson, Charles H. Ruggles, Addison Gardiner, Alexander S. Johnson, George F. Comstock, Samuel L. Selden, Hiram Denio, Henry E. Davies, Ward Hunt, Robert Earl. The remaining associates were the last named, excepting Judges Gardiner, Ruggles, and Earl; and in addition, Samuel A. Foot, William B. Wright, Henry R. Selden, John K. Porter; Martin Grover, Lewis B. Woodruff, Charles Mason, John A. Lott. This is an array of names of which our State may well be and always has been proud. When Judges Alexander S. Johnson, Denio, Comstock, and Samuel L. Selden formed the permanent composition of that court, it was a combination of talents that would bear comparison with the famous old Supreme Court.

The Supreme Court judges of this period were: William F. Allen, Cornelius L. Allen, John W. Brown, Levi F. Bowen, William J. Bacon, Ransom Balcom, George G. Barnard, Augustus Bockes, Benjamin W. Bonney, Lucien Birdseye, Daniel Cady, William W. Campbell, Edward P. Cowles, Thomas W. Clerke, Charles Daniels, Charles C. Dwight, Noah Davis, Jr., Gilbert Dean, Charles H. Doolittle, James Emott, Henry P. Edwards, John W. Edmonds, Henry A. Foster, William Fullerton, Stephen W. Fullerton, Benjamin F. Green, Martin Grover, Charles Gray, Hiram Gray, George Gould, Ira Harris, Augustus C. Hand, Henry Hogeboom, Elisha P. Hurlbut, Frederick W. Hubbard, James G. Hoyt, Charles R. Ingalls, Amaziah B. James, Addison T. Knox, James G. Kings, Jr., William H. Leonard, William T. McCoun, Leroy Morgan, Theodore Miller, William Mitchell, Robert H. Morris, Nathan B. Morse, Eben W. Morehouse, Levinus Munson, John Maynard, Joseph Mullen, James Mullett, Richard P. Marvin, Daniel Pratt, Alonzo C. Paige, Amasa J. Parker, Platt Potter, Rufus W. Peckham, Charles A. Peabody, John M. Parker, James J. Roosevelt, Enoch H. Rosekrans, William Rockwell, Selah B. Strong, William H. Shankland, Theron R. Strong, Josiah Sutherland, James C. Smith, E. Darwin Smith, Seth E. Sill, William W. Scrugham, Henry W. Taylor, Moses Taggart, Henry Welles, James R. Whiting, Malbone Watson, Deodatus Wright. This list has since furnished a United States senator, four judges of the present Court of Appeals, and two commissioners of appeals.

If asked whether popular election was wisely substituted for gubernatorial appointment of the judges, our citizens may confidently point to the names above recited. They compare favorably with any nominations by the Governors either before or during the period in question. Many of them were previous appointees. Of the first elections Mr. Butler says: They "have fully sustained the confidence reposed by the convention of 1846, in the capacity of the people to select upright and able judges." They represented the best talents and the loftiest virtues of the legal profession of this period. Many of these men were not politicians. Some of them who had taken a lively interest in politics proved to be among the best judges. Almost universally they completely eschewed politics on reaching the bench. Political

motives had comparatively little to do with the nomination of most of them. Not infrequently both parties united in the same nomination, in districts strongly one-sided. Occasionally judges were elected of political tenets opposed to those of a majority of the electors of the district. Certainly such a thing as an accusation or a belief in any considerable number that a judge was swayed by political favoritism in his judgments, was almost unheard of. The judges were faithful, honest, learned, and industrious, and the people were satisfied with their merger of the appointive agency in the direct popular control.

But after this system had been in operation twenty years it was plainly seen to be quite inadequate to the prompt dispatch of the judicial business of the State, and to be open to several other grave objections.

*First:* The Court of Appeals and the Supreme Court were entirely unable to keep up with the business. The arrears in both courts were very great. In the former court it took four years to reach an unpreferred cause; in the latter, in many counties, almost as long. More judges were needed.

*Second:* It was felt that the arrangement by which judges sat in review of their own decisions was unwise; even if it worked little positive injustice, it subjected judges to severe animadversion. That it really produced little injustice is probable. Frequent instances could be cited in which judges voted to reverse even their own decisions. But such a system, theoretically unjust to the suitor, is certainly unjust to the judge, putting him under temptation, laying him open to misconstruction, and being harmful to his influence.

*Third:* It was believed that the term of eight years was too short; that it rendered elections too frequent, often remitted a judge to private life just as he had become most useful to the State, and possibly interfered with the complete independence of the judiciary. It was believed that a juster mean could be found short of a tenure for life.

*Fourth:* But on the other hand it was thought that it would be wise to impose a limitation of age, above that of the old Constitutions, and yet not beyond the period fixed by the Almighty as the boundary of man's power and usefulness. Here too it was believed that a just mean could be found between the limitation of the old Constitutions and the unrestricted tenure of the English judges.

*Fifth:* Fault was justly found with the fluctuating composition of the Court of Appeals. It was quite apparent that a court could not attain its highest usefulness when its membership, to the extent of one-half, was changing every year.

*Sixth:* Fault was found with the existence of eight independent and equal branches—the general terms—of the Supreme Court, frequently pronouncing discordant and inconsistent opinions, thus necessitating appeals, bringing justice into ridicule, and subjecting the suitor to costs, expense, and vexation. Full meed of respect was not yielded to the decision of a court which seemed only the eighth of a court.

These considerations led to a radical change of the judiciary system in 1870. [\[28\]](#)

It should be remarked that the commissioners appointed, in pursuance of the constitutional requirement to codify the entire law—consisting finally of David Dudley Field, William Curtis Noyes and Alexander W. Bradford—reported, in 1865, a Civil Code, a Penal Code and a Code of Criminal Procedure, thus forming, with the Code of Civil Procedure, a complete written system of law. None of these were adopted during this period, except the last named.

*The Judiciary Article of 1870.*

A constitutional convention having been called in 1867, a new judiciary article, the result of their deliberations, was submitted to the people, adopted by a majority of less than seven thousand votes in about half a million, and went into effect January 1, 1870.

Under this new system the Court for the Trial of Impeachments is composed of the president of the Senate, the senators, or a majority of them, and the judges of the Court of Appeals, or a majority of them. The Court of Appeals is composed of a chief judge and six associates, chosen by the electors of the State, and holding for a term of fourteen years, five forming a quorum and the concurrence of four necessary to a decision, with power to appoint and remove its clerk, reporter, and attendants. For the first election, such provision was made that the minority party was to be represented on the bench by two judges. A Commission of Appeals was constituted, consisting of five commissioners, four constituting a quorum, to dispose of the arrears of the old Court of Appeals. This Commission was composed of the last judges of the old Court of Appeals and a fifth commissioner appointed by the Governor. Its tenure was limited to three years, but was afterward extended two years. The existing judicial districts were preserved, but provision was made for five justices of the Supreme Court in the city of New York, and four in each of the other districts. Under the new article and the legislation in pursuance of it, the State was divided into four general term departments, instead of eight, as under the former Constitution, in each of which a general term is held, composed of a presiding justice and two associates, designated by the Governor from the Supreme Court justices, the presiding justice to act as such during his term of office, and the associates for five years unless their terms shall sooner expire. The general term is to sit in each of the eight judicial districts. The Supreme Court justices hold office for fourteen years. No judge or justice can sit in review of a decision made by him or by a court of which he was a sitting member. The judges of the Court of Appeals and the justices of the Supreme Court can hold no other office or public trust, and can be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. The number of judges of the New York Common Pleas is increased to six. The jurisdiction of the county courts is increased to \$1,000. In counties having a population not exceeding 40,000, the county judge acts as a surrogate. The tenure of the county judges is six years. No one shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age. Vacancies are temporarily filled by the Governor and Senate until election. The Senate, on recommendation of the Governor, by a concurrence of two-thirds of all the members elect, may remove all judicial officers except judges of the Court of Appeals, justices of the Supreme Court, justices of the peace, and judges and justices of inferior courts not of record. No judicial officer, except

justices of the peace, can receive any fees, nor can any judge of the Court of Appeals, justice of the Supreme Court, or judge of a court of record in the cities of New York, Brooklyn or Buffalo practice as attorney or counsellor or act as referee. The judges and justices of the higher courts receive a salary, not to be diminished during their official terms. County clerks act as clerks of the Supreme Court. The Legislature may establish inferior courts of civil and criminal jurisdiction.

Provision was also made for submitting to the people the question whether the offices of judge of the Court of Appeals, justice of the Supreme Court, county judge, judges of the Superior Courts in cities, the New York Common Pleas, and the Brooklyn City Court, should be filled by appointment. This question was so submitted in 1873, and determined in the negative, as to the Court of Appeals and Supreme Court judges, by a vote of 319,979 to 115,337; as to the other judges, by a vote of 319,660 to 110,725.

The first election of judges of the Court of Appeals resulted in the choice of Sanford E. Church as chief judge, and William F. Allen, Rufus W. Peckham, Martin Grover, Charles A. Rapallo, Charles Andrews and Charles J. Folger as associates; the first five being Democrats, the last two Republicans. Subsequent substitutions from time to time made Alexander S. Johnson, Theodore Miller, Robert Earl, Samuel Hand, George F. Danforth and Francis M. Finch associates. The court is now composed of Messrs. Rapallo, Andrews, Miller, Earl, Danforth, Finch and Folger. Of these the two first named and the one last named are the only remaining of the original members of the court on its organization eleven years ago. The other four died in office. Of these men, Messrs. Church, Grover and Peckham were of exceptional native vigor of intellect and common sense. The lamented chief judge, Church, was long one of the most prominent figures in the later political history of our State. He was recognized by bench and bar as the very model of the chief judge, well founded in learning, of broad and comprehensive modes of thought, sound judgment, untiring industry, and unwearied courtesy. He will long be held in high veneration and affectionate esteem by the citizens of our State. Judge Grover had an extremely incisive and far-seeing mind, and an industry perhaps unparalleled in our day, supported by a marvellous capacity for labor. The name of Judge Peckham is associated with the tragic fate of the steamship *Ville du Havre*, on which he perished in 1873 while going abroad in the endeavor to recuperate his health. These three judges had marked mental resemblances. Judge Allen was unquestionably one of the most accomplished lawyers who ever sat on the bench of this State, not only possessing extraordinary learning, but having a remarkable skill as a logician and unexcelled powers of expression. His opinions are an ornament to our jurisprudence. He also was prominent in politics before his accession to the bench, and like Chief Judge Church had held responsible State offices. The judicial career of these two men goes far to disprove the popular theory that a political aptitude and experience necessarily unfit the individual for the duties of the bench. <sup>[29]</sup>

In these men at least the love of justice and the sense of duty completely sank the politician and the partisan. It should be here remarked that the constitutional device to keep the bench of this court non-partisan as to its members has resulted in these few years in a bench now composed, temporarily, at least, of four Republicans and three Democrats. Thus has its political complexion changed. It is believed by the members of the court, and probably by the great mass of thoughtful citizens, that the court under its original organization and now is as free

from political bias as the imperfections of human nature will allow, and that its decisions have never been liable to the charge of being controlled or tinged by partisan motives.

The Commission of Appeals did the work assigned to it effectually and satisfactorily. The original commissioners were John A. Lott, Robert Earl, Ward Hunt, Hiram Gray, William H. Leonard. Alexander S. Johnson, John H. Reynolds, and Theodore W. Dwight were subsequent commissioners. The Commission not only did the work at first assigned to it, but disposed of a large amount of business afterward sent to it by the Court of Appeals, under the authority of a subsequent constitutional amendment, extending its term two years. The inevitable effect of having a divided appellate court was observed in two or three decisions pronounced by the Commission which were discordant with nearly contemporaneous decisions of the Court of Appeals.

The presiding justices of the general term departments of the Supreme Court have been Daniel P. Ingraham, Noah Davis, Joseph F. Barnard, Theodore, Miller, William L. Learned, Joseph Mullin. and the associates have been Albert Cardozo, George G. Barnard, John R. Brady, Noah Davis, Charles Daniels, Charles R. Ingalls, Jasper W. Gilbert, Abraham B. Tappan, John L. Talcott, Jackson O. Dykman, Platt Potter, John M. Parker, Augustus Bockes, Douglass Boardman, Thomas A. Johnson, E. Darwin Smith, James C. Smith, George C. Barrett, Charles Daniels.

The other names in the Supreme Court of this period are Enoch L. Fancher, Abraham R. Lawrence, Charles Donahue, Calvin E. Pratt, Peter S. Danforth, Theodor R. Westbrook, A. Melvin Osborn, Joseph Potter, Judson S. Landon, William H. Sawyer, Charles O. Tappan, George A. Hardin, Milton H. Merwin, James Noxon, William Murray, Jr., Edwin Countryman, David L. Follett, Celora E. Martin, David Rumsey, George W. Rawson, James L. Angle, George Barker, George D. Lamont, William H. Henderson, Albert Haight, Francis A. Macomber, Erastus Cooke, John C. Churchill, Edgar M. Cullen, William Rumsey, Charles C. Dwight.

In reviewing the working of the judiciary article of 1870, the following may be said to be the practical results: *First*, the Court of Appeals barely keeps up with its business by dint of the hardest exertion. There are no arrears of over one year in this court. *Unpreferred* causes are reached and disposed of in about a year. This result is at the expense of the health of its members, it is feared. It is undoubtedly true that the four deceased members shortened their lives by the enormous work of their later years. To enable the court to keep pace with the business, appeals to it were limited, in 1874, to cases involving at least \$500, exclusive of costs, unless certified by the general term to involve important questions of law. An effort to increase this limit to \$1,000 has recently been made, but was defeated. It is a grave question how long the court can continue to keep up with the rapidly accumulating mass of appeals without detriment to the public service. *Second*, the Supreme Court is not keeping up with its business, either at the trial or general terms. The general terms, in particular, are sadly overworked and heavily in arrears. In three of the departments, at least, the calendars are about as heavy as in the Court of Appeals, with three judges instead of seven to dispose of them, and without the benefit, which the ultimate court has, of a careful review of the cases by a lower appellate court. As to the trial terms, it is estimated that at no time are there less than some 10,000 causes on the calendars undisposed of. A recent investigator has

declared that the litigation of our State is larger than that of England.<sup>[30]</sup> At all events, it is apparent that the judicial force of the Supreme Court is quite unequal to the enormous amount of business, and that at no distant day some new provision must be made; but whether an increase in the number of judges is necessary, or whether the desired result can be attained by a new

system of distribution, is considerably mooted.<sup>[31]</sup> *Third*, on the other hand, it is thought that the county judges—certainly in the counties where they do not act as surrogate—are not occupied to any thing like the reasonable extent of their capacity. The enlargement of jurisdiction of the county courts has not relieved the Supreme Court, and nothing will probably divert business into those courts except a compulsory provision of jurisdiction or a denial of costs in certain actions brought in the Supreme Court. *Fourth*, the increased length of the term of judicial service is thought to be an improvement. *Fifth*, no serious fault is found with the limitation by reason of age. Justice has been done to judges removed by joint resolution of the Legislature, for causes not involving moral delinquency, by continuing to them one-half the salary for the unexpired balance of their terms, during their lives, not exceeding three thousand dollars a year (Laws of 1881, chap. 62); and to judges retired at the age of seventy, and who have served ten years, their salary is continued for the remainder of the term for which they were elected (Constitutional amendment of 1880).

During the period in question the Code of Civil Procedure received extensive amendments and additions, by a commission appointed to revise the statutes, consisting of Messrs. Montgomery H. Throop, Sullivan Caverno, Nelson J. Waterbury, James Emott, and Jacob I. Werner, so that it now comprises not only the substantial of the Code of 1848, but all the matters relating to procedure, scattered through the Revised Statutes, the session laws, and the court rules, and forms an entire law of civil practice. The first nine chapters of this revision went into effect September 1, 1877, and the last thirteen chapters, September 1, 1880. The necessary construction of this has already cost the judiciary considerable labor, which is not yet ended.

At the session of the Legislature in the present year (1881), after a lapse of sixteen years, the Penal Code and the Code of Criminal Procedure became laws, the former to take effect May 1, 1882, the latter September 1, 1881. These laws will necessarily pass through a period of construction, amendment, and reconstruction, devolving fresh, perplexing, and onerous labor on the judiciary. Three of the steps toward general codification, contemplated by the Constitution of 1846, have been made. It seems not improbable that the remaining step, the adoption of the proposed Civil Code, will be taken at no very distant day. It has already become the law of sixteen States, and it would seem that its parent State will not much longer deny it recognition. When this event takes place, a third period of construction will open to the judiciary, of vast extent and the gravest importance. Thus it is evident that our judiciary have great responsibilities and unparalleled labors before them.

In reviewing the moral history of our judiciary there seems to be but one conspicuously dark spot. It has been remarked that the question of the policy of returning to the appointive mode of choosing the judges

was submitted to the people in 1873. At this period many had lost faith in the public virtue in this regard. Two or three of the judges had proved grossly delinquent in their high trust. It is noteworthy, however, that they were all in the same locality, and subject to the same malign local political influence, which for a time seemed likely to corrupt all the fountains of legislation and administration. Outside that particular locality the breath of suspicion never attached to the judiciary. While the history of the Tweed rule, and the offenses of the judges alluded to are in one sense a deep shame and disgrace to our State, they at the same time have afforded a striking and tremendous vindication of the public virtue and outraged public sentiment, which sent the great political intriguer and corrupter to prison; impeached, deposed, and forever disqualified from office one judge, and compelled the resignation of two others. It is not improbable that the judges might have risen to the bench by appointment as well as by popular election. They were of fair repute when elected, and two of them, in spite of their unpardonable offenses, did much useful and intelligent judicial service. At all events, the history of that time shows the existence of a lively popular conscience and an inexorable popular sense of decency, honor and justice in the public service. The people exhibited a morality superior to partisan feeling and appeals, and it is not likely that the lesson learned by their servants at that period will need to be repeated. A republic that so nobly rose to such an emergency need never be despaired of.

It is frequently alleged that our courts of justice have declined in ability and usefulness. Much of this feeling is the natural spirit of the *laudator temporis acti*. It is undoubtedly true that their adjudications are less widely influential abroad than they were half a century ago,<sup>[32]</sup> but this is mainly due to the fact that they were then the most important of a very few. Her judges were few, and their judgments would have been received as authoritative even if they had not been men of great abilities. In our day, the jurisprudence of other communities has been settled, and they have able judges of their own. In our own State the particular talents of the judiciary are perhaps lost sight of in the great number of judges, and it may be there are none who tower above the high average. It would be strange, indeed, if our judiciary, having the advantage of the accumulated wisdom of their predecessors, should allow the courts to decline in usefulness and learning.

Such is an outline of the judicial history of New York, from the humble beginning under the simple Dutch colonial rule, for two hundred and fifty years, to the present time, when she has become the most populous, wealthy and influential of the American States. In a material view she is indeed the Empire State. It would be arrogating too much to claim for her the Empire in Law. Fortunately for the happiness of mankind, the best jurisprudence does not depend upon material resources, or great aggregations of population. But owing to the great men who early formed our jurisprudence, New York has made law not only for herself, but for most of the other States of the Union. Her judgments and those of Massachusetts have always been the most influential upon the nascent jurisprudence of the younger States. Her adjudications have long been listened to with deference even in the mother country, and this has grown rather than lessened down to this time. Her reforms in procedure alone have entitled her to a marked pre-eminence. She has always been creative in the domain of the law. With a decent conservatism, she has at the same time headed the advance of legal reform, and still marches in the van. That the laws which her lawyers have devised; her Legislature has enacted, and her judges have

construed and enforced, are now ruling a large part of the English-speaking world, and have even been adopted by our venerable mother country, is a prouder and more durable achievement for our State than all her material glory and power. Her judiciary have been the most numerous of any of the States. They have had the largest and the most various interests to protect, and the most intricate legal problems to solve. Great lights have shown from her bench, in every period, like beacons visible from afar, illuminating even the shores of foreign lands. In all times the mass of her judges have been just, humane, and God-fearing men, of good report, not greedy of gain, not ambitious of power, not anxious for fame; learned in the law, cultivated in letters, untiring in duty, unswerving from right, passionate lovers of justice and liberty. The names of most of them have been and can be but little known to fame, but their work has been a worthy part of the heritage of which the State is proud. Their reward is in her prosperity, glory, and happiness.

**JUDGES OF THE COURT**

- A. Robert Earl
- B. Charles Andrews
- C. Charles J. Folger.
- D. Sanford E. Church, Chief Judge,
- E. William F. Allen.
- F. Charles A. Rapallo.
- G. Theodore Miller.

**OFFICERS OF THE COURT**

- H. Amos Dodge, Court Crier
- J. F. Stanton Perrin, Deputy Clerk.
- K. E. O. Perrin, Clerk of the Court.
- L. A. J. Chester, Attendant.
- M. G. Parks, Assistant Clerk.
- N. H. E. Sickles, Reporter.
- X. J. Cooper, Doorkeeper.

**MEMBERS OF THE BAR**

1. Matthew Hale, Albany.
2. T. W. Dwight, N. Y. City.
3. Charles Hughes, Sandy Hill.
4. J. E. Burrill, N. Y. City.
5. A. J. Vanderpoel, N. Y. City.
6. Samuel Hand, Albany.
7. Wm. M. Evarts, N. Y. City.
8. Jno. K. Porter, N. Y. City.
9. W. C. Ruger, Syracuse.
10. Wm. H. Waring, Brooklyn.
11. S. P. Nash, N. Y. City.
12. David Dudley Field, N. Y. City.
13. George B. Bradley, Corning.
14. Horatio Ballard, Courtland.
15. Daniel Pratt, Syracuse.
16. Geo. F. Comstock, Syracuse.
17. Joseph H. Choate, N. Y. City.
18. Francis Kernan, Utica.
19. Amasa J. Parker, Albany.
20. Sherman S. Rogers, Buffalo.
21. Benjamin D. Silliman, Brooklyn.
22. E. D. Ronan, Albany.
23. J. McGuire, Elmira.
24. William Allen Butler, N. Y. City.
25. N. Comstock, Brooklyn.
26. J. Lawrence Smith, Smithtown.
27. Calvin Frost, Peekskill.
28. John Sherwood, N. Y. City.
29. Homer A. Nelson, Poughkeepsie.
30. General James H. Martindale, Rochester.
31. Henry E. Davies, N. Y. City.
32. A. Shoonmaker, Jr.
33. Geo. F. Danforth, Rochester.
34. Elbridge T. Gerry, N. Y. City.
35. J. Hampton Wood, Albany.
36. N. C. Moak, Albany.
37. L. B. Kerr, DeRuyter.
38. Esek Cowan, Troy.
39. A. P. Lanning, Buffalo.
40. W. F. Cogswell, Rochester.
41. Wm. A. Beach, N. Y. City.
42. Henry R. Selden, Rochester.
43. Roger A. Pryor, Brooklyn.
44. E. C. Sprague, Buffalo.
45. John F. Seymour, Utica.
46. Benj. K. Phelps, N. Y. City.
47. James Hubbell, Buffalo.
48. George N. Kennedy, Syracuse.
49. W. A. Poucher, Oswego.
50. W. W. McFarland, N. Y. City.
51. Rufus W. Peckham, Albany.
- O. George C. Eldridge.
- P. F. J. Swinburne.
- Q. W. M. Scott.
- R. J. K. Larmon.
- S. Scott D. M. Goodwin.
- T. S. W. Rosendale.
- U. A. T. Bulkley.
- V. P. F. Miller.
- W. George H. Stevens.

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### Footnotes

**Footnote 1:** After reading this it is not so difficult to believe the account which Washington Irving, in Knickerbocker's History of New York, gives of Governor Wouter Van Twiller's mode of administering justice in the action of account between Wandle Van Schoonhoven and Barent Bleecker. The veracious historian says: "The two parties being confronted before him, each produced a hook of accounts, written in a language and character that would have puzzled any but a High-Dutch commentator, or a learned decipherer of Egyptian obelisks. The sage Wouter took them one after the other, and having poised them in his hands, and attentively counted over the number of leaves, fell straightway into a very great doubt, and smoked for half an hour without saying a word; at length, laying his finger beside his nose, and shutting his eyes for a moment, with the air of a man who has just caught a subtle idea by the tail, he slowly took his pipe from his mouth, puffed forth a column of tobacco-smoke, and with marvellous gravity and solemnity pronounced, that having carefully counted over the leaves and weighed the books, it was found that one was just as heavy and as thick as the other; therefore it was the final opinion of the court, that the accounts were equally balanced; therefore Wandle should give Barent a receipt, and Barent should give Wandle a receipt, and the constable should pay the costs. This decision being straightway made known, diffused general joy throughout New Amsterdam, for the people immediately perceived that they had a very wise and equitable magistrate to rule over them. But its happiest effect was that not another lawsuit took place throughout the whole of his administration; and the office of constable fell into such decay, that there was not one of those lousel scouts known in the province for many years." This famous judgment is only equalled by those of Sancho Panza during his governorship of the island of Barataria.

**Footnote 2:** A survival of this is found in New Jersey, in the ultimate Court of Errors and Appeals, where several laymen are associated with the law judges. The abolition of the lay element is now being seriously agitated.

**Footnote 3:** Possibly a survival of the Roman *fascēs*.

**Footnote 4:** What is ordinarily known as the "Dutch auction" (as Judge Daly points out) was when the auctioneer set up the property at an announced price, and gradually lowered it until he found a taker. In this way flowers and vegetables are still sold every morning at Covent Garden. (White's "England Within and Without," p. 108.)

**Footnote 5:** Mr. Gerard, in "The Old Streets of New York under the Dutch," tells of an action waged by Domine Everardus Bogardus against Anthony Jansen Van Salee, as husband and guardian of his wife, Grietie, for slandering the Domine's wife, Anneke, the famous Anneke Jans Bogardus, whose heirs of late years have been trying to wrest her lands from Trinity Church. The latter lady had made some slighting remarks about the former lady, whereupon the former had retorted by alleging that the latter had unnecessarily exposed her ankles in going through a muddy part of the town. The court adjudged

Mrs. Van Salee to make a public declaration, at the sounding of the bell, that she knew the minister to be an honest and pious man, and that she had falsely lied, and to pay costs and three guilders for the poor. The precise connection between the Domine's honesty and piety and the Dame's coquetry does not appear.

**Footnote 6:** Giles Corey, one of the Salem "witches," was pressed to death, in 1692, for refusing to plead, and Jean Calas, in Toulouse, in 1762, was racked and subjected to the "torture of water" to extort confession of murder.

**Footnote 7:** This act is in the first edition of the Colonial Laws, printed by Bradford in 1694, "the only perfect copy of which," Judge Daly says, "now supposed to exist is in the library of a private gentleman in New York." A copy is now in the State Library, having been purchased last year by the State for the sum of \$1,650.

**Footnote 8:** Mr. Fowler thinks Smith not an impartial witness, having followed the political bias of his father, who was a leader of the popular party at this time. (Observations on the Particular Jurisprudence of New York, 23 Albany Law Journal, 291.) He says: "The late Judge Hoffman, who, years afterward, gave the subject the closest attention, seems to have had a very different estimate of the volume of chancery business in the Province, as well as of its comparative importance." The reduction of the fees, however, seems a very conclusive circumstance in favor of Smith's view. When the "fund" gave out in *Farndyce v. Farndyce* (Dickens *Bleak House*), the lawyers lost their interest, and when the chancery fees were materially reduced, it seems reasonable to believe, the lawyers may have resorted less frequently to a court so ungrateful for their attendance. Mr. Johnson, the reporter, in his preface to his Cases, describes the business of the chancery previous to the Revolution as small and unimportant.

**Footnote 9:** Governor Hardy, who was a seaman, said to learned counsel who appeared before him to argue a demurrer to a bill in equity, "Gentlemen, my knowledge rotates to the sea; that is my sphere. If you want to know when the wind and tide will serve for going down to Sandy Hook, I can tell you, but what can a captain of a ship know about demurrers?"

**Footnote 10:** It is a singular coincidence that seventy years later Alexander Hamilton, in *People v. Crosswell*, should have urged the right of the defendant in a criminal accusation of libel to justify by showing the truth of the publication. Gouverneur Morris pronounced the Zenger case "the germ of the Revolution."

**Footnote 11:** New Jersey still has a Probate Court called the Prerogative Court, and presided over by an Ordinary.

**Footnote 12:** It is noteworthy that the Constitution did not expressly provide for the continuance of the Supreme Court and the Court of Chancery, but only impliedly recognized them, Mr. Fowler says (Observations on the Particular Jurisprudence of New York, 22 Albany Law Journal, 489): "The continuance of the Supreme Court of Judicature of the Province and the old Court of Chancery was evidently contemplated by the framers of the State government. The Constitution provided for the tenure of the judges of such courts and *eis nominibus* made them members of the future Council of Revision and of the Court of Errors; yet in no more direct way were these fundamental courts of the common law perpetuated. It is a noteworthy fact, that both these high courts of justice, thus impliedly transferred to the new order of things, had been either erected or continued by virtue of ordinances promulgated by the royal governors of the Province without, and indeed contrary to, the assent of the Legislature. These

ordinances had originally provoked hostility, for the Legislature maintained that the Governor had no power to act, in this regard, without their concurrence. It is highly probable the framers of the Constitution had abandoned the old objections to the ordinances founding these courts, which always bore a political rather than a legal complexion. Or, it is possible, that with the reverence formally felt for the common law, the theory—that the jurisdiction of the fundamental courts was derived from the common law—obtained, and they were considered as falling within such parts of the common and statute law of England as were adopted by the 35th section of the Constitution. However the fact may have been, these courts of general jurisdiction, in law or equity, continued substantially on their old foundations until the Constitution of 1846."

**Footnote 13:** The following extracts from a letter written by Kent to Thomas Washington, of Tennessee, in 1828 (6 Albany Law Journal, 41), will be of interest: "When I came to the bench there were no reports or State precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it was. I first introduced a thorough examination of cases, and written opinions. In January, 1799, the second case reported in 1st Johnson's Cases of *Ludlow v. Dale*, is a sample of the earliest. The judges, when we met, all assumed that foreign sentences were only good *prima facie*. I presented and read my written opinion that they were conclusive, and they all gave up to me, and so I read it in court as it now stands. This was the commencement of a new plan, and then was laid the first stone in the subsequently erected temple of our jurisprudence. Between that time and 1804. I rode my share of circuits, and attended all the terms, and was never absent, and was always ready in every case by the day. I read, in that time, Vattel and Emerigon, and completely abridged the latter, and made copious digests of all the new English reports and treatises as they came out. I made much use of the Corpus Juris, and as the judges (Livingston excepted) knew nothing of French or civil law, I had an immense advantage over them. I could generally put my brethren to rout, and carry my point, by my mysterious wand of French and civil law. The judges were republicans, and very kindly disposed to every thing that was French; and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities, and thereby enrich our commercial law. I gradually acquired proper directing influence with my brethren, and the volumes in Johnson, after I became judge in 1804, show it. The first practice was, for each judge to give his portion of the opinions when we all agreed, but that gradually fell off, and for the two or three last years before I left the bench, I give the most of them. I remember that in 8th Johnson all the opinions for one term are '*per curiam*'. The fact is, I wrote them all, and proposed that course to avoid exciting jealousy, and many '*per curiam*' opinions are inserted for that reason.—Many of the cases decided during the sixteen years I was in the Supreme Court were labored by me most unmercifully; but it was necessary, under the circumstances, to subdue opposition. We had but few American precedents, our judges were democratic, and my brother Spencer, particularly, of a bold, vigorous, dogmatic mind and overbearing manner. English authorities did not stand very high in these feverish times, and this led me a hundred times to attempt to bear down opposition, or shame it, by exhausting research and overwhelming authority. Our jurisprudence was, probably, on the whole, improved by it. My mind, certainly, was roused, and was always kept ardent and inflamed by collision. In 1814 I was appointed chancellor. The office I took with considerable reluctance. It had no charms, \* \* \* \* It is a curious fact that, for the nine years I was in that office, there was not a single decision, opinion, or dictum of either my predecessors—Livingston and Lansing, from 1777 to 1814, cited to me, or even suggested. I took the court as if it had been a new institution, and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English chancery practice and jurisdiction as I thought applicable under our Constitution. This gave me grand scope, and I was only checked by the revision of the Senate as a court of errors. I opened the gates of the court immediately, and admitted, almost gratuitously, the first year, eighty-five counsellors, though I found there had not been but thirteen admitted for thirteen years before. Business flowed in with rapid tide. The result appears in the seven volumes of Johnson's Chancery Reports. My course of study in equity-

jurisprudence was very confined to the topic elicited by the cases. I had previously read, of course, the modern equity reports down to the time; and of course, I read all the new ones as fast as I could procure them. I remember reading Peere Williams as early as 1792, and I made a digest of the leading doctrines. I always took up the cases in their order, and never left one until I had finished it. This was only doing one thing at a time. My practice was first to make myself perfectly and accurately (mathematically accurately) acquainted with the facts. It was done by abridging the bill and the answers and then the depositions; and by the time I had done this slow and tedious process, I was master of the case and ready to decide it. I saw where justice lay, and the moral sense decided the case half the time. And then I sat down to search the authorities until I had exhausted my books; and I might, once in a while, be embarrassed by a technical rule, but I almost always found principles suited to my views of the case, and my object was so to discuss the point as never to be teased with it again and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel."

**Footnote 14:** "God makes the folly, as well as the wrath, of man to praise Him, and the stupid enactment of the New York Constitution, which turned its judges out of office at the age of sixty, has atoned for all the injustice it wrought, by giving us Kent's Commentaries." —*Browne's Short Studies of Great Lawyers*, p. 225.

**Footnote 15:** Johnson, the reporter, in the preface to his Cases, says that "sufficient materials could not be obtained for an authentic and satisfactory account of the decisions prior" to January, 1799.

**Footnote 16:** The reporter, Johnson, in the dedication of the last volume of his reports to the chief justice, Spencer, said: "Those who in the course of their professional attendance on the court have observed your unwearied attention to the arduous duties of your judicial station; your promptness and facility in the dispatch of business; the readiness and ease with which you have penetrated and unfolded cases the most obscure and intricate, placing their merits in the strongest and clearest light; the force and precision with which you have stated and explained the reasons and grounds of every judgment; and your accurate discrimination and just application of the authorities adduced in their support,—know best how to estimate the extent and value of your judicial labors, and to do justice to the learning and ability for which they have been so eminently distinguished." These are strong words of praise from one perfectly qualified by intelligence and experience to speak of the subject. Judge Bowen Whiting said that he was once at the Tompkins circuit, held by Spencer. The calendar was taken up on Monday with forty eight causes. The circuit adjourned on Thursday, every cause disposed of. This reminds one of Ellenborough, who was said to go through the calendar "like an elephant through a sugar plantation." Daniel Lord, in an address on the death of Kent, reviewing the bench and bar of the early part of this century, spoke of "the sagacious, the complete Hamilton; the honest-minded Pendleton; Harrison, the learned, the elaborate; Hoffman, that ingenious, polished master of the advocate's art; the deeply-learned, wise, searching Riggs;" "Emmett, whose enlarged and extensive learning was equalled by his childlike simplicity of heart; Colden, the polite scholar, the speculative philosopher, the able lawyer; also that model of all that is valuable in our memory, Van Vechten, whose eloquence was Ciceronian, and charmed every heart; the terse, the highly-gifted Henry; the younger Jay, full to abounding in every noble trait; and that union of scholar, lawyer, orator and gentleman, John Wells;" "the ingenious, polished Livingston; the sound and judicious Radcliffe; Thompson, the honest, steady and staunch friend of all that was true and just; Van Ness, the accomplished man of genius; Platt, the sedate, the sober-minded; and last, he, who in every trait and lineament, in every part and member, was every way a giant, Spencer."

**Footnote 17:** That admirable reporter, Johnson, in 1811, in the preface to his series of reports of the Supreme Court and the Court of Errors, says : "If works of this nature are found so indispensable in that

country,"—England—"they are far more necessary in our own, where new questions every day arise, in the decision of which English adjudications cannot always afford a certain guide." "Though the English reports, published since the Revolution, will continue to be read by every lawyer who entertains a just and liberal view of his profession, as containing the opinions of judges of eminent learning and ability, expounding the principles of that excellent system of jurisprudence which has been adapted as the basis of our own, yet it may be observed that of the numerous questions decided in Westminster Hall, a small number only are found applicable to questions which arise here. We must look, therefore, to our own courts for those precedents which have the binding force of authority and law."

**Footnote 18:** Daly's Judicial Organization.

**Footnote 19:** In his address to the bar on assuming the duties of his office, Walworth disclosed the fact that none of the other judges would accept the office. (1 Paige's Reports, v.) In this address he speaks modestly of himself as "Brought up a farmer until the age of seventeen, deprived of all the advantages of a classical education, and with a very limited knowledge of Chancery law." In *American Insurance Company v. Center*, 4 Wendell's Reports, 50, in the Court of Errors, he went out of his way to confess that at the time of the trial he had "a very imperfect knowledge of insurance law," and that his ruling then was wrong.

**Footnote 20:** As examples of his wit and learning, reference may be made to his opinion in *Nevin v. Ladue*, 3 Denio, 437, on the question whether ale and beer are strong and spirituous liquors, and his architectural simile in *Cutter v. Doughty*, 7 Hill, 308.

**Footnote 21:** Browne's *Short Studies of Great Lawyers*, 343.

**Footnote 22:** In these he interspersed notes of wonderful learning and research; as, for example, those on *lex loci* and *lex fori*, in *Andrews v. Herriot*, 4 Cowen, 410; on *quo warranto*, in *People v. Richardson*, id. 100; on possession after sale, as evidence of fraud, in *Bissell v. Hopkins*, 3 id. 189; which are exhaustive monographs.

**Footnote 23:** Mr. Austin Abbott has very lately observed, in reference to the pending agitation in New Jersey of the question of eliminating the lay element from the Court of Errors and Appeals of that State: "An unprejudiced observer who watches the course of adjudication in such courts, or studies their workings as manifested in the records of our Court of Errors, in which lay senators were able to determine the law again and again contrary to the accumulated and unanimous judgment and learning of the chancellor and the judges of the Supreme Court, can have little doubt, that while lay representation upon the bench may now and then prevent the harsh operation of a rule of law, it will more frequently introduce, to control the decision, elements which ought to have no influence in determining or applying the law; and no form of misadjustment in judicial machinery has more power to introduce uncertainty into the law and bring its oracles into disrespect than this. It is much to be hoped that throughout the country this old usage may wholly disappear, and the development and formulation of what is called 'judge made law' may be committed entirely to men thoroughly trained by study and experience for judicial functions."—*New York Daily Register*.

**Footnote 24:** The supposed necessity for general codification grew out of a state of things, very vividly but perhaps rather extravagantly described by Senator Tracy, in 1837, in his opinion in the case of *Wright v. Hart*, 18 Wendell's Reports, 450, as follows: "I am getting to learn that the spirit of the age, which is disposed to consider nothing settled that it considers susceptible of improvement—a spirit

which regards nothing as too ancient to be attacked—nothing as too new to be attempted, is extending its influences to the oldest and deepest-rooted principles of the common law. This event might not be so much regretted, if it were proposed to be brought about only through the open and responsible agency of legislation; but when pursued through the devious and occult process of judicial exceptions and qualifications, it becomes a subject of some solicitude and apprehension. Lord Eldon wisely remarked, that instead of struggling by little circumstances to take cases out of a general rule, it is more wholesome to struggle not to let little circumstances prevent the application of the general rule. But this principle, in modern times, has been so poorly maintained, that the profession of the law, it seems to me, is fast becoming a matter of memory rather than of reason and judgment; and the study of it is already so much more the study of the exceptions and evasions of general principles than of general principles themselves, that I am sometimes induced to think, that as a science the law would be better understood and as a rule of right more justly administered, if the reports of judicial decisions for the last half century were struck out of existence. We see continually, that the qualification or relaxation of a general principle, established by one reported case, is made the place of departure for ascertaining a new position in another, and this again in a third, and so on, until the original rule, the natural standard of the law, is obscured and utterly lost sight of, by means of intervening artificial measures of supposed particular justice. The consequence to be feared is, that judicial reports, instead of being what no doubt it is intended they should be, beacons and land-marks to guide the public into quiet havens of security and repose, may become false lights to decoy into the whirls and shoals of litigation. In speaking of the new and refined distinctions upon general principles, which in his day were multiplying, though in no degree so rapidly as since, Lord Mansfield remarked, that 'if our rules are to be incumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to proceed to more fixed rules.' And much more may we say, in looking at the ponderous volumes of reported cases which flood the country, and are multiplying with a rapidity that no diligence can keep pace with, that rather than that the science of the law should have to be sought in the exceptions, qualifications and evasions of general rules, made and to be made by innumerable judges, the records of which are to be spread through thousands of volumes, it were better to abandon all attempts to preserve a written system of jurisprudence, and to revert at once to that species of administrative justice commended by Cicero, when '*amissis ductoritatibus, ipsa re et ratione exquirere possumus veritatem.*'" As the number of reports has probably multiplied four-fold since these words were written, they will now be read with a degree of amusement. If codification should render the law more fixed and certain, there must at all events ensue a long, tedious and expensive period of construction, before the meaning of a code can be definitely ascertained. This, as we shall see, proved true in regard to the Code of Procedure. Indeed, the history of statutes shows that they are fruitful in litigation. The old statutes of frauds, limitations, and usury, and the modern married women's acts, have been among the most fertile sources of legal strife.

**Footnote 25:** That very distinguished jurist, Hiram Denio, afterward chief judge of the Court of Appeals, in the preface to the fifth and last volume of his reports, said: "A new system of legal procedure has been introduced. Under the specious name of reform, and in professed obedience to a constitutional provision looking only to the modes of practice, all the divisions under which legal rights and remedies had been arranged, and the whole nomenclature of legal science, as learned and practiced in this court, have been abolished. The ancient simplicity of the common law has been made to give place to a system in which every case is made a special one; and the ancient and established principles of jurisprudence, illustrated and enforced in the series of adjudications of which this, volume is the concluding portion, can now only be found and applied by approximation, and a species of elective affinity, as tedious in its operation as it must be uncertain and fluctuating in its result."

This opposition has by no means died out in other States, in 1879, Judge Orton, of the Wisconsin

Supreme Court, in the case of *Sengpeil v. Spang*, 47 Wis. 29, observed: "This very material omission occurred through undue haste, want of intelligent consideration, or proper deliberation in the adoption of the New York Code, and through ignorance or disregard of the wisely considered and long established practice in this State, which it superseded and replaced; and is one amongst many omissions and Incongruities of that radical and revolutionary change of legal procedures." Chief Justice Ryan, of the same State, in so address to the law class of the University of Wisconsin, in 1880, observed: "This State is suffering today from a notable instance of unwise and unhallowed tampering with the common law. The system of pleading and proceeding in the courts of the common law, which had grown up with generations of lawyers and survived them, matured by the experience of ages, rested in the surest principles of logic and of law. It was, in some things, over technical. It has excrescences and absurdities—faults which embarrassed or impeded justice. But these were frailties not essential to the system, which might be easily weeded out from it. Else where they have been, leaving the hereditary wisdom, the adjudicated certainty of the system, redeemed from its defects. But in several States, as in this, it has been arbitrarily abolished—sacrificing the essential wisdom of the system for its accidental faults. And under pretense of simplifying the administration of law, and facilitating justice, there has been substituted for it a crude and mischievous theory, which, attempting to dispense with, skill, dispenses with certainty and security, embarrasses the processes of the law, unsettles much, far beyond its purpose, which was settled before; has vastly increased litigation and its cost; has impeded justice, and added to the uncertainty of the law. If it survive, it will need exposition for generations of judges, before its innovations, in all their scope and effect, will be settled; and then it will be more or less of an evil, as the courts shall have given it, more or less, of likeness to the system which it displaced. Its simplicity is a cheat. It is loose, not simple. Its plainness is a fraud. It is vague, not plain. It makes the remedies of the law a paradise of doubt and ambiguity."

Prof. Tyler says, in his edition of Stephens on Pleading, that the "love of innovation carried its abolition in New York, and that other States have followed in this barbaric empiricism."

Judge Cooley, of the Michigan Supreme Court, the celebrated author of "Constitutional Limitations," says, that the "works on common-law pleading are not superseded by the new Codes which have been introduced in so many States. After a trial of the Code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has teamed to state his cause in a logical manner after the rules laid down by Stephens and Gould is better prepared to draw a pleading under the Code which will stand the test of demurrer, than the man who without that training undertakes to tell his story to the court as he might tell it to a neighbor, and who never having accustomed himself to a strict and logical presentation of precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little as to leave his rights in doubt on his own showing."

**Footnote 26:** The pleader "seems to be continually laboring under the delusion that if he calls things by their right names something awful will happen; that he is wandering about the temple of justice in a state of enchantment, being bound to flank every fact by verbal circumlocution, for fear the use of a common word or a direct and simple phrase will wake him up, and tumble the temple about his head." "Many pleadings are apparently drawn with the idea that every allegation is forgotten or loses its virtue as soon as read, and so the pleader rolls along his snow-ball of words, growing bigger and bigger and more unwieldy and shapeless to the end. It is like the 'house that Jack built.'" "The Pyramids, the Colossus of Rhodes, the Simplon road, are well enough in their way, but if you want to get sit adequate idea of the industry, the ingenuity, and the perseverance of man, read a law-pleading. The Cretan labyrinth is not so involved; the Sphynx is not so mysterious; like a suspension bridge its middle rests on nothing, but it is continuous and self-sustaining; take an allegation out of the center, although it is just like a dozen others

preceding it, and down goes the structure. Reading one of these pleadings is like crawling through a long and narrow tube—you can't turn around, but having once started, you must go through to the other end, or else back out."— Browne's *Humorous Phases of the Law*, 116, 117.

As early as 1807 DeWitt Clinton thus expressed himself in the Court of Errors (*Bayard v. Malcolm*, 2 Johns. 572) "Though the system of pleading may be denominated a *science*, and contains rational, concise and luminous principles, well adapted to the elucidation of truth, yet it must be observed that it originated in a gothic age, when the light of genuine knowledge had shed but feeble rays upon mankind, when the jargon of the schoolmen had infected every branch of science, and when the subtleties of a false logic had completely bewildered the human understanding. Though purified and refined by the extension of knowledge, yet it still partakes, in some degree, of its original character. Distinctions without a difference, subtleties which puzzle and perplex without enlightening the mind, a minute, servile observance of forms and attention to words, without a due regard to ideas and matters of substance, are evils which ought to be banished from our courts of justice; they at least ought not to be countenanced in this court of *dernier resort*."

The way in which justice was often defeated by technicalities of pleading is illustrated in the case of *Bloss v. Tobey*, 2 Pick. 325, where, for want of an innuendo in a declaration for slander, and in the absence of the power of amendment, the plaintiff was defeated beyond remedy. Chief Justice Parker said in this case, "In a matter of technical law, the rule is of more importance than the reason of it." The unfortunate pleader in this case was William Cullen Bryant, then a young lawyer, who in consequence of this defeat retired from the profession in disgust. In *Titus v. Follet*, 2 Hill, 318, Bronson, J., said: "Though this declaration is clearly good in substance, yet a certain form of declaring seems to be required by the books, which had better be adhered to for the sake of precedent rather than any obvious principle." "I do not see how we can avoid saying there must be judgment for the defendant."

**Footnote 27:** This point was amusingly illustrated by the following, in the *Albany Law Journal*, of September 17, 1870,—vol. 2, p. 204: "In 1857 the Legislature of New York passed an act permitting parties to be sworn in their own behalf, but attempting to prohibit the privilege in cases where one party was dead or otherwise disqualified from testifying. As a matter of course, the ingenuity of the whole legal profession was at once set in motion to defeat the intention of the Legislature in regard to the excepted cases, and a flaw was picked in the phraseology. The Legislature at once rushed to the rescue, and has been rushing to the rescue ever since. This unfortunate section has been amended in 1858, 1859, 1860, 1862, 1863, 1865, 1866, 1867, 1869. The outbreak of the rebellion in 1861 distracted the attention of the Legislature in that session, and the interest excited by the crushing of the rebellion had the same effect in 1864, and in those two sessions alone for a period of eleven years we find a little rest for section 399 of the Code. This section has been a sort of statutory *pons asinorum*; a verbal donkey in the legislative circus that throws every Legislature that tries to ride it; an Eddystone light-house of law, always tumbling down; a Gibraltar, defying besiegers. At first, the Legislature seemed to think the difficulty consisted in not having used words enough, and so for several years the act kept swelling like a sesquipedalian anaconda, with 'words, words, words. Having vainly tried this remedy for a series of years, in 1869 they suddenly changed their tack, and struck out most of the verbal stuffing, so that the skin of the act now hangs flabbily about it, like a collapsed balloon, or a lady's skirts after the abolition of 'crinoline. From forty-four lines in 1867, it dwindled to seventeen lines in 1869—a case of statutory emaciation almost unparalleled. The repose of 1868 did not seem to be congenial with its health. This new and strange artifice seems to have stunned the legal profession, for one year at least, but no doubt by next winter some ingenious fellow will have discovered some consequent defect, and the act will be called on again like the troubled sea that cannot rest, to cast up mire and dirt." The same statute has since been repeatedly amended.

In his address, as president, before the American Bar Association, at their annual convention, at Saratoga, in August 1881, the Honorable E. J. Phelps, of Vermont, denounced the "fluctuation of purpose that deprives statute law of all stability. and alters, amends, reconstructs and repeals its enactments, from year to year, more rapidly than the courts can grope their way to a construction of the language in which they are couched."—24 *Albany Law Journal*, p. 165.

**Footnote 28:** This result was predicted by Mr. Butler, upon the adoption of the Constitution. He said, in 1847: "There seem to be defects in the system, which no amount of ability or integrity in the judges can entirely overcome, and which will soon demand material and extensive changes."

**Footnote 29:** "The sudden and unexpected death of Chief Judge Church, at the age of sixty-five, and at the height of his mental powers, crones with a painful shock to our profession and to our State. The death of any man, occupying for ten years the highest judicial position but one in this country, would be a striking event; but in this instance we are deprived of one who had for many years been a conspicuous figure in our State and Nation, and in his judicial post had commanded the respect of the community against the prepossessions and prejudices of many. When Mr. Church was taken from political life and put upon the bench without previous judicial experience and without even the reputation of a learned lawyer, the feeling at least among those of the opposite political party was that he was put there from partisan motives and would be controlled by party favoritism. It is but simple justice to say that in his case, as in the similar case of the late Judge Allen, this expectation was disappointed. Except in the Tweed case, we have never heard a serious accusation against either of these two eminent and lamented men, and they both died high in the esteem and confidence of the entire community. Judge Church suffered from the worst infliction to which a judge can ever be subjected, namely, the constant use of his name as a contingent candidate for the presidency. Doubtless this was a thing that he himself laughed at, but could not publicly prohibit. At all events, in spite of this, it is due his memory to declare that he has gone to his grave with the reputation of an honest and unprejudiced magistrate."—21 *Albany Law Journal*, 401.

**Footnote 30:** 22 *Albany Law Journal*, p. 142.

**Footnote 31:** A constitutional amendment is pending, to be voted upon in the fall of 1881, providing for twelve additional Supreme Court justices.

**Footnote 32:** Much of the wide influence of the early decisions of this State was due to the excellent manner in which they were reported by Johnson, Wendell, Cowan, Hill and Denio. Several of the ablest judges have been reporters, namely, Comstock, Selden, Hand, Parker, Paige, Duer, Robertson, Sandford, Daly, Bosworth. It was believed by Johnson's contemporaries that he wrote many of the "*per curiam*" opinions in his reports.

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