

Editors' Notes to Our Readers



Judith S. Kaye



*Maryann Saccomondo
Freedman*

This May *Journal*, marking the New York State Supreme Court's entry upon its fourth century, both celebrates that court's glorious past and looks to an equivalent future. History buffs as well as crystal-ball gazers should find their appetites well satisfied by this special Tricentennial issue.

Looking Back on a Glorious Past



Albert Rosenblatt

The issue begins by looking back to May 6, 1691, when the New York Assembly passed a law establishing a "Supreme Court of Judicature," to be "Duelly & Constantly Kept" at specified times. It is safe to pronounce after 300 years that the Assembly's mandate has been faithfully discharged. Through three centuries of evolution, revolution and reconstitution, the Supreme Court endures as a premier bench serving, and advancing, justice throughout the State.



David Boehm

The two articles introducing this Tricentennial issue span the three centuries. The first article, by Appellate Division Justice Albert Rosenblatt, breathtaking in its scope and efficiency, explores the firm foundations of the Supreme Court. A delightful wit, love of subject matter and deft hand in presenting it, are evident as well in Supreme Court Justice David Boehm's complementary tales of the courts, judges and lawyers of the Western frontier of New



Phylis Bamberger

York State.

Focusing on a single facet of Supreme Court history, Judge Phylis Bamberger traces the jury through 300 years, amply establishing her thesis that the jury both democratizes the legal process and reinvigorates allegiance to the fundamentals of democracy. Her explication of jury exemptions throughout the centuries is a fascinating chronicle of changes in societal attitudes, certainly as to age and gender, but in other areas as well. Judge Martin Stecher concentrates on a different facet of history — the origin of popular election of Supreme Court Justices, taking us back into New York's feudal system and other surprising remnants of our past.



Martin Stecher

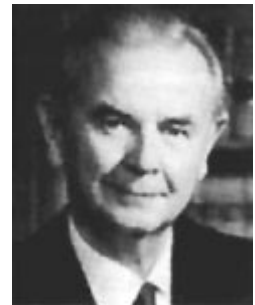
Finally, archivist James Folts gives new dimension to the description of the Supreme Court as a "court of record," tracing that term from its earliest common-law roots, and describing as well the various efforts to gather, preserve and make available court records.



James Folts

Looking Ahead to the Next Century

With this rich history as prologue, the *Journal* then peers into the future, projecting the practice of law in the next century.



William J. Brennan

We begin in outer space. As Justice William J. Brennan, Jr. notes in his article, the law of outer space is no fantasy today: the subject already is knocking at the door, demanding attention. Long before its next centennial, New York's Supreme Court no doubt will grapple with problems of equitable distribution of property situated on Mars, contracts and conspiracies executed outside the Earth's atmosphere, and tortious acts on distant planets causing injury to persons within the State.

Columbia Law School Professor and Vice Dean Vivian Berger's prognostications for



Vivian Berger

civil liberties in the next century are a sobering return to Earth. She sees fundamental rights receiving increasingly cramped definitions at the federal level, turning attention more and more on state courts and legislatures, and on new — or newly emphasized — rights. Into this last category Dean Berger places the questions engendered by medical breakthroughs, several of which are themselves the subject of an article by Buffalo attorney Grace Marie Ange. Already bedeviling in the year 1991, Ms. Ange's questions regarding new reproductive technologies assure that lawyers and judges of the future will have no dearth of knotty problems to fill their work days.



Grace Marie Ange

Finally, no *Bar Journal* glimpse into the next century would be complete without a view of both legal education, provided by CUNY Law School Dean Haywood Burns, and the legal profession, offered by New York City attorney Stephen Rackow Kaye. Dean Burns envisions profound change in the academy of the future, affecting who is taught and by whom, as well as law school subject matter and method. Like Dean Burns, Mr. Kaye also foresees fundamental change in the profession, concluding that the ultimate issue is "whether the intellectual core of lawyering in its widely diverse forms can survive the assaults of routinization, specialization and technology, and can respond to social, economic and political change." While the issue is sprinkled throughout with Supreme Court history, these two articles furnish the perfect end note for a tricentennial celebration: what the Supreme Court *will be* depends not only on the strong foundations that have been built, but also on those being built today and on the contributions of the generations yet to enter the profession.



Haywood Burns



Stephen Rackow Kaye

Judith S. Kaye

Maryann Saccomando Freedman

Foreword

SOL WACHTLER [\[1\]](#)

This issue celebrates the 300th anniversary of the Supreme Court of the State of New York — surely an extraordinary event in our nation's history, and an extraordinary institution.

No less than society generally, the Supreme Court reflects enormous growth and change. In 1691, serving a population of about 14,000, the Supreme Court was to be composed of at least three justices appointed by the royal governor, and it was to have original and appellate jurisdiction over all pleas "as fully and amply to all intents and purposes whatsoever, as the Courts of King's Bench, Common Pleas and Exchequer." Today, five constitutions later, with a State population exceeding 18 million, several hundred distinguished trial and appellate judges discharge the Supreme Court's incredibly large and varied docket while maintaining its tradition of doing justice.

This tradition gave us, in 1735, the decision in the case of John Peter Zenger, which focused the attention of all thirteen colonies on the importance of a free press. Although since that time, New York has remained at the forefront of the articulation and protection of personal rights, the mechanism for the protection of those rights can be traced to the legislative act of 1691 that created the Supreme Court and set the limits of its jurisdiction. With that one piece of legislation, New York's Assembly simplified the administration of justice in the province as a whole and established a foundation for the incorporation of the English common law into New York's jurisprudence.

It is hard to believe that this creation sprang from legislation drafted in only one day. Although its source was an earlier law which had proposed a similar system for the Dominion of New England (of which New York had been a part), the act creating the Supreme Court was drafted, debated and passed in a little less than two weeks.

New York's culture in 1691 was both rudimentary and rural, but it was able to take English institutions and English common law and adapt both to fit its diverse, multicultural and multilingual population. The establishment of the Supreme Court serves as an example of the pragmatism of those who settled the province and set into place its legal institutions. This pragmatism is the legacy of those who looked to English models and developed American solutions to pressing social and political problems.



The Supreme Court served as the foundation for the development of a uniquely New York-based common law, and this tradition carried over into the centuries that followed.

The Court heard cases that later became famous in American legal history: the Zenger case, the criminal contempt trial of Samuel S. Frear in 1803, and libel suits brought by James Fenimore Cooper. In *People v. Lemmon*, the New York Supreme Court upheld the freedom of a fugitive slave in the wake of the United States Supreme Court's *Dred Scott* decision, and in *People v. King*, New York's Supreme Court let stand a New York law banning racial discrimination in public accommodations eight short years before the United States Supreme Court was to affirm the "separate but equal" doctrine in the case of *Plessy v. Ferguson*.

But more than this, the founding of the Supreme Court in 1691 simplified the means for bringing justice to the people of New York. For every John Peter Zenger that came before the court, there were scores of artisans, traders and property owners, rich and poor, English and Dutch, who needed to be heard. The Supreme Court was the source of justice and authority in a rapidly changing New World. The world is a little older now, but bringing justice to all the citizens of New York remains the goal of those who serve the courts.

As we celebrate this tricentennial — the uninterrupted continuance of this remarkable court — we are reminded of the admonition of the Assembly of the New York Colony, which provided that the court should be "duely and constantly kept." Because of their dedication to justice and due process, the citizens of New York State can be proud that the Supreme Court today is still "duely and constantly kept."

The Justices of the Supreme Court, as well as our entire judiciary, are grateful to the New York State Bar Association for this commemorative publication.

Footnotes

Footnote 1: Chief Judge of the State of New York.

The Foundations of the New York State Supreme Court (1691-1991): A Study in Sources



ALBERT M. ROSENBLATT^[1]

One of the most intriguing things about seemingly portentous events is that we can almost never be sure whether the day will be celebrated again. Is it worthy of an anniversary? A jubilee? A centennial? A tricentennial, perhaps?

Some momentous events seem to have simply happened: Newton experiments with gravitation in 1665 and is struck by an apple, and an idea. Others are shaped by political and military circumstances: Normandy, June 6, 1944. Sometimes the participants themselves seem to have known that a great day was upon them, of the kind that would echo through the corridors of history: July 4, 1776.

In 1691, the General Assembly of the Colony of New York established a "Courts of Judicature for the Ease of Benefit of Each Respective City, Town and County." It appears to have been the fourth item of business enacted on May 6th; its modest place and tenor give little clue that it was destined for tricentennial celebration. To put the matter in chronological perspective, J.S. Bach, George Frederick Handel and Domenico Scarlatti were all six years old; Carolina was soon to be divided between North and South, and in 15 years Benjamin Franklin would be born.

The creation of the 1691 judiciary was extraordinary in a number of ways. That it was put into place at all, and ready to function, seems miraculous, considering the character of the colony at that time.

New York was founded not as a like-minded, theologically ordered community, but as a commercial enterprise. New Yorkers of the day were a heterogeneous lot. In 1686 Governor Thomas Dongan could report that the City of New York contained not only major groupings of Dutch Calvinists, French Calvinists and Anglicans, but also Lutherans, Quakers, Jews, Sabbatarians, Antisabbatarians, Anabaptists and Independents.

Judicial Mosaic

Reflecting such wide political, social and ethnic diversity, the years preceding 1691 reveal more of a judicial mosaic than anything resembling a coherent court plan. Although our present system has been called a patchwork of courts, the same may be said of it 300 years earlier, with one or two added impediments. Unlike our colonial courts, today's tribunals function in the same language, more or less, and have resort to a common jurisprudence. In 1691, however, all the courts did not, in a manner of speaking, read from the same advance sheets. There were the Dutch, the Bible Code practitioners and the English.

The Dutch settled the colony in 1623, and had developed their jurisprudence directly from Holland. For official business and judicial affairs, they converted a tavern into the Stadt Huys on Pearl Street in Manhattan in 1642,^[2] and in 1646 authorized villagers of "Breuckelen," and later, Manhattan, to elect their own judicial officials,^[3] helping (however unsubstantially) to satisfy a thirst for popular rule. Schout, Schepens and Burgomasters was not the name of a law firm. It was the name of the Colonial Dutch court corresponding roughly to sheriff, prosecutor and mayor. The records of these courts from 1653 to 1674 are felicitously intact in several bound volumes.^[4] The earliest conveyance on record of the Colonial Dutch involves the sale of a lot for 24 guilders (figured to be \$9.60, or less than half the cost of Manhattan Island, which, seven years earlier, Peter Minuit, the third governor, bought from the Indians for 60 guilders).

In 1665, our first English Governor, Richard Nicolls, revoked the Dutch rule by appointment of the "Mayor, Alderman and Sheriffe," according to the "Custome of England....," but the Dutch courts and their influence did not dissolve overnight. The names of their officials are, of course, still with us, in such place names as Van Cortlandt, Kip and Beekman. Their tribunals evolved into the "Mayor's Courts," specifically authorized under the 1691 Act as Courts of Common Pleas.^[5]

In addition to the Dutch, a second source of jurisprudence flowed from the Bible Codes practiced by New England Puritan migrants to Long Island and Westchester towns. Their courts looked more to biblical scripture than the commercial orientation of Dutch law.

The Seeds of Due Process

The 1691 enactment was more than a vehicle for court reorganization. It contained the seeds of due process. Although the Crown's charge to Governor Sloughter to set up a judicial system speaks of "our rights" (i.e., those of the Mother Country), and is aimed principally at the preservation of order and obedience, the directive is not without a lofty conception rooted in Magna Carta and the English Petition of Right of 1628: The Crown instructed Sloughter to "take care" that "life, Member, Freehold or Goods" not "be taken away or harmed in our said Province, otherwise than *by established and known Laws*, not repugnant to, but as much as conveniently may be agreeable to the Lawes of this our Kingdome of England..." (emphasis ours).

This concept of a Rule of Law evolved along with the colonists craving for liberty that underlay the Zenger free speech trial of 1735, and ultimately erupted in revolution in 1776. New York's Constitution of 1777, our first, was written largely by John Jay, Robert Livingston, and Gouverneur Morris. It perpetuated the Supreme Court of Judicature and gave it veto power over legislation. (Yes, veto power.) This Constitution also created a Court for Impeachment and the Correction of Errors, to consist of the Senate, the Chancellor and the Supreme Court Judges.

It is a fascinating document, not only for what it changed, but also for what it preserved, and for its having been written at a convention that travelled from White Plains to Harlem, King's Bridge, Phillip's Manor, Fishkill, Poughkeepsie and Kingston, eluding the danger of attack and capture by the British. Understandably, it is redolent with expressions of newly acquired political and religious freedom, and even includes the Declaration of Independence, but its drafter felt no need to cast off existing legal concepts. Detached from the Crown, the system of law was a fit legacy from England, and the Constitution expressly adopted the English Common Law, as it existed on the date of the Battle of Lexington, subject, of course, to legislative alteration.^[12] By so doing, the drafter incorporated the English Bill of Rights of 1689 as apart of the law of New York. The words of the English Charter of Right appear in Section XIII of the Constitution of 1777, proclaiming that "no member of this state shall be disfranchised or deprived of any rights... *unless by the law of the land...*" (emphasis ours).

The recorded history of the Supreme Court of Judicature does not truly begin until the turn of the century when James Kent joined the court. He served as its Chief Justice from 1804 until 1814, when he became Chancellor. Before that, no reliable records exist.^[13]

The first Supreme Court reporter was appointed in 1804, and it is his reports, and those of his contemporaries, that leave their rust colored dust on our palms and fingers, as we lovingly open the volumes of Caines reports, Coleman's Practice and Johnson's cases. Caines's first volume (1 New York Cases in Error) deals overwhelmingly with property and procedure. Even the two sauciest index headings reveal as much. Under Distress one is told to see Insurance. Under Robbery, see Executor.

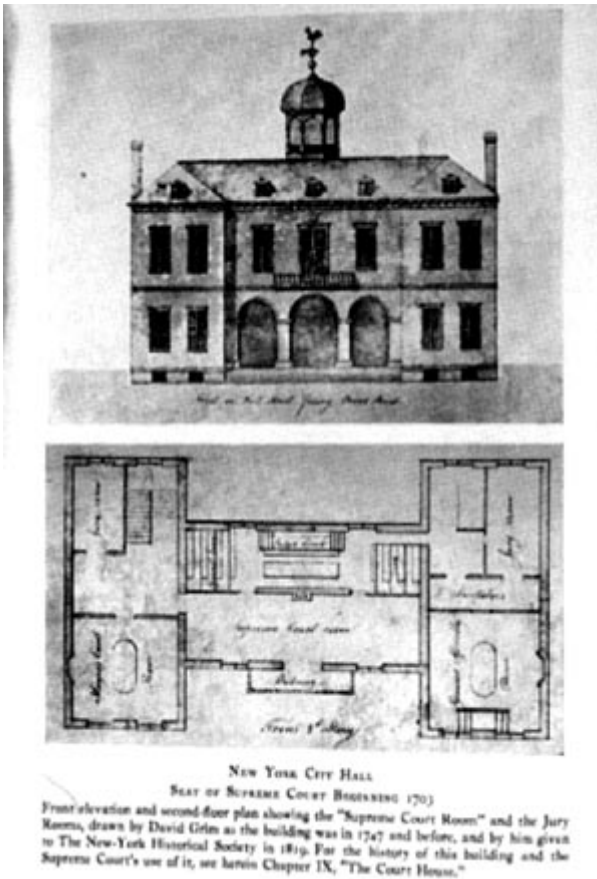
From this period until the constitutional convention of 1821, one of the Supreme Court's most illustrious cases was *People v. Crosswell*, 3 Johnson's Cases 337 (1804), in which Justice Kent ruled in favor of Alexander Hamilton, who argued that the liberty of the press includes a defense of truth to a libel charge. The Constitutional Convention incorporated the concept into the Constitution of 1821.

This Constitution, our second, did not bring major change to the Supreme Court, save for one feature. By abolishing the Council of Revision, the court, which then consisted of three judges, no longer enjoyed veto power over legislation. The action was taken to extinguish the "ill-assorted alliance" between the legislative and judicial branches, and while we may occasionally decry the political and economic weakness of the third branch, the experience with judicial veto power seemed to have brought its own set of woes.^[14]

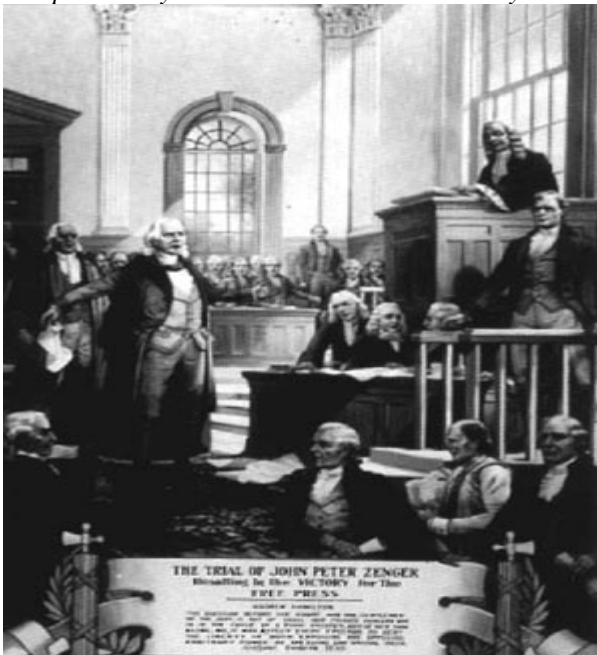
Under the Constitution of 1821, the State was divided into eight circuits, with all higher judicial appointments made by the Governor with the consent of the Senate. This "Second Constitution" took the circuit system then in operation and localized it into district divisions which evolved, in 1846, into judicial districts. The circuit judges were trial judges, and appeals from their judgments were taken to Supreme Court, to Chancery, or to the Court for the Correction of Errors.

The Second Constitution remained in existence for 24 years, until 1846, a period in which the State, aided by its canal system, was said to have enjoyed almost unexampled prosperity.

As a prelude to the Third Constitution (1846), four successive governors advanced the need to reorganize the court system "to prevent the delays which amounted to a denial of justice" on the ground that the Supreme Court was "oppressed with business." The Court for the Trial of Impeachments and Correction of Errors, which was akin to the English House of Lords, and which had been criticized for almost never declaring a statute unconstitutional (possibly because the senators were members of the court) was abolished, and in its place arose a Court of Appeals, composed of eight judges, half of them elected, half of them appointed from among the Supreme Court Justices — a device designed to satisfy our concomitant thirsts for democracy and experience. When the ancient Court of Errors fell, there also fell the prohibition against Supreme Court judges voting to support their own judgment in cases which had previously come before them (see *Pierce v. Delameter*, 1 NY 3 (1847)). The interdiction was revived through the 1867 constitutional amendment. "[T]here is nothing to exempt the wearer of the ermine" from the frailties of human nature, as one historian put it.^[15] The 1846 Constitution abolished the Court of Chancery and vested the Supreme Court with equity jurisdiction.^[16] It also established eight coordinate appellate tribunals, a condition that led to discordance and was remedied in 1870 with the creation of four departments, and a "General Term" that later became the "Appellate Division of the Supreme Court."



New York City Hall, Seat of Colonial Supreme Court. Completed in 1703, the New York City Hall housed the terms of the colonial Supreme Court. The Zenger trial occurred here. Drawing in the New York Historical Society. Permission to reproduce by the New York Historical Society.



"The Trial of John Peter Zenger resulting in the victory for the free press," print by David C. Lithgow. This recreation of the Zenger trial depicts attorney Andrew Hamilton, the original "Philadelphia lawyer," arguing in favor of Zenger's right to publish a newspaper critical of the royal governor. Though Zenger was acquitted of criminal libel charges, the trial did not establish a legally binding precedent. Artist's presentation print. Permission to reproduce by New York State Library.

The Constitutional court reorganization of 1846 signalled an era in which the population wanted to see the judiciary as more representational than aristocratic. Nothing reflects this mood more than the mandate that Supreme Court Judges be chosen by the voters, commencing 1847, for eight year terms.

Until then, the number of Supreme Court Justices had been no more than five. In 1847 there were three. In 1848, following the reorganization, there were thirty-two elected Supreme Court Justices, four of whom served on the newly formed Court of Appeals. Jacksonian democracy had arrived. The Supreme Court was to be "The People's Court" supplanting what the population regarded a "feudal" domain, occupied exclusively by the high born and privileged.^[17]

If we were to look for decisional law evidence of the evolving relationship between the citizen and the government, it may be found in the employment of the due process concept itself. Although the majestic phrase, due process of law, made its American debut in chapter 1 of the Laws of 1787, and in 1788 had been advanced in Poughkeepsie by delegates John Lansing, Jr. and Melanotos Smith at the convention to ratify the United States Constitution, its first Supreme Court appearance in a reported New York case may have been in *Thomas v. Woods*, 4 Cow. 173, 182 (1825) where it was used in a fleeting, peripheral context. We next see it in *Mtr. of John and Cherry Streets*, 19 Wend. 659 (1839), where Supreme Court Justice Esek Cowen breathed some life into the phrase, as did Supreme Court Justice Greene C. Branson, in *Taylor v. Porter and Ford*, 4 Hill 140, 146 (1843), with regard to the encroachment by the government on individual property rights.

As late as 1835 in *The People v. Morris*, 13 Wend. 325, 328, New York Supreme Court Chief Justice Samuel Nelson could comment that New York State has no Bill of Rights.

It is not until after its appearance in the Constitution of 1847 that we see decisional application of due process of law in a way that more closely resembles today's usage. In 1866 Supreme Court Judge Ransom Balcom in *Mtr. of Janes*, 30 How. Pr. 446, held that the petitioner was denied State and Federal due process of law under a statute which, upon an ex parte application, authorized a year's commitment for inebriates, with no provision for examination or legal adjudication.

By virtue of the Constitutional Convention of 1867, the Court of Appeals was reorganized in 1870, giving it seven elected members with 14 year terms, as it has today, except that its membership rose to between eight and ten, enhanced by additional Supreme Court judges who were appointed to the Court of Appeals under an 1899 constitutional amendment to Article VI, Sec.7. It also extended the term of Supreme Court Justices from 8 to 14 years.

The General Term of the Supreme Court lasted from 1870 until our Fourth Constitution in 1894, when it was abolished and replaced, in 1896, by the Appellate Division of the Supreme Court, whose members were appointed, as they are today.

The Fourth Constitution (1894) also abolished Courts of Oyer and Terminer, Circuit Courts, the New York City Superior Court, and Court of Common Pleas, the City Court of Brooklyn, and the Superior Court of Buffalo, and folded them all into the Supreme Court. An 1896 statute and a 1915 constitutional amendment authorized the Appellate Division to set up Appellate Terms.

The Constitutional Convention of 1915 proposed a number of changes, which the voters rejected, but in 1921, one of the proposals for creation of Children's Court and Domestic Relations Court was passed.

The constitutional provision regarding the jurisdiction of the Supreme Court, with alterations in 1925, 1947, 1953, 1962, and 1977, has not changed substantially since the Fourth Constitution of 1894.

For three centuries, under the banner of due process, the Supreme Court has delivered justice to its recipients, through periods of revolution, stability, depression, prosperity and war. We mark this tricentennial as a celebration of the Supreme Court's enduring commitment to excellence, and to the Rule of Law.

Looking at the composition of the court over its first two and a half centuries, and comparing it with its current membership, it is reassuring to see that the theme of due process not only emanates from its decisions, but also is now part of the fabric of the court itself.

The men and women who comprise its membership today have brought to the court a rich diversity that we hope will grow, and continue to enhance its texture.

Footnotes

Footnote 1:Justice Supreme Court, Appellate Division, Second Department.

Footnote 2:A.M. Earle, *The Stadt Huys of New Amsterdam*, Hail Moon Series, Papers on Historic New York, M.W. Goodwin, ed., p.1 (New York, 1896).

Footnote 3:M. L. Booth, *History of the City of New York*, pp.135-136 (New York: W.R.C. Clark, 1867).

Footnote 4:*The Records of New Amsterdam, From 1653 to 1674*, Berthold Fernow, ed. (New York: Knickerbocker Press, 1897).

Footnote 5:H. A. Johnson, *The Advent of Common Law in Colonial New York*, Selected Essays, Law and Authority in Colonial America, G.A. Billias, ed., pp. 80-83 (Barre, Mass: Barre Publishers, 1965); *Law in Colonial New York: The Legal System of 1691*, 80 Harv. L. Rev. 1757-72 (1967).

Footnote 6:See, generally, P.M. Hamlin and C. E. Baker, *Supreme Court of Judicature of the Province of New York, 1691-1704* (New York: The New-York Historical Society, 1952).

Footnote 7:*Albany Law Journal*, March 15, 1879, p. 211.

Footnote 8:See Joseph H. Smith, *Appeals to Privy Council from the American Plantation* (New York: Columbia University Press, 1950).

Footnote 9:See R. H. Robbins, *The Encyclopedia of Witchcraft and Demonography*, p.355 (New York: Crown, 1959); C.A. Hoyt, *Witchcraft* (So. Ill. U. Press, 1989) (2d ed.).

Footnote 10:II County Law, *McKinney's Consolidated Laws of New York*, pp. ix et seq.; see, also, L. 1790, ch, 18.

Footnote 11:L. 1695, ch. 49, 1 Colonial Laws, 351-52.

Footnote 12:Under L. 1788, ch. 46, New York State's Legislature declared English statutes inoperative.

Footnote 13:2 A. Chester, *Courts and Lawyers of New York*, pp. 843-44 (New York:1925).

Footnote 14:2 Chester, *supra*, p. 848.

Footnote 15:2 Chester, *supra*, p. 696.

Footnote 16:II Lincoln, *The Constitutional History of New York*, pp. 66-73, 146-163 (New York 1906).

Footnote 17:See, generally, R. D. Niles, *Are We Ready for a True Legal Profession in New York?*, 22 *New York County Lawyers Bar Bulletin* 148-64 (1964-65).

The Duke's Laws

Superimposed on these two juridical systems was the English Common Law itself, which had its American roots in the "Duke's Laws," promulgated in Hempstead, Long Island, on March 1, 1665, shortly after the English took the colony from the Dutch, in 1664. There was not much of a celebration in March of 1965. The tricentennial was scarcely noted, if at all, but there is much in it worth celebrating. Considering that the English Common Law eventually survived the other early systems, the Duke's Laws established a cornerstone upon which the Judiciary Act of 1691, and, in turn, our present system of law, was built.

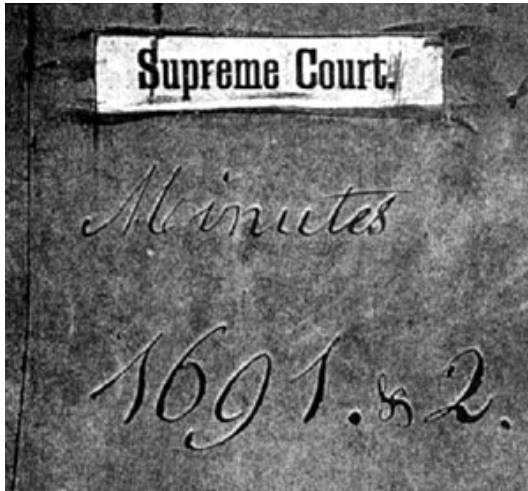
The "Duke" was the Duke of York, later to become James II of England, who acquired New York colony as a gift from his brother, Charles II. He set down a code of law which by today's standards might seem quaint and odd, or even implausible, but there are also provisions that warm the heart. Consisting of some 75 pages, it calls for the establishment of various trial courts, with appeals to a Court of Assizes, the colony's highest tribunal. There is even a brief, mid-17th Century version of the CPLR, dealing with actions, costs, jury duty, and equity, and there is also a bounty for wolves. There are prohibitions against conflicts of interest, penalties for "causeless vexation," treble damages for inflated claims, a mandate for "speedy trials" and a law requiring that brewers had better know what they are doing. There is also, blessedly, an express provision for arbitration, a lasting vestige of Dutch law, as a device for settling suits.

Beyond the Duke's Laws, the Bible Codes and the Dutch Mercantile Law, there was, in 1688, the Crown's grand plan to merge the courts of New York into a unified New England Dominion. Into this mix came militia officer Jacob Leisler in 1690. Following reports of the expulsion of James II, and purportedly acting in the name of William and Mary, he seized control of the colonial government and further attempted to reconstitute the judiciary.

In all, we learn of there having been Manor Courts, an Orphans, and Surrogates Court, a Court of Governor and Council, a Court of Adjudicature, Patroons Court, Town Courts, Courts of Exchequer, General Gaol Delivery, Oyer and Terminer, Common Pleas, Prerogative, Admiralty, Assizes, Chancery, Courts of Constable and Overseers and Courts of Quarter Sessions of the Peace.^[6]

This was the history and condition of the colony and its courts in 1691 when Governor Henry Sloughter arrived, charged with the obligation of putting the judicial house in order, or, for want of a better word, merger, but without overhaul. In this fractious environment, it is remarkable that an orderly court system was created at all, the more so that the writing was reportedly completed in one afternoon by drafter James Graham.

That it endured for many decades, may have been the result of Sloughter's method. Rather than impose a judicial system on the population, he authorized New York's colonial legislature to enact one, a decision that was the product of his insubordination, prescience, misunderstanding or political expediency (or all of the above), considering that his mandate from the Crown was to streamline the judiciary, while leaving it intact.



Cover of the earliest Minute Book; New York Supreme Court 1691-2 Historical Document Collection. Library, Queens College Flushing, NY.

He departed from the Crown's practice of having the Act of 1691 has been described as a masterpiece: the executive create the judicial system, by allowing the legislature, of the colony no less, to do so. in the eloquent language of historian Robert L. Fowler,^[7]

It was from the act of 1691 that the Supreme Court of this State inherited not only the traditions of the Saxon Aula Regis, but the best fruits of the centuries of English Law. So wise were the provisions of that early act of 1691, that the patriotic framers of the first State government recognized its creature, the Supreme Court of the Province, as an appropriate tribunal for a free people and a new order of things.... [I]t will be still the link which connected the judicial system of New York and the very dawn of English Law.

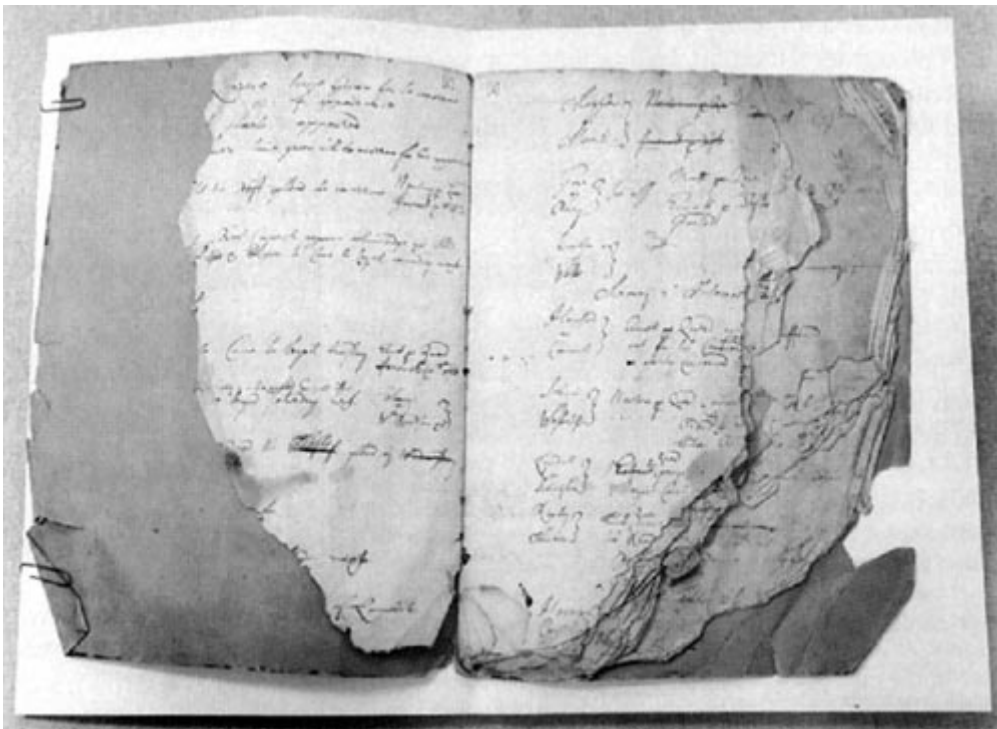
The Judiciary Act of 1691 created the Supreme Court of Judicature of the Province of New York, and thereby unified, in one tribunal, the province s highest court of original jurisdiction, civil and criminal. The Supreme Court centralized the full range of cases that in England fell within the jurisdiction of the three great law courts: King's Bench, Common Pleas, and Exchequer. It was also granted equity jurisdiction concurrently with New York s High Court of Chancery, and could transfer to itself criminal and civil matters of other courts. Any doubts as to its being "Supreme" were dispelled by its status as the court of last appeal in the Province. After that, there was only the royal governor and the King.^[8]

The Court s work included a wide assortment of matters, with the notable exception of witchcraft, a concern that was keeping some Massachusetts courts very busy at that hour. For this departure we may again thank the Dutch, whose sober attitude gave us a disdain for sorcery prosecutions. In New York, we learn of only two such proceedings, one in Long Island, the other in Westchester. The Long Island case was the closer of the two. The jury intoned: "[H]aving well weighed the evidence, we find that there are some suspicions..." but the proof was insufficient to make a case.^[9]

To better suit the public's convenience, the Judiciary Act was soon amended to provide for "Circuit riding," with one Supreme Court Justice sitting with two local justices of the peace. We may wonder as to the enviable or unenviable travel assignments made, presumably by its first Chief Justice, Joseph Dudley, considering that Nantucket and

Martha's Vineyard were then part of New York's jurisdiction, as were portions of Maine and the wilderness that was to become Vermont. Alas, shortly after 1691, we, who smile at the purchase of Manhattan for 60 guilders, relinquished Martha's Vineyard and Nantucket to Massachusetts, and later ceded Vermont to the Vermonters.^[10]

As for the practice of law, conducted by barely a score of lawyers, the Legislature identified a problem: "Number of Attorneys at law that practice at the Barr in this Province are but few and that many persons Retain most of them on one side to the great prejudice and discouragement of others...." The lawmakers therefore resolved to administer justice more evenly, by decreeing that if one side retained more than two attorneys, the judge could direct the surplus attorneys to plead for the other side "Without Returning the fee Received."^[11]



Pages of the earliest Minute Book; New York Supreme Court 1691-2 Historical Document Collection. Library, Queens College Flushing, NY.

The Seeds of Due Process

The 1691 enactment was more than a vehicle for court reorganization. It contained the seeds of due process. Although the Crown's charge to Governor Sloughter to set up a judicial system speaks of "our rights" (i.e., those of the Mother Country), and is aimed principally at the preservation of order and obedience, the directive is not without a lofty conception rooted in Magna Carta and the English Petition of Right of 1628: The Crown instructed Sloughter to "take care" that "life, Member, Freehold or Goods" not "be taken away or harmed in our said Province, otherwise than *by established and known Laws*, not repugnant to, but as much as conveniently may be agreeable to the Lawes of this our Kingdome of England..." (emphasis ours).

This concept of a Rule of Law evolved along with the colonists craving for liberty that underlay the Zenger free speech trial of 1735, and ultimately erupted in revolution in 1776. New York's Constitution of 1777, our first, was written largely by John Jay, Robert Livingston, and Gouverneur Morris. It perpetuated the Supreme Court of Judicature and gave it veto power over legislation. (Yes, veto power.) This Constitution also created a Court for Impeachment and the Correction of Errors, to consist of the Senate, the Chancellor and the Supreme Court Judges.

It is a fascinating document, not only for what it changed, but also for what it preserved, and for its having been written at a convention that travelled from White Plains to Harlem, King's Bridge, Phillip's Manor, Fishkill, Poughkeepsie and Kingston, eluding the danger of attack and capture by the British. Understandably, it is redolent with expressions of newly acquired political and religious freedom, and even includes the Declaration of Independence, but its drafter felt no need to cast off existing legal concepts. Detached from the Crown, the system of law was a fit legacy from England, and the Constitution expressly adopted the English Common Law, as it existed on the date of the Battle of Lexington, subject, of course, to legislative alteration.^[12] By so doing, the drafter incorporated the English Bill of Rights of 1689 as apart of the law of New York. The words of the English Charter of Right appear in Section XIII of the Constitution of 1777, proclaiming that "no member of this state shall be disfranchised or deprived of any rights... *unless by the law of the land...*" (emphasis ours).

The recorded history of the Supreme Court of Judicature does not truly begin until the turn of the century when James Kent joined the court. He served as its Chief Justice from 1804 until 1814, when he became Chancellor. Before that, no reliable records exist.^[13]

The first Supreme Court reporter was appointed in 1804, and it is his reports, and those of his contemporaries, that leave their rust colored dust on our palms and fingers, as we lovingly open the volumes of Caines reports, Coleman's Practice and Johnson's cases. Caines's first volume (1 New York Cases in Error) deals overwhelmingly with property and procedure. Even the two sauciest index headings reveal as much. Under Distress one is told to see Insurance. Under Robbery, see Executor.

From this period until the constitutional convention of 1821, one of the Supreme Court's most illustrious cases was *People v. Croswell*, 3 Johnson's Cases 337 (1804), in which Justice Kent ruled in favor of Alexander Hamilton, who argued that the liberty of the press includes a defense of truth

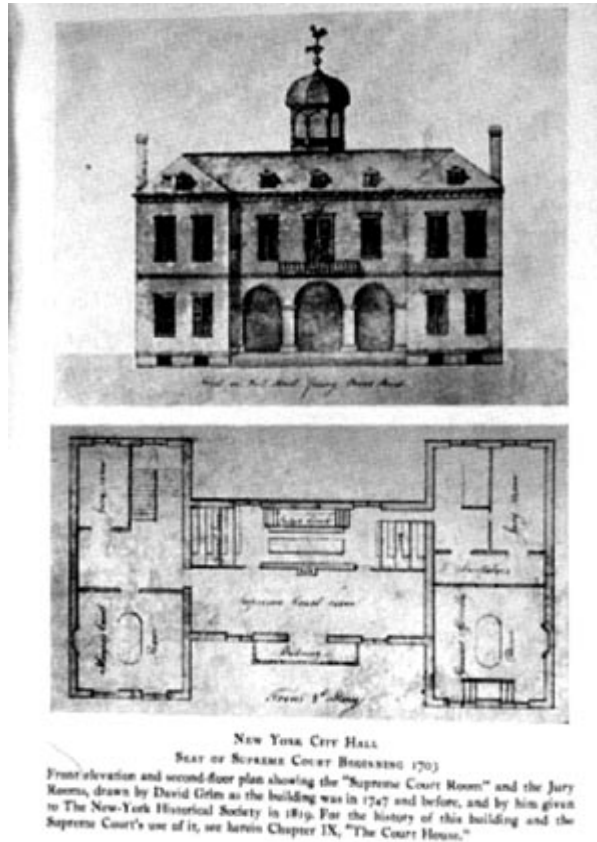
to a libel charge. The Constitutional Convention incorporated the concept into the Constitution of 1821.

This Constitution, our second, did not bring major change to the Supreme Court, save for one feature. By abolishing the Council of Revision, the court, which then consisted of three judges, no longer enjoyed veto power over legislation. The action was taken to extinguish the "ill-assorted alliance" between the legislative and judicial branches, and while we may occasionally decry the political and economic weakness of the third branch, the experience with judicial veto power seemed to have brought its own set of woes. [\[14\]](#)

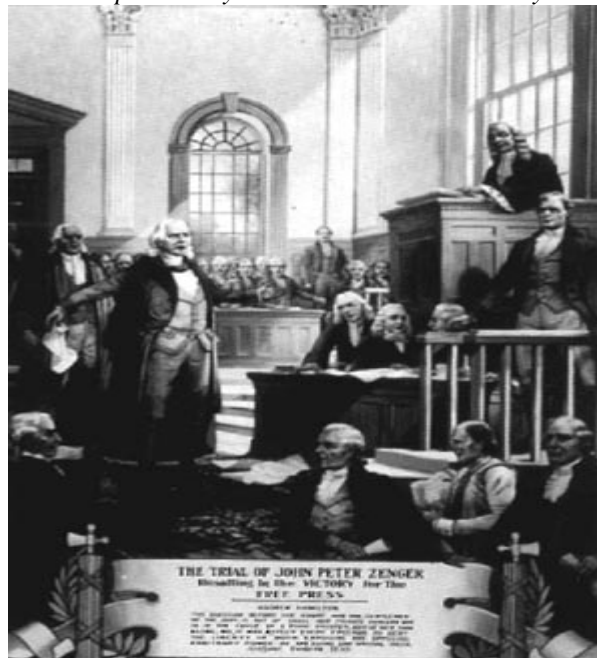
Under the Constitution of 1821, the State was divided into eight circuits, with all higher judicial appointments made by the Governor with the consent of the Senate. This "Second Constitution" took the circuit system then in operation and localized it into district divisions which evolved, in 1846, into judicial districts. The circuit judges were trial judges, and appeals from their judgments were taken to Supreme Court, to Chancery, or to the Court for the Correction of Errors.

The Second Constitution remained in existence for 24 years, until 1846, a period in which the State, aided by its canal system, was said to have enjoyed almost unexampled prosperity.

As a prelude to the Third Constitution (1846), four successive governors advanced the need to reorganize the court system "to prevent the delays which amounted to a denial of justice" on the ground that the Supreme Court was "oppressed with business." The Court for the Trial of Impeachments and Correction of Errors, which was akin to the English House of Lords, and which had been criticized for almost never declaring a statute unconstitutional (possibly because the senators were members of the court) was abolished, and in its place arose a Court of Appeals, composed of eight judges, half of them elected, half of them appointed from among the Supreme Court Justices — a device designed to satisfy our concomitant thirsts for democracy and experience. When the ancient Court of Errors fell, there also fell the prohibition against Supreme Court judges



New York City Hall, Seat of Colonial Supreme Court. Completed in 1703, the New York City Hall housed the terms of the colonial Supreme Court. The Zenger trial occurred here. Drawing in the New York Historical Society. Permission to reproduce by New York Historical Society.



"The Trial of John Peter Zenger resulting in the victory for the free press," print by David C. Lithgow. This recreation of the Zenger trial depicts attorney Andrew Hamilton, the original "Philadelphia lawyer," arguing in favor of Zenger's right to publish a newspaper critical of the royal governor. Though Zenger was acquitted of criminal libel charges, the trial did not establish a legally binding precedent. Artist's presentation print. Permission to reproduce by New York State Library.

voting to support their own judgment in cases which had previously come before them (see *Pierce v. Delameter*, 1 NY 3 (1847)). The interdiction was revived through the 1867 constitutional amendment. "[T]here is nothing to exempt the wearer of the ermine" from the frailties of human nature, as one historian put it.)^[15] The 1846 Constitution abolished the Court of Chancery and vested the Supreme Court with equity jurisdiction.^[16] It also established eight coordinate appellate tribunals, a condition that led to discordance and was remedied in 1870 with the creation of four departments, and a "General Term" that later became the "Appellate Division of the Supreme Court."

The Constitutional court reorganization of 1846 signalled an era in which the population wanted to see the judiciary as more representational than aristocratic. Nothing reflects this mood more than the mandate that Supreme Court Judges be chosen by the voters, commencing 1847, for eight year terms.

Until then, the number of Supreme Court Justices had been no more than five. In 1847 there were three. In 1848, following the reorganization, there were thirty-two elected Supreme Court Justices, four of whom served on the newly formed Court of Appeals. Jacksonian democracy had arrived. The Supreme Court was to be "The People's Court" supplanting what the population regarded a "feudal" domain, occupied exclusively by the high born and privileged.^[17]

If we were to look for decisional law evidence of the evolving relationship between the citizen and the government, it may be found in the employment of the due process concept itself. Although the majestic phrase, due process of law, made its American debut in chapter 1 of the Laws of 1787, and in 1788 had been advanced in Poughkeepsie by delegates John Lansing, Jr. and Melanotos Smith at the convention to ratify the United States Constitution, its first Supreme Court appearance in a reported New York case may have been in *Thomas v. Woods*, 4 Cow. 173, 182 (1825) where it was used in a fleeting, peripheral context. We next see it in *Mtr. of John and Cherry Streets*, 19 Wend. 659 (1839), where Supreme Court Justice Esek Cowen breathed some life into the phrase, as did Supreme Court Justice Greene C. Branson, in *Taylor v. Porter and Ford*, 4 Hill 140, 146 (1843), with regard to the encroachment by the government on individual property rights.

As late as 1835 in *The People v. Morris*, 13 Wend. 325, 328, New York Supreme Court Chief Justice Samuel Nelson could comment that New York State has no Bill of Rights.

It is not until after its appearance in the Constitution of 1847 that we see decisional application of due process of law in a way that more closely resembles today's usage. In 1866 Supreme Court Judge Ransom Balcom in *Mtr. of Janes*, 30 How. Pr. 446, held that the petitioner was denied State and Federal due process of law under a statute which, upon an ex parte application, authorized a year's commitment for inebriates, with no provision for examination or legal adjudication.

By virtue of the Constitutional Convention of 1867, the Court of Appeals was reorganized in 1870, giving it seven elected members with 14 year terms, as it has today, except that its membership rose to between eight and ten, enhanced by additional Supreme Court judges who were appointed to the Court of Appeals under an 1899 constitutional amendment to Article VI, Sec.7. It also extended the term of Supreme Court Justices from 8 to 14 years.

The General Term of the Supreme Court lasted from 1870 until our Fourth Constitution in 1894, when it was abolished and replaced, in 1896, by the Appellate Division of the Supreme Court,

whose members were appointed, as they are today.

The Fourth Constitution (1894) also abolished Courts of Oyer and Terminer, Circuit Courts, the New York City Superior Court, and Court of Common Pleas, the City Court of Brooklyn, and the Superior Court of Buffalo, and folded them all into the Supreme Court. An 1896 statute and a 1915 constitutional amendment authorized the Appellate Division to set up Appellate Terms.

The Constitutional Convention of 1915 proposed a number of changes, which the voters rejected, but in 1921, one of the proposals for creation of Children's Court and Domestic Relations Court was passed.

The constitutional provision regarding the jurisdiction of the Supreme Court, with alterations in 1925, 1947, 1953, 1962, and 1977, has not changed substantially since the Fourth Constitution of 1894.

For three centuries, under the banner of due process, the Supreme Court has delivered justice to its recipients, through periods of revolution, stability, depression, prosperity and war. We mark this tricentennial as a celebration of the Supreme Court's enduring commitment to excellence, and to the Rule of Law.

Looking at the composition of the court over its first two and a half centuries, and comparing it with its current membership, it is reassuring to see that the theme of due process not only emanates from its decisions, but also is now part of the fabric of the court itself.

The men and women who comprise its membership today have brought to the court a rich diversity that we hope will grow, and continue to enhance its texture.

Footnotes

Footnote 1:Justice Supreme Court, Appellate Division, Second Department.

Footnote 2:A.M. Earle, *The Stadt Huys of New Amsterdam*, Hail Moon Series, Papers on Historic New York, M.W. Goodwin, ed., p.1 (New York, 1896).

Footnote 3:M. L. Booth, *History of the City of New York*, pp.135-136 (New York: W.R.C. Clark, 1867).

Footnote 4:*The Records of New Amsterdam, From 1653 to 1674*, Berthold Fernow, ed. (New York: Knickerbocker Press, 1897).

Footnote 5:H. A. Johnson, *The Advent of Common Law in Colonial New York*, Selected Essays, Law and Authority in Colonial America, G.A. Billias, ed., pp. 80-83 (Barre, Mass: Barre Publishers, 1965); *Law in Colonial New York: The Legal System of 1691*, 80 Harv. L. Rev. 1757-72 (1967).

Footnote 6:See, generally, P.M. Hamlin and C. E. Baker, *Supreme Court of Judicature of the Province of New York, 1691-1704* (New York: The New-York Historical Society, 1952).

Footnote 7:*Albany Law Journal*, March 15, 1879, p. 211.

Footnote 8:See Joseph H. Smith, *Appeals to Privy Council from the American Plantation* (New York: Columbia University Press, 1950).

Footnote 9:See R. H. Robbins, *The Encyclopedia of Witchcraft and Demonography*, p.355 (New York: Crown, 1959); C.A. Hoyt, *Witchcraft* (So. Ill. U. Press, 1989) (2d ed.).

Footnote 10:II County Law, *McKinney's Consolidated Laws of New York*, pp. ix et seq.; see, also, L. 1790, ch, 18.

Footnote 11:L. 1695, ch. 49, 1 Colonial Laws, 351-52.

Footnote 12:Under L. 1788, ch. 46, New York State's Legislature declared English statutes inoperative.

Footnote 13:2 A. Chester, *Courts and Lawyers of New York*, pp. 843-44 (New York:1925).

Footnote 14:2 Chester, *supra*, p. 848.

Footnote 15:2 Chester, *supra*, p. 696.

Footnote 16:II Lincoln, *The Constitutional History of New York*, pp. 66-73, 146-163 (New York 1906).

Footnote 17:See, generally, R. D. Niles, *Are We Ready for a True Legal Profession in New York?*, 22 *New York County Lawyers Bar Bulletin* 148-64 (1964-65).



Courts of the Western Frontier

David O. Boehm^[1]

In 1638, the Dutch called all of New York west of Albany, "Terra Incognita." When the English took possession, they named it Albany, County, after the Duke of York and Albany (later James II). In 1772, Tryon County was set off from Albany County. After the Revolutionary War, Tryon County was re-named Montgomery County for the popular general who was killed in the assault on Quebec. With Charlotte County, Tryon contained all of the land west of colonial New York, and it was in Tryon County that the last session of the Crown Court was held on December 17, 1775.

When the Constitution was finally adopted at Kingston on April 20, 1777, temporary appointments were made to the Supreme Court; Robert R. Livingston was appointed Chancellor, John Jay, Chief Justice, Robert Yates and John Schloss Hobart, Associate Justices of the Supreme Court. They were to hold office during good behavior, or until they should reach the age of 60 years.

The Supreme Court was not at that time regarded as newly created, but as merely reconstituted and continued. The minutes of the first term of the court at Kingston in September, 1777, were entered in the same volume that had been used by the Crown Court in pre-Revolution days. The only change of any consequence was in the title and docket of the first case, People of the State of New York being substituted for that of Dominus Rex.

In April, 1786, legislation required that one or more of the Supreme Court Justices hold court in each of the counties of the state for the trial of cases triable there. What this imposed upon the three Supreme Court Justices may be imagined from Justice John Schloss Hobart's journey from New York by boat, canoe and on horseback to western New York.

First Term of Court

In the Albany Law Journal, Volume LVI, pages 349-54, an article written by L. B. Proctor describes the "First Term of Supreme Court in Western New York." It tells of how Justice Hobart left his home in New York City in early June, 1795 and "traveled westward through distant forests, crossing lakes, journeying along the shores of rivers, over the warpaths of the Indians, to the country of the Genesee" to hold the first term of the Supreme Court ever to be held west of Cayuga Lake, at the Village of Geneva. After being ferried over Cayuga Lake, Justice Hobart rode on horseback through "primitive forest." His horse cast a shoe, and the judge finally reached a hut in the forest where he asked to be directed to the nearest blacksmith. The settler, who was the only

white inhabitant for miles around, himself, shod the horse.

The judge finally reached Geneva and sittings began on September 20, 1795. Justice Hobart was given quarters in the Patterson Tavern "a place constructed of hewn logs, one story high, but roomy and comfortable." A large log building had been erected for the courthouse. The bench was of rough-hewn logs as was the judge's seat and the jury box. One can only wonder what must have passed through the good judge's mind as he presided in this frontier courtroom. He had been an associate of Justice John Jay and was described "in scholarly attainments, legal learning and judicial ability... the equal, if not the superior, of Jay." But perhaps the experience was eased somewhat by the respectful treatment he received from the settlers. In the morning, at the sound of a horn, the judge was escorted to the courthouse by the sheriff and the lawyers who had gathered. He took his seat on the bench "with the ease and grace with which he sat on the bench in the metropolis of the State, surrounded by a brilliant bar and all that renders a temple of justice impressive." At least one of the members of the bar matched the dignity and learning of the judge. He was Aaron Burr, then a United States Senator, and present on behalf of a client.

Justice Hobart gave an eloquent and prophetic charge to this frontier Grand Jury, a portion of which follows:

Humble as are your surroundings, they rise into the degree of grandeur, not so much from the importance of the work you are to perform here as from the thought that you are the first Grand Inquest ever impanelled in Western New York, a region which time will embellish with cultivation, by intelligent people, institutions of learning, art, science and all that adorns and elevates society. We are here to lay the cornerstone of jurisprudence not only for the present but for the future of this magnificent wilderness, and to set the grand machinery of the law in motion for all time.

One of the first settlers in the Town of Shelby in Orleans County, Alexander Coon, described what the primitive frontier was like at that time: "My father and his family came into two miles west of Shelby Village in 1810. The whole family, with a hired man, left the Lewiston road at Walsworth, and arriving upon our land, four crotches were inserted in the ground, sticks laid across, and the bark of an elm tree used for roof and sides. The hut was only intended for a sleeping place; the cooking was done in the open air. So much accomplished, my father and mother went out to Walsworth's for a few nights to get lodging, the hired man and boys lodging in the hut. A log house was the next thing in order. A very comfortable one was built in five days and that too, without the use of boards, nails or shingles. Our cattle were carried through the first winter entirely on browse; the next winter we had a little corn fodder to mix with it."

Footnotes

Footnote 1: Justice, Supreme Court of the State of New York, Seventh Judicial District.

New York's Pioneer Frontier

That huge section of Western New York lying west of the Pre-emption Line, formed from the Phelps and Gorham tract and the Holland Purchase, which Ontario County originally encompassed, was literally the pioneer frontier of New York. First organized in 1789, it embraced almost all of the counties in the Seventh and Eighth Judicial Districts. It included all of the western territory of New York State. Neither Rochester nor Buffalo then existed and all of the legal business of the scattered settlements throughout this frontier region was conducted in Canandaigua, which is today the county seat of a much reduced Ontario County. Oliver Phelps made Canandaigua his home and, in 1789, was appointed the first judge of the Court of Common Pleas. That office was subsequently held by his grandson.

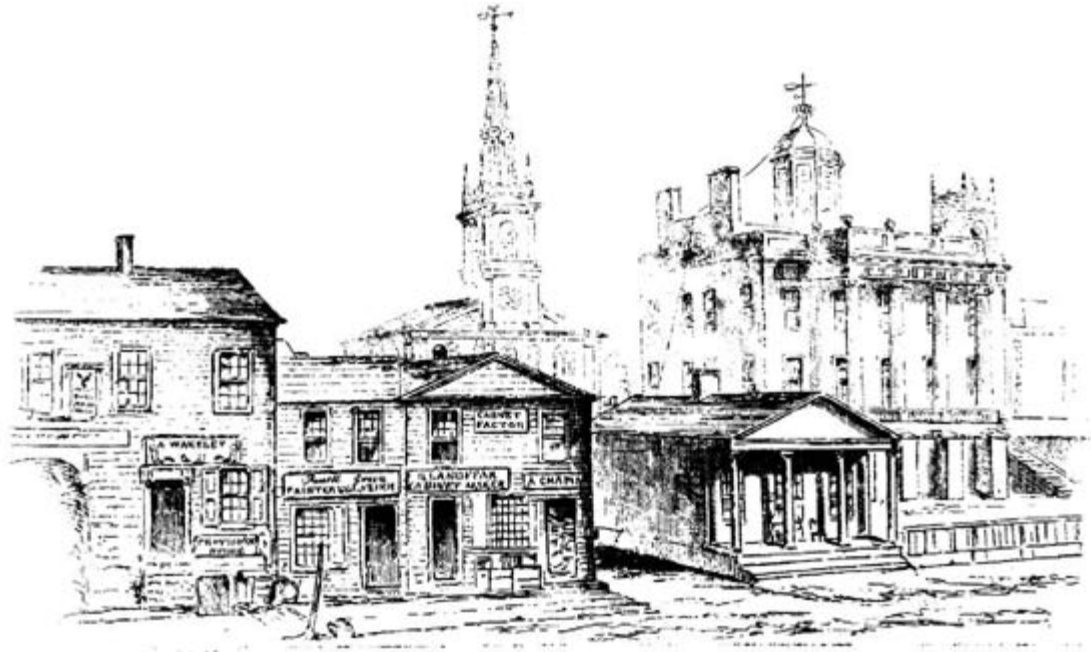
The counties, towns and villages where the young frontier lawyers began to practice were named to express their early founders sense of history, their pride and boundless optimism, their homesickness, and even a little pretentious display of classical knowledge. Names from the ancient world, such as Syracuse, Aurelius, Marcellus, Brutus, Cato, Sparta, Ovid, Ithaca, Utica sprang up out of the cleared forest. Others recalled European cities, Amsterdam, Liverpool, Warsaw, Rome, Geneva, Bath. Patriotism was reflected in the names of Revolutionary War generals, such as Montgomery, Pulaski, Herkimer, Schuyler, Lafayette, and Presidents were honored, Washington, Monroe, Jefferson and Madison. The Mohawk and Cherry Valley trails, now routes 5 and 20, running west from colonial New York became redolent with the names of the early Dutch presence. The Erie Canal exerted its influence upon the many settlements that dotted its route, Lockport, Brockport, Spencerport, Fairport. Land investors, Oliver

Phelps, Nathaniel Gorham and Nathaniel Rochester contributed their names to towns in Ontario County and to what is today the third largest city in the state. And great place names from the Iroquois tongue resonated throughout the western frontier.

Courts were at first held in private homes, as in Allegany County when it was first established in 1806, or, weather permitting, outdoors under the trees, as in Tioga County. Some courthouses doubled as schoolhouses and meeting houses, as the one in Clinton County, which met an honorable end in the War of 1812, when it was struck by shot from cannon of the American forces attacking British-occupied Plattsburg and burned to the ground. Some courthouses, like the one at Delhi in Delaware County, remained unused so long that the legislature finally authorized it in 1812 to be used as a tavern.

Although not typical, there is the account of a court session held in the meeting house at New Hartford in January, 1794, on a cold January day. The trial continued until near nightfall. Since there was little or no heat, some of the lawyers were successful in getting the sheriff to obtain a jug of spirits from a nearby inn. It was passed around the bar table and the contents of the jug satisfyingly enjoyed by each attorney. The three judges, who were suffering from the cold as much as their brothers at the bar, had a little consultation at the bench. It is reported that the first judge announced that the court saw no reason why it should continue longer and freeze to death and

requested the crier to adjourn the court. The sheriff immediately jumped to his feet, grasped the jug and holding it up to the bench, pled with the judges not to adjourn yet and instead to take a little gin which would keep them warm. Whether or not the suggestion was followed, the record tells us that the order to adjourn was revoked and business went on.



Monroe County Courthouse, Rochester, 1827. The courthouse was the seat of one of the Supreme Court's general terms starting in 1841. (Basil Hall, Forty Etchings, from Sketches Made with a Camera Lucida in North America in 1827 and 1828 [London; 1830], Plate X. Permission to reproduce granted by Manuscripts and Special Collections, New York State Library.

Early Frontier Courthouses

The early frontier courthouses were far from the grand Greek Revival buildings which succeeded them when the settlements became more prosperous. For example, the first courthouse in Franklin County at Malone was completed in 1812 at a cost of only \$4,757.25, including the cost of a "necessary" and \$3.00 for "spit boxes." The early settlers were more concerned that their courthouses be functional and sturdy than beautiful. As late as 1864, a young boy, who was taken to a murder trial at the courthouse in Johnstown, described the courtroom floor as "covered with sawdust and peach pits, and peanut shells, and old tobacco quids." Court was called to order by several constables banging long black poles on the festooned floor. It was in this same courtroom, in 1845, that Elizabeth VanValkenburgh was found guilty of poisoning her husband with arsenic and sentenced to death by hanging. Because a hip injury disabled her from standing unaided on the scaffold, the sheriff, with true pioneer ingenuity, devised a harness to lift the unfortunate widow to the necessary position.

Legal training was not required in those early pioneer settlements to practice law or to become a judge. For example, from 1793 to 1803 Dr. Timothy Hosmer, a physician with little knowledge of the law, was judge of the Common Pleas Court

in Ontario County. His son, who was a lawyer, had the misfortune of trying his first case in his father's court. There were many interruptions by his father, who continually admonished his son that he was wrong or that he misapprehended the point. To his credit, young George persisted, until the judge, acting probably as both judge and parent, sternly ordered, "George, sit down!" We are told that George eventually became one of the ablest lawyers in western New York in spite of this inauspicious beginning.

Another pioneer Common Pleas judge without education in the law was William Cooper who brought his family to Otsego County from Burlington, Vermont, in 1790, after opening a store in what was then a wilderness in 1786, and erecting a house in 1789. Cooperstown, the county seat, was named after him, but he is more famous for being the father of James Fenimore Cooper, the author of the Leatherstocking Tales. James Fenimore, acting as his own counsel, struck terror in the hearts of editors of rural newspapers by the libel suits he successfully tried in many upstate courthouses.

It was said of Judge Jedediah Peck, an ex-soldier, preacher, legislator and Politician of Otsego County, "He would survey your farm in the daytime, preach a sermon in the schoolhouse in the evening on Sunday, and talk politics the rest of the time."



Justice's Court in the Backwoods, by Tompkins H. Matteson. New York State Historical Association, Cooperstown.

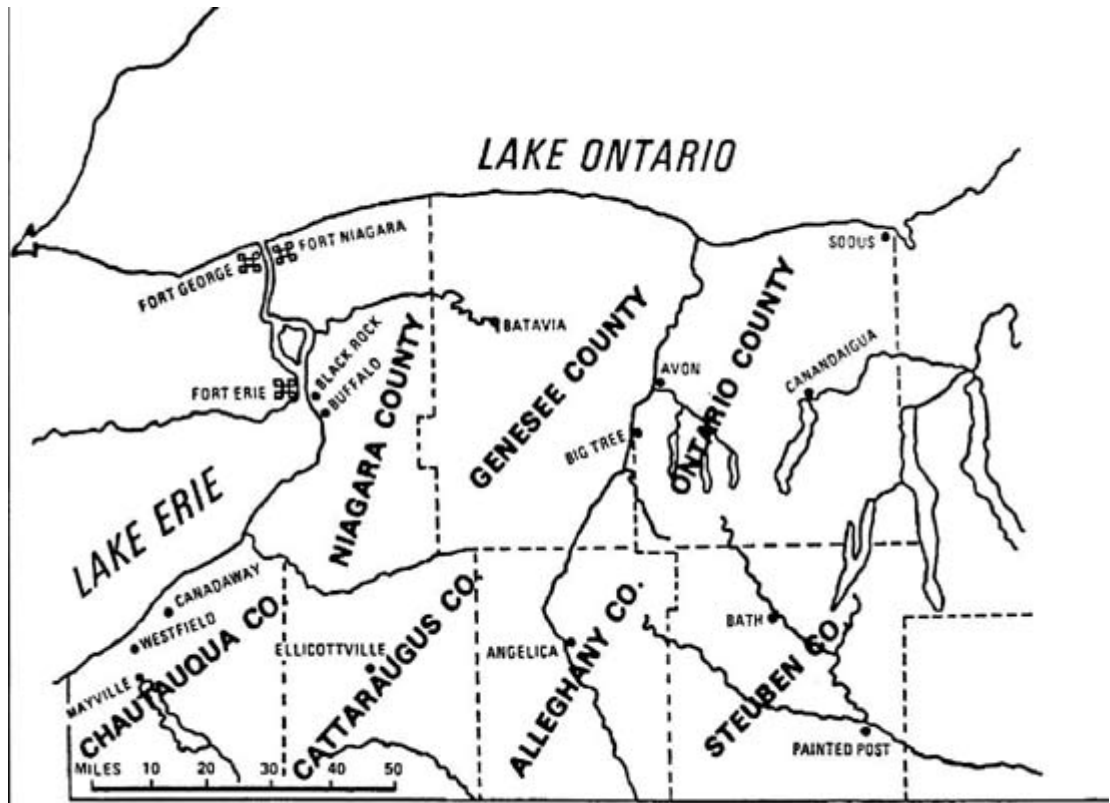
The first courthouse built in Canandaigua is presently being used as the Canandaigua Town Hall. A new building replaced it in 1858. It was in the new courthouse, in 1873, that Susan B. Anthony, the suffragette leader, was tried for having illegally voted in the presidential election. Although Susan B. Anthony was then living in Rochester, the U. S. Attorney asked for a change of venue because of Anthony's popularity, and venue came to the courthouse in Canandaigua.

Among those attending the trial was former President, Millard Fillmore, then 73 years old, who travelled from Buffalo where he lived. Henry R. Selden, a former judge of the New York Court of Appeals, was Anthony's counsel. Her co-counsel was Eugene VanVoorhis, the father of John VanVoorhis, the great Court of Appeals judge. Judge Ward Hunt prevented Susan Anthony from testifying in her own behalf and directed the jury to return a verdict of guilty. The next day, June 18, Justice Hunt sentenced Anthony to pay a fine of \$100. The story is told that when sentence was passed, the arm holding the scales on the statue of Justice on the courthouse dome fell to the ground, from which James Glynn, a witty Rochester lawyer, derived the dramatic moral that when justice is not vindicated, it is amputated.

Well into the 19th Century judges were appointed, but the thousands of immigrant families who came to New York and settled in different parts of the

state, as Alden Chester wrote in his monumental work "Courts and Lawyers of New York" (Volume 2, page 853) "wanted democratic standards; and as they gained political strength, they demanded that the institutions of their adopted country be more in accord with democratic principles... They demanded among other changes, the right to select the judges of their courts; they condemned the appointive system; they contended 'that the open strife of political canvass and election 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.'" So it was that in 1847, for the first time, all judicial officers were elected.

As Bellamy Partridge wrote in his popular book, "Country Lawyer," about his father who opened a law office in Phelps, Ontario County, after serving in the Civil War, most of the early villages where the young lawyer opened his office had only one street. It was lined by elms and maples shading every place of business on the street, with the lawyer's shingle hung from the limb of a tree outside his office window. Many of those trees had been there when the street was still an Indian trail. The early upstate attorney became a civil and criminal trial lawyer, a conveyancer, a drafter of wills, a generalist in the great manner of Justice Jackson, who came to the U. S. Supreme Court from a law practice in Jamestown.



COUNTY ORGANIZATION - 1808

County Organization - 1808. Published in Joseph Ellicott and the Holland Land Company by Chazanof. Published by Syracuse University Press. Permission to reproduce by Syracuse University Press.

Early Monroe Bar

The early bar of Monroe County is illustrative of the breadth of the western judge and lawyer. Among the organizers of the Rochester Bar Association, later the Monroe County Bar Association, 100 years ago, was Martin Cooke who became Chief Judge of the Court of Appeals in 1870; Albert H. Harris, a vice-president, general counsel and chairman of the finance committee of the New York Central and Hudson River Railroad; Arthur E. Sutherland, whose son became a great professor of constitutional law at Harvard Law School; William B. Hale, one of the founders of the Lawyer's Co-operative Publishing Company; and Eugene VanVoorhis who, as noted, with Henry Selden defended Susan B. Anthony, and was the father of Judge John VanVoorhis of the Court of Appeals.

At its first annual meeting, the speaker was William F. Cogswell, admitted to the bar in 1843, whose subject was "The Judiciary of the State of New York Prior to 1846." He recalled that when he began to practice, the Clerks of Supreme Court were paid on a fee basis and often made more money than the judges, who then earned a salary of \$3,500.00. He mentioned seven instances of Supreme Court Judges resigning to become Clerks. Trials would sometimes begin at 8 o'clock in the morning and continue until 6:00 or 7:00 in the evening and, he recollected, Saturday was just another trial day.

Another of the Association's founders was John D. Lynn, who graduated from Genesee Wesleyan Seminary and went on the bench as a Monroe County Judge in 1888. Judge Lynn was one of the more popular members of the Rochester bar and it is said that it would take him two hours to walk to his office downtown in the morning, so many friends and acquaintances would stop him to talk. Henry Glynn, the father of James F. Glynn, who wrote an enchanting history of the Monroe County Bar Association on the occasion of its 75th Anniversary, recalled that when he first went into Judge Lynn's office and looked at the law library, he asked "Are all of those books law books?" The judge is said to have replied, "There is law in some of those books, and some of them contain the reports of the Appellate Division." The story is also told of a young law school graduate being welcomed by Judge Lynn in his office and told to make himself at home, and if he had any questions to ask the stenographer. The young lawyer replied, "I am a graduate of the Cornell Law School." "I know it is a damnable handicap" the judge is said to have sympathized, "but that can be overcome by perseverance and industry."

The law, as it developed on the western frontier, has as an eloquent and enduring memorial the many graceful and stately courthouses in the western counties. They symbolize today, as they did in those early years, the great ideals of the young republic which were shaped laboriously, sometimes crudely, within their lofty chambers.

"The county court house occupies a unique and revered place in American life....[I]t symbolizes the formative and unifying influence that law and the tradition of constitutionalism have played in the history of the United States. As outposts of our young republican states, the first courthouses stood at the intangible frontier of human progress and civic order where legal process attempts to

resolve society's conflicts and to secure the safety and dignity of mankind." ("Historic Courthouses of New York State," Johnson & Andrist, Introduction, page 14).

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The Origins of Popular Election of Supreme Court Justices



MARTIN B. STECHER^[1]

On June 1, 1846, a New York Constitutional Convention assembled in Albany. A rising generation of democrats, imbued with the example of Andrew Jackson, prepared to confront the Federalist and Whig aristocracy over the name of government in New York. One author termed the Convention the first "ever assembled in this State which fully deserved to be styled a people's convention."^[2] Among its accomplishments, regarded at the time as of lesser significance than economic reforms, were election of Supreme Court justices and a revision of the statewide judicial system.

Those developments can best be understood in their historical setting.

Well into the nineteenth century, government in New York State, including the judiciary, reflected a republican mistrust of monarchical powers and an aristocratic mistrust of democratic authority. No appointment to any significant office could be made by the governor alone. From the convention of 1777 to the 1821 convention, Supreme Court justices were appointed by a Council of Appointment consisting of the governor and four state senators, one from each district. The justices served during good behavior until the age of 60.

This anti-monarchical attitude also denied the governor veto power over legislation. The veto was vested in a Council of Revision consisting of the governor, the chancellor and the justices of the Supreme Court. The separation of powers doctrine, so firmly embedded in the Federal Constitution, had not overcome New York's Dutch tradition of a merger of executive, legislative and judicial function. Thus, at one point, when the Council of Appointment sought to enlarge the Supreme Court, the Council of Revision, by vetoing the appropriation for the new justices salaries, in effect vetoed the enlargement. "The rejection of the bill crystallized the sentiment against the council of revision, and aroused an hostility to the judiciary which would be contented with nothing less than the removal of the existing incumbents of the bench from office."^[3] Similarly, in 1819, the Council of Revision vetoed legislation calling a new constitutional convention which might have limited judicial powers. The reaction to this veto led to a move to dismember the Supreme Court.

Democratic Ferment and the Rise of Labor

Perhaps the most significant act of the 1821 Constitutional Convention was the acceptance of broadened suffrage. This was a period of democratic ferment, not only in the United States but also in much of the European-oriented world. New York, at the time of the Revolution and thereafter, was governed by a federalist, landed aristocracy, which was to give way in the early years of the nineteenth century to a moneyed (banking and trading) aristocracy.

Universal suffrage was repugnant to the conservatives of the period, who clung to the Hamiltonian wedding of the rich and well-born to government. Typical was New York's Chancellor James Kent who, in reports of debates at the 1821 Convention, is quoted as having said:

The notion that every man that works a day on the road, or serves an idle hour in the militia is entitled as a right to an equal participation in the whole power of government, is most unreasonable and has no foundation in justice. Society is an association for the protection of property as well as life, and the individual who contributes only one cent to the common stock, ought not to have the same power and influence in directing the property concerns of the partnership, as he who contributes his thousands.^[4]

The 1821 Convention, in compromise, granted suffrage to all white male inhabitants over the age of 21 who, within the preceding year, had served in the militia or paid a tax to state or county on real or personal property. Black suffrage was limited to male freeholders who had been citizens of the state during the preceding three years.

After two depressions, stemming largely from bank abuses and land speculation, popular discontent with government, the laws and the judiciary continued, leading to the election of President Andrew Jackson in 1829.

Those years also saw the beginnings of organized labor, with the first laborers party formed in Philadelphia in 1828. Then in 1834, the first nationwide association of trade unions convened in New York City, where the judicial atmosphere was not conducive to unionism. Soon after, journeyman shoemakers in Geneva, New York, refused to work for any master shoemaker who would not conform to union standards; the strikers were convicted of criminal conspiracy. Then the Society of Journeyman Tailors in New York City struck for higher rates of compensation; again, twenty tailors were convicted of criminal conspiracy. Some weeks later, shoemakers in Hudson, New York, faced similar charges, but this time were found not guilty by a jury.

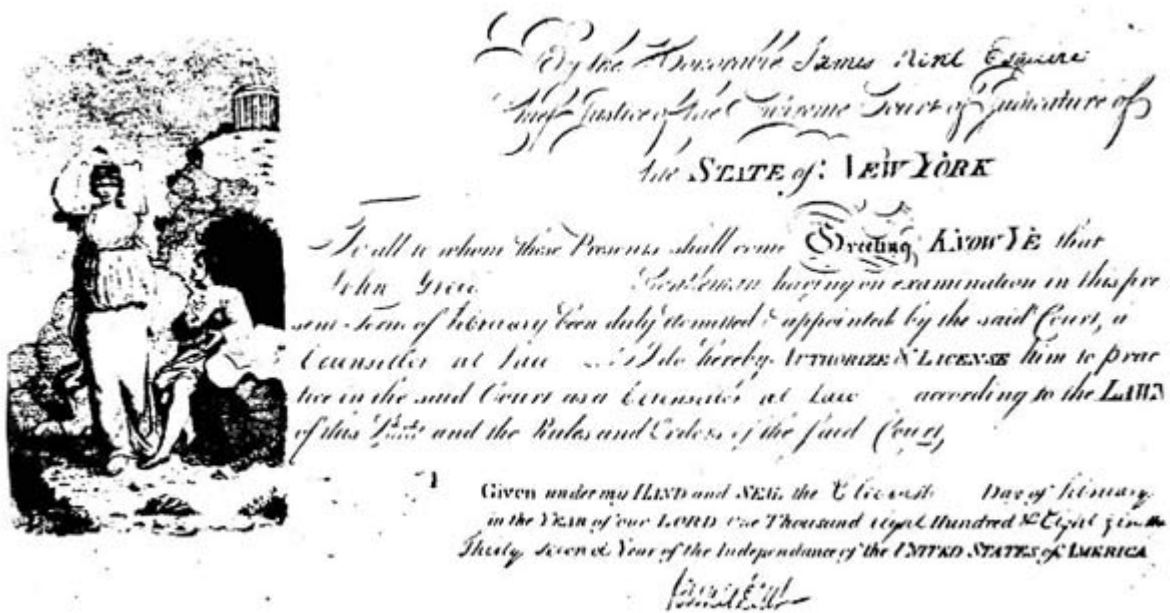
Feelings ran high, with huge demonstrations in New York City. The *New York Times* chastised the Supreme Court judge in the tailors case for his intemperate remarks. William Cullen Bryant's *New York Post* termed the decision "slavery." Organized labor had a clearly identified antagonist: the Supreme Court.

New York's Feudal System

Class antagonisms were not limited to urban workingmen. The fertile lands of New York's Hudson River Valley were, in large measure, held in feudal tenure. Dutch and British land grants gave hundreds of thousands of acres to single individuals and their families. The American Revolution only served to enlarge the holdings of those who chose the victorious side at the expense of those who did not.

As one author has quipped, if "the English Statute Quia Emptores, enacted in 1290, had been held applicable to the royal grant made by Charles II to the Duke of York, we might not now have elected judges in New York State or, for that matter, in the United States."^[5] The author noted that especially in the Hudson River watershed, colonists who came to New York took their lands from the patroons or manorial lords by lease or incomplete transfer, subject to perpetual rents and services — a sort of sub-infeudation, including mineral rights, water power, timber and "quarter-sales" (one-fourth of the proceeds of sale by the tenant).

Passive resistance by the tenants in the 1820s soon changed to violence, to such degree that landlords and their agents are said to have found it unsafe to travel through the countryside. In 1845 one of the tenant leaders, Dr. Smith Boughton, was charged and tried for highway robbery, after forcing a sheriff to yield a set of foreclosure papers. At one point during Boughton's trial, after a particularly fierce exchange, defense counsel Ambrose Jordan and Attorney General "Prince John" Van Buren (Martin Van Buren's son) came to blows, and both were imprisoned overnight for contempt of court.^[6] Boughton was convicted and a life sentence was imposed.



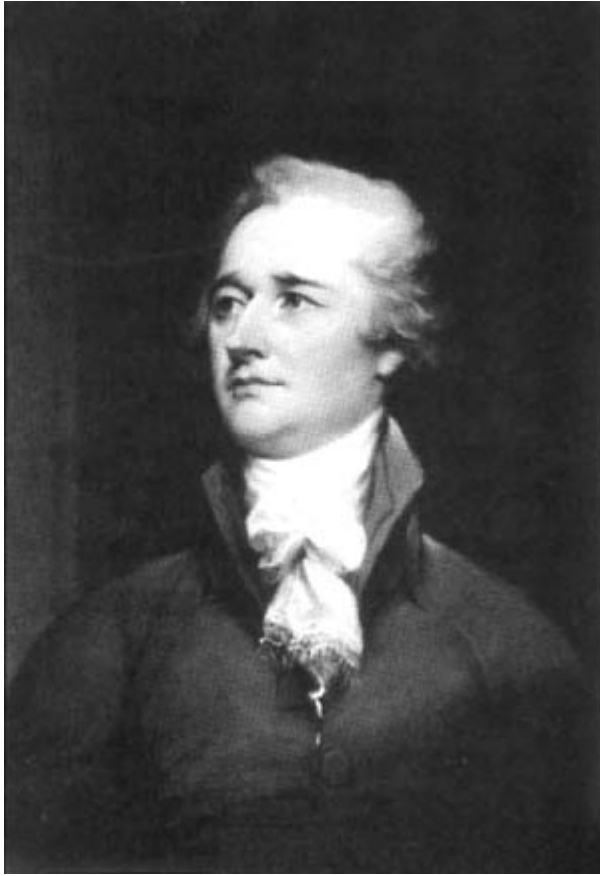
License to Practice Law, 1808. This license, signed by Chief Justice James Kent, admits John Greig of Canandaigua to practice as a counselor at law in the Supreme Court of Judicature. The engraving at the left depicts Themis, goddess of justice, instructing a young attorney. Manuscripts — Special Collections, New York State Library.

Impetus for the 1846 Convention

There are various theories as to what led to the 1846 "people s" Convention. Dean Niles points to the rural anti-rent movement. In Professor Schlesinger s view, the impetus for the Convention was the despair of a growing urban working class whose members felt victimized by landlords, employers and the courts. Another author suggests that the chief cause for calling the Convention was to limit the legislature s power to increase the public debt, for maintenance of canals and for the disposition of its revenues.^[7] All no doubt contributed. But dissatisfaction, urban and rural, was widespread, and it focused on the judiciary and the law itself.

According to Professor Schlesinger, "the common law seemed an infinite morass of judicial precedent which would always result practically in "judge-made law;" and it is true that in the hands of judges like Peter Oxenbridge Thacher the common law became a bottomless reservoir of reasons why no one should do anything."^[8] The demand, strangely contemporary, was to have judges interpret and apply accessible law and not create the law.

The judiciary was regarded as part of those landed and moneyed establishments — and there was some justification for that belief. Prior to 1821, the justices were appointed by the Council of Appointment, consisting of the governor and four state senators.



Alexander Hamilton. Hamilton had an active practice before the New York Supreme Court. Portrait painted by John Trumbull. Photograph from New York State Archives.



James Kent. Eminent American jurist James Kent served as associate justice of the Supreme Court from 1798 to 1804 and as chief justice from 1804 to 1814. He later served as chancellor. Permission to reproduce from the New York State Library

While assembly electors were required to be freeholders of the value of at least 20 pounds, electors of state senators had to have freeholds of at least five times that amount. As Chancellor Kent explained at the 1821 convention, I wish to preserve our Senate as the representative of the landed interest. I wish those who have a interest in the soil, to retain the exclusive possession of a branch of the legislature.*** The man of no property, together with crowds of dependents connected with great manufacturing and commercial establishments, and the motley and undefinable population of crowded ports, may, perhaps, at some future day, under skillful management, predominate in the assembly; and yet we should be perfectly safe if no laws could pass without the free consent of owners of the soil. That security we at present enjoy; and it is that security which I wish to retain.^[9]

It was from the body of senators so chosen that the Council of Appointment originated, and it was the Council that selected the chancellor and the Supreme Court justices. They in turn, with the governor, until 1821, constituted the Council of Revision. From 1821 to 1847, the justices were appointed by the governor with the acquiescence of the entire senate. But despite the wider electorate that chose the senate, the dissatisfaction with law and judges grew as the entire democratizing movement grew.

Changes Effected by the Convention

The Convention of 1846 made many changes. Most significant to the people of the day, no doubt, was its adoption of Article VII of the Constitution, severely limiting the legislature's use of the public credit. The existing Supreme Court ceased to exist, the terms of its Chief Justice (Greene C. Branson) and its four puisne justices (Samuel Beardsley, Freeborn G. Jewett, John McKissock and Frederick Whittlesey) having been terminated by the new Constitution.

In the place of a five justice court, the new Constitution divided the state into eight districts, seven of them having four justices each, and the district coterminus with New York County having such number as the legislature might fix. All justices were to be elected by the electors of the respective districts.

New York was by no means the first state to elect its judges; and since 1856 every state admitted to the Union, with the exception of Alaska, adopted as part of its constitution the direct election of judges.

Terms of Office

The concerns underlying judicial tenure were submerged at the 1846 Convention to the goal of popular control. There were those at the Convention who recognized the principal concern to be not who chooses the justices, but their independence. The colonial judges served at the pleasure of the royal governors and were often thought to dispense justice for the royal governor's pleasure. The 1777 Constitution, recognizing the need for an independent judiciary, provided for tenure during good behavior to age 60. (That age limitation was due, no doubt, to the fact that the 1777 Constitution was written in an era of young men. It was drafted by John Jay, Gouverneur Morris and Robert R. Livingston, the eldest of whom was but 31. At 31, and younger, 60 may still look like old age.)

The 1846 Convention compromised on eight year terms — a concept whose threats and disasters (despite the presently lengthened terms of 14 years) still are visited upon us periodically (e.g., the recent denial of renomination to two Bronx County Supreme court Justices by a leader of their own Democratic party; the denial of renomination to a most highly-respected Appellate Division Justice by a Long Island leader of the Republican party; the abandonment by an Appellate Division Justice of his state seat for the Federal District Court, purportedly for fear of being denied renomination by the same Republican leader; the denial of renomination to an upstate Appellate Division presiding justice; and the list goes on).

On the substantive side of the law, the 1846 Convention "merged" law and equity; the chancellor's office was abolished and equitable powers were vested in the Supreme Court. Steps were also taken toward codification of the law, which had actually begun in 1827 with the "Revised Statutes of the State of New York." The 1846 Constitution provided for the creation of commissions to revise practice and create a code of laws. By 1850, under the leadership of David Dudley Field, codes had been created for criminal and civil procedure, and in 1857 a statute was enacted ordering codification of the entire law, though that objective has never been fully accomplished.

Popular election of judges has remained an issue in this State, sometimes with greater intensity, sometimes less, since 1846. It is not about to go away. What seems clear, however, is that the independence of the judiciary is more significant than who selects it.

One postscript: despite the abolition of 'all feudal tenures of every description by the 1846 Constitution, the Court of Appeals which it created discovered in 1859 that the Statute Quia Emptores had always been in force in this State [see *Van Rensselaer v. Hays*, 19 NY 68].



Old Capitol, 1808-1883. Built in 1806-1808, the Capitol was the seat of the Albany terms of the Supreme Court throughout most of the nineteenth century. This photograph dates from the early 1880s; the new Capitol is seen under construction in the background. New York State Archives Series A0421.

Footnotes

Footnote 1: Justice of the Supreme Court of the State of New York.

Footnote 2: J. Hampden Dougherty, II Legal and Judicial History of New York, p. 147 (New York, 1911).

Footnote 3: *Id.* at p. 74.

Footnote 4: N.H. Carter and Associates, Reports of the Proceedings and Debates of the Convention of 1821, as reported in Arthur M. Schlesinger, Jr., The Age of Jackson, p. 13 (New York, 1945).

Footnote 5: Russell O. Niles with Judith Smith Kaye, "The Popular Election of Judges in Historical Perspective," 21 Record of the Association of the Bar of the City of New York, p. 523 (1966).

Footnote 6: *Id.* at p. 525.

Footnote 7: Dougherty, *supra* note 1, pp. 147-148.

Footnote 8: Schlesinger, *supra* note 2, p. 16.

Footnote 9: Dougherty, *supra* note 1, p. 95.

Democratizing the Supreme Court: 300 Years of the Jury

PHYLIS SKLOOT BAMBERGER^[1]

Myth has it that courts are the least democratic of institutions of government. However, a study of the jury, an integral part of the New York State Supreme Court, refutes the myth. Jurors not only curb the power of the state, but by their participation they also regularly recreate democracy and learn the principles that underlie our government's structure. Over the course of 300 years, New York's jury service has included more and more citizens, both democratizing the legal process and reinvigorating allegiance to the fundamentals of democracy.

New York State's formal declaration of the right to a trial by jury preceded the statutory creation of the Supreme Court by eight years. In 1683, the Colonial Assembly issued the Charter of Liberties and Privileges requiring that "all tryalls shall be by verdict of twelve men as neer as may be peers or equals from the neighborhood and in the county, shire or division where the fact shall arise or grow whether the same be by indictment, infirmacion, declaration or otherwise, and the person offencer or defendant." Then, in 1691, the Assembly established the Supreme Court, and legislated that no question of fact was to be decided except by default, admission or the verdict of a jury of twelve men. The Charter of 1691 continued the right to a jury trial, although later legislation denied it in some minor civil and criminal cases and the number of jurors was changed in civil cases.

By the time of the first State Constitution, adopted in 1777, the Supreme Court was taken for granted. All the Constitution said about the Court was that its judges were to hold office during good behavior or until 60 years old. Similarly the Constitution retained prior jury practice: trial by jury where used in the colony was to be inviolate forever and the use of the jury was to be as it existed on April 19, 1775. Subsequent New York State Constitutions reaffirmed the right to trial by jury and incorporated statutory changes in the right. Although the jury has generally been viewed from the perspective of the litigant, and most frequently that of the criminal defendant, the separate and independent right of a person to be a juror was recognized by the Legislature in 1895 when it protected citizens' civil and legal rights, and prohibited disqualification as a juror based on race, color or creed. The Constitution of 1938, Article 1, § 11, prohibited discrimination in the exercise of civil rights, and that provision continues today. When the Legislature re-structured and made uniform the procedures for jury selection and the qualifications for service in 1977, it declared as the policy of the State that all eligible citizens shall have the opportunity and obligation to serve as jurors unless disqualified, exempted or excused. Because jury service is a protected right, even peremptory challenges are subject to constitutional limitations.^[2]



Right to be a Juror

The statutory right to be a juror recognizes that it is inherently valuable, something qualitatively different from the important role of resolving factual disputes between litigants. A juror's service is an instrument for democracy. It forces people who might never otherwise have met to interact with one another. It requires that people share ideas and listen to one another critically. It necessarily compels and provides a means of participation in government. It teaches about the basic principles of our system of laws, and the underpinnings of that system in due process fairness. It provides the opportunity for citizens to make public decisions and thereby to oversee their public officials and limit their powers. It provides an opportunity to right imbalance and to redress wrongs as the community believes appropriate.

Jury service's potential for teaching and re-enforcing democratic principles, although not often articulated, appears to be generally accepted in our State's constitutional history. In the debate at the 1846 Constitutional Convention, Delegate Rhoades said: "The jury box is the means of bringing a larger portion of our citizens, the mechanics and farmers, into immediate contact and connexion with our courts of justice, and makes them a part of the same. It enables them to acquire a knowledge of the general principles of law — the rules which exist as the foundation of all good government and the mode and manner in which their own laws are administered....[B]y the force and requirements of these provisions in relation to jurors, a large portion of our citizens are brought into a situation to understand these laws and hear many of the leading principles of constitutional, statute and common law, discussed and applied."^[3]

A report to the delegates of the 1938 Constitutional Convention noted that "[t]he recruiting of the general community to decide judicial issues both democratizes the law and educates the general public in their personal and civil rights, brings them to an understanding of the nature of law and judicial procedure and makes them more competent and fit to decide the issues of the day."^[4]

The importance of jurors has raised critical questions through the years about who should be jurors and how jurors should be selected. Debate on these matters appears within a few years after the Charter of Liberties and Privileges in 1683 and continues to this date. Consideration of these issues has caused us to regularly re-examine our beliefs about equality, privilege and responsibility. On the pragmatic level, we have been required to deal with the problem of providing a sufficient number of jurors to satisfy the needs of the judicial system.

Who Can be a Juror

The debates over who could be a juror provide insights into the political and economic history of our State. They also reflect concern about the improvement of the quality of jurors and their capability to decide the issues before them. Although it appears elitist, this concern for quality was, at least in part, an effort to include as jurors those people in the community with higher education, professional status, financial wherewithal or worldly experience who tried to avoid jury duty. It also reflects the ambiguous views of citizens about whether jury service was a privilege and a treasured right of citizenship, or whether, like paying taxes, it was a periodic duty to be avoided.

In 1741, the Colonial Assembly wrote that the juror qualification statute was for "the returning more able [and] Sufficient Jurors ... and for Reformation of Abuses ... [of those who] for reward may be Tempted to Spare the most able, [and] Sufficient, and Return the Poorer and Simpler Freeholders [and] others Less able to discern the Causes in Question" In 1915 the Constitutional Convention and then in 1936 the Judicial Council expressed the same concern. The democratization of the jury can be traced by examining changes in qualifications made through the years based on property, gender, age, physical abilities and employment.

Property: On May 16, 1699, the Colonial Assembly expressed concern about jurors who were insufficiently qualified "to discern causes between the parties." The Assembly then required that a person eligible for jury duty be a free and lawful male over 21 who had in his own name and right a good house or messuage with ten acres of land of freehold. On the other hand, if the person lived in New York City or Albany, he needed to have one dwelling house free from encumbrances or a personal estate of \geq 50 free and clear. Property ownership remained a qualification for jury service for almost 250 years, until abolished in stages in the later 1960 s.

The irrelevance of property ownership to juror competency was recognized in 1912, when the Court of Appeals spoke of it as a legal and technical qualification of jury service, the absence of which would not require reversal of a conviction. The Court recognized that lack of property ownership did not reflect the character of the juror, or show that the juror functioned with prejudices precluding impartiality.⁵¹ The curious nature of the relationship of property ownership to competence to serve as a juror is apparent from the fact that from county to county



King vs. John Peter Zenger, Supreme Court Trial Verdict, August 4, 1735. Supreme Court clerk's minutes state that "The Evidence offer'd by Mr. Attorney Genll. was thro news papers which were owned by the Defendant. The Jury Brought in their Verdict not guilty." New York State Archives Series 15912; original in Supreme Court of Judicature Minute Book, Archives of the New York County Clerk's Office.

the required value of the property and type of interest differed. Significantly, before 1938, a male citizen s eligibility could be based on his wife s interest in property, although she could not be a juror.

Perhaps the original justification for requiring an interest in property was to assure that the juror had a stake in the community. But 30 years before the abolition of the property requirement, it was noted that "viewing the jury as a significant political institution, property qualifications eliminat[e] the point of view of a great proportion of the population... [and are] inconsistent with the view of the jury as a force for the democratization of the law."⁶¹ Today, we recognize that a stake in the community rests on more than ownership of real or personal property, and current law includes no such requirement, desiring rather "to increase citizen participation."⁷¹

Gender: When the Charter of 1683 said the jury was to consist of men, that is precisely what it meant; so did the Constitutions of 1777, 1821, 1846 and 1894. The 1895 statute that recognized the right to be a juror did not grant that right to women. And when in 1899, the Court of Appeals wrote that the Constitution secured the right to a common law jury of twelve men,⁸¹ "men" was not a gender neutral term. In 1909, the right to be a juror was included in the State Civil Rights Law, but the Judiciary Law continued to disqualify women as jurors.

Service by Women

Largely because of a concern about having enough jurors who could understand the issues being litigated, the Judicial Council, in 1936, recommended service by women, subject to the same qualifications and exceptions applicable to men. The next year, the Legislature amended the relevant statutes to withdraw male gender as a qualification for jury service. In 1938, the Civil Rights Law was amended to guarantee the right of women to be jurors. The right of a woman to be a juror has never been explicitly included in the language of the State Constitution, but it is part of the constitutional common law and, at this point in our history, it cannot be disputed that the state constitutional interpretation protects that right.

Although after 1937 women could not be excluded as jurors, by law they could claim an automatic exemption. The exemption in practice appeared to have resulted in a scarcity of women members on jury panels.^[9] Largely because of the belief that federal law required it, in 1975, the Legislature substituted for the women's exemption a non-gender-based exemption for those actually caring for children under 16 years old between 8 a.m. and 6 p.m. The words of United States Supreme Court, considered by a Seneca County judge, explain the impact of the elimination of gender discrimination: "The two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables."^[10]

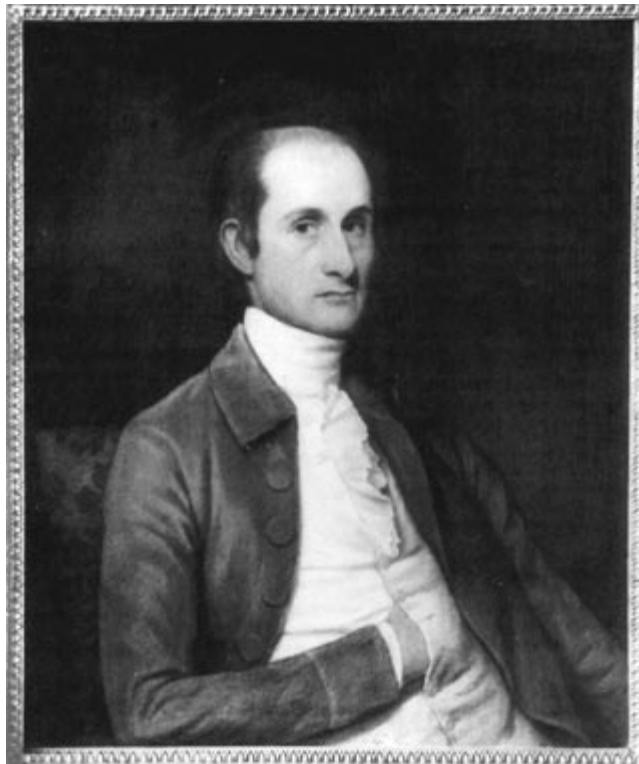
Age: In 1699, a juror was required to be 21 years old. The minimum age requirement remained at 21 for 275 years, after which it was reduced to 18. Significantly, this occurred just three years after the voting age was reduced by the 26th Amendment to the United States Constitution.

In 1741, the Colonial Assembly included a requirement that the eligible juror be under 70. By 1829, the maximum age of qualification had been reduced to 60 years. Thereafter, the age was again made 70. The age limits then remained unchanged until 1965. In that year, in some counties persons were made eligible to sit as jurors until they were 72 years old, but a party could strike from the panel a juror who was between 70 and 72 years without using a peremptory challenge. By 1973, in all counties the age for service was increased to 75, but the parties were still allowed their free challenges. Although allowed to serve, each juror over 70 was allowed a statutory automatic exemption.

The revolution in thinking about the abilities of those over 70 was reflected in statutory changes made in 1981. The free challenge was eliminated as unreasonable in a society where people were living longer and healthier lives, and were encouraged to participate in government. Challenges for cause for those determined to be unable to serve and the normal peremptory challenges were considered sufficient to satisfy the interests of litigants in obtaining capable jurors.^[11] In 1987, the language of the statute went full cycle: the upper age range for service was unlimited, leaving jurors to claim their exemptions and lawyers to use their challenges.

Physical and Mental Condition: Before 1829, the law imposed physical and mental qualifications for jury service. A juror had to be in possession of his natural faculties, and not be infirm or decrepit. The language remained in that exact form until 1977. In the major recodification of 1977, the test was modified so that a juror was required to be in possession of his natural faculties and not incapable by reason of mental or physical infirmity of rendering satisfactory jury service. This change was intended to eliminate the previous subjective tests for qualification.^[12]

In 1983, the Legislature eliminated the requirement that a juror be possessed of natural faculties; the basis for disqualification became a mental or physical condition or combination



John Jay. First chief justice of the New York State Supreme Court, later chief justice of the United States. New York State Archives Series A0471; photograph portrait in New York Historical Society. Permission to reproduce from New York Historical Society.

thereof which caused a person to be incapable of performing the duties of a juror in a reasonable manner. This change required evaluation of the individual juror's ability to perform jury service, and was prompted to assure compliance with federal statutes.^[13] Consequently, for example, a profoundly deaf person, with the aid of an interpreter, can be a juror if capable of performing the functions of a juror: to understand the evidence, to evaluate the evidence rationally, to communicate effectively with other jurors and to comprehend the court's legal instructions. As with age requirements, the focus of the qualification to serve became the ability of an individual juror to perform his or her duty: the rule was inclusive.

Employment and Profession: Employment and profession have always been the basis of statutory limitations on jury service, at first constituting a basis for disqualification and then for an exemption to be claimed by the potential juror. By 1829, those permanently discharged or temporarily exempted from jury service included members of duly organized fire companies; employees of any glass, cotton, linen, woollen or iron manufacturing companies; superintendents, engineers, inspectors, toll collectors, lock-tenders, and weight masters of any canal actually constructed or navigated; a minister of the gospel; a teacher in any academy, college or school; non-commissioned officers, musicians and privates of a uniform company or troop; all those employed in the manufacture of coarse salt; keepers of alms-houses; practicing physicians with patients needing their attention, and surrogates or other holders of civil office whose duties were inconsistent with jury duty.

By 1901, there were additions to the kinds of work for which exemptions were permissible and differences in exemptions among the counties. Members of the clergy (not just those of the gospel) and attorneys in actual practice were granted exemptions. Pharmacists, veterinarians, telegraph and railroad employees, and licensed steam boiler engineers were added. Prison guards and employees of state asylums were exempted except in New York and Kings counties, In New York County an editor, editorial writer or reporter of a daily newspaper was exempted; in 1909 that exemption was applied statewide.

The 1915 Constitutional Convention, and the 1936 Judicial Council, were concerned about the impact of these exemptions upon the quality of jurors. The Council described exemptions from jury duty as a menace to the proper administration of justice and a major cause leading to deterioration of the jury. It noted that certain groups with exemptions were not unfit to serve as jurors and that certain exemptions were granted merely as rewards.

In 1936, exemptions were limited to clergy, physicians, dentists, pharmacists, embalmers and optometrists engaged in practice, practicing attorneys, members of the military, active members of fire companies or police forces, and officers and pilots on vessels actually involved in regular trips. As noted, in 1937 the women's exemption was added in place of the disqualification.

Exemptions Return

But it was only several years before the deleted exemptions began to reappear. In 1943, the editor and newspaper reporter exemption for those handling news was reenacted, and expanded to include even copy readers for daily, semi-weekly and weekly newspapers. The exemption became permanent in 1946. The justification for the exemption was that no lawyer would ever allow a newspaper editor or employee to sit on jury. It cannot but be noted that newspaper people supported the exemption for years.^[14] The exemption was later expanded to include radio and television news staff. The teachers exemption was restored in 1955, but was subsequently limited to those actually working during the school session.

In the major revision of jury procedure in 1977, teachers and newspaper editors, reporters, and proof readers were not exempted although, like everyone else, they were able to seek adjournments of their service based on employment obligations. In the 1977 statute and later amendments, the category of physicians and dentists was expanded to other health services providers, including nurses, psychologists, prothetists, orthodists and physical therapists. The newest exemption is for small business proprietors or managers with one or two employees. Lawyers, police officers, corrections officers and fire officers are also exempt. Recently there has been proposed legislation to end exemptions leaving prospective jurors to seek postponements of service and lawyers to use their challenges. The proposal would further advance the democratization of the jury.

At the beginning of every jury trial, I tell jurors that by serving they make our federal and state Constitutions living documents. I also thank them for what will be their hard work. I have no doubt that when the jurors hear the remarks at the commencement of a trial, they cannot appreciate the significance of their experience. It is only after jurors have listened to the evidence, observed the interplay between the participants, been instructed on the law, entrusted to apply those principles, and deliberated with their colleagues, that they realize how much they have learned about a remarkable process and the foundations of our democratic system.

Footnotes

Footnote 1: Judge, New York State Court of Claims, designated to the New York State Supreme Court, 12th Judicial District, Bronx County.

Footnote 2: *People v. Kern*, 75 N.Y. 2d 638, 652-53 (1990).

Footnote 3: Crosswell & Sutton (ed.), *Debates and Proceedings* at 425-26 (New York State Convention for the Revision of the Constitution, 1846).

Footnote 4: VI Problems Relating to Bill of Rights and General Welfare (New York State Constitutional Convention Committee 1938).

Footnote 5: *People v. Cosmo*, 205 N.Y. 91, 103 (1912).

Footnote 6: VI Problems Related to the Bill of Rights and General Welfare at 18 (Constitutional Convention 1938).

Footnote 7: 2 McKinney s Session Laws at 2617 (1977) (Memorandum of Office of Court Administration).

Footnote 8: *People v. Dunn*, 157 N.Y. 528,536 (1899).

Footnote 9: 1975 N.Y. Legis. Annual at 413; *People v. Cosad*, 189 Misc. 939 (Seneca County Ct. 1947).

Footnote 10: *Ballard v. United States*,329 U.S. 187, 193 (1946), Cited by *People v. Cosad*, 189 Misc, at 940.

Footnote 11: 1981 N.Y.S. Legis. Annual at 105 (Memorandum of Senator Hugh Farley).

Footnote 12: 2 McKinney s Session Laws at 2617 (1977) (Memorandum of Office of Court Administration).

Footnote 13: 2 *People v. Guzman*, 76 N.Y. 2d 1, 4-5 (1990).

Footnote 14: 1946 N.Y.S. Legis. Annual at 20 (Memorandum of Sponsor).

The Supreme Court: A Court of Record(s)

JAMES D. FOLTS^[1]

While the Supreme Court has always been a "court of record," the meaning of that term has changed over the centuries.

Sir William Blackstone explained in his *Commentaries* that a court of record is a court "where acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony." Until the early nineteenth century the Supreme Court was a true court of record in this old common-law sense. All Supreme Court writs and judgment rolls were parchment — the dried, stretched and polished skin of a sheep. Parchment was expensive, and attorneys (or more likely their law clerks) wrote out writs and pleadings in tiny script to save space. The New York County Clerk's Office, the present repository for most of the colonial records of the Supreme Court, stores thousands of parchment rolls dating back to the seventeenth century. The State Archives has hundreds of judgment rolls that were filed in the Supreme Court's Albany office opened in the 1790's.

After 1798, however, judgment records were no longer true rolls, but sheets of paper trifolded and neatly tied with red cloth tape. This format continued until flat filing in standard file cabinets was introduced in the early twentieth century. Despite the changes in format, traditional elements in the record of a civil judgment persist. Still called a "judgment roll," the modern judgment record includes the pleadings, trial verdict and final judgment, which were likewise part of the ancient common-law judgment roll.

The common-law requirement that judgment rolls be retained as a "perpetual memorial and testimony" was embodied in a New York statute of 1807 and, as a result, no judgment roll of a court of record could legally be destroyed. Over the decades this law caused a mounting storage problem across the State until, in 1952, the Judiciary Law was amended to permit destruction of most categories of judgment rolls, by order of the Appellate Division. A 1990 amendment gives the Chief Administrator of the Courts the power to issue rules for the retention and disposition of court records.

But the common law casts a long shadow. The Judiciary Law still requires permanent retention of judgment rolls and other records affecting title to real property or the status, custody, marital rights or lineage of any individual. Most county clerks still retain judgment rolls, even after legal retention periods have passed, because past filing practices do not permit easy identification of categories of judgments that can be destroyed under current rules.



Appellate Division Documents

The most voluminous records of the Supreme Court, Appellate Division are records and briefs on appeal. Since 1984 Appellate Division records and briefs have been preserved on microfiche instead of paper. However, thousands of bound volumes of older records and briefs line the shelves of law libraries and the State Archives. The clerks of three of the four departments no longer maintain retrospective sets of records and briefs, having destroyed them or transferred them to other repositories.^[2] Complicating the situation, law libraries around the state hold sets of bound or microfilmed New York Supreme Court records and briefs.^[3] While many are duplicates of the sets compiled by the four clerks of the Appellate Division, some — especially the "cases and points" of the old Supreme Court General Term (1847-1895) — are unique.

In short, it appears that in no department is there a single, complete master set of Supreme Court records and briefs dating back to 1847. Law librarians and archivists face the enormous task of identifying and preserving (most effectively by microfilm) the most complete sets of records and briefs, filling in gaps where necessary, and disposing of unneeded duplicates.

Court Records in the State Archives

The 1846 Constitution reorganized New York's superior courts. The Court of Chancery was abolished and its equitable jurisdiction transferred to the Supreme Court. A new Court of Appeals succeeded the old Court for the Correction of Errors as the state's highest appellate court.

In July 1847 the Court of Appeals took custody of records from the Supreme Court (upstate clerks offices); the Court of Chancery; the Court for the Correction of Errors; and the former Court of Probates, which operated until 1823 and had jurisdiction over certain categories of decedent estates. The Court of Appeals retained the records of these courts for 135 years until, in 1982, it ordered transfer of these records, as well as its own briefs and records, to the New York State Archives. In 1984 the Appellate Division, Third Department transferred records and briefs to the Archives.

Archivists opened up bundles and volumes that had been closed for a century or more. Many documents were tied up in red tape (long since faded to pink) and covered with historic Albany soot. Archives staff members discovered numerous pleadings and judgments filed by attorney Aaron Burr, who had an active practice in the Supreme Court of New York both before and after his duel with Alexander Hamilton in 1804. Many documents relate to civil libel suits filed by James Fenimore Cooper against prominent Whig editors Thurlow Weed, Horace Greeley and William L. Stone, who had published reviews panning Cooper's novels *Homeward Bound* and *Home as Found*. Supreme Court cases from the early nineteenth century reflect the boisterous life of the frontier. For example, in *Nickles v. Beebe*, an 1813 case appealed from a Chenango County justice of the peace, plaintiff was awarded \$25 damages sustained when defendant urinated in a whiskey bottle that was being passed around at a barn-raising.

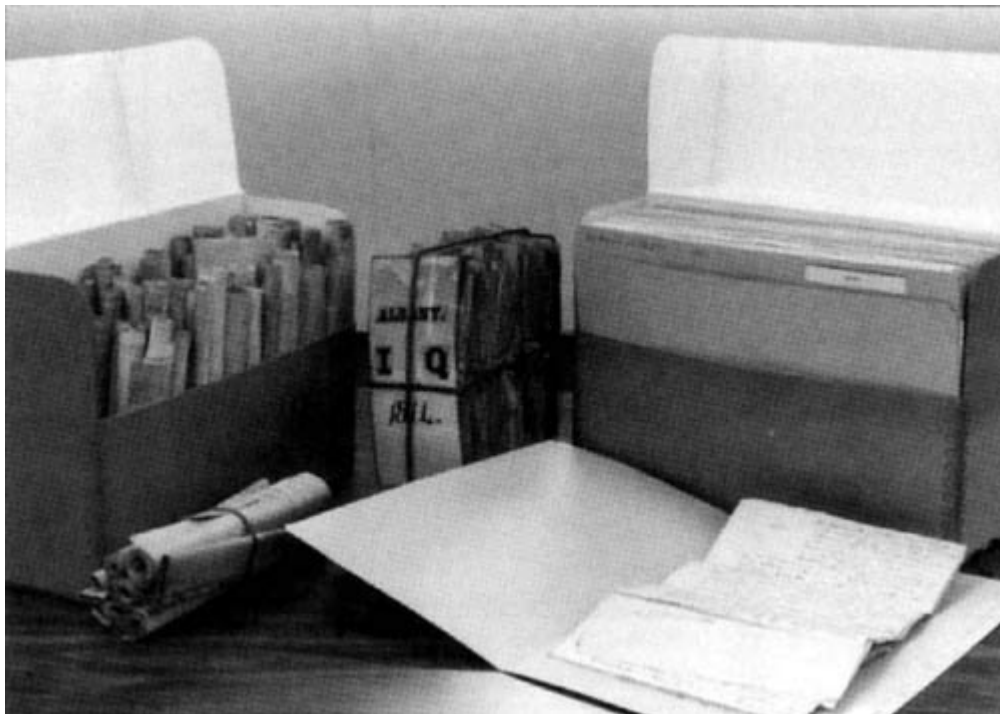
Varied Uses of Court Records

Appellate court records transferred to the State Archives provide background information on many precedent-setting cases. Examples are *Lawrence v. Fox* (1859), on the third-party beneficiary rule,^{[4](#)} and *MacPherson v. Buick Motor Co.* (1916),

establishing a manufacturer's liability to a consumer for a defective product. The testimony and exhibits found in appellate court records and briefs can be rich sources for historical research. A good example is the 1896 case of *Burden v. Burden Iron Co.* The record on appeal contains hundreds of pages of data on the management and operations of Troy's most famous iron works, which manufactured the iron plates for the U.S.S. *Monitor* during the Civil War.

Beyond researching individual court cases, however significant they may be, perhaps the most important use of historical court records is in understanding how the courts have functioned over time. Much is known about the development of New York case law, because important decisions and opinions since the 1790s have been reported and indexed. Much less is known about the history of New York's judicial system; the last full history of the state's courts appeared in 1925.^[5] The new and growing discipline of legal history investigates not only the development of legal doctrines, but also the operations of the courts. Trial court records in Massachusetts, Illinois, South Carolina and California have furnished abundant source material for scholarly studies. Research topics include long-term changes in court caseloads and case types, and the flexibility of court procedure to meet changing public and private needs and demands. "Think tanks" like the Disputes Processing Research Program at the University of Wisconsin (Madison) have sponsored research projects that have made good use of trial and appellate court records.

Scholars are using the historical court records in the State Archives. Colonial wills are providing a graduate student with data on the economic condition of widows in early New York. Early nineteenth century Supreme Court judgment rolls are helping an historian to reconstruct the business relations and financial careers of members of the Van Rensselaer family of Albany. Supreme Court records are also contributing information on the early law practice of Samuel Nelson, later a justice of the New York Supreme Court and the Supreme Court of the United States. An historian of slave law has found unique briefs prepared for fugitive slave cases. The State Archives makes historical court records more accessible to the public through published and unpublished inventories and through public exhibits.^[6]



Supreme Court Judgment Rolls and Writs

Managing and Preserving Court Records

The court records transferred to the State Archives number thousands of volumes and millions of documents. Most have suffered from harmful environmental conditions. Innumerable documents have become frayed from being tightly folded and tied up for a century or more. However, parchment and rag paper documents from the eighteenth and early nineteenth centuries are in generally better condition than wood-pulp paper documents from the later nineteenth and early twentieth centuries. Acid incorporated into wood pulp paper when it was bleached has weakened the more recent documents, sometimes to the point where they break at a touch. Preservation efforts must aim to halt mass physical deterioration. The State Archives storage facilities provide a relatively clean, dry environment, which slows or halts further deterioration from environmental pollution.

Documents that were previously unavailable for research, such as the parchment decrees of the colonial Court of Chancery, are being unfolded, humidified and flattened in the State Archives conservation laboratory. Many Chancery records, as well as the judgment dockets of the Supreme Court of Judicature, are being microfilmed with funds from a National Endowment for the Humanities grant. Particularly significant individual documents may be flattened and encapsulated in chemically-inert polyester so that they can be safely handled and exhibited. These preservation measures are making the historical court records in the State Archives available for easy, safe use for the first time.

The Supreme Court and other courts in New York's Unified Court System generate or receive an almost overwhelming amount of information. All the state's courts together have about a million

cubic feet of paper records, enough to fill 125,000 office file cabinets. Most of this volume dates from the twentieth century, when population and court caseloads have increased dramatically. More and more New York courts preserve information not only on paper, but also on microfilm or on computer disks and tapes.

In order to better manage these massive quantities of records, the Chief Administrator of the Courts in 1989 issued comprehensive records retention and disposition schedules for all courts in the Unified Court System, from town justice courts up through the Court of Appeals. These schedules list all record types maintained by New York's courts and indicate the retention period for each type. Some records are designated for long-term or even permanent retention because of their legal or historical values. However, records retention schedules are not the end, but rather the beginning of effective records management. Technical assistance on filing, indexing, microfilming, storage, and disposition of court records is now available from a new Office of Libraries and Records Management in the New York Office of Court Administration. The State Archives and Records Administration makes grants from a Local Government Records Improvement Fund for the management and preservation of local government records, including court records.

New York's courts have come a long way from the time when law clerks wrote out judgment records and writs on parchment with goose quill pens. However, at the turn of the twenty-first century the courts continue to produce records that will form the judicial archives of the future. Modern records management programs, tools and techniques are essential to identify and preserve those records that are needed to document legal rights and to support administrative, legal and historical research.



Writ of capias ad satisfaciendum

Footnotes

Footnote 1: Associate Archivist. New York State Archives & Records Administration, Albany.

Footnote 2: The First Department has transferred its records and briefs to the library of the Association of the Bar of the City of New York. The Second Department has disposed of its records and briefs; volumes for the period 1896-1931 are now in the State Archives. The Third Department has transferred its records and briefs for the years 1896-1983 to the State Archives. The Fourth Department maintains records and briefs for the Supreme Court Appellate Division (1896-current) and the Supreme Court General Term (1850-1895).

Footnote 3: The most complete guide to archival and library holdings of records and briefs of New York appellate courts is the *Union List of Cases and Points/Records and Briefs in New York State Law Libraries*, comp. Joan T. White and Dawn M. Tybur, 3d ed. (Buffalo: 1987). See also Gene Teitelbaum, "Intermediate Appellate State Courts Briefs and Records: An Updated Union List," 8 *Legal Reference Services Quarterly*, 181-92 (1988); and "The Library: Briefs and Records," 1 *The Record of the Association of the Bar of the City of New York*, 87-88 (1946).

Footnote 4: An intensive analysis of this case relied heavily on records and briefs filed with the Supreme Court General Term and the Court of Appeals. Anthony J. Waters, "The Property in the Promise: A Study of the Third Party Beneficiary Rule," 98 *Harvard Law Review* 1109-1210 (1985).

Footnote 5: Alden Chester, *Courts and Lawyers of New York*, 3 vols. (New York: 1925).

Footnote 6: See "*Duely & Constantly Kept*": *A History of the New York Supreme Court, 1691-1847 and An Inventory of its Records (Albany, Utica and Geneva Offices)*, 1797-1847 (Albany: Court of Appeals and State Archives and Records Administration, 1991).

Why a 14-Year Term?

Have you ever wondered why the term of Supreme Court Justices is 14 years?

As a former Court of Appeals Judge Francis Bergan explains in his magnificent book, *The History of the New York Court of Appeals, 1847-1932* (Columbia University Press, 1985), that rather odd number of years was actually a compromise. Its seeds are in the 1867 Constitutional Convention, and specifically a debate within the Judiciary Committee over whether Court of Appeals Judges should have life tenure (until age 70) or a term of years. The Committee ultimately recommended service for life during good behavior. On the Convention floor, attorney William Evarts staunchly defended that principle, urging that judges should be able to devote themselves unreservedly to court work, without the distraction of having to seek re-election.



Justice Francis Bergan

Intense debate raged for months, the opposition as fervently advocating a fixed term of 14 years — which represented nothing more than the statistical average of the actual number of years that had been served by federal judges and others who had life tenure.

Ultimately, the principle of a fixed term of years prevailed, and the 14-year term became firmly settled for both Court of Appeals and Supreme Court judges (see Bergan, *op. cit.*, pp. 99-112).

Stevens is Sworn to New Bench Job First Negro on the Supreme Court—Advanced From General Sessions Post

Harold A. Stevens became yesterday the first Negro in New York's history to hold the position of justice of the State Supreme Court.

In a ceremony before 200 persons in the State Office Building at 80 Centre Street, the 47 year-old jurist moved up from the Court of General Sessions in New York County to the higher post.

Judge Stevens was sworn in by Secretary of State Carmine G. DeSapio with Governor Harriman, standing alongside as a witness. Afterward Mr. Harriman described the new justice as a man "who has won the respect of the

community and who will serve with great distinction" in the Supreme Court.

Justice Stevens is a Democrat and a former State Assemblyman. His appointment to the Supreme Court filled a vacancy in the First Department caused by the death last February of Justice Thomas L. J. Corcoran.

The jurist was elected to the Court of General Sessions in 1950. He will serve as a Supreme Court justice until Dec. 31. Next November, voters in the First Department will elect a justice for a full fourteen-year term.

Among the friends and officials to witness the swearing-in were Michael H. Prendergast, new chairman of the State Democratic Committee; Hulan E. Jack, Borough President of Manhattan; Joseph T. Sharkey, majority leader of the City Council; Thomas Carrant, former Secretary of State, and Alex Rose, vice

chairman of the Liberal party.

Earlier in the day Governor Harriman had announced the Stevens appointment. At the same time, Mr. Harriman designated Supreme Court Justice Joseph A. Cox to serve on the court's Appellate Division.

Justice Cox, a Democrat, was named for a full five-year term on the appellate bench to fill a vacancy caused by the retirement last Friday of Justice Joseph M. Callahan. Mr. Callahan was sworn in last Thursday as the new Moreland Act Commissioner to investigate the workmen's compensation system. Justice Cox, a Manhattan resident, was elected to a fourteen-year term on the Supreme Court in 1952.

Woman Inducted to High Court Here

Induction services for Justice Birdie Amsterdam, the first woman elected to the Supreme Court in New York State, were held yesterday in a flowered-bedecked courtroom in the County Conit House in Foley Square.

About 400 persons, including relatives, friends, justices and State Attorney General Louis J. Lefkowitz attended.

Justice Saul S. Streit, Chairman of the Board of Justices, presided. Presiding Justice Bernard Botein of the Appellate Division paid tribute to Justice Amsterdam as "the first lady of our judiciary."

Justice Amsterdam pledged herself to the true administration of justice. She expressed the hope "that the day is not far distant when discriminatory and anachronistic practices will be eradicated."

Justice Amsterdam lives at 170 Second Avenue. She was admitted to the bar in 1923.

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