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CHAPTER XII.

THE BENCH AND BAR.

Dutch Period, 1609-1664.

Hudson discovered the river known by his name in 1609. During the next ten years many Dutch ships were in New York waters, and Manhattan Island had a small settlement of traders. Magisterial authority, if there was any in this little trading community, probably followed the rules of the sea, with sea captains as arbiters, and with the certainty that capital offenses would be referred to the home government.

In 1621 the Dutch West India Company was chartered, with wide powers and charged with the keeping of "good order, police, and justice." The charter contained many guarantees of freedom in social, political and religious life, but reserved final judicial authority for the States General. Next in magisterial authority were the directors of the company, who exercised supervision of, and accepted responsibility for, the judicial acts of their provincial officials, the superintendents of the trading posts and the ship captains. This system of judicial administration in all probability prevailed until the appointment of a local director.

In 1623 the first party of colonists came, the Walloons crossing in the good ship "New Netherland," commanded by Cornelis Jacobsen May (Mey), of Hoorn, who was also to be the first director. There were thirty families, one hundred and ten men, women and children in all; and, upon arrival in New York waters, they were distributed over as much territory as possible. Some settled on Manhattan Island, some on Long Island, some on the Fresh (Connecticut) River, some in the Esopus country, some on the North (Hudson) River at what became Albany, and others along the Delaware tributaries. In these isolated settlements a degree of parental control was probably the only magisterial power called for. At all events, Captain May and his lieutenants had to apply themselves, chiefly to the development of the trading possibilities of the region. In that time of war between the United Netherlands and Spain, the States General had, at home, vital matters of such grave moment as to occupy almost the whole of their thoughts.

The National situation, however, was less critical in 1625, and it was then arranged to send out to New Netherland a Director-General, to bring the provincial establishment more into line with the legal and civil systems of the homeland. It was planned to admit New Netherland to the union of provinces, making it a county of Holland, with provincial status to all intents like that of any other of the United Provinces. Peter Minuit was commissioned as Director-General, and sailed on December 19, 1625, in the vessel "Het Meetje," accompanied by more immigrants. Upon arrival at Manhattan in May, 1626, he set the new plan of government in operation. [1] It called for the appointment of a Council of five, "who, with himself, were to be invested with all legislative, executive and judicial powers, subject to the appellate jurisdiction of the chamber (of the company) at Amsterdam." This council was to have jurisdiction in all criminal cases, to the extent of fine, but each capital offender was to be sent, "with his sentence, to Holland," where his sentence would be reviewed, and where, if sustained, he would be punished. The Director-General and Council, therefore, constituted the local judicial body.

An important functionary of the provisional government was the *Schout-Fiscaal*, who was expected to be the

expert in all matters of law. He was, to all intents, the Attorney-General, public prosecutor, and, when given his full authority, presiding magistrate. Numerous other less dignified duties rested upon him. He was expected to act as constable or sheriff, as excise officer, as clerk of the courts, and sometimes, it seems, had duties not unlike those of a supervisor of stevedores.[2] He was, in fact, expected to be the "Eye of the Law," the "Encyclopedia of Jurisprudence," the Vigilance Committee of the Province, and be able to cite every law, detect every infraction of it, and bring to justice every violator. There is record that at least one schout was expected to be the Keeper of the Pigs, and that when he dared to rebel against such an indignity, pointing out that such a duty might well be performed by a negro slave, he provoked the irate Governor to reach for a bastinadoe. Jan Lampo was the first *schout-fiscaal* of New Netherland, though he was not the bastinadoed Oracle of the Law. The first magistrates were the members of Minuit's Council. They were: Peter Bylvelt, Jacob Elbertsen Wissinck, Jan Janszen Brouwer, Simon Dirckson Pos and Reynert Harmenssen. They knew little of law, and in other respects hardly constituted an ideal court of justice, inasmuch as all were servants of the Dutch West India Company.

In 1629 a new system of colonization was devised in the Charter of Freedom and Exemptions, which introduced the patroons and the feudal system of land tenure. The intention was that this system of local government should be subservient to the provincial authority of the Director-General, just as the latter was subservient to the Amsterdam directors of the West India Company, and these in turn were controlled by the College of the Nineteen (delegates drawn from all the shareholders of the company) . All were expected to recognize the over-lordship of the States General of the United Provinces of the Netherlands. To what extent the patroon system interfered, in New Netherland, with the judicial authority of the early Directors-General will never be positively known, for the official company records of the period 1626-37 have been lost. Neither can it be stated, with assurance, how judicial proceedings were conducted under Directors Minuit, Krol, or Van Twiller, the first three Directors-General. It is quite clear, however, that authorities clashed, and that while the directors may have been arbitrary, they had little power in the patroonships.

Such a system as that which the patroons were permitted to set up would be considered tyrannical in these days. The life of the immigrants in the patroonships would be looked upon as a kind of bondage, for, it seems, the colonists were bound to serve the patroons for a period of years after emigration,--ostensibly to repay the latter for the expense incurred in transportation to, and establishment upon, the land of the patroons. The most extensive and successful patroonship-in fact the only successful one-was that founded by Kiliaen van Rensselaer. In it, the patroon system is seen at its best and its worst. Upon the manor of Rensselaer were, in time, established, by their own means or by the assistance of the Van Rensselaer family, hundreds of tenant-farmers who accepted the system of manorial land-tenure, which demanded of the occupying farmer, for life and through succeeding generations, payment of a portion of each year's product of the land they tilled. It was a perpetual rental, the tenant, no matter how prosperous, never being able to own the land he tilled. The manor embraced parts of several of the present counties in the vicinity of Albany, and, surprising as it may seem, this near feudal system was maintained with the Van Rensselaer family for over two centuries, long after the time when, one would suppose, all traces of feudalism and monarchical government had, by the Revolution, been swept away from all parts of the United States.

When the Dutch West India Company, in 1629, made public its plans for, or sanction of, a charter of "Privileges, Freedoms, and Exemptions to all patrons, masters or individuals who should plant any colonies and cattle in New Netherland," the proposals were not viewed as an impossible system by either the moneyed class or the emigrants. Life in the homeland had been a constant struggle for two or three generations, the sea vieing with Spain in an attempt to wrest from the Dutch their home. Furthermore, the alluring new land, a mysterious and possibly vast treasure-house of gold, silver, and precious stones, a National treasury more precious and potential than that which had been enriching Spain for a century, was the hope of the adventurous. So, several of the wealthy directors of the West India Company hastened to claim such privileges, receiving large land grants and making colonization plans to meet the conditions of such grants.

[3]Much happened, in 1630 and 1631. Minuit in these land transactions came into conflict with the home authorities, for alleged excess of zeal in the interests of certain Amsterdam directors of the company who

became patroons, and for not showing enough consideration for the interests of the company.[4] Although the privileges of the Charter of 1629 were open to "all persons, peasants or nobles," who could meet the conditions, they were in reality only within the reach of the wealthy; hence, the grants made were to men who, while not of the nobility, were of the great burgher class-wealthy merchants. To such persons as should "undertake to plant a Colonie there (in New Netherland) of fifty souls, upwards of fifteen years old," within four years, the company offered the feudal status of Patroon within the area the grantee would succeed in colonizing. "The extent of a colony of fifty souls was limited to sixteen miles on one bank of a waterway, or eight miles on both shores of a navigable stream; but the colony might extend indefinitely into the interior," which was the unknown land of the denizens of the forest, human and otherwise. "In ratio to the increase of colonists over the stipulated fifty, the limits of the colony along a waterway might be expanded." Within his manor, or patroonship, the patroon was to be the lord of the manor with absolute authority. He could hold inferior court, and in any cities developed in the colony he was to have power to appoint magistrates and municipal officers. No colonist, man, woman, or child, could leave the service of the patroon without his written consent; and whatever supplies they needed must be purchased at the store of the patroon.

Patroons were, it seems, the final authority in matters of law. Through the medium of his principal agent, sitting as presiding magistrate in the patroon's court, the patroon had power even of life and death over the people of the manor.[5] The Dutch legal system provided certain restrictions, but in the actual administration of judicial affairs, as of civil government, the local authorities had devious but sure ways of gaining their ends. For instance, the law provided that capital sentence must be referred to Holland for review. Possibly some were; but the Patroon of Rensselaerswyck was in the habit of weakening the power of the Provincial Government and of the States General over the judicial acts of his agents by drawing from the prospective colonist a promise "not to appeal from any judgment of the local tribunals." Perhaps, however, this did not hold in capital cases, which it seems were few.

While there were many patroonships,[6] that which was developed at the head of navigation on the Hudson River by agents of Kiliaen van Rensselaer, the wealthy Burgomaster of Amsterdam, is the only one that enters vitally into the history of New Netherland and New York. The quasi-independent government set up in the patroonship of Van Rensselaer had so important a part in the impoverishment of the West India Company, and was so disturbing a factor in the State politics of two centuries later, that it is well that much of its history has been preserved. In the preface of the "Minutes of the Court of Rensselaerswyck, 1648-52," translated recently by State Archivist Van Laer,[7] is the information that in July, 1632, Patroon Kiliaen van Rensselaer-who by the way never came to New Netherland-appointed Rutger Hendricksz van Soest to the office of schout of the colony, *i. e.,* the patroonship, New Netherland generally being differentiated as the *province.* Rutger Hendricksz was empowered to administer the "oath of schepen" to five persons, four of whom were then resident in the colony. The five *schepens* were to constitute the Patroon's Court of Rensselaerswyck, over which Hendricksz was to preside. Wouter van Twiller, the Director-General of the Province, a nephew of the patroon, was authorized to administer the "oath of schout" to Rutger Hendricksz, though, as Van Laer states, it is doubtful if he ever did. Hendricksz seems to have been an agricultural overseer on the manor, and his term "as farmer" having expired, he seems to have left the colony in 1634. It is, therefore, doubtful whether he was ever *Schout* of Rensselaerswyck. The first *schout* of the Patroon Court seems to have been Jacob Albertsen Planck, who arrived in the colony, with his instructions as *schout*, about August 12, 1634. Soon after that date, in all probability, the Rensselaerswyck Court was organized.

There is difference of opinion as to what effect the patroonships had upon the province. Lincoln, in tracing the patroon system, seems to feel that its part in the development of the province was important and beneficial; others condemn the system. Certainly, it brought into strong functioning a quasi-independent government, making the task of the Directors-General hard. Three Governors came and went in eight years, and the next two-Kieft and Stuyvesant-found the power of the Patroon of Rensselaerswyck so well entrenched that provincial authority was enforced in the colony only after the Patroon Court had been so weakened as to lose power over the colonists.

Adriaen van der Donck, a man who had studied canon and civil law at the University of Leyden and was about to enter professional life, was chosen by Burgomaster van Rensselaer, in 1641, to proceed to the colony and take over the duties of *schout-fiscaal* from Planck. The latter had also been *commies*, or commissary, at Rensselaerswyck, and had given up both offices, Arendt van Curler taking his place as *commies.* Of Van der Donck, the patroon wrote to one of his partners thus: "This young man of proper habits is in truth a good thing for us." Undoubtedly Van der Donck could. be useful in the colony if he would, for they had nobody versed in the laws at hand to advise the schepens of the Patroon Court. In truth, the patroon at the moment stood much in need of a *voorspraecke*, or attorney, to defend the interests of his colony against litigation of colonists and of Governor Kieft. Van der Donck was commissioned as *Officer de Justice* on May 13, 1641, and arrived at Rensselaerswyck in August of the same year. He did not get on amicably with Van Curler, who perhaps was inclined to be overbearing, holding as he did, the more important post, that of manager of the colony. Van der Donck himself was ambitious. Reports that reached the Patroon as to this, so concerned him, that he went to infinite pains to draft for Van der Donck a treatise on his duties. This paper, it is said, took Van Rensselaer "the better part of four days to compose." He blamed Van der Donck "for being too hot-headed, for arguing with fractious colonists instead of maintaining his dignity by summoning them before the court of justice." He accused Van der Donck of overweening ambition. "I tell you frankly," he wrote, "if you set your mark so high, you will study more your own advancement than my advantage."

Van der Donck's most serious breach was in seeking to become a patroon himself. His first attempt to do so was abandoned only after he had been threatened with dismissal and imprisonment. Soon after, however, other friction arose to make Van der Donck seem to be not the ideal man to enforce the will of the Patroon. It seems that Commissary Van Curler had issued orders that none of the colonists should go into the forest to trade with the Indians, the latter being expected to bring their furs to the Rensselaerswyck store for barter. Furthermore, the colonists were forbidden to buy goods from any ships that came up the river. Van der Donck flatly refused to enforce these ordinances; and once when he was ordered to search the houses of colonists for woolen cloth surreptiously acquired from a trading vessel, he just gave the people "the wink" and reported: "Nothing found."

In 1644, Kiliaen van Rensselaer died, and in 1645 Van der Donck went out of the colony, going down the river to Manhattan, where later he became one of the outstanding leaders of the people. He also became a patroon.

Nicolas Coorn and Gerard Swart were respective successors of Van der Donck, as Schout of Rensselaerswyck, but the Court of Rensselaerswyck does not seem to have functioned strongly until it was reorganized by Brant Aertsz van Slichtenhorst in 1648.[8] Van Slichtenhorst was then in charge of the colony, as director or commissary, and he seems to have been the only outstanding figure in the Rensselaerswyck Court also. He had a tilt with Governor Stuyvesant in 1652, when the latter organized a schepen's court, quite independent of Rensselaerswyck, just outside the patroonship, at Fort Orange. Stuyvesant came up from Manhattan, and arrested Van Slichtenhorst for his resistance of the authority of the Provincial Government. Thereafter, and until 1665, when the Province passed to the English and the Duke's laws came into force, the jurisdiction of the Patroon Court of Rensselaerswyck was weak.

With this brief review we may pass from the patroon courts, which actually were the first local inferior courts of New York, to the other provincial courts of the Dutch period in New York. The chief magistrates, the chief justices as it were, of the Province of New Netherland, were the directors-general, who lived at New Amsterdam and presided over the Council, the members of which, even up to the closing years of Stuyvesant's administration, were mainly under the direct control of the governor. They were mostly employees of the West India Company, or former employees, and generally, the will of the Governor was the law with them. The Council was, in fact, the court of last resort in the province. So the directors-general seem to have right of place among the judges and magistrates of the Dutch period. Minuit served as Director-General for six years, being recalled early in the spring of 1632. Later he went into the service of the Queen of Sweden and led a Swedish colonizing party to the Delaware. New Sweden eventually had to bow to the authority of New Netherland, through the military prowess, or stronger military force, of Stuyvesant. Minuit had by this time died in the

colony. He seems to have been more faithful to the Swedish Government than to the Dutch.

His successor, as Director-General of New Netherland in 1632, was Bastiaen Jansz Krol, or Crol, who had been in charge at Fort Orange. He took over control of the province from Minuit at the end of February, 1632, and acted as Director-General until April, 1633, when Wouter van Twiller reached New Amsterdam. Krol was, in all probability, never commissioned as Director-General, which explains why some official lists show Van Twiller as the direct successor of Minuit as Governor.

Van Twiller was a nephew of Kiliaen van Rensselaer, and though the latter professed to have had no part in procuring the appointment for the young man, there seems no doubt that he looked upon it with favor. Van Twiller's task was by no means an easy one, and he is considered by some to have been hesitant and inert as director. The truth is, however, that he had to temporize and compromise with the stronger forces that opposed the governmental authority of New Netherland. The English were of sufficient strength in neighboring colonies to have subdued the Dutch of New Netherland had they been exasperated unduly by Van Twiller, who by the letter of his instructions, was supposed to assert the authority of the United Netherland from Cape Cod to the Delaware.[9] He also had to deal diplomatically with the patroons, who were inclined to overrule him, and who, as home directors of the West India Company, were, in fact, his superiors. So Van Twiller should not be looked upon as a man of such colorless characteristics as his actions as Governor indicate. He lived comfortably, and was apparently well able to care for himself. At all events, he seems to have enriched himself while Governor and he was sorry to leave the province after five years.

Van Twiller had a Council of four: Jacob Jansen Hesse, Martin Gerritsen, Andries Hudde and Jacques Bentyn. None had been on the Council of Minuit, but the *Schout-Fiscaal* who was in office when Minuit left was continued by Van Twiller, though not, it would seem, because of fitness for the office. Within a year Schout-Fiscaal Notelman gave way to Dr. Lubbertus van Dincklagen, who, however, was too highly qualified to stay long. He was probably skilled in all the sciences, and also was "possessed of considerable means." It might be reasonably assumed, therefore, that he would have been permitted to function more fully as Schout than Notelman had been. Moreover, it seems certain that he would not stoop to do the menial tasks expected of some of his predecessors. Quite possibly, the judicial processes of the province were left largely in his care. Van Dincklagen was not Schout for long, Ulrich Lupold succeeding him before the end of Van Twiller's administration.

To succeed Van Twiller as Director-General, the West India Company sent William Kieft in 1837. He was "a commercial adventurer of ill repute," but of aggressive personality. Perhaps the directors of the West India Company thought that a Governor who had no connection with the Patroon of Rensselaerswyck might be better able to see that the company had its proper share of what trading was possible with the Indians. Kieft arrived in March, 1638. That he was determined to rule with absolute authority was soon evident, for his Council consisted of only one man, Dr. John la Montague, who had arrived with his wife and four children in 1637.[10] Montagne had one vote in the Council against Kieft's two; which meant that the Governor was the government. Kieft was unscrupulous,[11] and was quite convinced that the instructions of the home government, "that he should maintain a Council," had been met by the appointment of Dr. la Montagne, even though previous Councils had consisted of four or five men, in addition to the Governor. However, he eventually had to realize that his fellow-counsellor would not stand meekly by while he carried out arbitrary measures upon Indians and whites.

According to Kieft's testimony, the affairs of the province were in a woeful state of chaos when he arrived. Company servants had been enriching themselves at the expense of the company; smuggling was common; the Indians were obtaining firearms and were getting out of hand; the garrison was insubordinate; the sailors riotous; New Amsterdam disorderly; drunkenness, theft, fighting, and immoralities prevailed; and generally there was need of a strong governing hand. The unfortunate fact, however, is that the Governor was not a broad-minded as well as a strong-minded man. He was apparently a ruthless tyrant. A new Charter of Exemptions and Privileges made known in 1640 the wish of the West India Company to improve the lot of the "free colonists" of New

Netherland, and restrict the judicial authority of the patroons; and while Kieft did his best to break down the latter power, he ignored both the letter and the spirit of the Charter of Exemptions and Privileges. It provided for "competent Councillors, Officers and other Ministers of Justice for the protection of the good and the punishment of the wicked"; yet, from the beginning Kieft's Supreme Court of Justice was his Council of one. "When anything extraordinary occurred (perhaps when Dr. la Montagne disagreed with him), the Director allowed some whom it pleased him-officials of the company for the most part-to be summoned in addition; but that seldom happened," was the testimony given by Adriaen van der Donck, in 1649, in his "Remonstrance of New Netherland." One could not have much confidence in a court so constituted, for such additional judges, referees, or arbitrators would hardly hold views contrary to those of their superior, the all-powerful Director-General.

Pettiness, superstition and inconsistency marked the administration of justice. Hendrick Jensen, arraigned in October, 1638, "for scandalizing the Governor," was sentenced to stand at the entrance of the court at the ringing of the bell, and there publicly beg the Governor to pardon him. Anthony Jensen's wife, Grietje, slandered the Reverend Everardus Bogardus. The court fined her husband, and compelled her to beg "pardon of God, the court, and the minister"; but thereafter they were constantly in litigious trouble. They were of such frequent court record that finally, on April 7, 1639, they were sentenced to be forever banished from New Netherland, "as public disturbers and slanderers." For stealing a sheet while intoxicated, Jan Hobbesen was "put to torture" until he confessed, in 1641; whereupon he was sentenced to be "whipped with rods," and afterwards banished. A man accused of murder, but still at large, was sentenced to be punished "by sword until dead." For "drawing a knife upon a person," in a sailor's brawl in 1638, Gysbert van Beyerland was sentenced "to throw himself three times from the sail-yard (yard-arm) of the yacht 'Hope,' and to receive from each sailor three lashes at the ringing of the bell." A negro was more fortunate. He was tried for a capital offense, was convicted, and was sentenced "to be hanged by the neck until dead as an example to all malefactors." Twice they placed the noose around his neck, and twice his immense frame broke the halter. He was then allowed to go free "by God's providence."

Some of the justice meted out by Kieft was not, perhaps, any sterner than that of preceding and later administrations; yet the fact that offenders, or accused, had no appeal against the findings of one man, must have stirred men of courage to resistance, even though complaint to the home government might bring upon complainants total disaster. In a province so far from the homeland, life should, if anything, be less curbed by governmental restrictions; yet, New Netherland was denied even the privileges that burghers had in the homeland. The Dutch system of local government placed in the hands of municipalities the judicial power, but in New Netherland, as yet, there were no municipalities. In Holland a magisterial bench of burgomaster and schepens had jurisdiction of inferior offenses, the bench being chosen by the representatives of the people-by a delegation of eight or nine "good men," selected in town meeting by the burghers. In New Netherland Governor Kieft had more arbitrary sway "than would a king or emperor in their former home." "Month by month Kieft grew in unpopularity, while the protests of the people against him increased and their demands to participate in the government were more and more insistent."

Kieft must have sensed growing resistance of colonists to his arbitrary system of government and administration of justice; and he soon had to recognize that an outside danger was growing more and more serious. He had but little interest in the Indians, treated them as a conquered race, and seemed to shut his eyes to the deceit practiced by the company's traders, in their dealings with them. The latter were cheated out of proper payment for the peltries they brought and had no recourse. Kieft, through his court of justice, his Council, would not aid them. Indeed, he arrogantly demanded tribute "of furs, maize, and wampum," and in 1641, even demanded the life of the son of a chief. The Indians refused to pay tribute and the chief was even more determined not to permit his son to be tried in a Dutch court.

Kieft wanted to wage war, but he was shrewd enough to see that he must set his own house in order first. So he then opened his ears to the petition of the people, and resolved to give them some part in the government of the province. With this intention, he called together the heads of families. They met, and, as was the custom in Holland, chose twelve men to represent them in the government. The Twelve Men[12] were drawn from

Manhattan, Long Island and Pavonia (New Jersey). This was the first popular body organized in New Netherland, the first board representative of the people.

The imperative need of campaigning against the Indians, of teaching them such a lesson that they would be tractable thereafter, was put to the Twelve Men by Kieft. It is said that they agreed to punitive measures being taken, but subsequent disclosures make it appear that Kieft gained the consent of the Board of Twelve Men by unscrupulous means. It is recorded that he induced "three of the most unscrupulous members after a bountiful entertainment, to sign an authorization for him to proceed." He needed no more, and, inasmuch as the Board of Twelve Men demanded reforms in local government, insisting "that courts of justice similar to those which existed in the towns and villages of Holland should be established," and also inasmuch as they emphatically condemned the Governor's Council of one, as it placed the judicial power absolutely in Kieft's own hands, the Director-General decided that he had no further use for that board. While he promised to increase his Council to five, he adhered to his general form of government, and in summarily dismissing the Board of Twelve Men, warned them that further meetings would tend "to a dangerous consequence, and to the great injury both of the country and of our authority." Indeed, he forbade the Twelve Men to again assemble, "on pain of being punished as disobedient subjects."[13]

Freed from such a constitutional curb, Kieft went his fatal way unheeding. It led to a massacre of Indians under conditions which besmirch the Dutch record, or would do so if the disgrace could not be placed almost wholly upon this vindictive Governor. The reaction was a massacre of white people in 1643, and the destruction of almost the whole settlement of Pavonia. The Indians exacted a terrible revenge. "With tomahawk and torch they laid waste most of Pavonia. Indeed, their onslaught was so furious that not a white man remained within its limits, except as a prisoner. Those who escaped with their lives found that they were not safe from attack even when within a thousand paces of Manhattan Fort. Such was the disastrous outcome of Kieft's tyranny in one direction."

Before the storm had reached such intensity as to cause almost all the Dutch of New Netherland to cry out against Kieft, because of his vindictive Indian policy, the Governor had again tried to shift responsibility upon the people, or at least to again get their chosen men to help him out of his troubles. In the autumn of 1643, he again "convoked the community into an assembly to plan for the common protection." For his own immediate ends, Kieft was not unwilling to follow the old Roman system He would not give the burghers power to initiate any legislation, but would permit them to give their opinion, through their chosen representatives, as to any measure he and his Council might decide upon and submit to the popular body. In this way, Kieft planned to hold control, while seeming to offer representative government. To the average person it would seem that any legislation approved by the representatives of the freemen would necessarily reflect the will of the people. Only a few would know that the measure had been drafted by Kieft himself and his Council. However, the freemen were willing to have even this small share in governmental affairs. Perhaps they thought it might lead to a larger share in the future. At all events, the freemen met in September, 1643, and chose eight representatives to form a Board of Eight Men. As a matter of fact, they did not themselves choose the eight men, but permitted the Governor to nominate eight, claiming for themselves only the right to reject any undesirable nominees. One of those nominated was Jan Jansen Damen, "but he was excluded by his associates for his connection with the Pavonia massacre." Jan Evertsen Bout was chosen in his place and the other seven were Joachim Pietersen Kuyter, Barent Dircksen, Abraham Pietersen, Isaac Allerton, Thomas Hall, Gerrit Wolfertsen and Cornelis Melyn. The last-named was president.

The Board of Eight Men met in session on September 15, 1643, "to consider the critical condition of the country." The condition of the country remained critical throughout the next year, and, therefore, their deliberations were chiefly upon questions of war during that winter. While they did not condone Kieft's acts, they had now to consider the defense of their own homes against the ferocity of the marauding Indians. When, on June 18, 1644, they reconvened for their second term as a legislative body, the situation was not so critical, and they had more time to think of governmental matters in general. Matters of revenue and taxation were submitted to them and Kieft's proposals in this respect brought from them opinions which were pointedly against

the Governor. They did not, for instance, see why the people of the province should be taxed for the maintenance of soldiers from Brazil or elsewhere. By the charter, the "home government had guaranteed protection, as one of the inducements to emigrate," and, therefore, the home government ought to bear the expense. Furthermore, the Eight Men did not see that the West India Company had any right to tax the people of New Netherland, as power of taxation lay only with the States General. Certain measures connected with the provincial treasury they approved, such as a placard issued by the Governor, stating that "by the advice of the Eight Men chosen by the commonalty" certain taxes were imposed "provisionally, until the good God should grant us peace, or that we shall be sufficiently aided from Holland." When, however, in July, soldiers arrived from Holland and Governor Kieft sought to impose further taxes to meet the cost of their subsistence, the Board of Eight Men positively refused, or rather, finally disapproved of measures proposed by the Governor and Council in this connection. Whereupon, the arbitrary Kieft did what was contrary to the laws of Holland itself-he usurped the power of the people and imposed taxes without the consent of the Eight Men.

He soon found that there are certain infractions of the rights of man that none but the most craven or servile will bear for long. Taxation only with consent had been the fundamental principle in Holland for a long time. The arbitrary rule of Governor Kieft, in this and other respects, so exasperated the Eight Men that, on October 28, 1644, they appealed directly to Holland, memorializing both the Board of the Nineteen of the West India company, and the higher authority, the States General. They accused Kieft of usurping "princely power." "We did not conceive," they said, "that our powers extended as far as to impose new taxes, but that such must first be considered by a superior authority (to wit, by the Lords Major). "They prayed for a new Governor and for popular government, "so that the entire country may not be hereafter, at the whim of one man, again reduced to a similar danger," such as they had endured, and as still threatened them, because of Kieft's relentless treatment of the Indians.

The complaint reached Holland at a time when the affairs of the West India Company were at a low ebb. Indeed, the company was to all intents insolvent; and while the colonists were sympathized with and there was a general desire among the College of the Nineteen to recall Kieft, more serious thought was given to the suggestion that the colonists be transported back to the homeland, and the province of New Netherland abandoned, as an unprofitable enterprise. The Dutch Government, of course, did not wish this to happen, as no government views abandonment of territory without grave concern. So, when the West India Company stated that such a course might be forced upon them unless they should be granted a subsidy, "in order that the colony should be placed in a safe and prosperous condition," the States General did not dismiss such a request summarily. Indeed, decision against abandonment was soon taken. Matters of reconstruction were promptly considered and it was decided that the predicament of the colonists and remedial plans should be the principal matters of consideration by a committee of the company. This committee, the Chamber of Accounts, in March, 1645, sustained the colonists, and recommended the organization of village and hamlet communities, somewhat after the manner of the English places, giving to each community of certain size the privilege of electing a deputy who, at the call of the Director-General, should gather with other deputies twice yearly for "the upholding of the statutes and the laws." They were to have the power to deliberate "on all questions which might concern the prosperity of their colonies." Governor Kieft was, of course, to be recalled. It was decided that Dr. Lubbertus van Dincklagen, who had returned to Holland, should become Director-General. He was commissioned as such, but before he could leave Holland, his commission was revoked; not because anyone doubted his integrity or ability, but because the changing and grave state of European politics made it seem more prudent to send out as Governor a man of military experience. Hence, in July, 1645, the West India Company decided to commission Petrus Stuyvesant as Director-General.[14]

Dr. van Dincklagen was not averse to taking second place. He seems to have been the first to hold, officially, the title of Vice-Director; and the new plan seemed to assign to him, particularly, the care of the judicial department, the Director-General devoting his thoughts more to the political and military situations.

There was delay in despatching the new Governor and his staff and this delay came as a result of several important happenings. First, the physical condition of Stuyvesant was as yet not quite satisfactory. He had only

recently been under surgical treatment, having lost a leg in an attack upon the Portuguese island of St. Martin, in 1644, and having had to return to Holland for operation and a wooden leg. Furthermore, the provincial situation was brightening. As the year 1645 passed the military situation of New Netherland improved and Governor Kieft succeeded in signing a peace treaty with the Indians on August 30, at Fort Amsterdam, "in presence of the whole community" and "under the blue canopy of heaven." There may have been other reasons why the commission was not issued to Stuyvesant until July 28, 1646, and why he did not leave Holland until 1647. However, no important changes were made in the plan decided upon in 1645; and in May, 1647, therefore, the new Governor, resplendent in his silver-mounted artificial leg, pegged his way from the ship to the fort at New Amsterdam.

It cannot be said that Stuyvesant made evident effort to soothe the ruffled state of public feeling; indeed, his attitude was autocratic, arrogant, unbending, pompous. The populace had received Stuyvesant with acclaim; but this redoubtable man of war seemed to look upon the "vehement" welcome as but his due. He and his staff "landed on a fine morning, in the presence of all the people, who came out with guns and received him with shouts." They knew little of Stuyvesant, but the fact that his coming meant that Kieft would soon go was sufficient to bring them joy. "So vehement was their welcome that nearly all the breath and powder of the city was exhausted." Stuyvesant marched through the cheering crowds "in great pomp," making the most conspicuous display possible of his "silver-mounted wooden leg of fine workmanship." It was of definite political value to him. It testified emphatically, to a valiant past. Its embellishments also testified to his exalted station. Maybe, it helped to keep in good humor the "principal inhabitants" who had gathered at the fort to receive him, and who stood before him bareheaded, awaiting his pleasure, while he remained covered "as if he were the Czar of Muscovy." Though he eventually, with brutal frankness, told them that he would make any man "a foot shorter" who dared to appeal to Holland against his rulings as Governor, they may have taken his words as but an indication of his basic honesty, and have been glad to cast in their lot with him, who at the worst was at least displacing Kieft.

Stuyvesant promised to govern them "as a father his children, for the advantage of the chartered West India Company and these burghers and this land." He assured them that "justice should rule," but at the same time pointed out that the directorship held "exclusive privileges," which he was determined to exercise. He frowned upon "every expression of republican sentiment."

Accompanying Stuyvesant were Lubbertus van Dincklagen, his Vice-Director, and Henry van Dyke, his *Schout-Fiscaal*. Cornelis van Tienhoven, who had been Secretary to Kieft, was continued as Provincial Secretary by Stuyvesant. He also appointed an English secretary, George Baxter, who had acted in a similar capacity, since 1642, in Kieft's administration, and was evidently a necessary official, seeing that "none of the company's officers could tolerably read or write in the English language," and that the English-speaking settlers in the Dutch province were ever increasing, both in numbers and restlessness. Another Englishman, Captain Bryan Newton, was given a place on Stuyvesant's Council, as was also Dr. Johannes la Montagne, the original and sole member of Governor Kieft's original Council.

The new Governor soon organized a court of justice to consider the charges against those who had attacked the outgoing administration. Stuyvesant did not bring the culpable ex-Governor to justice, but those who had brought his misdeeds to light, Patroon Cornelis Melyn and Joachim Pieter Kuyter, the leaders of the case of the people against Kieft, were arraigned and tried, presumably before Vice-Director van Dincklagen and "others of the Company's officers," and found guilty "of grave offense for presuming to attack one in authority over them." Both were heavily fined and banished from the province. It was decreed that they, as prisoners, should sail for Holland in the very ship upon which Kieft, triumphant and complacent, would depart, vindicated with the dignity and courtesy that one of his high station might expect to enjoy at the end of a worthy term of service. With him went his Schout, Van der Huygens, and also the Dominie, Everardus Bogardus. In the same ship, the "Princess," was deposited Kieft's ill-gotten wealth. All were lost in the wrecking of the ship off the rocky coast of Wales; at least, all but Melyn and Kuyter, the prisoners. They managed to reach the shore and eventually crossed to Holland, whence they ultimately returned to New Netherland vindicated, their sentences having been quashed, much to the annoyance of Stuyvesant.

The new Director-General, as has been stated, organized a court of justice, soon after he reached New Netherland. It was apparently his Council, and, as formerly, it was to be the Supreme Court, the tribunal of last resort, in the province. As before, it was also to be much under the control of the Governor. The Vice-Director became presiding judge, but it seems he had to give way whenever the Director-General wished to preside.[15]

Stuyvesant probably would have liked to have only one court, and that absolutely under his governing hand, but the province was growing, especially in independent thought. The people were getting to the point where they did not look upon their Governor as their patriarch. They demanded a share in the government, and especially in the administration of local justice and in the making of laws. It seems possible that Stuyvesant had a secret understanding with the Company's managing board, and that the expressed wish of the Company, in the matter of popular government and the betterment of governmental processes under which the provincials should live, was to be borne in mind by Stuyvesant only after the Company's commercial interests had been safeguarded. Unfortunately, Stuyvesant seems to have felt that the people's interests and the Company's could not be merged. "That the people should rule themselves was as good as to say that the horse should loll in the carriage while his master toiled between the shafts" was his opinion. He did, however, not have absolute control, and neither did the Company. The States General, though not very strong at that time, had, of course, a certain degree of authority over all the provincial governments, and it was their wish to establish or to get the Company through its provincial Director to establish a governmental system like that of the home provinces in New Netherland. The people's leaders were aware of this, and ere many months had passed Stuyvesant found that the popular demand could not be ruthlessly put aside. So, in September, 1647, four months after he had landed, he permitted the people to organize and establish a Board of Nine Men. At least, he permitted the people to choose eighteen men from whom he himself would select nine to constitute the Board of Nine Men.[16]

This board was to have some legislative authority. At least, it was to be consulted in matters of taxation, and upon any civil matters it was to hold advisory capacity. Its most definite function, however, was to be magisterial. The board was to be an inferior court, to the extent that the nine members were to form three groups of three, and attend in group rotation all sessions of court, "and consider all civil cases which might be referred to them as arbitrators." Stuyvesant evidently did not intend that the board should long remain a people's body, for his plan did *not* include popular elections. Retiring members were to nominate their successors, "with the aid of the Director," the latter having the power to dissolve the board at his discretion. In time, no doubt, Stuyvesant expected the official class to have a majority on the board, and so be quite amenable to his will.

The first Board of Nine Men consisted of three "merchants," three "citizens," and three "farmers."[17] They took office in September, 1647, and soon proved that they were truly representative of the people. They would not become mere puppets. If they were looked upon by the people as their representatives, they would see to it that the interests of the people were made paramount, or they would resign. Stuyvesant, on the other hand, was determined that the board should be subservient to his will, or should not exist. That the board was soon dissolved indicates that its members refused to bow to the Governor.

Another Board of Nine Men took office in 1649,[18] but the Governor was no more successful with the new body than he had been with the old. Indeed, he soon became so angry that he arrested its president and dissolved the body.[19] This action was taken after he had discovered that the board had dared to think of bringing his own administration under investigation by the home authorities. Van der Donck, Patroon of Colendonck and president of the Board of Nine Men, had been keeping a journal of certain investigations he had been making of the state of the people and of the actions of the Director-General, and this journal was to be the basis of a remonstrance to the States General. Stuyvesant seized the journal and cast its compiler in jail. On March 15, 1649, his Council, acting as a Court of Impeachment, expelled Van der Donck from membership of the Board of Nine Men.

Footnotes

Footnote 1: The Dutch, while not giving to the people the exclusive choice of their rulers, kept the feudal system within its legitimate sphere, and limited it to the ideal. The feudal ideal, politically, was the law of service, written in Roman jurisprudence and realized in the Christian life. Its fatal weakness was that it was powerless to protect the people against despotic kings, princes and judges.

By its terms (the charter of the Dutch West India Company) the will of the company was supreme, and all power was vested in the Director-General and Council, who were to be governed by the Dutch Roman law, the imperial statutes of Charles V, and the edicts, resolutions and customs of the United Netherlands. . . . This shows the genesis of Dutch government. The basis of it all was the customs of the fathers. The superstructure was a union of the Roman, German and Dutch municipal systems. The Dutch were governed by a league of commercial guilds, represented in the States-General in order that they might protect the organized interests of each class of people; not that they might invade the rights of others. This principle of conserving the ancient and vested rights of all the people as against any portion thereof, even a majority, and as against government itself, was the foundation principle of the province as of the mother country, and distinguished it in the beginning from either of the English colonies. . . .In the last analysis, the English system gave the government absolute power over all subjects. Whoever controlled the government worked their sovereign pleasure with all people, whether such control was held by Crown or Parliament. . . . The Dutch system, while holding the elements of feudal liability to tyranny, held them in strict subservience to Law, and guarded against abuses by conferring no power without accompanying it with an adequate safeguard against its arbitrary exercise. In England it was either the Crown or Parliament making laws at their own pleasure; in the Netherlands government was a commercial agent, while the laws and customs of the fathers were administered and justice secured by magistrates nominated by the people. While the Dutch form was feudal, its spirit was municipal. . . . The Dutch gave the New Netherland in feudal shell, a paternal guardianship of liberty regulated by law.

The English parliamentary system vested supreme power in the legislative majority. The Virginia system placed the Legislature under the control of a royal master. The New England system (except in the Plymouth Colony) rendered the Church supreme. . . . . The Dutch made the Judiciary supreme, and denied all arbitrary power, either in people or parliament, in civil rulers or religious teachers and sought to fortify the people against its exercise. Thus the feudal shell of Dutch government enclosed the seed of liberty, ready in fullness of time to germinate in most perfect form. Constitutional History of the Colony and State of New York, New York Civil List, 1888 ed., pp. 22-26.

Footnote 2: He is charged specially with enforcing and maintaining the placards, ordinances, resolutions and military regulations of the High Mightinesses, the States General, and protecting the rights, domains, and jurisdiction of the company, and executing their orders as well in as out of court, without favor or respect to individuals; he was bound to superintend all prosecutions and suits, but could not undertake any action on behalf of the company, except by order of the council; nor arraign or arrest any person upon a criminal charge, unless upon information previously received, or unless he caught him in *flagrante delicto.* In taking information, he was bound to note as well those points which made for the person as those which supported the charge against him, and after trial he was to see to the proper and faithful execution of the sentence, pronounced by the judges who, in indictments carrying with them loss of life and property, were not to be less than five in number. He was, moreover, specially obliged to attend to the commissions arriving from the company's outposts, and to vessels arriving from, or leaving for, Holland, to inspect their papers and superintend the loading and discharging of their cargoes, so that smuggling might be prevented; and all goods introduced, except in accordance with the company's regulations were at once to be confiscated. He was to transmit to the directors in Holland copies of all information taken by him, as well as all sentences pronounced by the court, and no person was to be kept long in prison at the expense of the company without special cause, but all were to be prosecuted as expeditiously as possible before the Director and Council.- O'Callaghan's "History of New Netherland," Vol. I, p. 102.

Footnote 3: No number 3 footnote in original.

Footnote 4: While the charter was under consideration in the meetings of the Company at Amsterdam, two of the directors (Samuel Godyn and Samuel Bloemmaert) purchased of the Indians a tract of land on Delaware Bay, extending from Cape Henlopen (the southern boundary of New Netherland) northward full thirty miles, and two miles in the interior. This purchase was ratified by the company when the charter was issued.

Very soon afterwards, Kiliaen van Rensselaer purchased a large tract of the natives on the upper navigable waters of the Hudson River; and Michael Paauw, another. director, secured by the same means a large tract in New Jersey at the mouth of the river opposite Manhattan, and all of Staten Island. This adroit management of wide-awake directors, in securing the best lands in the province as to situation-who "helped themselves by the cunning trick of merchants"-provoked jealousy and ill will among their fellow directors, which was finally allayed by admitting others into partnership with them.- Lossing.

Footnote 5: Invested as well by the Roman law as by the charter, with the chief command and lower jurisdiction, the Patroon became empowered to administer civil and criminal justice in person, or by deputy, within his colonie; to appoint local officers and magistrates; to erect courts and take cognizance of all crimes committed within his limits; to keep a gallows, if such were required, for the execution of malefactors, subject, however, to the restriction that if such gallows happened by any accident to fall, pending an execution, a new one could not be erected, unless for the purpose of hanging another criminal. The right to inflict punishment of minor severity was necessarily included in that which authorized capital convictions, and accordingly we have several instances throughout the record of the local court, of persons who had, by breaking the law, rendered themselves dangerous to society, or obnoxious to the authorities, having been banished from the colonie, or condemned to corporal chastisement, fine, or imprisonment, according to the grade of the offense.

In civil cases, all disputes between man and man, whether relating to contracts, titles, possessions or boundaries; injuries to property, person or character; claims for rent, and all other demands between the Patroon and his tenants, were also investigated and decided by these courts; from the judgment of which, in matters affecting life and limb, and in suits where the sum in litigation exceeded twenty dollars, appeals lay to the Director-General and the Council at Fort Amsterdam. But the local authorities, it must be added, were so jealous of this privilege that they obliged the colonists on settling within their jurisdiction to promise not to appeal from any sentence of the local tribunal.

The laws in force here were, as in other sections of New Netherland, the civil code, the enactments of the States General, the ordinances of the West India Company and of the Director-General and Council, when properly published within the colonie, and such rules and regulations as the Patroon and his co-directors, or the local authorities, might establish and enact.

The government was vested in a general court which exercised executive, legislative, or municipal and judicial functions, and which was composed of two commissaries *(gecommit teerden)*, two councillors styled indiscriminately by *raets-personen, gerechts-personen or raeds-vrienden, or schepenen,* and who answered to modern justices of the peace. Adjoined to this court were a colonial secretary, a sheriff, or *schout-fiscaa1,* and a *geracht-bode,* court messenger or constable. Each of these received small compensation, either in the shape of a fixed salary or fees, the commissaries and magistrates (receiving) fifty, one hundred or two hundred guilders annually, according to their standing; and the court messenger one hundred and fifty, with the addition of trifling fees for the transcript and service of papers. The magistrates of the colonie held office for a year, the court appointing their successors from among the other settlers, or continuing those already in office at the expiration of their term of service, as it deemed proper.

The most important functionary attached to this government was, as throughout the other part of the country, the *schout-fiscaal,* who, in discharge of his public functions, was bound by instructions received from the Patroon

and co-directors, similar in tenor to those given to the same officer at the Manhatans. No man in the colonie was to be subject to loss of life or property unless by the sentence of a court composed of five persons, and all who were under accusation were entitled to a speedy and impartial trial. The Public Prosecutor was particularly enjoined not to receive presents or bribes, nor to be interested in trade or commerce, either directly or indirectly; and in order that he might be attentive to the performance of his duties, and thoroughly independent, he was secured a fixed salary, a free house, and all fines amounting to ten guilders ($4) or under, besides the third part of all forfeitures and amendes over that sum were his perquisites.-O'Callaghan's "History of New Netherland," Vol. I, 320-322.

Footnote 6: Samuel Godyn, Samuel Bloemmaert, Michael Paauw, Cornelis Melyn, Adriaen van der Donck, Meyndert Meyndertse van Keren, Hendrick van der Capelle, Cornelis van Werkhoven.

Footnote 7: The first step to organize a court in the colony of Rensselaerswyck was taken by the Patroon on July 1, 1632, when he appointed Rutger Hendricksz van Soest *schout,* and empowered him to administer the oath of schepen to Roelof Jansz van Masterland, Gerrit Theusz de Reus, Maryn Adriensz, Brant Peelen, and Laurens Laurensz, all of whom, with the exception of de Reus, were then residing in the colony. The Patroon issued instructions for the *schout* and *schepens* on July 20, 1632, and sent these to the Colony by his nephew, Wouter van Twiller, the newly-appointed director-general of New Netherland, who also took with him a silver-plated rapier with baldric and a hat with plumes for the *schout,* and black hats with silver bands for the *schepens.*

Van Twiller sailed from the island of Texel on the ship *Soutberg* shortly after July 27, 1632 and arrived at New Amsterdam in April of the following year. He had with him a power of attorney from Kiliaen van Rensselaer to administer the oath of *schout* to Rutger Hendricksz van Soest, but as far as can be judged from the meagre information that is available did not administer the oath.

Conditions just then were not favorable for the erection of a court in the colony. Differences had arisen in the board of directors of the Dutch West India Company in regard to the fur trade, and efforts were made by those who were opposed to the agricultural colonization of New Netherland to deprive the Patroons of the privileges granted to them by the Charter of Freedoms and Exemptions. Van Rensselaer complains of this in a memorial presented by him to the Assembly of the XIX on November *25,* 1633, in which he makes the statement that in July, 1632, he had people and animals enough to start five farms, but that his efforts were frustrated because the Company refused to let him have carpenters, smiths, and other mechanics, and also declined to furnish his people with supplies, in exchange for grain and dairy products.

Taking this statement with the facts that Rutger Hendricksz' term of service as a farmer was about to expire and that his name does not appear in the records of the colony after 1634, it seems safe to conclude that when Van Twiller arrived in New Netherland Rutger Hendricksz had determined to leave the colony and declined to accept the position of *schout.*

Van Twiller wrote to the Patroon and recommended Brant Aertsz van Slichtenhorst for the post, but before his letter was received the Patroon had already made other arrangements, and entered into a contract with Jacob Albertsen Planck, whereby the latter was engaged as *schout* for the period of three years. Planck received his instructions on April 27, 1634, and soon after sailed for the colony, where he arrived on or just before the 12th of August. His instructions provided that on his arrival in New Netherland he was to present himself before Director Van Twiller, and to request him to administer to him the oath of office, "instead of to Rutger Hendricksz, according to his previous power of attorney, and furthermore that, at the first opportunity, he was to choose three *schepens* from among the fittest of the colonists, so that he could hold court, if need be. Presumably, therefore, the court of the colony (of Rensselaerswyck) was first organized after August 12, 1634.-See Preface of *Minutes of the Court of Rensselaerswyck, 1648-1652,* translated by State Archivist A. J. F. Van Laer (University of State of N. Y., publishers, 1922).

Footnote 8: The court as organized (in 1648) by Van Slichtenhorst consisted at first of four and afterwards of

five persons, of whom two were designated as *gecommitteerden,* or commissioners, and two, or afterwards three, are in the record indiscriminately referred to as *raden, raetspersonen, gerachtspersonen* or *rechtsvrienden.* The duties of the *gecommitteerden* were primarily of an administrative nature, while those of the *raden* contrary to what one might expect from the title, seem to have been chiefly judicial. The *gecommitteerden* represented the patroon and acted under definite instructions from the guardians. The *raden,* on the other hand, were appointed by the director, but represented the colonists, it being at that time held sufficient if persons who were to represent others were chosen from among them, so as to represent their class. The only requirement was that they should not be in the patroon's service. Goossen Gerritsz made a point of this on October 22, 1648 when, as one of the reasons for his being unable to accept the office of *gerachtspersonen* he stated that he was "not yet on a free basis with the patroon." The object was, however, overruled, so that he was obliged to serve.

The members of the court were as a rule chosen from among the most prominent residents of the colony. . . . .

The proceedings of the court presided over by Van Slichtenhorst cover the period from April 12, 1648, to April 15, 1652. They form the most important source for the history of the colony (of Rensselaerswyck) during that period, but unfortunately add but little to what is known from other sources in regard to the outstanding event of that period, namely, the controversy between Van Slichtenhorst and General Peter Stuyvesant, regarding the jurisdiction of the territory around Fort Orange, which forms one of the dramatic episodes of the history of New Netherland. As is well known, this controversy had its origin in the claim made by the patroon, as early as 1632, that "all the lands lying on the west side of the river, from Beyren Island to Moeneminnes Castle" . . . . "even including the place where Fort Orange stands," had been bought and paid for by him. The Dutch West India Company on the other hand maintained that the territory of the fort, which was erected several years before the land of the colony was purchased from the Indians, belonged to the Company, and consequently was not included in the patroon's purchase. The question had remained unsettled during the lifetime of Kiliaen van Rensselaer, but came to an issue when Van Slichtenhorst, soon after his arrival in the colony, began to issue permits for the erection of houses in the immediate vicinity of the fort. Stuyvesant objected to the erection of these houses, on the ground that they endangered the security of the fort, and ordered the destruction of all buildings within range of cannon shot, a distance at first reckoned at 600 geometrical paces of five feet to the pace, but which was afterwards reduced to 150 Rhineland roda (equal to 12.36 English feet). The order called forth a vigorous protest from Van Slichtenhorst, who regarded it as an unwarranted invasion of the patroon's rights; and he proceeded with the erection of the buildings. A counter protest followed, and in 1651 charges were brought against Van Slichtenhorst, who was summoned to appear before the director-general and council at Manhattan, and there detained for four months. The controversy continued after his return but was definitely settled on April 10, 1652, when a proclamation, drawn up by the director-general and council of New Netherland on the 8th of that month, was issued in the colony for the erection of a separate court for Fort Orange, independent of that of the colony.

The erection of this court was a serious blow to the colony of Rensselaerswyck, from which it never fully recovered. By virtue of this proclamation, the main settlement of the colony, which was known as the *Fuyck,* but which in the court record is generally referred to as the *byeenwoninge,* or hamlet, was taken out of the jurisdiction of the patroon and erected into an independent village by the name of Beverswyck, which afterwards became the city of Albany. As a result of this action, the jurisdiction of the court of the colony was thereafter confined to the sparsely settled outlying districts of the colony, so that the cases which came before it must have been very few. No consecutive judicial record of the colony after April 15, 1652, has been preserved, but entries in the minutes of the court of Beverswyck indicate that the court of the colony continued to hold sessions.

Van Slichtenhorst protested vigorously against the erection of the court of Fort Orange and Beverswyck, and with his own hands tore down the proclamation which had been posted on the house of the patroon. For this he was arrested on April 18, 1652, and taken to Manhattan, where he was detained until August, 1653. With his arrest, Van Slichtenhorst's administration came to a close. On July 24, 1652, he was succeeded as director by Jan Baptist van Rensselaer, and as officer of justice by Gerard Swart, so that thereafter the two functions were no longer combined in one person. The latter had been commissioned *schout* on April 24, 1652, and continued to hold this position until 1665, when, by order of Governor Richard Nicolls, the court of the colony was

consolidated with that of Fort Orange and the village of Beverswyck. The year 1665, therefore, marks the end of the first local court that was organized in the province of New Netherland, outside of New Amsterdam.-See *Minutes of the Court of Rensselaerswyck, 1648-1652*, by A. J. F. Van Laer, published by the University of State of N. Y., 1922, pp. 16-19.

Footnote 9: Van Twiller had a difficult task. His inertia in certain dramatic situations was rather the demand of the national state of politics than the manifestation of craven characteristics in himself. Europe was in a state of war, and the international situation was delicate. To deal resolutely with some colonial matters might have endangered the offensive and defensive alliance between England and the United Provinces of the Netherlands. Van Twiller was a comparatively young man when he arrived in the province as Director-General; it is therefore all the more creditable that he curbed his youthful spirit and preserved a pacific attitude. That he had the confidence of his uncle, Patroon Van Rensselaer, is indicated by his later responsibility, that of guardian of the Rensselaer estate and heirs, from about 1644.-Williams in *Courts and Lawyers of N. Y.*, Chap. IX (1925).

Footnote 10: The first regular physician who came to New Amsterdam and stayed was the Huguenot Johannes La Montagne, who in 1637 came from Leyden. He had received his degree from the University of Leyden and settled down to practice there. He married Rachel de Forrest, whose family emigrated to New Netherlands-to be the ancestors of our New York de Forrests-and after her death Dr. La Montagne was tempted to follow them. (He) was born in 1595, at Saintonge, on the Bay of Biscay. His family were among the first Huguenot refugees to Holland. As Jean Mousnier de la Montagne he registered as a student of medicine at the University of Leyden, November 19, 1619 . . . . we can trace his connection with the university as student and probably lecturer, off and on for some seventeen years until 1636. . . . It was not until the following year (1637) that with his wife and four children, he arrived in New Netherland.-Walsh in *History of Medicine in New York* (1917), Vol. I, pp. 19-20. See also Medical chapter of this work.

Footnote 11: In 1638 William Kieft was appointed governor. This governor was a grasping, arbitrary narrow-minded man, full of his own importance, with a restless activity that was never turned in any right direction, or applied to the accomplishment of any wise purpose. During the nine years that he mismanaged the colony, he retained in his hands the sole administration of justice. In obedience to his instructions, it was necessary that he should keep up the form of a council, but that he might enjoy exclusive control, he reduced it to one member, reserving two votes for himself.-Brodhead's "History of New York"; also Daly's "State of Jurisprudence During the Dutch Period"; "History of Bench and Bar of N. Y.," p. 8.

Footnote 12: Board of Twelve Men in 1641-David Pietersen de Vries, president; Jacques Bentyn, Maryn Andriaensen, Jan Jansen Damen, Hendrick Jansen, Jacob Stoffelsen, Abraham Pietersen Molenaar, Frederick Luhbertsen, Jochem Pietersen Kuyter, Gerrit Dircksen, Joris Rapelje, and Abram Planck.

Footnote 13: And whereas the Commonalty at our request appointed and instructed these twelve men to communicate their good council and advice in the subject of the murder of the late Claes Cornelissen Swits, which was committed by the Indians; this now being completed by them, we do hereby thank them for the trouble they have taken and shall with God's help make use of their rendered written advice in its own time. The said Twelve Men shall now, henceforth, hold no further meetings, as the same tends to a dangerous consequence, and to the great injury both of the country and of our authority. We therefore hereby forbid them calling any manner of assemblage or meeting except by our express order, on pain of being punished as disobedient subjects.-See "Documents Relative to the Colonial History of New York," Vol. I, 203.

Footnote 14: The Commissioners of the Assembly of the XIX of the General Privileged West India Company acted upon this report (of the Chamber of Accounts) in instructions given to the Director and Council under date of July 7, 1645. The Council was to consist of "the Director as President, his Vice, and the Fiscal." In cases in which the Advocate-Fiscal appeared as Attorney-General, either civil or criminal, the military commandant was to sit in his stead; and if the charge was criminal, three persons were to be associated from the commonalty of the district where the crime or act was committed. The Supreme Council was the sole body "by whom any

occurring affairs relating to police, justice, militia, the dignity and just rights of the company" were to be "administered and decided." That is, it was an executive, administrative and judicial body, but possessed no legislative functions, and had no power to alter or abridge the ancient rights of the people. The gathering of the inhabitants "in the manner of towns, villages, and hamlets, as the English are in the habit of doing," was to be aided by all means in their power, and the privileges (heretofore noted) as being granted in the Freedoms and the amplifications thereof" were continued; and, further, "inasmuch as the respective colonists have been, allowed, by the Freedoms, to delegate one or two persons to give information to the Director and Council concerning the state and condition of their colonies, the same is hereby confirmed." The recommendation of a semi-annual assembly, therefore, was not confirmed.-"Constitutional History of the Colony of New York," "New York Civil List," 1888 ed., p. 33.

Footnote 15: Immediately after his arrival, Stuyvesant established a court of justice, of which van Dincklagen was made the presiding judge, having associated with him occasionally others of the company's officers. The new tribunal was empowered to decide "all cases whatsoever," subject only to the restriction of asking the opinion of the governor upon all momentous questions, who reserved to himself the privilege, which he frequently exercised, of presiding in the court, whenever he thought proper to do so.-Justice Chas. P. Daly in the "State of Jurisprudence during the Dutch Period," quoting *Breeden Raedt*, extracts in 4 Doc. Hist. N. Y., 69; and Albany Records 20, 28, 29, 38, 56 to 61.

Footnote 16: The new Director proceeded with great vigor to restore the disordered government. He promulgated municipal regulations, and stringent enactments against smuggling; established customs duties on wines and liquors and on beaver skins. He ordered an election of eighteen men from Manhattan, Breukelen, Amersfoort, and Pavonia, from whom he selected nine as "Interlocutors and Trustees of the Commonalty," or "Tribunes" of the people. These Nine Men were to hold courts of arbitration weekly, and were to give advice to the Director and Council on all matters submitted to them. They received their appointment September 25, 1647. Three were taken from the merchants, three from the burghers, and three from the farmers. Thus was preserved and continued the system of giving representation to the various vocations which formed the groundwork of municipal organization in the Netherlands. The tribunal was of very ancient date. Indeed, in its essence it was a method of adjudication which prevailed in one form or another from time immemorial; of which the village elders were the most ancient type. The "Tribunal of Well Born Men," or "Men's Men," had existed for centuries in the Netherlands. It originally had separate criminal and civil jurisdiction, the first exercised by thirteen and the second by seven men. These courts were afterwards united, the number of members being thirteen until 1614, when it was altered to "Nine Well-Born Men." This institution was now introduced, as a form of government for the capital of New Netherland and surrounding villages. It was provided that six should annually retire, and that twelve men were to be referred to the Director, with the Nine who had served during the year, from whence the new board was to be selected. The Board met on the 15th of November, when the Directors communicated his views by written message, in consequence of illness. They consented to appropriations for schools and for completing the church; but declined to repair the fortifications, on the ground that, as the company had agreed to incur expenses of that class, the money for that purpose ought to come out of the funds derived from customs and excise duties and from tolls paid at the company's mills. This board therefore, was also a legislative body, in the ancient sense; that is, a body without whose consent taxes could not be lawfully assessed nor vested rights modified.-New York Civil List and Constitutional History of the Colony of New York, 1000 edition, pp. 33-34.

Footnote 17: *Board of Nine Men*, 1647-Augustine Heermans, Arnoldus van Hardenburg, Govert Loockermans, merchants; Jan Jansen Danm, Jacob Wolfertsen van Cowenhoven, Hendrick Hendricksen Kip, citizens; Michael Jansen, Jan Evertsen Bout, and Thomas Hall, farmers.

Footnote 18: *Board of Nine Men*, 1649-Adriaen van der Donck, president; Aug. Heerrnan, Arnoldus van Hardenburgh, Govert Loockermans, Oloff Stevensen van Cortlandt, Hendrick Hendricksen Kip, Michael Jansen, Elbert Elbertsen (Stoothof), Jacob Wolfertsen van Cowenhoven.

Board of Nine Men, 1650-Oloff Stevensen van Cortlandt, president; Augustine Heerman, Jacob van

Cowenhoven, Elbert Elbertsen, Hendrick Hendricksen Kip, Michad Jansen, Thomas Hall, Govert Loockermans, J. Evertsen Bout.

Board of Nine Men, 1652-David Prevost, William Beeckman, Jacobus van Curler, Allard Anthony, Isaac de Forest, Arent van Hattem, Joachim Pietersen Kuyter, Paulus Leendertsen van der Grist, Peter Cornelissen, miller.

Footnote 19: Within two years the first Board of Nine Men became dissatisfied and uncompliant, and another was appointed. This second board proved as unmanageable as the first, and succeeded in doing what the first had attempted to do without success-in sending a deputation to The Hague to present to the States General a statement of the grievances of the colonists. . . . Of this commission, Adriaen van de Donck was the head, as he was probably the author of the *Vertoogh*, or Remonstrance, presented to their High Mightinesses.

This important measure was not carried out without a struggle with the imperious Director. When the Nine Men proposed it, they asked permission of Stuyvesant that they might confer with their constituents in a popular meeting to be called to consider the condition of the colony, whether it would approve of sending a delegation to Holland, and to provide means to defray the expense. The Director refused permission, saying that any such communication with the people must be made through him, and his directions followed. The next best thing the Nine Men could do was to go from house to house to consult with their constituents privately; and Van der Donck was appointed to keep a record of these private conferences. Stuyvesant, exasperated at the defiance of his authority, went to Van der Donck's chamber, in his absence, seized all his papers and the next day arrested and imprisoned their author.-Bryant's "History of U. S.," II, 131.

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Stuyvesant was not, in other respects, sailing on a placid sea. His own Lieutenant-Governor, Vice-Director van Dincklagen, as well as his Attorney-General, Schout-Fiscaal van Dyck, had been at odds with him in the Council, perhaps because of his treatment of Van der Donck. At about this time Patroon Melyn, whom he had banished in 1647, returned to New Amsterdam, his sentence of banishment having been reversed by Their High Mightinesses, the Lords-Major of the States General. Moreover, the Patroon also brought from Their High Mightinesses "a mandamus requiring the Director-General to appear at The Hague, either in person or by attorney, to answer the charges which Melyn and Kuyter had brought against him." Melyn created considerable excitement in New Amsterdam by demanding that the Director-General make public his vindication, by a placard as widely distributed as had been that which had made known his condemnation two years earlier. Melyn made this demand upon the Governor at a public meeting held in the church; and he also called upon the President of the Board of Nine Men to read to the meeting the mandamus he had brought. Motion to read it was carried, and Van Hardenburg was about to do so when Stuyvesant snatched the document out of his hands, declaring that a copy should first have been served upon him. This undignified action by the Governor resulted in action equally undignified and unceremonious by others, the commotion indicating that the people were inclined to show as little respect for the authority of their Governor as the latter had shown for that of Their High Mightinesses of the homeland. The mandamus sustained a broken seal in the snatching and resnatching, but finally the Governor consented to the public reading of it after Melyn promised that a copy should be delivered to him. After the reading of the mandamus Stuyvesant said, in answer: "I honor the States (General) and shall obey their commands. I shall send an attorney to sustain the sentence that was pronounced."

Nevertheless, the Governor lost ground with the people by this undignified public action, and the suspicion of a few that Stuyvesant had been using his office for his own enrichment rapidly spread until it became general. Whether the Director feared that his treatment of Van der Donck might injure his own case before the States General, or that the term of imprisonment had been fully served by the Patroon of Colendonck is not clear; but the record shows that the latter was soon released, and that although he and others again pursued their former purpose, and even more openly prepared the *Vertoogh*, or Remonstrance, against the Governor's arrogant despotism in office, they were not molested. Stuyvesant no doubt knew that the Vice-Director and the Schout-Fiscaal were openly abetting the Board of Nine Men in their scathing condemnation of himself. He probably knew its exact wording, for the drafting of the *Vertoogh van Nieuw-Nederlandt* was not done in a corner but in the light of day"; yet he permitted the instrument to be signed, and sanctioned the sailing of three of the signers with it, for delivery to the States General. Two years earlier, Stuyvesant had declared, after sentencing Melyn and Kuyter: "If I were persuaded you would appeal from my sentences or divulge them, I would have your heads cut off, or have you hanged on the highest tree in New Netherland." Now, with his administration already discredited in the records of the States General, he permitted further condemnation to be heaped upon his head. Possibly Stuyvesant sensed the changing of the times. Most governments in Europe at that time were trembling lest the republican spirit which, in that year, 1649, had reached such intensity in England as to result in the decapitation of the King, might spread to the Continent, and sweep away all monarchical institutions and despotic governments. Europe was far from New Netherland, of course, and the Government was far also from aid in case the provincials should inhale the republican air, which might cross the sea quicker than soldiers could. Stuyvesant probably did not lack an experienced soldier's quick recognition of a military situation, and, with a soldier's sense of the greater importance of fending off near dangers before making dispositions to meet those that are still distant, he had probably decided that the New Netherland situation forbade a display of arrogant despotism such as had been his customary course of late years. Whatever may have been his reasons, he took no action to stop Van der Donck and two others from sailing with the *Vertoogh.* Neither did he detain

Melyn, though he must have realized that his own case would be bettered if by some means Melyn could be kept in New Netherlands while Van Tienhoven, Stuyvesant's personal attorney, was presenting the Governor's side of the case to the States General.

However, the republican spirit did not become ominous in New Netherland, and the European situation soon became so confused that the States General lost much of its prestige; so much indeed, that the Amsterdam directors of the West India Company, in 1650, openly challenged the right of the States General to issue a "Provisional Order" recalling Stuyvesant and interfering with the government of their proprietary province. They averred that the action of the States General was "a violation of the privileges granted in the charter" of the General Privileged West India Company. It is believed that they advised Stuyvesant to ignore the Provisional Order. At all events that doughty administrator manifested no perturbation upon receipt of it. Indeed, he said, after reading the order: "I shall do as I please." Certainly he did not return to Holland, neither did he act in the matter of organizing a schepens court in New Amsterdam until 1653, by which time other great events had occurred to influence the local and home situations politically.

Van der Donck, upon arrival in Holland in 1649, appeared before the States General, praying to be heard. He laid the case of the people before Their High Mightinesses "at great length," and with great effect. The papers were referred to a committee; and this committee, in due course, on April 11, 1650, reported to the States General. The report favored the people, recommended a liberal and popular policy. Grievances were to be remedied; Stuyvesant was to be recalled; the Patroons were to be "obliged to settle their colonists in the form of villages"; the Nine Men were to have increased judicial responsibilities, eventually giving way to the Schepens Court in New Amsterdam; the Governor's Council thereafter was to be more representative of all classes of provincials; a well-defined judicial system was to be established as soon as possible; and matters of taxation and expenditure of public money were to be considered by a legislative body in which all classes were to have a part.

Van der Donck improved the situation by publishing his *Vertoogh* in Holland, which paper aroused a strong popular feeling. It also impressed the States General, who were insistent that reform be carried out by the West India Company. The latter had at first been ill at ease, the Amsterdam directors writing to Stuyvesant: "The name of New Netherland was scarcely ever mentioned before, and now it would seem as if heaven and earth were interested in it." The Company soon recovered itself, however, and, taking advantage of the temporary weakness of the States General, resolved to do as it pleased in governing New Netherland, which to the Company represented but a commercial investment. Still, in those grave, restless, unstable times the political situation was apt to change so completely and rapidly that what might be good policy in one year might be disastrous in the next. The States General had brought Holland triumphantly out of the Thirty Years' War in 1648, and ended the eighty years of strife with Spain by concluding a separate treaty of peace with the latter, much against the wish of the Stadtholder, William the Second.[20] His opposition during the next two years took from the States General much of the prestige it had gained in 1648. However, he himself passed from power and all things earthly in November, 1615, succumbing to an attack of smallpox at a time when Holland seemed in grave danger of losing the independence that eighty years of bloodshed and incessant war had won for it. With his death the power of the States General again became definite, which fact the West India Company realized. So, recognizing the danger that lay in flouting the States General any longer, the College of the Nineteen of the West India Company bowed to the higher authority of the General Government, and in 1652 instructed Governor Stuyvesant to bring a municipal form of government into effect in New Amsterdam, in accordance with the seventeenth clause of the Provisional Order of 1650.

This order was made less objectionable to the Director-General by the cancellation of that part of it which called for his own recall. Again, the home situation controlled the provincial. The seas were unsafe at that time, England, under Cromwell, having, it seems, determined to cripple the maritime power of Holland. In case of English victory at sea there was, of course, always the possibility that hostilities would spread to the colonies; and in America the Dutch were not nearly as strong as the English. So it behooved the States General not to withdraw a good soldier-which Stuyvesant apparently was-from New Netherland, while there seemed a possibility that his military experience might be needed.

Life in the province now became less strained, and the people looked forward hopefully to better government. The possibility of danger from the English colonies seemed to trouble them less than the continuance under the old order of government. During the years in which the Company and its provincial agent, Stuyvesant, had flouted the States General, life had been generally uncomfortable for all classes in New Netherland-for the Governor as well as for the governed. Stuyvesant had never gone abroad during those years without an escort of four halberdiers. True, he had used those soldiers, in some instances, to arrest those who had displeased or opposed him-among those arrested being his own Vice-Director, Van Dincklagen[21]-but the halberdiers had probably been especially instructed to exercise unceasing vigilance, lest harm come to their chief. If Stuyvesant thought that others might return evil for evil, he must have been quite uneasy, for his treatment of some had been especially vindictive; he made life so intolerable for Patroon Melyn that the latter was at last forced to leave the provinces altogether.[22] Possibly, the Director-General's treatment of Van Dincklagen is explained by the latter's sympathy for Melyn.[23]

Stuyvesant, apparently, was reluctant to bring in the new order. "Pride goes before a fall," but at times seems to hold a man suspended for a long time before the fall comes. The Director-General may not have been pleased that the order for the change had been brought by Van der Donck, his opponent. So he moved slowly. Still, no other course was open to the arrogant Governor, and, therefore, on February 2, 1653, the day of the Feast of Candlemas, Stuyvesant promulgated a decree in the matter.[24] It was a farcical freedom, however, that his placard offered New Amsterdam. Certainly, popular government was not Stuyvesant's plan, for by the proclamation it was clear that the municipal officers were not to be elected by the people, but by himself. However, the facts that the settlement on Manhattan Island now became the city of New Amsterdam, that it was to have municipal officers, and a municipal court of justice, were changes that probably brought cheer to the less discerning. As a matter of fact, burgher government even in Holland was never truly representative of the commonalty, and the new order in New Amsterdam was probably thankfully received.

The first city magistrates were Arendt van Hattem and Martin Kregeir, *burgomasters;* Paulus Leendertsen van der Grist, Maximilian van Gheel, Allard Anthony, Pieter Wolfertsen van Couwenhoven, and William Beekman, *schepenen.* They entered upon their duties earnestly. Their first meeting was on February 6. Schout-Fiscaal Cornelis van Tienhoven was present, the Governor's intention being that he should become city schout, though this did not conform with the Dutch municipal system Jacob Kip was to be secretary, or city clerk. Minutes of that meeting shows that it was merely for organization, and that their regular meetings would begin on the 10th. [25]

The first regular meeting of the municipal court opened with prayer on the 10th, and it was evident that the burgomasters and schepens intended to administer their judicial and civic offices honestly and justly for the common weal. They seemed to place most importance upon their magisterial functions. They were seemingly almost reluctant to take up their executive responsibilities, for, as a City Council, there was always a danger that they might clash with the vital interests of the Director-General and the Company. Their lot was not enviable, for their administration was attended with more difficulties than would come to burgomasters in the homeland. In Amsterdam, for instance, there were four burgomasters, each of whom was expected to sit in the City Hall in rotation for three months of each year, to deal with executive matters. The duties of the *schepens* were especially judicial. The *schout* was president of the court of justice. For municipal business and enactment of ordinances these three bodies would meet together as a "college," and this "college" was dignified by the title of *The Lords of the Court of the City of Amsterdam.* In New Amsterdam, however, there was but one body for judicial, executive, and legislative purposes, the senior burgomaster presiding over each session of the Court of Schepens. Because of the irregular procedure in making the Schout-Fiscaal (the attorney-general of the province) the City Schout, this highs official did not demand place on the local bench as Presiding Magistrate, which, under the Dutch system would be his right. When, however, in 1660, a separate City Schout was appointed, the latter, Peter Tonnemann, took his rightful place as president of the court, and the burgomasters

presided only when the Schout had to appear before the court as public prosecutor.

The first meetings of the burgomasters and schepens were held in the fort, for the reconditioning of the old City Tavern, as the *Stadt Huys*, could not be completed in time for the first session of February 10, 1653. But from February 24, the court sat fortnightly in the Stadt Huys,[26] as an inferior court of justice. After the hearing of cases, the members dealt with any executive matters that needed attention. In 1657 the burgomasters established a separate court, meeting on Thursdays for the disposal of executive business, the volume of which was rapidly increasing. It increased so much that they sought sanction to separate the judicial and legislative courts. The burgomasters would have liked to be released from attendance at the schepens court, so that they might give more of their time to the general affairs of the city. The Director-General, however, was unwilling to sanction the change, and the Court of the Schout, Burgomaster, and Schepens was destined to continue as a mixed tribunal until the end of the Dutch period.[27] At first, Stuyvesant was inclined to interfere in city affairs, but with the passing of years and the increase of other duties and perplexities local affairs were left more and more to the local officials.

Court procedure in the schepens court was simple and summary. The court met on a stated day, at first fortnightly and later weekly. The court messenger, a man of many duties, would summon the adverse party to be present. If the defendant should fail to appear, he would incur the cost of summons and lose the right to object to the jurisdiction of the court. A new citation would be issued, with additional costs, and if the defendant should again fail to appear, he lost the right of making "dilatory exceptions." For the third time he would be cited, and if he should again fail to appear the court would proceed with the case and give judgment, the defendant by his negligence being cut off from all right of appeal. In case the court deemed the presence of the defendant essential, a fourth citation, having the nature of an arrest, would be issued. In most cases, however, the parties cited would appear on the first intimation. The plaintiff would state his case, the defendant would answer; and if a differing fact which the court might deem material should be brought out the court might put either party on oath, and if they were still at variance might require the examination of witnesses. Adjournment would be taken until next court day, when depositions of witnesses before a notary, or given orally before the court, would be considered, testimony being given under oath. In most cases, however, the litigation would be disposed of at the first hearing, without resorting to the oath, or to witnesses. In intricate cases it was the general custom of the magistrates to refer the case to arbitrators, who were always instructed to bring about a reconciliation between litigants, if they could. This practice was not confined merely to accounting disputes; it extended to nearly all classes of cases that could come before the municipal court. The litigants might choose the arbitrators, or they might be appointed by the court. In some cases, one of the magistrates would take the matter in hand and endeavor to reconcile the differences. Failure to do so would bring the case again into court for final disposition.

This method of arbitration was in constant practice in the municipal court, which tribunal might indeed be looked upon as chiefly a Court of Conciliation; "and it is worthy to remark that, though the amount involved was frequently considerable, or the matter in dispute highly important, that appeals to the court from the decisions of the arbitrators were exceedingly rare. Indeed, the first appeal found upon the records was brought by a stranger."[28]

A more formal mode of procedure was possible, if litigants preferred it. The plaintiff would state his case, and the defendant would require the statement put in writing. He would answer in writing, the plaintiff would reply and the defendant rejoin, which would end the pleadings. Depositions of witnesses would then be taken by a notary, who would put the depositions in writing, making a copy for his own record. When the proofs were complete, they were added to the pleadings, the whole constituting what was called a Memorial. This was submitted to the Court, the parties both having the right to read it, and to cross-examine witnesses, or to reply by the testimony of additional witnesses. The loss of time and cost of this Memorial mode of litigation was such, however, that few litigants resorted to it. Most cases were referred to arbitration, or summarily disposed of by the magistrates at the first hearing. In respect to the rules of evidence, it may be remarked that whenever a paper or document was produced purporting to be in the handwriting of a party, it was taken as his handwriting, unless

he denied the fact under oath. Properly kept books of account could be produced in evidence, and they were fully credited if strengthened by oath. "A leading distinction in evidence was also made between what was termed *full proof*, as where a fact was declared by two credible witnesses as to their own knowledge, or it was proved by a document or written paper; and *half proof*, as where it rested upon the positive declaration of knowledge of one witness only, under which latter head, as weak but assisting evidence, hearsay was allowed, which, in some instances, as in the case of certain dying declarations, was admitted to the force of full proof. As the determining of a case upon the evidence of witnesses was left to the judges, very discriminating and nice distinctions were made in adjusting or weighing its relative force or value."[29]

Execution of judgment was considerate. Defendant was usually given fourteen days in which to pay the first half, and a further fortnight in which to discharge the remainder. If then delinquent, the court messenger would go to the defendant, exhibit a copy of the sentence and his wand of office (a bunch of thorns) and demand satisfaction within twenty-four hours. If still delinquent at the expiration of that day of grace, the Court Messenger would take into custody the debtor's movable goods. These he would detain for six days, within which time debtor might redeem them upon payment of judgment and additional costs incurred by delinquency. If not redeemed, notice would be given, on a law day or Sunday, that the goods would be disposed of by auction, publicly, on the next law or market day. The debtor was given a longer term of grace before public sale, in case the levy had been upon his immovable property, e. g., real estate. The manner of selling was somewhat different. Movable property offered for public sale would be primarily set at a figure higher than its real value, and the auctioneer would gradually lower the price until a bid was received. Immovable property sales, however, would begin at a low figure, and the bidding would go on during the life of a candle. He who had offered the highest price when the candle flickered to extinction would become the purchaser.

The civil business of the municipal court was extensive. Actions for the recovery of debt did not constitute the greater part of the business done. There were proceedings by attachments against the property of absconding debtors; actions to recover possession of land, or to determine boundaries; actions for damage in trespassing; action for freight, for seamen's wages, for rent, for breach of promise of marriage, "where the performance of the contract was enforced by imprisonment"; actions for separation between man and wife, "in which the children were equally allotted to the parties and the property divided, after payment of debts," proceedings in bastardy cases, "in which the male was required to give security for the support of the child, and in which both delinquents might be punished by fine or imprisonment"; actions for assault and battery, and for defamation of character, punishable by fine or imprisonment, or both, "though the defamer was generally discharged upon making a solemn public recantation before the court, sometimes upon his knees, asking pardon of God and the injured party." Pecuniary compensation for physical injury could not be enforced; neither could damages be had for defamation, though the recantation by the offender was sometimes made more sincere by his tender of material compensation, in money or goods, to the other party.

The municipal court was also a Court of Admiralty, and a Court of Probate. Out of this last responsibility developed the appointment of a burgomaster, as orphanmaster.[30]

It will thus be realized that the duties of the magistrates of New Amsterdam were many and important. It must be admitted that, generally, the Director-General sought to hedge them about with considerable dignity, though sometimes, in anger, he would belittle them, once referring to them, with scorn, as "the little bench of justice." Whatever his own opinion may have been he wished the populace to recognize that they were dignitaries of consequence in the provincial capital. Each burgomaster was to be addressed as "My Lord." In the court room of the *Stadt Huys* soft cushions made their seats very comfortable, and on Sunday these cushions would be removed to the church within the fort, for the further comfort of the dignitaries when at their devotions. A pew in the church was set apart for them, and on Sunday they and their families would go early to the *Stadt Huys* and thence proceed to the church in a procession which was led by the court messenger. In 1657 Stuyvesant sought to add even greater distinction, by introducing the "Burgher Right," by which the populace was divided into two classes, Great and Little Burghers. The former were the landowners and wealthy merchants, and the latter had no right to hold office. However, there were so few who could qualify as Great Burghers that in 1658 the Director-

General was at a loss to know how to secure a sufficient number to permit double nominations for burgomaster and schepens to be made. At last, he found it necessary "to invest some of the more prominent citizens with the right, in order to fill the offices."

Stuyvesant was always careful to address the municipal court in most dignified terms. Some of his communications were addressed to the "Honourable, Beloved, Faithful, the Schout, Burgomasters and Schepens of the City of New Amsterdam in New Netherland"; "the Most Worshipful, Most Prudent and Very Discreet, their High Mightinesses, the Burgomasters and Schepens of New Amsterdam"; "Respected and Particularly Dear Friends"; "Most Worshipful, Gracious and Distinguished;" and other gracious terms. When he addressed them merely as "Schout, Burgomasters and Schepens" it would be to convey some reproof. So the Burgomasters and other members of the Court of Schepens may, perhaps, be pardoned for fining one person 1,200 guilders for daring to refer to the magistrates as "mere blockheads." Though they were but poorly paid,[31] and sometimes risked the anger of the choleric Governor, there were compensations in local prestige and respect which made the office an inviting one. Several of the most successful merchants of New Amsterdam were among those who became magistrates.

New Amsterdam was not the only place that enjoyed burgher government during the Dutch period in New York. At least there were many courts of Schepens, though in executive matters the outside magistrates did not have as wide or as full governmental authority as the magistrates of New Amsterdam enjoyed.[32] The Long Island communities were grouped for judicial purposes, and extorted from Stuyvesant full municipal rights only by force of agitation, and circumstances which left the Director no other course.

In 1653, the English communities on Long Island became restless, and the Director had to lodge John Underhill in jail for a while, for inciting the citizens "to throw off this tyrannical yoke." He wanted the English towns to recognize Dutch rule no longer. After he was released, he resumed his agitation, with greater boldness. He was again arrested, and this time was banished. Had Stuyvesant not to be very anxious to avoid provoking a collision with the English of neighboring colonies Underhill would probably have been hanged.

The English of the four Long Island towns, Hempstead, Gravesend, Flushing, and Middleburgh (Newtown), grew more and more restless. They flatly refused to be taxed for the cost of completing the fortifications at Fort Manhattan, which was too far away to afford them any protection. They resolved, rather, to take matters into their own hands and defend themselves against raids by Indians and by gangs of lawless white men, who overran the island, and took from the farmers whatever they fancied. In October, 1653, a convention of these four towns was held, and at this meeting it was resolved to call another convention to meet on November 25, in the *Stadt Huys* at New Amsterdam to further consider what measures would be necessary "for the welfare of the country and its inhabitants and to determine on some wise and salutary measures to arrest these robberies." On the stated day the delegates gathered in the capital much to the perturbation of the Governor. He met the delegates in the *Stadt Huys*, pointed out that he had not sanctioned their meeting, and declared that the convention was therefore irregular and illegal. He declared that their attitude "smelt of rebellion and of contempt of his high authority and commission." Nevertheless he offered to permit the convention to hold a session at a future time, after having been regularly convened by himself, and after having been expanded to admit delegates from the Dutch towns as well as some of his own council. On December 8 he issued writs for a convention two days later and in due course nineteen representatives, ten of whom were Dutchmen, met. The outcome was the adoption of a Remonstrance. It was drafted by George Baxter, and delivered at once to Stuyvesant. The remonstrants declared that it was "contrary to the first intentions and genuine principles of every well-regulated government that one or more men should arrogate to themselves the exclusive power to dispose at will of the life and property of any individual, and this, by virtue, or under pretense of a law or order which he might fabricate, without the consent, knowledge or approbation of the whole body, their agents or representatives," which, they humbly submitted, was one of their inalienable rights. The remonstrance further recited that "officers and magistrates were appointed in many places contrary to the law of the Netherlands, and several without the consent or nomination of the people," and also that obscure laws, enacted "without the approbation of the country, by the authority

alone of the Director and Council, remain obligatory."

The delegates evidently did not mince words. The hot-headed Stuyvesant likewise did not veil his opinion in gentle words. He defended the appointive system. "He would not permit the election of magistrates (to) be left to the rabble." "Your prayer is extravagant," he said. "You might as well claim to send delegates to the Assembly of their High Mightinesses themselves. Directors will never make themselves responsible to subjects."

The delegates continued in session and on the 13th defended their action by an appeal to the "law of nature," by which all men might "associate and convene together for the protection of their liberty and their property." The Governor retorted: "Magistrates alone, and 'not all men' are authorized to assemble to discuss public questions." He would have them realize that he derived his authority "from God and the Company, not from a few ignorant subjects," and that he alone could call "the inhabitants together." Stuyvesant was beside himself with indignation. "Such manners and forms of meetings, such insults, unprovoked affronts and contempt of the supreme authority, the Director and Council were bound to resist, yea to punish," he said. He ordered the delegates to disperse immediately "on pain of an arbitrary correction," and he forbade another gathering. Apparently, he was not sure that he would be obeyed, at least not by the English towns, for he wrote to the Dutch towns urging them not to send delegates to further meetings.

While no further attempt was made to convene, the people did not accept as final Stuyvesant's declaration that "the old laws will stand," that "Directors and Council only shall be the lawmakers," responsible only to the Company, never to the people. The delegates sent a remonstrance[33] to Holland. Unfortunately, however, they addressed the Company, not the States General; and the Company was unsympathetic, as might be supposed. The Dutch directors upheld Stuyvesant, though they censured him for lack of vigor in handling the "ringleaders of the gang." In their expressed opinion, it was "the height of presumption in the people to protest against the government." They forbade Le Bleeuw, the bearer of the Remonstrance, to return to New Netherland, and they wrote to Stuyvesant ordering him to punish the delegates "as they deserved, and especially those delegates from Gravesend, the English men Baxter and Hubbard."

The latter were warned of their danger and escaped to New England, but two months later returned to Gravesend. They were then arrested actually as they were raising the English flag and reading a proclamation "declaring Gravesend to be subject to the laws of the Republic of England," but instead of being shot or hanged, they were merely held in jail for some months.

The truth was that Stuyvesant was losing control of the situation. The people were not to be denied. So he attempted to stem the tide by promising to extend the system of local magistracies. Indeed, he declared that it had been his purpose to grant Burgher government, or to establish courts of justice, in the villages outside New Amsterdam at the next election. Breuckelen had indeed had a municipal organization since 1646 when, at its own expense and with the approval of Director Kieft, the village had brought into existence a Schepen's Court, "by electing two Schepens, with full judicial powers as at home." In 1654, Stuyvesant authorized the enlargement of the Breuckelen court to four Schepens;' Midwout (Flatbush) was made a municipality, with right to have a court of three Schepens in the same year; and Amersfoort was given like status. In 1661 Boswyck (Bushwick) and New Utrecht were added to time Dutch towns possessing burgher privileges. They were grouped in one district, served by one schout, who lived in Breuckelen and attended court sessions in each of the towns. This group was known as the "Five Dutch Towns," and balanced the five English towns, some of which had long been under a semi-independent government. Jamaica (Rustdorp) was added to the English towns (Hempstead, Gravesend, and Flushing) by the organization of a Court of Schepens with it in 1656; and Newtown (Middleburgh) was given burgher government in 1659, completing the five English towns of that section. New Haarlem was granted local government in 1660, and Bergen-the first municipality in New Jersey- received recognition in 1661. Before Dutch rule finally passed from New Netherland in 1674, by the terms of the Treaty of Westminster, inferior courts were in operation in the following towns and villages outside New Amsterdam: Fort Orange, or Willemstadt (Albany), Schenectady, Wiltwyck, Swaanenburgh, Hurley, Marbletown, Breuckelen, Midwout, Amersfoort, New Utrecht, Boswick, Middleburgh, Flushing, Hempstead, Rustdorp,

Oyster Bay, Huntington, Seatalcot, Southampton, Easthampton, Southold, Haarlem, Westchester, Mamaroneck, Fordham, Eastchester, Staten Island.

Thus, out of the seemingly unsuccessful convention so arbitrarily dissolved by Stuyvesant, in 1653, came definite results. "In these, the dosing days of the year 1653, there dropped from the wide-spreading branches of the ancient Aryan oak a wonderfully symmetrical acorn; and from this acorn there sprang, the beautiful American oak under which we are gathered." Certainly, the Cromwellian example of popular government was encouraging to those in New Netherland who felt that the feudal and paternal Dutch systems of government were no longer fitted to the times. As is invariably the case, despotism defeats itself. When Nicolls, at the head of an English expedition, appeared off Manhattan in August, 1664, and demanded the surrender of the fort, and of the whole of New Netherland, Stuyvesant found that even the Dutch of the province would not fight for him. All he could muster for the defense were about 100 mercenaries, the paid soldiers who constituted the garrison of Fort Manhattan; and these disreputable men, it seems, would not fight, but eagerly looked forward to the pillage and booty that might be possible in the confusion that would follow the surrender.

The Dutch inhabitants of New Netherland were no more disloyal to their native land than the English inhabitants were under somewhat similar circumstances in 1673. The Dutch did not rally to save New Netherland from the English in 1664; neither did the English gather round their Governor in 1673, to save New York from the Dutch. The basic reason for this torpid patriotism was the same. There are certain rights of men that cannot be denied them with impunity, and particularly is he aroused to resistance when arbitrary raids are made upon his personal property. Most men of good sense recognize and respect constituted authority that is just and fair; but few men consider such authority fair that does not represent the will and weal of the majority. There is always an inevitable reaction against injustice.

The Dutch rule covers only half a century of American history, and its dominion extended over only a small part of the continent. Moreover, it cannot be said that the government was good. So one must look elsewhere for the reasons why Dutch institutions have made such a positive impression in American life. There are many reasons, some obscure, some clear. Much credit cannot be given to the Dutch Governors and less was earned by their provincial councils,[34] the provincial Court of Last Resort. The pardons exercised even more feudal sway than the Governors, and the magistrates of their courts probably had the interest of the patron as constantly in mind as the Governor and his council had the interest of the company. In a different classification come the Boards of Twelve, Eight, and Nine Men.[35] Politically, these boards were of constructive importance, their work leading directly to the introduction of burgher government in New Netherland. The members of these boards pursued their high-minded purpose with courageous persistence, despite personal danger, and they were evidently of the class which left the Dutch impress most clearly in American characteristics.

Their successors, the local magistrates, the burgomasters and schepens of the municipalities, were also of high-minded purpose, and, as has been seen, administered the inferior courts intelligently and ably, having chiefly in mind the settlement of differences with the least possible injury to either party by litigation. These magistrates were drawn from the people and they had the characteristic strength of purpose of the Dutch people who, in that generation and the preceding one or two, had wrestled grimly for their independence with the mightiest Nation of Europe. Although the Dutch of New Netherland lived under despotic governors, it was the quiet strength of the people that was the chief factor in moulding Dutch institutions of lasting quality; and the people were most truly represented by the magistrates of the local courts. The "real existence of law courts based on the popular will" began with the organizing of the Court of Burgomasters and Schepens[36] in New Amsterdam in February, 1653. "They were the first judges in the colony in any way independent of the proprietary company." While they knew more of the problems of everyday life than of theories of political government and of jurisprudence, they were, as a class, men of broad mind, leaders of the community, and most had succeeded well in commercial life.[37] To a corresponding degree, the same might be written of the magistrates of the lesser municipalities.[38] They were stable, sensible men of affairs, generally well respected What they lacked in legal knowledge was supposed to be supplied by the *schout*, who was the professional member of the local bench, holding a relation

somewhat like that which the stipendiary magistrate of a British court of justice holds to the local magistrates.

The *schouts,* who were the chief exponents of the law in the Dutch courts, were not all lawyers-at least, those of the local courts were not. Indeed, some of the *schouts-fiscaal*[39] of New Netherland were not. For instance: Van Tienhoven graduated from a secretaryship to the Attorney-Generalship of the province. Some of the *city schouts*[40] graduated from the magistracy, which office did not demand a prior knowledge of law. Undoubtedly, however, the city schouts became comparatively well versed in law 'in course of time, for they were constantly in legal practice, as district attorneys as it were. Some of the most eminent lawyers of the Dutch period, it seems, are to be found listed among the schouts of the inferior courts, *i. e.*, the patron and municipal courts; in the lists are the names Adriaen van der Donck, Lubbertus van Dincklagen, Johanties la Montagne, all holding the degree of Doctor, though perhaps not all that of law. Other prominent and experienced schouts were David Provost, Pieter Tonneman and Nicasius de Sille. Provost was the schoolmaster at New Amsterdam in 1652, and at the same time was a notary public, the latter post at that time calling for greater knowledge of legal procedure than one would suppose; as a matter of fact, Provost was described as "an attorney and counsellor." Nicasius de Sille brought excellent credentials from the home authorities when he arrived in 1653. He was sent out as "First Counsellor" to the Director-General, his papers showing that in Holland he was looked upon as "an expert and able statesman," a man "well versed in the law," and moreover "acquainted with military affairs and otherwise qualified for public service."

Another schout whose knowledge of law was probably extensive was Tielman van Vleck, a New Amsterdam notary who was sent over to Bergen in 1661, by Stuyvesant, to organize a Court of Schepens in that village. The Director-General refers to Van Vleck as a "well qualified person."

Some of the papers relating to the organization of this Bergen court enable one to form a clear idea of the functioning and status of the inferior local courts during the last years of the Dutch period. Quoting from entries in the records of Ordinances of the Director-General and Council, as to Bergen Court of Schepens, it appears that the local courts in 1661 had jurisdiction without appeal up to fifty guilders. Above that sum, appeal to the Director-General and council was possible. Regular attendance of magistrates (schepens) at court sessions was demanded, members of the bench being fined twenty stivers if absent on a court day, a double fine being exacted from the President of the Court. Punctuality was also demanded, the minute-hand of the court clock determining the number of stivers each tardy magistrate must pay. The government, in its desire to provide "cheap and inoppressive justice," and with a view of maintaining a high standard of judicial acumen and probity in the magistracy, enjoined all members of the court of schepens, during their term of office, to "pay due attention to conversation, demeanor and fitness of honest persons, inhabitants of their respective villages, in order to be able, about the time of changing or election, to furnish the Director-General and Council with correct information as to who may be found fit, so that some may then be elected by the Director-General and Council."

Ownership of real property was one of the evidences of fitness to become a magistrate; and while it is clear that, until the last years of his administration of New Netherland, Stuyvesant actually appointed the magistrates himself, and, by the oath of allegiance,[41] demanded of magistrates a willingness to follow such orders and instructions as he and his council might give them, the standard of justice was more impartial in the courts of schepens than in any other judicial tribunal of the Dutch province.

The local judiciary and lawyers undoubtedly constituted, or actuated, the faction which brought most trouble to the directors-general of New Netherland; nevertheless, a brief scanning of the governmental history of the Dutch period shows that the magistrates constituted the most stable element of the province; and court records indicate that, as a class, the local magistrates were sincere in their endeavor to administer impartial justice, so far as their jurisdiction reached. Their interpretation of Dutch Roman law suited the people; so well indeed that, as will be seen, part of it had to be eventually merged in the English system of jurisprudence, to meet the needs of the people of New York.

Footnotes

Footnote 20: "And so ended the so-called Eighty Years' War. No sooner was peace concluded than bitter disputes arose between Holland on the one hand and the Prince of Orange supported by the Army and Navy and the smaller provinces, on the other. He was tempted into foolish acts; he arrested six of the deputies of Holland; he even tried to surprise and occupy Amsterdam; he favored the English Royalists, now plentiful in the provinces, while Amsterdam and Holland inclined toward the Commonwealth. Things went so far that William II had almost destroyed the liberty of the Provinces, and was intent on two schemes-the resumption of war against Spain, with a partition with France of the Spanish Netherlands, and interference on behalf of Charles II in England-when his opportune death by smallpox occurred (Nov. 6, 1650). A few days afterwards, his widow, Mary of England, gave birth to a son who was destined to be the most distinguished man of his race, William III, of Holland and England.

For a time the death of William II restored the Burgher Party to power, and made Amsterdam the head of the United Provinces. Holland triumphed over Zealand; the House of Orange, friend of the Stuarts, seemed to suffer eclipse with them; and though the Royalist mob, even at The Hague, set on by a princely rough of the Palatine house, made it impossible for the envoys of the English Commonwealth to come to terms with the Republic, still the popular monarchical party was in fact powerless in the Province for more than twenty years.-See *Encyclopedia Britannica*, sketch of Holland.

(No Stadtholder of Holland was elected to succeed William II, the Grand Pentionary, or Chief Justice, becoming the virtual President of the Dutch republic. Nevertheless, there was war between England and the United Provinces during the period 1651-54) .

Footnote 21: Vice-Director Van Dincklagen, from his place of refuge on Staten Island wrote to Van der Donck, in Holland, as follows: "Our great Muscovy Duke goes on as usual, resembling somewhat the wolf-the older he gets, the worse he bites. He proceeds no longer by words or letters, but by arrests and stripes."

Footnote 22: The Patroon returned in 1650, in a ship which was compelled by stress of weather to put into Rhode Island, and when she arrived.... at New Amsterdam, the Director ordered her to be seized for violation of a regulation of the Company in trading without a license, and brought Melyn to trial as her owner. Melyn was only so far interested in her voyage that she brought a number of settlers for his manor at Staten Island, and though the ship and cargo were confiscated, there was no evidence that could hold him responsible. Failing in this, Stuyvesant brought new charges against the Patroon, confiscated his property in New Amsterdam, and compelled him to confine himself to his manor of Staten Island. Melyn surrounded himself with defenses, and, establishing a sort of baronial court, contrived for a while to live till Stuyvesant's persecutions drove him at length out of the colony.-Bryant's "History of U. S., II, 135.

Footnote 23: With Melyn on Staten Island, Van Dincklagen, the Vice-Director, also found a refuge from the violence of Stuyvesant. The Vice-Director busied himself in preparing a new protest to the States General on behalf of the colony, when Stuyvesant ordered that he be expelled from the Council. Van Dincklagen refused to be so disposed of; on the plea that he held his commission not from the Director but from Holland. Stuyvesant arrested and imprisoned him for some days, and he felt that his life was not safe on Manhattan Island.- *Ibid.*, II, 136.

Footnote 24: After three years of delay, the prayer of the people was listened to in earnest. It was decreed that a "burgher government" should be established; that the citizens of New Amsterdam should have the right to elect their own municipal officers; that these officers should constitute a court of justice, with appeal to the supreme court of the Director and Council; that the export duty on tobacco should be abolished; that emigration should be encouraged by a reduction in passage money; that the importation of negro slaves, hitherto a monopoly of the Company, should be now free to all citizens; and Stuyvesant was ordered to return home.

These long-delayed concessions were taken to New Amsterdam by Van der Donck himself, and in accordance therewith Stuyvesant published a proclamation on the day of the Feast of Candlemas, the 2d of February, 1653. But none knew better than he how to keep a promise to the ear and break it to the hope. The States General meant to bestow upon New Amsterdam-in the election by the people of a schout or sheriff; of two burgomasters, who were in effect the chief magistrates of the town; and of five schepens, who constituted the court of civil and criminal jurisdiction. Van der Donck might well come home in triumph with this grant of municipal government as the fruit of his three years of incessant labor in Holland and the people might well rejoice that they were at last to govern themselves. . . . But even this first success the Governor defeated for a time, by assuming the right to appoint, where election was ordered.-*Ibid.*, II, 138.

Footnote 25: "Thursday February 6, 1653 present Martin Krigier (Aarent van Hattem) Poulus Leendersen van die Grist, Maximilynus van Gheel and Alard Anthony, Willem Beeckman, and Pieter (Wolfertsen).

Their Honors, the Burgomasters, the schepens of this city of New Amsterdam, herewith inform everybody that they shall hold their regular meeting in the house hereto called the City Tavern, henceforth the City Hall (Stadt Huys) on Monday mornings from 9 o'c, to hear all questions of difference between litigants, and, decide as best they can. Let everybody take notice hereof. Done this 6th of February, 1653, at New Amsterdam. Signed (as above except Arent van Hattem) .-*The Records of New Amsterdam From 1653 to 1674, Anno Domini*, edited by Berthold Fernow, 1897, I, 49.

Footnote 26: It was a stone building originally put up as a tavern during the time of Director-General Kieft. It was fifty feet square, with three upright stories and a two-storied gabled roof, and was conspicuous far down the harbor. Behind it was a Dutch garden of flowers and vegetables, and through this was a pathway leading to Hoogh Strat, or Stone Street, the road to the ferry.

On the second floor of this building, at the southeast corner, was a large chamber which was used for the court room. On the window panes of this room were engraved the arms of New Amsterdam. Above the bench on which the magistrates sat were the orange, blue and white of the West India Company, and the colors of Holland. Here also was the painted coat-of-arms of the city, which was sent over by the directors of the West India Company in 1654. On the wall near the door were suspended fifty leathern buckets, which constituted the fire equipment of the city. In the cupola which surmounted the building hung a bell which was rung for the assembling of the court and for the announcing of proclamations. The bell ringer was a man of many and varied employments. He served as the court messenger, was the village grave digger, and the church chorister, and sometimes was schoolmaster. As an attendant of the court he served the magistrate in small ways, keeping the court room in order, providing the magistrates with papers and other things necessary for their work, and ringing the bell at the opening of the court in the morning and for adjournment at noon. From the platform erected in front of the Court House he read the proclamation. For many years the bell ringer was Jan Gillisen, familiarly called Kock.-Chester's *Legal and Judicial History of New York*, I, 60.

Footnote 27: The proceedings of this tribunal, or as it has been denominated "the Worshipful Court of the Schout, Burgomaster and Schepens," were all recorded by their secretary or clerk; and as everything that took place before it, the nature of the claim or of the offense, the statements of the parties, the proof and decision of the court, with the reasons assigned for it, were carefully noted and written down, these records supply a full account of the whole course of its proceedings, and furnish an interesting exposition of the habits and manners of the people. Upon perusing them, 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 proceedings were infinitely superior to the more technical and artificial system introduced by their English successors. None of these magistrates were of the legal profession. They were all engaged in agricultural trading or other pursuits 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. Though the principles and practices of civil law prevailed in Holland, it was greatly modified by ancient usages, some of them of feudal origin, others the result of free institutions, which had existed from the earliest period..... In every town and village in Holland, moreover, there existed usages and customs peculiar to the place, which had the force of law, and were not only different in different towns, but frequently directly opposite. The Dutch law in fact was then a kind of irregular mosaic, in which might be found all the principles as well as the details of a most enlightened system of jurisprudence, but in a form so confused as to make it exceedingly difficult to master it. That these magistrates should have had any general or practical acquaintance with such a system at all was scarcely to have been expected; but that they had is apparent, not only from the manner in which they disposed of the ordinary controversies that came before them, but in their treatment of different questions as to the rights of strangers, their familiarity with the complicated laws of inheritance, and the knowledge they displayed of the maritime law while sitting as a court of admiralty. The Amsterdam Chamber sent out to them the necessary books to guide them as to the practices of the courts of Amsterdam, and, when the province passed into the hands of the English, there was attached to the court a small but very select library of legal works, mainly in the Dutch language. The authoritative work used in the administration of the criminal law was Damhouder's *"Practyke in Criminele Saecken,"* . . . . printed in Rotterdam in 1628. . . . There were, however, men educated in the legal profession in the colony; Van Dinklagen, the Vice-Director, who had acted as Schout Fiscal for Van Twiller and Chief Judge of the court established by Stuyvesant was a Doctor of Laws; and there is sufficient known respecting him to warrant the opinion that he was an able and accomplished jurist. Van der Donck was admitted to the same honorable degree in the University of Leyden, and was afterwards an advocate in the Supreme Court of Holland. The Schout-Fiscal Nicasius de Sille, who acted as City-Schout for four years, is stated in his commission from the Amsterdam Chamber to be "a man well versed in the law." In addition to these, there were several notaries: Dirk van Schellyne, who came out in 1641, had previously practiced at the Hague; David Prevoost discharged the duties of notary for some years before Schellyne's arrival; and there was another notary named Matthias de Vos. Under the civil law, as it prevailed in Holland, a considerable part of the proceedings in a cause, if it was seriously contested, was conducted by the Notary, who was required at least to be well versed in the manner of carrying on legal controversies; and as he was frequently consulted by suitors for advice as to their rights and liabilities, he was generally well informed and capable of giving it. Such was the case with Van Schellyne, who, from the records he has left, was evidently an experienced and skilful practitioner. He was not only connected with the court in the discharge of his duties as Notary, but he was appointed by it in 1665 High Constable (conchergio). All of these must have had more or less to do with establishing the mode of legal proceeding, and of advising and guiding the magistrates. Van Schellyne and De Sille were in constant official communication with them. Van Dinklagen must have brought into use the forms of legal procedure in the court over which he had presided, and Van der Donck was one of the chief getters up of the new tribunal; and, though he survived its creation but two years, he was no doubt advised with and consulted in respect to its organization, and as to the mode in which it was conducted. We find him, in fact, the very year that it was established, claiming its protection as a "citizen and burgher" against the menaces of Stuyvesant. The Court was required in all its determinations to regard as paramount law all regulations established by, or instructions received from, the Chamber of Amsterdam, or the College of Nineteen, for the government of the Colony. Next, all edicts and ordinances duly established by the Governor and Council; then the usages, customs or laws prevailing in the city of Amsterdam, and, where they furnished no guide, the law of the fatherland, by which it was particularly understood the ordinances of the province of. Holland and of the States General, and the civil law as it prevailed in the Netherlands, or, as it is denominated by jurists, the Roman Dutch Law.-See McAdams' "History of Bench and Bar of New York"; article by Justice Chas. P. Daly on the "State of Jurisprudence During the Dutch Period"; and quoting "N. Y. Rec. of Burg. & Schep."; Brodhead's "History of New York"; O'Callaghan's "History of New Netherland"; Valentine's "History of New York"; Meyer's "Institutions Judiciaries"; Van Leuwen's "Practyk der Notarissen" (1742); "Practyke in Criminele Saecken," by Damhouder (1628), and others.

Footnote 28: "Records of Burgomasters & Schepens of New York," I, 188, 231; II, 104, 176; III, 188; V, 190; VI, 474; VII, 180.

Footnote 29: Records of N Y Burg & Schepens VII, VIII, Meyer's "Institutions Judiciaries," chap. XIV, 387;

Van Leuwen's "Roman Dutch Law," Book V, chap. XIII to XX and XXIII.

Footnote 30: The court also acted as a Court of Admiralty, and as a Court of Probate, in taking proofs of last wills and testaments, and in appointing curators to take charge of the estates of widows and orphans. Application was made to Stuyvesant for liberty to establish an orphan house, similar to the celebrated institutions which exist throughout Holland. He did not think that such an establishment was necessary, but he afterwards assented to the appointment of orphan masters, and those officers acted in aid of the court. Some of its proceedings in the exercise of this branch of its jurisdiction will serve to illustrate how tenaciously the Dutch cling to old forms or legal ceremonies, as where a widow, to relieve herself from certain obligations, desired to renounce her husband's estate; it is in all such cases recorded that the intestate's estate "has been kicked away by his wife with the foot," and that she has duly "laid the key on the coffin." The court also exercised a peculiar jurisdiction, that of summoning parents or guardians before them who, without cause, withheld their assent to the marriage of their children or wards, and of compelling them to give it. It also granted passports to strangers, or conferred on them the burgher right, a distinction which, now that it has ceased to be attended with any practical advantage, is still kept up in the custom of tendering or presenting the freedom of the city to strangers as a mark of respect.-McAdam's "Bench and Bar of New York," quoting "N. Y. Records of Burg. & Schep.," Vols. I to VI.

Footnote 31: Burgomasters received an annual salary of 350 guilders ($140), and each schepen received 250 guilders ($100).

Footnote 32: Not long after the organization of this court (New Amsterdam) by Stuyvesant, courts of the same popular character were established in several towns on Long Island, and these received powers similar to those granted to that in New Amsterdam. Before this time, Breuckelen had a court of schepens, which was dependent on the court at Fort Amsterdam. Now her magistrates were increased from two to four, and Midwout (Flatbush) obtained the right to three schepens, while to Amersfoort (Flatlands) two schepens were granted. In all matters relating to police, peace, and security, in their several towns-which extended in criminal matters over cases of fighting, threatening, etc.-these courts had separate jurisdiction. Offenses of a graver character were reported to the director and council at Fort Amsterdam. In civil matters these courts could take cognizance of suits to the amount of fifty guilders. In excess of this sum to a further definite amount, an appeal lay to a superior district court. The latter court was composed of magistrates delegates from each town court, and a schout, who acted also as a clerk. To this district court was also committed the superintendence of such affairs as were of common interest to the several towns represented in it: that is, the laying out of roads, the observance of the Sabbath, and the erection of churches, schools, and other public buildings. It was also, to a certain extent, a court of records.

David Prevoost, who had been commissioner of Fort Good Hope, on the Connecticut River, was the first schout, or sheriff, of this district court. In January, 1656, he was succeeded by Pieter Tonneman, who acted until August, 1660, when Adriaen Hegeman was appointed. The salary of the office was two hundred guilders a year, with one-half of the civil fines imposed by the court, and one third of the criminal fines levied by each town, together with certain fees as clerk for entries and transcripts. In 1661, courts similar to those in Breuckelen, Midwout, and Amersfoort were established at Bostwyck (Bushwick) and at New Utrecht. These towns were then formed into a district which was called the "district of the five Dutch towns." The several town courts still continued to exercise their independent jurisdiction, but there was one schout for the district, and he resided in Breuckelen.

Courts were established, by virtue of grants from Stuyvesant. among the English settlers in Canorasset, or Rutsdorp (Jamaica), in 1656, and in Middleburgh (Newtown), in 1650. In 1652, Stuyvesant established a court in Beverswyck (Albany), independent of the patroon's court of Rensselaerswyck.

The courts which have thus been enumerated and described, including the patroon courts and the appellate court in New Amsterdam, which was composed of the governor and council, constituted the judicial tribunals of New Netherland until the colony passed into the hands of the English.-Chester's "Legal and Judicial History of New York," I, 86.

Footnote 33: "In substance, this petition reads:

"The States General of the United Provinces are our liege lords. We submit to the laws of the United Provinces; and our rights and privileges ought to be in harmony with those of the Fatherland, for we are a province of the State, and not a subjugated people. We who have come together from various parts of the world and are a blended community of various lineage, who have at our expense, exchanged our native lands for the protection of the United Provinces; we who have transformed the wilderness into fruitful farms, demand that no new laws shall be enacted without the consent of the people, and none shall be appointed to office without the approbation of the people, and that obscure and obsolete laws shall never be revived."

Footnote 34: "The *Governor's*, or *Director-General's*, *Council*, sometimes referred to as the Supreme Council, and in fact, the judicial court of last resort in New Netherland, was constituted as follows:

1626-Peter Minuit, Director*;* Isaac de Rasieres, Peter Blyvelt, Jacob Elbertsen Wissinck, Jan Jansen Brouwer, Symon Dircksen Pos, Reynert Harmansen.

1630-Peter Minuit, Director; Peter Blyvelt, Reynert Harmansen, Jan Jansen Myndertsen, Jacob Elbertsen Wissinck, Symon Dircksen Pos.

1636-Wouter van Twiller, Director; Jacob Jansen Hesse, Martin Gerritsen van Vergen, Andries Hudde, Jacques Bentyn.

1636-Wouter van Twiller, Director; Andries Hudde, Claes van Elslant, Jacobus van Curler.

1638-William Kieft, Director*;* Johannes la Montagne.

1639-William Kieft, Director; Johannes la Montagne, Ulrich Lupold.

1642-William Kieft, Director; Johannes la Montague.

1647-Peter Stuyvesant, Director; William Kieft, ex-director; Lubbertus van Dincklagen, vice-director; Johannes la Montagne, Brian Newton, Paulus Leendertsen van der Grist, Jacob Loper, Jeimer Tomassen, Jan Claessen Bol, Adriaen Keyser.

1648-Peter Stuyvesant, Director; Lubbertus van Dincklagen, Johannes la Montagne, Brian Newton, Paulus L. van der Grist, Adiiaen Keyser.

1650-Peter Stuyvesant, Director; Lubbertus van Dincklagen (forcibly expelled Feb. 28 1651); Johannes Ia Montague, Brian Newton, Adriaen Keyser.

1652-Peter Stuyvesant, Director; Johannes la Montagne and Brian Newton.

1653-Peter Stuyvesant, Director; Johannes la Montague, Brian Newton, Cornelis van Werckhoven (who returned to Holland in 1654), Nicasius de Sille (who came out from Holland in 1652, commissioned by the Company as "First Councillor").

1655-Peter Stuyvesant, Director; Nicasius de Sille, Johannes la Montagne (appointed Vice-Director at Fort Orange, Sept. 28, 1656).

1657-Peter Stuyvesant, Director; Nicasius de Sille, Peter Tonneman.

1657-Peter Stuyvesant, Director; Nicasius de Sille, Peter Tonneman, Johannes de Decker.

1659-Peter Stuyvesant, Director; Nicasius de Sille, Peter Tonneman (who went to Holland in fall of year); Johannes de Decker (absent from country from July 29, 1659, to July *12,* 1660); Cornelis van Ruyven.

1660-Peter Stuyvesant, Director; Nicasius de Sille, Johannes de Decker, Cornelis van Ruyven.

1664-1673-Under English rule.

1673-74-Anthony Colve, Governor; Cornelis Evertse, Jacon Benckes, Abraham van Zyll, and Anthony Colve, naval commanders controlling emergency government; Cornelis Steenwyck, appointed Sept. 19, 1673.

Footnote 35: *"Board of Twelve Men, 1641-David* Pedersen de Vries, President*;* Jacques Bentyn Jan Jansen Dam Handpick Jansen, Mary Andriessen Abram Pedersen (the miller) Frederick Lubbertsen Joachim Pedersen Kuyter Gerrit Dircksen George Rapalje Abram Planck Jacob Stoffelsen Jan Evertsen Bout Jacob Walingen

Board of Eight Men 1643-Cornelis Melyn President Joachim Pedersen Kuyter Jan Jansen Dam (expelled at first meeting); Jan Evertsen Bout (named vice Dam), Barent Dircksen, Abram Pedersen (miller), Isaac Allerton, Thomas Hall, Gerrit Wolphertsen van Couwenhoven.

Board of Eight Men 1645-Jacob Stoffelsen John Underhill Francis Douty (Doughty), George Baxter, Richard Smith, Gysbert Opdyck, Jan Evertsen Bout, Oloff Stevensen van Cortlandt.

Board of Nine Men, 1647-Augustine Heerman, Arnoldus van Hardenburgh, Govert Loockermans, merchants*;* Jan Jansen Darn, Handpick Hendricksen Kip, Jacob Wolphertsen van Couwenhoven, burghers; Michael Jansen, Jan Evertsen Bout, Thomas Hall, farmers.

1649-Adriaen van der Donck, President*;* Augustine Heerman, Arnoldus van Hardenburgh, Govert Loockermans, Oloff Stevensen van Cortlandt, Handpick Hendricksen Kip, Michael Jansen, Elbert Elbertsen (Stoothof), Jacob Wolphertsen van Couwenhoven.

1650-Oloff Stevensen van Cortlandt, President; Augustine Heerman, Jacob van Couwenhoven, Elbert Elbertsen, Handpick Hendricksen Kip, Michael Jansen, Thomas Hall, Govert Loockermans, J. Evertsen Bout.

1652-David Provost William Beckman Jacobus van Curler Mallard Anthony Isaac de Forest, Barent van Hattem, Joachim Pedersen Kuyter, Paulus Leendertsen van der Grist, Peter Cornellissen (Miller).

Footnote 36: *"Burgomasters of New Amsterdam-1653,* Barent van Hattem and Martin Cregier; 1654, the same until November, when Van Hattem returned to Holland and Mallard Anthony was appointed*;* 1655 Mallard Anthony and Oloff Stevensen van Cortlandt; 1656, the same; 1657, Mallard Anthony and Paulus Leendertsen van der Grist; 1658, P. L. van der Grist and O. S. van Cortlandt 1659; O. S. van Cortlandt and Martin Cregier, 1660; Martin Cregier 1660; Mallard Anthony and O.S. van Cortlandt, the latter taking the place of Cregier then the Esopus country on military duty 1601, Mallard Anthony and P. L .van der Grist 1662, O.S. van Cortlandt and Cornelis Steenwyck, 1663, O. S. van Cortlandt and Martm Cregier with P. L. van der Grist substituting for Cregier absent; 1664, P. L. van der Grist and Cornelis Steenwyck.

Schepens of New Amsterdam-Paulus Leendertsen van der Grist Maximilianus van Gheel Mallard Anthony William Beckman Pieter Wolfertsen Couwenhoven Joachim Pedersen Kuyter Oloff Stevensen van Cortlandt Johannes Nevius Johannes de Peyster Johannes van Brugh Jacob Stryker Handpick Hendricksen Kip Govert Loockermans, Adriaen Bloemmaert Handpick Jansen van der Lin Cornelis Steenwyck Isaac de Forest Johannes

Pedersen van Brugh Jeronimus Ebbingh Jacob Kip Timotheus Gabry Jacobus Bancker Isaac Gravenraet Jacques Cousseau Nicolaeus Meyer Christoffel Hoogland Laurens van der Spiegel Gelyn Verpianck Francis Rombout and Stephen van Cortlandt.

Footnote 37: "Here then in the Stadt Huys of New Amsterdam the worthy merchants and brewers Indian traders and ship captains who usually composed the body of burgomasters and schepens of the little municipality met and passed their ordinances for the government of the town, or sat as a court of justice to consider the numerous and sometimes queer controversies which were brought before them Naturally they were not men who were overstocked with legal lore. Ponderous folios, and quartos, in hog-skin of the civil and imperial laws of the ordinances of the States General and of the States of Holland, and the well-thumbed "Rosebooms rescued" of the Statutes and Customs of Amsterdam, lay before the magistrates, inviting them to lose themselves in the mazes of those abstruse treatises. They preferred, however, as a rule, to render their decisions by the aid of what is known as horse sense They were fond of settling cases informally by inducing parties to accept advice before going to trial failing this, they were apt to send their cases for arbitration to one or two good men, whom they could select out of the community, with instructions to reconcile the contending parties if possible in one case in the year 1662 when the question of the sewing of linen caps was involved the court went so far as to appoint good women as arbitrators.-J. H. Innes, in "New Amsterdam and Its People," p. 188.

Footnote 38: *"Magistrates of the Dutch Period:*

New Amsterdam, 1653-64-See footnote No. 36.

Fort Orange, 1654-64-Sander Leendertsen, Pieter Hartgers, Frans Barentsen, Pastoor Jan Verbeck, Jan Tomassen van Dyck, Volckert Jansen, Rutger Jacobsen, Andries Herbertsen, Dirck Jansen Croon, Jacob Jansen Schermerhoorn, Philip Pedersen Schuyler, Goosen Gerritsen van Schack, Abraham Staats, Adrien Gerritsen, Francis Boon, Evert Jansen Wendel, Gerrit Slechtenhorst, Stoffel Jansen, Jan Handpick van Bael, Jan Kostersen van Aecken.

Willemstadt, 1673-Gerrit van Slechtenhorst, David Schuyler, Cornelis van Dyck, and Peter Bogardus.

Schenectady, 1673-Sander Leendertsen Glen, Herman Vedder, and Barent Janse.

Wiltwyck, 1661-64-Evert Pels, Cornelis Barentsen Slecht, Albert Heymans, Tjerck Claessen de Witt, Albert Gysbertsen, Thomas Chambers, Gysbert van Imbrock, and Jan Willemsen Houghtaling.

Swaenenburgh, 1673-74-Cornelis Wyncoop, Roeloff Kierstede, Wessel Ten Broeck, Jan Burhans, Joost Adriaensen, and Cornelis Hoogeboom.

Hurley, 1673-74-Louis de Bois, Roeloff Hendricksen, and Adriaen Albertsen Roose.

Marbletown, 1673-74-Jan Jopsten, Jan Broersen, and William Jansen Schudt.

Breuckelen, 1646-1674-Jan Evertsen Bout, Huyg Aertsen van Rossum, Frederick Lubbertsen, Albert Cornellissen Wantenaer, William Brendenbent, Joris Dirksen, Peter Cornelissen, Joris Rapelje, Teunis Nyssen, Peter Montfort, William Gerritsen van Couwenhoven, Teunis Jansen, Thomas Verdonck, Teunis Gysbert Bogart, Thomas Lammertse, and Rem Jansen.

Midwout, 1654-1673-Jan Stryker, Adriaen Hegeman, Jan Snedecker, Thomas Swardwout, Peter Lott, William Jacobe van Boerum, William Guiljamsen, William Willemse, Jan Sned, Jan Stryck, Handpick Jorissen, William Guilliamsem, Auke Janse.

Amersfoort, 1654-1673-Elbert Elbertsen, Nicholas Stilwell, Cornelis de Potter, Peter Claessen, Martin Jansen Breuckelen, Coort Stevensen, and Abram Jorissen.

New Utrecht, 1659-1673-Jan Tomassen van Dyck, Jacobus van Corlaer, Rutger Joosten van Brunt, Jacob Hallekens, Balthazar Vos, Jacob Pedersen, Francis de Bruyn, Thomas Jansen van Dyck, Handpick Mattyssen Smack, Jan van Deventer, and Jan Gysbertse van Meteren.

Boswyck, 1661-1673-Peter Jansen de Witt, Jan Tilje Letelier, Jan Cornelissen Zeeauu, Ryck Leydecker, Jan Catjouu, Gysbert Teunissen, Barent Joosten, David Jochimsen, John Lequier, Handpick Barentse Smith, and Voickert Dirckse.

Gravesend, 1650-1674-George Baxter, William Wilkins, Nicholas Stilwell, James Hubbard, William Bowne, Edward Brouse, Thomas Spicer, John Cooke, Samuel Spicer, Richard Stillwell, John Emans, Barent Jurisensen, John Tilton, and Samuel Hoims.

Middleburgh, 1652-1673--Thomas Hazard, Robert Coe, Richard Gildersleeve, Henry Feake, Richard Betts, William Palmer, John Coe, Edward Jessup, Ralph Hunt, Jonathan Fish, Samuel Coe, John Layton, Francis Swaine, William Bloonsfield, John Cochrane, John Burroughs, John Ransden, and Jonathan Hazard.

Flushing, 1648-1673-John Townsend, John Hicks, William Toorn, John Underhill, Thomas Saul, Robert Terre, William Lawrence, Edward Farrington, William Noble, William Hallett, John Hinchman, Francis Bloetgoet, and Richard Wildie.

Hempstead, 1647-1673-Richard Gildersleeve, John Seaman, John Hicks, - Coe, Daniel Whitehead, John Strickland, William Washburn, Robert Ashman, Robert Forman, Robert Jacksen, John Smith, and William Jacobs.

Rutsdorp, 1659-1673-Benjamin Coe, Samuel Matthews, Richard Everett, John Townsend, Nathaniel Denton, Andrew Messenger, Robert Goe, Daniel Denton, John Strickland, Thomas Benedict, John Carpenter, and Robert Ashman.

Oyster Bay, 1652-1673-John Richbell, Robert Ferman, Nicholas Wright, Thomas Townsend, and Nathaniel Coles.

Huntington, 1673-1674-Joseph Whiteman, Isaac Platt, Jonas Wood, and James Chichester.

Seatalcot, 1673-Richard Woodhull, and John Bayles.

Southampton, 1673-Edward Howell, and Joshua Barnes.

Easthainpton, 1673-John Mulford, and John Stretton.

Southold, 11673-Thomas Hudson.

Haerlem, 1660-1673-Jan Pedersen Slot, Daniel Terneur, Peter Cressau, Johannes la Montagne, Philip Cassie, Dirck Claessen, Michael Muyden, Johannes Verveelen, Resolved Waldron, David des Marest, Joost van Oblinis, Barent Hermans, Jan Petersen Harling, Adriaen Cornelissen, Jacob Pedersen de Groat, and Wolfert Webber.

Westchester, 1656-1673-Thomas Wheeler, Thomas Newman, John Lord, John Smith, Josias Gilbert, Nicholas Bayley, Thomas Veall, Thomas Mollinaer, Edward Waters, Robert Heustis, William Betts, John Barker, Nicholas Bayley, Edward Jessup, Joseph Palmer, and Richard Panton.

Mamaroneck, 1673-John Busset, and Henry Disbrow.

Fordham, 1673-Johannes Veerveelen, Michael Bostiaensen, and Valentine Claessen.

Eastchester, 1673-John Hoit.

Staten Island, 1664-1674-David D'amarex, Pierre Bilyou, Wairaven Lutten, Tyse Barentse--Leendart, Jan Willemse, Gideon Marlet, and Nathan Whiteman.

Footnote 39: *"Schouts-Fiscaal of New Netherland*-Jan Lampo, appointed in 1626; Coenraed Notelman, in 1632; Lubbertus van Dincklagen, in 1633; Jacques Bentyn, in 1636*;* Ulrich Lupold, on March 28, 1638*;* Cornelis van der Huyghens, on July 53, 1639*;* Hemrich van Dyck, on May 22, 1647*;* Cornelis van Tienhoven, on March 27, *1652;* Nicasius de Sille, on June 26, 1656*;* William Knyff, on December 15, 1673.

Footnote 40: *City Schouts:*

New Amsterdam-Cornelis van Tienhoven, appointed February, 1653*;* Joachim Pedersen Kuyter, appointed in 1654, but was murdered by Indians in September of same year, before he had taken over duties; Cornelis van Tienhoven, continuing in dual office*;* Nicasius de Sille, 1656; Pieter Tonneman, 1660, the first to have only the one office.

Rensselaerswyck-Jacob Albertsen ver Planck, Adriaen van der Donck, Nicolas Coorn, Gerrit van Slechtenhorst, Cornelis Teunissen, and Gerrit Swart.

Esopus-Roeloff Swartwout, Mattys Capito, William Beckman, Isaac Gravenraet.

Haerlem-Johannes Ia Montague, and Resolved Waldron.

Westchester-Thomas Wheeler.

Breuckelen-Jan Teunissen, David Provost, Peter Tonneman, Peter Hegeman, Adriaen Hegeman, Jacob Stryker.

Flushing-William Harck, John Underhill, John Hicks, William Hallett, Tobias Feke, John Mastine.

Fort Orange and Beverwyck-Jan Daniels, Jacob Teunissen, Hans Vosch.

Willemstadt and Rensselaerwyck-Andrew Draeyer.

Schanegtade (Schenectady)-Jan Gerritsen van Marcken.

New Orange, 1673-Anthony de Milt.

New Utrecht-Nicasius de Sille.

Gravesend-James Hubbard, Richard Gibbons, John Morris, John Cooke, and Charles Morgan.

Middleburgh-Thomas Newton, Elias Bagley, and Thomas Pettit.

The Five English Towns-William Lawrence, and Francis Bloodgood.

South Seatalcot, Huntington, and East Southold, 1673-Isaac Arnold.

Staten Island, 1673-Peter Biljou.

Bergen-Tielman van Vleck.

Footnote 41: "Whereas we are chosen by the authority of the High and Mighty Lords of the States General to be Magistrates of the Town of Bergen, we do swear in the presence of Almighty God to be true and faithful to said authority, and their Governors for the time being, and that we equally and impartially shall exercise justice between party and parties, without regard to parties or Nations, and that we shall follow such orders and instructions as we from time to time shall receive from the Governor and Council. . .

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CHAPTER XII-(Continued).

THE BENCH AND BAR.

English Period, 1664-1775.

Long before New Netherland passed to the English, the Dutch authorities must have been well aware of the significance of colonial happenings; they must have seen that colonial importance was inexorably pointing to English supremacy in America In the first decade of colonization the Governor of the English colony (Plymouth) bad had to exercise extreme caution in his negotiations with the Dutch, who were numerically stronger; but between 1629 and 1640 25,000 Protestants crossed to New England, while comparatively few Dutch crossed to New Netherland. The English, indeed, began to reach out into Dutch territory, Long Island, in the forties; and in the next decade Stuyvesant must have been often perplexed at the ominous shrinkage of Dutch governmental power on Long Island. In that part of New Netherland the English towns overshadowed the Dutch, just as the neighboring English colonies domineered over New Netherland; and New England was inclining more and more to side with the belligerent English towns of Long Island.

John Scott had been one of the disturbers of the peace. Stuyvesant had, indeed, imprisoned him for inciting Long Islanders to rebellion, but in 1663-64 Scott was again on the island, spreading disaffection. It appears he had gone to England after the Restoration, had petitioned King Charles II to bestow upon him the government of Long Island, and had returned as one of three commissioners, instructed not merely to examine into English titles upon Long Island but to consider the question of the "intrusion" of the Dutch and their disregard of English law. Scott prevailed upon Connecticut to annex the whole of Long Island; but when he visited the English towns of western Long Island he found that the Quakers, Baptists, and other dissenters of those towns were just as averse to rule by Connecticut as by New Netherland. They dreaded Puritan rule, indeed, more than Dutch. So when they heard that King Charles had given the whole of Long Island to the Duke of York the five English towns resolved to set up an independent government temporarily, with John Scott as their president, until such time as the will of the Duke of York would be made known. For mutual protection, the towns raised an army of I 50 men; and this force, headed by Scott, took the field "to reduce the Dutch towns to obedience to the English king."

The army of Scott did not clash with that of Stuyvesant, and fortunately these two governmental heads met in conference. It was agreed that there should be no hostilities for twelve months; that the case of Long Island should be referred to the home governments; and that, meantime, pending settlement of its status, the English towns should be permitted to govern themselves as they pleased.

The status of Long Island was finally decided within the twelve months, but not in the way the Dutch had hoped. Indeed, the States General had ordered the English towns, somewhat peremptorily, to renew their allegiance to New Netherland. At about the same time Connecticut claimed Long Island, and seemed likely to get it had the English Government itself not taken a hand. It happened in this way. James, the Duke of York and Albany, received letters patent on March *22,* 1664, from his brother, King Charles II The instrument granted him proprietary right to not only Long Island, but to the whole of New Netherland as well. Certain other territory was included, and the royal brothers had, it seems, ulterior designs on New England also. So, having letters patent to what he anticipated would prove a lucrative territorial possession, and being of somewhat slender purse, the

Duke of York hastened his plans to profit by the grant. In April, 1664, four ships of war, carrying a force of 300 or 400 men, under the command of Colonel Richard Nicolls, sailed from England for Boston. It was represented in Amsterdam that this force was sent "to reduce the New England colonies to obedience and uniformity in state and church"; and the Duke of York was not disinclined to let the Dutch think so. In Boston, however, the expedition was differently viewed; in fact, the English colonies were asked to cooperate with Colonel Nicolls and his fellow commissioners-Sir Robert Carr, Sir George Cartwright, and Samuel Maverick-in an attack on New Netherland. Rumor of the coming of the English fleet reached New Amsterdam in July. There was consternation for a time, but soon afterwards Stuyvesant received reassuring despatches from the Amsterdam directors of the Dutch West India Company, conveying the Amsterdam impression of the true motive of the Duke of York. So, calm was restored in governmental circles of New Netherland. The shock was all the more unnerving, therefore, when, in the next month, the English fleet entered New York waters with belligerent designs against New Amsterdam and the province.

That England, in a time of peace, should thus pounce upon the possession of another Nation seems indefensible. Of course, there is a reason-a justifiable one, as the English see it, and other people cannot form an opinion on the subject without informing themselves as to the bases of claims to sovereignty in America put forth by rival European Nations. As these conflicting claims entered 'importantly into land-title disputes between individuals of New York Province and New York State, it seems fitting to give a little space at this point to the subject

The explorations of Spanish navigators need not be considered; but, during the seventeenth century. France, England, and Holland clashed, each asserting positive claim to what is now New York territory. The French claim was based on the early explorations and settlement of the River St. Lawrence region, and the explorations of Samuel de Champlain in northern New York. Verrazzano was in New York waters in 1524, commissioned by the King of France, though one historian[42] was of the opinion that the voyage, if made at all, was made in the service of Henry the Eighth of England. On the other hand, Cartier's voyages of 1534 and 1535 were undoubtedly in behalf of France; and subsequent French expeditions, down to that of Samuel de 'Champlain in 1609, when he penetrated far into New York, strengthened claims made' by France that French sovereignty should be supreme in North America.

Holland's claim rested upon the discovery of New York Bay and the Hudson River by Henry Hudson in 1609, and upon subsequent colonization. The United Provinces of the Netherlands claimed all the country lying between the Connecticut and Delaware rivers, and the land drained by them, their navigators and traders having been the first to ascend these rivers and their tributaries, and to settle upon their shores.

The English claim seems to have been best based. Henry VII gave to the Venetian John Cabot "the right to discover western lands"; and he, accompanied by his three sons, sailed westward, in due course reaching the western continent. The Cabots raised the English standard on the eastern coast of Labrador on June so, 1497. In the next year they followed the coast line from Labrador to Mexico, John Cabot dying during the voyage. Subsequent English expeditions were in New York and Delaware bays before the coming of Henry Hudson, an Englishman employed by the Dutch Government, in 1609. The settlement of New England might feasibly 'be dated from 1607, when the West of England Company sent two ships, under Raleigh Gilbert and George Popham, from England with colonists to establish a settlement in the' new land. They settled at the Sagadahoc (Kennebec), Maine, in August of that year. True, the surviving colonists were glad to return to England in the next year; and the abandonment might be taken as cancelling the occupational priority. Still, the Pilgrims reached Cape Cod in *1620*, beginning settlement three years before the first permanent settlement was made at Albany by the Dutch, though trading posts had been established at several points a decade or so earlier. The English King, James I., had been quite' positive of the right of the English, and the patents granted to the English companies by the Crown left no room for Dutch colonization, save as English subjects or at the expense of the English companies. Hence we read that the English colonies protested to the English Government, and the latter protested to the Dutch Government "against this unwarrantable invasion of English territory." Of course, the Dutch authorities were just as positive of Dutch right to settle in the land lying between the territories named in the grants of the two English companies However, the political situation of the homelands governed the colonial

policy, and, in the constantly changing fortunes of European Nations during the next forty years, a period in which the enemy of one year might become the ally of the next, the colonial question could not come up for final decision. In consequence, the Dutch remained in possession of New Netherland, although the English colonies, for a generation, had been strong enough to have ended the controversy by ousting her, had they felt so disposed.

During this period of occupation, there had necessarily been very many land transactions between the Dutch provincial authorities and individuals. The French, of Canada, had also made vast grants of land on both sides of Lake Champlain, thus complicating the situation. It was therefore only to be expected that, when the English entered into possession of the province in 1664 and considered that all prior land grants were without proper basis, land suits would begin to clear doubt as to the title of eminent domain. "The entire question turned on the point whether England had annexed this territory by prior discovery, or whether by conquest and invasion it had been reduced to an English dependency. If the former contention were tenable the English common law was paramount and had, from the date of discovery, been the law of the land. If, however, it be conceded that English domination was due to the success of British arms, the law remained as it had been before the conquest, and was so applicable to all causes of action which had origin prior thereto. Taking this latter view, the Dutch possession was that of mere squatters holding possession adverse to the real owners of the soil, and of no legal effect, and subject to removal and confiscation upon the forcible or other entry of the lords paramount. The vacillating tactics of the colonial judges, who never sharply and clearly defined their position in this matter, has left the title of eminent domain in doubt and uncertainty,"[43]

While it is a fact that since 1664, when the first formal English occupation of New York began, the English common law has generally controlled the decisions of New York courts,[44] there is no doubt that the terms of capitulation of New Netherland, to Colonel Richard Nicolls in August, 1664, gave the Dutch holders of landed estate clearer title than they otherwise would have had, as squatters. But even as squatters, some had been long enough in occupation to acquire a landed right. Some other phases of the local situation explain why Roman Dutch law was to some extent recognized in New York Province, even though the English common law became paramount. The terms of surrender of New Amsterdam provided some recognition of Dutch institutions and customs, the papers stipulating that "the Dutch here shall enjoy their own customs concerning their inheritances; that no judgment that has passed any judicature 'here shall be called, in question; that all inferior civil officers and magistrates shall continue as they are (if they please) until the customary time of new elections, and then new ones to be chosen by themselves, provided such new chosen magistrates shall take the oath of allegiance; and that all differences of contracts and bargains made before this day by any in this country shall be determined *according to the manner of the Dutch."* It seems that these guarantees were never deliberately repudiated by the Duke of York's Governors "On the contrary, the Dutch law continued to be administered by Dutch methods, and in the Dutch language, in certain of the purely Dutch districts, like Albany and Esopus, until the reoccupation of the province by the English in November, 1674," after it had been reconquered by the Dutch in August, 1673, and held under Dutch rule for a few months by the Dutch naval council.

English administration of the former Dutch province does not seem to have strictly followed the capitulation terms of 1664, but much happened between that time and 'the beginning of the second English period, in 1674, to affect the status of the Dutch. In 1665 war broke out between the English and the Dutch home Governments, and although the English Governor in New York had, in February, permitted the burgomasters and schepens of New Amsterdam and other places to stand for reelection and had permitted, the Dutch court to be reestablished in the capital, thus indicating that the Duke meant to live up to the terms of surrender, he had had to recognize a few months later that the change in the European situation demanded a change in colonial policy. In that time of war he could hardly have left the local control of the few fortified places in any but English hands Although within a year of the signing of capitulation papers the English Governor departed from the spirit, if not the letter, of the terms of surrender, and abolished the New York City Court of Burgomasters and Schepens and created in its place an English municipal court, the records of his administration show that he protected the interests of the Dutch in America more scrupulously than they were cared for by the Dutch Government itself. Indeed, the Dutch of the former 'New Netherland seem to have been forsaken by their country-men, for in neither of the

treaties signed between the English and Dutch Governments-the Treaty of Breda in 1667 and that of Westminster in 1674-was any express reservation made in favor of the Nicolls guarantees of 1664. Hence these subsequent treaties between English and Dutch authorities were considered to have nullified the agreement of 1664. At least, so the English contended; and as thenceforth they were dominant in the province, the English common law naturally became paramount. Nevertheless, Roman Dutch law was never quite stamped out by succeeding systems. Even a century after the surrender of New Amsterdam, the Dutch of the province still considered that the articles of surrender were in force, and, as Cadwallader Colden remarked, that any breach of them would be an "injustice to them."[45]

After England's entry into New Amsterdam in 1664 the change of Government in New Netherland was effected without extraordinary commotion. It was a peaceful entry. The ordinary affairs of the capital, New Amsterdam, were hardly disturbed. Indeed, life for the Dutch of New Amsterdam, which now became New York, was more placid than it had been for some years. "Nicolls wisely acted as if he were receiving a penitent province that had for a season forgotten its true allegiance, rather than as taking possession of one he had conquered." He endeavored to avoid unduly disturbing local affairs in the Dutch communities, and, for some time after the coming of the English, the municipal affairs of New Amsterdam and Fort Orange (Beverswyck), Esopus (Wiltwyck), the group of Dutch towns in Kings County, and the settlements on the Delaware, went along almost unchanged. The Dutch were not disposed to take willingly the oath of allegiance to the English Crown, but in other respects seemed to be more contented than the English of the essentially English towns of Long Island. The latter, perhaps, had some reason for dissatisfaction. When the English fleet had appeared in New York waters, in August, 1664, the English settlers had rallied in armed force, prepared to aid in the subjugation of New Amsterdam. Although Colonel Nicolls entered into possession without the firing of a shot, and in any case could probably have taken the place without assistance, the militant English towns of Long Island naturally expected that their loyalty would be rewarded, and that in the new order of government they would have privileged place. Nicolls promised them as much. Proclamation issued by him at the end of August, from Utrecht Bay, and "scattered broadcast" among the Dutch towns, promised protection to all who would submit. "Forasmuch as his majesty hath sent us, by commission under his great seal, among other things to expel or reduce under his majesty's obedience all such foreigners as have without his majesty's leave or consent seated themselves amongst any of his dominions in America, to the prejudice of his majesty's subjects and the diminution of his royal dignity," reads the proclamation of Nicolls and his fellow commissioners, "We, his Majesty's Commissioners, declare and promise that whosoever, of what nation soever, will, upon knowledge of his proclamation, acknowledge and testify themselves to submit to this his majesty's government, as his good subjects ought to do, shall be protected by his majesty's laws and justice, and peaceably enjoy whatsoever God's blessing and their own honest industry have' furnished them with, and all 'other privileges with his majesty's English subjects. We have caused this to be published that we might prevent all inconveniences to others, if it were possible; however, to clear ourselves from the charge of all those miseries that may any way befall such as live here and will not acknowledge his majesty for their sovereign-whom God preserve."

The commissioners had promised to meet delegates from the English towns on September 4, at Gravesend. They accordingly met Winthrop and other Connecticut magistrates also attending. Nicolls, in their presence, published the royal letters patent, and demanded submission of Long Island to his authority. To the inhabitants who lived east of the Dutch towns, the question was not one of passing from Dutch to English government, for they were already nominally within the jurisdiction of Connecticut. As Winthrop, on behalf of Connecticut, now recognized that the king's will was that the jurisdiction of Connecticut over any part of Long Island should cease, they were willing that it should. Whereupon, Nicolls promised that all civil officers appointed by Connecticut in the transferred territory should continue to act, but under him as the Duke's deputy, "until a convenient season served to convene deputies from all the towns on the island, when and where laws were to be enacted and civil officers established." In this promise the English seemed to see that their privileges under royal government would be important ones. Therefore, Long Island submitted willingly to the authority of the Duke of York, volunteer forces from its eastern towns joined others from New England, and all marched through Amersfoort and Midwout toward Brooklyn, prepared to cross at the ferry and with the English regular soldiers to attack Fort Manhattan. After the surrender had been accomplished without bloodshed, the militia units were

dismissed, with the thanks of the commissioners. Colonel Nicolls addressed a letter to Captain John Younge, of Southold, who commanded the Long Island militia, asking him to list all who had rallied "for their king and country," so that they might be "suitably rewarded." He promised that deputies from the Long Island towns should "in convenient time and place be summoned, to propose and give their advice in all matters tending to the peace and benefit of Long Island."

Very soon afterwards the Provincial Council was organized by Governor Nicolls. Captain Matthias Nicolls became Provincial Secretary, and with Captains Robert Needham and Thomas Delavall, two of the commanders of the English expedition, and two Long Island residents, Thomas Topping, of Southampton, and, William Wells, of Southold, constituted the Council. This body, as well as having general governmental responsibility, was, it seems, the highest judicial court and was charged with the drafting of the legal code which was to be enforced throughout the Duke's proprietary province, and which was to be submitted to a convention of English representatives of Long Island towns. It was not until winter had come that the status of Long Island was finally settled by the inclusion of the whole of it in New York Province. Then, "to conciliate its inhabitants." Colonel Nicolls addressed a letter to Howell and Younge bringing up the subject of Long Island deputies to a Provincial Assembly, but stating that "as soon as the weather should permit" he would "notify them of the time and place of meeting." Meanwhile, he wished the existing municipal administrations to continue in office.

While Governor Nicolls, with the assistance of members of the Court of Assizes,[46] made it his "whole business to prepare a body of laws," the Long Island towns became increasingly impatient. The English Governor had, it seemed, treated the Dutch residents with greater consideration than the English. The Dutch had at first refused to take the oath of allegiance; yet when informed that its terms would be considered as in no way infringing or nullifying any of the articles of capitulation, they no longer hesitated, even Stuyvesant taking the oath. The Dutch magistrates in the Dutch places were still in control of the municipal government. The city of New Amsterdam, now New York. had, on February 2, 1665, elected burgomasters and schepens for another year. These new city officers were confirmed in office by Nicolls, and "announced to the commonalty" in the old Dutch way "after the usual ringing of the bell." All of the officers were Dutchmen,[47] except Allard Anthony, who, however, had long been a favored municipal official under Stuyvesant. Jeremiah van Rensselaer, the Patroon, had been confirmed in his patroonship (which was almost a province in itself) merely by renewing his patent under the Duke of York and taking the oath of allegiance; Albany and Esopus had been informed that the inhabitants there "should enjoy all the articles of surrender" made at New York; the English commander sent to reduce the Swedes in the Delaware region had been rebuked by Nicolls for making too rigorous a conquest, and reminded by Nicolls "that we came to serve his majesty and not our own ends." A vessel belonging to the Dutch West India Company had been permitted to go to and return from Holland with merchandise, and the city authorities of New York had been so evidently satisfied with the future prospects for the Dutch in New York, that Burgomaster Steenwyck had been prompted to write to the Duke of York, praising Nicolls as a "gentle, wise, and intelligent" Governor, under whose fostering care they hoped to "bloom and grow like the cedar on Lebanon." These and other evidences of consideration for the Dutch, and the lack of consideration of, or tardiness in fulfilling promises made to, English communities of the former New Netherland, tended to make the Long Islanders disconsolate.

However, on February 8, 1665, Governor Nicolls addressed a communication to each of the towns on Long Island, declaring that in discharge of his "trust and duty to settle good and known lawes within this government for the future" and receive their best advice and information in a general meeting," he invited each town to send two deputies, chosen by a majority of the taxpayers, to such a general meeting, or convention, to be held at Hempstead on the last day of February, 1665. He expected the delegates, or deputies, to be "the most sober, able and discreet persons" that the towns could choose, and . to produce in convention documents showing the boundaries of their towns, and to bring with them certificates of their election as deputies, "with full powers to conclude any cause or matter relating to their several towns." Westchester was also invited to send delegates, but invitations were not extended to the municipalities of New York, Albany, Esopus, Bergen, and other places.

Accordingly, on February 28, thirty-four delegates gathered at Hempstead, sixteen Dutch and English towns on

Long Island sending deputies, and Westchester sending two also.[48] These towns were within what the Governor and Council had decided should be the bounds of a new English county, or shrievalty, to be known as Yorkshire, and divided into three ridings.[49]

Governor Nicolls opened, the convention, the General Meeting as the delegates chose to call it. by reading the Duke's patent and his own commission. He told the delegates that they should first settle their local differences, as to town boundaries, after which they would be able to consider "a body of general laws hereafter to be observed," which "he had prepared." This legal code[50] was delivered to the delegates, and eagerly perused by them. They found it to be compiled chiefly from the codes of New England, "with abatement of the severity against such as differ in the matters of conscience and religion." This was satisfactory, but the delegates found fault with many other parts of the code. Those from the towns which had until recently been under Connecticut jurisdiction were especially disappointed. They had interpreted earlier promises made by Nicolls as indicating that an improved Puritan form of government would be established in New York. The people of Southold wished all civil officers to be elected annually by the freemen; that all military officers should be chosen by the soldiers; that no magistrate should have "any yearly maintenance," and that no taxes should be levied that had not been approved by a majority of the deputies of a General Court. The Duke of York's code made no such provisions. Therefore, the delegates, in convention, offered several amendments, some of which were accepted by the Governor, who, however, said it was absolutely necessary to establish a system of county rates, and that to permit them to choose their own magistrates would be directly contrary to his instructions. He exhibited that part of his instructions from the Duke of York "wherein the choice of all officers of justice was solely to be made by the governor"; but he pointed out to the delegates that by this provision they were assured "that a Parliament of England can neither make a judge nor justice of the peace." Finally, the Governor made it clear that it was not possible for him to allow them a greater share in the, government than his commission and instructions, which were before them for their perusal, permitted, and that they "must go to the king" for any expansion of privileges.

The delegates thereupon realized that they were not, in fact, a legislative body, convoked to make laws as popular representatives, in accordance with the will of the people, but were merely agents of the Duke of York, called together to accept laws already prepared by the Duke's chief representatives, the Governor and Council. Disillusioned and dissatisfied, they, nevertheless, had no option but to accept the code submitted and hope that the royal proprietor, or his chief representatives, would in the future consider and accept such amendments of the code as they, the delegates, might propose So, on March 1, the delegates passed the only act that was possible in this convention; they adopted a loyal address to the Duke of York. In this memorial they acknowledged their dependence, and declared their "cheerful submission to all such laws, statutes, and ordinances which are or shall be made by virtue of authority from" the Duke, whose rights they would forever, maintain, and whom they besought "to accept of this address, as the first fruits of this General Meeting, for a memorial and record against us, our heirs and successors, when we or any of them shall fail in our duties."

The "Duke of York's Laws," or the Nicoll's Code as it is otherwise called, thus promulgated at the Hempstead General Meeting, or convention, were arranged after the order of a modern digest, the subjects beginning with *Absence* and ending with *Warrant;* "but the arrangement under the various headings is unscientific, and it is necessary to read practically the whole code to ascertain the law relative to any particular subject." The courts to function under the code were: Assizes, the highest court; Sessions, a county court; and the Town, or Constable's Court.

The code did not expressly provide for a Court of Assizes as the supreme judicial tribunal, but its appellate jurisdiction was set out therein, and a clause fixed its sessions. The Duke's Laws prescribed the holding of one annual session of this court on the last Thursday in September, at New York City. It was somewhat after the plan of the Dutch supreme judicial court, though the Court of Assizes was not so much the executive voice as under the old system which made the Council of the Director-General the court of ultimate judicial appeal. The Court of Assizes, while composed chiefly of the Governor and his Council, also seated two justices of the peace of

each of the judicial districts, or ridings. The justices of the peace, who may perhaps be properly classed as the representatives of the people, thus equalled, or outnumbered, the representatives of the government, at court sessions. Indeed, on at least one occasion (October 6, 1680) the Court of Assizes was formidable, having in all thirty-nine members, the normal bench being increased, in this case, by inclusion of municipal dignitaries of New York City and Albany. The Court of Assizes was made less cumbersome and tardy in operation by the right accorded to the Governor and council of issuing commissions of Oyer and Terminer for the prompt trial of pressing capital cases. And, besides its annual session, the Court of Assizes might be called at any time to hear and determine civil and criminal cases which required a speedy despatch. Appeals from its judgments might be taken to the King in council.

The territorial jurisdiction of the Court of Assizes was coextensive with the Duke's possessions, which included the Pemaquid country (between the St. Croix and Kennebec in Maine), Martha's Vineyard, Nantucket, Fisher's (now Newcastle) in Delaware, New Jersey (at the outset), and also, of course, New York proper, as far north and west as Schenectady. The Court of Assizes had original jurisdiction in all criminal cases, and in civil actions for the recovery of more than twenty pounds, in addition to its appellate authority. "It was also made a vehicle, a veritable *lit de justice,* for promulgating and recording the ordinances of the Duke and his council in England, and those of his deputy (the Governor) and council here." Trial was to be by jury, yet it seems that the Governor possessed extraordinary power, for in at least one case the proceedings of the Court of Oyer and Terminer show that sentence was actually pronounced upon the criminal before he had been tried, the sentence indeed being decided upon by the Governor and council *before* the commission of Oyer and Terminer, for trial by jury, was issued; and the instructions that accompanied the commission of Oyer and Terminer were so explicit that the jury seemed to have no other course than to find the accused *guilty.*

The Courts of Sessions were to function three times yearly in each riding of Yorkshire. The court was to be composed of the Governor, the Deputy-Governor or any member of his council, as presiding justice, and of a number of justices of the peace drawn from the residents of the riding, but commissioned by the Governor and council. If the Governor or some one of the councillors should be absent, the senior justice would preside, and would pronounce the decrees or sentences of the court. Jurisdiction, in civil cases, was between five pounds and twenty pounds; and the court had criminal jurisdiction in all but capital cases. No appeal lay from their findings in civil cases involving less than twenty pounds, except "where there is a dubiousness in the expression of the Law." Whenever "the law is silent in any case," the sessions were to remit it to the next Assizes, "where matters of equity were to be decided and punishments awarded 'according to the discretion of the bench and not contrary to the known laws of England'."

A High-Sheriff[51] was appointed. His authority extended over the three ridings of Yorkshire, and the incumbency was for one year, the Governor, in making the annual appointment, being expected to choose from each riding in rotation. In addition, each riding was to have a deputy-sheriff, or high-constable. The justices of the peace were to continue in office during the pleasure of the Governor; but the Governor and council might, by special warrant, displace any officer within the government "for neglecting of his office, or other notorious misdemeanor or misbehavior." The justices, or the high sheriff issued all writs or warrants, except in the case of special warrants from the Governor. The clerk of the sessions certified to the sheriff before the sitting of the court what, and how many, cases were entered for trial thereat; the sheriff then issuing warrants for jurymen to the constables of the several towns of the judicial district; and the constables notified so many of the town overseers as might be required to attend as jurors. Talesmen might be selected by the Court from persons attending the court, or from inhabitants of the town in which the session was held. The jury was to be composed of not less than six nor more than seven men, "unless in special cases upon life and death, the Justices shall thinke fitt to appoint twelve." The jury was required to find all fact, according to the evidence, the justices directing the jury in points of law. Matters of apparent equity the Bench might determine. In cases where the law was obscure, the jury might return a verdict contingent upon a later determination of the point of law.[52] In case any juror might require advice concerning any case, he might consult "any particular man upon the bench, *or any other whom (he) they shall think fitt* to Resolve and direct (him) them before they give in their Verdict." Except in capital cases, the verdict of the majority of the jury disposed of the case at issue; protest by the

minority was not permitted, and the revealing of dissenting votes of the jury was punishable by fine. Undoubtedly, the Duke of York's laws, in this vital question of jury, were out of harmony with the constitutional rights of Englishmen.[53] Nevertheless, the proceedings of the Courts of Sessions probably impressed the average inhabitant, i. *e.*, if pompous ceremony meant anything to the layman. The crier was an awesome functionary, and the command *Silence!* dared not be ignored. Moreover, criticism of a finding by the court was contempt, punishable "at the next Court of Sessions or Assizes."

Town government was based more upon the New England plan. Each town had a local court, for the trial of minor cases, up to five pounds. Each town at first was to have a governing body of eight "men of good fame and life," who were truly elected at town meeting by a majority of the freeholders. Four were to retire at the end of a year, and four more were to be elected to succeed them; thereafter the overseers were to remain in office for two years. One of their number, chosen by themselves and confirmed by the justices of the riding, was to be constable for one year. The constable was to be the highest local officer, and, with six overseers, was to hold the Constable's or Town Court, and also make the local ordinances. The constable and overseers had right to make assessments for church and town purposes.

This system, of course, was not operative in the Dutch communities outside of Yorkshire, the observance of the terms of surrender of New Netherland complicating jurisprudence in New York. It developed the anomaly of a government functioning under two legal systems which could not be merged without conflict in some of the vital principles. It was probably the intention of the Duke's advisors to eventually make the Duke's laws enforcable throughout the proprietary province; but it was hard to bring people who had grown under one system to take willingly to the other. For instance, the Dutch objected to trial by jury, preferring their system of settlement by arbitration, or by decision of the judges. Again, primogeniture, an English custom quite different from that of Holland, made no headway among New Yorkers, who rigidly held to the Dutch customs in respect to inheritance. The Dutch method of making wills by oral declaration before a notary, or by written instructions put in his keeping, could not be stamped out; and in many other ways Dutch methods, or some very similar, were to be found incorporated in provincial or State practices of later times.

The English supervision of the Dutch within the province was very lenient and some of the Dutch communities actually petitioned to be brought under the Duke's Lawe, which they preferred to their own. From 1674 until 1683, the Duke of York's laws were in force. The Dongan code then established in turn gave way, in 1691, to a better English code, which, with some modifications, remained in effect until the end of the provincial period. Nevertheless, it is difficult to change the customs of a people by statute or ordinance; and traces of Dutch influence are still to be found in some of the laws and customs of New York.

The general course of government by the English Governors was dictated to some extent by local conditions, but influenced more by European affairs and National exigencies. Governor Nicolls, for instance, in 1665, became aware that England and Holland were at war, and that strong Dutch naval forces were on the high seas, doing damage to English possessions, and seemingly stronger than, or at least not inferior to, the naval forces of England. Governor Nicolls was aware that the Dutch Grand Pentionary, De Witt, had demanded the return of their American province, and that the Dutch admiral, De Ruyter, might descend upon New York at any time. Therefore, although the Dutch of the former city of New Amsterdam had, in February, 1665, elected burgomasters and schepens to govern the city for another year in the old Dutch way, Colonel Nicolls deemed it more prudent to institute Anglicized municipal government in the provincial capital without delay. Early in June of 1665 Governor Nicolls, by proclamation, made known to the people that upon mature deliberation and advice, he had found it necessary to "revoke and discharge the forms and Ceremony of Government of this his Majesties towne of New Yorke under the names, style or styles, of *Schout Burgomasters & Schepens."* The proclamation thus put an end to burgher government in New York City. King Charles had written to Governor Nicolls and his colleagues in the American colonies, enjoining them "to use all possible diligence for their security"; the Duke of York had directed that his province should be put "into a posture of defense against the Dutch;" and Clarendon had written to Nicolls, warning him to "expect all the mischief the Dutch can do him."

Burgher government had already been ended in New York City before these final dispatches reached Nicolls, in June, from Carteret. The new municipal court, which was to have jurisdiction over the whole of Manhattan Island, was formally organized on June 15, in the Stadt Huys, Thomas Willetts becoming mayor, Thomas Delavell, Oloff Stevensen van Cortlandt, Johannes van Brugh, Cornelis van Ruyven and John Lawrence becoming the Aldermen, and Allard Anthony, a former burgomaster, becoming sheriff. Johannes Nevius, who had been secretary of the old Schepens Court, became clerk of the new Mayor's Court, which for more than 550 years was destined to be the municipal court of New York City. It may be pointed out that four members of the new court were connected with the old. Although trial was by jury on June *27*, when the first session of court opened,[54] the proceedings for long afterwards were recorded in both English and Dutch. On June *27*, it was resolved that "trials by jury should be on the first Tuesday of every month" thereafter, this seeming to indicate that the Dutch practice of arbitrating differences was not to be wholly abolished. Even in the record of the first case tried by jury in New York County, that of Doughty vs. Hinxman and Winslow, is seen an instance "of a compulsory reference of a part of the issues, a common enough practice among the Dutch, but practically unknown in English procedure." The Mayor's Court of New York City was not merely a town court; it was a Court of Sessions, with jurisdiction equal to those of the ridings of Yorkshire.

In the same National emergency Governor Nicolls dealt with the courts of Albany and the Esopus. John Manning was appointed sheriff of the Albany district. He was in command of Fort Albany, and presumably had judicial responsibilities like those of his successor, Captain John Baker, who, in September, 1665, was commissioned to be "chief military officer," and instructed "in capital cases or treaties with the Indians" to "sit in the fort, with the schout and commissioners of Albany; but he was to have no concern with the ordinary civil courts."[55] He was especially urged to "avoid all disputes with the inhabitants," with whom he was advised to live "as brothers together." Nicolls visited Esopus in September, 1665. At this place there had been trouble during the winter between soldiers and townsmen. A more arbitrary Governor may have dealt sternly with the Dutch leaders, but Nicolls "continued" Beekman and the other officers of Wiltwyck. Captain Daniel Brodhead was appointed "chief officer of the militia in the Esopus," and given responsibilities like those vested in Baker at Albany. Brodhead, however, was to see that the village authorities were respected, and seek "rather to reconcile differences than to be head of a party." The Governor's attitude toward the Dutch of New Netherland is well indicated by his instructions to Captain Brodhead: "Preserve yourself single and indifferent as to justice between soldiers and burghers." "Give not too easy an ear to private whisperers and insinuators, which may overrule your judgment and beget a prejudice in your mind against the Dutch. For, though I am not apt to believe they have a natural affection to the English, yet, without ill usage, I do not find them so malicious as some will seek to persuade you they are." Apparently the burgher system of government had not yet been taken away from Albany and the Esopus. Nevertheless, Nicolls reported to the Lords of Plantations, of which home department Lord Clarendon was the head: "All causes are tried by Juries, no Lawes contrary to the Lawes of England"[56] (being in force).

The Court of Assizes went into session, according to the requirements of the Duke of York's Laws, in September, 1665, the session lasting from September 28 to October 4. It was attended by the Governor and his council, and also by the justices of the three ridings of Yorkshire. The fact that magistrates of Albany and Wiltwyck (Esopus) did not attend is further indication that the Dutch courts still functioned in these places. Several amendments of the Duke's laws were considered at this first session of the Court of Assizes; and they were adopted and promulgated, subject of course to approval by the royal proprietor.

After disposing of legislative business, the Court of Assizes sat as a judicial tribunal. The first case was that of *John Richbell vs. the Town of Huntington.* Governor Nicolls presided, and a jury of seven heard the case. Mr. John Rider was attorney for plaintiff and "Mr. Leveredge" for defendants. The jury found for defendants, but "the Court having heard the case debated at large" demurred, and, after examining "further into the equity of the cause and upon the nature and serious consideration, do find" the plaintiff to be the rightful owner of the parcel of land in dispute. "And all persons are hereby required to forbear giving the said Pl't or his assigns any molestation in the peaceful and quiet enjoyment of the premises." Another interesting case heard at the first

session was a charge of witchcraft, or rather of murder, by sorcerous evils. The accused were Ralph Hall and his wife, Mary, both of Seatalcot, Long Island. Under the Duke's laws witchcraft could not be punished in the extreme manner of the New England systems, but the inhabitants were just as superstitious, and when they heard that the Halls "by some detestable and wicked acts commonly called witchcraft and sorcery," practiced upon the person of George Wood, had caused the latter sicken and languish and finally to die, they preferred a charge of murder against the couple. The jury, however, found "nothing considerable" to charge against the man. As to Mrs. Hall, however, they had "some suspitions," though not sufficient "to take away her life." Whereupon the court bound the accused to be of good behavior, "and to appear at every session of the court." In 1668, however, they were "released and acquitted from any and all recognizances."

The Court of Assizes, at its first session, ordered that all wills should be deposited in the Record Office in New York City thereafter, and in this office all land patents were thenceforth to be recorded. To enforce this provision of the Dukes' laws it was ordered that "all persons whatsoever who have any grants or patents of townships, lands, or houses within this government, shall bring in the said grants or patents to the Governor, and shall have them renewed by authority of his Royal Highness, the Duke of York before the beginning of the next Court of Assizes." A few days later, Governor Nicolls issued a patent to David Gardiner, confirming to him the grant of the Isle of Wight, or Gardiner's Island, which had been made to his father, in 1640, by the agent of the Earl of Stirling. Gardiner was, it is said, the first "considerable landowner" to meet the requirements of the English code. However, before the decree was generally recognized, by the English on Long Island as well as by the Dutch landowners elsewhere, some stern examples had to be made by the Governor.

The troubles Governor Nicolls had to face were not unlike those of the former Governors of New Netherland. There was considerable discontent on Long Island. Some towns positively refused to recognize the Duke's laws. Southampton, Southold and Easthampton would choose no local officers, and would pay no tax levies. Nicolls warned them that their action was in fact seditious; yet he tried to ease the way, realizing that the fomenters of the trouble were Howell of Southampton and Younge of Southold, both of whom were annoyed that William Wells had been made high sheriff of Yorkshire. The redoubtable Underhill, who seemed to be happiest when nursing a grievance, wrote from Oyster Bay, pointing out "the distempers of the people against the present form of government, by which they are enslaved under an arbitrary power," which might lead some to "hazard both life and estate in a mutiny and rebellion, rather than bear the burden of the public charge." The Governor, disappointed and annoyed that Englishmen should take such an attitude, denounced the complainants as traitors with whom he would act "vigorously."

The Long Island English "pined for a legislative assembly after the manner of New England." Moreover, they were mortified that their chosen representatives at the Hempstead General Meeting should have shown such abject servility as to adopt and sign a memorial to the royal proprietor accepting a ready-made code which few of them liked. Disaffection became so general during the summer of 1666 that Governor Nicolls, through the Court of Assizes, issued a decree to protect the deputies from further "slander."[57] This did not end the reproachful and seditious utterances, but after a few of the principal townsmen had been fined or put in the stocks, the people soon began to realize that the government was not to be trifled with.

Another decree, issued at the same session of court, spread consternation among the Long Islanders. Towns as well as individuals were, by the decree, to lose all their landed estate unless the deeds were recorded, and new patents issued, at the Record Office in New York City prior to April I, 1667.[58] Therefore, during the next few months, Neperhaem, Pelham, Westchester, Eastchester, Huntington, Flushing, Brookhaven, Easthampton, New Utrecht, Gravesend, Jamaica, Hempstead, Newtown, Flatlands, Bushwick, Flatbush and Brooklyn paid their fees and obtained new charters, confirming generally their old boundaries and "all the rights and privileges to a town within this government." Southold and Southampton were the only two towns that refused to comply with the law. They were not dealt with in the arbitrary manner threatened, and a few years later they also yielded.

The Governor's position was not an easy one. There were perplexities everywhere. The English were restless,

but the Dutch were generally quiescent, though, of course, vigilantly watched, in that time of war. Not a ship came into New York with supplies for a year after Nicolls entered into possession, and the capital so was impoverished and Long Islanders lived so much from hand to mouth that supplies, or money for the public charges could only with great difficulty be collected in the province. The soldiers of the four garrisons had had only straw and canvas to sleep on since arrival, and Governor Nicolls had had to meet their sustenance needs out of his private purse. "For myself," he wrote home in April, 1666, "I am utterly ruined in my small estate and credit; and, which is worse, without very great supplies I shall not be able to secure or make an honest defense of his majesty's interest should we be attacked by a foreign force." His advice to Jeremias van Rensselaer, who claimed Albany as part of Rensselaerswyck, was therefore probably sincere. Nicolls advised Van Rensselaer "not to grasp at too much authority." "If you imagine," he said, "there is pleasure in titles to Government, I wish that I could serve your appetite, for I have found only trouble."

Richard Nicolls was an excellent Governor. By adroit diplomacy, he averted war between the French Canadian forces and his own in 1666, when a French force penetrated almost to Albany, ostensibly to punish the troublesome Mohawk Indians. Although signs of rebellion cropped out among the Dutch at Esopus, and Nicolls punished the ringleaders, he also dealt sternly with his own soldiers, who were not blameless. In this and other ways he showed that he desired to govern impartially and justly. "He did what he wanted to do," writes Mrs. Schuyler van Rensselaer; "he won the affections of the people confided in such difficult circumstances to his care"; and although he desired to be relieved of the governorship long before he was, he faithfully held to a tactful, loyal, considerate, and withal successful, superintendence of provincial affairs. Maverick, one of the royal commissioners, wrote of Nicolls that he had served in the province "with great reputation and honor"; had done "His Majesty and His Royal Highness very considerable service in these parts," having, "by his prudent management of affairs, kept persons of different judgments and of diverse nations in peace and quietness during a time when a great part of the world was in warrs." The Treaty of Breda brought peace between England and the Dutch in July, 1667, and confirmed England in the possession of the former New Netherland. The conclusion of peace became known in New York, by proclamation, on New Year's Day of 1668. Soon thereafter, Colonel Nicolls' request that another Governor be appointed was given attention, and his successor found in Francis Lovelace, second son of the first Baron Lovelace. When Colonel Nicolls sailed for England, on August 28, 1668, he bore an address from the freemen of New York to the Duke of York, "setting forth his good service and the peacefulness of the province." He left behind "a name which stands preeminent among the royal Governors in America for moderation, justice, and wise forbearance." In his four years as Governor, "he accomplished a work far in advance of anything that had ever been achieved by any of his predecessors," had "placed the colony upon a sound foundation," and had "proved himself to be a remarkable man of affairs, farsighted and statesmanlike, tactful and generous in his dealings with the people over whom he had been placed, but at the same time unswerving and determined in whatsoever he believed to be the best interests of the community. His praises have been sounded by every historian of New York."

As much cannot be said about his successor, Colonel Lovelace. During his five years as Governor of New York, he appeared in an unfavorable light, by comparison with the brilliancy of the Nicolls administration. Lovelace was of somewhat colorless character; manifested little initiative or energy, or was himself quite satisfied that Nicolls had already well laid the foundations of government. Like his predecessor, however, Lovelace found that the course of government is not always placid and enviable. The Dutch, in some parts of the province, were disconsolate. Their hopes that New Netherland would again come into its own had been blasted by the Treaty of Breda; and Lovelace did not manifest as intelligent an understanding of the Dutch, or as sincere an interest in them, as Nicolls had shown. The Dutch could not get along amicably with the English garrisons, and, although the English commander at Albany was removed, some of the Dutch preferred to leave the province altogether, migrating in 1670 to the Ashley River colony in North Carolina. However, the most prickly thorns on the governmental bush during the Lovelace administration were the English towns of Long Island. In 1669 they had refused to pay taxes levied for repairs to the fortifications at New York City, "because they had been denied . . . . the liberties due all Englishmen the right that no taxes could be levied except by their own representatives." The Court of Sessions, sitting at Gravesend, declared that the resolutions of the several towns were "false, scandalous, illegal, and seditious." Governor Lovelace ordered the town votes to be publicly burned. This was done, but it neither brought him the money he needed, nor decreased his difficulties. In the heat of the moment,

when checked in his governmental measures, by a demand by the people for popular government, Governor Lovelace had indiscreetly ordered his council to "lay such taxes as may give them liberty for no thought but how to discharge them." Maybe the answer to this arrogant abuse of governmental authority is to be seen in the apathy of the English of Long Island in the emergency of 1673-when a Dutch fleet suddenly appeared in New York waters. The 'English were then at war with the Netherlands; nevertheless, the drummers who marched through the streets of New York, calling for volunteers to defend the city, did not stir any "martial ardor in the breasts of the citizens." Although all males, sixteen years of age and older, were by law liable to military duty, and each town had its militia unit, only a few of the militia captains of Long Island units responded to the call to arms sent out from Fort James. They had no companies to command, unfortunately; therefore, the first English period in New York ended with the Lovelace administration, ignominiously, in 1673, when a force of six hundred Dutch soldiers or sailors, from the Dutch ships of war, landed on the bank of the Hudson River, in the rear of Trinity Church on Broadway, and prepared to assault the fort which could not be defended.

Lovelace was out of the city at the time, but when, a few days later he indiscreetly' returned, he was placed under surveillance, and three days later had to 'bear the crushing indignity of being arrested *for debt* by the civil authorities of the city. Thereafter, until the departure of the Dutch naval commanders, the deposed Governor remained virtually under arrest. He was stripped of his last guilder when the naval authorities confiscated all his personal property; and the humor of the situation was no doubt lost upon him when then told that "if he would now pay what he owed, he would in six weeks be permitted freely to leave the country." He left the province eventually without harm having been done to his person; but he perhaps was a sadly disappointed man, fully convinced that his career had been wrecked by a mere chance turn of the wheel of fortune. The Dutch ships, in fact, had only come into New York Harbor to replenish their water supply, then perilously low; they had not thought it possible that the former Dutch province could be retaken so easily.

As to the functioning of the courts under the Lovelace administration, it seems that he interfered with court procedure oftener than his predecessor had. Smith, the historian, stated that Nicolls erected no courts of justice, and that he "would pronounce his verdict" in the manner of edicts to "be executed by the sheriffs whom he had appointed for that purpose." There is no doubt that a Court of Assizes did function, as a supreme judicial tribunal for the province, during the Nicolls period, and that a county court system was established in the Courts of Sessions of his time; also that the municipalities had either town or schepens courts, New York City having the greater privilege of a Mayor's Court.

The outstanding lawyer of the first English period was Matthias Nicolls, who served under Nicolls and Lovelace and was also later prominent under Andros and Dongan. Other early lawyers were John Rider, John Sharpe, Thomas Owen, Mr. Leveridge, Nicholas Bayard, and Mr. Bogardus. Many other names are recorded as "attorneys" in the minutes of inferior courts, though not all of them were learned in the law. Admission to practice was simple; all that seemed to be essential was that the applicant would pay the crier before whom he was sworn, and take' oath not to exact fees "above what shall be allowed by the Governor and Court," and not from both plaintiff and defendant of the same case. These temporary attorneys were drawn from "traders, factors for foreign merchants, land speculators, or, it may be, mechanics who, possessing a recognized talent for managing affairs, or for penmanship, or an easy volubility, were likely to be called on by their neighbors to act as conveyancers, attorneys, or advocates, as the matter in hand might require." However, the professional advocate was of better qualifications. He probably confined his practice to the Court of Assizes, to Courts of Oyer and Terminer, and to Courts of Sessions. The last named were 'held three times' in each year in each riding of Yorkshire, and as the sessions "were not to exceed three days in duration," and came in the first, second and third weeks of March, June, and December, the professional lawyers could practice in each Court of Sessions without difficulty. The justice chosen from residents in the three ridings could not sit in the court of any riding but his own, but the High Sheriff of Yorkshire had to attend all courts. Possibly the lawyers "rode the circuit" with him. Between times, the lawyers would centre their practice in the Mayor's Court of New York City, which sat weekly, with the Mayor as chief magistrate. Thus, Thomas Willett was head of this court for two years, 1665-67; Thomas DeLavell for one year (1666); Cornelis Steenwyck from 1668 to 1671; DeLavell again in 1671, and Matthias Nicolls in 1672. Thomas Lawrence was Mayor of New York in August, 1673, when the Mayor's Court had to give way temporarily to a revived Schepens Court, in which Vail Brugh, Luyck, and De Peyster, the

burgomasters, had seats.

The records of the courts of the Delaware region indicate that the Dutch courts were still operating long after the Duke of York's Code had been brought into general operation. When Sir Robert Carr, in 1664, took possession of New Amstel it became New Castle. The Schepens Court was ' permitted to continue "for six months until His Majesty's pleasure be further known." The Schepens Court was still functioning in 1668, when Lovelace became Governor. In April of that year he made Captain John Carre commander of the colony of the Delaware and promulgated an ordinance making the said John Carre the chief magistrate. Further, he called "the Schout, Hans Bloch, Israel Helme, Peter Rambo, Peter Cock, Peter Alrichs, or any two of them," to act as Councillors to Captain Carre, "to prevent all abuses or oppositions in Civil magistrates." Further, he ordained: "That the laws of the government established by his Royal Highness be showed and frequently communicated to the said Councillors and all others, to the end that being therewith acquainted, the practice of them may also *in convenient time* be established.

An ordinance dated June 14, 1671, providing that constables might be appointed "as in the rest of his Royal Highness' dominions" indicates that even in the lowest local court burgher government still prevailed. In 1672, however, an ordinance erected the town of New Castle "into a corporation by the name of a bailiwick" and provided that the "office of Schout be converted into a sheriffalty." Peter Alrichs was appointed Bailiff-General of New Castle and the Delaware. In the next year the Dutch again came into possession of their former province, and Peter Alrichs became commandant, with authority over three Dutch courts, one at New Amstel, one at Upland, and one at the Whorekill. The Delaware courts were reorganized again in 1674 under the English authority, all the former officers and magistrates, except Alrichs, being continued in office. However,'the Duke's Code was still an unknown legal system on the Delaware, and evidently not in effect, for in September, 1676, Governor Andros found it necessary to order imperatively "that the books of Laws established by his Royall Highness and practiced in New York, Long Island and dependencies, be likewise in force and practice on this river." This indicates that the Duke's Laws were not effective in the Dutch communities at the head of navigation on the Hudson River either, the word "dependencies" being generally understood to refer to the Duke's outlying Maine settlement, and the several islands. Indeed, it is doubtful whether the Duke's Laws were ever enforced along the Delaware, for in 1677 the Court of New Castle wrote to Governor Andros: "Wee lykewise humbly desier that the sending of the Lawe Booke may not bee forgott; there being great occasion for the same." The book apparently was forgotten, for on July 17, 1678, they wrote, requesting "the new corrected Law-Booke and seal for ye office as heretofore promised."

Under the Duke's Laws capital punishment was provided for innumerable minor offences. For instance, any child under sixteen years of age, who raised a hand to strike its parent, might, upon the bare unsupported testimony of the parent, be put to death. Arson was punishable by death. Hog stealers, as first offenders, would have their ears cut off*;* burglars or highway robbers could be branded on the forehead for the first offence, severely whipped for the second, and put to death for the third offence. Still, a comparison of the Duke's Laws with any New England code of that period, or even with the English code, shows that it was more lenient than any. Indeed, even as late as the beginning of the nineteenth century death was the penalty for about two hundred offences under English law*;* and our own State code was stern by comparison with the Duke of York's Laws. While it was the law of the province the number of capital cases tried in New York City were few. Only one case need be referred to-that of Engeltie Hendricks, a Dutch woman, accused of infanticide. On September 13, 1666, she was sentenced to death, but was to receive twenty lashes with rods twenty-four hours before being "brought to the Townes Gate." She managed to escape from the jail, and was not apprehended until 1665. She was then hanged. In the "Records of New Amsterdam," Vol. I, 188, is a report, dated July 26, 1660, of an "Examination of William Fisher whether he had any conversation with Engel Hendrix, who is lately put to death for murdering her child." The sentence upon a negro who was involved in this woman's escape was "that he serve as public executioner for a period of five years or pay a fine." Apparently he did the latter. An indication of the disreputable class from which the hangmen were recruited is found in a letter from Jo. Clarke, "Ffrom ye Secretary's Office at ffort James the 28th day of January in the evening, 1672-3," addressed to "Captn. Silvester Salisbury, Governor at Fort Albany." The writer explained to the Albany commandant that "our Hangman, Ben Johnson," having been "taken in divers Thefts and Robberyes," and' found guilty, "scapd his neck through want

of another Hangman to truss him up." He was fortunate, for his sentence was "only thirty-nine stripes at the Whipping-Post, loss of an ear and banishment."

The Treaty of Westminster concluded between England and Holland on March 6, 1674, finally ended Dutch sovereignty in any part of North America. It was a crushing blow to New Netherlands, but the Dutch Government had no option; its outlying province, New Netherland, had to be sacrificed to save the home provinces from possible extinction. Fortune' had favored the English, and soon afterwards King Charles II, of England, appointed Major Edmund Andros, "an officer of distinction," to receive the surrender of New Orange and New Netherland under the treaty.

That England's status in the former Dutch province was made clearer by the treaties of Breda and Westminster is indicated by the fact that the new patent issued to the Duke of York in June, 1674, gave him governing authority over not only British subjects within the territory, but also over "any other person or persons" living within the government. One would suppose that, ordinarily, the Government in possession or occupation would have authority over whomsoever might have residence therein. Possibly, the *other person or persons* were the Dutch who, by the terms of capitulation in 1664, had had a certain degree of independence from the general government.

The government under Andros was to be stiffened, but, as to the "formes of Justice," his instructions were to put in execution such lawes and ordrs" as he would find had "been established by Coll Nicolls and Coll. Lovelace, and not to vary from them but upon emergent necessities." So. on November 9, 1674, the day upon which the outgoing Dutch Governor, Colve, absolved the magistrates of New Orange from their oaths of allegiance, the incoming English Governor, Andros, proclaimed "the will of James regarding the rights and properties of the ceded province," and reestablished "the Duke's Lawes" as the legal code of the province. He declared "that the known Book of Lawes formerly establisht and in force under his Royall Highnesse government is now again confirmed by his Royall Highnesse the which are to be observed."

Accordingly the town and county (Sessions) courts again began to function, and where possible under the same officials as served Lovelace. "The two courts of sessions on Long Island and one for the towns of Esopus were revived." Sylvester Salisbury became High Sheriff of Yorkshire on December 9. Sheriffs of other judicial districts were Michael Siston for Albany, Thomas Gibbs for New York City, George Hall for the Esopus, and Edward Cantwell for the Delaware. These sheriffs were appointed in November, 1674, and energetic measures were taken to enforce the Duke's Laws throughout the province. In January, 1675, the first session of the reestablished Court of Assizes was held in New York. Of the inferior courts, the first to reorganize was the Mayor's Court of New York City, which began its first session on November 13, 1674, three days after Andros had ordered that the name of the city be changed from New Orange to New York, the fort at the same time becoming Fort James, instead of Fort Willem Hendrick. On the same day, Andros commissioned Matthias Nicolls as Mayor, John Lawrence as Deputy Mayor, and appointed William Dervall, Frederick Philipse, Gabriel Minvielle and John Winder as aldermen. All court records thereafter were to be in English; consequently, at the first session of the Mayor's Court "every paper offered was preserved in that language, except in the case of those Dutch or other foreign individuals who were too poor to pay for translation." The court procedure of the next ten years, however, again demonstrated that the customs and practices of a people cannot be changed at will by proclamation. Dutch modes of practices prevailed in the New York court "to a very considerable extent," though English forms were introduced. There was, of course, good reason for this. New York City remained predominantly Dutch, in population and sentiment. The leading merchants were Dutch, and the English were in a minority on the local bench, indeed, with two exceptions "the twelve immediate successors of Nicolls in the mayoralty were either of Dutch origin or had been residents of New Amsterdam under the Dutch." Therefore, although Andros ordered all trials to be by jury, the Dutch practice of referring cases to arbitration still continued in very general practice for many years.

In other respects Governor Andros was perhaps correct when, in 1678, he assured the Lords of Trade that the judicial system as planned had been brought into full operation, and that the "law booke in force" was that

"made by the Governor & Assembly att Hempsted in 1665 and since confirmed by his Royall Highnesse."[59] The English system of pleading then in vogue in England was introduced in the provincial courts by two English lawyers who arrived in New York in 1682. Thereafter the' English forms of procedure gradually made headway, but "did not entirely supersede those of Dutch origin until well into the first and second decades of the eighteenth century." Indeed, the particularly; Dutch custom of arbitrating cases continued, in disputed actions, until 1772, when it was regulated by statute enactment.

The Duke of York apparently was of the opinion that in the Cour of Assizes, the people had a General Assembly. Andros was oppose to legislative curb by a popular assembly, and the Duke agreed with him pointing out that the justices who attended the annual session of th Court of Assizes were the persons who, "in all probability would be theire (the People's) representatives if another constitucon were al bowed."[60] Certainly the Court of Assizes was such a large bench that I might reasonably be pointed to as a Provincial Assembly. For instance thirty-one were seated at the session of October, 1680, including Si Edmund Andros, "who was a good lawyer," and Matthias Nicolls,whoh was a better. The latter was about to leave for England, so John West a New York lawyer, was appointed provincial secretary and clerk of th courts.

However, the people of New York did not look upon the Court of Assizes as a Provincial Assembly. They saw that other provinces ha legislative bodies. True, Andros was at odds with the governments of West and East Jersey and tried to assert the right of the Duke of York to these territories. He even arrested Carteret, the New Jersey Governor, and tried him in a New York court, which, however, acquitted Carteret. The discomfited Andros then referred the case to England but Carteret was upheld there, even though his case was against th King's own brother. All of which stiffened the resistance of the people of New York to the Government, thereby causing Andros to adopt measures that were more arbitrary and despotic. Eventually, the Duke of York was reluctantly forced to see that a change of officials was advisable, lest worse happen in the province.

Andros left New York on January 6, 1681, but a month or so before his departure, though some months after he had been relieved of the Governorship, the merchants of New York and the taxpayers in general had become positively defiant. The obnoxious import duty had expired by its own terms in November, 1680, and the merchants would not recognize a renewal. In fact, they had sued the collector of the port of New York for illegally detaining goods upon which tax had not been paid. "He was arrested, was brought before the Court of Assizes and charged with high treason, and sent to Britain for trial." This must have appeared distorted reasoning to the Duke of York, for the collector was only enforcing the will of the government.

Brockholst, the Lieutenant-Governor appointed by Andros, was then in charge of provincial affairs. And when, following this case the high sheriff of Long Island, John Young, drew up a petition, "praying for the early establishment of a General Assembly in New York like those of the Jersey provinces and in conformity with the constitutional rights of Englishmen," there was cause for apprehension in governmental circles. Brockholst wrote to England: "The people generally cry out for an Assembly. Authority and Magistracy is grown so low that it can scarce maintain the public peace and quiet of the government." The Duke of York could hardly fail to recognize, then, that, even if he considered his own purse, some degree of popular government must be extended to the people. So, although the next Governor, Thomas Dongan, did not come until 1683, one of the important missions entrusted to him was that of bringing into being an Assembly that would be representative of all the freeholders of the province.

It was apprehended that such a General Assembly would make changes in the Duke's Laws; nevertheless, the Duke's instructions to Governor Dongan were encouraging. He said: "If such laws shall be propounded as shall appeare to me to be for the manifest good of the Country in generall and not prejudiciall to me, I shall assent unto and confirme ym,"[61] yet he made it quite clear that his right to veto any measure was still in force.

Colonel Dongan was commissioned on September 30, 1682, but did not reach New York until August 25, 1683. Anthony Brockholst was continued as Lieutenant-Governor; John Spragg became provincial secretary and clerk

of the Court of Assizes; and Cornelis Steenwyck, as Mayor of New York, became chief magistrate of the courts of that city. On October 3, 1683, the Governor took his seat, as presiding judge, in the session then held of the Court of Assizes. It was its last session, and perhaps disposed of most pending matters, preparatory to the establishment of a new system of government.

At the close of this session, Governor Dongan issued notices convening a General Assembly. It was to consist of the eighteen representatives elected, in accordance with governmental decree, on September 13, 1683. The Assemblymen convened on October 17. Unfortunately, the records of this Dongan Assembly, the first legislative body organized in New York by some degree of popular vote, have not been preserved. From several sources the names of fourteen members of the Dongan Assembly have been gathered, but whether they all sat in the first session is not certain.[62] The first session lasted three weeks, and fifteen acts were passed, the most sensational being "The Charter of Libertyes and Privilidges granted by his Royall Highnesse to the Inhabitants of New Yorke and its Dependencyes." This, which drew principles "from the immortal Magna Charta," was undoubtedly not liked by the Duke, though he did not at once make known his will in the matter. Fate decided for him, in placing him on the throne of England, succeeding his deceased brother, Charles II, in 1685. This important happening, of course, altogether changed his relationship to New York. He was no longer proprietor by royal patent, but ruler, by birthright, over New York and all other dominions of Britain. What James, Duke of York, may have accepted may have become positively obnoxious to James II, King of England. As a matter of fact, the charter which expressly declared that the supreme legislative authority, "under his Majesty and Royal Highnesse should forever be and reside in a governor, counsell, and the people meet in General Assembly," was objectionable to both Duke and King. As the Duke of York, James hesitated to state frankly his opinion, but as King of Britain James saw objectionable features in almost all clauses of the Charter of Libertyes and Priviledges. So the Charter came under the royal ban.

One of the important measures of the Dongan Assembly which did not come under the royal ban was "An Act to Settle Courts of Justice." By this act four distinct tribunals were created: a Petty Court, or Town Court, to function in every town, for the trial of small causes, fortnightly or monthly; a County Court, known as the Court of Sessions or Quarter Sessions, meeting quarterly or half-yearly in each county;, a Court of Oyer and Terminer and General Gaol Delivery, with original and appellate jurisdiction; and a Court of Chancery. The last was apparently intended to be the supreme court of the province. The act provided that the courts should "not be or remaine Longer in force than for the time and space' of Two Years and until the End of the sitting of the next Assembly after the expiration of the said Two Years." Thus, the Assembly wished to reserve to itself the power to meet, by further legislation, any adverse action by the Duke or his deputy, the Governor. The Dongan Laws, as those established by the Act to Settle Courts of Justice might be called, were amended even in Dongan's time, but not substantially, and "in the end became incorporated in the laws of the colony."

The second session of the First General Assembly was opened on October 21, 1684. Thirty-one acts were passed, the last being of importance to court history, for it abolished the Court of Assizes.[63] The Second General Assembly passed six acts in its first session, which began on October 20, 1685, and continued until November 3 of that year. Adjournment was taken until September *25*, 1686, but the Assembly was destined never again to meet. The King abolished the General Assembly altogether on June 16, 1686, and news of his action reached New York on September 14, eleven days before that on which the body was to begin its second session. Governor Dongan complied with the edict of the King by dissolving the General Assembly, by formal proclamation, on January 20, 1687.

Referring in more detail to the courts created by the Dongan Legislature: The Town Courts, which were to sit fortnightly or monthly, on the first Wednesdays, were to be conducted by three "commissioners" appointed by the Governor. Their jurisdiction extended to actions of debt or trespass, up to forty shillings. The Mayor's Court at New York (and the Mayor's Court at Albany from 1686) was not looked upon as a town court, by the way.

The county system was expanded, the old shrievalty of Yorkshire and other county divisions, bailiwicks, and so

forth, giving way to new political divisions which organized the province into twelve counties.[64] In each a Court of Sessions was to sit twice in each year, the court consisting of three or four justices of the peace, drawn from residents of the county. While in the town courts jury trial of the issues joined could only be had at the special request of either side upon payment of the proper cost therefor, all trials in the County Courts were to be by jury.

The Court of Oyer and Terminer and General Gaol Delivery was in fact a Circuit Court of Assizes, and was to function with one circuit judge and four or more justices of the peace. A regular term of this court was to be held in each county twice yearly, and, inasmuch as Governor Dongan appointed two circuit judges, Matthias Nicolls and Thomas Palmer, both of whom were barristers, it would seem that the province was divided into two judicial circuits. The province does not seem to ' have had a high sheriff under the new system, but each county had its sheriff, whose duty it was to meet the circuit judge and retinue upon their entrance into the county-town, and conduct the judge to his lodgings, which, according to the etiquette of the time, was not to be the same as that occupied by the lawyers. The Court of Oyer and Terminer had unlimited jurisdiction of criminal and civil cases, and generally acted as an appellate court.

The Court of Chancery, which took the place of the Court of Assizes and, indeed, assumed some of the functions of the Court of Sessions, was composed of the Governor and members of his council, the Governor haying power to depute or nominate in his stead "a Chancellour and be assisted with such other persons as shall by him bee thought fitt and convenient."[65] The act creating the Court of Chancery gave only "a high-sounding but hated name to a body which, from the first, had assumed chancery jurisdiction,"[66] the only effect of this act being to give legislative sanction to a jurisdiction which had hitherto been exercised as a prerogative of the Crown. Despite opposition, it remained so constituted to the end of the colonial period.

That successive royal Governors should insist upon the functioning of the Court of Chancery and the people be consistently opposed to it is not surprising, for it vitally affected the purses of both Crown and people.[67] When its rulings were satisfactory to one class, they were displeasing to the other. However the Crown was in control until 1776, and the Court of Chancery continued as long. As a matter of fact, it continued longer, though for the benefit of the State instead of the Crown; and what arguments the Crown could find to justify its existence could be equally well used by the State from 1777 to 1847, when the Court of Chancery finally expired-at least under that name, for it thereafter was a branch of the Supreme Court. John Spragg, who was provincial secretary, was the first master of the Court of Chancery; his appointment was dated December 29, 1684; and at the same time he became registrar.

The Mayor's Court of New York was reorganized in 1684. At the request of the Mayor and Aldermen,[68] the Governor, on January 14, 1684, appointed James Graham as recorder. On the next day "all the new magistrates went in a body to the Fort, where they were sworn into office by the Governor and Council, after which they returned to City Hall and opened court." The recorder took his seat on "ye right hand of ye mayor." John Tudor was appointed sheriff, and John West became clerk of the city of New York. James Graham was recorder of New York for the next seventeen years, except for one brief period. The Mayor's Court, which, by the new Dongan Charter, became the Court of Common Pleas, had jurisdiction up to twenty pounds sterling. It sat frequently as a municipal court[69] and thrice yearly as a Court of Sessions. The Mayor and aldermen, to the number of four, also sat with the circuit judge twice yearly, as a Court of Oyer and Terminer; and, after the Dongan City Charter came into effect, the Recorder also had a seat on this appellate court. Whether they reviewed their own findings, in the lower courts, is not clear from the information at hand. In 1686 Albany also was accorded a city charter somewhat like that of New York.

One other court 'established by Dongan should be referred to. In a report which he made on February *22*, 1687, to the Committee of Trade, Governor Dongan made reference to a new Court of Exchequer, which he called a

Court of Judicature.[70] There was need of such a court, to determine revenue cases, for the tax collectors of the province had but indifferently performed their duties. This was another of the unpopular courts, and did not function long, though in almost all cases where later courts sat as Courts of Exchequer, there was criticism. Chief Justice Atwood came into public odium and royal disfavor by certain exchequer-chamber business he disposed of irregularly, it was charged-in the Supreme Court in 1701. Governor Cosby also, in 1733, came under criticism by filing a bill against Rip Van Dam, conveniently using the Supreme Court as a Court of Exchequer; and in the Zenger case of the next year, the people more emphatically condemned exchequer proceedings in the Supreme Court. In 1742, however, the Court of Exchequer was, in effect, made a branch of the Supreme Court by an act then passed "for regulating payments of quit-rents and the partition of lands," the act clearing legal doubt by giving the Supreme Court jurisdiction. In 1766, Governor Moore, writing to the Lords of Trade, recommended the creation of a separate Court of Exchequer, but the Lords, while conceding the importance of establishing such a court, felt that at that time it was "a consideration of too great importance to be hastily taken up." No further development of the plan occurred during the English period, and to the end of the provincial period the Supreme Court had general cognizance of all matters in exchequer. Indeed, it still has such powers.

The Governor and Council were vested with three-fold judicial powers during the Dongan administration; its appellate jurisdiction was enlarged to £300 sterling, but cases involving more than that amount could be appealed to the King in Council. The Mayor's Court at Albany sat fortnightly at this period, and had jurisdiction up to twenty pounds.

Under the Duke's Laws, matters of probate were dealt with in the Courts of Sessions, and also in the Mayor's Courts; but after 1686 the Governor and provincial secretary took responsibility, Governor Dongan taking proof of the execution of wills and directing, or causing government officials to direct, the inventory and appraisement of estates. In 1691, Lieutenant-Governor Ingoldsby caused a clause to be inserted in all letters granted declaring "that the hearing of accounts, the granting of probates, the discharge of executors, and all cognate matters belonged to the Governor and not to the inferior judges." Wills were proved by the Provincial Secretary, certificate annexed to the instrument making it clear that the secretary "being thereunto delegated," had acted for his superior. The prerogative seal would be affixed to the papers, and the whole recorded in the secretary's office, the record, to be valid, having to be attested by the signature of the secretary. Gradually this department of the secretary's office developed into the Prerogative Office. Its records were styled the Registry of Prerogatives, and the entire department, in 1691, was denominated the Prerogative Court.

Still another court must be briefly referred to-that which dealt with admiralty matters. The first English Governors dealt with all admiralty proceedings, as matters within their own prerogative and under their general commission. Governor Andros, in 1678, had even wider admiralty authority, being commissioned to act as Vice Admiral "throughout the entire colonial government." He was also authorized to appoint a "Judge, Register and Marshall of the Admiralty." He did not act immediately in the matter, so the former method of issuing special warrants, when necessary, was continued, most of the admiralty cases being heard in the Mayor's Court of New York City. In practice it became evident that the Mayor's Court was the logical tribunal; so, on October 5, 1678, Governor Andros took his personnel for a Court of Admiralty from the officials of the municipal court. The mayor of New York, Stephen van Cortlandt, was appointed Judge of Admiralty, and it was decreed that his assistant judges should be the aldermen of the city. The city clerk, Wilham Leet, was appointed Register of Admiralty, and the city sheriff, Thomas Ashton, became Marshal of Admiralty. The outgoing mayor, it was planned, should thereafter be the *ex officio* Judge of Admiralty; outgoing aldermen were to take *ex officio* seats on the Admiralty bench. The plan does not seem to have been followed far, for though Thomas Delavell succeeded Van Cortlandt in 1679, the next Judge of Admiralty was Lucas Santen, in 1683, and he was collector, not mayor, of New York. In 1684 Thomas Palmer, a member of the Governor's council, became Judge of Admiralty; and in 1686 Circuit Judge Matthias Nicolls was appointed to the Admiralty bench. The next register after William Leet was William Nicoll, appointed in 1685; he became a member of the council. John Spragge, provincial secretary, became register in 1684. It therefore seems that Governor Dongan held the Admiralty Court more closely to his near officials. He created another Admiralty office, that of Advocate-General of Admiralty, and to this office he appointed John Tudor in 1684. In 1700 the attorney-general of the province became *ex*

officio Advocate-General.

Governor Dongan's administration was good; indeed, he seems to have been the most liberal-minded Governor New York had during the provincial period. Dongan "had many arbitrary royal commands to execute," yet in all of his official acts a tolerant interest in the governed was seen. "The despot's heel was not shod with iron, nor was it stamped down too hard." As Duke of York, James could not, perhaps, so freely express his opinion and pleasure as he later could, as King; so Dongan's mild administration was borne. However, a sterner Governor than Dongan was eventually sent.

The change was not immediately made. Indeed, Dongan was, in 1686, recommissioned as Governor of New York by King James and he did well, both for his sovereign lord and for New York. Where he stumbled was in circumventing the aim of William Penn in the Susquehanna Valley. The gain was New York's, but William Penn had much influence with King James, and it is said that he prejudiced James against Dongan. Moreover, the French King had protested to King James against Dongan's encouragement of the Iroquois Indians who were thwarting the aims of the French Canadian Governor, Denonville, to establish firmly French sovereignty in upper New York. Once more, the gain was New York's. However, Dongan apparently was too good a steward to be retained.

Of course there were other vital reasons why it was deemed advisable to recall him. He had done well, by just and peaceful means, but was not the type of man James needed at the moment; Dongan was not the kind of man to institute arbitrary government; Andros was more suitable for such commissions. Andros was thought of by James, 'when he decided to take away the charters of all the New England colonies, and make them all royal provinces, perhaps in the hope that, in the remoulding, he could turn the Protestant colonies into Catholic provinces, just as he was then ' strenuously striving to draw Protestant England closer to Catholicism.

James was apparently confident that Andros could govern with a heavy hand, and effectively reduce all American colonies to direct dependence on the Crown. King Charles, had, indeed, begun with Massachusetts having in June, 1684 declared its charter conditionally forfeited, the judgment being confirmed in the Michaelmas term. Virginia became a royal province in the same year New York of course was already to all intents in that category; and when, after the death of Charles and the ascension of James to the throne, in February, 1685 it became clear that all colonies were to become Crown provinces, Lord Baltimore hastened to England to defend his charter rights to Maryland. He appealed in vain Maybe, James suspected that the colonies might hold traitors as deserving of attainder as those unfortunate Presbyterians to whom Judge Jeffreys had given such short shrift during the Bloody Assizes which followed the Monmouth rebellion in England in 1685.

The new, order in Massachusetts was brought prominently forward by the arrival in Boston in May, 1686, of Joseph Dudley; in the capacity of "President" of all the English colonies; from Nova Scotia to Narragansett Bay. In December of that year Andros arrived, commissioned as Governor of all New England, and charged with the 'abolishment of all popular assemblies and existing churches, or at all events of the establishment of a state church which could readily be converted to papal forms at the opportune moment. Moreover, taxes were to be imposed at the will of the Crown.

Andros had been riding roughshod-uncomfortably, it is true-over New England for twenty months before he appeared in New York to take the reins of government from Dongan. The new order had not gone well anywhere in America. South Carolina had defied, its royal Governor in 1687, refusing to pay quit-rents; Connecticut had contrived 'to hold possession of its charter, though declared non-effective by Andros, whose visit to Hartford in 1687 was especially disconcerting to himself, it seems; and everywhere the spirit of rebellion seemed'to be rising. In 1688 North Carolina deposed and actually exiled its Governor; the Virginians resorted to arms and obtained more moderate government; and Maryland was watched very closely. Of all the colonies, Massachusetts seemed to be most subdued, Andros there exercising absolute sway. There were no sessions of the General Court, taxes were imposed by command, and those who refused to pay, because such arbitrary measures infringed their inalienable rights as freeborn Englishmen, were told that they must not imagine that the

laws of England could follow them to the ends of the earth; that, as a matter of fact, they had but one privilege: "Not to be sold as slaves." Furthermore, if they opposed the royal will there was a way, through judicial channels, of making them even slaves. Maybe Andros thought that in Dudley he had a Chief Justice who could emulate "Bloody Jeffreys." Certainly, Dudley was showing good promise in Massachusetts. "Juries were packed, and Dudley, to avoid all mistakes, told them what verdicts to render." A justice of the peace who was of independent mind was not wanted. "The scabbard of an English Red Coat shall quickly signify as much as the commission of a justice of the peace," Andros had declared, quite frankly. The Governor had flaunted Episcopacy in the face of the Church of the Puritans, and had crippled the latter, thus taking away a vital governing factor from the towns. "There is no such thing as a town in the whole country," Andros had declared after some months. Massachusetts seemed to be prostrate-under the heel of a tyrant. The Puritans, though passive, were no more in abject submission to the Papishly-inclined government than the Protestants of England were to King James, who was adhering to his policy against even the advice of his own bigoted Catholic courtiers, blindly declaring that he would "lose all or win all." Just as in England smouldering resentment was fast reaching the state of angry flame in the people, so were injustices to New Englanders reaching the point at which they could be borne no longer. Willard, in one church meeting grimly remarked to the gathered Puritans that they "had not yet resisted unto blood, warring against sin."

Such was the general state of governmental affairs at about the time Andros arrived in New York, commissioned as Captain-General and Governor-in-Chief of all the English possessions ' from Nova Scotia to Delaware Bay. After some days of pompous ceremonies in New York City, conspicuous features of which were the breaking of the seal of the province of New York and the substitution of that of the Dominion of New England, Andros crossed to the Jerseys, which were to be annexed to New York under the general plan. On October 9, 1688, Francis Nicholson, Lieutenant-Governor, was directed to make his headquarters in New York City; and Andros returned to his own headquarters at Boston.

News travelled slowly in those days, for although the momentous happenings which led James II to abdicate began with the landing of William of Orange at Torbay in November, 1688, Boston did not hear of it outside official circles, before April, 1685. During the winter the government of New York had remained in the hands of Nicholson, and the New York members of the New England Council-Philipse, Bayard, Van Cortlandt, Younge and Baxter. Dongan had retired to his farm at Hempstead, on Long Island, and took no further part in New York affairs. Little was done during Nicholson's short administration to change the judicial system Dongan had established. Nicholson, indeed, had hardly become settled in the deputy Governorship of New York and New Jersey before news reached him (in February, 1689,) of the landing of William of Orange, with all the ominous consequences it portended for James. He immediately transmitted the news to Andros, and took precautionary measures to safeguard the King's money, but he did not attempt any radical measures of government. Andros sent no extraordinary instructions from Boston Knowledge of the English situation seems to have been kept from becoming general until April, when John Winslow reached Boston from Virginia and spread the news, of the success of William and the flight and abdication of James. Action was quick and sensational thereafter. On April 18, the Andros government was abruptly terminated, and Andros himself was taken into custody. Throughout New England governing bodies drawn from the people sprang up with surprising quickness.

When news reached New, York of the happenings in Boston, Lieutenant-Governor Nicholson, on April 26, read the communication to his Council and other officials, including the Mayor and Common Council of the city, and the militia captains. What would have happened in New York City had not news simultaneously' reached the Governor that France had declared war on both England and the Netherlands can only be conjectured. With the possibility of active warfare against French Canadians on the northern frontier, and French naval forces off New York, the concern of those who gathered at the call of 'Nicholson to hear the news from Boston turned from affairs of local government to measures of defense against the common enemy, France. Nicholson was thus saved the fate of Andros. His Council, with an eye to the future of their own province, thought the moment opportune to address the Lords 'of Trade of the English Government-they did not mind whether of James or William-pointing out "how fatall it hath been to this city and the Province of New York for to be annexed to that of Boston, which, if it had continued, would have occasioned the totall ruin of the inhabitants 'of said Province."

However, the first scare of war soon passed, and the militia captains in particular seemed to realize how potential was their own power. They were mostly Protestants, and they began to be suspicious of Nicholson and his Council. They did not wish a provincial government that might favor the Catholic James, against the Protestant William, to continue in office. So, on June 3, the militia captains with James Leisler at their head mobilized the New York militia units, and took control of the city. Young Nicholson realized that, under the existing conditions, 'he could not long continue in office and so on June 6 he gave over the government to his Council, and at the end of that month sailed for England.

Leisler then became to all intents dictator. He and his associates seemed to be more suspicious of Bayard, Philipse and Van Cortlandt than of Nicholson, and he would not permit these three, as the Council, to exercise the powers of government passed to them by the outgoing Lieutenant-Governor. Leisler assumed the government himself, and on June 22 called upon all Catholic officeholders to vacate their offices. Ere long the members of the Council, feeling that their personal safety was in jeopardy, fled to Albany, where Leisler's authority had been repudiated.

Footnotes

Footnote 42: Biddle, "Memoir of Cabot," 275.

Footnote 43: Scott, "Courts of New York."

Footnote 44: "The question of the validity of the grants of vast tracts of land on both sides of Lake Champlain made by the French provincial government at Quebec provoked vehement discussion in the New York Assembly in 1773 when it published a vindication of the British title as founded on original right by virtue of Cabot's discovery and not by conquest. The question was argued before Kent Ch. J. in Jackson *ex dem* Winthrop *vs* Ingraham *4* Johns, 163, but the judgment proceeded on other grounds. Another important case in which this question came up was the Canal Appraisers of the State of New York *vs* the People on the relation of George Tibbits which was argued and decided in the Court for the Correction of Errors (17 Wend 571). Chancellor Walworth, in his opinion, said:

"Until the former argument of this cause, I had not supposed that any one seriously contended that the Roman Dutch law which was brought here by the original settlers from Holland in 1614, remained a part of the law of the colony after the capitulation of Governor Stuyvesant. I also supposed that it was generally conceded that the province of New York was claimed by the English by right of discovery and not by right of conquest; and therefore that when it was taken possession of as an English colony under the Duke of York, in 1664, no formal act was necessary to substitute the common law of England in the place of that law by which the Dutch settlers had previously been governed. In a colony acquired by discovery or occupancy merely, and not by conquest or cession, the discoverers and new occupants thereof carry with them all the general laws of the mother country which are adapted to their new situation as colonists."

The Chancellor further insisted that even if the province be considered acquired by the English by conquest, there was sufficient to show an intention on the part of the conquerors to abrogate the Dutch laws and substitute those of England in their place. Lord Mansfield, in Campbell *vs.* Hall, decided in King's Bench in 1774 and reported in I Cowper, 204, held the same opinion on this point. Among other cases, the question was argued by the counsel in briefs in Jackson *vs.* Gilchrist, in Johnson's Report, 89, and in brief or in opinion the subject appears in Canal Commissioners *vs.* The People, *ex. rel.* Tibbits, 5 Wendell, 423 (1850), and Bogardus *vs.* Trinity Church, 4 Paige, 578 (1833).-Chester's "Legal and Judicial History of New York," Vol. I, pp. 595-92.

Footnote 45: "So late as 1759 Lieutenant-Governor Cadwallader Colden wrote: "The Dutch of this province, it is probable, think the articles of surrender are still in force and that any breach of them is a piece of injustice to them and there among other things they may, in their own minds, justify themselves in carrying on an illicit

trade with Holland in opposition to the Laws of Trade which have been carried on from New York for many years He then argues against any such assumption (N.Y. Hist. Soc. Coll. 1868 series) This was a fruitful subject for hot debate in the province for many years. On November 9, 1674 the Duke's Deputy Governor confirmed by proclamation, "all former grants, privileges, and all estates legally possessed by any under the Duke of York before the late (Dutch) government which the Dutch claimed was only in accordance with the law of *post-liminy,* under which the intervening conquest operated merely to suspend not to extinguish their rights On the other hand it was argued that there had been no conquest*;* that the Dutch ships had no thought of attempting the conquest of New York when, in August, 1673, they came in under Staten Island, but only to take in wood and water, knowing that there was not sufficient force there to hinder them*;* but that the Dutch inhabitants treasonably told the Dutch commodore of the absence of the Governor and the greater part of the garrison up the river and of the defenseless condition of the city and invited him to consent to take it which he did without firing a gun; that, having voluntarily without force renounced their allegiance to the English crown and submitted anew to Holland's sovereignty, "they forfeited without doubt all privileges that they could claim by the articles of surrender -Colden, ibid, 184, Smith's History of New York 1854, ed, p 61 n, has the following: "In New York, the right of *post-liminy* was disregarded and perhaps unknown."

Footnote 46: The Court of Assizes thus established by Nicolls was no advance toward democracy. It was not in any popular sense a Legislature. It had not even the representative character enjoyed by Stuyvesant's "Landt-dag," or Assembly. Its members were wholly dependent on the governor's will, and they were expected to perform their legislative function with the usual docility of a French "bed of justice." The governor and his council remained the real law-makers, as well as the interpreters of the laws they made. Before long, it is true, the Court of Assizes deliberated with closed doors upon the general concerns of the province, and made such changes in the laws as were thought proper. But the Duke of York, who, by his patent, had "full and absolute power," disapproved of legislative assemblies as inconsistent with the form of government which he had established in his province. Yet he supposed that no harm and much good might result from the justices being allowed once a year to meet with the governor and his council, and make desirable changes in the laws, which, after all, were subject to his own approval. These justices, he complacently assumed, would be chosen by the people themselves as "their representatives, if another constitution were, allowed." Moreover, the Court of Assizes was the most convenient place for the publication of any new laws, or of any business of general concern...

The governor and his council, who at present were the only members of the Court of Assizes were early called upon to frame a body of laws for the province. . .

It was his (Governor Nicolls') function under the royal patent . . . . to make laws. . . . With the assistance of members of the Court of Assizes, he made it his "whole business to prepare a body of lawes" to be submitted to the general meeting proposed to be held on' Long Island.-Brodhead, "History of New York," Vol. II, pp. 64-67.

Footnote 47: Notwithstanding all the changes which had occurred in the province, the city magistrates of whom Stuyvesant thus took leave still exercised the same powers which he had himself conferred on them twelve years before. When their term of service expired, the burgomasters and schepens named their successors, as they had done under the Dutch government. This they did on the usual day, and in pursuance of the sixteenth clause of the capitulation. The new officers were confirmed by Nicolls, and announced to the commonalty after the usual ringing of the bell. They were Cornelis Steenwyck and Oloff Stevensen van Cortlandt, burgomasters; Timotheus Gabry, Johannes van Brugh, Johannes de Peyster, Jacob Kip, and Jacques Cousseau, schepens; and Allard Anthony, schout.-Ibid., II. 60.

Footnote 48: New Utrecht sent Jacques Cortelyou and Younger Fosse; Gravesend, James Hubbard and John Bowne; Flatlands, Elbert Elbertsen and Roeloff Martense; Flatbush, John Stryker and Hendrick Jorassen*;* Bushwick, John Stealman and Guisbert Tennis; Brooklyn, Frederick Lubbertsen and John Evertsen*;* Newton, Richard Betts and John Coe; Flushing, Elias Doughty and Richard Cornhill; Jamaica, Daniel Denton and Thomas Benedict; Hempstead, John Hicks and Robert Jackson; Oyster Bay, John Ijnderhill and Matthias

Harvey; Huntington, Jonas Wood and John Ketcham; Setalcott (or Brookhaven), Daniel Lane and Roger Barton; Southold, William Wells and John Younge; Southampton, Thomas Topping and John Howell; Easthampton, Thomas Baker and John Stratton; and Westchester, Edward Jessop and John Quinby.-Gen. Exit., I, 96; Journ. N. Y. Leg. Council, Int., v.

Footnote 49: To Long Island, thus made part of New York, the name of Yorkshire was given. That, with the neighboring country, was afterward divided into three judicial districts, or ridings, in each of which a court was to sit three times a year. The present Queen's County (excepting the town of Newtown) and Westchester, formed the North Riding; Newtown, the present Kings County, and Staten Island made the West Riding; the present Suffolk alone was the East Riding. There was, however, some question whether Staten Island belonged to New Jersey or New York, which was not settled until 1668, and seems to have been referred to the Proprietary in England. Samuel Maverick, one of the Commissioners, writing in February, 1669, to Governor Winthrop, says, on the authority of a letter from Nicolls-who returned to England in the previous autumn:

"Staten Island is adjudged to belong to N. Yorke." It is, he says in another letter, "the most commodiosest seate and richest land I have seene in America."-"Maverick Letters," in the "Winthrop Papers," Mass. Hist. Soc. Coll., 4th series, Vol. VII.

Footnote 50: LAWES

Established by the Authority of his Majesties Letters Patents, granted to his Royal Highness, James, Duke of Yorke and Albany; Bearing date the 12th day of March in the Sixteenth year of the Raigne of our Soveraigne Lord, Kinge Charles the Second.

Digested into one Volume for the publicke use of the Territoryes in America under the Government of his Royall Highnesse.

Collected out of the Severall Laws now in force in his Majesties American Colonyes and Plantations.

Published March the 1st Anno Domini, 1664, at a general meeting at Hemsted upon Longe Island by virture of a Commission from his Royall Highness, James, Duke of Yorke and Albany given to Colonell Richard Nicolls Deputy Governeur, bearing date the Second day of April, 1664.

Footnote 51: The High Sheriff, in certain emergencies, might plead in court as an attorney, the Duke's Laws reading:

"That no high Sheriffe, under Sheriffe, high Constable, petty Constable or Clarke of the Court shall be permitted to plead as an Attorney in any Persons behalfe in the Court where he officiates, provided always that if any poore person not able to plead his own Case shall request the Court to Assign him the High Sheriffe under Sheriffe high Constable, petty Constable or Clark to plead for him it shall be Lawful for the Court to grant it; And for the person to plead accordingly. But the person so pleading the poor man's Case is not to give Judgment provided also that any high Sheriffe, under Sheriffe, high Constable, or Clark Acting as general Attorneys for any person, absent out of the Country and Negotiating their Affaires, and so Lyable to be sued for their Employers such Persons shall have liberty also to plead and prosecute in any Cause that shall any way Concerne their said Employers.-Duke of Yorke's Laws, p. 11.

Footnote 52: "In all cases wherein the Law is obscure, so as the Jury cannot be Satisfied therein, they have liberty to present a special verdict, *vz.*: If the law be so in such a point, We find for the plaintiffs, but if the Law be otherwise, We find for the Defendants, in which case the determination shall properly belong to the Court and all Juryes shall have liberty in matter of fact, if they cannot finde the main Issue, yet to find and present in their verdict so much as they Can."-See Eastman's *Courts and Lawyers of Pennsylvania*.

Footnote 53: While general legislative power *for England* was never claimed by any of her sovereigns, it was never doubted that the Crown possessed this high prerogative power over the *colonies*, and that this power was communicable to a subject. In New York, the Duke of York's deputy-governor might, as he did, declare that "no jury shall exceed the number of seven, nor be under six, unless in special causes upon Life and Death, the justices shall think fit to appoint twelve"-the verdict, in civil cases, to be by a majority vote and perjury to be a capital felony in certain cases. But in England, we are told, "the most violent and imperious Plantagenet never fancied himself competent to enact, without the consent of his Great Council, that a jury should consist of ten persons, instead of twelve, that a widow's dower should be a fourth instead of a third, that perjury should be a felony, or that the custom of gavelkind should be introduced into Yorkshire."-Macaulay, *History of England*, I, 35.

Footnote 54: They first met, *i. e.*, the magistrates of the Mayor's Court, for a trial of civil causes on June 27, 1665, when a jury was impanelled (without doubt the first in New York County) in the cause of Francis Douty (Doughty) against John Haixman and Khellum Winslow. The record, which is brief, may be worth transcribing, if for no other reason than it shows an instance of a compulsory reference of a part of the issues, a common enough procedure under the Dutch rule, but practically unknown in English procedure. The judgment (which is the only indication the record gives of the nature of the action) was as follows: "The Court doth order that the partyes shall deliver in their evidence to the following juries to wit: Caleb Burton, Isaacy Bedow, Christ. Hoogland, Balek de Haert, Wm. Dornel, James Ballaine, John Garland, John Browne, Charles Bridges, John Dawrel, Thos. Carvet, Samuel Edsal. The juries do judge that the defendants shall pay the plaintiff soo much as he shall appeare by true accounts due unto him from the defenders, besides the costs and damages of the Court. The Honable Court does allowe off the above sd Judgment, and Nominates for to view, examine and make up the accounts betwixt the partyes from the tyme that the Bark was sould to Mr. Tatcher til the time that she was returned again to the said Douty, to wit: William Jacob Backer, William Isaacy Bedloo, William Balthazar De Haert, and Mr. Samuel Edsal" (two of the jurymen and two outsiders) .-See McAdam, "Hist. Bench & Bar of N. Y.," I, 49.

Footnote 55: Brodhead, "History of New York," II, 87-88.

Footnote 56: 1st. The Governour and Councill with the High Sheriffe & the Justices of the Peace in the Court of General Assizes have the Supreme Power of making altering and abolishing any Laws in this Government The County Sessions are held by Justices upon the Bench Particular Town Courts by a Constable and Eight Overseers, the City Court of N. Yorke by a Mayor and Aldermen. All causes tried by Juries.

7th. All causes are tried by Juries, no Lawes contrary to the Lawes of England. Souldyers only are tryable by a Court Marshall and none others except in cases of sudden invasion mutiny or Rebellion as his Mates Lieutenants in any of his Countries of England may or ought to exercise -See *Documents Relative to the Colonial History of New York*, O'Callaghan, III, 188.

Footnote 57: At the autumn session of the Court of Assizes it was accordingly decreed "that whosoever shall reproach or defame any person or persons who have or shall act in any public employment, either in court or otherwise, or shall vilify their proceedings who serve the public in this Government by authority under his Royal Highness the Duke of York, or whoever hereafter shall any ways detract or speak against any of the deputies signing the Address to His Royal Highness at the General Meeting at Hempstead, they shall be presented at the next Court of Sessions, and if the Justices shall see cause, they shall from thence, be bound over to the Assizes, there to answer for the slander upon plaint or information."-Brodhead, *History of New York*, II, 108.

Footnote 58: The Court, having taken notice of the defects and failings of both towns and persons in particular of not bringing in their grants or patents to receive a confirmation of them, or not coming to take out new grants where they are defective, or where there are none at all, according to former directions in the Law, As also taking it into their serious considerations that several towns and persons within this Government, as well English

as Dutch, do hold their lands and houses upon the conditions of being subjects to the States of the United Belgic Provinces, which is contrary to the allegiance due to his Majesty, 'they do therefore Order that all grants or patents whatsoever formerly made, shall be brought in, to be confirmed or renewed by authority of his Royal Highness the Duke of York, and all such as have not patents shall likewise be supplied therewith by the first day of April next after the date hereof; after which time neither town nor private person, whether English or Dutch, shall have liberty to plead any such old grants, patents, or deeds of purchase in law, but they shall be looked upon as invalid to all intents and purposes."-"Court of Assizes," II, 80; "Col. MSS.," XXII, 107; "N. Y. Hist. Soc. Col.," I, 414-19; Hoffman's "Treatise," I, 97; Brodhead, "Hist. N. Y.," II, 109.

Footnote 59: I. The Governor is to have a Councell not exceeding tenn, with whose advice to act for the safty & good of the country & in every towne, Village or parish a Petty Court, & Court of Sessions in the several precincts, being three on Long Island, & Townes of New Yorke, Albany & Esopus, & some smale or poore Islands & out places; And the General Court of Assizes composed of the Governor and Councell & all the Justices & Magistrates att New Yorke once a yeare the Petty Courts Judge of five pounds & then may appeale to Sessions, they to twenty pounds & they may appeale to Assizes to ye King, all sd courts as by Law.

2 The Court of Admiralty hath been by speciall Comission or by the Court d Mayor & Aldermen att New Yorke.

3 The chiefe Legislatiue power thereis in the Governr with advice of the Cairn cell the executive power Judgments giuen by ye Courts is in the sheriffs & other civil officers.

4 The law booke in force was made by the Governor & Assembly att Hempsted in 1665 and since confirmed by his Royall Highnesse -See O'Callaghan's *Documents Relative to the Colonial History of the State of New York,* III, 260.

Footnote 60: *Ibid.*, III, 230.

Footnote 61: And wn the said Assembly soe elected shalbe mett at ye time and place directed, you shall lett ym know that for the future it is my resolucon that ye said Genll Assembly shall have free liberty to consult and debate among themselves all matters as shalbe apprehended proper to be established for laws for the good government of the said colony of New Yorke and its Dependencyes, and yt if such laws shalbe propounded as shall appeare to mee to be for the manifest good of the Country in generall and not prejudicial to me I will assent unto and confirme ym In the passing and enacting of all such laws as shalbe agreed unto by the said Assembly, wch I will have called by the name of the General Assembly of my Colony of New Yorke and its Dependencyes wherein the same shalbe (as I doe hereby ordaine they shalbe) prsented to you for yor assent thereunto."-O'Callaghan's *Documents Relative to the Colonial History of N. Y.* III, *331*.

Footnote 62: "In Chester's *Legal and Judicial History of New York (1911),* Henry Beeckman, William Ashton, Giles Goddard, Samuel Mulford, John Lawrence, Matthias Nicolls and William Nicolls are named. The Civil List of New York (1888) names seven others.

Footnote 63: An Act for the confirming all Judgments and proceedings in the former Courts, taking away the General Court of Assizes.

And forasmuch as the General Court of Assizes, heretofore held annually in this Province, is of great charge and Expense to the same, and by reason of the Great number of the members thereof nott so fit & capable to heare and determine matters and Causes of Civil nature, usually brought to the said court: Bee it enacted by the Authority of this Present Assembly: That the said Court called the General Court of Assizes, and all Jurisdiction, power, and Authority belonging unto or used and exercised in the said Court or by any of the Judges,, Ministers or members thereof, bee from the first day of November next ensuing clearly and absolutely dissolved, taken away and determined, and that from and after the said first day of November next ensuing, Neither Judge, '

Justice, Member or Minister of the said Court whatsoever shall have any power or Authority to heare, Examine or determine any matter or thing whatsoever in the said court called the General Court of Assizes, or to pronounce or deliver any Judgment, Sentence, Order, or decree, or to do any Judiciall or Ministeriall act in the same court; provided always that all actions, suits or Complaints now pending in the said Court of Assizes either by Bill, Plaint, Declaracon, appeale, review, by Peticon to the Governor and Councell, or any other ways or means whatsoever, shall be ended determined and finished by the High Court of Chancery.-See *The Colonial Laser of New York,* I, *172.*

Footnote 64: In 1683, an act of the Dongan Legislature, effective November i, 1683, was passed to divide this Province and dependencies into shires and counties Twelve counties were decided upon, the name of some perhaps being suggested by Dongan. The City and County of *New York* included Manhattan Mannings and the Barn Island *Westchester* contained all the land eastward of Manhattan, "as far as the Government extends and northward along the Hudson to the Highlands *Ulster* embraced all the towns on the west side of the Hudson from Roelof Jansen s Creek and on the west side from Sawyer s Creek to the Saraaghtoga *Dutchess* extended from Westchester northward to Albany and eastward into the woods twenty miles *Orange* included the region on the west side of the Hudson from the New Jersey boundary northward to Ulster at the Murderer s Creek and westward into the woods as far as Delaware River *Rschrnond* contained all Staten Island with Shooter s Island and the islands of Meadow on the west side*; King's County,* on Long Island, including Bushwick, Bedford Brooklyn Flatbush Flatlands New Utrecht and Gravesend *Queen's* contained Newtown Jamaica Flushing Hempstead and Oyster Bay *Suffolk* embraced Hunting ton Smithfield Brookhaven Southampton Southold Easthampton to Montauk Point Shelter Island the Isle of Wight Fisher s Island and Plumb Island *Duke's* contained the islands of Nantucket Martha s Vineyard Elizabeth Island and No Man s Land *Cornwall* included Pemaquid and all his Royal Highnesses territories in these parts with the islands adjacent-Brodhead s Hist N Y II 385, 386.

Footnote 65: There shall bee a Court of Chancery within this province which said Court shall have power to heare and determine all matters of Equity and shall be Esteemed and accounted the Supreme Court of this province. And be it further Enacted That the Governor and Council bee the said Court of chancery, and hold and keep the said Court: And that the Governor may Depute or nominate in his stead a Chancellour, and be assisted by such other persons as shall by him bee thought fitt and Convenient. Together with all necessary Clerkes and other officers as to the said court are needful.- *Colonial Laws of New York,* I, 128.

Footnote 66: The earliest record of a proceeding in chancery is cited by Murray Hoffman in "A Treatise Upon the Court of Chancery." It was during the rule of Governor Andros.

"To the Right Honorble Major Edmond Andross, Esqr., Left & Govemr Generall of his Royal Highness, his Territoeries in America, Thomas Wandall, Complainant. Ofiffe Stephens, Deft. And the deft. to ye Complaints bill humbly answereth yt alt. 30 years last past. The Land in questione was by ye authority then in being-Ordered for a Lane or Alley-abt 16 years within sd time aforementioned-The 2d ground by Orde of the Burge Masters of this City was exposed to sale*; thereupon* this Complaint and deft joyntly purchased ye same*; &* soon after made eqwale divisione thereof; upon the sd ground this complaint hath built; & ever since the purchase enjoyed e quietly possessed ye same-And all soe this deft bath until ye 7th Novembe, 1676-by virtue of his Title aforesd & his quiett possessions he humblt conceives, makes him an undoubted right and ye Mutual agreemt upon partitione as aforesd being confirmed by a judgment given In the Mayors C. T. ' as p record appears: In tende Consideracon whereof humbly prays yr Honr and honble Bench to take the ye into yr Grave Consideracon & be pleased to grant judgmt according to Equity & Justice, and this deft as in duty bound shall pray &c (Endorsed).

The Answer. Tho. Wandall plf. Oloff Stevens, deft., 1677, put off by the Go."- Chester's *Legal and Judicial History of New York,* I, 293.

Footnote 67: From first to last the court was the most unpopular judicial establishment in the colony. This can be well believed. But it had a vital purpose, and the successive governors determinedly sustained it substantially

as originally purposed and constituted. The Assembly of 1691, by Act of May 6th, continued the court for seven years, after which "the only authority for the exercise of equity jurisdiction by the successive governors was by ordinance or executive order." 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," wrote Butler in his "Outline of the Constitutional History of New York." Bellomont wrote to the Lords of Trade in 1700*:* "There is a great want of a Court of Chancery here, but no body here understanding it rightly I delay appointing one till the Judges and Attorney-Generals come from England." In January, 1701, he again wrote: "I am extremely importun'd to erect a ' court of chancery, many people being like to be ruin'd for want of one. I shall therefore very soon settle that court tho' I should make no decrees till the arrival of the judge and attorney-general." A court was erected in that year, but the obj ectionable conditions remained, the royal prerogative continuing to be the dommating factor. Lord Cornbury took heed of the popular opposition to this court when he became governor, for on June 13, 1703, he suspended its sessions. However, on November 7, 1704, he had to reestablish it, and did so by ordinance. Thus, it had not even the semblance of sanction by a 'popular body, and the opposition to it became more and more radical. In *1727,* the Assembly, moved to action by the defeat of its speaker, Frederick Phillipse, in a case in the Court of Chancery wherein Governor Burdet sat as Chancellor, resolved: "That the Erecting or Exercising in this Colony a Court of Equity or Chancery (however it may be termed) without Consent in General Assembly is unwarrantable, and contrary to the laws of England, and a Manifest oppression and grievance to the subjects and pernicious consequence to their Libertys and propertys." The answer of the Governor and Council was that the resolutions were "unwarrantable and highly injurious to his majesty's prerogative." Thereafter, however, the Governors were reluctant to sit as chancellors, Historian Smith writing: "The wheels of the Chancery have ever since rested upon their axis-the practice being condemned by all gentlemen of eminence in the profession."-See *Courts and Lawyers of New York,* Chester and Williams, Chap. XXII.

Footnote 68: "that the Recorder bee appointed by the Governor and Council who shall be Judge of the City and Corporation and be aydeing and assisteing to the Mayor and Aldermen & Comon Councill in all matters that relate to the well beinge and supporte thereof.

And further that "a Sheriff bee annually appointed by the Governor & Councel."-O'Callaghan's "Documents Relative to the Colonial History of the State of New York," 111, 338.

Footnote 69: "AND I DO, by these presents, for and on behalf of his most sacred majesty aforesaid, his heirs and successors, give and grant unto the aforesaid Mayor, Aldermen, and Commonalty of the said city of New York and their successors that they and their successors shall and may have, hold, and keep within the said city and liberties and precincts thereof in every week in every year forever, upon Tuesday, one Court of Common Pleas, for all actions of debt, trespass upon the case, detinue, ejection and other personal actions; and the same to be held before the Mayor, Recorder and Aldermen, or any three of them whereof the Mayor or Recorder to be one, who shall have power to hear and determine the same pleas and actions, according to the rules of the common laws and acts of general assembly of the said province."-The Dongan Charter, City of New York.

Footnote 70: The Courts of Justice are most Established by Act of Assembly and they are:

1. The Court of Chancery, consisting of the Governor and Council, is the Supreme Court of this Province, to which appeals may be brought from any other Court.

2. The Assembly finding the inconvenience of bringing of ye peace, Sheriffs, Constables & other persons concerned from the remote parts of this Government to New York did instead of the Court of Assizes, which was yearly held for the whole Government of this Province erect a Court of Oyer and Terminer to be held once every year within each County for the determining of such matters as should arise within them respectively, the members of which Court were appointed to bee one of the two judges of this province assisted by three justices of the peace of that County wherein such Court is held. Which Court of Oyer and Terminer has likewise power to hear appeals from any inferior Court.

3. There is likewise in New York & Albany a Court of Mayor & Aldermen held once in every fortnight from whence their can be noe appeal, unless the Cause of Action bee above the value of twenty pounds who have likewise privilege to make such by-Laws for ye regulation of ye Govr. & Council. Their Mayors, recorders, Town-Clerks & Sheriffs are appointed by the Governor.

4. There is likewise in every County twice in every year (except in New York, where it's four times, & in Albany where its thrice) Courts of Sessions held by the Justices of ye peace for the respective Countys as in England.

5. In every Town wth ye Government there are 3 Commissioners appointed to hear and determin all matters of difference not exceeding the value of five pounds which shall happen within the respective towns.

6. Besides these, my Lords, I finding that many great inconveniences daily hapned in the managemt of his Mats (Majesty's) particular concerns within this Province relating to his Lands, Rents, Rights, Profits & Revenues by reason of the great distance betwixt the Cursory settled Courts & of the long delay which therein consequently ensued besides the great hazard of venturing the matter of Country Jurors who over and above that they are generally ignorant enough & for the most part linked together by affinity are too much swayed by their particular humors & interests I thought it fit in Feb last by & with ye advice & Consent of ye Council to settle and establish a Court which we call the Court of Judicature (Exchequer) to be held before ye Govr & Council for the time being, or before such & soe many as the Govr. should for that purpose authorize, commissionat & appoint on the first Monday in every month at New York, which Court bath full power and authority to hear try & determin Suits matters and variances arising betwixt his Maty (Majesty) & ye Inhabitants of the said Province concerning the said Lands, Rents, Rights, Profits and Revenues.

The Laws in force are ye Laws called His Royal Highnesses Laws and the Acts of the General Assembly, the most of which I presume yr Lops (Lordships) have seen & the rest I now send over by Mr Sprag to whom I refer yr Lops in this point -See *New York Entries* Vol II, p I, O'Callaghan's *Documents Relative to the Colonial History of New York,* III, 389.

The Historical Society of the Courts of the State of New York

On-Line Book

Little need be written in this chapter regarding the Leisler administration, which concerns political history more than legal. He was Acting Governor from June, 1689, to March, 1691, and during the latter part of his administration was able to make his authority seem more regular by getting his Assembly or Council to consider that a commission as Lieutenant-Governor, sent by King William was properly Leisler's, seeing that Nicholson had vacated the office, and that the commission had been addressed to Nicholson or, in his absence, "to such as for the time being take care for preserving the peace and administering the laws " Leisler appointed his son-in-law, Jacob Milborne, as provincial secretary, attorney-general and advocate-general; and the government was largely in their hands. They were destined eventually to pay with their heads for these and other irregular proceedings*;* and the politics of the succeeding three or four decades was to crystallize mainly into Leislerian or anti-Leislerian factions, as has been stated in another chapter. The unfortunate happenings for Leisler began on January *29,* 1691, when Major Richard Ingoldsby, in command of a company of regular soldiers, reached New York as the advance guard of the new Governor, Sloughter, who had been delayed at Bermuda. Ingoldsby demanded that Leisler deliver the fort to him. Leisler resisted. There was some fighting, but Leisler did not surrender until after the new Governor arrived, in March. Up to this stupid resistance of the King's troops, Leisler's administration had been good. But lives had been lost. So Leisler and his Council were arrested and indicted for murder and treason. Governor Sloughter promptly issued a special commission for a session of Oyer and Terminer. Those who were commissioned to constitute the court were: Joseph Dudley, of conspicuous-some would think notorious-Massachusetts record, who had just been appointed judge of admiralty of New York and New Jersey; Thomas Johnson, also a judge of admiralty; Sir Robert Robinson, Colonel William Smith, Recorder William Pinhorne and Mayor William Lawrence, of New York City; Jasper Hicks, captain of the frigate "Archangel", Major Ingoldsby, an infamous choice, Colonel John Young, and Captain Isaac Arnold. Six of the prisoners pleaded in form, but Leisler and Milborne refused to plead until the court had decided that the King's letter and papers accompanying it gave no power to Leisler. After eight days \the trial ended in sentence of death being passed upon all. The Governor, however, by the advice of the judges, reprieved the prisoners until such time as the King should make known his pleasure.

This outcome did not please some of Leisler's enemies, most vindictive among whom might be named one or more of the ousted Council of Nicholson. It is said that Governor Sloughter was'inveigled into signing a death warrant while "in his cups" as a guest of Nicholas Bayard, and that Leisler and Milborne were led to the gallows and hanged "before the Governor had recovered his senses." The record has it that these unfortunate misguided patriots were afterwards decapitated "in the presence of an indignant people." However, Nemesis came later to Bayard, almost by his own hand, for he' had caused to be made law an attainder act, which, when political power changed, was used to indict Bayard himself. He was tried by another administration for treason and narrowly escaped being "hanged, drawn and quartered," for such was the sentence found in his case. Sloughter died within a couple of months of signing the Leisler death warrant, and rumor has it that he was poisoned.

However, much was done by Sloughter during that brief period to reorganize the provincial government. His Council consisted wholly of anti-Leislerians; Frederick Philipse, Stephen van Cortlandt, Nicholas Bayard, William Smith, Gabriel Minvielle, Nicholas de Meyer, Francis Rombout, Chidley Brook, William Nicolls, Thomas Willett, William Pinhorne and John Haines. A Boston lawyer, Thomas Newton, "who was reputed to be the best lawyer in America," was appointed attorney-general but resigned a month later, James' 'Graham taking his place.

No time was lost by 'Governor Sloughter and his Council in bringing the new order into effect. The King's

commission gave the Governor authority to summon general assemblies "of the Inhabitants being freeholders." None but 'Protestants could sit in the Assembly; and the Governor, "by & with 'the consent of our said Councill and Assembly;" had full power "to make, constitute, and ordaine Laws, Statutes & ordinances for ye republique Peace, welfare and good Government: of our said Province." "Approbation or disallowance" of any laws ' passed rested with the King and Queen. All laws were to be submitted to the King and Queen within three months of passage, but the royal veto might be declared at any time.

The new Constitution, as a matter of fact, was vetoed by the King six years later and from that time until the Revolution the provincial government was continued under an unwritten constitution, with the common law of England as the fundamental law of the province, and a "bicameral" Legislature, of Council and Assembly, the' former invariably voicing the opinions and will of the Governor and the Assembly, with increasing persistence and stubborn reiteration, making known to the successive Governors the rights that Magna Charta and subsequent laws of England and the province gave to provincials.[71]

On April 6, 1691, the Assembly was "summoned to meet" on April 9. The session ended on May 18. The second session began on September I I of that year and ended October *2.* In the next year two sessions were held, one in April, and the other in August-September. While the Dongan Assembly of 1683 was the first Assembly to function under English Government in New York, it is not counted as the First Assembly, because it was summoned by the Governor. The first people's body to be called together *under direct authority of the Crown* was that of 1691, and the latter, therefore, comes into provincial records as the *First Assembly.* Its personnel is stated below.[72]

One of the first measures enacted in the Assembly of 1691 was that which reenacted most of the vital legislation passed by the Dongan Assembly in 1683, to legalize "the several Ordinances, or reputed Laws, made by the preceding Governors and Councils for the Rule of their Majesties Subjects within this province" that were then recognized as still in force.[73] Most of the acts of the Assembly of 1691 followed word for word, with only slight variation, those of the Dongan Assembly. On May 6, 1691, the House passed "An Act for the Establishing of courts of judicature for the Ease and benefit of each respective Citty, Town and County within this Province." "This act changed the town courts into Courts of Justices of the Peace; created a Court of Common Pleas for each county, except the counties of Albany and New York, to be held by a judge commissioned by the Governor and Courts of General Sessions for each of the counties; also it made for a Court of Chancery the same provisions that had been made by the act of 1683. But the most important feature in the act was the creation of a Supreme Court. It declared that a Supreme Court of Judicature should be established in the city of New York, to be composed of a Chief Justice and four assistant justices, to be appointed by the Governor; and that it should have cognizance of all actions, civil, criminal or mixed, as fully and amply as the courts of King's Bench, Common Pleas or Exchequer of England, and should have power to establish rules and ordinances, and to regulate the practice of the court. Courts of General Sessions of the Peace were also organized as criminal tribunals, distinct and separate from the Courts of Common Pleas, which were courts for the trial of civil actions only. In all the counties except New York and Albany the Courts of General Sessions of the Peace were held twice a year, in Albany three times a year, and in New York quarterly. The civil jurisdiction of the Court of Common Pleas was essentially the same as that of the former Court of Sessions; and the term of court began on the day after the sitting of the General Sessions, the term of both courts being limited to two days each. By this act the Court of Oyer and Terminer was abolished, but, in conformity to the organization of the courts of Westminster, its name was retained to designate the criminal branch of the Supreme Court."[74]

Seven days after the passage of the Judiciary Act the Assembly reenacted the "Charter of Libertyes and Privileges," not realizing that kings are much alike, and that Crown and people can never have much in common. The legislators on May' 13, 1691, passed "An Act declaring what are the Rights and Privileges of their Majesties' Subjects inhabiting with the Province of New York" fully believing that King William had basically different thoughts to King James. The Assemblymen kept their rights and privileges so much to the fore during the next few years that Governor Fletcher, who succeeded Sloughter, was once prodded by angry impatience to

remark: "There are none of you but what are big with the privileges of Englishmen and Magna Charta." However, the Assemblymen were destined to be rudely disillusioned as to King William, for in 1697 he vetoed the provincial "Charter of Libertyes and Privileges," objecting indeed to the first sentence, which contained a phrase that might be interpreted as curtailing the royal prerogative. "People met in General Assembly" was one of the "several large and doubtful expressions" that William pointed to in the charter as obnoxious to himself, and as giving "great and unreasonable privileges" to the Assembly. It is doubtful whether William attached much importance to the province of New York, which at that time did not have more than 10,000 white inhabitants. However, to the legislators, the province of New York was their world; so they strove to lay the governmental bases properly, for the good of the 10,000 and their posterity.

Sloughter died in July, 1691, and for the next thirteen months Major Ingoldsby acted as Governor-with the consent of all parties, and without disastrous consequence such as came to Leisler. Benjamin Fletcher, the next Governor, duly arrived. He was a man of military experience, a colonel, and in that time of war his military qualifications seem to 'have been looked at more closely than his executive record by the King's ministers. He was commissioned as Governor of New York and New Jersey, but was also commander-in-chief of the militia of Connecticut and Rhode Island. There was a duplicating of military commissions, and the friction became three-sided by the contention of the Governors of Connecticut and Rhode Island, that the command of local forces devolved upon themselves.

However, we need not here further refer to the military troubles of Governor Fletcher. His commission as Governor of New York empowered him "to erect courts of judicature not already established." He does not seem to have enforced the laws very strictly, for under his sway New York City became "a nest of pirates"; at least so Lord Bellomont, his successor as Governor, reported. Certainly, Fletcher was kept busy issuing licenses to captains of seagoing vessels who wished to act as privateers. It is said that Governor Fletcher sold such licenses to all who applied, "quite indifferent" as to the records of applicants; and it was later thought that many lawless buccaneers, on hearing of the ease with which governmental protection of their questionable practices might be had in New York, set sail for the harbor and, having procured a privateering license, set sail again for some distant point of the seven seas, there to prey upon the commerce of France and Spain. These Nations not being able to furnish sufficient practice for the privateers, the latter in some cases drifted into piracy, paying little heed to the nationality of the prize so long as they possessed it.

Governor Fletcher became incensed with the Assembly in 1694, when the latter dared to ask him to account for the nearly $40,000 of taxes and revenue he had used during his brief period. Fletcher dissolved the Assembly, feeling that "it was the business of the Assembly to raise money and of the Governor and Council to lay it out." Queen Mary, wife of William of Orange, died in 1694, and in 1697 William and Anne commissioned Richard Coote, the Earl of Bellomont, as Governor, recalling Fletcher "to answer many charges of maladministration brought against him." The courts of the Fletcher period were: The petty courts of single justices of the peace; the Quarter Sessions Courts; the county courts of Common Pleas; the municipal courts of New'York and Albany; the Supreme Court; the Court of Chancery; the Prerogative Court; the Admiralty Court, and the military court. **[75]**

Lord Bellomont arrived in April, 1698, as the Governor of three provinces, New York, Massachusetts, and New Hampshire, and also having military command, as Captain-General of Connecticut, Rhode Island and the Jerseys, as well as of the three provinces of which he was Governor. The original plan was to commission Bellomont to organize a New England dominion somewhat after the Andros plan, but in deference to the protests of Connecticut and Rhode Island the consolidation was curtailed. New York did not object, thinking that Bellomont, who had shown an active interest in the Leisler case and sympathy with New York, would make New York City his headquarters. He did come first to New York, perhaps because he wished first to deal with the situation Fletcher had made difficult, before proceeding to Boston.

New York welcomed him with evident signs of appreciation in April, 1698-at least, the Leislerian faction in the province did-and for more than a year thereafter his activities centred in that city. His task was difficult. For six

months he had to endure a Council that was anti-Leislerian. The Assembly also was of the opposition, for Bellomont was aligned with the Leislerians, though in fact he was of neither party. His council included Bayard, Van Cortlandt and Philipse, the three to whom Nicholson had entrusted the government in 1689; two other councillors-Smith and Lawrence-were two of the judges who had sentenced Leisler and his associates; and Monvielle had been of Sloughter's Council. In September, 1698, Bayard, Philipse, Monvielle, and Lawrence gave way to Robert Livingston, Abraham de Peyster, Samuel Staats and Robert Walters. Peter Schuyler also was a member; and James Graham was added in 1699.

Bellomont had been able to deal with the anti-Leislerian Assembly earlier Fletcher's "packed" Fifth Assembly had,, with Bellomont's coming, been dissolved; but the Sixth Assembly, which began its first and last session on May 19,,698, was as anti-Leislerian as the Fifth had been. Before the end of May the Governor had to berate the legislators "with a scolding address," and on June 14 he lost patience with the body altogether. On that day he dissolved the Assembly as "disloyal." Certain moneyed interests in the province did not take kindly to the reorganization plans of Lord Bellomont, especially the plans which would disturb the dealings New York merchants had with the sea rovers, privateers, and those of even piratical tendencies. Under Fletcher the law had had little effect; if enforced, to the detriment of those engaged in maritime enterprises, the loyal justices of the peace had been apt to manifest greater partiality to the people than the Crown, and so the ends of justice were not gained. Bellomont wrote to the Lords of Trade soon after reaching New York: "The people have such an appetite for piracy and unlawful trade that they are ready to rebel as often as the Government puts the law in execution against them." It was very difficult for reputable merchants to avoid having dealings with the pirates, for if they traded in ship's supplies at all-and there were few New York merchants of that day who did not-they could hardly refuse to deal with captains who held Fletcher licenses; and if a captain who had been outfitted by a New York merchant should happen to return with a cargo of spices and silks from the East, the merchant could hardly be expected to refuse such goods when offered by the captain, to meet his debt to the merchant. Bellomont's plan was to bring those suspected of piracy before the courts for punishment, and for condemnation of cargo. To do this it was necessary to reorganize the courts.

A reorganization of the judicial system was necessary for another reason, the King having vetoed the Charter of Liberties of 1691, and seen grave danger to royal prerogative in the continuance of the Judicial Code of 1691. William had only reluctantly consented to the functioning of the code of 1691 for a period of two years, and although the Assemblies since that time had "continued" the code for further like periods, the King had been too much involved in other more weighty matters to take definite action to reorganize the legal system. Undoubtedly, King William recognized that a high court which had been erected by statute instead of by executive ordinance would be difficult to revoke at his pleasure; so Bellomont was given particular instructions in regard to the Supreme Court. Maybe Bellomont was not therefore very much displeased when he found that the local legislators were so inclined to thwart him. He professed to be much embarrassed when the Sixth Assembly, in 1698, after he had notified them that the courts would cease to exist at the end of that year, if there were no extension act passed by the Assembly, should pass an act which while continuing the existing courts added amendments which he could not accept without surrendering the royal prerogative.[76] Bellomont's expressed opinion was that the amendments were "put forth as a political move," so as to compel him to reject the bill and so leave the province without any courts at all. But certainly this move, and the consequent rejection of the legislation, made it possible for Bellomont to do away with the statutory courts, and also the intractable Assembly. He dissolved the latter on June 14, 1698, and on January 19, 1699, *by proclamation*, continued the courts, this action being confirmed in the following May by an order of the Governor in Council.

The Governor had been either very conscientious and especially crafty. He seems to have been an Englishman of pronounced insularity, certainly, he had little confidence in provincial lawyers Before continuing the courts by proclamation he had asked Chief Justice William Smith and Attorney-General James Graham for their opinions They had both declared that the King himself had no such power of establishing courts without the concurrence of Parliament, and that consequently he could not delegate to his Governors powers which he did not himself possess." These opinions, however, had merely confirmed Bellomont's own theory-that matters in which the King was concerned should be in the 'hands of Englishmen, not provincials. In a communication to the home

minsters, Bellomont had declared that all provincial officials, from the Governor to the meanest official, ought to be not men of the country, but Englishmen. Particularly, he urged that English lawyers be sent out. In the place of Chief Justice Smith he wished "to have an English lawyer sent over by the King, a man of sufficient wealth and social position to be above the temptations of the low arts and practices then prevalent in the colony."[77]

With the issuance of ordinance, in May, 1699, "reestablishing the courts as they had existed" under the Constitution of 1691 and later renewals, Governor Bellomont brought the affairs of government in New York sufficiently into line with the King's wish and instructions; therefore, he went to Boston, to look more closely into Massachusetts matters. In July, 1700, he returned to New York, and on March 5 of the next year he died.

Lieutenant-Governor Nanfan was at that time in Barbadoes, and the Council and Assembly-which bodies were both Leislerian-concurred in the opinion that the administration of the province devolved upon the Council, as a whole. On the other hand, Colonel William Smith-the former Chief Justice-considered that he himself was, in fact, Acting Governor by virtue of his office of president of the Council. He had been removed from the office of Chief Justice in October, 1700, Stephen van Cortlandt taking his place. Three weeks later Smith had been again Chief Justice through the death of Van Cortlandt; but he had had to vacate first place, in favor of Abraham de Peyster, one of the *puisne* judges, in January, 1701, Bellomont indeed showing such insistence in removing Smith that when two months later the demise of the Governor rightly made Smith the executive head it is not to be wondered at that the followers of Bellomont's policies should take alarm at the developments, and endeavor, even by irregular means, to prevent Smith from becoming Acting Governor, even for a few months. However, Lieutenant-Governor Nanfan returned from Barbadoes on May 19, and at once took over administrative control from the Council; and with the coming of Chief Justice Attwood from England in the early summer the policies of Bellomont, in one respect, were continued. An English lawyer, Attwood was in charge of the courts; another Englishman, Sampson Shelton Broughton, had come to fill the vacancy caused by the dismissal of James Graham as attorney-general; and another English lawyer, the son of Justice Attwood, was at hand to reap a rich harvest for himself-and, it was charged, for his father-in legal fees for service to litigants who appeared in Justice Attwood's court.

Nanfan and Attwood dealt resolutely-their opponents said ruthlessly-with legislative and judicial matters. Smith was still in judicial office as judge of Admiralty when Attwood came; but the latter on August 4, 1701, took over the charge of the Admiralty Court, and next day of the Supreme Court also. Furthermore, he decided to sit in judgment without the assistance of the three *puisne* judges-De Peyster, Pinhorne and Walters.[78] What Attwood lacked in legal precedent for his actions was compensated for by support he received from Nanfan. By their joint efforts they were able to appreciably add to the royal exchequer, at the expense of the moneyed interests in the province. Their rulings in the courts brought such consternation, and pecuniary loss, to certain "protestants of New York" that the latter-who might otherwise be accurately identified as anti-Leislerians-mem0rialized the King and Parliament in September, 1701, declaring that "the late differences were not grounded on a regard for his (the King's) interests, but were the corrupt designs of those who had laid hold of the opportunity to enrich themselves by the spoils of their neighbors." The remonstrants accused the deceased Governor, Lord Bellomont, with malfeasance in office, and accused Lieutenant-Governor Nanfan and Chief Justice Attwood of receiving bribes from the Legislature-"the one to pass desired bills and the other to defend the legality of the Assembly proceedings." The memorialists had drafted their remonstrance in the tavern of Alderman Hutchins, in New York City. Nanfan and Attwood deemed such action as seditious. Action was promptly taken against the ringleaders. Nicholas Bayard, Rip Van Dam, Philip French and Thomas Wenham were arrested on January 2, 1702, and charged with 'high treason. Alderman Hutchins had refused to disclose the names of all the signers, and Attorney-General Broughton had been honest enough to give an opinion to the effect that "there was nothing criminal in the addresses, and that Hutchins' refusal to give up the names was not a criminal contempt justifying his commitment." After the ' Grand Jury had been induced to bring in an indictment, and Broughton had refused to prosecute, Nanfan went a step too far. He temporarily suspended Broughton-who being commissioned by the King could not be removed-and appointed Tax Collector Weaver as Solicitor-General to conduct the case, which was heard before a specially commissioned 'Court of Oyer and Terminer, composed of Chief Justice Attwood and Puisne Judges De Peyster and Walters. Two "able and fearless lawyers," William Nicoll and James Emott,

defended the accused anti-Leislerians, but the outcome was the conviction of prisoners. Bayard, who had been one of the most active in bringing death and decapitation to Leisler, was found guilty of high treason, and was sentenced to be hanged, drawn, and quartered. Alderman Hutchins received a like sentence. Bayard came very near death in this way. Indeed, it is said that his own children spent so much of his estate in prevailing upon the Acting Governor to defer execution of the sentence from time to time that at last they appealed to their sentenced father to permit the sentence to be carried out, lest his estate be entirely absorbed and they, 'his children, be without means.

However, fortune was to favor Bayard; Nanfan and Attwood had almost reached the end of their reign. Lord Cornbury reached New York in May, 1702, as Governor He immediately suspended Attwood, and when worse seemed to be impending, both Nanfan and Attwood disappeared, eventually to emerge in Virginia, where they obtained safe passage to England.

Cornbury's coming did not benefit the province, but for a while the anti Leislerians lived easily Former Chief Justice "Tangier" (William) Smith was vindicated by reappointment to his old office; those under sentence of death for high treason were released, and in the same month of the next year the Assembly passed legislation "reversing and making null and void said judgments and all proceedings thereon," the Governor making further recompense by appointing some of the convicted remonstrants to his Council.

The Assembly, while expressing loyalty to Queen Anne, yet did not hesitate to contend, at its first session under Cornbury, that no courts of law could be established without the consent of the legislative houses, *e. g.*, of Parliament in England and of the General Assembly in the provinces. In 1702, to make this opinion clear, the Ninth Assembly passed "An Act to declare the illegality and frustrate the irregular proceedings, Extortions and Decrees, of the late pretended Court of Chancery." They referred particularly to the Chancery Court which had been erected by Nanfan, with himself as chancellor. The act, which was read three times between November 25 and *27, 1702,* had followed resolutions adopted declaring that "the setting up of a court of Equity in the Colony, without Consent in General Assembly is an innovation without any former Precedent, inconvenient and contrary to the English Law"; further, that the Court of Chancery "was and is unwarrantable, a great Oppression to the Subject, of pernicious Example and Consequence," and that, therefore, "all proceedings, Orders and Decrees in the same are, and of right ought to be declared null and void."

Lord Cornbury was prevailed upon to sign this act; and, consequently the functioning of the Court of Equity came to an end on June 13, 1703. Less than eighteen months later, however, the unpopular Court of Chancery was revived by Lord Cornbury, without the consent of the Assembly, by the obnoxious method of executive ordinance instead of by statute. Thereafter, the governmental course of Governor Cornbury became rougher and rougher. The Assemblies of New York and New Jersey became firmer and firmer in insisting upon their rights, and in pointing out the limitations of royal and vice royal prerogative. The Lords of Trade regarded one act that was passed as "highly presumptuous in the Assembly to pretend to propose or pass any clause whereby Her Majesty is restrained in her Royal prerogative of pardoning or reprieving her subjects whenever she sees it reasonable and convenient. The New York Assembly was not the only disturbing element during Cornbury's administration, for in 1707 the New Jersey Assembly addressed Governor Cornbury recounting their grievances that came from maladministration, and there was grim warning in their ending words: "Liberty is too valuable a thing to be easily parted with."

New York had no Assembly from October, 1706, to August, 1708; nevertheless, when the Eleventh Assembly got well into session, Lord Cornbury had to realize that there was little difference between assemblies, if properly elected by the people. This Assembly endorsed the opinions of previous Legislatures: "That the erecting of a Court of Equity without consent in General Assembly is contrary to law, without precedent, and of dangerous consequence to the liberty and property of the subjects."

Troubles began to multiply round Cornbury, and eventually became so troublesome to the home ministers that Cornbury, though a cousin of the Queen, was recalled. Notwithstanding his royal connections, this profligate

Governor was arrested in New York for debt, as soon as it became known locally that he was no longer Governor. Cornbury was held in the custody of the sheriff of New York until the death of his father, the Earl of Clarendon, brought him his inheritance. With this he was able to appease his New York creditors sufficiently to purchase release.

The Chief-Justice of New York during the latter part of Lord Cornbury's administration was Roger Mompesson. He came to New York in 1703 as Judge of Admiralty. His English record was good, including a term in Parliament, and some time as Recorder of Southampton. Wilham Penn testified to Mompesson as "well grounded in the law and an honest and sober gentleman." In 1704, upon the death of Chief-Justice John Bridges, Mompesson became Chief-Justice, and for a while also acted as Chief-Justice of Pennsylvania and of the Jerseys. Mompesson was the most capable jurist of his time in New York, and was the first to bring into the province the English forms of procedure. O'Callaghan declares that Mompesson "did more than any other man to mould the judicial system of both New York and New Jersey." He resigned from the Pennsylvania office in about 1706, the Quaker Assembly having persisted in refusing to grant him a salary, complaining that he was "too well-affected to Penn," and also "that he drank too much." In 1709 Mompesson, fearing removal from office, resigned the Chief-Justiceship of New Jersey, but he held the Chief-Justiceship of New York until his death in 1715.

Lord Lovelace, the next Governor of New York, arrived on December 18, 1708. He was well received. His administration was brief, death ending it on May 5, *'709,* before he really had time to become perplexed by the insistence of the Crown and home ministers and the stubbornness of Provincial legislators. Still, Bancroft writes of the Twelfth Assembly: "The assembly which in April, 1709, met Lord Lovelace began the contest that was never to cease but with independence."

Lieutenant-Governor Ingoldsby became Acting-Governor upon the death of Lord Lovelace, and, though unpopular, he contrived to hold it for almost a year. In April, 1710, however, he was removed, Geraldus Beeckman being temporarily entrusted with the Governorship. In July, 1710, Beeckman gave the reins of government to Robert Hunter, who had just arrived from England, properly commissioned by Queen Anne, to succeed Lovelace.

Hunter soon became convinced that government of New York would continue to be difficult until the Crown conceded to the people the right they claimed of control over the public purse, and, in general, of vital legislation. Governor Hunter handled a difficult situation well. Queen Anne was desirous of bringing the processes of government more into line with those of the Stuart period, and of cancelling the aims of the Revolution of 1688-89. Her ministers, in 1712, after being advised that the New York Assembly had persistently refused to pass revenue measures unless assured that they would not be altered by the Governor's council, wrote to Governor Hunter pointing out that "the Assembly sit only by virtue of a power in Her Majesty's commission to you, without which they could not be elected to serve in Assembly." This was communicated to the Assembly, but made no difference; the Assembly still calmly asserted "that they do not sit as an Assembly and dispose of money by virtue of any commission, letters patents or other grant from the Crown, but from the free choice and election of the People." This attitude was maintained over the first six years of Hunter's administration, and it affected the salaries of judicial officers, as well as of other provincial officials. Crown appointees, in general, were expected to look to the King's treasury for their stipends, since the people had had no chance of stating their opinion before appointment. Chief-Justice Mompesson, it would seem, was paid out of the King's purse, for when, after his death, it became necessary to appoint a successor, Lewis Morris was given the office because, as Governor Hunter explained to the Lords of Trade, he was "able to live without a salary, which they (the Assembly) will most certainly never grant to any in that station."

However, by that time, a fundamental change had taken place in the status of the monarchy. Queen Anne died in *1714,* and George, Elector of Hanover, became King George the First of England, by virtue of the fact that Anne had no living child, and that the descendants of Charles I were "forbiddingly Catholic." But when this Hanovarian "foreigner," of the line of James I, was accepted as the successor of Anne, the English Parliament

incorporated in the Act of Succession some remarkable restrictions of royal prerogative. For instance, no judge could be removed from office, save on an address from Parliament to the Crown; and in all things the King must act only through his ministers, and the ministers must be directly responsible to Parliament This had been decided upon soon after the death of Anne's only child, the Duke of Gloucester, in 1701. While Anne lived there was always a possibility-at one time it seemed a probability-that the Act of Succession would be revoked, However, with her death in 1714 and the accession of George as a "constitutional King," subordinate to Parliament, England-and of course England's overseas possessions-began a great political change. "No sovereign since Anne's death has appeared at a Cabinet Council or has ventured to refuse his assent to an Act of Parliament," states Green.

With the English situation so established, Governor Hunter, in 1715, perhaps by the advice of the English ministers, was influenced to bow to the will of the New York Assembly, and bring the provincial government more in conformity with the English. Thereafter, until the end of his term, Governor Hunter's relations with the Assembly and people were comparatively amicable. Some obnoxious institutions continued, but the strife was not as bitter as in Hunter's first years in the Governorship. Especially obnoxious was the functioning of the necessary court of Chancery. Governor Hunter, with the advice of his council, had begun to exercise the office of chancellor, in a reorganized Chancery Court, and, having appointed Rip Van Dam and Adolph Philipse as masters of chancery, he had made known, by proclamation, that the court henceforth would sit weekly. The Assembly emphatically protested and that and some other matters were still in active disputation in 1719 when the Governorship passed from Hunter to Burnet.

William Burnet, son of Bishop Burnet, did fairly well as Governor, but he stumbled disastrously in the exercise of the chancellorship, in which he delighted, but for which office he was not well fitted. He was impulsive, and rendered some ill-considered decisions. To the end of his term as Governor he insisted upon sitting as chancellor and thus exasperating the Assembly, which felt that "the erecting and exercising in this Colony a Court of Equity or Chancery . . . . without Consent in General Assembly is unwarrantable and Contrary to the laws of England." In *1727*, the Nineteenth Assembly adopted resolutions denouncing Burnet for his action in setting up a Chancery Court that rendered "the Libertys and properties of the Subjects extremely Precarious" and had wrought financial ruin to some and personal degradation by imprisonment to others. The Assembly further resolved that in its next session a bill "to make null and void all acts, decrees, and proceedings of the court under Burnet" would be introduced. Burnet met this threat by dissolving the Assembly and his more tractable council appointed a committee to "make their observations" on the said "resolves" of the Assembly.

The committee did not report to the council until August of the next year, *1728*, by which time Burnet had passed from the Governorship of New York and the Jerseys. The choice of his successor had been a happy one, for John Montgomerie was as naturally disinclined to act as chancellor as Burnet had been eager. Perhaps he recognized the power of the Assembly, and wished to avoid all unnecessary friction; and although the committee, in August, 1728, reported to him in council, through their chairman, Cadwallader Colden,[79] that "unless such attempts as this be Effectually discouraged, the Authority of His Majesty's Courts may often be in danger from the Artifices of popular man That Judges may be frightened even in Cases where the King is highly concerned," and further that "if such an open invasion of the King's prerogative should now be passed with neglect, any Discourse of it for the future may become the Test of the people," Governor Montgomerie still persisted in declining to exercise his right to sit as chancellor. He can hardly have forgotten that a month earlier the Twentieth Assembly had given clear indication that it was as sternly insistent upon the rights of the House and the people as earlier Assemblies had been. Indeed, the Assembly had shown such animosity to Crown officers that Attorney-General Bradley had written to England reporting that "persons in power dare not yet venture to displease these people so far as to show much countenance to officers of the Crown"; in his opinion, the Assembly seemed "in express words to claim an independency."

Governor Montgomerie handled the Assembly more skilfully than some of his predecessors, and was able to get appropriations with comparative regularity and satisfaction, but, by the power the Assembly held over Crown officials-who were dependent upon their will for their stipends year by year-there is no doubt that the people's

representatives had assumed legislative control of executive power. Montgomerie, to avoid friction with the House, dismissed Lewis Morris, Jr., son of Chief Justice Lewis Morris,[80] from membership in his council, and appointed in his place "Phillip van Cortlandt, Esq., a man more inclinable to give up the rights of the Crown," complained Morris himself. To the Governor, as to some of the leading officials, the future for the Crown in America must have seemed dark. Attorney-General Bradley, in November, *1729,* felt impelled to point out to the Lords of Trade the ominous significance of this trend. "Most of the previous and open steps," he said, "which a dependent province can take to render itself independent at its pleasure, are taken by the Assembly of New York."

Montgomerie, however, was not of contentious mind, and behind a veneer of indolent gentlemanliness may have lain a shrewd mind. He gained his ends in most cases without much friction, and although he was at last commanded to act as chancellor of the Court of Chancery, to protect Crown interests, he contrived to make his connection with it inoffensive. "In it he never gave a decree and issued no more than three orders, and even these, both as to form and matter, were first settled by ' his council." Governor Montgomerie died of small-pox in New York City in the summer of 1731.

The outstanding achievement of Governor Montgomerie's administration was the granting of a new municipal charter to New York. Known as "Montgomery's Charter," this form of municipal charter was destined to serve the great city for long thereafter, and prove to be a very important factor in its development. Chancellor Kent, writing in 1836, considered the charter as the one "best adapted to the genius and wants of the people."[81]

Rip Van Dam, as president of the council, became Acting-Governor upon the demise of Governor Montgomerie. This was quite regular and according to the deceased Governor's own wish; but the appointment gave rise to litigation which seriously disturbed the administration of the next Governor, William Cosby, who reached New York thirteen months later, and demanded from Van Dam a portion of the emolument of the latter as Governor. Van Dam, according to the historian, Smith, was "distinguished more for the integrity of his heart than his capacity to hold the reins of government," but he certainly had tenacity of purpose. The salary as Governor had been granted to him in a regular way by the council, and he did not feel disposed to relinquish any portion of it, not even in face of the King's Order, which Mr. Cosby exhibited, providing "for the equal partition between himself and the president (of the council, *i. e.,* Rip Van Dam) of the salary and all perquisites and emoluments of government" during the period. Of course, Colonel Cosby would not consent to Van Dam's demand that if division be made the salaries of both be divided. Van Darn, during the period, had received "no more than one thousand nine hundred and seventy-five pounds, seven shillings and ten pence," whereas the Governor's receipts were, Van Dam asserted, six thousand four hundred and seven pounds, eighteen shillings and ten pence.

Cosby decided to prosecute Van Dam, proceeding against him in the exchequer. He dreaded a suit at common law, dependent upon the verdict of a jury, "the president being a popular and reputable merchant." At the same time, he recognized the inadvisability of bringing the case into a Chancery Court of which he, as Governor, would be the chancellor. So it was pointed out to him that the Supreme Court "exercised the ample authorities both in the King's Bench and Common Pleas," and that in certain instances the Supreme Court judges had acted as a Court of Equity, their commissions directing them "to make such rules and orders as may be found convenient and useful, as near as may be agreeable to the rules and orders of our courts of King's Bench, Common Pleas and Exchequer." Thus supported, he decided upon a proceeding in equity before the justices of the Supreme Court, sitting as Barons of Exchequer. On December 4, 1732, he promulgated an ordinance enabling justices of the Supreme Court to sit as a court of Equity.

The Supreme Court then consisted of a Chief Justice and two associate justices. The two latter, DeLancey and Philipse, "were the Governor's intimate friends," although he had not "equal confidence" in Morris, the Chief-Justice. However, Cosby's mind was easy, for he had a majority of the Bench. Van Dam was represented by William Smith and James Alexander, "two lawyers in high reputation." "They took exception to the jurisdiction of the court, and boldly engaged in support of the plea," writes the historian, Smith, "but when judgment was

given by the puisne judges for overruling it, the Chief-Justice opposed his brethren in a very long argument in writing, in support of his opinion; at which the Governor was much offended, demanding a copy, and then the judge, to prevent misrepresentation, committed it to the press."[82]

Out of this action developed another celebrated case, one in which the freedom of the press was tested. The Van Dam case was subsequently dropped without settlement, but a few months after the trial Lewis Morris was removed and James DeLancey was commissioned as Chief-Justice on August 21, 1733. This was unfortunate for Cosby. He was further discomfited by the defeat of his choice and the election of the people's choice (Lewis Morris, the ex-judge) as a member of the Assembly. Such a reception as that accorded to Assemblyman Morris upon his next visit to New York after election must have added to the uneasiness of Cosby.[83] He, however, went his arrogant way seemingly unconcerned, and in any case felt assured that his influential English connections[84] would bring him any support necessary to defeat whatever plans the People's party might have to flout his will. Undoubtedly, Cosby in a few months had done more than any recent Governor to make the cleavage between the Crown and the people wider. Party feeling became so keen that James Alexander, one of the counsel for the defense in the Cosby vs. Van Dam case, was threatened with death if he did not leave the province; and it is said that Mrs. Cosby "frequently, and without reserve, had declared that it was her highest wish to see them (Alexander and Smith) on a gallows at the fort gate." Lewis Morris, the former Chief-justice, had, it is said, escaped arrest, perhaps death, by leaving the province, after Cosby had determinedly resolved to find and punish the author of some scurrilous political articles published in 1733 in Zenger's Journal. Zenger had earlier also dared to print Chief-Justice Morris' opinion in the Cosby vs. Van Dam case, and so had incurred the displeasure of the Governor. There were many troublesome elements in Cosby's life. He was worried by chronic and hopeless physical ailments, but more, perhaps, in 1734, by the effective opposition that arose to his government. The Twentieth Assembly, after the election of Lewis Morris, contested "every measure of the Government."

The judicial establishment of New York was the main bone of contention. Over it wrangled patriots, loyalists, demagogues, all angry. Undoubtedly, the judiciary "furnished the theatre for nearly all the ultimate contentions of the political parties of the province down to the time of the Revolution." The seventh session of the Twentieth Assembly was showered with petitions from many parts of the province, all condemning the governmental method of creating courts by executive ordinance, "especially the Court of Equity lately erected in the Supreme Court of this Province." Such a manner of establishing courts of judicature was "destructive to the liberties of the people," the petitions stated. The Assembly decided to hear opinions, and called upon two leading lawyers to address the House. William Smith, one of Van Dam's lawyers, spoke for three hours to the House, and "laid it down as an undeniable position that no Grant, Commission or Letters Patent can erect a Court of Equity or Chancery*;* and that it can only be by a Prescription or Act of Parliament." Smith's eloquence impressed the House, and, although addressing a legislative body in which his own, the People's party, constituted only a troublesome minority, he spoke convincingly and fearlessly, voicing the spirit of home rule with forceful logic. His closing words "painted a dark picture if the rights of English common law were to be denied to the colonies." Fowler writes: "It is doubtful whether there was ever any clearer statement of the American position touching the English supremacy" than that presented to the New York Assembly in 1734. Murray, "the recognized leader of the bar and in sympathy with the theory of prerogative government," addressed the House a week later, presenting the other side. He "laid it down that the Courts of Chancery, King's Bench, Common Pleas and Exchequer were, by the Laws of *England,* of original Jurisdiction by the Constitution of *England,* and as antient as the Kingdom itself*;* That as in this Colony, we are entitled to the fame Laws, Liberties and Privileges and under the fame Constitution, so we are entitled to the fame Courts and produced many Authorities in support thereof, and by several arguments showed that if we should put those Courts upon any other footing here than they are in *England,* our own Act would draw into question whether we are intitled to the Liberties and Privileges aforsaid; but that he however conceived it would be improper to regulate the Courts, *and that* (the tenure of office of) *the judges might be, during good Behavior, by an Act, as it is in England."* So reads the entry in the "Journal of the General Assembly," (I, 644). Murray recommended, in conclusion, "that if new laws were passed, they should be in imitation of such laws, relating to those courts as the wise legislatives of England have

thought fit to make."

It seems that the aim of the People's party really was to draw the House "into the quarrel between the Governor and Mr. Van Dam," writes Smith, "for they saw that he would put a negative upon any bill sent up for the purpose." However, no definite action was taken; the Assembly merely "laid aside" the petitions, but also the act which prompted them. No further attempt was made by Cosby, however, to bring equity matters into the Supreme Court.

The case against Editor Zenger was of another class. The first number of Zenger's paper, "The New York Weekly Journal," came from the press on November 5, 1733. The next issue, that of November *12*, was given over almost entirely to a defense of the liberty of the press and of the individual. A paragraph from one of the editorials reads: "No nation ever lost the liberty of freely speaking, writing, or publishing, but forthwith lost their liberty and became slaves." 'Week after week, by serious dissertations on liberty, by quips at the expense of the Court Party, by unveiled charges of extravagance and corruption, some unknown but very effective writers kept the anger of the Governor at storm intensity." Some court retainer remarked that it would be best "to keep well with the governor." The "Journal" retorted: "A Governour turns rogue, does a thousand things for which a small rogue would deserve a halter . . . . therefore it is prudent to keep in with him." So, the political warfare went on. The undermining power of Zenger's paper was seen in the New York City election in September, 1734. The Court party in the municipality was completely overthrown, only a single Tory gaining place in the new Common Council. The lampooning of Cosby and his supporters thus received fresh impetus. Zenger's "Journal" became bolder, and from the Zenger press came other discomforting literature. Chief-Justice DeLancey, in October, called the attention of the Grand Jury "to certain low ballads, which he charged to be libels." "Sometimes," he said, "bean half-witted men get a knack of rhyming, but it is time to break them of it when they grow abusive, insolent and mischievous with it." The Governor's council, at about the same time, sought to get concurrence of the Assembly, "in an address to the governor, for the prosecution of the printer." But the Assembly did not act in the matter, and the council, "converting themselves into a privy council, made an order for burning the libels."[85] To carry this out, it was necessary for the sheriff to get "compliance of the magistrates (of the city) at the quarter sessions." The magistrates, however, "would not suffer the order to be entered, and the aldermen offered a protest against it, as an arbitrary and illegal injunction." The aldermen forbade "even their whipper" to obey the order of the Governor in council, and the public burning of the libellous papers was done "by a negro slave of the sheriff's."

Some days later Zenger, "on the Lord's day," was seized, upon an order of the Governor, and thrown into jail. Morris was then in England, but Alexander and Smith hastened to the aid of the printer. Such a heavy bail was exacted that Zenger had to remain in jail for a while. His paper was still published, and on January *28*, '735, the Grand Jury refused to find a true bill against him. He was released, of course, but the case was not ended. The Governor, upon the advice of his Attorney-General, decided to proceed against Zenger without indictment, "by information for a misdemeanor." This brought further commotion. In DeLancey's court in April, 1735, exception was filed by Smith and Alexander to the "commissions of the Court." Chief-Justice DeLancey angrily inquired of the lawyers whether they had considered the possible consequence of their boldness. Smith replied that he had, adding "that he was well satisfied of the rights of the subject to except to the commission of his judges, if he thought it illegal, that he would stake his life upon the question." The matter was adjourned until next day, but then, upon Mr. Smith's motion to renew discussion of the exceptions, Chief-Justice DeLancey, "in great heat," said he "would neither allow nor hear the exceptions," adding: "You thought to have gained a great deal of popularity and applause by opposing this court as you did the Court of the Exchequer, but you have brought it to that point that either we must go from the bench or you from the bar." He then disbarred both Alexander and Smith.[86]

Zenger's fortune was then at its lowest. There were only two other attorneys, Murray and Chambers, from whom choice of his counsel could be made. Murray was very able, but of the court party. Chambers was "more distinguished for a knack of haranguing a jury than for erudition in the law." However, the Chief Justice assigned Mr. Chambers to the Zenger case as counsel for the defense. Chambers abandoned the line of defense

set by Alexander and Smith, but obtained a rule for a struck jury. August 4, the day of the trial, was hot, the humidity being such as New York City experiences only occasionally in the height of summer. Chief Justice DeLancey and Puisne Justice Philipse sat upon the bench; Attorney-General Bradley was the prosecutor, alert yet confident of the outcome; and Attorney Chambers was, it seems, as concerned in taking ground that would be safe for himself as in bringing advantage to his client. The courtroom was crowded, the public interest being intense. Some irregularity by the clerk of the court brought Chambers to his feet to protest; and there was some difficulty in impanelling the jury. Eventually, however, Attorney-General Bradley opened the case against Zenger, and evidently expected it to be quickly disposed of; but when he found that another and greater lawyer than Chambers rose to defend Zenger, he was probably as much surprised as anyone present. A thrill of excitement ran through the courtroom when the great Andrew Hamilton, who has been referred to as "The Day Star of the Revolution," arose and said: "May it please your Honor, I am concerned in this cause on the part of Mr. Zenger, the defendant." It is interesting to compare the common review[87] of this case with that written by William Smith, a Tory judge of New York, a son of Attorney Smith, who was disbarred by Chief Justice DeLancey.[88] Andrew Hamilton, at the time he appeared in the Zenger case was sixty-four years old, almost at the end of his career of notable practice of law in Pennsylvania and Maryland. In his defense of Zenger, a defense so masterly as to be "repeatedly printed" in England and America, and to "justly establish its author's fame as the first lawyer in the British Provinces," Hamilton forcefully quoted the William Penn trial, one of the most flagrant cases of judicial intimidation of the jury. Hamilton did not hesitate to admit the publication, but contended that as the statements were true there could be no libel. Chief Justice DeLancey differed, and delivered a scathing charge to the jury, who, however, were so impressed by the eloquence of Hamilton, who made the "first plea ever heard in America for the freedom of the citizen and of the press, from the tyranny of the rulers," that they quickly brought in a verdict of *Not Guilty.*

The verdict occasioned considerable commotion. The whole city strove to do honor to Hamilton, and Zenger's fortune seemed at its highest. Popularity, however, was the latter's ruination, eventually, it seems.[89]

Cosby also came to his end soon after the excitements of the Zenger case had subsided; he died in New York City on March 7, 1735, vindictive and arbitrary to the end. One of his last acts was to remove Rip Van Dam from his Council, his motive being that Van Dam, as senior councillor, would upon Cosby's demise become Acting Governor. Such an eventuality was unthinkable to Cosby, who wished his gubernatorial mantle to fall upon George Clarke. The Council, after Cosby's death, ignored Van Dam's claims and recognized Clarke as president.

Government was difficult, and civil war was not beyond the bounds of possibilities for a year or more after Cosby's death. However, the followers of Van Dam gave up claims for him when the King commissioned Clarke as Lieutenant-Governor. Lewis Morris returned from England in 1736, vindicated; and in 1737 James Alexander, the disbarred attorney was elected to the Assembly from New York City.

In 1741 the Negro Plot stirred New York City into one of those uncontrollable panics that are apt to grip large cosmopolitan communities, seemingly without sensible reason. New York City, *i. . e.,* the white people of New York City, had discovered that some negro slaves had planned to strike a blow for freedom-their own freedom from slavery- and that this would involve the burning of the city. Incidentally, slave-owners were to be killed; and as most of the wealthy citizens owned slaves, the apprehension was general. The Supreme Court was the venue of somewhat hysterical legal proceedings, and the outcome was the hanging of John Hughson, an innkeeper, his wife, and John Ury, a priest. Daniel Horsmanden, who was at that time recorder of the city, was one of the judges; and he later published his "Journal of the Proceedings in the Detection of the Conspiracy." His journal is the best evidence that the panic extended even to the bench, making justice impossible. "For its disregard of all rules of legal evidence, for its prostitution of the forms of law, for the perpetration of cruelty, for popular credulity and cowardice, for the abnegation of all sense of mercy, for. the oppression of the weakest and most defenseless, the whole transaction was without precedent, and has no parallel in any civilized community,"

wrote Mr. Gay.[90] As a matter of fact, there were other panics, in other communities and other countries, that might be referred to as bringing as disgraceful scenes as those that blot New York history of that time; for instance, the "Popish Plot" of 1679 mars the English record as badly as the Negro Plot does that of New York. Lord Campbell considered the Popish Plot trials as "more disgraceful to England than the massacre of ..St. Bartholomew's to France."

The Clarke administration was unusually long for a Lieutenant-Governorship. For eight years after Cosby's death Clarke was Governor, though never commissioned as such. Cosby's successor was Admiral George Clinton, who arrived on September *22,* 1743, and for the next ten years was Governor-in-Chief of the province of New York. New Jersey was no longer governed from New York, Lewis Morris having been commissioned as the first separate Governor of New Jersey.

Admiral Clinton was a blunt sailor, used to command, but a novice in the art of politics. He chafed under the restrictions of the Assembly; and had England not been passing through a very serious war period he would have undoubtedly acted with greater vigor and independence. Situated as he was, however, he endured the "encroachments" of the Assembly until after the signing of the Treaty of Aix la Chapelle, in 1748. Then, he flatly refused to assent to the revenue bill passed by the House, determined that thereafter his governmental departments should not be hampered by a yearly grant of revenue. He wanted a five-years grant. The Assembly persisted in their attitude, reiterating "that the faithful representatives of the people would never recede from the method of an annual appropriation." This Governor Clinton looked upon as "a dangerous invasion of the King's prerogative." Clinton had to confess to the home ministers that since he had rejected an annual grant "every executive part of the government has stood still." While the English ministers sympathized with Clinton, they realized that the Government could not function without the Assembly, and, as Clinton could not get along amicably with the legislators, the home government thought a change of Governors might be advisable.

Undoubtedly, Clinton was disappointed with Chief Justice DeLancey. It seems also clear that DeLancey had to some extent, undermined the confidence of the English ministers in Clinton; It appears that when first puzzled by legal and political problems in New York, Clinton had had too implicit confidence in DeLancey's loyalty to him. In all matters of law Clinton had leaned upon the Chief Justice, and the latter seizing the opportunity, had contrived to get himself recommissioned *for life,* or at least during good behavior, instead of as formerly, during the pleasure of the Governor. The Governor and the Chief Justice, in June, 1746, quarrelled "over a bottle of wine," it is said, and they became outspoken enemies thereafter. Still, the separation was really of earlier date, and first became noticeable soon after the Chief Justice gained his new judicial status in 1744. After the quarrel in 1746, Clinton resolved to "get even" with DeLancey, and in pursuing such folly did some vindictive and unwise things, bringing more discredit upon himself than upon DeLancey. He attempted to bring discredit upon the Chief Justice by accusing the latter's brother, Oliver DeLancey, of stabbing Dr. Alexander Calhoun in a tavern brawl in 1749. The two attorneys, Alexander and Smith, who had been disbarred by DeLancey, under Cosby, were readmitted to practice by Clinton, who took no heed of the opinion of the Chief Justice in the matter. Moreover, he tried to bring further honor to Smith, and thus further discredit to DeLancey, by planning to make Smith attorney-general. Also, Clinton recommended that judges be "imported," because New York judges "were interested in all quarrels of account before them, and by their connections with the politics and the politicians rendered the administration of justice impossible." The English ministers, however, rejected his recommendations.

The personal enmity between Clinton and DeLancey had made the aristocratic judge a staunch supporter of the Popular party. A serious clash between Governor and Chief Justice in 1750, resulting from an order issued by DeLancey to arrest a royal sailor, notwithstanding that admiralty law strictly exempted naval offenses committed on shipboard from the jurisdiction of the provincial courts, encouraged Clinton to believe that he could remove DeLancey for misdemeanor, the charge being that he had "wilfully disregarded the royal commands, by trying to borrow the Crown's jurisdiction in admiralty cases." DeLancey was also president of the Council, and Clinton thought that if removed from the one office DeLancey would automatically vacate the other, opening the way for the appointment of Dr. Cadwallader Colden as Lieutenant-Governor. Fortune seemed to favor Clinton, for in

1751 Puisne Justice Philipse died; so also did Attorney-General Bradley. To the bench the Governor elevated John Chambers, one of the Zenger advocates of 1734; and he gave William Smith a *pro tern* appointment as attorney-general. He added to the cup of bitterness by appointing James Alexander to his Council, and made Cadwallader Colden "Speaker" of the Council, so as to prevent the Governorship devolving upon DeLancey in the event of his own death or departure.

Then the home ministers intervened. They saw that such friction was harmful; and they decided in favor of DeLancey. The latter was commissioned as Lieutenant-Governor, and he also tenaciously held to the "life" justiceship William Smith was not confirmed in the attorney-generalship, William Kempe being sent out as such in November, 1752. So the Governor was completely discomfited. Clinton then asked to be permitted to resign, but was told that he was needed in the office, and must not look upon New York as a "place of punishment."

Still, Clinton's term was almost at an end. In July, 1753, Sir Danvers Osborne was commissioned as Governor. He reached New York in October of that year. Two days after Osborne had taken the oath, he was dead-by his own act-and DeLancey, the Lieutenant-Governor, was in full control of the province. DeLancey nevertheless, clung to the Chief Justiceship, though he was forced to leave all judicial matters to the puisne justices. While he was Acting Governor, DeLancey also assumed the office of Chancellor. He was, in 1754, unpleasantly reminded of certain court proceedings of twenty years earlier, for when DeLancey presided at a term of the Court of Errors in *1754,* his inveterate opponent William Smith rose to challenge DeLancey's right to sit also as Chief Justice, "arguing that on account of the incompatibility between his old position as Chief Justice and his new political dignity, his right to the former naturally became extinct." DeLancey, however, was of different mind.

With the coming of Sir Charles Hardy as Governor, the chancellorship was vacated by DeLancey, who resumed his work as Chief Justice, also continuing as Lieutenant-Governor. Hardy arrived in September, 1755. Like his predecessor, he was an experienced sailor but had no knowledge of politics. He had even less liking for judicial office than Clinton had, and he was even more disposed to lean on DeLancey, contented in being only nominally Chancellor.[91] Therefore, Hardy looked with disfavor upon the movement initiated shortly after his arrival to prevent DeLancey from returning to active duty as Chief Justice. The protest was carried even to England, but the Lords of Trade sided with DeLancey, after the attorney-general had given an opinion. In 1757 Hardy was called to active war service at sea, and in his absence DeLancey was again Acting Governor. Still, he would not relinquish his judicial office, and the court duties devolved upon the puisne justices, Chambers and Horsmanden. In one case in 1758 it so happened that both judges were interested parties; therefore it was necessary to appoint an additional justice. David Jones received the appointment, and the Supreme Court thereafter, to the end of the provincial period consisted of a Chief Justice' and three associates.

Hardy was still in sea command when death came, on June 30, 1760, to Acting Governor DeLancey. The last three years had been trying ones for the Chief Justice, but probably were the most creditable of his life. With increase of responsibility, he had become aware that . both sides, the Crown and the people, had rights in the province; and, in his conscientious endeavor to develop the civil polity of the province so as to make it an efficient medium for executing the will of the people, without impairing the authority of the crown, he had had to face perplexities which demanded all his strength. He apparently spent himself upon his public office. On the day of his death he crossed the harbor, to transact urgent governmental matters. These matters occupied his whole day; indeed, the night was far spent before he was able to return; and it is thought that the effect of the night crossing in an open boat had so distressed him, a chronic sufferer from asthma, that the remainder of the night he dared not move from a sitting posture. He was found dead in his chair in his library next morning.

Dr. Cadwallader Colden, then seventy-two years old and for many years president, or speaker, of the Council-in fact, its oldest member at that time-became Acting Governor upon the death of DeLancey. Colden was a man of somewhat different type; and as Governor his first thought seemed to be to safeguard Crown interests. He could begin with the judiciary. The question of tenure of judgeships . could be opportunely taken up at that time, for the demise of DeLancey occurred in the same year that King George the Second died. Colden had been so close to Clinton and had seen how independent of the Governor a. judge commissioned *quamdiu bene se gesserint-to*

all intents for life-instead alas formerly *durante bene placito-during* the pleasure of the Governor, that he perhaps wished to save himself from a. predicament like that of Clinton. Upon the death of King George II was a good time therefore. to ask whether all commissions should not also then terminate. Colden was able to find a Chief Justice who would accept a commission "during pleasure", but with the appointment of Benjamin Pratt to that office on such a status, the anomalous situation existed of having a Chief Justice removable at will, and two or three puisne justices who could not be removed at all, if they behaved themselves The associate justices took umbrage at the appointment of Pratt, a stranger from Massachusetts, but they were more indignant when offered new commissions on the revocable basis. 'They all refused, and for a while Pratt, who knew nothing or very little of New York law, had to conduct court proceedings unaided. He sat alone during the January, *1762*, term of court, and at its end implored Colden to fill the bench. This Colden did not then do. He had had explicit instructions from the Lords of Trade on December *2*, 1761, "that you do not, upon any pretense whatever, upon pain of being removed from your government, give your assent to any act by which the tenure of commissions to be granted to the Chief Judge and other justices of the several courts of judicature shall be regulated or ascertained in any manner whatever (by the People) and that you are to take particular care in all commissions to be by you granted that they be during pleasure only, agreeable to ancient practice and usage." On the other hand, the Assembly had defied the Crown, refusing to grant any salaries to jurists who held any other commissions than those of "good behaviour" tenure; and even in such cases they would grant salaries for no more than one year at a time. Colden offered to compromise with the Assembly, by offering to make the judiciary entirely independent of both Crown and people, if the Assembly would settle permanent salaries upon them. ' Colden risked his own office in this, and was sternly reprimanded by the Lords of Trade, for signing an act which provided present salaries for those justices who still held their old commissions, of "good behaviour" tenure. They wrote that no personal consideration "ought to have induced you to acquiesce in such an unprecedented and unjust attack upon the authority of the Crown." It seems that Pratt did not benefit by this act, because of a qualifying clause, making the liability of the Assembly only "from the time of his being qualified"; but Puisne Justices Chambers, Horsmanden and Jones, having "good behaviour" commissions, were provided for. Pratt, as a matter of fact, received no salary at any time from the Assembly, and was opposed "in every judicial act he did" by the Republican faction. According to Justice Jones, the unfortunate Massachusetts jurist was made the victim of the political factions of the time, was "insulted, abused and lampooned through the artful insinuations and cunning, sly, dark designs" of the faction that opposed Colden. Finally, Pratt went to England, "to lay his own case before the home authorities." There death' overtook him in January, 1763.

Just as DeLancey had been Acting Governor while the Governor was still in office but on leave of absence, so had Colden been in charge during a long period of absence of the appointed Governor. Hardy did not resign the governorship until 1761, though he remained in naval command; and Robert Monckton, who had been second in command in Wolfe's last battle before Quebec, did not reach New York, as Governor, until October, 1761. Monckton abstained from any act of government, and a few weeks later left the province to command an English expedition against Martinique. Major-General Monckton handed over his seals to Lieutenant-Governor Colden on November 5, 1761. The Governor did not return until 1763, Colden, therefore, having had to handle himself the difficult judicial situation that had developed since DeLancey's death in 1760 Monckton, in 1763, found the Assembly more tractable. The puisne justices also were not so indignant as when Colden had first offered them new commissions of "during pleasure" tenure. The death of Chief Justice Pratt enabled Monckton to reorganize the bench, on revocable tenure. Horsmanden, who had consented, in March, 1762, to serve as second justice on "during pleasure" status, was offered the Chief Justiceship, and David Jones, William Smith, Sr., and Robert R. Livingston became the puisne justices, all accepting commissions *durante bene placito.* No further "good behaviour" commissions were issued during the provincial period Horsmanden remained Chief Justice until the Revolution, George D. Ludlow became puisne justice in 1769, Thomas Jones in 1773, and Whitehead Hicks in 1776.

Although the commissions were revocable at will, the justices maintained a commendable independence of opinion. In 1764 they did not hesitate to refuse to deviate from the strict judicial course, even to obey peremptory orders of the King. The justices aligned themselves against the Government to preserve the integrity of trial by jury; and they flatly refused to obey a writ of inhibition drafted by the Governor himself, against the advice of the Supreme Court. This dispute, "involving the right of the King to establish courts and regulate

practice in the colonies though he could not in England, would, if the contention of the judges and lawyers should prevail be subversive to every Government in the colonies, where all of them depend upon the King's charter, or on his commission to his Governor," pointed out Lieutenant-Governor Colden, "not only for their executive but their judicial powers." He complained that the judges, instead of "giving the reasons for 'their judgments in private and simple," as he had expected, surprised him "by haranguing to a large audience to make his Majesty's Instructions appear illegal and arbitrary, and to render his Governor odious in the eyes of the people."

Colden's complaint brought from the Privy Council a peremptory order of the King in Council, commanding the judges to send up the proceedings to the Governor and Council for review. This occurred on July *26,* 1765. Meanwhile, Attorney-General John Tabor Kempe had given his opinion that the Council could only correct errors; and the Council itself had unanimously decided that no other than an appeal of error would lay to them. Still, in the face of the King's command, a writ was issued to the Supreme Court in October, 1765. The determination of the justices did not waver. On November 12, the Chief Justice replied that the justices of the Supreme Court found it impossible to comply with the command, the law knowing no appeal from a verdict. A month later the Assembly adopted resolutions supporting the Supreme Court, sustaining their action, condemning the illegal proceedings, affirming the right of trial by jury, and declaring "that an appeal from the verdict of a jury is subversive of that right, and that the Crown cannot legally constitute a Court to take cognizance of any such appeal."

This "mutiny" of the judges was not the only trouble then before the Crown's representatives. The Stamp Act excitement of that year had given the English ministers and the colonial governments ominous indication of the gathering storm. Sons of Liberty began to organize into bands, after Barre had corrected Townshend, in the British Parliament, and declared that "Americans are Sons of Liberty" rather than "children of England's planting." Lawyers, it is worthy of remark, were well in the lead in these republican units; indeed, "it is asserted that the New York Association of the Sons of Liberty had existed since 1744, when the Bar entered into an association to free the Bench from the exercise of the King's prerogative." New York in 1765 was heading more definitely towards independence than any other colony, states Bancroft. In May of that year Colden wrote to Monckton, who was then in London, that "the gentlemen of the law seem to have placed the chief stress of their cause in raising public clamour." New York seems to have been the seat of the forces of liberty. Deputies of a Continental Congress met in New York City in October, the convention going into 'history as the "Stamp Act Congress." Colden's life was in danger in November, when Sons of Liberty threatened to storm the fort, seize the stamps and burn them; they hanged Colden in effigy, riddled another effigy of him with bullets, and dared him to issue the stamps, warning him that if he did he would die "a martyr" to his own "villainy and be hanged like Porteous upon a 'high post, as a memento to all wicked governors."

Sir Henry Moore was Governor at that time, but had not yet arrived. He reached New York on November 13, easing the situation which had been so critical under Colden. New York was at least thankful that they were "rid of the old man" (Colden). Governor Moore gave evidence that he had no arbitrary or belligerent intentions, and in 1766 the Stamp Act was repealed. Still, Liberty was abroad in the land, and could not, or would not, be shackled. There were other obnoxious Crown institutions that gave the Sons of Liberty, or the agitators for independence, something to abuse. For instance, the Courts of Admiralty and Chancery; tenure of judgeships. The ever-present royal prerogative rankled most, but feelings on both sides of the Atlantic were becoming more sensitive, and eyes more fault-finding.

Colden was again in office, as Acting-Governor, in 1796, when Governor Moore died. Though the times were dangerous and he was eighty-two years old, Colden seemed to revel in a resumption of the difficulties of office. Watts, writing to Monckton of him, said: "He fairly lives himself into office, being, they tell me, as hearty as when you knew him . . . . The old man seems to be the Son of Fortune in his advanced years." Certainly, he accumulated a considerable sum, £10,000 it is said, in fees for the execution of patents left in abeyance by the deceased Governor; and when the next Governor, John Murray (Lord Dunmore) arrived, and demanded of Colden one-half "of all fees, perquisites and emoluments that had accrued during his year as Acting-Governor," he precipitated litigation somewhat like that between Cosby and Van Dam. Colden would not part with a

farthing, and eventually retained the whole of the £10,000. Murray sat as Chancellor and heard the case, but James Duane, counsel for Colden, so convinced the Chancellor Governor that he dared not decide in his own favor against Colden that Murray submitted the case to the Supreme Court justices. They promptly decided that Duane's demurrer was well taken, the justices finding so, notwithstanding that they were bitter enemies of Colden, and that the Governor could, if vindictively minded, have removed them from office.

Lord Dunmore was a man of broad mind and good character. He took the ruling as right, and went on with other matters of government. If other Governors, and the English ministers-as well as many of the provincial leaders of the people, no doubt-were as broadminded and open to conviction as Lord Dunmore was, the course of American affairs might not have led inexorably to revolution. However, it was not to be.

Provincial records show that the real champions of the people were the lawyers. This is not surprising, for no other class could better point out the grievances, or see how far from the fundamental laws the English ministers had drifted, in their instructions to provincial Governors. Edmund Burke declared: "In no country, perhaps, in the world is law so general a study as in America." Fowler, in his "Constitutional and Legal History of New York" wrote: "A complete history of the Bar of last century (eighteenth) would be almost the history of independence." When, in the last few years of Crown government in New York the Assembly veered more to Tory influence, the lawyers transferred the people's cause to other organizations, lawyers being most prominent in the Congresses and committees.

There was confusion for a while in judicial matters after the outbreaking of war The judges, with one notable exception, were aligned with the Tory or Loyalist faction, and to the end all but Livingston considered that they were sitting in Crown courts. A Republican local committee actually haled a Tory suspect before Justice Thomas Jones at his last session of circuit court at White Plains (in April, 1776) and had so confused an idea of the judicial situation as to expect a Crown judge in the Crown court to deal sternly with a townsman suspected of loyalty to the Crown. The suspect was, of course, promptly discharged. However, no more sessions of the provincial courts were held, except in those parts occupied by British troops during the Revolution. The Crown "ceased to be the general Conservator of the Peace and the Fountain of Justice in the Province when the Declaration of Independence was adopted, on July 4, *1776*." The State courts, when organized, were merely a continuation of the Crown courts; the common law of England still ruled in American courts; and the Royal Prerogative, which provincials had so stubbornly resisted, as encroaching upon their Magna Charta rights, merely became State Prerogative. In the minds of the people, however, there was this satisfying difference: that all who had part in the government were fellow-citizens, men of their own State, their brothers, as it were, instead of distant kinsmen, and that whatever new laws might be necessary would be enacted by those they themselves had chosen to make such laws. In other words, they felt that they were free to manage their own affairs, instead of having their affairs directed by a government seated three thousand miles away. The people of New York felt no apprehension when their own delegates in Provincial Congress drafted and brought into effect a State Constitution which they themselves had had no opportunity of considering. When, however, it was proposed to set up a federal government, the United States, by which the several States were to be bound by a National Constitution, the people of New York, in common with those of other States, began to look more closely into the proposals. They were jealous of their own rights, and suspicious of all interference. So there was nothing inconsistent in the political psychology of New Yorkers in the last decades of the English period and the same New Yorkers in the first decades of the State period. Some of the actions of English ministers in the last decade of Crown rule in America were drastic and imprudent, and brought condemnation and protest from even English bodies of prime importance;[92] but the fact seems to be that the seed of liberty, sown by governmental indifference, to neglect of common rights, had grown into a strong and fertile plant, had propagated its kind and spread Liberty until it covered the whole of the American colonies. Nothing short of independence would satisfy those of the people's leaders who were most active in agitation, and although the advocates of separation were not a majority of the people of the colonies and provinces of America, the definite opinions of the positive faction swayed the average peaceful colonist into belligerency, just as the English advocates of drastic measures fanned the flame of National impulse until the average Englishman felt indignant that American Englishmen should defy the will of the Mother Country.

So, the two English-speaking peoples drifted into war; and, in the' regrettable incidents that come when aroused passions dash, they drifted farther and farther apart during the Revolution, never again to be quite reconciled to each other, though in the last great war they fought side by side, in appreciating kinship.

Footnotes

Footnote 71: The charters of 1683 and 1691 made a shadowy differentiation between executive, legislative, and judicial authority. They followed in the main the English theory of colonial government. The council and assembly constituted a bicameral legislature. The governor, and after him the king, had an absolute veto on all its acts. Landed proprietors alone were recognized as entitled to share in the business of government. The members of the council received their commissions from the crown, but the governor had a qualified right to fill vacancies. Besides sitting as an upper legislative chamber, the council sat as a privy council to advise and assist in political cases. The governor was empowered to adjourn, prorogue, and dissolve the assembly in his discretion.

Substantially this type of government was continued until the Revolution, but under an unwritten constitution, no actual charter having been in force after 1697. As has been well said by Mr. Lincoln in his exhaustive treatise upon our constitutional history, the student who would understand the essentials of the institutions which by degrees had been evolving in the colony, will find them formulated in the commission issued in February, 1771, three years before the commencement of the Revolution, by George III, to Governor William Tryon, and in the instructions that accompanied and explained the commission.

In an explanation of the nature of the colonial constitution, transmitted by Governor Tryon to the home government in 1774, its salient features are briefly and admirably described. Its constitution, since it became a royal province, "nearly resembled that of Great Britain and the other royal governments in America." The governor was the king's appointee and held office during royal pleasure; he had a council in imitation of his majesty's council; the province "enjoyed a legislative body," consisting of the council and representatives of the people, "chosen as in England," which the governor might adjourn, prorogue, or dissolve; it could make no laws repugnant to the laws and statutes of Great Britain, and over all its enactments the governor possessed an absolute veto. Within three months after its passage, every law was required to be sent to his majesty for his approval. The governor was not to give his consent to any law that was not to remain in force for two years. No clause foreign to the import of the title of an act might be inserted in that act, and no act might be suspended, altered, continued, revived or repealed by general words, but the title and date of any such act was required to be particularly mentioned in the enacting part. The province had a court of chancery in which the governor sat as chancellor, and courts of common law, the chief being the supreme court, the judges of which held their commissions at the king's pleasure, and there were minor courts of less jurisdiction, and the justices of the peace to try minor cases. There were also criminal courts "correspondent with those in England." Besides these tribunals, all administered according to the common law, there was a court of admiralty which proceeded "after the course of the civil law," and a prerogative court, charged with the probate of wills, the administration of estates and the issuing of licenses for marriage. The governor was commander-in-chief and appointed all military officers, who held office at his pleasure. He had power to suspend the lieutenant-governor and members of the council, and to grant pardons, except in cases of treason and murder. The colony could erect forts and other means of defence and establish and maintain a militia. Public money was to be paid only to the governor's warrant, approved by the council. The common law of England was considered the fundamental law of the province, and, continued the governor: "It is the received doctrine that all statutes not local in their nature, and which can be fitly applied to the circumstances of the colony, enacted before the province had a legislature, are binding upon the colony; but that statutes passed since do not affect the colony, unless by being specially named. Such appears to be the intention of British legislation."- Dougherty's "Constitutional History of New York," II, 15-17.

Footnote 72: *First* Assembly-Speaker, James Graham, of New York*;* clerk, John Clapp, of Westchester sergeant-at-arms Benjamin Phipps doorkeeper William Welsh Representatives, and districts:

Albany-Dirck Wessels, Levinus van Schaick. Kings-Nicolas Stillwell, John Poland.

New York City-James Graham, William Merrett, Jacobus van Cortlandt, Johannes Kipp.

Queens-John Bound, Nathaniel Pearsall. (They were Quakers, and, as they refused to take the oath they were dismissed) Daniel Whitehead was admitted April 14, 1691. John Tredwell was admitted same day, but was expelled two days later, being arrested on a "scandalous charge." John Robinson was elected in place of Tredwell.

Rensselaerswyck-Killiean van Rensselaer who was admitted on May 1, 1691.

Richmond-Elias Duksberry and John Dalley Lambert Dorland was admitted September 17, 1691, in place of Dalley, deceased.

Suffolk-Henry Pierson and Matthew Howell.

Ulster and Dutchess-Henricus Beekman Thomas Garton who resigned on April 10, 1691; William Demiere admitted April 25 1691, in Garton's place.

Westchester-John Pell.

Footnote 73: "Upon an information brought into this House by several Members of the House declaring: That the several Laws made formerly by the General assembly, and his late Royal Highness James Duke of York &c and also the several Ordinances or reputed Laws made by the preceding Governors and Councils for the Rule of their Majesties Subjects within this Province are reported amongst the People to be still in force:

"Resolved, Nemine Contradicente, That all the laws consented to by the General Assembly under James Duke of York and the Liberties and Privileges therein contained granted to the People and declared to be their Rights not being observed and not ratified and approved by his Royal Highness, not the late King, are null, void, and of none effect. And also the several Ordinances or reputed laws made by the late Governors and Councils, being contrary to the Constitution of England, and the Practice of Government of their Majesties other Plantations in America are likewise null void, and of none effect nor force within this Province."-See "Journal of the New York Assembly," p. 8.

Footnote 74: This ad is chapter four of Livingston and Smith and Van Schaick, where the title only is printed. It is printed in full in Fowler's "Bradford," p. *2.* The title only is printed in Baskett, p. 105. The act is also printed in full in "Colonial Laws of New York," Vol. I, pp. 226-231.

Footnote 75: *Single Justice-Every* Justice of the Peace hath power to determin any suite or controversy to the value of fourty shillings.

Quarter Sessions-The Justices of the Peace in quarter sessions have all such powers and authorities as are granted in a Commission of ye Peace in England.

County Court-The County Court or common Pleas both cognizance of Civil accons to any value excepting what concerns title of land and noe accon can be removed from this Court if the damage be under twenty pounds.

Mayor & AIdermen-The Court of Mayor and Aldermen hath the same power with the County Courts.

Supreme Court-The Supreme Court hath the powers of Kings Bench, Common Pleas & Exchequer in England and noe accon can be removed from this Court under œ100.

Chaucery-The Gouvernour and Council are a Court of Chancery, and have powers of the Chancery in England, from whose Sentence or decree nothing can be removed under œ300.

Prerogative Court-The Gouvernour discharges the place of Ordinary in granting administracons and proveing Wills & the Secretary is Register. The Governr. is about to appoint Delegates in the remoter parts of the government with supervision for looking after intestates, estates and orphans.

Court Marshall-The Governr. bath established a Court Marshall att Albany whereof Major Richd. Ingoldsby is President and Robert Livingston Judge Advocate, who with the other commissioned Captains att Albany have power to exercise Martiall Law being a frontier garrison and in actuall warr.

Admiralty-Their Majesties reserve the appointment of a Judge Register and Marshall-See O'Callaghan's "Documents Relative to the Colonial History of New York," IV, 28.

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Footnote 76: The reluctance with which William III consented to the erection of this high court (Supreme Court) by statute rather than by a mere executive ordinance revokable at will is made apparent by the proviso of the act creating it which limited the court s existence to two years. As nothing occurred, however, in the conduct of the court during the first two years of its existence inimical to the King s ideas of governing the province by royal prerogative the limitation was extended from time to time by subsequent legislation until 1698. The court was thereafter continued not by legislation but by the governor s proclamation of January 19, 1699 and then finally by the order of the governor in council under date of May 15 of the same year This assumption on the part of the crown of a right to erect a court of justice or to revive a defunct court, gave excuse, on at least one occasion, for a great popular outcry against the court on a plea to the court s jurisdiction being raised in a pending case the contention on the part of counsel bemg in effect that the court had had no legal existence subsequent to the expiration of the limitation fixed by act of assembly that the fundamental principles of the English constitution were as conrolling in New York as in England and that as the king could not constitutionally of his own will erect and maintain a court of justice at home he could not do so here The king s claim of right to rule by prerogative in the colonies any further than in England was contested in New York mainly by the lawyers in pending litigation at the bar of the Supreme Court, and this with a frequency and persistence unknown because uncalled for in neighboring colonies which lived under the guarantees of written charters by which the right of govenment by prerogative was, to a greater or less degree, surrendered by the crown to the people These forensic discussions at the bar as they occurred from time to time, filled the courthouse with eager and sometimes applauding and even riotous audiences; they were subsequently rehearsed in every tavern taproom, and thus was begot that familiarity with and stubborn devotion to the underlying doctrines of institutional liberty under English law which became characteristic of the province notwithstanding the diversity of nationalities which from first to last made up its population -Redfield's English Colonial Polity and Judicial Administration 1664 1776 McAdam's "History of Bench and Bar of New York."

Footnote 77: ...the hostility of the popular party to the assumed chancery jurisdiction of the governor and council was due to the crown's denial of the exclusive right of the assembly to erect its own courts and fix the limits of their jurisdiction though any court exempted from the rules of common-law procedure, as courts of equity are supposed to be, was always and everywhere in the American colonies regarded with distrust. It is not surprising, therefore, that every attempt of the Supreme Court to exercise equity powers, though made under the guise of exchequer business, should excite an instant and persistent opposition on the part of the whig bar, than which nothing was surer to receive popular applause.

The first exchequer-chamber business attempted in the Supreme Court was made by Chief-Justice Attwood shortly after his arrival here in 1701, Lord Bellomont being governor. The latter had come out under special instructions to suppress the illicit trade, not to say piracy, at that time largely engaged in by merchants and traders of New York. To assist him in this arduous task, a new chief justice (Attwood), and a new attorney-general (Sampson Shelton Broughton) had been respectively commissioned directly by the king-no resident being trusted in the emergency. The seat of corruption seemed to have been in the Court of Admiralty. Attwood was accordingly armed with a commission as Judge of Admiralty for New England New York and New Jersey, in addition to the chief-justiceship of New *York.-Ibid.,* p. 75.

Footnote 78: Attwood, upon arrival early in the summer of 1701, took his seat in a Court of Admiralty. "In the summer of 1701, he learned of a case of a vessel which, seized for lack of registry under the navigation acts, had been discharged by the admiralty judge whom he succeeded. What was wanted was some jurisdiction somewhere to prohibit, by writ, the execution of the decree discharging the vessel until the admiralty proceedings could be reviewed. But there was no court in the province having an unquestioned right to issue a writ of prohibition against the decree of the Admiralty Court. The chancery jurisdiction of the Governor was questioned; the Supreme Court was claimed by lawyers to be a court of law only. He concluded, however, that by its constitution, as gathered from the original act of 1691, and the subsequent ordinances continuing the court, the Supreme Court, sitting as a Court of Exchequer, had power, by writ of prohibition, to prevent the discharge of the vessel and the consequent defeat of his Majesty's forfeitures, under the Navigation Acts, pending an inquiry by it into the legality of the vessel's discharge. He thereupon, assuming to sit as a Baron of the Exchequer, directed "a suggestion to be exhibited to it for a prohibition to the Court of Admiralty upon its sentence in that matter." But, as "one of the persons designed for a judge in the Supreme Court had given the obnoxious sentence in favor of the ship," and the other judge "was a merchant who might be concerned in interest, the Governor thought fit to suspend the granting of their commissions till this matter should be over in the Supreme Courts," and "therefore," he writes, "the enclosed Ordinance was made empowering me alone to determine this matter." In justification of his assumption of this extraordinary jurisdiction, Attwood assured the Board of Trade that the matter "had been solemnly argued by Council on both sides; that he had taken due time to compare the authorities cited to ' him, and to collect others which are produced at large in his "long argument" enclosed, given at his granting the writ of prohibition. Notwithstanding a prompt appeal direct to the King by the vessel's owners, "men of good estates" as he had reported, he proceeded to try the Crown's claim to a forfeiture. The captain refused to appear, though "his former attorney offered several things as *anticus curiae,* principally the pendency of the appeal." On the facts found, a forfeiture was declared, under which the vessel was sold at public auction, to the ' consternation, we may suppose, of the "men of good estates" engaged in the prevailing illicit trade.-Redfield, in "History of Bench & Bar of New York" (McAdam), pp. 75-77.

Footnote 79: See McAdam's "Bench and Bar of New York," Vol. I, p. *72.*

Footnote 80: Lewis Morris, Jr., had protested against the signing of the warrants, one of which warrants submitted by the Assembly touched him closely, inasmuch as it reduced his father's stipend, as Chief-Justice, from œ300 to œ26O.

Footnote 81: Chancellor Kent wrote: "It remains to this day with much of its original form and spirit after having received by statute such modifications and such a thorough enlargement in its legislative judicial and executive branches as were best adapted to the genius and wants of the people and to the astonishing growth and still rapidly increasing wealth and magnitude of the city."-Kent's "Book of Charters of New York."

Footnote 82: "The exceptions were three: That the supreme court, which claimed this jurisdiction in equity, was established by an ordinance of the late king George the first, and expired at his demise, and had not been reestablished in the present reign*;* that his present majesty, by his commission to governor Montgomerie, under the great seal of Great Britain, having commanded him to execute all things in due manner, according to the powers granted by that commission, and the instructions therewith given, by the 39th article of which he was required to grant commissions, with the advice of the council, to persons fit to be judges, and that he had

commissioned Mr. Delancey and Mr. Philipse without such advice; that they had no jurisdiction or authority todefendanthe defen4ant to appear upon oath, concerning the matters in the bill; and there is no prescription, act of parliament, nor act of assembly, to establish any supreme court, nor to empower any court or persons to hold cognizance of pleas in a court of equity, in or for this province."-Smith's "History of New York," Vol. II, pp. 7-8.

Footnote 83: .... their joy on Mr. Morris's next arrival there was announced by the explosion of the cannon of the merchants' ships in the harbour and by the citizens meeting and conducting him, with loud acclamations, to a public and splendid entertainment."-*Ibid*., p. 9.

Footnote 84: Cosby had most powerful connections in England, and he seemed to feel that they would sustain him through his imprudent arrogant course. He was a brother-in-law of the Earl of Halifax; and the Duke of Newcastle then in ministerial power was his patron. His daughter had just married Lord Augustus Fitzroy, son of the Duke of Grafton, a descendant of Charles II.-"Courts and Lawyers of N. Y.," chapter XXVII.

Footnote 85: Following is copy of entry in Minutes of Council:

"At a council held at fort George, in New York, the 2nd of November, 1734:

PRESENT,

His excellency William Cosby, esq., captain-general and governor-in-chief, &c.

Mr. Clarke. Mr. Livingston. Mr. Courtlandt.

Mr. Hanson. Mr. Kennedy.

Mr. Lane.

Dr. Colden. Mr. Chief Justice. Mr. Horsmanden.

"Whereas, by an order of this board of this day, some of John Peter Zenger's journals, entitled 'The freshest advices, foreign and domestic,' Nos. *7*, *47*, 48, 49, were ordered to be burnt by the hands of the common hangman or whipper, near the pillory in this city, on Wednesday the 6th instant, between the hours of eleven and twelve in the forenoon, as containing in them many things tending to sedition and faction, to bring his majesty's government into contempt, and to disturb the peace thereof; and containing in them, likewise, not only reflections upon his excellency the governor in particular, and the legislature in general, but also upon the most considerable persons in the most distinguished stations in this province. It is therefore ordered, that the mayor and magistrates of this city do attend at the burning of the several papers or journals aforesaid, numbered as above mentioned."

Footnote 86: Entry in Court Minutes:

"James Alexander, esq., and William Smith, attorneys of this court, having presinned (notwithstanding they were forewarned by the court of their displeasure, if they should do it) to sign, and having actually signed, and put into court, exceptions in the name of John Peter Zenger; thereby denying the legality of the judges, their commissions, though in the usual form, and the *being* of this supreme court:

"It is therefore ordered, that, for the said contempt, the said James Alexander and William Smith be excluded from further practice in this court, and that their names be struck out of the roll of the attorneys of this court."-See Smith's "History of New York," Vol. II, 25.

Footnote 87: See "Courts and Lawyers of New York" (Chester-Williams, 1925), Chap. XXVII.

Footnote 88: Smith's "History of New York," Vol. II, 27.

Footnote 89: "As it happens on such occasions as these, the scribblers of the day grew more wanton than ever, and a low printer, dandled upon the knee of popular applause, gave into prodigalities which contributed to his indolence, and ended, as the ferment subsided, in the ruin of his *family."-Ibid.*, p. *29.*

Footnote 90: "Bryant and Gay's "History of the United States."

Footnote 91: Sir Charles Hardy . . . . was a typical sailor, and had no liking for political intrigue.... He knew even less of law yet he was chancellor Historian Smith describes the perplexed state in which Hardy found himself immediately after his arrival when four eminent counsel-Murray Nicolls 'and the two William Smiths-appeared before the Governor to argue a demurrer to a bill of equity. Hardy had asked the Chief Justice to be at hand, but DeLancey had failed to appear. So his excellency had to act alone He called the counsel of both sides into a private room and asked: 'Does this matter turn upon a point of law?' When assured that it did, he frankly confessed I have been justice of the peace in England but know nothing of the law. My knowledge, gentlemen, relates to the sea; this is my sphere. If you want to know when the wind and tide will suit for going down to Sandy Hook I can tell you that but what can a captain of a ship know about demurrers in law? If you dispute about a fact I can look into the depositions and perhaps tell who has the better of it but I know nothing of your points of law ' Fortunately Chief Justice De Lancey came to his aid at that moment. Smith writes: "The cause was afterward debated and a decree pronounced by DeLancey, who dictated the entry in the register. The Governor, who awkwardly sat by, interfered only to pronounce an amen."- "Courts and Lawyers of New York," Chap. XXVII.

Footnote 92: "The Corporation of the City of London; see Sharp's "London and the Kingdom."

The Historical Society of the Courts of the State of New York

On-Line Book

CHAPTER XII-(Continued).

THE BENCH AND BAR.

American Period, 1775-1925.

For more than 100 years New York has been the leading State of the Union-the Empire State of the United States of America. Some will perhaps challenge this statement to her National leadership, and, *it* must be confessed, will be able to cite particular striking examples *in* refutation. As a matter of fact, every State has produced National leaders; and if New York has produced more, there is good reason why she should have done so-at least during the last hundred years, *in* which she has headed the States in number of inhabitants. When the first United States census was taken, in 1790, New York State had to be content with fifth place among the confederated States, for she had less than half as many inhabitants as Virginia, and less than Pennsylvania, North Carolina and Massachusetts. New York City was second to Philadelphia.

There was good reason, however, why New York State went ahead more rapidly than other States and thirty years later, in 1820, gained the premier place she has ever since held in federal enumeration Centrally situated, New York State was naturally an important pivotal point She became potential in inter-colonial relations as early as 1690, when delegates from Maryland, New York, Connecticut, Massachusetts, and Plymouth colonies gathered in New York City to hold a colonial congress- the first of the English period-to consider matters of defense against the common enemy. Again, in1754, win 1754e formation of a Colonial Confederation was advocated by Benjamin Franklin, the venue of the inter-colonial convention was *in* New York State. As the colonies drew closer to each other in the general resentment against Crown enactions, the influence of New York was powerful. Colden admitted, in 1765, that "whatever happens in this place (New York) has the greatest influence on the other colonies." John Morin Scott, a New York lawyer, through the medium of the New York "Gazette" startled the people of the American colonies, in 1765, to the consequence of non-resistance to the Stamp Act; he showed that if the colonies were denied the nights to which the English constitution ended them, the remedy lay in independence. Bancroft's summing up of the colonial situation of that time was that Virginia marshalled resistance, Massachusetts entreated talon, but that New York pointed to independence. A Continental Congress, which goes into American history as the *Stamp Act Congress,* was held in New York City. The Sons of Liberty, the patriotic society which became such a definite remedial factor, or at least a positive expression of the grim purpose of the people, in the last troublous years of the Crown period, had its inception in New York City, it is said, in an association of lawyers of that place formed in 1744. In innumerable ways from that time until the United States became a National entity, able to take its place among the sovereign powers of the world, lawyers of New York were in the van, leading the American people on to their destiny. Hamilton, Jay, the Livingstons, the Morrises, Clinton, Scott, Duane, Duer, Lansing, Benson, Yates, Burr, Kent-these and others are names of New York lawyers and jurists that are encountered in National records of the period before New York State assumed first place in United States population statistics. Hamilton's financial measures brought stability to a bankrupt Nation*;* Jay founded a judicial system which brought dignity and unity to a confederated group of suspicious, sensitive States; Kent, the Great Chancellor, came to the rescue of bewildered jurists and lawyers of floundering States who were groping for American precedents in the English law which still controlled American jurisprudence. As a memorial erected in Chancellor Kent's memory a century later[93] stated: "He gave to the common law in its new home fresh vitality and power. He moulded from meagre precedents a noble system of equity jurisprudence and marked the lines of its growth for commonwealth and Nation." Another

writer[94] is even more positive in his eulogy of New York jurists and lawyers: ".... owing to the great men who early formed our jurisprudence," he writes, "New York has made law not only for herself, but for most of the other States of the Union." The judicial and legal history of New York during 150 years of New York State thus seems to be more important than that of the century and a half of the colonial, or provincial period. It undoubtedly is; yet, the record can be stated in fewer words. The State courts were, in fact, merely a continuance of the Crown courts; and except that the expansion of Bench and Bar has corresponded with the growth of New York during the last 150 years, and that the details of court functioning have assumed proportionate volume, there is not so much that could properly be brought into this review as there was in the formative happenings of the much less important provincial period. Few new courts have been established. The Court of Appeals is but a reorganization-very much more judicial, it is true-of the Court for the Trial of Impeachments and the Corrections of Errors which, in 1784, was formed to take the place of appellate courts of the provincial period. A Court for the Correction of Errors and Appeals was erected in 1691, and functioned to some extent throughout the Crown period, drawing its personnel from the Governor's Council, the higher legislative body, just as the Court of Errors of the State period drew its personnel mainly from the State Senate. The Supreme Court of the State is even more like the provincial Supreme Court, and the county courts are substantially the same as the Courts of Common Pleas which functioned in each county from 1691 to the end of the Crown period in 1775, and from the beginning of the State period to 1847. The laws, too, are basically the same. Therefore, it will be seen that the fundamentals of State jurisprudence have already been given in the review of provincial jurisprudence. There has been expansion and improvement in the judicial system; and in some instances the adaptation of English law to American needs has made American practice better than English, or at least has given distinctively separate precedents; but the fact remains: that Blackstone's Commentaries even yet cannot be dispensed with, notwithstanding that we have an American work, in Kent's Commentaries, worthy of place at its side. One eulogist of Kent recently asked: "Where, among all the judges who have been members of the highest State con do we find one who has influenced the development of our law to the extent that Kent did? By this standard we may venture the opinion that he was without a peer."[95] "In measuring Kent's achievements and his influence, the remarkable versatility of his strong and analytical mind must not be forgotten. His influence was great in four widely different fields of the law-the Common Law, Equity, Constitutional Law, and International Law." Still, to define the elements of American law and jurisprudence would, in a measure, be but to repeat what has already been written in earlier sections of this review.

Fowler,[96] in one of his masterly historical papers on American jurisprudence, describes the transition of the courts from provincial to State status thus: "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 . . . . It is possible that, with the reverence formerly felt for the common Jaw, the theory-that the jurisdiction of the fundamental courts was derived front the common law-obtained, and that they were considered as falling within such parts of the common and statute law of England as were adopted by the thirty-fifth section of the Constitution. However the fact may have been, these courts of general jurisdiction, in law and equity, continued substantially on their old foundations until the constitution of 1846." Provision was made in the first State Constitution for salaries of Judges, and the tenure of office was also definitely set; but in no more direct way were the courts of original jurisdiction brought into the judicial system of the State. No direct attempt was made to erect a State Supreme Court, for instance; the fundamental courts of the common law were considered as existing, though not in session, and that when in session the only difference would be that *Dominus Rn* would be supplanted by *The People of the State of New York* in court records. The fundamental courts were merely perpetuated or continued, notwithstanding that attacks had been made upon them during the provincial period for irregularity of establishment. "It is a noteworthy fact that both these high courts of justice, Supreme and Chancery, 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,"[97] writes Fowler.

Constitutional history has been generally reviewed in an earlier chapter, and there is no need here to refer to more than that part of it which provides for the judicial department of government. Briefly, therefore, out of the

efforts of earlier committees of citizens grew the Provincial Convention of deputies of the counties of New York, which was opened in New York City Hall on April *20,* 1775. At that meeting, delegates were chosen to attend the second Continental Congress, in May, 1775, this action by the convention being taken after the New York Assembly-which had a Tory majority-had refused to name such delegates, or to recognize the Continental Congress. A Committee of Observation (or Public Safety) met in New York City on April 28, to organize a Provincial Congress to take New York affairs out of the hands of the Tory Assembly, which, as a matter of fact, was then moribund, and indeed never met again, after its adjournment for one month on April 3, 1775. The Provincial Congress, which met on May *22,* 1775, can not be looked upon as positively belligerent; in fact, the invasion of Canada was condemned and resolutions were adopted favoring conciliation with England. Few called for an absolute cleavage but all were content to let the Continental Congress lead them out of the existing difference with the mother country. John Jay and others of New York had, on May 5, addressed a sympathetic English body, the Lord Mayor and Corporation of London, declaring that the colonists "could never submit to slavery," that, indeed, "all the horrors of civil war will never compel America to submit to taxation by authority of Parliament." But, as the latter half of that year and the first half of the next passed, the passions aroused by acts of war had drawn Americans-some very reluctantly-to the recognition that independence was the most probable outcome. In June, 1776, the Continental Congress had to face the trend squarely, and by July *2* the Declaration of Independence was adopted, the reasons for such action being approved on July 4. Five days later the New York Provincial Congress met at White Plains, and by unanimous vote referred the Declaration of Independence to a committee of which John Jay was chairman. An hour later, the committee reported back the resolution drafted by Jay, approving the Declaration, though deploring the necessity for it. Thus, the die was cast., Next day, July io, 1776, the *Provincia1 Congress,* by resolution became the *Convention of the Representatives of the State of New York.*

Although this was, in truth, the birth of the State of New York, a resolution was adopted on July 10, 1776, declaring that "the sovereign and independent State of New York" had actually begun its existence on April 20, 1775, upon which day the first Provincial Congress that was independent of Crown influence met It was resolved that no land grants made by the King of England after October 14, 1775, the day upon which Tryon, the last royal Governor of New York took refuge on board of a British man-of-wit, would be recognized as valid. The course of the State during the latter part of 1776 was chequered and exciting, and legislative matters were less engrossing than military exigencies. Governmental matters were mainly in the keeping of the Committee of Safety until March *5,* 1777. On July 10, 1776, the convention, at White Plains, had provided for a .provisional judicial system by formally declaring that, until further notice, the common law and the statutes of England would continue in full force in the State of New York, just as, prior to April 20, *1775,* they had existed in the province. On August 1, 1776 the convention held a session in a church at Harlem, and then appointed a committee to draft a permanent constitution for the State. John Jay became the chairman of this committee. The other members were Gouverneur Morris William Duer, Robert R. Livingston, Abraham Yates, Robert Yates, John Morn Scott, Colonel John Broome, John Sloss Hobart, Colonel Charles DeWitt, Samuel Townsend, William Smith and Henry Wisner. The committee was well chosen, and represented all shades of Republican thought. The radical tendencies of Scott were counteracted by the conservatism of Gouverneur Morris. The Livingstons and the Yateses were conservative, and John Jay seems to have been an ideal chairman, being neither conservative nor radical. If he veered to either side, it was probably in the direction of the conservative. The committee was asked to draft a constitution and report within a fortnight. Even in peacetime this would have been an unreasonable request; but in such a time and situation as they were then passing through, with an active British army only a few miles away, and a fleet of enemy ships in the offing greatening to ascend the Hudson River and isolate an important part of the American forces, there were other more pressing duties than the drafting of constitutions then before New York State leaders. As a matter of fact, Jay, when appointed chairman of the Constitutional Committee, was absent in the highlands of the Hudson, giving what advice he could to Clinton in the latter's task of constructing defenses at that point, to prevent the British from going further up the Hudson. Governmental details, even the drafting of a constitution, might well be set aside at such a time. The vigilance of a committee was needed then more in watching the Tories so numerously spread throughout New York and New England. Indeed, a few weeks after the Constitutional Committee was organized, another committee "for inquiring into, detecting, and defeating conspiracies against the liberties of America," was formed. Its personnel included John Jay and William Duer*;* and the committee had little time for much else until

February of the next year, when a commission took over its duties.

During the month of March Jay and the other members of the Constitutional Committee centered their efforts upon that important task, and on March 12 reported to the Fourth Provincial Convention (or the First Constitutional Convention) a Constitution which, it is said, was drafted by Jay himself. It is asserted that "he preferred to do the major part of the work alone," and that for that purpose he had withdrawn from the convention, "and, indeed, from all contact or communication with his colleagues and in some sequestered retreat in the country" had given "his undivided and undisturbed attention to the task."[98] Still, the other members of the committee were either lax in their attention to State affairs, or the assertion that Jay was the sole author of the Constitution is incorrect, for on that committee were some of the brightest minds in New York of that time, men whose mature years had been devoted to the cause of the people, and to the problems of government. It hardly seems possible that they would have remained mute and inert while Jay, alone, fulfilled a trust which was of such vital importance and had been vested in them as a whole. Unfortunately, only a fraction of the minutes of this important committee on government have been preserved,[99] at least in State records, and the Constitution itself was in private hands until 1818,[100] so that the procedure of the committee is not fully known. It appears, however, that the draft of the Constitution was entirely in Jay's handwriting,[101] and that when it was debated in the convention only a few changes were made to the draft, "and of these nearly all were proposed by jay himself."[102] Undoubtedly, Jay was the factor of most influence in the devising of the State Constitution; and, as chairman, he may have assumed the greater part of the labor of its preparation; but his was not the only opinion expressed in the draft submitted, we may be sure. Chancellor Kent, in *1821*, credited Jay with the authorship, but Justice Thomas Jones, who held the last term of Crown court in White Plains, prior to the adoption of the Declaration of Independence, which ended the functioning of all Crown courts in New York, left manuscript[103] in which he asserts that justice William Smith, who later deserted the republican cause and became Chief Justice of Lower Canada, was the main author of the New York Constitution. Again, John Adams, on the authority of James Duane, said that Jay based the Constitution on information contained in a letter from Adams to George Wythe, prescribing a system of constitutional government for a state. There is evidence that Gouverneur Morris, a member of the Constitutional Committee, differed emphatically from Jay as to some phases of the proposed Constitution. So, it hardly seems that John Jay can have been the sole author of our original system of State Government.

As a matter of fact, there was nothing notably original in the plan of government submitted by the committee to the convention at Kingston on March 12, 1777. Fortunately, demagogic impulses were not evident. The passions that war had stirred had not blinded the eyes of the framers of our Constitution to the good that was in the British Constitution. The passionate impulses that are so apt to come to men of fervent patriotism at such times did not impel them to overthrow all the old institutions. Jay and his associates had no American State Constitutions to aid them, and they did not pose as doctrinaires. With prudent wisdom they recognized that the Revolution was waged against the Crown and the distant Parliament in which they had had no voice, and not against the common law, nor the familiar institutions which, if in the keeping of the people, would serve them just as well in their new status as republican citizens as they would have as Crown colonists. The Constitution provided for a government having three coordinate departments, the legislative, the executive, and the judicial, principles of government distinctly Anglo-Saxon. The legislative houses, Assembly and Senate, followed the plan of the English houses, the Commons and the Lords; and there was even greater similarity in the judicial system. Fowler writes: "The transition of New York from the provincial condition to that of an independent state developed but few changes in the judicial establishment; it affected mainly the theory of the source from which the judicial power emanated." John Adams, in a reply to Mr. Turgot's strictures on the resemblance of the American Constitutions to the English model, explains, in substance, that the colonial plans of government were retained after the Revolution "because they were founded in nature and reason, and the people were attached to their familiar features."

The first section of the Constitution was debated in the convention on March 13, 1777. It gave the key to the

whole instrument in the declaration "that no authority shall, on any pretense whatever, be exercised over the people, or members of this State, but such as shall be derived from and granted by them." Therein lay the difference between Crown and State administration of the same institutions. The sentiment seemed to suit the representatives of the people; so well, indeed, that the legislators, after adoption of the Constitution on April *20,* 1777, did not seem to think it necessary to even consult the people as to the Constitution, the provisions of government under which they must henceforth live. The Constitution was never submitted to the people, nor ratified by them. It was merely adopted by the convention, which ordained that it should be the Constitution of the State. New York State was not alone in such irregular procedure. With the exception of the Massachusetts Constitution, all State Constitutions of ex-colonies of Britain in America came into force in much the same way as that of New York. While all legislators were apparently sincere in their affirmation of profound belief in the inalienable rights of the individual, there were few, throughout America, who were not convinced that the State Government established should so guard the rights of the *responsible* citizens-in other words, the landowners-that the *irresponsible* factions-e. g., the poor people-could not become disturbing elements. In this again they followed colonial precedents, for colonial government was basically government by the landowners. Indeed, in those times, the voice of the poor people was hardly heard; the franchise was not universal, and only men of estate were able to voice their grievances in the legislatures. This leads one to the thought that the cry of the people against the Crown was in reality the wail of the landowning class and other men of taxable means against the extortions of the Government. As a matter of fact, "in none of the first Constitutions of the original thirteen States did the people (if by the people those of no landed estate are meant) receive any consideration in either branch of the Legislature." John Jay's maxim, that those who owned the country ought to govern it, underlay every American Constitution. None but freeholders could vote for Senators. Despite the preamble of most constitutions, manhood suffrage was not to be found in any State; a property qualification was almost universal. It was not until about the beginning of Jefferson's administration that the States began to broaden the suffrage; and not until 1840 did the words *People of the United States* signify that the sovereignty was in the hands of the male majority.

Such a principle of government was not as inconsistent with democracy as, at first thought, it seems. Unlike the landed classes of other countries, American estate owners were mainly of the people. There were some aristocrats, and some immense landed estates-more in the Southern than in the Northern States-but in some of the States freeholders constituted a majority of the voters. In New York State, for instance, the census returns of 1795 showed 36,338 freeholders out of a total population of 60,017 voters. Outside they principal cities and centers of population land was cheap, and although the homesteader automatically came into the land-owning class, he did not necessarily at the same time become an aristocrat. Land-owning, therefore, had, and has, a different significance in America*;* and although government by land-owners was undoubtedly a class government, it was not inconsistent with the democracy upon which the republic was supposed to have been based. Of course, New York was one of the States in which change came rapidly, the growth of the "future London of America" soon startling those who advocated universal suffrage as well as those who opposed it. New York City had 21,000 inhabitants in 1773*;* it had 60,000 in 1801; 76,000 in 1806; and in 1820 it had 123,000. In 1821, when a new State Constitution was being debated, the proposition that all white men of major age be given the elective franchise received overwhelming support, notwithstanding that Chancellor Kent, who had a strong following, was convinced that a property qualification of at least $250, freehold, for all voters for State Senators should be retained. Justice Ambrose Spencer's argument, in 1821, against universal suffrage was that with it New York City would govern the State in less than a century. She could, undoubtedly, if other ways of counterbalancing elective preponderance had not been found during the century which saw New York City increase in population from 123,000 in 1820 to 5,620,048 in 1920. (New York State in 1920 had *10,385,227* inhabitants). Federal statistics show that while the land-owning (home-owning) class in the United States in 1920 embraced *45.6* of the occupiers, the same class in New York State then totalled to only 30.7 of the occupiers. As a matter of fact, there were 30.2 persons to a dwelling house in Manhattan in 1920, and about only one in fifty of the heads of families would be entitled to the franchise, as a landowner, if the Constitution of 1777 were still in force. The case was different in the first years of the State period, and the property qualification of elective suffrage was not then the grotesque inconsistency that such a voting restriction would now be in a democratic country. So one ought not to consider the constitution makers as quixotic in deciding to embody in the State Constitution the famous Thirty-ninth Article of Magna Charta: "No member of this State

shall be disfranchised or deprived of any rights or privileges secured to subjects of the State by this Constitution, unless by the law of the land or the judgment of his peers."

The proposed State Constitution was debated in the convention until April 20, 1777, when it was adopted, and became the organic law of the State. Immediately thereafter a committee was formed to report a plan of establishing such a government. Probably the section of the Constitution destined to exercise the most potent influence in the political history of the State was that which provided for a Council of Appointment. This body was to consist of the Governor and four Senators, in whom was to be lodged, with few exceptions, virtually the whole power of appointment in the State. The power of removal also rested with them, and as a majority of the members constituted a quorum, nearly all State officials were to hold their offices by the pleasure of the Governor and two Senators. Electors of certain qualifications could vote for Assemblymen, and a more restricted body of electors could seat Senators and the Governor, but with these exceptions nearly all State offices, civil and military, were filled by appointment. Even mayors of cities were to take office by the will of the Council of Appointment. This all-powerful body, however, could not come into existence until an election of Assembly and Senate had been held; therefore, the convention, by an ordinance dated May 8, '777, appointed a Council of Safety, and invested it with all powers necessary for the administration until a meeting of the Legislature could be held.

The "distribution of justice" was one of the most urgent matters of business that came before the Council of Safety; and, as the Constitution had retained the provincial Supreme and County Court systems, the Council of Safety designated certain persons to fill the judicial offices temporarily. John Jay was appointed Chief Justice, *pro tempore*, and two associate justices were named (Robert Yates and John Sloss Hobart) to complete the Supreme Court bench. Robert R. Livingston was appointed Chancellor, and Egbert Benson was named attorney-general. These appointments were all eventually confirmed by the Council of Appointment.

Under the supervision of the Council of Safety, elections were held, and the returns showed that George Clinton had been elected to the Governorship. The twenty-four Senators began their first session on September 9, 1777, at Kingston, the seventy members of the Assembly beginning their initial session on September i The legislators elected a Council of Appointment, so as to legalize the temporary appointments made by the Council of Safety, but no laws were passed in the 1777 session, the military situation at that time being so grave and urgent as to call for most of their thought and persons. The first statute of the State of New York bears date of February 6, 1778. It was the act of ratification of "the proposed Articles of Confederation and perpetual Union between the United States of America," the New York delegates to the Continental Congress being authorized to sign the Articles-with the reservation, however, that ratification and signature would not become valid until the last of the thirteen States subscribed to the Articles. The thirteenth was Maryland, and she did not sign the Andes until March 1, 1781*;* therefore,. until that time New York State's ratification had no force.

The State Constitution of 1777, except as modified in 1801, remained in force for forty-four years. Sections 24, 25, 27, 28, 32, 33, 34, 35 relate to the establishment of courts within the State. In the case of the jurists the Council of Appointment had not absolute power, for the Constitution itself specified the term of office. After appointment by the Council the Supreme Court justices were to hold office, during good behavior, or until they should reach the age of sixty years. The judiciary thus was much more independent of political control than the incumbents of other State offices, though, as the years passed the Supreme Court justices became entangled in political affairs-to their detriment-through membership of the Council of Revision, which, for a while, exercised a veto on legislation. However, the "good behavior" tenure brought to, or held on, the bench some very eminent jurists, whose opinions had marked influence upon the jurisprudence of the other States.

The first term of the Supreme Court of New York State was opened at Kingston in September, 1777. That it was looked upon as merely continuing the provincial court is indicated by that fact that the minutes were entered in the old volume in which the records of the Crown court had been entered. Between the minutes of the session of April, 1776, under Crown auspices, and the session of September, 1777, under State judges, are a few blank pages; but nothing was written upon these pages to record the important change of status; and the only unusual

entry in the minutes of Jay's State court that shows that any reorganization of particular significance that had occurred is in the change of title on the docket of the first case. *Dominus Rex* disappears, the party plaintiff being *The People of the State of New York.* There was great significance in some of the remarks of Chief Justice Jay. He opened the session on September 9, and the first charge made to any Grand Jury in the State, that which he delivered in that session to the Grand Inquest of the County of Ulster, a body of twenty-two of the most respectable citizens of that county, was "a chaste and beautiful piece of rhetoric," redolent of "liberty, justice and equality before the law." The Chief Justice took the opportunity of pointing to "the wonderful fact in human affairs": that "the Americans were the first people whom heaven had favored with an opportunity of deliberating upon and choosing the forms of government under which they should henceforth live."

Judicial administration in New York State during the Revolution depended mainly upon military exigencies. In regions of British control the Crown courts functioned to some extent, perhaps*;* and the fact that Jay held court in the county of Ulster in September, cannot be taken to mean that the county judicial system of the State was organized so early in all counties that were not in British occupation. Some were too near the theatre of war and others were still in the wilderness. Ulster County, in which Kingston, the temporary capital was, would naturally be the first to organize its judicial establishment.[104] It is doubtful whether any of the courts functioned with regularity in those uncertain times. Kingston itself was destroyed by the British on October 16, 1777, although on the very next day a whole British army surrendered at Saratoga.

The Legislature convened in Poughkeepsie on January *5,* 1778, in a tavern, or what was a tavern. Chapter XII of the State Laws, on March 16 provided more fully for the organization of the State departments, John Jay being confirmed as Chief Justice of the Supreme Court, and Robert R. Livingston as Chancellor of the State. On April 4, 1778, judicial stipends were fixed at rates which would at once brush away the thought that cupidity could be an impulse to ambition for judicial station in those days. The Chief Justice was to receive a salary of £300 per annum, equal to *$750* New York currency. The associate justices were to have £200 ($500). In addition, the Supreme Court justices were to be allowed forty shillings each for each day of attendance on the Oyer and Terminer, and their travel fees. These were slender salaries, deplorably inadequate in wartime. Continental currency soon sank to abysmal depths, and New York currency, like that of every other State, deprecated deplorably. The New York Legislature need hardly be deemed to have been in an especially generous frame of mind when, in October, 1779, they approved a measure which awarded to Associate Justices Yates and Hobart "for extraordinary duties and services in . . . office, from the 5th of July last, and in consideration of the advanced prices of necessaries of life, the sum of $1,000" each.

As a matter of fact, these puisne judges had been carrying on judicial affairs of the State without the assistance of the Chief Justice for some time. Jay had entered the National Congress in December, 1778, and had been president of that body*;* and, as, on September *27,* 1779, he had accepted appointment as United States Ambassador to the Spanish Court, and had thus drifted even farther from possibility of return to State judicial office, the New York appointing body in October, filled the vacant seat on the bench. The Chief Justiceship did not go to one of the puisne justices, Yates or Hobart. John Morin Scott, who had been an aspirant for the office when Jay was appointed in 1777 and had refused the puisne judgeship, afterwards offered to and accepted by John Sloss Hobart, was either not now offered Jay's mantle or again refused judicial office. The successor of Jay, as Chief Justice, was Robert Morris. He was appointed in October, 1779, probably at the time the associate justices were granted increased stipends.

Chancellor Robert R. Livingston was originally granted a salary of £300 per annum. It was increased to £400 by Chapter 34 of the Laws of 1779, which also made the Chief Justice's salary £400, and that of the puisne judges œ3oo.[105] The matter of salary can hardly have caused much perturbation to the Chancellor, who was the son of the wealthiest landowner in New York. Indeed, as Chancellor, Robert R. Livingston seems to have had, for some years, what would nowadays be deemed a sinecure. The Court of Chancery was recognized as existent in 1777, when the Constitution was adopted, and Livingston was made Chancellor. The court was formally organized, or reorganized, in May, 1778, by the Convention of Representatives of the State of New York; but it is doubtful whether any chancery business was before the court until 1785. Judge Charles H. Truax investigated this phase

of judicial history closely, and his researches discovered no chancery minutes for the period between January 9, 1776, and June, 1785. The last Crown book of chancery minutes he found was for the period from April 5, 1770, to January 9, 1776, the last entry in this book being an application made before "His Excellency William Tryon, Esq., Captain-General and Governor-in-Chief in and over the Province of New York and the Territory depending thereon in America, Chancellor and Vice-Admiral of the same," for the appointment of a guardian for two infants, on the 9th day of January, 1776. And the first State book of the Court of Chancery was for four years beginning in June, 1785. There was little difference between the business of the provincial and State Courts of Chancery apparently, as far as can be judged by the two minute books under reference; and, as Judge Truax remarked, "most of it related to infants and lunatics." Certainly, there was not enough to fill the time of such a learned publicist as was our first Chancellor, of whom Thomas Jefferson wrote: "Robert R. Livingston is in every sense of the word a wise, good, and great man, one of the ablest of our American statesmen. Nothing that he writes or does seems to cost him any effort, yet there is beauty, power, and practicability in all his intellectual productions. It is not a power that awes; it is gentle, unpretending, but resistless." Jefferson, no doubt, referred more to Chancellor Livingston's national activities. Livingston was Chancellor of New York until 1801, but as the years passed, from 1777 until 1801, when he resigned the Chancellorship, he gave more and more of his time to national responsibilities. He was delegate from New York to the Continental Congress from 1779 to 1781, and for the next two years was national Secretary of Foreign Affairs. So it would seem that his duties in the Chancellory did not press heavily upon him. Mr. L. B. Proctor contributed an article to the "Albany Law Journal" in 1892, under the title: "First Trial Term in the Old Court of Chancery of the State of New York." He was apparently under the impression that this was the opening term, but, as has been shown, there is record of an earlier term of the State Court of Chancery than that which was opened in Albany *Stadt Huys*, on July 25, 1786, by Chancellor Livingston, on July 25, 1786.[106]

The judicial department of the State cannot be deemed to have come into general operation until after the signing of peace. The problem of judicial administration in the southern counties, under the sway of the British military forces, was to some extent met by the passing of an act, in 1779, creating a council or committee for the Southern District of the State. The committee, composed of the Governor, the members of Assembly and Senate, the Chancellor, the three Supreme Court justices, the Attorney-General and the judges appointed to the county courts of the Southern District, was vested with broad governmental authority, having power, in any seven including the Governor, to act for sixty days after convening in that part of the State. It is doubtful, however, whether the State courts functioned any more than Crown courts in that region. Of the Crown judges who were in office at the outbreaking of hostilities in 1775, Livingston joined the revolutionary forces; the other judges, Horsmanden, the Chief Justice, and Thomas Jones and George D. Ludlow, the puisne judges of the Supreme Court, tried to administer their offices, but Jones and Ludlow retired to their farms on Long Island in 1776. Horsmanden remained in New York City, and held court until his death, in 1778, after which the administration of judicial affairs of the Crown were entrusted solely to Justice Ludlow.[107] But, although it is known that he was the principal judge of the Crown court during the war, little regarding judicial proceedings of the last years of Crown occupation is positively known, for the Crown records were carried away by Loyalists when the British forces evacuated the territory. After the evacuation, however, the State Council, or Committee, for the Southern District, was organized, or reorganized, in New York City, in 1783, and continued in session until the convening of the Legislature.

It was then possible to organize more thoroughly the judicial establishment of the State. The first session of the Supreme Court in ibencher and Terminer banch, after the close of the war, was held in New York City on May 14, 1784. James Duane, who was the first State mayor of New York City, was commissioned, with Justice Hobart, to hold this term of Oyer and Terminer; and Duane had the privilege of delivering the charge to the Grand Jury.

An important section of the Judiciary Article of the Constitution of 1777 remained dormant during the war; but when the political horizon was less hazy, it was decided to bring into being an independent appellate tribunal which would have power to review even Supreme Court decisions. Therefore, the Legislature, on November 23, 1784, passed an act which created the Court for the Trial of Impeachments and the Correction of Errors, and

provided that such a court of ultimate judicial resort-which tribunal in reality was not an innovation, a court of somewhat like name and purpose having functioned during the provincial period- should hold sessions concurrently with legislative sittings, and at such other times and places as might be ordered. In its two-fold duties, the Court for the Trial of Impeachments and' the Correction of Errors was an unwieldy body, the largest tribunal in the history of New York, excepting perhaps the original Court of Assizes. In the operation of the State Court of Errors, the tribunal was of such doubtful judicial value that it is somewhat surprising that it should have continued to function until 1847.

Organized in colonial imitation of the English House of Lords, the New York Court of Errors, by which abbreviated title the highest State court came to be known, was so constituted as to embrace the higher grades of judicial and governmental personnel. The Lieutenant-Governor, as president of the Senate, was *ex officio* Presiding Judge of the new court. The other members were also of *ex officio* status, every Senator having a seat, and every Supreme Court justice, also the Chancellor of the State. The Chancellor had no vote in the determination of appeals from his decrees, neither had the Supreme Court justices in that of writs of error to their court; but they might, and did, deliver opinions or arguments in support of their judgments under review. The Senators were not all lay members, but the majority probably were men of no legal training, recognition of which incompetency, perhaps, caused them to hesitate to give opinions on legal points, for some years. As the years passed, however, and as the lay members gained more legal acumen or more confidence in their own judicial capability, Senatorial opinions[108] became more frequent. Over the same period, opinions by the professional members of the Court of Errors-the Chancellor and the Supreme Court justices-became fewer, though the reason for the latter was different, their own courts-Chancery and Supreme-becoming busier. Some grotesque situations arose, some inconsistent findings resulted, in consequence of the growing tendency of lay Senators to voice judicial opinions.

This amateur court, by its very constitution, necessarily opened itself to criticism. With the exception of the Court of Appeals and Errors of New Jersey, there was no other high court in the United States like that of New York, composed in part of persons who were not lawyers. Mr. Austin Abbott well expressed the vital objections to which such courts are open, when he said: "An unprejudiced observer who watches the course of adjudications in such courts, or studies their workings as manifested in the record 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 judges of the Supreme Court, can have little doubt that while 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."

This flaw in the judicial system was not at once seen, and when it did become evident, there were still many who were convinced that it was not a flaw. Some of the Senators were lawyers, and some even of these professional men praised the lay element in the constitution of the tribunal of ultimate judicial resort. They argued that even if the court were entirely composed of laymen, it could not have been more uncertain and inharmonious, as to what the law is, than was shown by other courts composed only of lawyers. Moreover they cited important instances in which this hybrid court was right and the trained judges wrong. The divergence of opinion was just as wide, the advocates of each side were just as positive in 1846, when the court was abolished, as forty or fifty years earlier.

Unanimity could hardly be expected in a court so numerous. Its possible membership was thirty-seven. Usually, decisions were made by about twenty members; the largest on record, probably, was twenty-nine. Unanimity, as a matter of fact, was rare. There were many affirmances, many reversals, both of the Chancellor and of the Supreme Court; indeed, so many as to cease to be startling, except to the overruled jurists themselves. Some of the affirmances showed an equal division, and in a few instances the president would have to give his casting vote. In these days of "judge-made law," in these times when the jurist has a lifetime of legal experience to reinforce his innate sense of right and wrong, a percentage of reversals such as obtained in those days of

reviewing by the hybrid Court of Errors would be considered appalling. Chancellor Walworth was reversed in thirty out of ninety appeals. The percentage of reversals of Supreme Court decisions was even greater. The exasperation of the jurists, many of whom were eminent as jurists and had had wide and valuable experience as lawyers, was all the more maddening when they realized how the reversals were sometimes obtained. Lobbying was not infrequently resorted to by interested parties, the Senator-members of the Court of Errors being more accessible to litigants than could ever be conceived as remotely possible in another court of more judicial, or less political, composition. The ordinary person did not feel that the crime was greater to lobby for a judicial decree than for a legislative bill. Moreover, there was much more room for the exercise of personal favoritism and political preference in the decisions of this quasi-political tribunal than in a court of smaller size composed exclusively of lawyers. Among the Supreme Court justices overruled were such eminent men as Spencer, Savage, Cowen, Nelson, Bronson and Beardsley. They were naturally sensitive that their findings should be brought into question "by a score of Senators, none of whom had ever sat on a bench, and some of whom were laymen."

The bitterness continued, and in the final years of the Court of Errors the parties were more emphatic in their criticisms. Justice Bronson, in 1840, charged that the Court of Errors failed even to abide by its own decisions. He further pointed out that "some members of that court do not feel bound to decide *according to the rules of law,* but go according to their own sense of what is right." Such a court, which claimed larger license in disposing of questions than other courts exercised, is "entitled to much less weight than the judgments of those courts which consider themselves bound by legal adjudications"; and where, as in the instance Justice Bronson cited, "the court has professedly departed from the whole course of decisions, the judgment is entitled to no weight at all." Of course there were some who thought that the fault was with the jurists. Senator Hopkins lamented that it was so "difficult even for those distinguished for their legal attainments, acuteness of intellect, and the purity of their intentions, to free themselves from the influence of early opinions" and permit "to be brought into the court of last resort the plain good sense and unbiased sound judgment of the laity to mingle with the latent and legal erudition of the profession, who, nevertheless, may be liable to bring with them to the bench the errors of prejudged opinions formed at the bar." There was some logic in this view, and the argument for the Court of Errors was strengthened when it was further pointed out that even the Supreme Court had not "always followed its own decisions."

The discussion at this time, however, disclosed one very surprising and serious flaw in the operation of this court; *the members of the Court of Errors never met for consultation or deliberation.* Brown describes the judicial procedure: "Each member separately and apart examines the case, and prepares for its decision. The court then comes together; the opinions of the members are delivered; and the court then unites in a general conclusion, either of affirmance or reversal of the judgment or decree reviewed. For this conclusion, and for this only, is the court as such responsible, unless indeed, which is very rarely the case, the court proceed by resolution to declare the grounds upon which that general conclusion rests. Different minds arrive at this conclusion by different processes of reasoning; but no member is answerable either for the reasons or the language of any other member." By such a process, it would be difficult to ascertain the real reason for a decision, nor could any definite rule be deduced from the decision. "In short," writes Brown, "it is little better than a town-clerk's record of a vote at town-meeting."

Such a court called for reorganization long before it was done. Litigants, whose causes had passed through the County or Supreme Courts, and in the latter had been decided according to the law by experienced men of the law, would naturally protest against a judicial system by which their legal rights could. be swept away by the chance vote of a political faction-by Senators who, in the Court of Errors, were not accountable for their opinions, and who need not state their reasons for voting-if they indeed had any reasons other than political. Of course there were some very able Senators, and in the names given of the Senator-members who most frequently delivered written opinions will be noticed those of some of the leading lawyers of their time. But there were very many Senators who did not give written opinions, but whose votes were just as weighty. One is, therefore, not surprised that, in 1848, after the Court of Errors had been abolished, and the Court of Chancery merged in the reorganized Supreme Court, "the Bar of the City of New York met and passed resolutions highly complimentary to the outgoing Chancellor and Judges, but no one had anything to say of the Senators, nor of the Court of

'Errors." The most useful purpose served by this hybrid court was the relaxation of the ancient strictness and inconvenient technicality of the Supreme Court in some questions of importance.

The sessions of the Court of Errors were held in the Senate chamber at Albany for many years after 1784, but eventually the court became itinerant, sitting in New York, Saratoga, Rochester, Buffalo. An interesting session was that of June-July, *1825,* held in New York City Flail, General Lafayette being received in this "marble hall" which had been built on a common waste north of the city, and had only a marble face, the north wall of City Hall being of brown stone instead of marble "because no one expected the city ever to grow north of it."

Let us now review the history of the Supreme Court over the same period, 1784-1847. As has already been stated, the first session of the Supreme Court after the close of the Revolution was held in New York City in May, 1784. In 1785 the terms of the Supreme Court for the different counties were settled by an act of the Legislature. Two terms were to be held in ' New York City and two in Albany; the court was to sit in New York City in January and April, and at Albany in July and October. The April and October terms were to continue for three weeks, and the others for two. New York City was apparently recognized as the logical State headquarters of the court, for the office of the clerk was to be there, and in it all court papers were to be filed, the deputy clerk at Albany forwarding the papers of' that office to New York every half-year. In '797 Albany acquired equal rank with New York, having a clerk of its own and right to remove from the New York office such papers as the Albany clerk might deem proper. In 1807, another office was opened at Utica, under its own clerk. The clerks of court were requested to furnish each other, at every term, with a transcript of the docket of all judgments in their office. By the act of April 19, 1786, it was decided that issues joined should be tried in the county in which the land was, or the cause of the action arose, unless the court should order the trial at the bar of the court. This did not apply to transitory actions, and the court could, notwithstanding, order trials in other counties when proper or necessary. By the act, one or more of the justices of the Supreme Court, during the periods in which the New York or Albany courts were not in session, were required to hold circuit court in each of the counties of the State. All proceedings in the circuit courts were to be returned to the Supreme Court and there recorded and judgment given, according to law. Tn 1789, the Legislature enacted that all issues triable by a jury might be tried either at the Circuit Court or at the bar of the Supreme Court, without any order for the purpose. In 1797 an order became necessary. On February 12, 1796, the office of Clerk of the Circuit was abolished, the duties devolving upon the county clerks. On February io, 1797, the Legislature passed an act directing the court to designate, at its April term, one of their number to hold Circuit Court in the western, one in the eastern, one in the middle, and one in the southern districts, the designated justice passing from county to county, however inaccessible, and holding court in each. This was not so arduous at that time as circuit duties had been when the Supreme Court consisted of three judges; the bench was increased to four in 1792, with the appointment of Morgan Lewis, and to five in 1794, when Egbert Benson was appointed.

By act passed February *22,* 1788, Supreme Court justices, while on circuit, were to hold terms of Oyer and Terminer in each county, two or more of the judges of the Courts of Common Pleas sitting in Oyer and Terminer with the justice on circuit. The associate-judges of the Supreme Court justice in New York City and Albany were the mayor, recorder and aldermen*;* but local magistrates could not sit in Oyer and Terminer of any other city or county than their own. The court, however, could direct its process into any city or county. Continuing a custom of provincial times, the Governor had power to issue commissions of Oyer and Terminer when he deemed it advisable*;* the commission issued would name the justice designated, and such others as the Governor and the Council of Appointment might select. Once in each year the records and processes were to be sent to the exchequer to remain of record.

The system of circuit courts above described remained substantially the same until 1823, when the Constitution of 1821 became effective; and the Supreme Court remained at a strength of one chief-justice and four associate-justices until that time also. All were given commissions of permanent tenure, *i. e., quamdiu bene se gesserint;* at least until they should reach the retiring age of sixty years, regarding which one writer[109] wrote, having in mind the case of James Kent: "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 the judges out of office at the age of sixty, has atoned for

all the injustice it wrought, by giving us Kent's Commentaries."

It has been said that the formative history of the Supreme Court did not definitely begin until 1798, when James Kent became one of the puisne judges. This may not have been because of the outstanding excellence of Kent as a jurist. Another important factor entered the judiciary with him, or soon afterwards through his initiative. There probably were capable judges before Kent. There undoubtedly were, but the opinions of these earlier jurists were not spread or perpetuated, like those of Kent and later justices, for the simple reason that the reporter goes no further back than Kent's time in Supreme Court records. The excellent or indifferent work of the judges who went before Kent could, therefore, not be compared. "An official reporter is as essential to the usefulness and reputation of a judge as a poet is to a hero." George Gaines, the first reporter of the Supreme Court, was appointed in 1804. William Johnson succeeded him, and in the preface of the latter's "Cases" it is stated that "sufficient materials could not be obtained for an authentic and satisfactory account of the judicial decisions prior to January, 1799." Kent explains the reason. In a letter written by Kent to his friend, Thomas Washington, in 1828, the Great Chancellor wrote: "When I came to the bench there were no reports or State precedents. The opinions of 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 first 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." Undoubtedly Kent's reputation was enhanced as his written opinions spread; and he became even more favorably known as chancellor. Wirt, in recommending Kent for appointment as a justice of the United States Supreme Court, in 1823, asserted that "Kent knew more law than most of the other judges of the United States put together"; that Kent held "so lofty a stand everywhere for almost matchless intellect and learning, as well as for spotless purity and high-minded honor and patriotism" that he, Wirt, was convinced the Nation would applaud the appointment of Kent to the Federal Court. Yet, the justices of the New York Supreme Court who served the State before 1798 may be deemed to have possessed legal knowledge and judicial ability quite equal to the need of their time; indeed, the Chief-Justices—Jay, Morris, Yates and Lansing-were all lawyers of much experience, and the Associate-Justices, with the single exception of Hobart, were all bred to the law. Egbert Benson, the first Attorney-General and an Associate-Justice for many years from 1794, was one of the most learned lawyers of his day. He drew the first rules of the State Supreme Court, these being adopted in 1796. Of Benson, Kent said: "He did more to reform the practice of the court than any member before or after." Duer said that, "as a master of special pleading Benson was hardly surpassed by Chief Justice Saunders himself." Still, it seems that the true formative period of the Supreme Court was from 1798 to 1823, under the lead of Kent, Spencer and Thompson. What judicial opinions anterior to that time were made known to the public, were promulgated in occasional private pamphlets; but when Kent, with his written opinions, began to give us precedents, our Bench and Bar, with the aid of the reporter, "began to walk independently," of English law. Under the guidance of Kent, Thompson, and Spencer (1798-1822), the Supreme Court probably reached its highest state of efficiency-at least, as it functioned under the original constitution. Indeed, it has been stated that the judicial establishment of New York never reached greater efficiency than during the first twenty years of last century. Although still substantially the same tribunal as that which functioned during the provincial period, the State court gradually gained a distinctive place for itself. Many legal principles were settled, and "fluctuating theories gave place to determinate and known rules. of law," other States as well as New York being aided by the work of Reporters Caines and Johnson, who put into print, for study by jurists and lawyers of other States, as well as New York, a famous series of leading cases. The opinions of Kent and his successors were eagerly studied by the legal profession of other States; the fame of New York jurisprudence was Nationwide, and did not pass unnoticed even in England. This was the golden period of New York law. Yet, these eminent jurists were not permitted to bask in an Indian summer of adulation and flattery; it is doubtful whether such openly-expressed condemnation as was showered upon them has had to be borne by the jurists of any other period. Not without reason, either, although the criticized judges were none the less eminent men of law. The criticism was not of their judicial acts. The truth is that all jurists under our original State Constitution were somewhat closely allied-too closely for their own good-with the legislative department of government. A flaw of the Constitution of 1777, it seems, was the association of judicial and executive functions in the same persons. Kent, Thompson,

and Spencer were not the first benchers of New York's higher courts to come under the lash of public criticism; John Jay was at times treated with scant courtesy by those who differed from him as to some phase of public affairs. Fault could not be found with his judicial record, but when he entered into political affairs, he had to bear the brunt of partisan feeling, which, as a rule, is more emphatic than polite. For instance, in 1795 the venerable John Rutledge, who was to succeed John Jay as Chief Justice of the United States Supreme Court, could not hold back his angry thoughts; he said that Jay was either a fool or a knave. It was not a judicial indiscretion by Jay that prompted this scathing thought, but his failure to secure from England all that his country hoped he would, in the difficult treaty negotiations of 1794-95. The world could afford to drop this destructive sprag, though it never will. Flagellation is the penalty of public service. He who would enter public life must leave self-esteem at home if he would succeed, for he at once becomes the target of partisan strife, which is blind to all but faults. Kent and Spencer, in particular, were held up to scorn; politicians of New York and other States in the heat of partisan anger or political expediency, gave utterance to some painfully shameful expletives regarding them. Kent was compared "to the poisonous upas tree of Java, which destroyed all that came beneath its shade." Of Spencer, Clay said: " . . . . if Spencer be confirmed (as Justice of the United States Supreme Court) he will have run a short career of more profligate conduct and good luck than any man I recollect." This opinion was formed, or prompted, wholly by Spencer's political activities, for none doubted his legal ability to fill the judicial office; indeed, Spencer was told "that he might have been a Holt or a Mansfield if he had kept away from the political arena."

The original Constitution protected ministers of religion by excluding them from public office, so that no foreign element might enter into their life, to jeopardize their mission of saving souls; but the constitution makers did not seem to think that the judiciary would need protection by like isolation. They were rather of the conviction that the men of law should be the pillars of government. So the justices of the State Supreme Court came to have political responsibilities to their detriment, it seems. Fowler writes: " . . . these gentlemen were doubtless 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," explains Fowler, "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 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 Council of Revision had been especially unpopular during the War of 1812, for then the will of the two Houses of the New York Legislature, which sought to uphold the arm of the President and congress, was negatived, because the Chancellor and justices of the Supreme Court were Federalists and as such were opposed to the war, and by their power in the Council of Revision were able to veto the acts of the Legislature. This was not forgotten, and, as the years passed, public opinion with increasing emphasis demanded the abolition of the Council. In 1820 the Legislature adopted a bill calling a convention, and providing for the election of delegates to consider constitutional amendment. Particularly an amendment which would abolish both the Council of Appointment and the Council of Revision was sought; and public opinion was even more condemnatory of the power of the judiciary, when the Council of Revision vetoed the bill on the ground that, as Chancellor Kent stated in his written opinion "a convention could not constitutionally be called until the people had first decided that it should be held, and that the bill was also defective in not directing the separate submission to the people of all amendments which the convention might propose." Of course, few considered that the written opinion stated the true reason for the action of the Council of Revision. Still, the veto merely set the convention movement back for a season. In March, 1821, another act recommending a convention was passed, and in due course delegates were elected, and convened; the outcome being the abolition of the Council of Revision, which had been functioning contrary to well-recognized principles of government. The Council of Appointment, which had been an even worse offender, was also abolished. What an enormous hold this latter body had upon the State may be imagined from statistics presented to the Convention of 1821. It appears that 8,287 military and 6,663 civil officers[110] held their commissions subject to the will of the Council of Appointment. As to the mode of

appointment, Governor Clinton once said: "If the ingenuity of man had been exercised 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 convention, to all intents, transferred the power of the two councils to the Governor, in whom was vested the power of veto, also that of appointment, subject to certain reservations of power to the Senate.

The Judiciary Article of the Constitution was substantially amended. The structure of the Supreme Court was altered, by increasing the number of judges, and changing their duties to some extent. The new Constitution divided the State into eight Senatorial districts, and as many coextensive judicial districts, every one of which was to have a circuit judge, with power to hold the District Court of Oyer and Terminer, and at other times to perform the duties of a Supreme Court justice at chambers. These circuit judges were in reality of the Supreme Court establishment; yet they came to be looked upon as different, or rather, in their respective districts, as superseding the Supreme Court, which henceforth was to consist of one Chief Justice and two associate justices. The only connection the latter was to have with the Circuit Courts was in cases of appeal to them from the decisions of the circuit judges. The Supreme Court justices were entirely relieved of circuit duty, which change-al their political enemies were glad to think-"deprived (them) of all the political advantages conferred on them . . . by an official tout in the name and under the authority of the majesty of the law." The Supreme Court was now permanently seated, the new system in reality adding to their importance while reducing their labor. The three Supreme Court justices had appellate jurisdiction over all the judgments of inferior courts, including circuit courts, although, of course, Supreme Court decisions might, under certain circumstances, be appealed to the Court of Errors.

Equity jurisdiction was taken from the Supreme Court justices by the Constitution of 1821, and vested in the circuit judges. Accordingly, an act was passed, in 1823, creating equity courts in the several circuits. The system was somewhat unsatisfactory, however, and these distinct equity courts were abolished in a short time. General equity jurisdiction was given to the Chancellor, while on the circuit judges were conferred equity powers, as vice-chancellors. In 1831, the equity business of the city of New York had grown so voluminous that the circuit judge could not handle it; so a separate vice-chancellor was appointed for that district. A like separation of circuit and equity duties was made in the Buffalo (Eighth) district in 1839. Frederick Whittlesey becoming vice-chancellor. No changes were made in the other districts, and therein the circuit judges continued to also act as vice-chancellors until the Court of Chancery itself was abolished by the Constitution of 1846.

Before passing on, reference must be made to another important change made by the Convention of 1821, in the organic law of the State. When the first Constitution was framed the English laws of criminal libel, which then became the law of the State, were extremely narrow, making it the province of the jury to ascertain whether the so-called libel had been published, and leaving the question of the fact of libel to the court Through the efforts of Erskine, Fox, and Pitt, the English law had been ameliorated in 1792. In the case of the People v. Croswell, in which the defendant was indicted for a libel upon Thomas Jefferson, President of the United States, two of the judges-Kent and Thompson-considered that the truth should be received in evidence, and that the jury should judge both of the facts and the law. This had been the attitude taken by Andrew Hamilton, in the famous Zenger case of 1735, and, as Kent showed in his learned opinion as to the Croswell case, it was in accord with common law rules observed before the days of the Star Chamber. Still, the opinions of Kent and Thompson balanced the contrary views of the only other Supreme Court justices of that time (Morgan Lewis and Brockholst Livingston); hence the defendant was not punished. In 1804, the Legislature passed an act, supporting Kent's opinion. Certain amendments were made to the bill by the Council of Revision, at the suggestion of William W. van Ness, who later became a justice of the Supreme Court; and the bill, as amended, became law in 1805. "This declared that on the trial of every indictment or information for libel, the jury should determine the law and the fact under the direction of the court in like manner as in other criminal cases, and should not be directed to find the defendant guilty merely on proof of publication, and that in every other such prosecution, the defendant might give the truth in evidence as a defense." The Convention of 1821 incorporated the substance of the statute into the organic law. It is worthy of remark, perhaps, that the Zenger case was one of the last in which Andrew Hamilton appeared; and the Croswell case was one of the last causes argued *in banc* by Alexander Hamilton. Regarding the latter's presentation of this case, Kent declared "that more able and eloquent argument was perhaps never

heard in court." In closing his opinion of this case Kent adopted as perfectly correct "the comprehensive and accurate definition of one of the counsel at the bar (Hamilton) that the liberty of the press consists in the right to publish, with impunity, truth with good motives and for justifiable ends, whether it respects government, magistracy, or individuals."

The Constitution of 1821 did not change the tenure of office of the higher judicial officers; the justices of the Supreme Court continued in office during good behavior until they reached the age of sixty years. The appointive system was still in effect, but the justices were removable by joint resolution of the Senate and Assembly, a concurrence of two-thirds of the latter and a majority of the Senate being necessary.

There was little need of removal of judges during the period of the second Constitution; indeed, great as was the reputation of the Supreme Court during the first twenty years of the nineteenth century, it is doubtful whether the State was blessed then with a Supreme Court of higher standard than that of the second Constitution, 1823-47. The Chief Justices during this period were Savage, Cowen, Beardsley, Jewett, Whittlesey and McKissock. Associate justices were Jacob Sunderland, William L. Marcy, Samuel Nelson, Greene C. Bronson, as well as, at some time, most of those who became Chief Justices. "It would be difficult to parallel these names for public virtue, profession, learning, and successful administration of the law, in the history of any community," writes Browne. "The name of Marcy is of national reputation . . . a man of the highest quality of native powers. Judge Nelson served his country on our State and Federal Supreme benches for half a century, a man of leonine strength and sagacity. The reputation of Judge Cowen is also a national possession. It is doubtful whether any other State judge, excepting Kent and Shaw, is so well and widely known throughout the country." His written works "stand upon the shelves of nearly every lawyer in the land-a mine of professional learning." 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," continues Browne. "Our Supreme Court, under these eminent men may be declared the finest fruit of the system of an appointive judiciary."[111]

New York State was rapidly growing; its population was rapidly changing in character; the conservative provincial families were being outnumbered by the thousands of immigrant families that debarked at New York and settled in different parts of the State, the change being most evident after the opening of the Erie Canal. These immigrants came mostly from monarchies; came to what they thought would be the land of democracy; but they found that the institutions of the new country were not very different from those of their native land. They wanted democratic standards to prevail; and, as they gained political strength, they demanded that the institutions of their adopted country be more in accord with democratic principles. This impulse was one of the underlying forces that influenced the people to sanction the holding of a convention in 1846, to revise the Constitution of the State. The people demanded, among other changes, the right to select the judges of their courts. They condemned the appointive system, contending "that the open strife of political canvass and elections was less to be dreaded than the secret intrigues of the Governor's council chamber"; that a "feeling of responsibility to the people was a better guarantee of fidelity in a judge than a sense of personal obligation to a single man."

The people objected also to the tenure of judicial office. While they saw the folly of dismissing an experienced and mentally vigorous jurist at the age of sixty years, they did not like to be committed to him for life, even with the "good behavior" proviso. They would prefer to have an opportunity of declaring, by means of the ballot, at stated times, their opinion of his service. In other words, they wanted to hold the reins of government a little oftener in their own hands. Singularly enough, this spirit of decentralization found its first expression in the State institutions in 1823, when the Circuit Courts distributed some of the former greatness of the Supreme Court among localized benches; yet this method of decentralization in the end proved unsatisfactory to the people, because of the disposition evidenced by litigants to review all their decisions before the Supreme Court *in banc*. So these changes were brought about and a new order came into effect on July I, 1847.

Footnotes

Footnote 93: "In the hall of the Court of Appeals at Albany, N. Y., in 1923.

Footnote 94: Irving Browne, in "Public Service of the State of New York," III, 41.

Footnote 95: Hon. Ed. M. Colie, in American Bar Assn., Jnl., December, 1924.

Footnote 96: Fowler's "Observations on the Particular Jurisprudence of New York"; see "Albany Law Journal," XXII, 489.

Footnote 97: *Ibid.*

Footnote 98: Willis Fletcher Johnson, in "Political and Governmental History of New York State (Smith 1922), Vol I, p. 46.

Footnote 99: Coll. N. Y. Hist., MSS. Rev. Papers, I, 552.

Footnote 100: Jnl. Gen. Assembly, N. Y., Feb. 11, 1818, p. 156.

Footnote 101: Johnson, in "Political and Governmental History of New York State" (Ray Smith, 1922), Vol. I, p. 46.

Footnote 102: *Ibid.*, I, 47.

Footnote 103: Jones' "History of New York During the Revolutionary Period"; New York Hist. Soc., 1879.

Footnote 104: The Convention on April 20, 1777, appointed Messrs. Robert R. Livingston, J. M. Scott, Morris, R. Yates, Jay and Hobart a committee "to prepare and report a plan for organizing and establishing the Government agreed to by the Convention." On May 8, 1777, this plan was adopted.

It appointed the higher judicial officers as stated above and County establishments as follows:

Albany-Volkert P. Doow, First Judge; Jacob Ten Eyck, Abraham Ten Broeck, Henry Bleeker, Walter Livingston and John H. Ten Eyck, Associate Judges.

Dutchess-Ephraim Paine, First Judge; Zephaniah Platt, and Anthony Hoffman, Associate Judges.

Westchester-Lewis Morris, First Judge; Stephen Ward and Joseph Strang, Associate Judges.

Ulster-Levi Pawling, First Judge; Dirck Wynkoop, Jr., Associate Judge.

Charlotte-William Duer, First Judge; John Williams and William Marsh, Associate Judges.

"No judges were appointed for the counties of Tryon, Orange, Curnberland, and Gloucester, but blanks were left in which the names of the judges for these counties could be inserted. No provision was made for the appointment of judges in the counties of New York, Kings, Queens, Suffolk, and Richmond, which counties were then in the possession of the British."-See McAdams' "History of Bench and Bar of New York," I, 103-104.

Footnote 105: In addition to their salary, the Chancellor and Justices were entitled to receive certain fees, which varied from time to time. As an instance of the fees received, the Act of April 18, *1785,* 15 quoted:

The Chancellor was entitled to receive for the seal of every common writ, three shillings*;* for exemplifications, twenty shillings; for every decree, *£2;* for every opinion or order, on a petition or motion, LI; for every order appointing a guardian, ten shillings.

The Master in Chancery was to receive three shillings for every summons; £1 for every report or certificate made pursuant to order*;* five shillings for every certificate or report made upon petition or motion, and for drawing every report, one shilling per sheet.

The Justices of the Supreme Court were to receive: for allowing a writ of error, or marking the roll that the writ had been allowed, five shillings; for signing every writ of privilege, *habeas corpus, procedendo, certiorari,* or prohibition, three shillings; for acknowledging a deed, four shillings*;* for licensing an attorney, ten shillings; taxing a bill of costs, six shillings; for every attorney, when admitted, ten shillings. The attending judges were also paid five shillings on the first motion in every cause except a criminal one, which money was divided between them.-See McAdams' "History of Bench and Bar of New York," I, 105-06.

Footnote 106: The interesting procedure is thus described by Mr. Proctor:

"Precisely at half-past nine in the morning, the City Hall bell announced the arrival of the hour for the courts to convene. According to the custom of the times, in opening the terms of courts, the Sergeant-at-Arms, the Sheriff of the county, both in full uniform, the Mayor of the city, and the members of the Bar waited on the Chancellor at his hotel, and in procession escorted him to the City Hall. The courtroom was thronged with spectators. Amid the most impressive silence, the Chancellor took his seat on the bench, the crier made the usual proclamation, and the first Court of Chancery under our free government opened for business."-"Albany Law Journal," 1892.

Footnote 107: "Two years later, in 1780, Ludlow, in addition to his powers as Justice of the Supreme Court, was created Master of the Rolls, with power to 'hear and determine controversies until civil government should be restored.' He also acted as Judge of Admiralty, and was appointed Superintendent of Police for Long Island. In the same year, 1780, Robertson, the last of the royal governors, issued a conciliatory proclamation, announcing that he had brought out a royal appointment for supplying the place of Chief Justice, and as soon as the public exigencies would permit, he would give an order for opening the courts of judicature, and convene the Assembly. But his proclamation produced no effect, and he did nothing under it until the following year, when he held a Court of Chancery in person, about once a month, from the 24th of January, 1781, until the 9th of June, 1783."-Daly's "Account of the Judicial Organization of the State"*;* Smith's "Reports, New York Common Pleas," Vol. 1, LXVIII.

Footnote 108: The senators who most frequently delivered written opinions were: De Witt 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 Bockes, John Porter, Addison Gardiner, Hiram F. Mather, Nathaniel P. Tallmadge, John W. Edmonds, Albert H. Tracy, Leonard Marson, Samuel L. Edwards, David Wager, Gabriel Furman, John Crary, Charles Stebbins, Cadwallader Colden, John Sudam, and John C. Spencer. It will be noticed, however, that lawyers have preponderance in this list. Gardiner, Lott and Edmonds subsequently became judges of the Court of Appeals, which took the place of the Court of Errors in 1847. Senators Putnam, Verplanck, Colden, Tracy, Spencer, Edwards, Marson and Hopkins gave numerous opinions, "very generally characterized by extensive learning and careful elaboration." Verplanck's were among the most numerous, and "are among the most learned and elegant judicial essays ever written in the State," asserts Browne.

Footnote 109: "Brown's "Short Studies of Great Lawyers," p. 225.

Footnote 110: Dougherty's "Constitutional History of New York."

Footnote 111: Irving Browne, in "Public Service of the State of New York," Vol. III, p. *23.*

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CHAPTER XII-(Continued).

BENCH AND BAR (AMERICAN PERIOD).

Reviewing the State of Jurisprudence Under the Elective System

1847-1925.

The Constitutional Convention of 1846 differed from earlier constitutional conventions in one quite important element; it was a people's convention, whereas those of 1777 and 1821 were not. To the average citizen who broadly believes that democracy came in with the Revolution, this statement may seem strange. To him it seems when the people took the place of the King, as the party of the first part in state papers, when the republican State of New York assumed the prerogatives of the royal province of New York, there could be no doubt that the people were at the helm of the Ship of State. Closer study of the political log will convince him that until 1847 navigation did not always follow the course charted for full democracies. Government was rather for the people than by the people; and, actually, for only a portion of the people. The delegates to the first State Constitutional Convention, that of 1777, were mainly from the better classes, or at least represented great landed interests. The 'delegates to the next convention; that of 1821, were drawn from a larger class, but suffrage was not even yet universal. Electoral conditions in 1846, however, made it possible to send into conference a group of citizens who were much more representative of the people. That the people had resolved to be a dominant factor in government thereafter is indicated by the amendments proposed in 1846 to the existing Constitution. Articles VII and VIII of the Constitution of 1846 unmistakably show the trend, for they asserted the "supremacy of the People over the Legislature, of the Principal over the Agent." They added "a needed bulwark against the tyranny of a temporary majority-one of the greatest dangers incident to a republican form of government." These articles, it is said, "form a new Bill of Rights no less important than any which the Third Estate ever wrested from monarch or nobility." So far as the changes affected the judicial department of State government, the revision of the organic law had one outstanding feature: it discarded the appointive system of filling judicial offices. This was such a radical departure that the history of the bench and bar of the American period naturally divides at this point.

Among the delegates who gathered at Albany on June 1, 1846, were many lawyers of note. In the list are seen the names of: Charles H. Ruggles, who later became Chief Judge of the Court of Appeals; Charles P. Daly, who for forty-one years was to serve as a justice, latterly as presiding justice of the historic Court of Common Pleas of New York City; Samuel Nelson, a former Chief Justice of the State Supreme Court, and then a member of the bench of the United States Supreme Court, a judicial career which, in all, was to span almost fifty years; and Samuel J. Tilden, whose name will be forever associated with the ousting of the corrupt Tweed "ring" of New York City politicians. Other leading lawyers among the delegates included Michael Hoffman, Charles O'Conor, Churchill C. Cambrelang, Ira Harris, Henry C. Murphy, Charles P. Kirkland, John K. Porter, Lorenzo B. Shepard, Alvah Worden, Ambrose L. Jordan, William C. Bouck, and James Tallmadge.

Only those of the happenings of the convention that affected the judicial system need be referred to in this review. The principal changes wrought in the Judiciary Article by the Constitution of 1846 were *(i)* the judges were to be chosen by popular election; *(2),* they were to hold office for terms of eight years, but without limitation as to age; (3), the distinction between law and equity was abolished; (4) an ultimate court, composed

only of lawyers, was substituted for the Court of Errors. That the latter would be abolished was a foregone conclusion; and there were many who felt that the Court of Chancery should suffer the same fate. It had never been a popular court, and very many citizens had long since tired of its head, Chancellor Walworth.

At this point in the narrative, the history of the Court of Chancery over the State period might be reviewed briefly. Continued under State control by authority of the Constitution of 1777, almost without change in jurisdiction, the Court of Chancery-which had been so obnoxious to the people during the Crown period-functioned without friction or noticeable offense under the first State Chancellor, Robert R. Livingston. He was succeeded in 1801 by John Lansing, Jr., who served as Chancellor until 1814. During this period of more than three decades, the Court of Chancery was inconspicuous as well as inoffensive. A great change came after James Kent was given the chancellorship in 1814. The condition of the Equity Court was at that time unsatisfactory, if not chaotic. The situation is clearly stated in Kent's own testimony, which in part reads:[112] "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 power and jurisdiction as I thought applicable under our Constitution." As to Kent's constructive work the words of another might be taken.[113] He writes:

The soundness, wisdom, and learning of his decisions placed the equity system of our State upon a firm foundation, and the influence of this great State, unsurpassed by any at that critical period, was a potent factor in creating the equity jurisprudence of the country. To play the part Kent did in establishing the common law and the principles of equity jurisprudence required the skill and qualities of a statesman. . . . His opinions were in many cases treatises elaborated to overcome the prejudices which he realized as obstacles to his purpose. His discussions of the Civil Law often were manifestly designed to soften the difference between the two systems.

But the State was not to have the services of James Kent for as long as it might have. In 1823, having reached the retiring age of sixty years, Kent had to resign the chancellorship. The later Chancellors-Nathan Sandford, 1823-26; Samuel Jones, 1826-28; Reuben H. Walworth, 1828-47-were undoubtedly unfortunate in having to follow so eminent a Chancellor as Kent; and disparaging comparison with him may have contributed to the dissatisfaction that was general. Certainly, during the second quarter of the nineteenth century the Court of Chancery steadily lost popular favor; and the cause of this disfavor should not be laid wholly to the last Chancellor, Reuben Hyde Walworth, though it is surprising that a man so inexperienced as he could hold the chancellorship for almost twenty years in the face of the frequent reversal of his decrees by the Court of Errors. Had the chancellorship been a desirable judicial office Walworth probably would never have been appointed. "It is said that the office was offered to all the judges of the Supreme Court and declined by them before it was offered to Mr. Walworth." He was himself taken aback; at least so one would infer from his address to the bar soon after taking office. With Democratic simplicity or frank humility, he said: "Brought up a farmer till the age of seventeen, deprived of all advantages of a classical education, and with very limited knowledge of chancery law, I find myself, at the age of thirty-eight, suddenly and unexpectedly placed at the head of the justices of the State, a situation which has heretofore been filled by the most able and experienced member of the profession." When Aaron Burr heard these confessions, he strongly advised the new Chancellor not to publish the address. "If the people read it," he said, "they will say if you knew you were not qualified, why the devil did you take the office." However, such was Walworth's destiny, and he did his best He made many enemies, but also many staunch friends who were convinced of his ability to administer the office. One biographer described Walworth as the *Bautham of America,* asserting that "what Bentham did in removing defects in English jurisprudence, Walworth did in renovating and simplifying the equity laws of the United States." Justice Story pronounced him "the greatest equity jurist living." His effort was at least thorough, and although it is said that in 1844 he was recommended by many "distinguished members of the Bar" of New York for elevation to the bench of the United States Supreme Court "merely because they were anxious to get rid of a querulous, disagreeable, unpopular Chancellor," fourteen volumes of Paige and Barbour's "Chancery Reports" testify to the fact that Walworth improved the system of equity practice. He took from it "many of those prolix and bewildering formalities which had their origin in the middle ages." With commendable industry, Walworth reduced the practice of his court to standard rule. He was personally obnoxious, however, and even his own political friends, it is said, "voted to abolish the office of Chancellor," so as to get rid of him. So the Court of Chancery went

down with Walworth. The Constitution of 1846 vested equity jurisdiction in the Supreme Court, and thus ended a particularly discordant state of jurisprudence.

It seems that the popular dissatisfaction was more against the Court of Chancery than against Walworth. "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," writes Browne, "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 guardians of each portal thought he should apply at the other." Browne asserts that the decisions of the Court of Chancery, however, were of far greater value than those of the Court of Errors, "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 Elden." Walworth was thanked by the bar for his long and eminent service as Chancellor, but, though he lived another twenty years, he was never again elected to judicial office.

Since 1847 the two higher courts of New York State have been. the Court of Appeals and the Supreme Court; and, as subsequent constitutional amendments have not materially changed the status of either court, we may, perhaps, now separately follow the history of each over the three-quarters of a century in which they have functioned under the elective system.

Taking them in order, the Court of Appeals first calls for review. This court, the tribunal of last resort, was established in a spirit of compromise. The Convention of 1846 was determined to correct the flaws of the first two State Constitutions. The delegates were desirous of freeing the judicial system of the layman element, and of making it independent of political control. This they did by abolishing the Court of Errors and the Councils of Revision and Appointment; but they had to retain part of the old court, to constitute the new Court for the Trial of Impeachments. However, this latter court was entirely beyond the intended jurisdiction of the proposed Court of Appeals; and the retention of that much of the old court was, it seems, justifiable.

In considering the question of tenure of office, the delegates probably had the case of Chancellor Kent well in mind. They wished to make it possible for mentally vigorous, capable, and, of course, reputable jurists to hold office beyond the age of sixty, which was then the constitutional limit, but they did not wish to be pledged to them for life. This desire was met, in part, by providing that the jurists should be called before the electors every eight years. In the organization of the Court of Appeals the reformers, it seems, had to stop halfway, for of the eight judges who were to constitute the bench of that court only four were to gain office by election, the Governor being given the power to appoint the other four. Still, he was restricted in his choice, none but justices of the Supreme Court being eligible for appointment. The advocates of the appointive system were thus conciliated, and at the same time those who insisted upon the elective system were satisfied, for although the Court of Appeals bench would seem to be a compromise between the two systems, in reality it would be an elective body also, seeing that the Supreme Court would contain none but those who came into office by elective means.

On June 7, 1847, four judges were elected to form the permanent half of the Court of Appeals bench. They were Freeborn G. Jewett, Greene C. Bronson, Charles H. Ruggles and Addison Gardiner. Jewett, having the shortest term to serve, was chosen Chief Judge. To complete the bench, the Governor soon afterwards named four justices of the Supreme Court, to serve a brief term as associate judges of the higher court. They were Samuel Jones, William B. Wright, Thomas A. Johnson and Charles Gray. These four Supreme Court justices were to serve on the Court of Appeals for eighteen months-until December, 1848. Justices subsequently designated, however, were to serve as judges of the higher court for only one year.

Section *25* of Article VI, of the Constitution of 1846, provided for the formal transference to the new Court of Appeals of all business pending in the Court for the Correction of Errors, "and for the allowance of writs of

errors and appeals to the Court of Appeals, from judgments and decrees of the present Court of Chancery and Supreme Court, and of the courts that may be organized under this Constitution." The election, limitations, compensation and removal of judges of the Court of Appeals were provided for by sections 7, 8, *II, 12* and 13 respectively.

The new Court of Appeals, as constituted by the law of 1846. functioned until 1870, but not satisfactorily. We who during recent decades have become accustomed to an appellate court which changes in personnel only at rare intervals, find it hard to realize that the same court during the first twenty-three years of its life was served by *123* judges, although no more than eight could hold office at the same time. Drastic reorganization was necessary, and radical change came in 1870. How radical it was is seen at a glance, in the judicial roster of the last almost fifty years; it shows the names of only thirty-nine judges. Undoubtedly, the Court of Appeals as planned by the Constitution of 1846 was not an ideal court; the constant change in personnel made efficiency almost impossible, for before the incoming justices could become comfortable in their seats as judges, so as to become quite conversant with the procedure and business of the court, their term of office would be nearing its end. This unsettled state recurred year after year, making it difficult for the ever-changing bench to keep pace with the demands upon the court. Before it was decided to reorganize the Court of Appeals it is said that the calendar had become so deplorably in arrear that it took four years to reach an argument in an ordinary case. Furthermore, thoughtful people gradually realized that it was not quite proper to permit Supreme Court justices-in their higher temporary office, as judges of the Court of Appeals-to sit in review of their own decisions.

A Constitutional Convention sat in 1867, and although it attacked very many articles of the existing Constitution and separately put many amendments of it to the people for approval or rejection, only the amendments of the Judiciary Article became law, and those only by a majority of about 7,000 in a vote of 500,000. Still, it was well that even that much was favored by the people, for the new judiciary article laid the basis of a much better judicial system.

The new order came into effect on January 1, 1870, and at a special election held in April of that year, a Chief Judge and four associate judges of the reorganized Court of Appeals were elected. According to the revised article, the new bench was to number seven, but the minority political party was to be represented by two judges, hence only five were elected. The composition of the new Court of Appeals, in 1870, was as follows: Sanford E. Church, Chief Judge*;* William F. Allen, Rufus W. Peckham, Martin Grover, Charles A. Rapallo, Charles Andrews and Charles J. Folger, associate judges. The judicial term was now fourteen years*;* and the retiring age was definitely set at seventy years.

The new judiciary Article also provided for an auxiliary Appellate Court-a Commission of Appeals, which was to consist of four of the judges of the old court, and a fifth commissioner whom the Governor was to appoint. The two Appellate Courts were to attempt to bring the Court of Appeals calendar up to date during the period in which the people were deliberating upon the general system of incumbency, that is, were deciding whether or not the State should revert to the appointive system of filling judicial offices. This question was to be decided in 1873.[114] Meanwhile, the Court and Commission were to apply themselves to their pressing duty of reducing arrearages of docket. The Commission of Appeals began its work on July i, 1870, constituted as follows: Judges John A. Lott, Robert Earl and Ward Hunt, of the permanent bench of the old Court of Appeals; Hiram Gray, one of the last Supreme Court justices designated to the old court*;* and William H. Leonard, appointed by the Governor. Judge Lott became chief commissioner. The commission was to have three years of life, but before this term expired its life was extended two years.

The Commission of Appeals was "a highly respectable body of lawyers"; but its decisions never ranked very high. During the last years of its functioning there was much dissent, occasioned "mainly through the excess of case-learning over sound judgment in one of the later commissioners," wrote Irving Browne. The commissioners of subsequent appointment were: Alexander S. Johnson, vice Ward Hunt; John H. Reynolds, vice Leonard*;* and Theodore W. Dwight, vice Johnson. All were appointed in January, 1873. Dwight, perhaps was the disturbing element, for he was the outstanding academician of the commission. Still, the discordance was the inevitable

result of a divided Appellate Court, the decisions of the commission and the court clashing noticeably in nearly contemporaneous instances. Nevertheless, the commission accomplished much. It disposed of all the business originally assigned to it, and other cases later transferred; and in general gave satisfaction. Its decisions are reported in many volumes. In one volume there are thirteen cases of dissent; in another volume, No. 57, which reports one hundred and fifteen decisions, twenty-three were pronounced by a divided court; of these, thirteen were decided by a majority of one out of five commissioners; and of these thirteen six were reversals. Therefore, it follows that in five per cent of the cases one commissioner reversed the Supreme Court of three judges. The commission decided about 1,000 cases in five years, these being reported in five volumes; but during the same period the Court of Appeals decided three times as many and with far more harmony. They are reported in fourteen volumes. One of the cases in which the commission was unanimous[115] was like one in which the court decided exactly the contrary.[116]

The new Court of Appeals found its task by no means easy; it was called upon to construct a new system of jurisprudence, based on the most radical changes. The Code of Procedure more than once came under judicial condemnation; and the Married Women's Acts of 1848, 1849, 1860 and 1866 brought many puzzling inquiries before the court. These were followed by many laws permitting parties to be witnesses in their own behalf. Indeed, New York State was pioneering reforms of jurisprudence, and the lot of the judge was not enviable. One reminiscence might be cited to show how the innovations reacted upon the temperamental judges. The instance is of the Supreme Court, not the Court of Appeals, but the ruffled feelings of more conservative judges were alike at that time. Justice John A. Lott, a man of definite convictions, ultra-conservative perspective, and deeply-set opinions, was hearing a case in the Supreme Court of the Second District He was positively opposed to the new Code of Procedure, as the unfortunate lawyer who first drew his attention to it soon discovered.

"Do you mean to say that that is the law, sir?" interrupted Justice Lott testily.

"I do, your Honor," replied the lawyer with assurance. With even more assurance he added: "It is right here in the Code."

"I don't care," retorted Justice Lott. "It has no business in the Code; 't ain't law."

As to this period of reform and confusion, Hiram Denio, in the last volume of his "Court of Appeals Reports," made known his own opinion of the new Code. In prefatory remarks, he states that the fifth volume is evidence that "the ancient simplicity of the common law" had become so complicated by the new procedure that it was hardly possible to apply the law except "by approximation, and a series of elective affinity as tedious in its operation as it must be uncertain and fluctuating in its result." However, as the judges became more familiar with the masterly codes the latter were found to be simpler than had been supposed.

Still, the reforms which had been intended to accelerate legal business for a while hindered the courts. The Court of Appeals soon found itself slipping behind. In 1874, appeals were limited to cases involving at least $500, exclusive of costs, unless certified by the General Term of the Supreme Court to involve important questions of law; but this restriction did not meet the emergency. So other means of keeping up with the calendar had to be devised; Accordingly, in,888, a constitutional amendment was adopted, authorizing the Governor, on the certificate of the Court of Appeals that an overcrowded calendar called for judicial reinforcement, to designate seven justices of the Supreme Court to sit as a separate body, to aid the court until the latter should certify that such aid was no longer needed. ' In this way, the Second Division of the Court of Appeals came into existence, the Governor appointing to this Division, in 1890, the following justices of the Supreme Court: David S. Follett, George B. Bradley, Joseph Potter, Irving G. Vann, Albert Haight, Alton B. Parker and Charles F. Brown. All were jurists of pronounced ability and long experience. Justice Follett, who became their chief, was "one of the most accomplished scholars of the State." The Second Division functioned for nineteen months (March, 1891, to October, *1892,)* and disposed of a considerable accumulation of cases with greater credit than the former commission had gained, their decisions reaching a higher standard. It was soon apparent that these temporary

auxiliary courts could not do more than relieve congestion. The remedy seemed to lie in the enlargement of the permanent court. In other respects, the emergency establishments were unsatisfactory, for it was recognized that "two coordinate Courts of Appeal could not well co-exist without divergence of opinion and the introduction of a degree of uncertainty into the law." Either the permanent court should be enlarged, or another and intermediate Appellate Court with clearly defined jurisdiction, should take over part of the work of the Court of Appeals, the scope of the intermediate court being made so different to that of the highest court that danger of clashing would not be an ever-present apprehension. A commission, to consider revision of the judiciary article of the Constitution, sat in 1890, and came to this conviction. Their report in April, 1891, recommended a single Court of Appeals unchanged in size but with much less business, it being thought that the General Terms of the Supreme Court might be made the final appellate tribunal in more cases than was then the practice. The theory underlying the report was that *an* Appellate Court possessed two functions: *1,* to apply the law as previously laid down by the courts and the Legislature to the case at bar, and to correct any substantial errors committed by the courts below; *2,* to decide new questions of law, and to lay down rules for the guidance of courts in future cases. The first of these functions primarily concerns the individual; the second affects the community at large. The greater proportion of litigation,. upon this theory, should never be carried beyond the first Appellate Court-the General Term. It was thought that the General Term decisions in applying the law should be conclusive unless some doubt should arise as to the underlying . .principle of law, or unless such important questions were involved as to render it desirable in the interests of the State that the Court of Appeals should consider the case."

The recommendations of the Commission of 1890 were not favored by the Legislature, but the Convention of 1894 debated the same questions, and finally came to the same opinion, except that in place of General Terms they recommended Appellate Divisions, as the intermediate court. The report of the Constitutional Convention of 1894 states that it was hoped "to obviate the overcrowding of the Court of Appeals calendar by establishing more effective and satisfactory courts of intermediate appeal, and . enlarging their power and jurisdiction." The recommendations of the Convention of 1894 were favored by the people. Therefore, the Constitution of 1894, which came into force in January, 1896, divided the State into four judicial departments, and provided that in each should be established "a tribunal composed of five justices of the Supreme Court, with shall perform substantially no other duties, and shall be the court of last resort for that department upon all questions of fact and upon all interlocutory proceedings. The report of the convention further reeds: "The Court of Appeals is limited to its proper function of declaring the settling the law. . Believing that under the operation of the proposed Appellate Division of the Supreme Court and with the distribution of duties and jurisdiction above indicated strictly observed, the Court of Appeals will have no difficulty in meeting all demands upon it, we have done away with the makeshift of a Second Division and have prohibited the imposition of a money limit upon the right of appeal to the Court of Appeals."

There was an arrearage of about 175 cases in the Court of Appeals at the time of the Constitutional Convention of 1894, and it was predicted that before 1896, when the new order, if authorized, would go into effect the arrearage would be increased to between 300 and 400. To meet this imperative need, the convention suggested the organization of another Second Division, though it expected that after the Appellate Divisions had been established, the normal bench of the Court of Appeals would be able to cope with its normal business. The emergency Second Division does not, however, seem to have been established, but the Governor was able to add to the personnel of the Court of Appeals by virtue of a constitutional amendment of 1889, up to four justices of the Supreme Court, the latter being designated to serve as associate judges of the Court of Appeals while the congestion continued, or until the calendar had been reduced to *200,* when the justices so designated would automatically return to the Supreme Court. This plan of assistance has been resorted to in all emergencies up to the present, and recently the calendar returned to reasonable limits. A Constitutional Convention was held in 1915, and at that time the state of the Court of Appeals calendar was even worse than in 1894. In 1915 there was an accumulation of more than 600 cases pending in the Court of Appeals, and the average time required between the date of filing return and that upon which it would be possible to hear argument was about two years. Each year added about a hundred cases to the accumulation. The Appellate Divisions were also overworked, this State indicating broadly that the general increase in court business corresponded with the growth of the State, and that there should be a corresponding expansion of the judicial establishment. Unfortunately, the work of the Convention of 1915 was set at nought, because all amendments recommended were rejected by the people. So

the old order continued, with Supreme Court justices reinforcing the higher bench. However, during the war and post-war periods this reinforced bench applied itself so efficiently and effectively that the state of the calendar was in time considerably bettered. Indeed, the judges are now able to keep the calendar down to reasonable limits without asking for the assignment of any justices of the Supreme Court.

Another judiciary convention was held in 1921. The delegates gave eight months of intensive study to Article VT of the existing constitution, sections 6, 7 and 8 of which provide particularly for the Court of Appeals. The convention expressed itself as in favor of continuing the Court of Appeals as at present constituted, *i. e.*, with a bench of a chief judge and six elected associate judges. Moreover, the delegates endorsed the present system of designating Supreme Court justices to serve as associate judges of the Court of Appeals during extreme pressure of work. They considered this system entirely satisfactory, for not only did the higher court receive efficient help when in need, but the designated justices thereby gained experience which made them the logical jurists to fill vacancies on the permanent bench. During the first twenty years of this century eleven justices were designated, and of these nine eventually became permanent judges of the Court of Appeals. . "In fact, it has come to be regarded generally that a temporary judgeship is the safest way of proving the merit of the jurist; and when found competent, the electorate has invariably shown a desire to promote the jurist to a permanent judgeship" of the State's highest court. The Convention of 1921 wished to insert a new provision in Section 6, leaving to the discretion of the Court of Appeals the release or retention of a designated Supreme Court justice who, by the existing law would have to return to the Supreme Court bench when the calendar of the Court of Appeals had been reduced to 200 cases.

As to the jurisdiction of the Court of Appeals, the Convention of 1921 agreed that the court should continue to be essentially and always a court of law. Two exceptions were provided: One is whenever the judgment is of death, which exception has long existed; the other is based on the principle of allowing the litigant at least one appeal on the facts. It is argued that if the Appellate Division actually makes new findings of fact, and thereupon renders final judgment, the litigant decided against ought to have a review of those findings in some appellate tribunal. This plea is not new*;* indeed, it was recommended by the Convention of 1915, after full discussion. The Convention Report of 1921, as amended by the Legislature in *1925* adds that "the right to appeal shall not depend upon the amount involved." It was also proposed to strike out of Section 9 that part which provides that no unanimous decision of an Appellate Division that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. The delegates were of the opinion that "this provision has frequently precluded the review of what is always and essentially a question of law, a possibility not contemplated by the framers of the Constitution of 1894." The convention further wished to provide that all litigants should be secure as a matter of right in the privilege of appealing to the highest judicial tribunal of the State, and not be dependent upon leave to do so. It was, therefore, recommended that the existing provisions of sections 588 and 589 of the Civil Practice Act be embodied in the Constitution, so that they shall no longer be subject to constant change and alteration by the Legislature.

The recommendations of the Convention of 1921 met with general concurrence of both legislative houses in 1924 and 1925*;* the constitutional amendments therefore went to the people in November, 1925, and were accepted.

One very important new section of the Judiciary Article is that which would take the question of judicial salaries out of the Constitution altogether. It is generally agreed that the present compensation of the judges of the higher State courts, as fixed by the Constitution, is inadequate. Few will deny that the cost of living is now very much higher than in 1887; but there has been no change in the stipend of the Court of Appeals judges since that time. **[117]** Several attempts have been made to fairly adjust the salary to the time, but without success. At best, the remedy by constitutional amendment is a slow and uncertain process, an indifferent electorate being apt to reject an amendment without giving the question the consideration it merits. If the question of judicial salaries were taken altogether out of the Constitution, it would be easier for the Legislature promptly to make the compensation for service meet the cost of service. Even then, however, it is by no means certain that justice would be done, for while State and Nation demand the highest standard of public service, they seem to have the

regrettable habit of weighing remuneration for service on a short-weight scale. There are few of the capable public servants who could not command, and readily obtain, higher salaries in private service. At the election of November, 1925, it was made possible for judges' salaries to be raised by the Legislature.

As to the relation of the Court of Appeals to the Legislature, it appears that the jurisdiction of the Court is to an extent statutory, though its existence is constitutional. The power of the Legislature over the court has generally been seen in restriction, though it also has power to enlarge the jurisdiction; but the Constitution holds a curbing hand, and no legislation can clothe the court with power except where the judgment is of death, to pass upon any question of fact, "nor can any legislation clothe it with power to review, after an unanimous affirmance by the Appellate Division, the sufficiency of the evidence to support a finding or a verdict not directed by the court. For the same reason, where the appeal is from an interlocutory judgment, or an intermediate order, other than an order granting a new trial on exceptions, there would seem to be no power in the Legislature to dispense with the necessity for the allowance of the appeal by the Appellate Division. This would leave the jurisdiction over criminal causes as the chief field for the possible enlargement of the court's jurisdiction. That jurisdiction cannot, however, be enlarged by the stipulation of the parties. The jurisdiction of the court is designated and created by law, and it has no other,"[118] states Judge Cardozo. The Constitutional Convention of 1921 was urged to leave the jurisdiction of the Court of Appeals elastic, to be dealt with as the Legislature from time to time might see fit; but the delegates were of opinion that the privilege of appeal to the highest judicial tribunal of the State should be fixed by constitutional means. The constitutional restrictions upon legislative power over the jurisdiction of the Court of Appeals are contained in Sections 7 and 9 of the Constitution of 1894. The statutory provisions affecting the court's jurisdiction are Sections 190 and 191 of the Code of Civil Procedure, and Sections 517, 519 and 528 of the Code of Criminal Procedure. The Convention of 1921 recommended that Sections 588 and 589 of the Civil Practice Act be also added to the Constitution.[119] Sections 7 and 8 of the existing Constitution regulate the composition of the Court of Appeals, but Section 3 limits the power conferred, and provides that "no judge or justice shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member." The provisions as to the disqualification of a judicial officer to sit as a judge cannot be waived;[120] "but a judge of the Court of Appeals, unlike other judges, except justices of the Appellate Division of the Supreme Court, may take part in a decision of a question which was argued orally in the court when he was not present and sitting therein as a judge."[121]

In a footnote is given the list of all the Chief Judges of the Court of Appeals, from 1847 to 1925. Although the list is a long one, and the page space not illimitable, the names of all the associate judges will be listed also, inasmuch as the roster of the Court of Appeals may be taken as embracing the names of more great lawyers and jurists than could be named in any other roster of equal size, covering the same period of judicial history of any other State. This does not detract from the excellent record of the New York Supreme Court; indeed, the latter shares in the distinction, for very few of the names shown do not also have place on the bench registers of the Supreme Court. With few exceptions the bench of the Court of Appeals has been recruited from that of the Supreme Court.

Footnotes

Footnote 112: Am. Bar. Assn. Jnl.," Dec., 1924.

Footnote 113: *Ibid.* Address of Hon. E. M. Colie, Nov. 24, 1924, presenting the Kent Memorial Tablet to the Court of Appeals at Albany, N. Y., on behalf of the American Bar Association.

Footnote 114: The electorate then registered an emphatic confirmation of the elective system.

Footnote 115: Merch. & Trad. Bank *vs.* Dakin, 51 N. Y., 519.

Footnote 116: Thurber *vs.* Blanck, 50 N. Y. 80.

Footnote 117: Under the Constitution of 1846, the judges of the Court of Appeals received a salary of $2,5oo a year. The salaries of judges of this court whose terms were abridged by the constitutional limitation as to age, after 1870, and who had served more than ten years, were to be paid for their full term. Salaries became $3,500 a year in 1857. This was doubled in 1870, the Chief-Judge receiving $500 additional, making his salary $7,500. And a clause in the Appropriation Bill of 1871 gave each judge right to an additional annual allowance of $2,000. By act of March 17, 1887, the stipend of the Chief-Judge was increased to $10,500 and those of the Associate Judges to $10,000. In addition, all now receive an annual allowance of $3,000 for expenses.

There was a time when the Clerk and Reporter received higher salaries than the members of the bench. The clerk, however, now receives $6,000 and the Reporter $5,000 *per annum.*

Footnote 118: Jurisdiction of the Court of Appeals of the State of New York," a volume written in 1903 by Judge Benj. N. Cardozo.

Footnote 119: "Five judges constitute a quorum, and the concurrence of four is necessary to pronounce a judgment. If such concurrence be not had, the case must be reheard; but no more than two rehearings can be had, and if then four judges do not concur, the judgment of the court below is affirmed. The Legislature may authorize the judgments, decrees, and decisions of any inferior local court of record established in a city, having original civil jurisdiction, to be removed for review directly into the Court of Appeals."-"Legislative Manual, N. Y., 1924," p. 641.

Footnote 120: Oakley *vs.* Aspinwall, 3 N. Y., *547.*

Footnote 121: Cardozo: and Code Civ. Pr., sect. 46

The Historical Society of the Courts of the State of New York

On-Line Book

The Court of Appeals of New York stands comparison favorably with other courts of last resort. Its judges preserve a dignified deportment, and command respect from the bar. When the judges enter the courtroom the members of the bar rise, and do not seat themselves until the chief judge nods permission. The judicial garb and the magnificence of the courtroom impress the layman with the majesty of the law. In some high courts of this republic the judges are ungowned, but in New York they wear silken gowns of black, somewhat like those of the Federal courts. There is, however, no affectation or pomp. This would be foreign to American standards, and as a matter of fact so much work is ever before the court that the judges have no time for unnecessary ceremony. A visitor to the court on any ordinary court-day is soon impressed by the fact that the proceedings are by no means leisurely. Indeed, a lawyer who has waited a year or two for the opportunity to argue his important cause-and all causes that reach the Court of Appeals are important-finds that his powers of argument are taxed to the uttermost in complying with the rules of court, which expect him to present all the salient features of his case within the half-hour or hour allowed for argument. This is not an arbitrary or unreasonable rule, for there is always dire need for expeditious handling of the calendar of the Court of Appeals. So much business is before the judges that each moment is precious. A writer,[122] giving his impressions of a visit he made to the Court of Appeals [123] in 1900, stated: "It must become quite evident to the visitor that he stands before a court whose docket is greatly congested, whose judges are greatly overworked, and who struggle under the constant feeling that they must get possession of their docket somehow if possible, and that long delays of justice are tantamount to denial of justice." The time allowed for argument is extended with great reluctance, and usually most important and complicated causes are argued within the customary limit. The judges seldom enter into the argument, and an idle question is never put-there is no time. Nevertheless, the bench is ever alert, always courteous, and "notwithstanding the limited time allowed for argument, a lawyer having a case to present to the court will sit down feeling the force of the remark that has often been made of this court: that it is a place where a gentleman can practice law without losing in any degree his self-respect." Higher testimony could hardly be desired, for the lawyer is the true barometer of the court. Inefficiency on the bench first affects the bar.

The courtroom of the Court of Appeals in the present building is almost identical with that which the court used for many decades on the third floor of the Capitol at Albany. Lord Coleridge once said that the old quarters were the finest "of any court in the world." The walls were panelled in oak and the ceiling also was oak-timbered. The elaborately carved bench harmonized with the other decorative work, and the dozens of portraits, of eminent deceased jurists, which hung upon the walls, added dignity to all. When, in 1916, it was decided to house the States highest court in a building of its own, it was resolved, if possible, to carry into the new courtroom the dignified setting of the old. This was accomplished, the remodelled State Hall at Albany, when opened, being found to have a courtroom that possessed all the impressive features of the old. It seems that the whole of the wainscoting of the old courtroom was transferred to the new, and that the portraits, fireplace, rail, and other striking features of the old quarters were given identical place in the new.

In the hall of this Court of Appeals Building, in 1924, a movement to pay fitting honor to the memory of a great American jurist was brought to consummation, the Kent Memorial Tablet then presented to New York State by the American Bar Association testifying to the invaluable. service rendered to American jurisprudence by a New York jurist, Chancellor James Kent, whose "Commentaries on American Law," which he began to publish about a century ago, definitely set American standards of jurisprudence. Accepting the tablet in behalf of the Bench and Bar of the State, Chief Judge Frank H. Hiscock said:

Placed upon the walls of this building, which we trust will endure for many generations and become historic as the abode of our court of last resort, it will confront the gaze of every member of our profession who comes to make the last plea in behalf of those rights of life, liberty or property to which he conceives his client to be entitled.

Inspiration also faces the lawyer, who comes to the bar of the Court of Appeals, in the bronze statue, of heroic size, of New York's first Chancellor, Robert R. Livingston. The statue is a replica, it is said, of that which, with one of Clinton, was given place in the National Congress more than a century ago, to mark the Nation's appreciation of the service rendered to the Republic, during its earliest and most critical period, by these two lawyers, these-as it was termed-"most representative" New York citizens. New York law has a noble heritage.

Let us now trace the history of the Supreme Court under the elective system of filling judicial office. In place of the small bench of appointed jurists, and the decentralization of the original Supreme Court by the erection of circuit courts in 1823, the Constitution of 1846 provided for the establishment, by elective means, of an enlarged Supreme Court, having jurisdiction in equity as well as in law, the Supreme Court having to take over the jurisdiction of the Court of Chancery as well as that of the circuit courts The eight judicial districts were to remain unchanged, and each district was to elect four Supreme Court justices to constitute a total bench of thirty-two. To the extent that the new Supreme Court justices were to be elected for service in particular judicial districts, the new system was to all intents the same as the old Circuit Court plan. The new plan called for the holding of general terms, by three or more of the justices, regularly in each district, and special terms and circuits by any one or more of the justices, one or more of whom would also be required to preside in courts of Oyer and Terminer. The new system did not provide for a chief-justice, and each district bench of four justices actually proved to be an independent tribunal.

The recommendations of the convention of 1846 having been fully approved by the people in the fall of that year, election date was set, and on June 2" 1847, the following were elected to constitute the new Supreme Court: Samuel Jones, Elisha P. Hurlbut, John W. Edmonds and Henry P. Edwards for the First District; Selah B. Strong, William T. McCoun, Nathan B. Morse and Seward Barculo, Second District; William B. Wright, Ira Harris, Malbone Watson and Amasa J. Parker, Third District; Daniel Cady, Alonzo C. Paige, John Willard and Augustus C. Hand, Fourth District; Charles Gray, Daniel Pratt, Philo Gridley, and William F. Allen, Fifth District; William H. Shankland, Hiram Gray, Charles Mason, and Eben B. Morehouse, Sixth District; Thomas A. Johnson, John Maynard, Henry Welles, and Samuel L. Selden, Seventh District; James G. Hoyt, James Mullett, Seth E. Sill and Richard P. Marvin, Eighth District; making thirty-two in all. One in each district was elected for two years, one for four years, one for six years, and one (or eight years, subsequent terms, however, being eight years. No retiring age was set.

These early jurists, in common with those of the Court of Appeals, had to adapt themselves to the radical changes in court procedure introduced by the Constitution of 1846. Admission to practice was secured to "every male citizen of good character, possessing the requisite learning and ability"; parties were to be enabled to waive trial by jury in civil cases; testimony in equity cases was to be taken in the same manner as in cases at law; witnesses were not to be "unreasonably" detained, and no person should be considered incompetent as a witness on account of his opinions on religious subjects; statute laws were to be speedily published and the judicial decisions reported; tribunals of conciliation for the decision of disputes voluntarily submitted were to be established; and commissioners were to be at once appointed to simplify and abridge the rules of practice, pleadings, forms, and proceedings of the court.

This reduction of the whole body of laws into a systematic code was, stated Butler, a "bold and startling innovation in our system of jurisprudence." At its adoption in 1848 the change seemed to stun and bewilder the judges, to whom the old, intricate and artificial system of pleading at law and in equity had, by long practice, become almost second nature. tinder the old system, pleading was a precarious and difficult science; but once mastered it established the advocate. The fate of a suit depended mainly upon the ability of the legal pilot to steer safely through the tortuous course made dangerous by the jagged rocks of established forms of pleadings

and the treacherous shoals of legal technicalities. A skilful pleader often won his case upon the pleadings and palpably against the merits. "The lawyers got pay in proportion to the extent of the web of words which they spun." Slight variance between pleadings and proofs was fatal. "Justice was a jealous God, deaf to the entreaties of her suitors, unless they prayed according to the established forms." One sees, therefore, why the new Code of Procedure was so vehemently opposed by bench and bar. Nevertheless, the new order had to be borne, though later legislative interference made it somewhat questionable whether the new system did not become more intricate than the old.[124]

These, and other innovations, prevented smooth functioning of the new judicial system. Criticism of the enlarged Supreme Court was, in some instances, not merited, but it seemed that the existence of eight independent and equal branches-particularly the General Terms-of the Supreme Court established a system in which there could be little cooperation. There was no central administrative control, which was unfortunate, for the many innovations that had come into the judicial system had tended to confuse the judges; hence it was not unusual to find that the decisions of the eight separate courts clashed deplorably. There were frequent discordant and inconsistent opinions. Not only did these bring "justice into ridicule" but appeals accumulated, seriously overcrowding the calendar of the appellate court. Moreover, the general inclination was to yield little respect-far from the meed each deserved- to the decisions of a court which seemed to be only an eighth of a court. So the division of the State into eight judicial districts was a failure, so far as the operation of the Supreme Court within them between 1847 and 1870 goes.

A Constitutional Convention was held in 1867, and of all the proposed amendments of the organic law, only those that revised the Judiciary Article became law. So far as these amendments of Article VT affected the general terms of the Supreme Court, the changes were drastic, sweeping away four of the eight. The revised Article VI created four judicial departments, in each of which a new General Term, vested with appellate jurisdiction, was to function. The judicial district system was not abolished, and the Supreme Court, for its ordinary functions in each district was just as large in 1870 as formerly; but the General Term branch had a wider territorial jurisdiction, and a smaller bench, the latter being selected, perhaps, with greater care. Each General Term was composed of a presiding justice and two associate justices, who were designated by the Governor from the whole Supreme Court of the State. The presiding justice thus designated served on the General Term during his judicial term as a Supreme Court justice, and associate justices held office for five years unless their Supreme Court terms expired sooner. General Terms were to be held once in each year in each department, the courts thus created having power to hear and determine appeals from the judgments and orders of the Circuit Courts; from Special Terms of the Supreme Court; from the courts of Oyer and Terminer; and also from the county courts within the department, except the first, which had a special status as to county court. Appeals from the General Terms lay to the Court of Appeals; but, with some exceptions hereinbefore noted, the intermediate court was the court of last resort.

This appellate branch of the Supreme Court was organized by Chapter 409 of the Laws of 1870, and its existence terminated with the year 1895, after which its jurisdiction passed to the Appellate divisions of the Supreme Court, with functions as at present. The Constitutional Amendments ratified in 1869 made the bench more permanent, the judicial term of office being increased to fourteen years, and the retiring age being set at seventy years. Some of the delegates advocated the continuance of the eight-year terms, others wished to elect the judges for life, subject only to good behavior; but the compromise of fourteen years was finally decided upon after statistics had been presented to show that even under the appointive system and life terms, the average length of incumbency was fourteen years. Opinion was so evenly divided as to the respective merits of the appointive and elective systems that the Convention of 1867 thought it unwise to decide either way; they adopted the more prudent plan of putting the question to the electors. Decision was registered at the polls in 1873 in favor of the elective system; hence, the new order went forward under an elective system, with a judicial term of fourteen years, and a definite retiring age of seventy years.

With this greater permanency of judicial personnel, the courts were able to make more satisfactory progress. Once elected to the Supreme Court, a lawyer became a jurist, to all intents, for life. Some went to higher judicial

or public office in State or Nation, but most of these who were elected to the Supreme Court bench settled down to a life-long association with that court. The bench of the General Term naturally became the aspiration of the abler jurists of the Supreme Court; and, as a whole, those who were designated to that appellate branch were, in most instances, the most experienced justices of the Supreme Court of the period. It became the settled policy of the State to retain on that appellate bench for long periods all who showed especial judicial fitness. Indeed, a justice who went to the General Term bench sat there, as a rule, until the end of his judicial term, and, if reelected to the Supreme Court, would be more than likely to be redesignated; in fact, it became almost unwritten law, and most Governors looked upon it as the will of the electors that a reelected General Term justice should be redesignated.

Hence, it happens that during the twenty-five years of existence of this appellate branch of the Supreme Court only forty-five jurists were designated, notwithstanding that it was a bench of twelve, and latterly of fifteen members. Seventeen of these forty-five served as presiding justice. The Hon. Joseph F. Barnard served as such, in the second department, for twenty-three years, no other justice equalling this; Justice Learned was head of the third department for seventeen years; Justice Charles H. van Brunt was Presiding Justice of the First Department from 1887 until the General Term was abolished in 1895; and in addition to those eight years he served as head of the succeeding Appellate Division from 1896 until 1905 (ten years). Justice Noah Davis was a General term justice for fourteen years, being presiding justice for thirteen years; Joseph Mullin was in charge of the fourth department for eleven years. Some of the designated justices sat on General Term for almost the whole of their judicial careers. John R. Brady served from 1873 until his death in 1891*;* Charles Daniels served from 1874 until 1895 on the General term and for seven subsequent years on the succeeding Appellate Division; Justice Jackson O. Dykman sat in the second department for twenty years from 1876; Calvin E. Pratt, for twelve years; Augustus Bockes for about fifteen years*;* John L. Talcott for about as long; and there were several others of notable and long service. In fact, with very few exceptions, all served commendably. The only spot that mars the record of the General Term for the period was the unfortunate involvement of two of the justices of the first department in the corrupt administration of the municipal affairs of New York City in the seventies. Justice Daniel P. Ingraham was presiding justice of the first department at that time and was placed in a very trying predicament, for his two associates, Justices George G. Barnard and Albert Cardozo, were "under grave suspicion as adherents of the Tweed regime." But although Cardozo resigned from the bench, and Barnard was impeached, "no one ever had the least suspicion of Justice Ingraham's absolute integrity."

Congestion of docket was really the most serious problem of the period; and called for remedial measures long before they were taken. A judiciary commission sat in 1890 to consider this, and to see whether the judicial system might not, with advantage, be reorganized in other respects. Reference has been made in the sketch of the Court of Appeals to the recommendations of that commission as to the Court of Appeals and the intermediate appellate tribunal. Briefly the commission favored General Terms of enlarged jurisdiction, confining the Court of Appeals, with some exceptions, to the decision of new questions of law and to the laying down of rules for the guidance of the courts. The recommendations of the commission of 1890 were not acted upon, but a Constitutional Convention was held in 1894, with different result, for their revision of the constitution, when submitted to the people, was accepted *in toto.* The new constitution, in general, followed the recommendations of the commission of 1890; at least as to the Supreme Court, although in place of General Terms, the intermediate Appellate Court took the name of Appellate Divisions. The Appellate Division of the First Department (New York City) was the intermediate court in which there was greatest change, for under the old system three New York City courts had appellate jurisdiction-the Supreme Court, the Superior Court and the Court of Common Pleas. Under the Constitution of 1894, the two latter courts passed away, their appellate powers being vested in the Appellate Division of the Supreme Court for the First Department.

The appellate divisions in the four departments became the court of last resort upon all questions of fact and upon all interlocutory proceedings. It still has that jurisdiction. The Constitutional Convention of 1915 confirmed the scope of the Appellate divisions, and of the Supreme Court in general, but as the recommendations of that convention were not approved by the people, there is no need to go more extensively into their plans. But the next convention, the Judiciary Convention of 1921 also recognized that the reform adopted in 1894, in creating Appellate divisions was "generally successful and satisfactory"*;* indeed, their

inclination was to enlarge the power of the Appellate divisions. These recommendations may become law this year, but as the Constitution of 1894 is still the organic law of the State, subsequent proposals need not here be analysed closely.

The revised Constitution of 1894 abolished courts of Oyer and Terminer and Circuit Courts, conferring their jurisdiction upon the Supreme Court. The age limit of seventy years was retained, but the system of pensions to retiring judges was abandoned. The judicial departments and districts remained unaltered until 1906, when the Ninth District was made out of part of the Second District. The ratio of Supreme Court justices to population was set at one justice to each eighty thousand of the population of the first and second judicial districts, and one to every sixty thousand in the other districts. The Appellate division of New York City (First Department) was to consist of seven justices, and the Appellate divisions of the others were to have benches of five. In each department four were necessary to form a quorum, and concurrence of three were necessary to a decision. No more than five justices could sit in any case. The method of constituting the appellate courts was by designation, as before. The Superior Court of New York City, the Superior Court of Buffalo, the Court of Common Pleas of New York City and the City Court of Brooklyn were abolished, and their general terms added to the jurisdiction of the Appellate divisions of the Supreme Court, beginning with 1896. No judge or justice was to sit in the Appellate division in review of a decision made by him or by any court of which he was at the time a sitting member.

No change was made in judicial salaries by the reorganization in 1895, and the stipend of justices of the Supreme Court is still $10,000 *per annum* except in Greater New York. An extra $2,000 a year is granted to justices sitting in Appellate courts, the presiding justice receiving an additional $500. The justices are forbidden to hold any other office or trust.

The Supreme Court in 1924 consisted of III[125] justices, all holding office by election. They were distributed as follows: First Judicial District, thirty-six justices; Second District, twenty; Third District, seven; Fourth District, six; Fifth District, eight; Sixth District, six; Seventh District, seven; Eighth District, fourteen; Ninth District, seven. These, of course, include the justices who sit in the Appellate divisions, by designation, and also any who may be temporarily designated to serve as judges of the Court of Appeals.

It is possible to measure the growth of the judicial arm of the State better in the expansion of the Supreme Court than in the development of any other court. For instance, the Court of Errors, under the Constitution of *1777*, had a possible strength of thirty-seven, whereas its successor, the present Court of Appeals, has now only a strength of seven judges. Again, under the county system continued by the Constitution of *1777*, each county had a Court of Common Pleas bench numbering four or five judges, whereas the present County Court, in each county except New York and Kings, has but one judge. But the Supreme Court bench in Jay's time was only "a corporal's guard"-a chief-justice and two associate-justices. Circuit duties of incredible hardship devolved upon this little body, but it is questionable whether as much judicial business was accomplished by the judge of a century and a half ago as is demanded of each judge today-if he would keep pace with his docket. The bench of the Supreme Court of today is thirty-seven times as large, and probably accomplishes much more than thirty-seven times as much as was asked of the first State bench, worthy as was their record. Time is of much greater value today, and the modern court pays as much heed to efficiency and despatch as do the executives of a successful manufactory, fully realizing that time waits for no man-except perhaps the wrong-doer.

As to the administration of inferior courts in the counties, and smaller political divisions. These have important places in the judicial structure, and very many of the county judges have had worthy records; but to attempt to follow, in even brief detail, the history of the several courts of the sixty-one counties would demand so much space that the attempt cannot here be made. Briefly, therefore, from 1777 to 1847 the county courts were Common Pleas and General Sessions. Civil cases were the forte of the Court of Common Pleas, which, in each county, had a first judge and several *puisne* judges; and its criminal branch was the Court of General Sessions of the Peace. These courts functioned much as in the provincial period. In the first decades of Statehood, the Common Pleas bench was reinforced by assistant justices, but in 1818 the office of assistant justice was

abolished, and the number of judges of Common Pleas was limited to five in each county, including the first judge.

The Constitution of 1821 did not materially change the county court system, but radical alteration came in 1847, by the provisions of the Constitution of 1846. Except in the City of New York, where there was manifested a great reluctance to interfere with the Court of Common Pleas of that place seeing that it had functioned for almost *200* years,[126] all the county Courts of Common Pleas were abolished, and a County Court, as at present, was created. In charge of this new court was an elected County Judge. The system was continued by the Constitution of 1894, and under its provisions the Court of Common Pleas of New York City also passed away, though the usual County Court did not take its place. The judicial term was six years, and the ratio was one county judge for each 200,000 inhabitants, or major fraction thereof. In counties of lesser population than 40,000, the offices of county judge and surrogate were combined.

The Constitution of 1846 associated with the county judge two justices of the peace, who were to be designated by law to hold Courts of Sessions, with such criminal jurisdiction as the Legislature might prescribe; but the Constitution of 1894, as amended, abolished Courts of Sessions, except in the County of New York, the jurisdiction of these being vested in the county courts. New York City was given a City Court, in place of its historic Court of Common Pleas, the City Court being made the civil tribunal and the Court of General Sessions the criminal branch in the metropolis. Certain courts of Special Sessions, with jurisdiction of offenses of the grade of misdemeanor also function in New York. Some other inferior courts of the larger cities have been provided by legislative enactment from time to time.

Under the first State Constitution, surrogates were appointed for an indefinite period, and an appeal from their decisions lay to the judge of probates. Under the second constitution, they were appointed by the Governor and Senate for terms of four years, appeals resting with the Chancellor of the Court of Chancery. The Constitution of 1846 abolished the office of surrogate in counties of less population than 40,000*;* on the other hand, in certain populous areas, the Legislative might authorize the election of an extra official, known as a Special Surrogate, who would take office for three years, usually. The county judges might be similarly aided, for, where there was need and legislative act was had, special county judges might be elected.

In 1818 an act was passed creating the office of District Attorney. This public prosecutor, at first, took office by appointment, but since 1846 has been elected. The term is three years, and each county may elect one. In New York County there are also assistant district attorneys.

In the towns and municipalities, inferior courts that are not of record may be organized, as prescribed by law, and administered by justices of the peace and district court justices. These judicial officers are elected at township or municipal elections, for terms of four years. The Constitution provides no salary for justices of the peace, but authorizes them to take judicial fees, Section *20* of Article VI of the organic law reading, in this connection: "No judicial officer, except Justices of the Peace, shall receive to his own use any fees or perquisites of office." Salaried judicial officers, if elected in a county having a population of 120,000 or more, are also forbidden to practice as an attorney or counsellor in any court of record in New York State, or to act as Referee. The prohibition does not apply to justices of the peace, because they need not be lawyers. On the other hand, none but lawyers are eligible to judgeships of the county and higher courts.

The administration of justice in New York City calls for an immense judicial establishment. In addition to a Supreme Court of thirty-six judges-who use the old Tweed Courthouse at present but will soon take possession of a magnificent new building on Centre Street-there are more than 140 judicial officers of lower courts of Greater New York. These embrace: a County Court system directed by nineteen judges[127] and two surrogates; a Court of Special Sessions, consisting of a chief-justice and twelve justices;[128] a system of children's courts, using a presiding justice and five justices; and a group of city magistrates' courts serving Greater New York,

with a total bench of one chief city magistrate and fifty-three city magistrates.[129] The supreme and county tribunals are courts of records; the others named are not. There is, however, still another New York City court, one which began as an inferior court not of record, but which, since 1915, has been a court of record, with wide jurisdiction. It is known as the Municipal Court and was created in 1898 by authority of Chapter XX, Title "Section 1350 of the Charter of the Greater City of New York." As now constituted, the Municipal Court bench consists of forty-eight justices.[130] The tribunal is of ever-increasing importance to the judicial system of the metropolis; it was created to take over the jurisdiction of the old District Courts of the City of New York, and that of the Justices' Courts of Brooklyn and Long Island City, both busy courts in which justice was more prompt than precise.

It cannot be said that the inferior courts of New York City have always been successfully administered, for they have not. In making this statement, however, it should be pointed out that the problems of the metropolis have been many and difficult. Stupendous as is the judicial department of New York City, there is an ever-present need of reinforcement, or of reorganization of some phase of its functioning. The population increases so rapidly that the city government finds difficulty in expanding city departments to correspond with the human increase. Again, the social status of the incoming residents has a direct and troublesome bearing on the judicial problem. New York City has to bear a national burden; she has not been able to escape from the consequences of her geographical and maritime importance to the Nation. America for decades has been the dumping ground of Europe, and latterly of the Levant; and New York City, as the chief port of entry, has had to permit to flow through her channels millions of immigrant aliens. A surprisingly large percentage of these immigrant waves have spent themselves in the backwaters of the city, and there stranded illiterate aliens who have been unable to get farther into America. Illiterate, and knowing little of the language and' modes of life and less of the laws of America, these aliens, through ignorance oftener than design, have run counter to city ordinances, committing infractions which cannot be condoned or ignored. Hence, calendars of local courts are chronically overcrowded. The average citizen will recognize that such a state could hardly be avoided, though few have any near conception of the magnitude of court business. It will astonish the average New Yorker to learn that in one branch only-the City Magistrates' Courts-of the judicial system of the great city more than 200,000 arraignments were disposed of in 1918.

There are thirty-one branches of the City Magistrates' Court in Greater New York. This court is somewhat aptly known locally as the *Supreme Court of the Poor.* To it are brought persons charged with felony, misdemeanor, or the violation of an ordinance or local law which is neither a felony nor a misdemeanor. In cases, where the charge is felony the magistrate must decide if the evidence is sufficient to warrant holding the case for the Grand Jury, or for the Court of Special Sessions if the charge is misdemeanor. In three-fourths of the cases the magistrates have final jurisdiction, being able to deal summarily with simple cases. Some are more perplexing, however; and it was in regard to this one-fourth of the arraignments that greatest fault was found with the judicial system. Many poor people who had committed some technical misdemeanor and who had been remanded to the Court of Special Sessions from the City Magistrates' Court in which they had been arraigned, but who, owing to congestion of court calendar, had to wait a week or more before they could be. heard in the Court of Special Sessions, had the mortification of realizing eventually that they had been held in jail unjustly. It is said that it was not unusual for the remanded, upon a hearing in Special Sessions, to be acquitted, or released without trial owing to lack of evidence. There was no redress, even though a poor family, in consequence, should have been deprived of its bread winner for a week or more. "Statistics showed that the Court of Special Session acquitted or released without trial because of insufficient evidence, an average each day of one person who had been held in jail awaiting trial, and that every year nearly 800 persons were so deprived of their liberty for periods ranging from three to twenty-one days in length, awaiting trial." In many cases, the offense charged, even if proved, would not have warranted so great a punishment. Social agencies became active, and in 1910 there was some reorganization; but not until 1915 was the grievance satisfactorily remedied. Then, an amendment provided: "That the Board of City Magistrates may provide for the holding in any borough such special City Magistrates' Courts or Courts of Special Sessions for the trial of specified cases of offenses or offenders."

This opened the way for the establishment of several special courts. One, which was established in 1915 and is known as the Municipal Term Court, is described by City Magistrate W. Bruce Cobb as "a court of prevention." It deals with infractions of municipal ordinances relating to fire protection, health, safe and sanitary housing, factory and employment evils. Its basic purpose is to try to get the citizens to obey the law of "do," as well as 'the law of "don't." It has been a busy court, having with promptitude disposed of an average of 10,000 cases yearly since 1915.

There were six special City Magistrates' Courts in operation in New York City in 1920. One was the Men's Night Court, to which went all men arrested after the close of the ordinary City Magistrates' Courts. There was a Women's Night Court, and until the establishment of the Men's Night Court offenders of both sexes arrested after nightfall were arraigned in the Women's Court. This was a somewhat undesirable arrangement, for it gave the wayward of each sex a knowledge of the misdoings of the other, to the demoralization of both.

However, improvement in court facilities is constantly sought. Soon a Women's Day Court was established. There are courts of domestic relations, children's courts, probation courts, traffic courts, and in several other ways the municipal authorities endeavor to administer justice in a helpful rather than a hurtful manner, especially to the young in, crime, hoping thereby to prevent the indiscreet young people of the present from becoming the hardened adult criminals of the future.

It would seem, however, that New York City will always be one of the most difficult in which to enforce the laws and administer correction justly. Still, the fight against crime and criminals goes determinedly on. A recent change is that which amends the Municipal Court Code, an act being passed in the 1924-25 session of the Legislature substantially altering this part of the judicial system of New York City. The court lacked coordination, but under the reorganization there will be a Chief Justice, who will have general authority over the whole system of Municipal Courts. Where formerly some courts had overcrowded dockets while others had little business, the Chief Justice may now, as needed, transfer cases from one district to another within the same borough of Greater New York And if the amendments of existing Constitution which are to be submitted to the people in November, 1925, are ratified, another important change will soon take place in the judicial system. So far as these changes affect New York City they will expand the City Court of New York City and County so as to embrace the civil business of all the existing county courts of Greater New York-those of Kings, Queens, Bronx and Richmond counties.

No American city has such an immense judicial establishment as New York. The metropolis may also claims to have the largest. law office and the largest law school in the United States. The former is known as the Law Department of the City of New York, and its purpose is evident in its name. Ten years ago the Law Department had 437 regular employees, and its growth since has corresponded, approximately, with the growth of the city. An indication of the production of this office may be seen in the statistics for the year 191 1, which is the most recent for which statistics are available to writer. In January, 191 I, the Law Department had pending 46,260 actions; the number of actions commenced during that year was 45,776; and the number terminated was 52,795. During the year 1,423 written opinions were furnished to the municipal departments by the Law Department, these opinions covering 26,160 pages "in the press copying books." Undoubtedly there has been much expansion of work in this office during the last troublesome decade. The law school referred to above as the largest in the United States-indeed in North America; probably in South America also-is the Brooklyn Law School of St. Lawrence University. This school in September, 1924, had an enrollment of 2,213 law students for that school year, the next highest in America being that of the Suffolk Law School of Boston, Massachusetts.

New York City and State may claim several other distinctive notices in the history of American jurisprudence. The first academic institution in America to establish a professorship of law was King's College, now Columbia University; the chair was created in 1773, with John Vardill, M.A., as professor. In 1793 James Kent took the chair; and out of his lectures, delivered in the school after he had retired from the chancellorship of the Court of Chancery in 1823, eventually grew his "Commentaries on American Law," which "crown his fame and service" to the Nation. The first written judicial opinions were those which he began to write after 1798. The first Chief

Justice of the United States Supreme Court was a New York jurist-the eminent astute John Jay. New York State has provided the Nation with four lawyer Presidents-Van Buren, Fillmore, Arthur and Cleveland-and many cabinet ministers of brilliant professional record, beginning with Alexander Hamilton and ending with Charles Evans Hughes.

New York has worthy place among professional organizations. The Association of the Bar of New York City, which was organized in 1869-70, may not have been the first such society to function in America, but it furnished the Nation with the most impressive object lesson of the value of such bodies. Following the Civil War, the municipal affairs of New York City were in the hands of an unscrupulous "ring" of local politicians who, with brazen abandon, robbed the city of many millions of dollars. And no civic body was strong enough to combat this "Tweed Ring" until the lawyers of New York City, in 1869, resolved to band together to take up the cause. The Association of the Bar of New York City was formed, the Tweed citadel was stormed, and some members of the corrupt municipal "ring" were jailed, and forced to return some of the stolen millions. This victory by the public-spirited lawyers of New York undoubtedly inspired the lawyers of other centers of population to organize bar associations. The New York State Bar Association was conceived in 1875 and now (1925) has a membership of almost 4,000 (3,820 in 1924) . The Association of the Bar of the City of New York has an active membership of almost 3,000 (about 2,800 in 1924). Another professional body of the city takes unique place among American bar associations, the New York County Lawyers' Association being the largest county bar association in the country, "and surpassed only by the American Bar Association." The local body had a strength of about 4,500 members in 1924. This, however, is not the limit of its possibility, for in New York City alone there are 15,000 lawyers. Similar organizations, though in some instances only small bodies, have been formed in other counties of the State. In all there were thirty-seven county bar associations in New York State in 1924, and also eleven other local organizations of lawyers.

Several of these organizations own large and valuable law libraries. That of the Association of the Bar of New York City is the largest, it embraced 147,000 volumes in 1924. The New York Law Institute then had a library of 99,338 volumes, and that of the New York County Lawyers' Association was stated to be 32,884. There were many other large law libraries, the Law School of Columbia University having 125,093 volumes, the New York State Law Library being fourth on the list with 96,000 volumes. The Library of the Court of Appeals at Albany embraces 60,000 volumes, and the same court has another library of 47,725 volumes, housed in the courthouse at Syracuse. The latter was the old Court of Chancery Library. The Appellate Divisions also maintain large libraries, and several of the judicial districts and county bodies have substantial collections. The Appellate Division of the Fourth Department has 53,000 volumes at Rochester; the Brooklyn Law Library exceeds 50,000*;* the Eighth Judicial District, at Buffalo, has 55,000 volumes,. and Cornell University has a law library of 60,000 volumes. There are many smaller law libraries generally accessible to the profession, and even these do not exhaust the list, for some lawyers have private collections reaching into thousands of volumes, while every lawyer in practice has to have at his hand a collection which to a layman would seem to be a substantial library. To the lawyers of the provincial period, the library of even one lawyer of the present would seem to be ample to fill the needs of the whole province. It is interesting to note that the first law library in Albany-probably the first in the province-consisted of two books, Patroon van Rensselaer, writing from Rotterdam, in 1634, to his nephew, Director van Twiller, regarding Schout Planck, whom he was about to send out to the colony to organize a court, as follows: "I have given him two books, namely, Damhouwer on 'Criminal Procedure,' and the 'Ars Notariatus.' " The "Duke's (Book of) Laws" seemed to fill the need of the courts during the early English period, and there were few American law books to be had until the nineteenth century was well advanced. The famous lawyers of the early State period "drew their knowledge from Plowden, Coke, Littleton, the Year Books, Grotius, Puffendorf, Vattel, Emerigon," in addition to Blackstone, of course. There was not a solitary volume of reports of any court in America in 1785, when James Kent was admitted to practice. It is obvious, therefore, that in this phase at least of New York jurisprudence there has been astounding expansion.

Without law books, lawyers and jurists could hardly be expected to be well versed in law Judges were the most illiterate in this respect, it seems. Maybe, the crude justice they administered was more just than legal. They knew little of law, but most of the judges were men of broad mind and wide human experience. Many of the judges of the Crown period were men of trade, and even in the early State period it did not seem incongruous to

appoint a layman to the highest court. And the appointing body seem to look only among the leading men of affairs of a community or county for judges of the Court of Common Pleas. Many interesting anecdotes might be told of these early judges of strong mind but no legal knowledge. In Essex County Court more than eighty years ago, at the end of a hotly contested and important trial, the presiding judge sent the jury to their deliberations with a charge so short and simple that it can have brought no consolation to any juror, if perplexed. Instead of summarizing the evidence and pointing out its bearing on the law, Judge Tyrrell said: "Gentlemen of the Jury I You have heard all of this case and the talk of the lawyers. You know your duty better than I can tell you. Go out and do your duty." Such a charge would hardly have taxed the mentality of a town-court constable of Dongan's day.

Nowadays, of course, none but attorneys are eligible' to judicial office in county and higher courts, but not so long ago graduates of law had little to compensate them, either in dignity or in purse, for their painstaking years as law students. The average grocer was happier and more prosperous; indeed Juba Stoors, a law graduate "of superior education" who went to Buffalo in 1808 to practice law, soon withdrew from practice and became a grocer, because the "too frequent success of legal quirks, quibbles and chicanery repelled him." Another young law graduate began to practice in the court of which his father, a physician, was First Judge. In his first case, the young lawyer, with confidence, began to "lay down the law" to his father the judge "That's not so, George," ruled the judge on one point which his lawyer son had tried hard to carry. The lawyer persisted, but by the time the argument had reached alarming heat, and the son seemed likely to emerge triumphant over the father, the latter came to himself. With judicial dignity, as well as parental authority, he ended the clash with a peremptory: "Sit down, George."

One more incident might be cited, one which nearly brought to an ignominious end a legal career that had scarcely begun. It concerned one who became internationally famous as a lawyer-James Kent, the commentator. It appears that after passing through a Latin school and Yale College, and serving four years as a law student in the office of Attorney-General Egbert Benson, young Kent was granted a license to practice law. When he first opened his law office it was much to the consternation of the villagers, who, in general, "regarded lawyers as destructive of the peace and order of the people." Without delay, a village deputation waited on him to tell him so, and ask him to remove to another place. Truly, the lot of the lawyer of that time was discouraging.

Great change, however, has since come in the status of the gentlemen of the bar. Although pre-legal requirements for admission to law schools are becoming more and more rigid, and the student course is getting harder and longer, the status of the lawyer is much more dignified than of yore; and this dignity is carried into the judiciary, for the bench nowadays is recruited from the bar; and only students of definite ability can now gain admission to the latter.

Laymen, perhaps, will be surprised to learn that the nineteenth century was in its second half before any law schools of appreciable size and permanency were regularly functioning. The law student of the eighteenth century and the first half of the nineteenth was in reality merely a law clerk. There were no law schools, and those who wished to become lawyers had to approach the study inversely, by taking clerical capacity in a law office, and, during the years of articled clerkship, hope to gain a superficial knowledge of law while performing routine clerical duties. In this way the articled clerks gradually became familiar with the forms of conveyances, phraseology of pleadings and so forth, but they knew little of their reason. However, at the end of the clerkship, they would be admitted to the bar, and would enter actively into practice. At least those who were of strong lungs and ready speech would, for in those days of quirk and quibble riot much else was effective. "Those who were not so gifted, in some cases, may have resolved to use their early years of little or no practice by taking up the study of law-directly from Blackstone. In those different ways, therefore, the schoolless period produced some sensational lawyers, but also some sound ones.

King's College, as has been stated, prepared to establish a school of law in 1773, but the Revolution came before it could get into satisfactory functioning. After the Revolution King's College became. Columbia College, and in 1784 the Americanized institution made preparatory plans to continue, or reorganize, the school of law. The

efforts of the college over the next six or seven decades were spasmodic-at least as regards the law department-and, with the exception of two short periods (1793-98 and 1823-26) in which James Kent was its professor of law, it is doubtful whether Columbia College School of Law functioned at all in the first half of the last century. Some of the leading lawyers of the early State period admitted articled clerks to their offices, but there was no law school, unless a private school conducted in Kinderhook from 1785 to about 1832 by the blind lawyer, Peter van Schaak, might be so considered. Certainly there was no law school in New York State in 1835, when Attorney-General Benjamin F. Butler actively interested himself in a plan to organize a school of law for New York University. The Law Department of New York University went. forward precariously from that year, but the earlier Columbia School remained dormant, it seems, for another generation, not being "placed on a permanent basis" until 1858, when Theodore W. Dwight became professor of municipal law at Columbia.

He had been at Hamilton College for a decade, 1848-58, and is credited with founding the law department of that collegiate institution, though there is record that Mr. John C. Spencer "formulated a plan" for a law school at Hamilton in 1835, or soon thereafter. Albany Law School was founded in 1851, by Ira Harris, Amasa J. Parker and Amos Dean, these three lawyers constituting the entire faculty of the school until 1870, when Isaac Edwards was appointed dean. In 1873 the Albany Law School became a branch of Union University, and still is. In the 'eighties and 'nineties four other schools came into existence, those of Buffalo, Cornell and Syracuse universities, and also the New York Law School. The Brooklyn Law School was not established until 1901, and four years later Fordham University School of Law began its first session.

The growth of the law schools has been phenomenal, for, according to statistics for 1924, three of the four largest law schools of America are in New York State. The order is as follows:

Brooklyn Law School, Brooklyn, New York.

Suffolk Law School, Boston, Massachusetts.

New York University School of Law, New York City.

Fordham University School of Law.

While the law schools do not yet insist upon college graduation as the pre-legal requirement, most of them will soon be demanding two years of college work from students who would register. The law department of Cornell University, indeed, became a graduate school of law in September, 1925.

Prior to 1894, admission to practice was somewhat lax, the examining committees of each county being at times indifferent, a lack of uniformity thus becoming evident in members of the bar. But an act of 1894 established a State Board of Law Examiners, composed of three lawyers, the Court of Appeals having power of appointment; and since January 1, 1895, this board has been responsible for all admissions. New rules went into effect on July 1, 1911, the pre-legal requirements being thereby made more exacting. The student was required to pass a sixty-count regents' examination instead of a forty-count as formerly. This requirement has now been increased to seventy-two. College graduates were required to take three years of legal study, and four years were demanded of a nongraduate. Attorneys who had practiced for five years in other States could be admitted to practice in New York State. Until 1886, only males were eligible, but by Chapter 425 of the Laws of 1886 women who could qualify were admissible. Comparatively few, however, have entered the profession, and a *Portia* in New York courts would still excite the curiosity of the average citizen. At least one woman, however, has been admitted to the judiciary; she now sits on the bench of one of the New York city special courts.

Footnotes

Footnote 122: Seymour D. Thompson, of St. Louis, Mo., in article, *"Three Courts,"* contributed to American Law Review, 1900, Vol. XXXIV, p. 398.

Footnote 123: *Judges of Court of Appeals from 1847 to 1870* (year of election): Freeborn G. Jewett, Greene C. Bronson, Charles H. Ruggles, Addison Gardiner, elected June 7, 1847; Freeborn G. Jewett, 1849 Samuel A. Foote, 1851; Alex. S. Johnson, 1851; Charles H. Ruggles and Hiram Demo, 1853; George F. Comstock and Samuel L Selden, 1855; Hiram Demo 1857; Henry E. Davis, 1859; William B. Wright, 1861, Henry R. Selden, 1862; John K. Porter and Ward Hunt 1865; Martin Grover 1867; Lewis B Woodruff and Charles Mason, 1868; Robert Earl and John A. Lott, 1869.

Justices of Supreme Court Sitting in Court of Appeals by Designation-Samuel Jones, William B. Wright, Thomas A. Johnson, Charles Gray, appointed July 1847, Daniel Cady, Selah B. Strong, William H. Shankland, James G. Hoyt, January, 1849; Elisha P. Hurlburt, Ira Harris Daniel Pratt, Henry W. Taylor, in 1850; William T. McCoun, Alonzo C. Paige, Hiram Gray, James Mullett, in 1851; John W. Edmonds, Malbone Watson, Philo Gridley, Henry Welles, 1852; Nathan B. Morse John Willard, Charles Mason, Moses Taggart, 1853; Henry P. Edwards, Amasa J. Parker, William F. Allen, Samuel L. Selden, 1854; Gilbert Dean, Augustus C. Hand, Schuyler Crippen, Richard P. Marvin, 1855; William Mitchell, William B. Wright, Frederick W. Hubbard, Thomas A. Johnson, 1856; John W. Brown, Alonzo C. Paige, William H. Shankland Levi F. Bowen, 1857; James J. Roosevelt, Ira Harris, Daniel Pratt, Theron B. Strong, 1858; Selah B. Strong, Cornelius L. Allen, Hiram Gray, Martin Grover, 1859; Thomas W. Clarke, William B. Wright, William J. Bacon, Henry Welles, 1860; John A. Lott, Amaziah B. James, Charles E. Mason, James G. Hoyt, 1861; Josiah Sutherland, George Gould, William F. Allen, E. Darwin Smith, 1862; James Emott, Enoch H. Rosekrans, Richard P. Marvin, 1863; Daniel P. Ingraham, Henry Hogeboom, Joseph Mullin, Thomas A. Johnson, 1864; John W. Brown, Platt Potter, William W. Campbell, Noah Davis, Jr., 1865; William H. Leonard, Rufus W. Peckham, Leroy Morgan, James C. Smith, 1866; William W. Scrugham, William Fullerton, Augustus Bockes, John M. Parker, Martin Grover, 1867; Thomas W. Clarke, Theodore Miller, William J. Bacon, Henry Welles, Charles C. Dwight, 1868; John A. Loft, Amaziah B. James, William Murray, Charles Daniels, 1869; Josiah Sutherland, Charles R. Ingalls, Henry A. Foster, B. Darwin Smith, 1870.

Chief Judges Court of Appeals, 1870 to 1925- Sanford E. Church 1870; Charles J. Folger 1880; Charles Andrews 1881; William C. Ruger 1882; Robert Earl 1892; Charles Andrews 1892; Alton B. Parker 1897; Edgar M. Cullen 1904; Willard Bartlett 1913; Frank H. Hiscock 1916-.

Associate Judges Court of Appeals, 1870-1925- William F. Allen, Martin Grover, Rufus W. Peckham, Charles J. Folger, Charles A. Rapallo, and Charles Andrews 1870; Alexander S. Johnson 1873; Theodore Miller 1874; Robert Earl 1875; Samuel Hand 1878; George F. Danforth 1878; Francis M. Finch 1880; Benjamin F. Tracy 1881; Rufus W. Peckham 1886; John Clinton Gray 1888; Denis O'Brien 1889; Isaac H. Maynard 1892; Edward T. Bartlett 1893; Albert Haight 1894; Celora E. Martin, Irving G. Vann 1910; Judson S. Landon 1900; Edgar M. Cullen, William E Werner 1900; John Clinton Gray 1902; Denis O'Brien 1903*;* William E. Werner, 1904; Willard Bartlett, Frank H. Hiscock, Emory A. Chase, 1906 Edward T. Bartlett 1907; Albert Haight 1908; Frederick Collin, Irving G. Vann, 1910; Frank F. Hiscock and Emory Chase, 1911; William H Cuddeback and John W Hogan 1912 Nathan L. Miller and Frank H. Hiscock 1913 William B Hornblower, Benjamin N. Cardozo, and Samuel Seabury, 1914; Cuthbert W. Pound 1915; Benjamin N. Cardozo 1917; Chester B. McLaughlin 1917; Frederick E. Crane, William S. Andrews; Benjamin N. Cardozo and Chester B. McLaughlin 1917; Abram I. Elkus, 1919; Emory A. Chase, Frederick E. Crane, 1920; .William S. Andrews, 1921; Irving Lehman, 1923.

Footnote 124: The Report of the Committee on Judiciary to the Constitutional Convention of 1915 reads, in this connection as follows:

"Underlying all these conditions (of congestion of court calendars) is a more fundamental cause with which your Committee has sought to deal and that is the character of the civil procedure prescribed by law for courts of

record in this State. The vice of this system lies not simply in the enormous body of complex and conflicting legislative rules which constitute the Code of Civil Procedure but in the uncertainty of these rules resulting from constant legislative tinkering."

"The legal profession as well as representative public bodies of various kinds have for several years past advocated a change in the present complicated and unwieldy system of judicial procedure established by the Code and the technicalities and uncertainties resulting from constant legislative amendment of it -See Journal of the Convention of 1915.

Footnote 125: Obviously space could hardly be given, in this general work, to such a large list as the complete roster of the Supreme Court over the more than seventy years of the elective system neither can space be found for a complete list of the General Term and Appellate Division benches but the Presiding Justices of these appellate courts might be named. There are as hereunder:

General Terms of Supreme Court 1870 1895; Presiding Justices:

First Department-Daniel P. Ingraham 1870; Noah Davis 1874; Charles H. Van Brunt, 1887-1895.

Second Department-Joseph F. Barnard 1870; Charles F. Brown 1894-95

Third Department-Theodore Miller 1870; William L. Learned 1876; Stephen L. Mayham, 1892-95.

Fourth Department-Joseph Mullin 1870; John L. Talcott, 1881; James C. Smith, 1883; George A. Hardin, 1884-95.

Fifth Department-James C. Smith 1885-87; George Barker 1880-89; Charles C. Dwight, 1890-95.

Appellate Divisions of Supreme Court 1896-1924; Presiding Justices:

First Department-Charles H. van Brunt 1896; Morgan J. O'Brien 1905; Edward Patterson 1906; George L. Ingraham, 1910; John Proctor Clarke 1916-24.

Second Department-Charles F. Brown 1896; William W. Goodrich 1897; Michael H. Hirschberg 1903; Almet F. Jenks 1911; Abel E. Blackmar 1921; William J. Kelly, 1923-24.

Third Department-Charles E. Parker 1896; Walter Lloyd Smith 1907; John M. Kellogg, 1916; Aaron V. S. Cochrane, 1922-24.

Fourth Department-George A. Hardin 1896; William H. Adams 1899; Peter E. McLennon, 1903; Frederick W. Kruse, 1914; Irving G. Hubbs, 1923-24.

Footnote 126: Known as the "Court of the Schout, Burgomasters and Schepens" of New Amsterdam from 1653 to 1665*;* as the Mayor's Court of the City of New York from 1665 to 1823; and as the Court of Common Pleas of the City of New York from 1823.

Footnote 127: Ten of the City Court and nine of the General Sessions.

Footnote 128: The Judiciary Constitutional convention of 1921 recommended that the Court be enlarged by merging in it the County Courts of Kings, Queens, Bronx and Richmond, but the Coles Judiciary Bill of 1925 does not adopt the recommendation.

Footnote 129: Twenty-two in Manhattan and Bronx, fifteen in Brooklyn, four in Queens County, and two in Richmond County.

Footnote 130: Twenty-six in Manhattan, four in Bronx, eleven in Brooklyn, five in Queens, and two in Richmond.