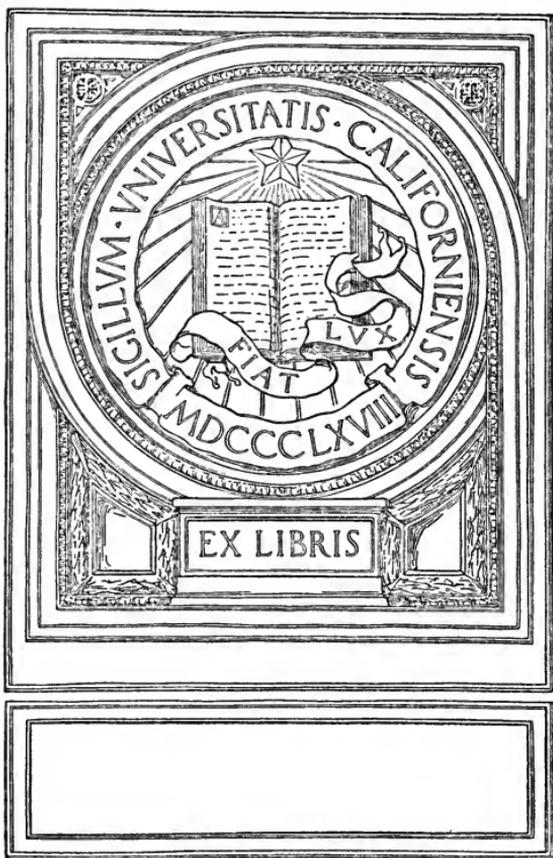


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# THE COURTS OF THE STATE OF NEW YORK

THEIR HISTORY, DEVELOPMENT  
AND JURISDICTION

Embracing a complete history of all the Courts and  
Tribunals of Justice, both Colonial and State,  
established from the first settlement of  
Manhattan Island and including the  
status and jurisdiction of all the  
Courts of the State as  
now constituted

BY  
HENRY W. SCOTT  
of the New York Bar.

Author of "Scott's Probate Law and Practice," "Distinguished American  
Lawyers," "Commentaries on the Evolution of Law,"  
"The Evolution of Law, A Historical Review,"  
"Uniform Marriage and Divorce," etc., etc.

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NEW YORK, *January, 1909.*

## P R E F A C E .

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If this work shall accomplish no other purpose it is safe to aver that it will pave the way for a more thorough exploration and treatment of the subject within the next few years. How a history of the courts of the great commonwealth of New York could so long be neglected will ever remain a dubious question to all whom the subject interests.

In the year 1896, the author, who was reared and educated in the West came to New York City as counsel for legal and financial interests in that part of the country, and, also, to engage somewhat in the general practice. It may be stated, as one of the causes leading up to the production of this work, that one of the first things to occupy his attention was a search for a treatise from which he could familiarize himself with the history, development and jurisdiction of the courts of the State in which he was to engage in the practice of his profession and which was to become his future home, with the astonishing result that there was nothing to be found. This fact, however, never abated the research, but on the contrary, stimulated activity in that direction, which has been carried on through all the intervening years, until early in the year of 1908 the author began the preparation of the final

## PREFACE.

manuscript, but soon discovered that the work could not be embraced in less than two large volumes, if the detail contemplated in gathering the material were to be carried out.

It was then concluded after sufficient consideration that the subject could be reasonably covered by a careful condensation of the matter to the number of pages here presented. Should there be a demand for a more exhaustive treatment, the author has the material at hand, and can supply the same within a few months.

However, in the preparation of this volume, no pains or efforts have been spared and the author's aim has been to meet the need for its production, and shed light on the early origin of the Courts of the State of New York, and as now organized and existing.

The scheme of its treatment was to devise a suitable and comprehensive plan by which the historical or narrative portion of such a subject could be analyzed and differentiated from its strictly legal and professional aspects. Here an obstacle was encountered in the fact that from the first settlement on Manhattan Island, on through the colonial, and most of the constitutional period, the courts were so interwoven with the general colonial and state governments as to render such a distinction extremely hazardous and difficult.

In a large measure this feature has been met and successfully overcome; but in order to insure

## PREFACE.

against even a partial failure of the object in view, the author has collated in Part III, a brief and separate treatment of each court from its inception, and so on chronologically, to the present time. In that part are to be found all courts, and a list of those codified under the present State Constitution, as well as the local courts throughout the State. Part I covers the colonial period; Part II, the constitutional period, and Part III includes a chronological compilation of each court separate and distinct, to its present status and jurisdiction, or to its final abolition.

In conclusion the author would submit that if in dealing with so varied and comprehensive a subject, he has laid himself or his subject open to criticism, he may receive a fair measure of indulgence and forbearance, as he feels that at least, he has opened the way to future effort and improvement.

HENRY W. SCOTT.

NEW YORK, *January, 1909.*



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PART I.



COLONIAL PERIOD—1623-1777.



## CHAPTER I.

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### STATUS OF LAW IN THE PROVINCE OF NEW NETHERLANDS UNDER THE DUTCH.

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ABORIGINES — ADVENT OF THE DUTCH — PURCHASE OF MANHATTAN ISLAND—THE STATES GENERAL—COLONY OF NEW NETHERLANDS—GOVERNOR AND COUNCIL—PATROONS—ADMINISTRATION OF KIEFT—CHARTER OF PRIVILEGES —POPULAR DISCONTENT—RECALL OF KIEFT—NEW COURT UNDER STUYVESANT—THE BODY OF NINE MEN—UNPOPULARITY OF STUYVESANT —BURGHER AND SCHEPENS COURT—POLITICAL CONDITIONS—COURT OF SCHOUT, BURGO-MASTERS AND SCHEPENS—PROCEDURE OF THE COURT—ALTERNATIVE PROCEDURE—RULES OF EVIDENCE—PROCEEDINGS AFTER JUDGMENT—JURISDICTION — ADDITIONAL POWERS — STATUTORY FEES—CRIMINAL JURISDICTION—ADDITIONAL COURTS—FINAL OCCUPATION AND ABDICATION OF THE DUTCH.

#### ABORIGINES.

At the time of the first settlement of Manhattan Island by the Dutch, in the year 1623, the aborig-

## THE COURTS OF THE STATE OF NEW YORK.

ines were the American Indians. History does not shed much light on what branch of the five great nations, as they are known, frequented the present site of New York City.

The Indians lived under their tribal form of government, and were ruled by a chief or grand sachem, whose functions were rather those of a military leader than civic administrator. A regular and orderly system of law and order they had not. These uncivilized children of nature relied on their personal prowess for the redress of their grievances, and blood was the wages of wrong. They were superior to the native beasts of these haunts only in their ability to hunt and subdue them to their needs. Their manner of life was nomadic, and when not on the warpath their chief occupation was hunting and fishing.

### ADVENT OF THE DUTCH—PURCHASE OF MANHATTAN ISLAND.

It was on this primitive soil that a civilized form of government was first installed by the Dutch in 1623. The territory now embraced by Manhattan Island was acquired by barter from the Indians for gewgaws and trinkets, worth, in all, about twenty-five dollars. The first appearance of the Dutch settlers and their heretofore unseen ships was regarded by the Indians with superstitious awe. This state of easy credulity may account for their ready acquiescence in what the courts of to-day

#### THE STATES GENERAL.

might regard as over-reaching and taking undue advantage of the unsophisticated.

Upon their formal occupancy of the soil the new landlords instituted a form of government similar to their home government in Holland. A charter to found and govern colonies in America and other parts of the world had been granted by the States General of Holland to the West India Company, a commercial corporation of Holland. Under this charter, the agents and directors of the West India Company were empowered to appoint governors and other officers to maintain order and perform the functions of government in the newly settled colonies.

#### THE STATES GENERAL.

This gigantic corporation was under the immediate supervision of the home government. The College of Nineteen was a board of nineteen delegates in whom were vested the general executive powers over the States General, and five separate chambers charged with the government of the West India Company's affairs. To the Chamber of Amsterdam, one of the five, was committed the sovereignty of the colony of New Netherlands.

#### COLONY OF NEW NETHERLANDS.

In 1623, under the administration of May, the first governor appointed by the Amsterdam Cham-

## THE COURTS OF THE STATE OF NEW YORK.

ber, was organized the colony of New Netherlands, the first settlement of which was established on Manhattan Island on what is now the present site of New York city. The name of New Amsterdam was given to the first settlement, and it was intended as the seat of government of the Dutch possessions in the New World. May was succeeded as governor, at the end of the first year, by Verhulst, whose rule was of no longer duration.

During the administration of the first two governors, the unsettled condition of the colony's affairs, the unremitting struggle with the barriers of nature, and the paucity of numbers, precluded the formation of any permanent or regular system of jurisprudence.

### GOVERNOR AND COUNCIL.

Verhulst was superseded as governor in 1626 by Peter Minuit, who, owing to the rapid settlement and increased importance of the new colony, was assisted in the duties of his office by a council of five, vested, like himself, with full legislative, executive, and judicial powers, subject to review by the Amsterdam Chamber.

Attached to the governor and his council was the schout fiscal, a semi-legal and military officer combining the duties of attorney-general and prosecuting officer for the province with those of sheriff, it being one of his functions to execute the decrees of justice.

## PATROONS' COURTS.

During the rule of Minuit, which covered a period of six years, and his successor Van Twiller, up to the year 1637, the governor, council and schout took charge of all judicial proceedings. Unfortunately all records of that period are lost, so we do not know the character of the justice administered during their terms of office.

## PATROONS.

In the year 1630, in order to encourage emigration to New Netherlands, the West India Company made extensive grants of land to certain wealthy men of Holland, known as patroons, on the condition that they bring a certain number of men to the province. These patroons were a landed aristocracy vested with feudal powers, as lords of the soil.

In addition to the ownership of the land, there was conferred upon them authority to establish courts of justice. The courts thus created were known as Patroons' Courts, and exercised within the patroons' territory an almost despotic jurisdiction, civilly and criminally.

The patroon or his deputy sat in arbitrary judgment and was vested with power of life and death. His decision was final in all civil cases, subject only to an appeal to the director-general and council of the province, where the amount involved exceeded fifty guilders; this right of appeal, however, was abrogated by the patroon first enforcing from the tenant, as a condition precedent to entry upon the

## THE COURTS OF THE STATE OF NEW YORK.

land, that he would in no case invoke this right. It is easy to imagine the high-handed and corrupt justice thus meted out to the suitors in these Patroons' Courts.

### ADMINISTRATION OF KIEFT.

In 1638, William Kieft, a harsh and unscrupulous man, was appointed to the office of governor. He has been characterized as unjust, arbitrary, narrow-minded, tyrannical, grasping, and pompous, with a restlessness that was ever perverted to futile purposes, inconsistent with the public good.

During the nine years of his administration he assumed entire charge of the conduct of public affairs, legislative, executive, and judicial. By his commission he was to be assisted in the duties of his office, as were his predecessors, by an executive council; such a limitation to his powers would have deprived him of the controlling voice in affairs of state. To overcome this difficulty, he reduced the council to one member, a literal, though not substantial, compliance with the wording of the act of investiture; this act of statecraft, in view of his two votes as governor, gave him exclusive control and domination.

### CHARTER OF PRIVILEGES.

In 1640, the College of Nineteen adopted a charter of exemptions and privileges which had for its

## CHARTER OF PRIVILEGES.

object the encouragement of emigration to New Netherlands. In this charter it was declared that the governor and council should act jointly as a court for the hearing of all claims and disputes; act as an Orphans' and Surrogates' Court, and pass judgment on all religious and criminal offences, and administer justice in general. In conformity with the powers and privileges of the charter, Kieft ordered the council to convene each Thursday for the purpose of hearing and adjudicating all civil and criminal processes, and the redress of all grievances brought into court; he also established certain rules of court procedure. Under a court of such doubtful complexion, let the reader picture how justice was travestied and debauched at the will and caprice of this headstrong and frowning "Jeffrys." Consistent with his other oppressive tactics, was his rude treatment of the schout fiscals, or schouts as heretofore designated. If they were occasionally invited to participate at the sessions of court, it was only to be humiliated and ignored, the effect of which injudicious policy was to render the court conspicuous by their absence.

The ruthless and unconciliatory methods of Kieft involved him in continuous trouble with the Indians, as well as his constituents. Fines, confiscations, and banishments became the order of the day, and the right of appeal to Amsterdam was rendered inoperative by unconscionably fining and imprisoning all who resorted to this privilege.

## THE COURTS OF THE STATE OF NEW YORK.

### POPULAR DISCONTENT.

The inevitable result of such harsh measures was an expression of popular indignation which took the form of a petition for remedial legislation, and the adoption of a system of judicature modelled on that to which the people were accustomed in Holland.

Kieft had persistently opposed the grant of any such right to the inhabitants of New Amsterdam, but at this juncture he needed their help in a war he contemplated against the Indians. The people consented to co-operate with him in waging this war, in return for concessions of reform in the colonial judicature. Quick, in his predicament, to avail himself of this promise of assistance, he thus rallied to his support the colonists. The advisability of going to war was to be submitted to a consensus of the community; therefore twelve men were selected by the heads of families to represent and act for them. The war was approved, and a petition presented to the governor for the establishment of courts of justice, similar to those of Holland. The request was at first evaded, and finally disposed of by summarily dissolving the peoples' chosen representatives.

### RECALL OF KIEFT.

Two years later Kieft again found it necessary to seek the aid of the inhabitants in adjusting the mismanaged affairs of the colony. Representatives

#### NEW COURT UNDER STUYVESANT.

were again chosen, to the number of eight, to confer with the governor as to means of relieving the situation. Efforts were not now wasted in futile requests to Kieft for a redress of the popular grievances but an earnest appeal was forwarded to the College of Nineteen and the States General of Holland. The upshot of the whole matter was the recall of Kieft to Holland, and the appointment of Peter Stuyvesant as governor in his stead.

Peter Stuyvesant came over to New Amsterdam in 1647, accompanied by a schout and an officer known as a vice-director. Upon his arrival Stuyvesant established a court whereof, in his absence, the vice director was to be presiding justice, and with other officers of the company, assist him in the administration of justice.

#### NEW COURT UNDER STUYVESANT.

The jurisdiction of the newly established tribunal was most comprehensive, and included cognizance of all cases whatsoever, subject, however, to the governor's opinion on weighty questions. The governor was, by virtue of his office, presiding justice, and occasionally exercised this prerogative by being present at important trials.

In criminal cases, besides the judges mentioned above, two capable citizens from the locality where the offence was committed were to be chosen by the governor to sit with him or his deputy as judges.

All this was but an inadequate measure of re-

## THE COURTS OF THE STATE OF NEW YORK.

form, and did not satisfy the demand for a more popular form of government. That some concession must be made to this insistent clamor was now evident to Stuyvesant.

### THE BODY OF NINE MEN.

Accordingly he allowed the people to elect eighteen representatives, nine of whom, selected by the governor, were to constitute a permanent body to advise him on all public matters. This number became known as the "Body of Nine Men," and was vested with certain judicial powers. They discharged their duties by rotation, three of them attending successively at each session of court, and acting as arbitrators in all cases. Their decision was binding upon the parties, subject only to an appeal to the governor and council, upon payment of costs amounting to one pound Flemish. These and the Patroons' Courts remained the established judicial system in the colony for seven years.

### UNPOPULARITY OF STUYVESANT.

In spite of Stuyvesant's conciliatory action in thus yielding to the popular demand for judicial reform, his government grew more and more in disfavor. Though himself a man of tact and enterprise, he was unable to adopt his policies to the exigencies of a people in a new and remote country. The great commercial interests entrusted to his care

#### BURGHER AND SCHEPENS COURT.

were incompatible with the executive functions of his administration as a colonial governor.

Despite the violent opposition of Stuyvesant, who imprisoned and removed from office its projector, the Body of Nine met, prepared a petition for redress to the States General, and deputed three of their number to present it in person. This petition embodied their grievances and demands, and resulted in some amendments to the existing order of things.

#### BURGHER AND SCHEPENS COURT.

In 1650 the States General ordered among other things that a court of Justice similar to that in existence in Amsterdam be erected in New Netherlands, and a burgher government be established at New Amsterdam, to consist of two burgomasters, five schepens and a schout, and that in the meantime the Board of Nine should continue to administer justice in the colony.

This order of the States General was for some time resisted by the Chamber of Amsterdam, as being in contravention of their charter rights, and on these grounds Stuyvesant refused to obey it. A struggle which lasted for two years ensued between the States General and the Chamber of Amsterdam. The Chamber finally surrendered and acquiesced in the wishes of the colonists. Stuyvesant was directed to establish a Court of Justice formed as much as possible after that of the city of Amster-

## THE COURTS OF THE STATE OF NEW YORK.

dam in Holland. Owing to a technical ambiguity in the order of appointment, Stuyvesant, who knew well the minds of his employers in Holland, decided that power was invested in him to appoint the magistrates. Although this was entirely contrary to the customs of Holland, Stuyvesant accordingly appointed magistrates, schepens and schouts who were but his minions, and did as he dictated.

On February 7th, 1653, the first board of magistrates met and gave notice that sessions of court would be held for "the hearing and determining of all disputes between parties, as far as practicable, in the building heretofore called the City Tavern and now the Stadt House (City Hall) on every Monday morning, at nine o'clock." The City Hall not being ready for the day appointed, the first meeting was held the following Friday at the Fort; proceedings were solemnly opened with prayer, and the organization of the court for the transaction of business effected.

## POLITICAL CONDITIONS.

Contrary to the intention of the States General to establish the municipal government on lines identical with that of the city of Amsterdam, Stuyvesant would suffer no curtailment of his power or that of his council. This inconsistent and selfish conduct of Stuyvesant in thus setting at defiance the order of the States General and the legal rights

and demands of the people, entailed a series of disorders, unrest and continual remonstrances.

At this period of the history of New Amsterdam the entire population was not far in excess of seven hundred inhabitants. This wide difference between the population of the cities of Amsterdam and New Amsterdam allowed for some relaxation in the government of the latter. Adapting themselves to local conditions, the newly appointed officers formed one body for the discharge of legislative, judicial, and executive functions. Until 1656 the eldest burgomaster continued to act as president of the court, when, by Stuyvesant's order, the presidency was to be changed every three months. In the year 1660, the offices of city schout and schout fiscal, which had been merged, were, much to the satisfaction of the colonists, made separate offices.

As the final step in this judicial evolution, a permanent tribunal, known as the Court of the Schout, Burgomasters and Schepens, was established, the records of which were kept by their clerk or secretary. This was a court of record, and complete minutes of the proceedings have been transmitted to us, which afford an interesting insight into the habits and manners of the people of that period. We cannot fail to be impressed with the depth of knowledge and display of the principles of jurisprudence, with which their legal investigations were

## THE COURTS OF THE STATE OF NEW YORK.

conducted. Originality marked their methods of ascertaining the truth, excelling by far the vicarious expedients to which the English settlers of the colony resorted when on a like quest.

The burgomasters claimed the right to administer unlimited justice, as the magistrates in the towns of Holland were accustomed to do. After some hesitation, Stuyvesant reluctantly allowed the magistrates, who were often laymen, unlimited civil and criminal jurisdiction in all but capital cases. A term of court was appointed for every fortnight. Frequently, if occasion required, a weekly or special term was held upon a day designated.

### PROCEDURE OF THE COURT.

The procedure followed in these courts was simple and severe, and somewhat similar to that of a modern police court. Upon complaint of the party plaintiff, an officer of court, known as the court messenger, summoned the party defendant to attend court on the next court day. In case of the defendant's failure to appear, he incurred the cost of the summons, waived the right to interpose any demurrer to the court's jurisdiction, and a new mandate was issued. A second default resulted in additional costs, precluded all "dilatatory exceptions," and operated as a forfeiture of the other usual privileges of a litigant. A third citation was now issued, and upon the defendant's default, after inquest taken, final and absolute judgment was rendered.

## PROCEDURE OF THE COURT.

If it appeared from the evidence adduced that the defendant's presence was essential, a fourth process of court in the nature of a warrant of arrest, was issued and his appearance compelled.

These extreme measures were rarely required, as the original summons was generally obeyed. Upon appearance of the parties in court, the plaintiff stated his case, and the defendant answered. If an issue of fact material to the merits of the controversy arose, either party might be sworn as a witness. Should the court be not then sufficiently enlightened, other witnesses might be examined, and an adjournment was taken until the following court day. In the meantime the witnesses made written depositions before a notary, or were required to attend personally at court on the adjourned day, to be orally examined under oath.

Cases brought to court seldom went beyond the initial stage of joinder of issue by complaint and answer, and were decided by the court without a jury. This reliance on the efficiency of such a system for the redress of their wrongs manifests clearly how thoroughly the colonial litigants were imbued with the spirit of law and the respect due it.

If the issues raised for adjudication were of an intricate and perplex nature, they were often referred to arbitrators selected by the parties or appointed by the court. It was the arbitrators' duty to effect, if possible, a settlement of the controversy out of court, and in default of such settlement, the

## THE COURTS OF THE STATE OF NEW YORK.

matter was regularly tried and disposed of by the magistrates on the bench.

### ALTERNATIVE PROCEDURE.

A more formal procedure was open to parties who preferred it. After plaintiff had submitted his case, he might, upon motion of defendant, be required to reduce it to writing, for which purpose he was accorded one day's time. If this procedure were invoked, the subsequent pleadings of both parties were required to be in writing. These consisted of defendant's answer, plaintiff's reply, and defendant's rejoinder. The depositions of each party's witnesses were likewise taken before a notary of his choice, whose duty it was to keep a record thereof. In case a witness resided without the court's jurisdiction, his depositions might be taken *ex parte*, upon written interrogatories, before a local magistrate, under what was termed a requisitory letter. This testimony was added to the other pleadings, and together they formed the memorial. This memorial was filed with the court, and open to the inspection of either party, to whom was reserved the right, within a limited time, to examine the adverse witnesses upon cross-interrogatories, on any matter material to the issues, contained in their depositions.

In rebuttal or reply, either party was at liberty to introduce the testimony of witnesses, examined for that purpose, in accordance with the directions.

## ALTERNATIVE PROCEDURE.

A practice so cumbersome and expensive was seldom followed. The more common procedure was a reference to arbitrators, or a hearing in court, which was less expensive and more expeditious.

## RULES OF EVIDENCE.

We deem it not amiss, in this connection, to consider briefly the rules which governed documentary evidence. Papers and documents purporting to be in a party's handwriting were presumed by law so to be, unless denied by the adverse party under oath. Account books, when properly itemized and kept, were admissible in evidence in behalf of the party who offered them.

The credibility of witnesses and weight of evidence were entirely left to the discretion of the judges, as no jury was empanelled. As a result of this, we are confronted with an extremely subtle judicial balancing, which led to a singular classification of the degrees and kinds of evidence. A fundamental distinction was drawn between full proof and half proof. The former was primary or original evidence, supported by at least two credible witnesses, or that species of evidence resting upon a document or written paper. The latter, above distinguished as half proof, was the testimony of a single witness, which would be admitted in our courts as direct evidence. Hearsay was classified as half proof, and admitted as corrobor-

## THE COURTS OF THE STATE OF NEW YORK.

ative evidence, and if a dying declaration, admitted as full proof.

### PROCEEDINGS AFTER JUDGMENT.

When judgment for a sum of money was rendered against a defendant, he was usually allowed fourteen days within which to pay one-half the sum and one month for the payment of the remainder. Non-compliance with these terms resulted in summary action by the court to enforce collection. Upon application, a schout, or more usually the court messenger, armed with his insignia of office, a bunch of thorns, was sent to the judgment debtor, and upon exhibiting a copy of the sentence, demanded that satisfaction be made in twenty-four hours. Should the debtor further default, this demand was repeated with increased expense, and at the end of the twenty-four hours the debtor's movable property was attached by the messenger in the presence of a schepen, and detained for six days, subject to redemption on payment of judgment and costs. If the goods still remained unredeemed, public notice was given on Sunday, and upon a law-day, that they would be sold at public auction on the next market day.

If it should be found necessary to levy on real estate, or immovable property, greater formality was observed in the method of conducting the sale and an extension of time, within which to redeem, was granted. By a general and unique custom,

## PROCEEDINGS AFTER JUDGMENT.

which at this time prevailed in the colony, the sale was continued at public auction, during the burning of a lighted candle; at the extinction of the candle the property was struck off to him who had made the highest bid.

## JURISDICTION.

All manner of actions were brought before this court, but the justice administered was by the conscientious and best efforts of the magistrates, who sought by a diligent ascertainment of the facts and law of the case to administer justice as they saw the light.

The civil business of the court consisted mainly of actions for money due and owing; attachment of absconding debtors' property; actions relating to real estate; actions to recover damages for injuries to land or personal property, and actions in replevin.

A penalty of imprisonment was imposed on the defaulting party in actions for seamen's wages, and for breach of promise of marriage. In cases of separation between man and wife, the children were equally allotted, and after payment of debts, the property equally divided. In bastardy proceedings, security for the child's support was required from the male, and both parties liable to fine or imprisonment. Assault and battery, and defamation, were quasi-criminal in their nature, and subjected the offender to fine and imprisonment,

## THE COURTS OF THE STATE OF NEW YORK.

though public recantation of slander before the court generally procured a discharge. Pecuniary damages were not allowed for injuries to person or property. The somewhat narrow and provincial character of the early inhabitants of Manhattan is evidenced by the unusual prevalence of actions for defamation of character.

### ADDITIONAL POWERS.

Among the other functions of this court were that of a Court of Admiralty, and of a Court of Probate. This latter branch of its jurisdiction included general powers over decedents' estates, such as proving last wills and testaments, and guardianship and management of the affairs of widows and orphans, through curators appointed for that purpose by the court.

The court had acted as an Orphans' Court, but an Indian massacre of the white settlers of Manhattan about the year 1655, left so many widows and orphans, that the burgomasters, who acted in the dual capacity of a municipal and judicial body, begged Stuyvesant to relieve them of some of their duties. In compliance with this request, Stuyvesant created a separate court to be known as the Court of Orphan Masters, which exercised many of the duties of the Surrogates' Court of today. It was at first composed of three masters, but this number was later reduced to two. The existence of

## CRIMINAL JURISDICTION.

this court terminated with the transfer of the colony into the hands of the English.

### STATUTORY FEES.

About this time, to-wit, on the 25th of January, 1658, Stuyvesant inaugurated a fee bill regulating the legal compensation of attorneys and public officers. The taint of avarice in the public service seems to have necessitated this legislation. The extortionate remuneration for their services which scriveners, notaries, clerks and other licensed persons had demanded, required public adjustment. The effect of this enactment was to provide for the better and easier administration of justice and to abolish the prohibitive costs of litigation.

## CRIMINAL JURISDICTION.

The enforcement of the law, in criminal cases, was vested in the schout. At his requisition, and upon sufficient evidence adduced to warrant it, the defendant might be summoned or arrested at the discretion of the court. Bail was accepted in all cases except those of murder, treason, arson or rape in the first degree. Two methods of trial prevailed: A public trial, conducted according to the general rules of evidence, which was the ordinary procedure; the other by private examination upon written questions, in the presence of two schouts. Torture, while available as a means of extorting

## THE COURTS OF THE STATE OF NEW YORK.

confessions, was but seldom invoked. Such crimes as were committed were not of a serious degree. The penalties were fines, imprisonment, whipping, the pillory, banishment, and death. The last could be inflicted only with the concurrence of the Director-General and his council. The fines collected were distributed among the schout and court, or given to the poor.

### ADDITIONAL COURTS.

With some slight modifications, similar courts were established on Long Island, in that district known as "The Five Dutch Towns." Each of these towns had its separate courts, and constituted a kind of circuit, over which one schout, residing at Breukelen, now Brooklyn, presided.

In 1652 Stuyvesant had, by virtue of his office, established a court among the English at Beverwyck—Albany. In 1656 and 1659, similar courts were established by Stuyvesant among the English settlers at Canorasset (Jamaica) and Middleburgh (Newton). These, the Patroons' Courts, and the Supreme or Appellate Court of Amsterdam, composed the judiciary until the capitulation of the Dutch to the English, on September 6th, 1664.

The only material change wrought in the public affairs of the colony by these events was the change of the name of the colony and city respectively, from New Netherlands and New Amsterdam to New York. This name was bestowed by Col. Rich-

#### ADDITIONAL COURTS.

ard Nicolls in honor of James, Duke of York, whom he represented.

#### FINAL OCCUPATION AND ABDICATION OF THE DUTCH.

From this period onward, the English were the governors of New York. On August 9th, 1673, the city of New York was temporarily reoccupied by the Dutch, but finally and forever abdicated in favor of the English, under a treaty signed by the States General at London.



## CHAPTER II.

### EARLY ENGLISH SOVEREIGNTY.

BASIS OF ENGLISH RULE—COLONIAL CONDITIONS—INTERNATIONAL CLAIMS TO NEW YORK—CONFLICTING LAND TITLES—TERRITORY CLAIMED BY ENGLAND—ADMINISTRATION OF NICOLLS—NICOLLS' TACT—PEACEABLE SURRENDER OF NEW AMSTERDAM—DEFECTION OF DUTCH OFFICIALS—POLICY OF NICOLLS—DISCONTENT OF ENGLISH—HEMPSTEAD CONVENTION—DUKE'S LAWS—ANIMOSITY OF ENGLISH—SCOPE OF THE ROYAL CHARTER—ORGANIZATION OF JUDICATURE UNDER THE HEMPSTEAD CONVENTION—COURTS OF THE THREE RIDINGS—MUNICIPAL COURT OF THE CITY OF NEW YORK—POWERS CONFERRED ON MAYOR AND ALDERMEN—MAYOR'S COURT.

#### BASIS OF ENGLISH RULE.

The basis of English rule of the province of New York was: First, the royal patent of the English monarch, Charles II, to his brother, James, Duke of York, dated March 12th, 1664 (old reckoning); second, Colonel Richard Nicolls' commission from the Duke to act as his deputy-governor:

## THE COURTS OF THE STATE OF NEW YORK.

third, the proclamation of Nicolls addressed to the inhabitants of Long Island, West Chester, and Staten Island, from New Utrecht Bay, and dated August 18th, 1664 (old reckoning); fourth, the terms of capitulation exchanged between Nicolls and the Dutch inhabitants of New Amsterdam.

### COLONIAL CONDITIONS.

To fairly comprehend the judicial status and political situation of New York under the English, we must adapt international law of that period to the fundamental elements of English polity and administration as above outlined. This political problem, worthy of the genius of Edmund Burke, can be solved by no ill advised and superficial consideration of the conflicting principles impressed on the new world by two nations so dissimilar in their traditions, institutions, and aspirations.

Even at this late day time has not completely eradicated the seeds scattered on this virgin soil by the first settlers. Their national characteristics are deeply rooted in the customs and posterity which is theirs. Long after the American colonies had foresworn all foreign allegiance, their European origin has often been the mainspring of their action, social and political. . . .

### INTERNATIONAL CLAIMS TO NEW YORK.

The province of New York had been claimed by three great powers of Europe, viz: England,

France and Holland. The French claim was the outgrowth of the early exploration and settlement by French pioneers, of the River St. Lawrence and its tributaries. These intrepid French voyageurs had descended Lake Champlain, in the northern part of the state of New York, and taken possession of the soil, as original discoverers, in the name of the King of France.

The claim of Holland found its origin in a like claim to the territory embraced by the Connecticut and Delaware Rivers, and the soil contiguous to their banks. If possession be nine-tenths of the law, the Dutch claim seemed best founded.

England's claim was most justly based on Cabot's discovery in 1497, under commission from Henry VII, of what now constitutes North America. The entire Atlantic coast was straightway settled by English subjects, who acted under Crown grants. This English occupancy antedated that of the Dutch, whom the English regarded as trespassers who had wedged themselves in between the colonies of Virginia and New England. Numerous protestations had been lodged at the Court of Holland against this unwarranted invasion of English territory, but the internal affairs of England at that period made it either impolitic or inconvenient to interfere, and no action was taken to make good British title by resort to arms, until the year 1664.

CONFLICTING LAND TITLES.

The logical and legal effect of these conflicting claims was to give rise to a long and vexatious series of land suits, in which title was derived on the one side from the Dutch, and on the other urged through English dominion.

The entire question turned on the point whether England had annexed this territory by prior discovery, or whether by conquest and invasion, it had been reduced to an English dependency. If the former contention were tenable, the English common law was paramount, and had from the date of discovery been the law of the land.

If, however, it be conceded that English domination was due to the success of the British arms, the law remained as it had been before the conquest, and was so applicable to all causes of action which had their origin prior thereto. Taking this latter view of the matter, the Dutch possession was that of mere squatters holding possession adverse to the real owners of the soil, and of no legal effect, and subject to removal and confiscation upon the forcible or other entry of the lords paramount. The vacillating tactics of the colonial judges, who never sharply and clearly defined their position in this matter, has left the title of eminent domain in doubt and uncertainty. From the first formal English possession, the English common law has received judicial sanction and controlled the decisions of the New York courts.

## ADMINISTRATION OF NICOLLS.

### TERRITORY CLAIMED BY ENGLAND.

We deem it proper in this connection, to consider to what territory England laid claim. The land granted by Charles II to his brother, the Duke of York, by royal patent, included the entire Atlantic coast, from the state of Maine to the Allegheny Mountains, and that portion more particularly described as bounded on the east by the Connecticut River, and on the west by the Delaware River and adjacent territory. This soil was claimed by the King as his private domain, and by royal prerogative, could be alienated at royal pleasure.

By his grant to the Duke of York the King had conveyed New York state, parts of New Jersey, the whole of Long Island, Staten Island, portions of Connecticut, and neighboring smaller islands, for a consideration of forty beaver skins a year. A privilege which ran with this cession of territory was the right to give the law thereto, subject only to the sole restriction that it be agreeable to the laws and statutes of England. The English King and privy council reserved to themselves the right to hear appeals from the inhabitants of the territories. New York thus became a proprietary province, similar in many respects to Maryland and Pennsylvania.

### ADMINISTRATION OF NICOLLS.

The Duke of York's first act upon receiving this

## THE COURTS OF THE STATE OF NEW YORK.

grant was to commission Colonel Richard Nicolls as deputy-governor of the province, for the purpose of carrying into effect the powers granted by royal patent. It was especially directed that this legislative power should be by ordinance and not by statute. The compilation of a code of laws to obtain in his possessions was entrusted by the Duke to his brother.

Armed with these, the King's patent and the Duke's commission, Nicolls sailed with a fleet to take possession.

### NICOLLS' TACT.

By an act of sagacity and foresight, immediately after his arrival, Nicolls set about conciliating the English inhabitants of the province. From New Utrecht Bay he issued a proclamation by which he promised them all the constitutional rights of English citizens, and in return sought their assistance in his struggle against the Dutch. This proclamation later led to popular protest when the Duke of York denied them the right to choose representatives of their own, for the enactment of laws for the province.

### PEACEABLE SURRENDER OF NEW AMSTERDAM.

Contrary to the expectation of Nicolls, who had anticipated a firm resistance from the inhabitants, the city of New Amsterdam tamely surrendered to the English invaders. We have already made clear

## PEACEABLE SURRENDER OF AMSTERDAM.

to our readers the universal dissatisfaction of the people of New Amsterdam with their government. Under the baneful influences engendered by this unhappy state of affairs, need we wonder that the English were hailed by the inhabitants as deliverers from oppression and tyranny, rather than conquerors who would impose the master's yoke upon them. Any change would be for them an escape from arbitrary and intolerable conditions, under which they had until then lived.

Nicolls, wisely gauging the popular mind, published a proclamation guaranteeing to the Dutch certain religious and civil rights, and a continuance of the government of New Amsterdam according to the Dutch customs. Hence it was that the Dutch expected a more representative and liberal government under English rule than they had heretofore experienced under the director-generals appointed by the West India Company.

On the 27th day of August, 1664, the city of New Amsterdam, without striking a blow, surrendered to the English. By the articles of surrender, the Dutch were granted certain rights, such as freedom of religious worship, the enjoyment of their customs of inheritance, confirmation of all judgments rendered prior thereto, the right of appeal to the States General of Holland, the continuance of the present incumbents in office until their successors, who would be required to take the oath of allegiance to the English Crown, were elected.

## THE COURTS OF THE STATE OF NEW YORK.

### DEFECTION OF DUTCH OFFICIALS.

When new officers had been elected, much reluctance was manifested by the Dutch magistrates to taking the required oath of allegiance. Some of the more important citizens who had acted as burgomasters, schepens, and schouts, flatly refused to take any such oath, and departed for Holland. New magistrates, who acquiesced in Nicolls' demands, were elected in their place, but not more than 150 of the inhabitants of New Amsterdam were induced to take the oath.

### POLICY OF NICOLLS.

The exigency of so revolutionary an epoch in the affairs of New York demanded administrative tact and ability of a high order; these Nicolls possessed in a marked degree. Measures of conciliation were necessary to foster allegiance to the English. With rare and consummate tact had Nicolls risen to the occasion and reconciled differences.

The purely Dutch towns on the upper Hudson, the city of New Amsterdam, and the five Dutch towns on Long Island, were permitted to retain their existing forms of government, which were found efficient and adequate. By this master stroke, Nicolls rendered these subjects loyal to his government.

### DISCONTENT OF ENGLISH.

The recalcitrant and rebellious attitude of the

#### HEMPSTEAD CONVENTION.

English speaking inhabitants was the cause of much difficulty to the administration of Nicolls, and called forth all his diplomacy and statesmanship. They were settled in towns situated in what is now Suffolk County, Westchester, and Staten Island, which had been from the first attached to the jurisdiction of Connecticut. In response to Nicolls' proclamation above mentioned, calling them to arms, they had raised a force to co-operate with the English fleet in the subjugation of New Amsterdam. Formerly they had identified themselves with the colony of Connecticut, with whose religious and political principles they were entirely in accord. To win them over to allegiance to Nicolls' government, equal, if not greater, liberties must be granted them.

#### HEMPSTEAD CONVENTION.

Two days after the surrender of New Amsterdam, Nicolls had promised them that "Deputys shall in convenient time and place be summoned to propose and give their advice in all matters tending to ye peace and benefit of Long Island." Accordingly on March 1, 1665, what is known as the Hempstead Convention was convened at Hempstead. Two delegates were present from each of the sixteen towns on Long Island, and from Westchester on the mainland.

## THE COURTS OF THE STATE OF NEW YORK.

### DUKE'S LAWS.

A code of laws, since known as the Duke's Laws, was submitted by the deputy-governor to the consideration of the convention. The sections of this code relating to capital punishment were a substantial re-embodiment of the Mosaic code of Connecticut. With slight changes, the code was ratified and adopted for the government of the towns represented. This code had been compiled by the Duke's brother in England, and was a heterogeneous medley of English and Dutch law, well adapted to the conveniences and customs of the people for whom it was intended. It was later extended to the entire province of New York. It conveyed the impression of having been prepared by one familiar with the New England codes, and the judicial system of Holland. In 1688 this code was entirely repealed by the first General Assembly after the revolution of 1688, as being in spirit contrary to the constitution of England, and the practice of the government of their Majesties' other plantations in America.

In 1757, the first historian who has written on this subject, says that all "laws made here antecedent to this period (1691) are disregarded both by the legislature and the courts of law; the validity of the old grants of the powers of government, in several American Colonies, is very much doubted in this province."

## SCOPE OF THE ROYAL CHARTER.

### ANIMOSITY OF THE ENGLISH.

Much animosity was displayed by the English inhabitants against their deputies, for their ready acquiescence in the proceedings of the Hempstead convention. Most of them had signed a memorial to the Duke of York, approving his laws.\*

In 1666 an ordinance was passed, which declared it a penal offence to in any way reflect on those who had thus committed their constituencies to this obnoxious code, by subscribing to the hypocritical and obsequious address to His Royal Highness, the Duke of York. It was prescribed that the offender be brought before the Court of Sessions, and if the gravamen of the offence so warranted, held for the next assize.

### SCOPE OF THE ROYAL CHARTER.

From the first a measure of home rule had been granted by the English Crown to the colony of New York. This was the effect of the royal grant from the English sovereign to the Duke of York. With the sole reservation of a right of appeal from the decisions of the colonial courts to the mother country, the powers of government had been alienated to the Duke and his deputies.

Acting under this sweeping grant, the deputy-governor of New York had enacted that "no jury

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\*We can but admire Nicolls' tact in thus having the deputies put their names to a document, which they knew was unpopular.

## THE COURTS OF THE STATE OF NEW YORK.

shall exceed the number of seven, nor be under six, unless in special cases upon Life and Death the justices shall think fit to appoint twelve." A vote of the majority was decisive in civil cases.

### ORGANIZATION OF JUDICATURE UNDER THE HEMPSTEAD CONVENTION.

The part of Nicolls' Hempstead code most pertinent to our subject relates to the establishment of courts of law. By the adoption of this scheme of government, a town court was allotted to each town, with jurisdiction in civil actions, if the amount in litigation was less than five pounds sterling. The personnel of this court consisted of a constable and two overseers, who might for the better rendition of justice, add a justice of the peace to their number.

### COURTS OF THE THREE RIDINGS.

A court of much wider jurisdiction was likewise established for what were known as the three ridings of Long Island, Westchester, and Eastchester. Terms of court were set for twice in the year, to be held by justices of the peace of the several ridings, to take cognizance of all cases, civil and criminal, involving and amount not less than five pounds sterling; their judgment for amounts less than twenty pounds sterling was final.

A court which exercised general assize jurisdiction composed of the governor, council, and magis-

#### MUNICIPAL COURT OF THE CITY OF NEW YORK.

trates of each town, convened in the city of New York, to hear appeals properly brought from the inferior courts, and exercised original jurisdiction in prosecutions for crime. Unless an appeal to the Crown were permitted, this was the court of last resort. It was through this medium that the Duke and his council in England promulgated their acts and ordinances, and was the administrative organ of the deputy and council. Its jurisdiction was co-extensive with the territory covered by the Duke's possessions, and included the Pemaquid country (between the St. Croix and the Kennebec in Maine), Martha's Vineyard, Nantucket, Fisher's and Gardiner's Islands, several towns now in Connecticut, New Amstel, now Newcastle, in Delaware, and for a time New Jersey, as well as New York proper, as far north and west as Schenectady.

#### MUNICIPAL COURT OF THE CITY OF NEW YORK.

Nicolls' next care was the organization of the Burgomasters and Schepens Court, or the municipal court.

On June 12th, 1665, by proclamation setting forth his commission and authority, and that he acted on mature reflection and advice, he proceeded to "revoke and discharge the form and ceremony of this government of this his Majestie's town of New York, under the name or names, style or styles of Schout, Burgomaster and Schepens;" accordingly these courts were from that time dissolved. To

## THE COURTS OF THE STATE OF NEW YORK.

quote further, "for the future administration of justice by the laws established in these the territories of his Royal Highness, wherein the welfare of all the inhabitants and the preservation of all their rights and privileges granted by the articles of the town upon surrender under his Majestie's obedience are concluded," then, "that by a particular commission such persons shall be authorized to put the laws in execution in whose abilities, prudence and good affections to his Majestie's service and peace and happiness of this government, have special reason to put confidence in which persons so constituted and appointed shall be known and called by the name and style of Major (Mayor), Aldermen and Sheriff, according to the custom of England in other his Majestie's corporations."

After reciting that it had been found necessary "to discharge the form of government late in practice to the end that the course of justice for the future may be loyally, equally and impartially administered to all his Majestie's subjects as were inhabitants as strangers" an ordinance issued on the same day declared the inhabitants of Manhattan Island to be forever accounted, nominated, and established as one body politique and corporate, under the government of a mayor, aldermen, and sheriff.

### POWERS CONFERRED ON MAYOR AND ALDERMEN.

By this act of constitutional creation, full power and authority was given to the mayor and aldermen

## POWERS CONFERRED ON MAYOR AND ALDERMEN.

to perform the functions of government "according to the general laws of the government and such peculiar laws as are or shall be thought convenient and necessary for the good and welfare of the corporation; and to appoint other officers for the orderly execution of justice."

### MAYOR'S COURT.

Three days later these officials met at the "Stadt Huys," and effected the organization of what was called the Mayor's Court, of which they were the first members.

This court continued to dispense justice for a hundred and fifty-six years, when its jurisdiction was assumed by other tribunals. Like the Courts of Justices of the Peace for the country towns, this Mayor's Court was the court of sessions for the city. Records of court proceedings were kept in Dutch and English, and with the exception of trial by jury, the Dutch procedure was retained.



## CHAPTER III.

### COURTS ESTABLISHED BY HEMPSTEAD CONVENTION.

COURT OF ASSIZE—FIRST SESSION—SPECIAL FUNCTIONS OF THE COURT—DENIAL OF PETITION FOR POPULAR ASSEMBLY—THE DUKE'S LAWS—THE THREE RIDINGS—THEIR GOVERNMENT—COURTS OF SESSIONS—JURISDICTION—JURY TRIALS—METHOD OF TRIAL—JUSTICES OF THE PEACE—APPEALS—HOW TAKEN.

#### COURT OF ASSIZE—FIRST SESSION.

The General Court of Assize convened at the Fort in New York, on the last Thursday of September (the 28th), 1665, and remained in session until the following 4th of October. It included the governor, his council, and two justices of the peace for the three ridings; its sessions were held annually, seldom lasting longer than a week. Special sessions of this court were summoned under a warrant from the governor, on the information of parties entitled to immediate relief. A capital offence or a violation of the navigation laws, and other crimes of public moment, on information duly laid, were grounds for a Court of Oyer and Terminer, if more than

## THE COURTS OF THE STATE OF NEW YORK.

two months would intervene before the next Court of Assize.

### SPECIAL FUNCTIONS OF THE COURT.

This General Court of Assize possessed the somewhat complex and twofold characteristics of a law tribunal and legislative body. Its records are mainly ordinances, summons, subpœnas, commissions of officers, oaths of allegiance and of office, letters of denization, popular petitions and answers thereto, cases on appeal from inferior courts, trials in civil, criminal, equity, admiralty, and prize cases.

### DENIAL OF PETITION FOR POPULAR ASSEMBLY.

In 1669, after the retirement of Nicolls as governor, and during the administration of his successor, Lord Lovelace, the English towns of the province presented a petition for an assembly of delegates, who should advise the governor and council upon laws for the good and weal of the commonwealth. This was in accordance with a promise made by Nicolls.

The petition was denied on the ground that Nicolls' commission as deputy-governor included no such power, and moreover, that by instructions given to the then governor, the existing laws were not subject to amendment or repeal.

Thus we see that while this conciliatory conduct of Nicolls gave entire satisfaction to his masters, it

“LAWES.”

had a contrary effect with his constituents, among whom it bred dissatisfaction and resentment.

THE DUKE'S LAWS.

We will here quote an extract from the Duke's laws, which were the first to obtain in this country. The opening paragraph, couched in the quaint English of three centuries ago, reads as follows:

“LAWES.

“Lawes established by the authority of His Majesties lawes and patents granted to His Royal Highness, Duke of York and Albany, bearing date the 12th day of March in the 16th year of Ye Reigne of our Sovereign Lord, King Charles, Charles II, digested into one volume for the public use of the territories in America under the government of His Royal Highness, collected out of the severall laws now in force in His Majestie's American Colonies and plantations; published March 1st, Anno Domini, 1664, at a general meeting at Hempstead, Long Island, by virtue of a commission from His Royal Highness, James, Duke of York and Albany, given to Colonel Richard Nicolls, deputy-governor, bearing date the 2nd day of April, 1664.”

The subjects were alphabetically arranged, and in perusing them we are impressed with the fact that the compiler was familiar with the New England codes, and in particular with that part of them dealing with capital offences.

## THE COURTS OF THE STATE OF NEW YORK.

There are also to be found gleanings from the Dutch system of administering judicial affairs, principally their practice of arbitration, which in some form or other, has survived in the procedure of our courts to the present day, and would seem to have become inseparable therefrom.

These laws were adopted by the convention of the English speaking inhabitants, originally for the government of the English towns, since it was considered imprudent by Nicolls to interfere with the Dutch government. He took under his control only those parts of the province inhabited by the English settlers, comprising Long Island, Westchester, and Staten Island, which he named "Yorkshire," which like the Yorkshire in England, he divided into three districts or ridings.

### THE THREE RIDINGS—THEIR GOVERNMENT.

What is now Suffolk County was the East Riding, Staten Island, Kings County, and Newton comprised the West Riding, and the remainder of Queens County and Westchester, the North Ridings.

The government established in these ridings was of a very simple and primitive character; there was a high sheriff over the entire shire, and a deputy-sheriff for each riding; constables represented the latter in the towns, and they, with the town overseers, had charge of the local government, which was carried on by town meetings; there were also

## JURISDICTION.

justices of the peace for each locality. The officers above mentioned were the appointees of the governor to hold office during his pleasure only.

We have already treated of the organization and duties of these different courts, and what follows is but supplemental to what has been already stated.

## COURTS OF SESSIONS.

The following clause relating to the establishment of higher courts is found in the "Lawes." "That the names of the several courts to be held in each riding three times a year shall be called the Court of Sessions." In continuation, the same article goes on to speak of the respect due to "courts which so nearly represent his Majestie's sacred person, and that such order, gravity and decorum which doth manifest the authority of the courts may be sustained."

The sessions were to begin the first Tuesday in June, in the East Riding, the second Tuesday in June in the North Riding, and the third Tuesday in June in the West Riding. The second court of sessions was to be held the first, second, and third Wednesdays of December, and the third sessions on the first, second, and third Wednesdays of March, in the East, North, and West Ridings respectively. The sessions were not to exceed three days in duration.

## JURISDICTION.

The two general courts, besides the smaller town

courts, were originally the only courts in the colony. Action on contract or tort was triable in the jurisdiction where the cause of action arose. Bail might be accepted in cases of assault and battery, breach of the peace and similar offences, by the justice of the locality where the offence was committed, or in lieu thereof, the offender was committed to prison until the next sessions.

Actions for five pounds sterling or less were triable out of court, by two arbitrators, who were usually the overseers of the town. Should the overseers be unavailable for that purpose, the constable of the locality was authorized to select the arbitrators, who were to be two indifferent persons; this procedure was a survival of the Dutch custom of New Amsterdam. Should the disputants refuse to abide by the judgment of the arbitrators selected, three other indifferent persons were chosen at the dissenters' charge, to render final judgment. A fixed fee was allowed the constable and justice for their part in the trial.

As already stated, actions involving not less than five, nor more than twenty pounds were to be tried by the Court of Sessions, from whose judgment there was no appeal, if the amount did not exceed twenty pounds. Before the rendition of the jury's verdict, plaintiff had the right upon payment of costs, to withdraw his action.

The complaint was to be in writing and filed in the office of the clerk, eight days before the day of

## JURISDICTION.

hearing, so as to enable the defendant to file an answer. The judgment was endorsed on the complaint or answer, as the case might be, and all papers and evidence relating to the case were to remain on file with the clerk of the court.

### JURY TRIAL—METHOD OF TRIAL.

All cases were triable by a jury chosen in the following manner: A list of the causes for trial at the next session was given to the clerk of the court, the sheriff or under-sheriff, so that warrants might be issued summoning jurors, usually the overseers of the neighborhood, to hear the different cases. Should a sufficient number not be available, the sheriff was authorized to select able and discreet men "as shall either attend the court upon other occasions, or shall happen to be inhabitants of the towne where the court shall be held."

It was the province of the jury to try the action between party and party, determine the facts of the case, and award damages according to the evidence. When the evidence had been fully submitted and the case tried, the governor and council, or in their absence, the senior justice, pronounced the judgment of the court, and instructed the jury as to the points of law which had arisen during the trial.

The compensation of jurors was three shillings, six pence per day, which were collected from the

fees and charges of each court; or if these moneys were insufficient, from the public treasury.

As already stated, the number of jurors was not to exceed seven, nor be less than six, except in capital cases, where it was discretionary with the judge to appoint a jury of twelve.

In cases of patent ambiguity, in which the jury could not agree, a special or hypothetical verdict might be submitted for interpretation by the judge, whose duty it was to direct a verdict for the prevailing party, based on the law and the jury's findings of fact.

It was the jury's province to determine questions of fact on the evidence submitted. If they were not clear on a point of law or fact, or wished to be instructed on some issue raised, they were at liberty to come into open court, and invoke the advice of the bench. The verdict of the majority of the jury was final and binding on the minority, who were deprived of any allowance of protest.

In capital cases, where the verdict meant life or death, a unanimous verdict was required. Before the jury retired for deliberation, the bench was to briefly deliver its charge as to the evidence and law of the case.

None were eligible to serve as jurors who were in any way related to the party or parties involved in the litigation; but after being accepted and sworn, a juror could not be challenged. Should a juror presume to reveal the discussions and opinions of

## JURY TRIAL—METHOD OF TRIAL.

dissenting jurors, or other proceedings of the jury, he was subjected to a fine of ten shillings, and further punished as the justices saw fit.

## JUSTICES OF THE PEACE.

The justice of the peace or the sheriff was empowered to issue writs or warrants, which were to be executed by an inferior officer in any of the ridings, whether or not the sheriff resided therein.

In the absence of the governor, lieutenant-governor, or any of the council, the oldest justice of the peace was to preside in the Court of Sessions and pronounce the judgment of the court, unless physically or mentally unable to do so, in which case the justices were to agree among themselves as to which of their number should do so. To justices of the peace was accorded the privilege, when they chose to exercise it, to preside at any of the town meetings or courts within their jurisdiction.

The fees of the justice of the peace and of the sheriff and his subordinates were paid from fees and charges fixed by law. The justice was to receive for nominating three arbitrators (when a case under forty shillings was brought to him by the constable), seven shillings, six pence; upon common actions, such as slander and the like, he was to charge one shilling; for subpoenaing the attendance of a person, six pence; no fee was allowed him on any criminal or capital warrants, nor for sitting as a justice on the bench.

## THE COURTS OF THE STATE OF NEW YORK.

A justice of the peace was at no time allowed, while in commission, to act as attorney, unless assigned to act in that capacity by the court, on behalf of a poor person. For absenting himself from any of the sessions or assizes held in his riding, a justice or high constable was fined ten pounds for each day's absence; a petty constable was fined five pounds for each day's absence. For proper cause shown, the justices on the bench might excuse the absentees.

### APPEALS—HOW TAKEN.

Appeals might be taken from the Court of Sessions to the Court of Assize, but no justice who had sat as a judge in the inferior court from which the case was appealed was entitled to a vote in the higher court; the case must be tried by those not disqualified by participation in the former trial of the case, and according to the former evidence, unless a witness whose testimony was material was absent from, or hindered from testifying at, the former trial.

Appellant was required to furnish ample security for costs of appeal, and to indemnify the respondent, should his appeal prove unsuccessful. In cases of appeal from a misdemeanor, the appellant must give security for good behavior, or if the offence were capital, the party appealing was to be kept in jail until the next assize, provided the latter were held within two months.

## APPEALS—HOW TAKEN.

All appeals and the security given therefor were recorded at the charge of the party appealing; the latter was required to file with the clerk his grounds of appeal, at least six days prior to court day. The charge for an appeal was ten shillings, paid to the court, and two shillings, six pence to the clerk for entering the same.



## CHAPTER IV.

### COURT OF ASSIZE.

ORIGIN—JURISDICTION—ENGLISH DISCONTENT—  
POPULAR ASSEMBLY DISAPPROVED—PERSONNEL  
AND TERMS OF COURT—FUNCTIONS OF THE  
COURT—AMENDMENTS—FEES—EXTANT REC-  
ORDS—DUTIES OF THE SECRETARY—PUBLIC REC-  
ORD—REMARKS.

#### ORIGIN.

In this chapter we will more fully treat of the Court of Assize. This court was the supreme judicial tribunal of the early English occupation; its origin, however, must remain unknown, as there is no record showing by what authority this high tribunal was established. No provision for its creation is to be found in any section of the Duke's Code nor can its inception be traced to any other source. Although the court is mentioned in the "Laws," and its jurisdiction and general powers stated, no clause is to be found which recommends or authorizes its creation.

The authorities on this point are much at sea, and shed but little light on the subject. From what knowledge is available it is certain that the court

## THE COURTS OF THE STATE OF NEW YORK.

was merely a continuation of the Court of the Director-General and Council, established among the Dutch during the governorship of Stuyvesant.

### JURISDICTION.

Whatever its origin, it was enacted by the Duke's laws, that a term of the Court of Assize should be held annually at the seat of government in New York. Its jurisdiction was both original and appellate. By virtue of its appellate jurisdiction this court could entertain all appeals from the inferior courts and review any judgment of the Courts of Sessions, or the town courts.

The court's original jurisdiction embraced all criminal actions, and civil and equitable actions for not less than twenty pounds, and was extended to capital offences and breaches of the navigation laws.

We glean from the Duke's laws that the Court of Assize was intended to be no more than a judicial tribunal. At a very early date, however, it assumed some of the functions of a legislative body, although at no time during its existence did it have full powers in enacting laws.

### ENGLISH DISCONTENT.

The English, who had been bred to a popular and representative form of government, were entirely disappointed in their hopes for an assembly of delegates to help enact laws for the regulation of the

#### PERSONNEL AND TERMS OF COURT.

colony. Their petitions for redress of grievances were therefore continually addressed to the Court of Assize, the highest tribunal within the province.

The great number of justices of the peace who attended these sessions tended to make this body a very popular one. Although in essence a judicial organization, and not legislative, it took upon itself the duty of suggesting reforms and changes, in the existing laws, to the governor and his council, who usually acceded to them. This assumed legislative power found its strongest expression during the governorship of Lord Lovelace, Nicoll's successor.

#### POPULAR ASSEMBLY DISAPPROVED.

Later in the history of the colony, while Andros was governor, he wrote to Duke James, as to the advisability of permitting the people to choose a popular assembly, but the Duke answered that redress of grievances could be obtained by petition to the "assizes where the same persons are usually present who, in all probability, would be their representatives if a different constitution were allowed."

In another letter to the governor, the Duke stated that he could not see the use of such assemblies, but advised him to exercise the utmost care to the end that justice be humanely carried out, and the affairs of the colony equitably administered.

#### PERSONNEL AND TERMS OF COURT.

The court was composed of the governor, his

council, and those of the justices of the peace who wished to attend; it was optional with these latter to be present, if not expressly ordered by the governor. In its earlier history, we find that the justices of the peace from the remoter towns did not attend court, but at a later period it became more popular, and having undertaken the functions of a legislature, its sessions were attended by justices of the peace from as far as Delaware.

The cases before this court were tried by jury. Originally the jury was to consist of only six, but this number was later increased to twelve. Contrary to the practice at the present time, juries were empanelled even when an appeal was heard by the court.

As stated heretofore, but one session of court was to be held each year. Authority was vested in the governor, however, to issue special commissions, wherein certain designated persons were to hold a special session of the assize, to hear causes; also when the governor and the council were informed of a capital offence by the Court of Sessions, and should the Court of Assize not hold a meeting within two months after such information, a special commission of Oyer and Terminer, usually addressed to the mayor and aldermen, was proclaimed for the more speedy trial of the offender.

The records do not disclose that the Courts of Oyer and Terminer were of frequent occurrence at that time, but we find two sessions of this special

## FEES.

court recorded in the office of the surrogate at New York, in the Records of Wills, Volume I.

## FUNCTIONS OF THE COURT.

Each member of the Court of Assize was entitled to a vote at its sessions, and the majority vote controlled. Legislative measures were adopted, but it could not be positively stated that the tribunal had exercised the powers of legislation. This was the prerogative of the governor and council.

The legislative duties of the court did not interfere with the administration of its judicial functions, and it continued until its end to be the high court of the province, especially for the hearing of appeals.

## AMENDMENTS.

Among the amendments made by the court to the then existing laws, was the limitation of the sessions of the town courts, and the convening of court by justices of the peace, once in two, three, or four weeks, as they saw fit, subject to a litigant's right for additional sessions at his own expense.

## FEES.

The members of the jury received payment from the time of leaving their homes until their return; a witness was allowed two shillings a day for attendance at court, if voluntary, or by subpoena. The

## THE COURTS OF THE STATE OF NEW YORK.

fees of town courts were one-half of those allowed to Courts of Sessions, and the fees of the latter one-half of those of the Court of Assize. If the question at issue were one of equity, the procedure of the Court of Chancery was followed as closely as possible.

A justice of the peace received besides his fees, an annual salary of twenty pounds, to be paid from the public treasury. (This salary provision was later annulled and only his fees were allowed him.)

The Courts of Sessions were held twice a year and the sessions of the Courts of Assize were changed from the last Thursday in September to the first Wednesday in October. A jury of twelve men was empanelled in all cases heard before the Court of Assize.

### EXTANT RECORDS.

There are but two volumes extant of the records of the Court of Assize, one volume of which may be found in the State Library at Albany, which covers the period from September 28, 1665, to December 7, 1672; the other volume is to be found in the library of the New York Historical Society, and covers the period from October 6, 1680, to October 6, 1683.

### DUTIES OF SECRETARY.

The secretary of the province was also the clerk of the court, and Mathias Nicolls, probably a rela-

#### DUTIES OF SECRETARY.

tive of the first governor, acted in the capacity of clerk, when the Court of Assize was first erected, and the earlier records are in his hand.

As secretary of the province he had the right to sit in the Courts of Sessions in the several ridings, and it is recorded that he frequently took advantage of this privilege in the county of Queens, where he owned considerable land. He later became mayor of New York City and speaker of the first Assembly of 1683.

#### PUBLIC RECORD.

Of one of the meetings of the Court of Assize, held October 6, 1680, we have a complete record in which it is stated that there were thirty members present at the session, to-wit: Sir Edmund Andros, the governor; his council, five in number; Francis Rumbout, mayor of the City of New York, and five aldermen; Richard Betts, the high sheriff of Yorkshire; four justices of the East Riding, one of the North Riding, three of the West Riding; two commissioners from Albany; one justice of Esopus; three justices of New Jersey; the chief justice of Nantucket; and two justices from Pemaquid. A complete list of all that composed this tribunal is given in the record.

The Court of Assize was finally abolished by an act of the Assembly, passed October 29, 1684, during Governor Dongan's rule.

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### REMARKS.

Relative to the Court of Assize, William Smith, the historian, claims in his history of New York, that Nicolls, the first governor of the province, erected no courts of justice, but took upon himself the sole decision of any disputes. Complaints were brought before him on petition by the parties, to whom one day's time was given in which to prepare for hearing. After a summary hearing of the facts involved, the governor would pronounce his verdict.

His decisions were designated "edicts," and in them was a direction that they be executed by the sheriffs whom he had appointed for that purpose.

We are informed by the same authority that during the governorship of Lovelace, he did not wholly follow his predecessor's example, but called to his assistance several of the justices of the peace, to aid him in administering justice, and the entire tribunal was known as the Court of Assize.

Judge Charles P. Daly, in his history of the Court of Common Pleas, takes issue with Smith on this point, and claims that there is no authentic foundation for such a statement, except that appeals from the Court of Assize came directly before the governor in the form of petitions.

Judge Daly assures us that the records of the Court of Assize, still extant, show that the court was convened at New York by Nicolls on September 26, 1665; it is therein stated that the first cause tried before it was a trial by jury.

## CHAPTER V.

NICOLLS TO DONGAN. (1673-1683).

THE MAYOR'S COURT—WISE POLICY OF NICOLLS—  
PROCEDURE OF COURT—FORM OF JUDGMENT—  
DUTCH CUSTOM OF NOMINATING MAGISTRATES  
—DUTCH RE-OCCUPATION—FINAL ABDICATION  
—DUKE'S TITLE—THE DUKE'S POLICY—  
CHANGES INTRODUCED BY ANDROS—THE BOOK  
OF LAWS—CERTAIN COURTS RE-ESTABLISHED—  
LEGAL REFORM—NEW CHARTER—THE EARLY  
COLONIAL BAR—LAYMEN AS COUNSEL—BAR-  
RATRY AND CHAMPERTY—RULES AND REGULA-  
TIONS.

### THE MAYOR'S COURT.

In passing over this period of the early administration of law in the colony of New York, we consider it essential to the subject of this volume, to bestow some attention on that most important tribunal—concededly the oldest in the state of New York—the Mayor's Court. In commenting on the Dutch period, we stated that during the rule of Stuyvesant, a Court of Burgomasters and Schepens was established in New Amsterdam, in accordance

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with the usages prevalent in Holland, and which continued to exercise its functions unaltered, even after the surrender to the English.

### WISE POLICY OF NICOLLS.

As above noted, it was deemed impolitic by Nicolls to interfere with the Dutch government which prevailed in the towns. This act of forbearance on the part of Nicolls was wise and urgent at this crisis in the affairs of the colony.

To inculcate the proper degree of submission and loyalty to the new rulers, it was necessary to appease rather than to antagonize the people to be governed; thus had Nicolls by the terms of capitulation guaranteed to the Dutch colonists the continuance of their established form of government.

Six months after the promulgation of the Duke's laws, when the English tenure was firm and secure, Nicolls had by proclamation changed the government of the city of New York, from Dutch to English customs.

At the same time, the Court of Burgomasters and Schepens, which convened at Harlem, was abolished by Nicolls, and a town court substituted for that locality.

By an ordinance then issued, the property of the Dutch who had not as yet taken the oath of allegiance to the English crown was subject to confiscation by the government.

## FORM OF JUDGMENT.

### PROCEDURE OF COURT.

The new court thus established was to try all cases by jury, on Tuesday. This was an innovation on the Dutch custom, to which the people did not take kindly.

In deference to the people's demand, minor cases were to be referred to arbitrators out of court, a practice which continued for many years, and which accounts for the small number of jury trials for the first eighteen years of this period.

### FORM OF JUDGMENT.

This was the origin of the Mayor's Court, and under its first environment and influences, but little attention was paid to the Duke's Laws. The first civil trial was held on June 27, 1665, and a jury empanelled. The cause before the court for trial was the matter of Francis Doughty vs. John Haixman and Khelum Winslow. The clerk of the court was Johannes Nevius, and the judgment of the court is in his handwriting and imperfect English, as follows: "The Court doth order that the partyes shall deliver in their evidence to the following juries, to-wit: Caleb Burton, Isaacy Bedow, Christ Hoogland, Balek de Haert, William Dornel, James Ballaine, John Garland, John Browne, Charles Bridges, John Dawrel, Thos. Carvet, Samuel Edsal. The juries do judge that the defendants shall pay the plaintiff so much as shall appear by

## THE COURTS OF THE STATE OF NEW YORK.

true accounts due unto him from the defenders, besides the costs and damages of the court. The Honorable Court does allowe off the above sd judgment and minutes for to view, examine and make up the accounts betwixt the partyes from the tyme that the Bark was sold to Mr. Thatcher till the time that she was returned again to the said Douty, to-wit: William Jacob Backer, William Isaacy Bedloo, William Balthazar De Haert and Mr. Samuel Edsal" (two of the juryemen and two outsiders).

## DUTCH CUSTOM OF NOMINATING MAGISTRATES.

Willett served as mayor for three years, and his two successors were appointed by the governor. In the year 1669, the Dutch custom of nominating a double set of magistrates was revived. By this custom the judges in office nominated two persons for each office, from whom Lovelace selected, and they were to serve for two years. In 1670, the term of office was reduced to one year, and the governor appointed magistrates annually until the arrival of Governor Dongan.

In the year 1669, as a signal mark of sanction and respect, the Duke of York presented the mayor of the city with a silver mace, as an insignia of office, and to each alderman he presented a gown.

In 1671, the English custom of publicly proclaiming bans of marriage was instituted here, and a record of marriages ordered to be kept by the clerk of the Mayor's Court.

## DUKE'S TITLE.

### DUTCH RE-OCCUPATION—FINAL ABDICATION.

England had in the meantime declared war against Holland, and a Dutch fleet had been despatched to New York to recapture the province. Accordingly on August 9, 1673, a fleet in command of Colve, the Dutch admiral, entered the harbor and recaptured the city. The name of the province was again changed to New Netherlands, and the city named "New Orange."

A council of war was called by the commanders of the fleet, and the old Dutch form of government, and the Court of Burgomasters and Schepens re-established, with slight modifications; magistrates and officers were named and the Dutch system of administering affairs reinstated.

The second Dutch occupation of the city was of short duration; a treaty had been signed in Europe, whereby Holland ceded the territory to England. On the 31st of October, 1674, Colve surrendered the city to Andros, the new deputy-governor of the province, commissioned by the Duke.

## DUKE'S TITLE.

The validity of the Duke of York's title to the land had long been questioned; both England and Holland claimed the territory. From the beginning the people had resented the arbitrary powers practised by the Duke as alleged proprietor of the province. To forever allay all doubt on this score,

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the King of England made a new grant to the Duke of York in 1674, with entirely the same conditions as in the original grant of 1664.

### THE DUKE'S POLICY.

The Duke must have been a man of prudence, and highly sensitive to the feelings of his subjects in America towards him and his policies. In his instructions to Governor Andros, he directed him to see that justice was administered in the colony with all possible equality, without regard to private concerns or nationality. "It being my desire," said James, "that such as live under our government may have as much satisfaction as possible and that without the least appearance of partiality, they may see their just rights preserved to them inviolable."

Andros was also instructed to put into immediate execution the laws, rules, and ordinances established under the governorships of Nicolls and Lovelace, and he was requested not to vary them, except upon urgent necessity; nor was he permitted even to change them then, unless advised to do so by his council and the gravest and most experienced inhabitants of the colony.

It was left to the discretion of Andros to appoint officers and magistrates for the colony, but he was to select men "of the most reputation for ability and integrity, who, for those reasons might be most acceptable to the inhabitants."

It can therefore be readily surmised that the

## THE BOOK OF LAWS.

Duke was awakening to the demands of the people, and granting them certain rights without entirely surrendering his prerogative as proprietor of the colony.

### CHANGES INTRODUCED BY ANDROS.

Upon taking possession of the city, Andros re-named it New York, and ordered that the previous English form of government be re-established and that the city of New York be governed by a mayor, aldermen, and sheriff, as originally established by Nicolls. The same officers were continued in office for six months. Upon the appointment of successors, Mathias Nicolls again took the chair as mayor of the city and called a session of the Mayor's Court for the 13th of November, 1674.

Andros had ordered that the records of court should thereafter be kept only in English, and that all papers submitted to the courts should be in the same language; the sole exception to this rule was in the case of a poor person, who could not afford the fee for translating a legal paper.

## THE BOOK OF LAWS.

The King sent Andros a copy of the Duke's laws which were in force in the province before the governor's arrival; they were bound in one volume, and with them was an order addressed to Andros, that he put into execution all such laws as were not inconvenient and unfeasible; he was also

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empowered to amend the laws, subject only to the approval of His Royal Highness.

Upon the receipt of this order, Andros issued a proclamation to the effect that the "Book of Laws" would thereafter be in force in the colony, and that the courts created by these and the officers chosen in conformity with them, be resumed.

### CERTAIN COURTS RE-ESTABLISHED.

The town courts were thereby re-established, and the Courts of Sessions were ordered to be revived; these latter were to be three in number, two to be held at Long Island and one at Esopus or Kingston.

The fourth Court of Sessions which had been established by Nicolls at Albany, was also revived by Andros, but its name was changed to the "Mayor's Court" of Albany.

Two months after this proclamation, the Court of Assize met on the regular day assigned for its sessions, and thereafter continued to hold court annually until its dissolution in 1684. The composition of this court was similar to that in existence during Nicolls' time, with the addition that the mayor, recorder (a new officer to assist the mayor), and aldermen, as justices of the peace, were ex-officio members of the Court of Assize.

### LEGAL REFORM.

The establishment of the code as the general law of the province made no material changes in the

#### NEW CHARTER.

practice of the courts in this city, although some form of English procedure was necessary because of the new ordinance requiring the records to be kept in English. The code had least effect upon the Mayor's Court, since entire sympathy with Dutch customs was the guiding principle of action in this court. The English form of pleading, necessitated by English procedure, was so blended with the Dutch as to be virtually indistinguishable.

It was in 1682, upon the arrival of two English lawyers, that special forms of pleading came into practice; in fact, the English forms of procedure were not brought into general use until the time of Chief Justice Mompesson, about the years 1704 to 1718.

#### NEW CHARTER.

Nicolls and five aldermen continued to hold office until October, 1675, when Andros issued a new commission and granted a new charter to the city of New York, which established a corporate government for the city and increased the number of aldermen to six. Full power and authority were conferred upon the corporation to maintain courts, administer justice, and govern the inhabitants according to the laws of the province, and privileges and practices of the city. The mayor and any four of the aldermen were authorized to sit as a Court of Sessions in the city, but no separate criminal tribunal was erected; the mayor and the aldermen con-

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tinued, as before, to exercise their three-fold functions of municipal, criminal, and civil jurisdiction at the regular sessions, which were held once every three weeks.

While trial by jury was the rule, this procedure was not strictly adhered to; the Dutch custom of arbitration continued and was generally practiced until English lawyers multiplied in the colony, when the system of special pleading grew so subtle and refined that arbitrators were no longer resorted to, except in cases of accounts, which were usually referred to three persons, at first designated arbitrators, and later referees; all cases of accounts continued to be so referred until 1772, when the practice was permanently fixed and regulated by statute of the Assembly.

## THE EARLY COLONIAL BAR.

Let us pause at this part of our work to examine the characteristics and methods of the lawyers of the early colonial period. Among the Dutch, lawyers as a class or profession were almost unknown; litigants were accustomed to appear and plead in person before the court or arbitrators.

Attorneys, however, are mentioned in the records of the Court of Assize; the appearance of one John Rider, as counsel for plaintiff, is noted in a case heard before that tribunal, and similar mention is made of others, but none of them seem to have been especially trained to the law. No cognizance of

## BARRATRY AND CHAMPERTY.

lawyers was taken by the Duke's Laws, and no provisions looking to their qualifications expressed.

## LAYMEN AS COUNSEL.

Neither the early magistrates nor those who occasionally acted in behalf of parties to a trial, were lawyers, in the primary signification of that term. They were generally merchants and mechanics who had achieved among their friends and neighbors a reputation for business sagacity, capable address, and a knowledge of the common law of England.

Lawyers seem to have been the objects of popular distrust and dislike in most of the colonies; this feeling was less pronounced in New York, which had so long suffered under disorderly and harsh administrators.

## BARRATRY AND CHAMPERTY.

The Nicolls Code contained the following provision against the litigious propensities and multiplicities of law suits—"vexing others with unjust, frequent and endless law suits" was made punishable by fine and imprisonment; besides "it shall be in the power of the court to reject his cause."

In addition to this penalty for common barratry was one disqualifying certain officers from acting as attorneys in any case; "no high Sheriffe, under Sheriffe, high Constable, petty Constable, or Clarke of the Court shall be permitted to plead as

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attorney in any person's behalfe in the Court where he officiates."

### RULES AND REGULATIONS.

It was in the power of the court to reject any cause considered to be merely frivolous and to fine or imprison the offender.

Justices of the peace, no doubt on account of their privilege of exercising appellate jurisdiction in the Court of Assizes, were also inhibited from engaging as counsel in any trial.

A poor person, illiterate and incapable of pleading his own case, might, upon request, be assigned counsel to protect his interests. In such case any of the officers above disqualified might be appointed, for the party, by the court.

## CHAPTER VI.

### PROGRESS OF LAW UNDER GOV. DONGAN.

APPOINTMENT OF DONGAN—POPULAR ASSEMBLY  
—TERMS OF COURTS OF SESSIONS—OYER AND  
TERMINER—COURT OF CHANCERY—EVENTS  
DURING DONGAN'S ADMINISTRATION—ABOLI-  
TION OF THE ASSEMBLY—NEW COMMISSION—  
COURT OF JUDICATURE—EXTENDED JURISDIC-  
TION—DONGAN'S REPORT—DONGAN CHARTER  
—TWO-FOLD FUNCTIONS OF MAYOR'S COURT—  
MINOR COURTS—RECORDER'S COURT—DISCON-  
TINUANCE OF OYER AND TERMINER—CHANGE OF  
DYNASTY—TWO PARTIES.

#### APPOINTMENT OF DONGAN.

In the year 1683, Colonel Thomas Dongan had been appointed by the Duke as his deputy for New York. In August of that year the former entered upon the discharge of his official duties. Acting on instructions from his superiors he had issued writs to the officers of the colony for the election of "a general assembly of all the freeholders by the persons whom they chose to represent them." The membership was limited to the number of eighteen,

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and the Duke's ratification and sanction would be given to such laws "as shall appear to me to be for the manifest good of the country in general and not prejudicial to me."

POPULAR ASSEMBLY.

It was through the good offices of that excellent law-giver, William Penn, the proprietor of Pennsylvania, that the Duke had been counseled to grant a popular assembly for the colony of New York, a concession dear to the English instinct for representative government.

The power to create courts, which had been bestowed on the governor and council, had remained in abeyance, or been left entirely to the Assembly. This new branch of government first met on October 30, 1683, and after passing an act entitled the "Charter of Liberties," enacted "An Act to Settle Courts of Justice." This act created four distinct tribunals—a Petty Court in every town for the trial of small causes; a Court of Sessions for each county; a Court of Oyer and Terminer, or General Gaol Delivery, and a Court of Chancery for the province at large. The town court was held on the first Wednesday of every month, by three commissioners appointed by the governor; its jurisdiction extended to actions of debt or trespass, wherein the amount involved did not exceed forty shillings. A trial by jury of the issues joined could be had only at the special request of either side upon payment of the proper cost and charge.

## OYER AND TERMINER.

### TERMS OF COURT OF SESSIONS.

The Court of Sessions was to be held by the justices of the peace of each county, or three of them, at least twice a year, in each county, except that in the city of New York it was to be held four times a year, and in Albany three times a year.

The sessions for the city of New York were to be held on the first Tuesdays in February, May, August, and November, and all trials were to be by jury.

In the city of New York sessions were to be held by the mayor and aldermen; like the former Court of Sessions, it had both criminal and civil jurisdiction, without limitations as to amount, and all cases were triable by jury. Other officers of court were a clerk, known as the "Clerk of Sessions," and a marshal and crier.

## OYER AND TERMINER.

The Court of Oyer and Terminer was composed of two justices commissioned by the governor, who were to go the circuit of each county twice a year, assisted by four justices of the peace from each county where they held court; in New York city the mayor, recorder, and four of the aldermen were to sit with the judges of Oyer and Terminer. The Court of Oyer and Terminer had unlimited jurisdiction of criminal and civil cases, and generally acted as an appellate court.

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### COURT OF CHANCERY.

The Court of Chancery was composed of the governor and council; but the governor reserved the power to appoint a chancellor in his stead. It had unlimited jurisdiction over all matters in equity, and was the highest tribunal of justice within the colony.

Immediately after the passage of this act by the Assembly, Dongan appointed as judges of the Court of Oyer and Terminer, Mathias Nicolls (before mentioned as mayor of the city) and Thomas Palmer, both of the legal profession. Commissioners were also appointed for the several town courts; and more justices of the peace and sheriffs were commissioned to act in the several localities.

### EVENTS DURING DONGAN'S ADMINISTRATION.

In the year following, 1684, the Court of Assize was abolished by act of Assembly, and the same year Thomas Rudyard, a London lawyer who had been lieutenant-governor of New Jersey, was appointed by Governor Dongan as the first attorney-general of New York.

The office of surrogate or probate judge was administered by the governor in person, who presided as such over the entire province and though schooled in the profession of arms and not of law, seems to have given general satisfaction.

The governor and council constituted a Court of

## EVENTS DURING DONGAN'S ADMINISTRATION.

Exchequer, which was to meet on the first Monday of each month.

Upon Dongan's arrival in New York, he dismissed all the old magistrates and appointed new ones. The November following his arrival, the mayor and aldermen of the city presented a petition to the governor, asking that the franchises and privileges of the city and its officers be confirmed. In this petition it was asked that the city be divided into six wards, and the freeholders of each ward be empowered to elect an alderman and appoint a common councilman, with other local officers, and that a recorder be appointed by the governor to assist the mayor in his duties (3 Colonial Documents 339). On December 14, 1683, James Graham was accordingly seated "on the right hand of the mayor" as New York's first recorder, a position which he filled, with but a short intermission, for a period of seventeen years.

The day following Graham's appointment, the new magistrates went in a body to the Fort, and after being sworn into office before the governor and council, returned and opened court, with the recorder at the mayor's right hand.

The general assembly which was convened by Dongan had exercised their legislative powers in the several sessions of the Assembly, by enacting laws which were deemed wise and salutary by the legislators, but were never ratified.

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### ABOLITION OF THE ASSEMBLY.

The Assembly met again on November 1, 1685, but the governor, by proclamation, dissolved it on January 30th, 1686. The reason for this step was that the Duke of York had, in the meantime, ascended the throne of England. An entirely new aspect was now put upon the relations which he bore to the colony of New York. Previous to this important step it had been held by him as a private citizen of the kingdom, but was now merged with the personality of the Duke in that of a royal title. An assembly was no longer necessary, and the King's word was to constitute the law of the land.

The passage of the Charter of Liberties, so repugnant to the imperious nature of James, had determined his course. He had resolved against all representative assemblies for the future, and accordingly issued a new commission to Dongan, in 1686, which concentrated all legislative power into the hands of the governor and the council, subject, however, to the royal approval of any laws, within three months after their passage.

### NEW COMMISSION.

By the new commission Dongan was especially empowered to erect courts of law and equity, and given discretionary power in the appointment of judges and other officers for the colony. The King's instructions to Dongan on this score were

#### EXTENDED JURISDICTION.

that the latter appoint "men of no mean ability and not necessitous people or much in debt, and not to displace judges, justices or sheriffs, without good and sufficient cause to be signified to the King, and to prevent their arbitrary removal, and that no time should be expressed in the commission for the duration of their offices."

#### COURT OF JUDICATURE.

The act to settle courts of justice having been approved by the King, the courts that were established by it were continued by Dongan; the only change he made was the creation of what he called a "Court of Judicature," but which was in fact a Court of Exchequer. Great difficulty had been experienced in enforcing payment of taxes and revenue, because of the imperfect organization of courts distant from New York. To expedite this work he had instituted this court, which was held by the governor and his council on the first Monday of every month; in it were determined all suits or matters between the King and the inhabitants, concerning lands, titles, rents, profits, and revenues. A Court of Chancery was also established by act of Assembly, to be held on the first Thursday of every second month from February 16th, 1683, when the first meeting was held.

#### EXTENDED JURISDICTION.

Further articles of law reform, under a commission sent out to Dongan, enlarged the appellate

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divisions of the courts. Appeals were allowed in cases of error, to the governor and council, where the amount involved exceeded one hundred pounds; in case the sum in litigation was in excess of three hundred pounds, the appeal could be taken to the King and privy council.

The judiciary powers of the governor and council were therefore threefold. They had general jurisdiction in all matters of equity, sat as a Court of Exchequer, and constituted the final court of appeals in the province.

At this period a Mayor's Court was held at Albany every fortnight, from which, as in the Mayor's Court in New York, appeals might be taken from judgments in excess of twenty pounds.

The Court of Oyer and Terminer was summoned to sit by special commission, issued when occasion demanded. The particular judge and justices of the peace who were to assist him were named in the writ. At the close of a circuit or term, the written pleadings in each case, with all orders, records of judgment, and a complete record of the minutes, was attached to the commission, enclosed to the secretary of the province, and filed as an official record.

### DONGAN'S REPORT.

In reporting to the King and privy council, on the affairs of the province, Dongan made honorable mention of the two regular judges of the Court of Oyer and Terminer, Nicolls and Palmer. He com-

## DONGAN'S REPORT.

mends these gentlemen in the following language: "Their methods have been by arbitration and such other mild management, that where there were ten suits formerly, there is but one now."

## DONGAN CHARTER.

During his first year in office, Dongan granted a charter to New York, which is known as the "Dongan Charter." By the provisions of this charter, the inhabitants of each ward in the city were to elect, annually, one alderman, one assistant alderman, and one constable; the mayor, recorder, and sheriff were to be appointed by the governor, and the high constable by the mayor. The mayor, recorder, and any three of the aldermen, with any three of the assistants, were created a common council, which in convention was authorized to pass laws and ordinances for the government of the community. The mayor, recorder, and aldermen, or any three of them, of whom the mayor or recorder must be one, were authorized to hold within the city, a Court of Common Pleas, on every Tuesday, for the trial of all debts, trespasses, ejectment, or other personal action, according to the rules of the common law and the acts of the General Assembly of the province; and it was further provided that the mayor and recorder, or three or more of the aldermen (not exceeding five) should be justices of the peace, and any three, of whom the recorder or the mayor should be one, were empowered to hear and

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determine all manner of petty larcenies, riots, routs, oppressions, extortions, and other trespasses and offences in the city.

### TWOFOLD FUNCTIONS OF MAYOR'S COURT.

Prior to the adoption of this charter for the regulation of municipal affairs, the Mayor's Court had united in itself the twofold functions of a city council and a court of justice. All matters of a legislative and judicial nature came before the court indiscriminately; priority was given to the regular business of court, after which the municipal affairs were taken up.

By the charter a distinction was made between the legislative and judicial functions of the mayor, recorder, and aldermen. A further distinction made their functions as criminal magistrates separate and distinct from those which they exercised as judges in civil cases. Three tribunals were organized, composed of the same officers, but each with different duties; these were the Common Council, the Mayor's Court (Court of Common Pleas), and the Sessions.

### MINOR COURTS.

In the Common Council was vested exclusive power to pass laws and ordinances for the government of the city; the Mayor's Court dealt with only civil business; the "Quarter Sessions" was the criminal side of the court. The court of "Quarter Ses-

#### DISCONTINUANCE OF OYER AND TERMINER.

sions," after 1688 known as the "Court of Sessions," was organized under the provisions of the charter authorizing the mayor, recorder, and aldermen to try criminal offences.

#### RECORDER'S COURT.

As previously stated, a Court of Sessions was established for the city by an act to settle courts of justice, which like similar courts in other counties, had both civil and criminal jurisdiction.

It was in view of the establishment of this additional court, and to secure a permanent tenure of office for the magistrates appointed, that the mayor and aldermen applied to Dongan for the appointment of a recorder. The first recorder, as we have seen, was James Graham. The Recorder's Court sat but once every three months, while the Mayor's Court sat every two or three weeks.

#### DISCONTINUANCE OF OYER AND TERMINER.

The circuit of Oyer and Terminer was held twice a year in the city, and as the Mayor's Court had the same jurisdiction as the Court of Sessions, with the advantage of sitting more frequently, there was comparatively little for the former to do. It was not embraced in the general provisions of the charter, nor yet was it repealed; the act creating it had been passed by the General Assembly, and had been signed before the charter was granted, and ap-

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proved by the king; it was not, therefore, in Dongan's power to repeal the law. But by general acquiescence, this court seems to have been discontinued, and the Court of Sessions, as a court of exclusive criminal jurisdiction, substituted in its stead.

### CHANGE OF DYNASTY.

In 1688, Dongan, who was the most independent and liberal-minded of our colonial governors, was recalled, and Lieutenant-Governor Nicholson left in charge.

The English revolution of 1688 had brought to the throne William of Orange, a monarch indifferent to the needs of his subjects in America, and chiefly engrossed in continental affairs.

The government of the province at this crisis was forcibly undertaken by one Leisler, who discharged this important duty for twenty-one months, or until the arrival of Colonel Henry Sloughter in 1691, the new governor appointed by King William.

During Leisler's administration, he issued several commissions for Courts of Oyer and Terminer at New York and on Long Island, appointed Peter De Lanoy a member of his council, and the mayor of the city as chief judge of Oyer and Terminer. It was Leisler who first called a Colonial Congress, in 1690, composed of representatives from the colonies.

## TWO PARTIES.

## TWO PARTIES.

The adherents of William and Mary, King and Queen of England, were divided into two parties, the Dutch and the French, headed by Leisler, and the English Episcopalians, known as the anti-Presbyterian party, which included all who had been in power under Dongan and Nicolls. The latter having secured the confidence of Sloughter, Leisler and Milbourne (his son-in-law and chief adviser) were arrested and brought to trial before a special court of Oyer and Terminer. Leisler refused to plead, and claimed as of right, an appeal to the king, which Sloughter, now governor, refused to concede. Both Leisler and Milbourne were convicted and executed.



## CHAPTER VII.

### GOVERNOR SLOUGHTER.

GENERAL ASSEMBLY—RESULTS ACCOMPLISHED—  
COURTS OF JUDICATURE—COURT RECORD—AD-  
DITIONAL POWERS — GOVERNMENTAL SUPERVI-  
SION OF LAWYERS — APPELLATE PROCEDURE —  
MARTIAL COURT.

#### GENERAL ASSEMBLY.

Colonel Henry Sloughter, the newly appointed governor, arrived on the scene of his new labors on March 19th, 1691, under a commission much similar to that of Colonel Dongan. Under the powers conferred by virtue of his appointment, he issued a call for a General Assembly of freeholders, which accordingly met on April 9th, 1691. The law-making power was vested in the governor acting in conjunction with the council and a majority of the Assembly. All laws enacted were subject to veto by the King, and became operative only after the royal sanction and ratification. Legal effect was given to legislation by a clause which we quote: "Be it enacted by His Excellency the Governor, by and with the consent of the Council and Assembly, and by the authority of the same"; in itself an

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epitome of the legal elements requisite to give constitutionality.

### RESULTS ACCOMPLISHED.

This assembly abolished all existing courts, on the ground that they had never received royal ratification, and took measures for the judicial re-organization of the province. The act "To settle Courts of Judicature" passed by this assembly, changed the town courts into Courts of Justices of the Peace, created a Court of Common Pleas for each county, except New York and Albany, to be held by a judge commissioned by the governor, and Courts of General Sessions of the Peace for each county, making the same provisions for a Court of Chancery as under the act of 1683.

### COURTS OF JUDICATURE.

The most important enactment of the Assembly of 1691, concerned the Judicature, to wit: "An act for establishing Courts of Judicature."

It created a Supreme Court to sit in New York, composed of a chief-justice, a second justice, and three associate justices, commissioned under royal warrant.

### COURT RECORD.

The following record of courts and their jurisdiction was preserved by Matthew Clarkson, secretary of the province, entitled, "An Account of all Establishments of Jurisdiction within the province."

COURT RECORD.

“Single Justice. Every Justice of the Peace hath power to determine any suite or controversy to the value of forty shillings.

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

“County Court. The County Court or Common Pleas hath cognizance of Civil Accons to any value excepting what concerns the title to land and noe accon can be removed from this Court if the damage be under twenty pounds.

“Mayor and Aldermen. The Court of Mayor and Aldermen hath the same power with the County Courts.

“Supreme Court. The Supreme Court hath the powers of Kings Bench, Common Pleas and Exchequer in England and no accon can be removed from this Court under one hundred pounds.

“Chancery. The governor and council are a Court of Chancery, and have the powers of the chancery in England, from whose decree nothing can be removed under three hundred pounds.

“Prerogative Court. The Governor discharges the place of Ordinary in granting administrations and proveing Wills and The Secretary is Register. The governor is about to appoint delegates in the remoter parts of the government, with Supervision for looking after intestates estates and orphans.

“Court Martiall. The Governor hath established

## THE COURTS OF THE STATE OF NEW YORK.

a Court Martialll at Albany whereof Major Richard Ingoldesby is President and Robert Livingston Judge Advocate, who with the other commissioned Captains at Albany have power to exercise Martiall Law being a frontier garrison and in actual warr.

“Admiralty. Their Majesties reserve the appointment of a Judge, Register and Marshall.”

We give the act creating the Supreme Court, in full, in another chapter.

### ADDITIONAL POWERS.

The acts of the Assembly of 1691 also provided for the establishment of a Court of Mayor and Aldermen for the city of New York, conferring on this court like powers, jurisdiction, and authority with the county Courts of Common Pleas; provision was likewise made that the governor should discharge the office of ordinary, in granting administration papers or letters testamentary, and entertaining the probate of wills. To himself the governor reserved the appointment of representatives in the remoter sections of governments, to whom was committed the supervision and guardianship of orphan and intestate estates.

### GOVERNMENTAL SUPERVISION OF LAWYERS.

On November 11th, 1692, the assembly re-enacted practically all the laws relative to the establishment of courts that it had passed in the preced-

## GOVERNMENTAL SUPERVISION OF LAWYERS.

ing year. On October 22nd, 1695, an act of assembly was passed regulating the employment of counsel. This is the first legislative cognizance taken of the legal profession; by a regulation therein contained, the number of attorneys to be retained by either party to a suit at law in any of the courts within the province was limited to not more than two.

### APPELLATE PROCEDURE.

By the original act, in the section that concerned appeals, it was prescribed that appeals might be taken to the governor and council, from the Courts of Mayor and Aldermen and from the Courts of Common Pleas, from any judgment above the value of one hundred pounds. From the governor and council, an appeal might be taken to the King and privy council from any decree or judgment above the value of three hundred pounds.

Under this provision, as a condition precedent to appeal, a party appellant was required to pay all existing costs of the judgment or decree, and furnish security in double the amount of the judgment, to secure judgment and costs on appeal. should the final decision be adverse to appellant.

It was provided in addition, that the party appealing should prosecute and make return of the appeal within twelve months after he requested the appeal.

An act was passed on October 24th, 1695, con-

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ferring upon the Court of Common Pleas, the right to try any action relating to real property, and from the judgment rendered, appeal lay to the Supreme Court.

### MARTIAL COURT.

In the same year the governor established a Martial Court at Albany, with Major Richard Ingoldesby as president, and Robert Livingston as judge advocate, who, with the other commissioned captains at Albany, had power to exercise martial law in the city of Albany. The reason for its establishment, as elsewhere stated, was that Albany was a frontier garrison, and at that time engaged in actual war.

Having thus enumerated the several acts relative to the courts immediately after 1691, we will now proceed to give a connected history of the several courts established by the Constitution of 1691, up to the next change in the judiciary in 1777.

## CHAPTER VIII.

### THE SUPREME COURT.

CREATION OF THE COURT—ORIGINAL ACT OF ESTABLISHMENT—FOUNDATION—BODY OF NINE—COURT OF ASSIZE — COURTS OF JUDICATURE — COURTS OF OYER AND TERMINER—CIRCUIT COURTS—SPECIAL TERMS OF COURT—AMENDED PROCEDURE—ADDITIONAL MENTION—SALARY—CHIEF-JUSTICE DUDLEY — SUCCESSIVE CHIEF-JUSTICES — CHIEF-JUSTICE ATTWOOD — LORD CORNBURY'S LETTER—DIFFERENT CHIEF-JUSTICES — TENURE OF OFFICE — INSTABILITY OF OFFICE—INNOVATION INTRODUCED BY GOVERNOR CLINTON—CONSTITUTIONALITY OF OFFICE OF JUDGE—OFFICE RENDERED UNATTRACTIVE—ACQUIESCENCE IN COURT CUSTOM—CHIEF-JUSTICE DELANCEY — COLONIAL ARISTOCRACY — CHARACTERISTICS OF THE BENCH—JUDGES' SALARIES—STATUTORY TERMS OF COURT—TERMS OF COURT CHANGED—ADDITIONAL POWERS—FEES — JURISDICTIONAL LIMITATIONS—DISCOURAGEMENT OF LITIGATION—REMEDIAL LEGISLATION — DEBTORS—INSOLVENT DEBTOR'S ACT—ACT AMENDED—CONSTITUTIONALITY OF KING'S PREROGATIVE.

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### CREATION OF THE COURT.

The proper basis and foundation for the present Supreme Court of the State of New York, as declared in the Code of Civil Procedure, subject to constitutional limitations, is "all the jurisdiction which was possessed and exercised by the Supreme Court of the Colony of New York, at any time." This reference is to the Supreme Court as established by the act of 1691.

### ORIGINAL ACT OF ESTABLISHMENT.

Owing to the scarcity and inaccessibility of the act which created the Supreme Court, we deem it our duty to furnish the readers with a verbatim copy of the original act of creation, which is as follows: "And that their Majesties subjects inhabiting within this province may have all the good, proper and just ways and means for the securing and recovering their just rights and demands, within the same, be it further enacted, and it is hereby enacted and ordained by the authority aforesaid that there shall be held and kept a Supreme Court of Judicature, which shall be duly and constantly kept at the City of New York, and not elsewhere, at the several and respective times hereafter mentioned, and there shall be five justices at least appointed and commissioned to hold the same court, two whereof, together with one chief-justice, to be a Quorum;

ORIGINAL ACT OF ESTABLISHMENT.

which Supreme Court is hereby fully empowered and authorized to have cognizance of all pleas, civil, criminal and mixed, so fully and amply to all intents and purposes whatsoever, as the courts of Kings Bench, Common Pleas and Exchequer, within their "Majesties" Kingdom of England have or ought to have; in and to which Supreme Court all and every person and persons whatsoever shall or may, if they shall so see meet, commence or remove any action or suit, the deed or damage in any such action or suit being upwards of twenty pounds, and not otherwise, or shall or may by warrant, writ of error or certiorari, remove out of any of the respective courts of Mayor and Aldermen, Sessions and Common Pleas, judgment, information or indictment there had or depending, and may correct errors in judgment, or reverse the same, if by just cause, provided always that the judgment removed shall be upwards of the value of twenty pounds.

"Always Provided and be it further enacted by the authority aforesaid that this Supreme Court shall be duly and constantly kept once every six months and not oftener, that is to say—on the first Tuesday of April, annually and every year, at the City Hall of the said City of New York, provided they shall not sit longer than eight days. And be it further enacted by the authority aforesaid that it shall not be lawful for any person or persons whatsoever appointed, elected or commissioned to be a

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justice or judge of the aforesaid courts to execute or officiate his or their said place or office until such time as he or they shall, respectively take the oaths appointed by act of Parliament, to be taken, instead of the oaths of allegiance and supremacy and subscribe the test in open court. And be it enacted by the authority aforesaid that all and every of the justices or judges of the several courts before mentioned be and are hereby especially empowered to make, order and establish all such rules and orders for the more orderly practicing and proceedings in their said courts as fully and amply, to all intents and purposes whatsoever, as all or any of the said judges of the several courts of the Kings Bench, Common Pleas and Exchequer in England legally do. Provided always, and be it further enacted by the authority aforesaid, that no person's right or property shall be by any of the aforesaid courts determined, except where matters of fact are either acknowledged by the parties, or judgment be acknowledged or passed by the defendant's default, for want of plea or answer, unless the fact be found by the verdict of twelve men of the neighborhood, as it ought of right to be done by the law."

### FOUNDATION.

The underlying elements of the Supreme Court, as at present constituted, are to be found in the Court of Assize established under the regime of Lovelace, in 1667, and the Court of Oyer and Ter-

#### COURT OF ASSIZE.

miner, instituted by Governor Dongan, who succeeded Andros, in 1683.

#### BODY OF NINE.

During the Dutch occupancy, the highest tribunal in the colony was the court of the director-general and his council; but during the administration of Peter Stuyvesant, the people were entitled to a representation of nine members, appointed by the governor, to confer with him and his council on public matters. This body constituted a court inferior only to the highest court in the province.

The body of nine was dissatisfied with the arbitrary actions of the governor and forwarded a remonstrance to the States General of Holland, demanding that courts be established in the province according to the customs of the Netherlands; this, as heretofore related, resulted in the erection of a tribunal composed of a schout, two burgomasters, and five schepens.

In addition to its judiciary powers, this court exercised executive and legislative powers; its procedure was principally by arbitration, but it had a regular system of declaration, plea and rejoinder.

#### COURT OF ASSIZE.

At the time of the surrender of New Amsterdam to the English, in 1664, the supreme tribunal established under the Duke's Laws, was the Court of Assize, convened once a year by the governor and

## THE COURTS OF THE STATE OF NEW YORK.

council, in conjunction with the justices of the peace throughout the province. It was vested with original jurisdiction in criminal matters, and in criminal and equitable actions of twenty pounds and upwards; trial was by jury, and to this court was carried all appeals from inferior courts. For reasons already given, this court was abolished.

### COURTS OF JUDICATURE.

The general assembly of 1691 appointed a committee to prepare a bill for the establishment of Courts of Judicature in the province, to replace those then in existence. Among other results achieved by the committee's action, was the establishment of the Supreme Court. In all the courts, except those of justices of the peace, trials were to be by jury. In case of default on defendant's part to plaintiff's pleadings, a jury was waived.

The action of England's rulers in authorizing Governor Sloughter to convene an assembly to frame laws for the establishment of courts for the government of the province of New York, evidently did not contemplate a Supreme Court, and a high Court of Chancery. The subsequent ratification of these courts was conditioned upon limiting them to two years. On November 11th, 1692, by an act of the assembly, these courts were, however, continued for two years more.

## CIRCUIT COURTS.

### COURTS OF OYER AND TERMINER.

Under Dongan, who had assumed the reins of government in 1683, a Court of Oyer and Terminer, with minor tribunals, was instituted, with jurisdiction in criminal cases, and all civil actions for the recovery of five pounds or upwards, such court to hold an annual session in each county of the province. Courts of Oyer and Terminer, thus founded in the latter part of the seventeenth century, were expressly abolished in the nineteenth century, under the Constitution of 1895, and their powers became vested in the Supreme Court as it now exists.

### CIRCUIT COURTS.

The Supreme Court as organized under the act of the Colonial Assembly of 1691, continued, with substantial modifications by ordinances of 1699 and 1704, until the Constitution of 1777, which re-organized and perpetuated it, providing only for the appointment, qualification and tenure of all judges. The modifications alluded to, comprise those effected by the ordinance of 1699, which provided that a justice of the Supreme Court, attended by two justices of the peace, should annually hold Circuit Court in the respective counties, and which required the Supreme Court to sit in New York city on the first Tuesdays in April and October, for a period of five days to each session.

## THE COURTS OF THE STATE OF NEW YORK.

The ordinance of 1704 empowered the Supreme Court to exercise all jurisdiction and powers possessed by the Courts of Queens Bench, Common Pleas and Exchequer of England. By the amendment embodied in the act of 1692, intended to keep pace with the colony's growing interests, a circuit of Supreme Court judges was established for outlying districts, where previously no sessions of court had been held; the circuit was to be held once a year by a judge especially commissioned. Notices of appeal, and complaints were to be filed prior to the holding of court; where no such notices of appeals, or complaints had been filed, the term of court was dispensed with for that year.

It was by way of co-operation, and for the more effectual administration of justice, that the judge of court, designated for the circuit, had associated with him on the bench, two local justices of the peace. The procedure followed was that of the Supreme Court at New York.

### SPECIAL TERMS OF COURT.

The act which authorized the Circuit Courts also provided for a session of Supreme Court to be held annually for the county of Orange, on the first Tuesdays in April and October of each year; for the city and county of Albany, on the first Tuesday in May; for the county of Westchester, on the last Tuesday in June; for Kings County, on the first Tuesday in August, and for Richmond County, on

the second Tuesday in June. The sessions of each court were to last only two days, and the length of the term at New York was reduced from eight to five days.

The act of October 24th, 1695, extended the provision of the last act relative to the establishment of courts, for two years, and on the 21st day of April, 1697, an act was passed continuing them for one year longer. In 1698 no further extension act was passed, and all courts ceased to exist.

## AMENDED PROCEDURE.

Governor Bellamont called the attention of the Assembly to the fact, and recommended the passage of an act extending those courts that formerly existed. The Assembly proceeded to enact a law re-establishing the different tribunals, but the governor claimed that it purposely drafted the act so as to contain clauses in contravention of the established courts and practices, and contrary to the laws of England, with the intention of forcing him to veto, thus leaving the province without courts, presumably on account of the governor's dissent. He therefore refused his assent, and dissolved the Assembly. He called upon Chief-Justice Smith and Judge Ingraham to advise him as to his powers in the premises. It had been customary, since Dongan's time, to include a clause in the governor's commission, authorizing him, with the consent of the council, to establish courts for the province.

## THE COURTS OF THE STATE OF NEW YORK.

Smith and Ingraham decided that since the King had no power to establish courts in England without the consent of Parliament, the King's deputy had no such power. Bellamont refused to accept their opinion, and claimed that no such clause would have been inserted had the intention been not to give full authority to the governor and council. He therefore issued an ordinance with the assent of the council, re-establishing all the courts in the colony, as they had existed before their expiration. This occurred in 1699.

Following this action of the governor and his council, in assuming to act as agents of the King, the question presented itself to lawyers, as to the right of the Supreme Court to hear actions, and for many years there were controversies on this point, before the legal profession recognized it as a regular court. Nevertheless, the court, from its re-establishment by Bellamont, continued its existence until the Revolution.

### ADDITIONAL MENTION.

The next mention of the Supreme Court in any of the acts of Assembly, was on November 27, 1702, on the occasion of its not having met at the October term, for that year. The act provided that all actions that would have been heard at the October term, would be adjourned by the act, until the next term of the Supreme Court, to be held at New York in April, 1703.

#### CHIEF-JUSTICE DUDLEY.

Nine days after the passage of the act creating the Supreme Court, the judges were appointed by the governor. James Graham, the first attorney-general of the state, was appointed shortly afterward in the same year.

#### SALARY.

No provision having been made for the salary of the Supreme Court judges, the Assembly passed an act which provided a salary for the chief-justice and his first associate; no allowance whatsoever was made for the other judges, nor for the attorney-general; but in 1693, fifty pounds per annum were allowed the attorney-general.

#### CHIEF-JUSTICE DUDLEY.

Joseph Dudley was commissioned to be the first justice, and Thomas Johnson, William Smith, Stephen Van Cortlandt and William Pinhorne were made associate judges. It was understood that the chief-justice was to hold his commission during the King's pleasure.

Dudley's term lasted eighteen months, when he was removed by Benjamin Fletcher, the new governor, because he was not a resident of the province. This governor later removed William Pinhorne and Chidley Brooke, two of the associate judges of the court; the former for speaking disrespectfully of the King, and the latter for official negligence.

## THE COURTS OF THE STATE OF NEW YORK.

### SUCCESSIVE CHIEF-JUSTICES.

Dudley was succeeded by William Smith, who filled the office for a term of eight years; he was succeeded in 1700 by Van Cortlandt, who remained in office about one month. It was just previous to this that Gov. Bellamont decided to re-establish the Supreme Court, and other courts originating in the Constitution of 1691. His object was to have an able English lawyer sent over by the King, a man of sufficient wealth and social position to be above the temptations of the low arts and practices then prevalent in the colony.

### CHIEF-JUSTICE ATTWOOD.

William Attwood was sent out from England with a writ of mandamus addressed to the governor, directing the latter to commission Attwood to act as chief-justice of the province under the provincial seal.

Although Attwood, who was a trained lawyer, had been selected for especial fitness, both socially and professionally, his gross misbehavior on the bench, during his brief occupancy of little more than a year, had brought out against him an order of arrest, signed by Lord Cornbury, the then governor. To escape the execution of this order, Attwood was forced to flee the province under cover of darkness.

## DIFFERENT CHIEF-JUSTICES.

### LORD CORNBURY'S LETTER.

In a letter to the Lords of Trade (4 Colonial Documents 1010), Lord Cornbury says: "Attwood in the execution of his office as Chief-Justice and First-Judge, in almost all cases that came judicially before him, by general report of all present, did openly, notoriously and most scandalously, and with wonderful partiality, in almost all cases in which his son was concerned as counsel, espouse and indeed plead and give countenance to such causes, and finally gave judgment on the son's side, by means of which justice was perverted, the laws abused and the subjects exceedingly injured; which recommended his son to great practice, and large sums of money were by parties given to him, to buy his father's favor."

## DIFFERENT CHIEF-JUSTICES.

William Smith, above mentioned, was then temporarily appointed to the office made vacant by Lord Cornbury's action in removing the incumbent, until the arrival in April, 1703, of John Bridges, another English lawyer. Bridges died in office and Roger Mompesson, by profession a lawyer, was commissioned, July 15th, 1704, to be chief-justice of New York and New Jersey.

He it was who first brought into the colony the English forms of procedure; he claimed that the procedure of the colonial courts was now "more

## THE COURTS OF THE STATE OF NEW YORK.

conformable to the practice of Westminster Hall than any other of Her Majesty's plantations in America." His death occurred while in office, on March 15, 1715, and he was succeeded by Lewis Morris, whose opposition to Governor Cornbury had brought him into prominence. He was a strong partisan in religion and politics, and his pronounced Presbyterianism and Republicanism had rendered him unpopular in office. His dissenting opinion in the "cause celebre" of Gov. Cosby vs. Rip Van Dam, he caused to be printed with an angry tirade against the governor, in which the latter's actions and character were set forth in a bad light. This official malfeasance led to his removal in 1733.

Morris' successor was James Delancey, a man of equally extreme views, but radically opposed to those of his predecessor. Delancey had been promoted from the position of second judge to that of chief-justice, in which latter capacity he presided until his death on July 30, 1760.

### TENURE OF OFFICE.

We now come to a consideration of the official terms of the justices of the Supreme Court: Up to Delancey's term, the associate judges of the province were nominated and commissioned by the governor, and held office during the latter's pleasure; the chief-justice, however, was commissioned directly by the Crown, and could be removed only by the King.

## INNOVATION INTRODUCED BY GOV. CLINTON.

### INSTABILITY OF OFFICE.

The effect of such methods of organization was to render the judiciary unstable and partisan. The judges were generally members of the aristocracy and the governor's council, who took sides on the political questions of the day, which agitated the body politic, and thus rendered themselves liable to removal from office on a change of political parties; this fate befell many of them.

## INNOVATION INTRODUCED BY GOV. CLINTON.

Upon Governor Clinton's accession to office, he introduced a striking innovation in this custom: In recognition of Delancey's services on the bench, he tendered him, in 1746, a new commission as chief-justice of the Supreme Court, during good behavior; similar commissions were later granted to some of the assistant judges.

This measure of judicial reform was most wholesome for the cause of public justice. The judges were rendered independent of political affiliations, and the chief-justice, inspired by motives of public good, placed himself in opposition to prevailing political power as concentrated in the person of the governor. This independent action enhanced Delancey's later popularity; but the fire had been kindled, and time only fanned the flames of opposition to the corrupt and debauched state of public affairs.

## THE COURTS OF THE STATE OF NEW YORK.

### CONSTITUTIONALITY OF OFFICE OF JUDGE.

The validity of the governor's grant extending the judicial office was challenged and attacked on the ground that the commission had not emanated from the Crown, a custom which had theretofore prevailed.

The attorney and solicitor general of England, to whom the matter was submitted for opinion, held that it was contrary to the usage of the colony for the governor to grant such a commission, but was nevertheless valid and legal, and irrevocable during good behavior.

The constitutionality of the judges' commission was again called into question upon Delancey's death in 1760, which was contemporaneous with that of the King. It was the opinion, quite generally shared, that the commissions granted to the judges expired with the demise of the King.

Attempts were made to establish the constitutionality of the tenure under the commissions granted. An act which passed the Assembly, had for its purport the re-appointment of the judges then in office, during good behavior. This was rendered ineffectual by the veto of Colden, acting governor, and when the time for holding court approached, the judges refused to act, and threw up their commissions.

### OFFICE RENDERED UNATTRACTIVE.

The King and governor adhered to their posi-

#### OFFICE RENDERED UNATTRACTIVE.

tion, and refused to grant new terms depending upon good behavior, which had the effect of rendering the office less desirable to those eligible to it. After some difficulty, a chief-justice was found in the person of William Pratt, a resident of Massachusetts. From the commencement of his term of office, his associate justices on the bench and the members of the bar treated him with disrespect and subjected him to indignities. The reasons for this unusual and unseemly conduct were two-fold: First, because the chief-justice was not a resident, and secondly, because he accepted his commission during pleasure only.

The home government, ever jealous of investing the colonial bench with too much independence, declined to accede to a petition of the Assembly to the reigning monarch, George III, looking toward the extension of the tenure of the judges' office during good behavior, as had been promised by that King on the occasion of his coronation. Thereafter up to the Revolution the judges held office according to the custom in vogue before Delancey's term.

#### ACQUIESCENCE IN COURT CUSTOM.

The successor in office of Chief-Justice Pratt was Daniel Horsmanden, who had been associate justice since March 16, 1763, and who held his new office until his death on September 20, 1778, after the Declaration of Independence had been proclaimed, abolishing the court.

## THE COURTS OF THE STATE OF NEW YORK.

The original act of 1691 stated that the court should consist of five judges, which was the number up to Attwood's time. When he came out to the colony, all the associate judges had ceased to act, and he held court alone, until Abraham De Puyster and Robert Walters were commissioned to act as his associates.

In his ordinance, Bellamont made no numerical limitation to the Supreme Court bench. It then consisted of a chief-justice and two associate justices, and they being found competent and adequate to transact the court's business, no change in number was made until 1758.

### CHIEF-JUSTICE DELANCEY.

Chief-Justice Delancey was nominated by George II to the office of lieutenant-governor in October, 1747, from which office he was later raised to the governorship on the recurring of a vacancy in the latter office. While leaving the entire business of the court to his associates, he continued to hold the office of chief-justice. This left but two judges to take care of the business of the court, a fact which was at times found inconvenient, especially in 1758, when a case involving title to land, wherein Trinity Church was plaintiff, came before the court. The two associate judges, Chambers and Horsmanden, were trustees of the church, and a protest was made against interested judges participating in the trial. Delancey therefore ap-

#### CHARACTERISTICS OF THE BENCH.

pointed David Jones as an additional judge of the court, and thenceforth, to the time of the Revolution, the court was composed of one chief-justice and three associate judges.

#### COLONIAL ARISTOCRACY.

From the manner in which estates had been created by governmental grant and patent, a form of feudal aristocracy had taken root and branch in the colony, which asserted itself in the councils of state. The influence of these great landed families was felt either in controlling the administration of public affairs, or in opposition to those in power. From such families the associate judges were usually chosen by the governor, and as the judges were generally members of the council, the position was much sought, not merely for its dignity and honor, but for the influence it commanded in colonial affairs.

#### CHARACTERISTICS OF THE BENCH.

With the exception of the woolsack and judicial robes which were worn by the English bench, the forms and customs prevailing in the courts of England obtained here; the colonial bar, however, did not follow the custom of wearing a wig and gown, which distinguished their brethren of the English bar.

## THE COURTS OF THE STATE OF NEW YORK.

### JUDGES' SALARIES.

The emoluments of the office of judge were not such as to make it financially desirable; in fact, only those of independent means could afford to accept the honor, and suitably maintain the dignity of the office.

At first only the chief-justice and the second judge received a salary; in 1698, all the judges were allowed some compensation for their services. The salary at first received by the chief-justice was one hundred thirty pounds annually, and that of his first assistant one hundred pounds. In 1702, when Attwood came out, he was granted three hundred pounds per annum, the first associate judge received one hundred fifty pounds and the second associate judge fifty pounds. In 1715 the Assembly allowed the chief-justice of the Supreme Court, three hundred pounds per annum for five years, for holding circuit courts. In 1765, the General Assembly allowed Daniel Horsmanden three hundred pounds for one year, and the other justices two hundred pounds for the same time; this salary was expected to defray the expenses of going the circuit of the province, and not intended as the official salary for holding sessions of the Supreme Court at New York.

In 1774, just prior to the Revolution, the salary of the chief-justice was raised to five hundred pounds sterling, paid by the Royal Exchequer, and

#### TERMS OF COURT CHANGED.

three hundred pounds in New York currency, to be paid by the colony; the associate judges were to receive two hundred pounds each in New York currency.

#### STATUTORY TERMS OF COURT.

Among the amendments and changes made during the period just traversed, and relative to the Supreme Court, an ordinance issued by Lord Cornbury on April 3, 1704, is worthy of mention. It pertained to the time and manner of holding court. By its provisions court was to be held on the first Tuesdays in June and September, and the second Tuesdays in October and March in every year, at the city of New York, or at such other place as the governor might appoint by official proclamation, to be issued at least twenty days before the holding of court, the sessions to continue no longer than five days.

#### TERMS OF COURT CHANGED.

Owing to the inclemency of the weather in the month of January, which made colonial travel difficult and impracticable and because of the heat and harvest in July, and the October and April terms being too short to transact the business of the court, it was decided that court be held in the city of New York on the third Tuesdays in October, January and April, and the last Tuesday in July of every year; the terms for April and October were to be held every day except Sunday, from the commence-

## THE COURTS OF THE STATE OF NEW YORK.

ment until the end of Thursday in the week next ending, thus making the terms considerably longer than formerly.

On the 30th of October, 1760, this ordinance was repealed by Colden and his council, and the April and October terms made two days longer than previously. Colden's ordinance also empowered any one or more of the justices to hold court in any county of the province, for the purpose of trying causes brought on for trial in the Supreme Court. The causes were to be tried at the first term of court, and judgment handed down at any subsequent term. The session of court was to last until the conclusion of its business, but in no event longer than six days.

Colden also established a court to be held in Albany, Dutchess, Ulster, and Orange counties in June, in Kings, Queens, Suffolk, and Westchester counties in September, and in Richmond county in May. The business of the court was under the charge of two clerks; the chief clerk held office at the city of New York, and the deputy-clerk performed his duties on the circuits of court. It was the latter's duties to transmit all records and processes of the Supreme Court on circuit, to the city of New York for record.

### ADDITIONAL POWERS.

By act of November 27th, 1741, it was enacted that the justices of the Supreme Court could hold

## LAWYERS' FEES FOR THE SUPREME COURT.

circuit courts under commission from the governor, with the seal of the colony annexed, without special appointment by the Crown. This authorization, at first limited to six years, was further continued, and in 1746 made perpetual.

An enactment of May, 1746, empowered the justices of the Supreme Court to commission as many persons as they saw fit, in all counties of the colony, to take affidavits to be read in any causes depending in the Supreme Court, as masters of Chancery Extraordinary in England were wont to do.

## FEES.

The exactions, often extortionate and unconscionable, demanded by the county officers, led to many disputes, and resulted in the passage by the Assembly, on May 24, 1709, of an act fixing the fees of every officer, under all circumstances. A schedule of fees relating to the Supreme Court is herewith published, conformably to the original.

## THE JURY'S FEES FOR THE SUPREME COURT.

For every juryman it gave one shilling.

## LAWYERS' FEES FOR THE SUPREME COURT.

- “ For a Retaining Fee, Six Shillings.
- “ For Drawing Writ, Three Shillings.
- “ For Drawing a Declaratiin, Six Shillings.
- “ For Drawing a Plea, Three Shillings.
- “ For Pleading upon Tryall, Ten Shillings.”

THE COURTS OF THE STATE OF NEW YORK.

THE JUDGES' FEES FOR THE SUPREME COURT.

“ For Allowance of a Writ of Errors, Two Shillings.

“ For Taking Bail, Two Shillings.

“ For Filing Same, Six Pence.

“ For Every Recognizance, Two Shillings.

“ For Filing Thereof, Six Pence.

“ For Habeas Corpus, Two Shillings.

“ For Certiorari, Three Shillings.

“ For Prohibition, One Shilling and Six Pence.

“ For a Procedendo, One Shilling and Six Pence.

“ For Supersedeas, One Shilling.

“ For Discontinuance, One Shilling.

“ Taking a Bill of Costs by any Judge or Clerk of the Court, One Shilling.

“ For Acknowledging a Deed, Two Shillings.

“ For every Cause in the Court, unless Criminal, Six Shillings.

“ For Admitting an Attorney to Practice in Court, One Pound, Ten Shillings.”

The act, as before stated, enumerates the fees of every officer in the colony, and takes up sixteen pages of the standard law book size.

JURISDICTIONAL LIMITATIONS.

An act was passed on October 11, 1709, which was a substantial re-enactment of the jurisdictional limitation to not less than twenty pounds, of actions

#### REMEDIAL LEGISLATION—DEBTORS.

triable in the Supreme Court. The purpose of this legislation was to make the minimum amount cognizable by the Supreme Court, on a case from the Mayor's Court or the Court of Common Pleas, involving the title to real property, twenty pounds.

#### DISCOURAGEMENT OF LITIGATION.

The litigious spirit seems to have been most rampant at this epoch in our juridical history. This may fairly be ascribed to the conflicting interests arising from the still primitive social and political conditions under which the colony was struggling.

The machinery of the law was insufficient for the steadily increasing business brought to it, and political economy required a curtailment, rather than an increase of expense. To allay this vexatious condition and check the overreaching tendencies heretofore encouraged by the smooth and convenient resort to law, litigation was to be discouraged or made prohibitive. Two acts were accordingly passed on September 4th, 1714, one "an act preventing Multiplicity of Lawsuits," the other "An act for Shortening Lawsuits and Regulating the Practice of Law."

#### REMEDIAL LEGISLATION—DEBTORS.

Following the custom prevalent in England, debtors in arrears were imprisoned by an order of court. This harsh custom prevailed until 1831, and

## THE COURTS OF THE STATE OF NEW YORK.

was the cause of much distress among the poor, and required remedial legislation, which found its expression in an act passed October 29th, 1730, entitled, "An Act for the Relief of Insolvent Debtors."

### INSOLVENT DEBTOR'S ACT.

By virtue of this act an imprisoned debtor was accorded the right to petition the Supreme Court for a hearing under oath, as to his financial ability. The creditor received notice to attend the hearing; the debtor was then sworn under a prescribed oath, and if his financial inability to pay was satisfactorily established, he was released from his obligation. If property of the debtor were discovered, the creditor had his remedy of execution and levy under the judgment, against the debtor's property and assets.

A defendant imprisoned for a debt under forty shillings could present a petition in the same form, to a justice of the peace, on whom was conferred full jurisdiction in the matter. If the examination showed, by oath of the debtor, that his possessions, besides wearing apparel, did not exceed forty shillings, he was discharged and no longer liable to imprisonment for the same debt.

### ACT AMENDED.

The immunities afforded by this act seem to have been abused, for on October 14th, 1732, we find that the Assembly passed another act relative to

#### ACT AMENDED.

insolvent debtors, which was virtually an amendment of the former.

Similar procedure was observed as to petitions and oaths; but to secure his release, the prisoner was required to pledge himself for service to the judgment creditor, for whatever period the justice hearing the petition should decide, in order to secure his discharge of the debt; if the debt were paid during this indenture, the debtor was released.

#### CONSTITUTIONALITY OF THE KING'S PREROGATIVE.

It is interesting to note that when Horsmanden was chief-justice of the Supreme Court, he and his associates took a firm stand against the government in the matter of appeals from civil cases.

The point at issue was whether the King, in allowing an appeal from the Supreme Court to the governor and his council, was not exceeding his constitutional powers; no such right was conceded to his Majesty in England, and it was questioned here. The danger inherent in such a practice was that, upon an appeal after conviction, to the governor and council, some influential defendant might nullify the jury's verdict; such a miscarriage of justice actually occurred in 1767, in the case of Force vs. Cunningham.



## CHAPTER IX.

### COURT OF CHANCERY.

EARLY EQUITY JURISDICTION—EQUITY JURISDICTION AND PROCEDURE OF EXISTING COURTS—EARLY CHANCERY—JURISDICTION IN EQUITY—DURATION OF THE HIGH COURT OF CHANCERY—ESTABLISHMENT OF A COURT OF CHANCERY—OPPOSITION TO COURT OF CHANCERY—GROUNDS OF OPPOSITION—ARBITRARY ACTION OF PHILIPSE—NATURE OF GRIEVANCE—REVISION OF COURT—AGITATION AGAINST COURT—ACTION OF BENCH AND BAR—PETITION TO GOV. CLARKE—SUCCESSIVE CHANCELLORS—DUNMORE'S DILEMMA—MASTER OF THE ROLLS—CHARACTER OF THE CHANCELLORS—COURT MINUTES.

#### EARLY EQUITY JURISDICTION.

No distinction was made by the Dutch law as administered in New Amsterdam, between actions at law and suits in equity. The equitable relief that might be afforded by the court in person, without the intervention of a jury, was jeopardized by entrusting the balancing of the scales to the labyrinthine mazes of legal chicanery and the untrained supervision of laymen.

## THE COURTS OF THE STATE OF NEW YORK.

The English courts, ever awake to the moral as well as legal rights of the subject, had at an early date delivered the administration of justice from the systematic and refined niceties of mere skill and dexterity in the interpretation and application of the principles of law.

To remedy the indiscriminate mingling of law and equity, the outgrowth of Dutch jurisprudence, a court similar in practice to the English Court of Chancery was established. The widespread speculation in land, always a prolific source of litigation, had multiplied the controversies that concerned the muniments of title; the subdivision and enlargement of estates, by bequest, gift, and purchase; the community and diversity of interests; all matters of equity jurisprudence had long required adjustment by a court of equity. The Dutch system of referring such matters to arbitrators was but a partial remedy for the complications engendered by the growth of New York.

### EQUITY JURISDICTION AND PROCEDURE OF EXISTING COURTS.

The town courts had equity jurisdiction to the amount of five pounds, and the Court of Sessions, and that of Assize, had unlimited jurisdiction in all matters. The procedure in vogue in the colony was conformed, as closely as possible, to the High Court of Chancery in England.

An action was brought before the court by a bill

## EQUITY JURISDICTION AND PROCEDURE.

in equity, and an answer required thereto; witnesses were examined as in England, and the case was tried without a jury. This practice was continued until a High Court of Chancery was erected under Dongan's administration here, in 1683. This was merely giving legislative sanction to a tribunal that had, "mutato nomine," already been in existence in the colony since its earliest period.

### EARLY CHANCERY.

The governors appointed by the Duke of York had in virtue of their appointment as such, and the Duke's instructions, acted as chancellors, without a court, as it were, since a regular Court of Chancery was not erected until 1683. In deference to a popular demand therefor, a Court of Chancery had been contemplated in Duke James' measures for local legislation.

The new tribunal was to consist of the governor and council as theretofore, and in the governor was vested power to appoint a chancellor to act in his stead. This court formed the highest tribunal in the province, having entire jurisdiction in all equitable matters; an appeal from which lay directly to the King and his council.

It is worthy of note that the equity practice of to-day has reverted to that of the early English period; it being now continued in the jurisdiction of the Supreme Court, or other courts of record.

## THE COURTS OF THE STATE OF NEW YORK.

### JURISDICTION IN EQUITY.

A practice peculiar to courts of equity during the early English period was their authority to grant divorce for adultery, which was a practice unknown to the English courts of equity. The reason ascribed for this unusual custom is that the practice was in vogue among the Dutch; the Court of Burgomasters and Schepens had granted divorces on this ground. When an action was brought in 1671, for divorce for adultery, the English court held that it had no jurisdiction. From this rule an appeal was taken to the governor, who held that since the practice had been prevalent among the Dutch, it was the common law of the colony, and therefore the court had jurisdiction, and he ordered it to take cognizance and proof of adultery at its next sitting. Upon the re-establishment of the court in 1683, to conform to the High Court of Chancery in England, this power of granting divorces was abrogated. From 1683 to 1691, the court continued as it had been previous to that time.

Following the legislative establishment of the court, Dongan summoned a session for the 16th day of February, 1683; thereafter the terms of court were set for the first Thursday of each month.

The court continued to exercise equity jurisdiction until all the courts were abolished, upon the succession to the throne of the Duke of York; the governor and council thereafter continued to act

#### ESTABLISHMENT OF A COURT OF CHANCERY.

as chancellor and court of equity, as they were accustomed to do before Dongan's time.

#### DURATION OF THE HIGH COURT OF CHANCERY.

When the Assembly of 1691 passed its act to establish courts of justice, provision was made for a High Court of Chancery for the whole province, composed as was Dongan's court and limited in the original act to two years.

Similarly to the Supreme Court, it was continued from year to year by separate acts until April, 1698, when the term of its existence ceased entirely, and although Bellamont provided in his ordinance for re-establishing the High Court of Chancery, such a court does not appear to have been erected.

The next mention made of this court is to be found in a letter of Lieutenant-Governor Nanfan, addressed to the Lords of Trade in England, and advising them of the non-existence of such a court in the colony, and the necessity for one. He urged on their attention, that under the law, to constitute a full bench, five of the council were required to sit with the governor, and that they very seldom attended.

#### ESTABLISHMENT OF A COURT OF CHANCERY.

In answer to this the Lords of Trade wrote Nanfan that he should establish such a court, to be composed of the governor and council, or any two of

## THE COURTS OF THE STATE OF NEW YORK.

them. The lieutenant-governor issued an ordinance to that effect, and convoked a session of court for the second day of April, 1701, and set the first Thursday of each month for the term of court.

From the date of its establishment, the strongest opposition was manifested by the colonists to a Court of Chancery; and the right of the Crown to establish an equity court in the colony, when it had no such power in England, without the consent of Parliament, was challenged.

The opposition was not confined to the Court of Chancery, which the people required, but to the constitutionality of its creation. The popular demand was for a court created by act of legislature, and not by the arbitrary act of the King of England. Petitions and memorials were addressed to the Assembly, which claimed that the rights of the inhabitants were imperilled, that the fees of the court were exorbitant, and asking that body to revise the act of establishment and conform the court to the needs and wishes of the people.

### OPPOSITION TO COURT OF CHANCERY.

When Lord Cornbury arrived, the opposition to the court was at the highest point, and he deemed it advisable to suspend its sessions temporarily, and hold an investigation. A commission was appointed to investigate the facts, and report thereon; the result of this was that the court was somewhat revised, the fees materially lowered, and

an ordinance issued to convene a court on November 7th, 1704. From thence to the Revolutionary War, the Court of Chancery continued its existence.

When Lord Lovelace came out as governor, in 1708, there was a new outbreak of hostility towards the Court of Chancery. In that year the Assembly passed a resolution claiming that the erection of a court without the consent of the Assembly was an abuse of the royal power and tended to jeopardize the liberty and property of the people. The effect of this was, that after the governor's death, and during the term of Ingoldesby, no court was held in this colony. Upon Governor Hunter's arrival, in 1710, it was re-established, and he took upon himself the duties of chancellor.

New opposition was brought to bear upon this action of the governor, and a memorial sent to the Lords of Trade, in which the colonists set forth their feelings concerning the establishment of such a court without the consent of the Assembly; but the Lords of Trade answered that the Assembly, in addressing such a petition to them, had acted impudently, and claimed that the Crown had a right to erect any court that it deemed essential to the colony's well-being. This court was therefore continued for sixteen years, without interruption, although the colonists showed their hostility to it whenever opportunity offered.

## THE COURTS OF THE STATE OF NEW YORK.

### GROUND'S OF OPPOSITION.

One of the reasons assigned for the spirited opposition to such a court for the province of New York was undoubtedly the following: The colonists had been granted large tracts of land; taxes were greatly in arrears and had accumulated to such an extent, that any action brought against the landlords for their collection at this time, must necessarily involve a large amount; the colonists knew that payment of unpaid taxes and quitrents could be compelled only through a Court of Chancery, and hence their opposition to it.

The strongest opposition to the Court of Chancery was encountered from the great landholders. During the period of dissension, Fletcher, Hunter's predecessor in the office of governor, saw the unpopularity of this court, and refused to preside as chancellor unless the matter came before him on direct appeal or writ of error. Governor Hunter repeatedly sat as chancellor, as did his successor Burnett, who is credited with having despatched the greatest amount of business as chancellor up to this time.

### ARBITRARY ACTION OF PHILLIPSE.

We are now brought to the year 1727, which is an important period in the history of the Court of Chancery. The opposition to this court was again

#### NATURE OF GRIEVANCE.

revived. Frederick Phillipse, a great landholder and speaker of the Assembly, had been defeated in a case brought by him into the Court of Chancery, wherein Burnett sat as chancellor. Claiming that the adverse judgment was due to partiality on the part of the chancellor, Phillipse, as speaker of the Assembly, caused the latter to pass a bill of grievances, during the last hour of the session.

This ill-considered conduct on the part of the Assembly enraged the governor, who claimed that the members had been inveigled into a highhanded act without just grounds therefor.

If the Assembly had acted in good faith, they would have passed an act or resolution calculated to remedy some of the defects, and not have resorted to the high tempered impulse of the moment.

#### NATURE OF GRIEVANCE.

The gist of the grievance was that the erection in the colony of a Court of Chancery without the consent of the Assembly was unwarranted and contrary to the laws of England, and was an oppression of the subjects and of pernicious consequence to their liberties and properties.

It also resolved that at the next meeting of the Assembly, an act would be prepared and passed, declaring all orders and proceedings of the Court so erected, to be illegal and of no effect, and the question would be debated as to whether or not the Assembly should establish a Court of Equity or Chancery in the colony.

## THE COURTS OF THE STATE OF NEW YORK.

### REVISION OF COURT.

The effect of this action was to bring the Court of Chancery into great disrepute in the colony, an effect contemplated by Phillipse, and the appointment of a committee to revise the acts regulating the court; many abuses of the court were abolished, and the fees so considerably reduced that no lawyer of high standing in the colony would find practice in that court sufficiently lucrative to undertake an action in equity.

When Montgomery assumed the office of governor in 1728, he declined to act as chancellor on the ground of his inability to competently discharge the duties of the office; when this demureness of the governor came to the ears of the Lords of Trade in England, their orders were made imperative, and His Excellency reluctantly acquiesced.

### AGITATION AGAINST COURT.

The ever growing opposition to the court reached its climax in 1735, in the form of another petition to the General Assembly, setting forth the danger and insecurity of a Court of Chancery. The hue and cry against the court was raised and stimulated by the two most popular attorneys of the day, Alexander and Smith.

Ignoring numerous petitions for its dissolution, which were presented to the Assembly and himself,

PETITION TO GOVERNOR CLARKE.

the governor refused to act, and in November of that year, the Assembly passed a resolution that "The Court of Chancery in this province, in the hands or under the exercise of the governor, without consent in General Assembly, is contrary to the law, unwarrantable, and of dangerous consequence to the liberties and properties of the people."

ACTION OF BENCH AND BAR.

At this crisis of law and order, when justice seemed to be running amuck, the bench and bar took a hand in matters; they saw the disturbed state of things within the colony, and realizing that equity jurisdiction must be vested in some hands, authority to hear equity business was conceded by them as the province of the judges of the Supreme Court. This right or remedy was to be enforced under the guise of exchequer business. The judges announced that they would hear all complaints and bills in equity, but Rip Van Dam, at that time governor, was ordered to act as chancellor until the arrival of the new governor, Cosby.

PETITION TO GOVERNOR CLARKE.

Cosby and his successor Clarke acted as chancellors, and during the latter's administration, a petition was addressed to him in the following words: "The settling and establishing of a general jurisdiction for a due administration of justice is necessary in every country, and we conceive they

## THE COURTS OF THE STATE OF NEW YORK.

ought to be settled and established by acts of the whole Legislature, and their several jurisdictions and powers by that authority remitted and appointed, especially courts that are to take cognizance of matters in a court of equity. This has been the constant practice in England, when new courts were to be erected, or old ones to be abolished or altered; and the several kings of England, in whose reigns those acts were made, never conceived that the settling, erecting, or abolishing courts, by acts of the Legislature, had any tendency to destroy or in the least to diminish their just and legal prerogatives. It was the method in use here, both before and since the revolution, and particularly recommended to the Assembly to be done in that manner, by a message from Governor Sloughter and council, on the 15th day of April, 1691. He was the first governor since the revolution, and the governors that since that time assented to those acts, we suppose, never in the least imagined that they were giving up prerogatives of their masters when they gave that assent; nor did we ever learn that they were censured for so doing. On the contrary, the constant instructions that have from time to time been given to the governors of this province seem clearly to point out the doing of it by acts of the Legislature, and not otherwise, as may be gathered from the instructions for the erecting of a court for the determining of small causes, by which there are positive directions given to the governors to

PETITION TO GOVERNOR CLARKE.

recommend it to the Assembly that a law should be passed for that purpose; but notwithstanding these directions given in express and direct terms, the governors never would apply for such an act, but erected that court by an ordinance of themselves and council, as they did the Court of Chancery, which had before that time been erected by acts of the Legislature in another manner. They could not be ignorant of what dissatisfaction the erecting of a Court of Chancery in that manner gave the generality of the people. This was very manifest by the resolves of the General Assembly, at the time of its first being so erected, and often since declaring the illegality of such a proceeding. And though these resolves have been, as often as made, treated by the governors with an unreasonable disregard and contempt of them, yet to men of prudence they might have been effectual to have made them decline persisting in a procedure so illegal, and so generally dissatisfactory; and when (as they imagined it) proved of no use to the public or benefit to themselves. For a few of them had talents equal to the task of a chancellor, which they had undertaken to perform, so it was executed accordingly. Some of them being willing to hold such a court, others not, accordingly as they happened to be influenced by those above them. So that were it really established in the most legal manner (as it was not), yet being in the hands of a person not compellable to do his duty, it was so

## THE COURTS OF THE STATE OF NEW YORK.

managed that the extraordinary delays and fruitless expense attending it, rendered it not only useless, but a grievance to the inhabitants, especially those who were so unfortunate as to be concerned in it; which we hope you think with us, that it is high time should be redressed. Your Honor well knows that the establishing that court in the manner it has been done has been a subject of contention between the governors and the Assembly; and since it is confessed, by all, that the establishment both of that, and other courts, by act of the Legislature, is indisputably legal and gives them the most incontrovertible authority; and if unquestionably legal, what is so cannot be destructive of His Majesty's prerogative. We therefore hope you will make no scruples of assenting to this bill, to put an end to the contention, that has not been, nor will be, while it continues, beneficial to His Majesty's service."

### SUCCESSIVE CHANCELLORS.

Governor Clinton, who succeeded Clarke, acted as chancellor, as did Chief-Justice Delancey when appointed lieutenant-governor of the province. In 1753 Hardy was the governor. He was not a lawyer, and experienced much embarrassment in hearing and determining equity actions; his bravest attempt to do so only carried him into deep water, and at the next trial he asked three of the judges of the Supreme Court to partially relieve him of his unsuitable duties.

## LORD DUNMORE.

### DUNMORE'S DILEMMA.

In 1770, during Lord Dunmore's administration as governor, he directed the attorney-general to bring an action in chancery against Lieutenant-Governor Colden, his predecessor, for certain moneys to which he laid claim. The case was to be brought before the Court of Chancery, whereof the governor himself was chancellor; notwithstanding his interest in the matter at bar, the governor presided in person at the trial, confident in the rectitude of his judgment; Colden was represented by James Duane, as counsel, who later became mayor of the city of New York.

Duane argued the case ably, and must have convinced Dunmore that he had absolutely no case. For a time the latter reserved decision, and was then diffident about making his verdict public, for he had originally commenced the action in the name of the Crown, thus flimsily hiding his own identity behind the royal name. Here were the two horns of a dilemma: Should he decide against Colden, the matter would be appealed to England; all prospect of obtaining the money would be relinquished to the Crown, in whose name the action had been brought; and if his decision were favorable to himself, the charge of partiality and self-seeking would be imputable to his judgment.

He was rescued from this predicament by being transferred to the governorship of Virginia, and

## THE COURTS OF THE STATE OF NEW YORK.

Tryon succeeded to the office made vacant in New York.

### MASTER OF THE ROLLS.

In 1774 Tryon appointed James Jauncey master of the rolls, with jurisdiction over all cases in equity and powers generally possessed by the master of the rolls in England.

### CHARACTER OF THE CHANCELLORS.

It was a standing grievance of the colonists, in their complaints to England, that most of the governors who acted as chancellors were unfit to hold that office; that their opinions were those of laymen, who had not been bred to the law. This was indeed undeniable, since we have the confessions of some of the governors, who were more honest than ambitious, and who refused to act as chancellors, from these conscientious motives.

On the contrary some few had most ably and honorably risen to the high claims of the office on their ability and conduct. Among those who were called to the chancellorship at a very critical period, special mention is due to Clarke, who came into office just after the death of Cosby, when all the courts were practically at a standstill, and by tact and good management averted disorder, and restored to the machinery of the law its proper functions.

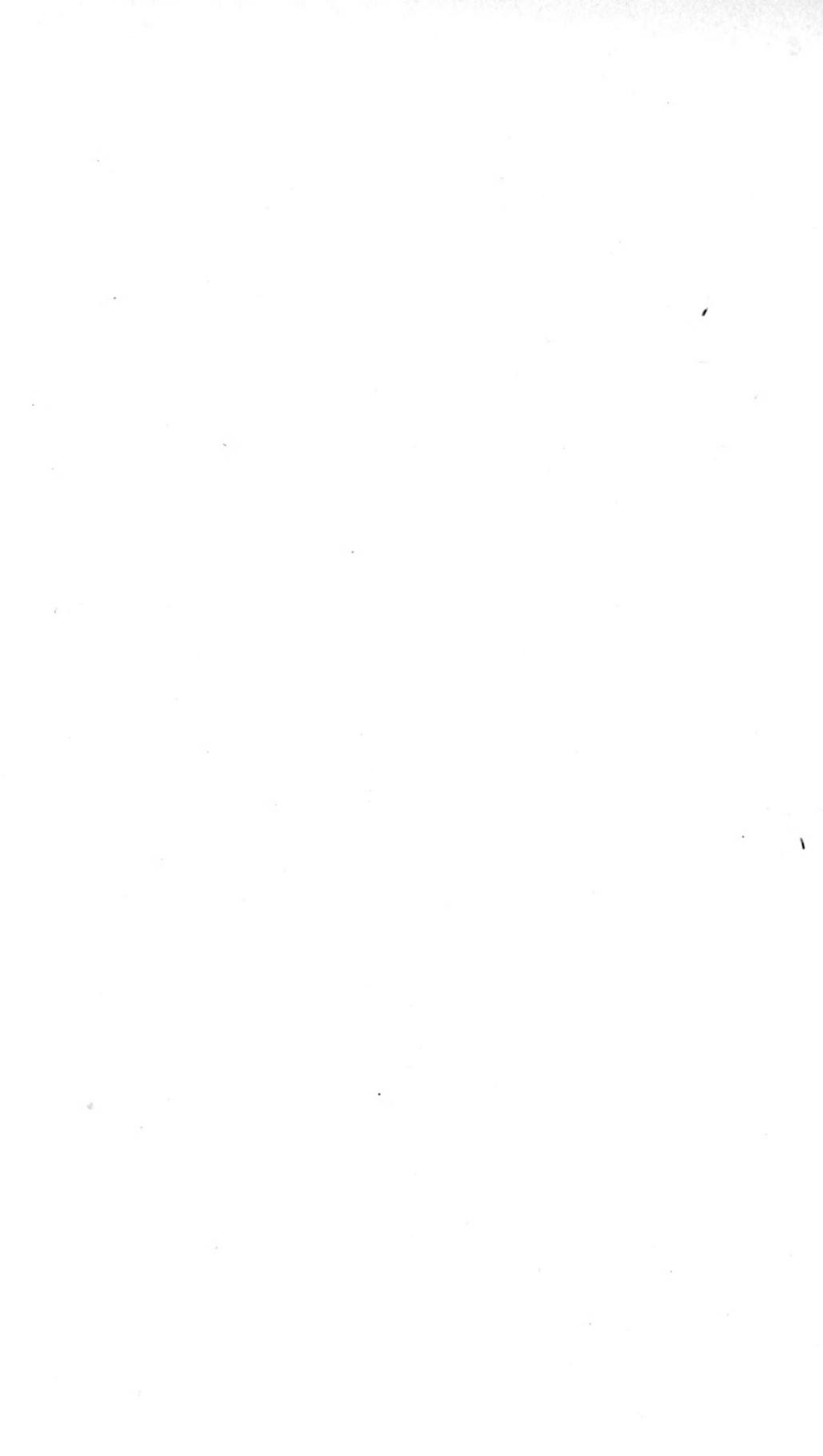
For lack of records of the Court of Chancery, we are unable to form a proper conception of the

#### CHARACTER OF THE CHANCELLORS.

code of procedure that obtained within this court. It was only after Tryon had appointed Jauncey master of the rolls, that a record of the Court of Chancery was kept.

#### COURT MINUTES.

The minutes are dated from April 5th, 1770, to January 9th, 1776. In these minutes there is but one written opinion, handed down by Governor Tryon, in the case of the Reverend Joshua Bloomer vs. Robert Hinchman and Phillip Edsal. The last entry in the book, January 9th, 1776, concerned the appointment of guardians for two infants.



## CHAPTER X.

### SURROGATE AND PROBATE COURT.

DUTCH PERIOD—ORPHAN MASTERS—PROBATE OF WILLS — FURTHER ENACTMENTS — PROBATE PROCEDURE—ORIGIN OF TERM “SURROGATE”—JURISDICTION OF PREROGATIVE COURT — THE COURT OF PROBATES.

#### DUTCH PERIOD.

Among the Dutch was a court that corresponded to a Surrogate's and Orphan Court. This was the natural outgrowth of the pressing business which necessitated a court in the nature of an overseer and guardian for the helpless and afflicted. This branch of chancery, which entertained the probate of wills, and the administration of estates, had an earlier existence than the Court of Chancery itself.

We find that the College of Nineteen, in its charter of 1640, by virtue of which it established courts in New Amsterdam, also ordered that the director-general and the council of New Netherlands should, among their other duties, assume the functions and jurisdiction of a Surrogate's and Orphan Court.

During the administration of Governor Stuy-

## THE COURTS OF THE STATE OF NEW YORK.

vesant, when the Court of Burgomasters and Schepens achieved such prominence, it acted as a probate court, took proof of wills, and undertook the control and management of the estates of widows and orphans. It continued to perform these duties for a period of about fifteen years.

### ORPHAN MASTERS.

In the year 1655, as already related in a previous section of this work, an Indian massacre of the white settlers left so great a number of widows and orphans that the governor was under the necessity of appointing three special orphan masters to transact the unusual amount of business.

After this extraordinary condition of probate affairs had been properly adjusted, two masters were found sufficient to attend to the regular business of this court, and they continued in the performance of their functions as probate masters until the English occupation.

### PROBATE OF WILLS.

The Duke's Laws made ample provision for the care and management of intestates' property and the procedure necessary to the proof of testamentary instruments. By a special jurisdictional clause contained in the Duke's Laws, the Court of Sessions in each of the three ridings was empowered to act as a Court of Probates, and later like jurisdiction was conferred on the Mayor's Court.

## PROBATE OF WILLS.

The laws provided that wills involving dispositions of more than one hundred pounds should be filed in the office of the governor's secretary at New York, who was also secretary of the province; this practice gradually induced the governor of the colony to take upon himself the duties of a probate judge.

Acting under this assumed jurisdiction, Governor Nicolls granted some letters of administration, and performed other duties pertaining to a surrogate, in accordance with his prerogative right. This practice was continued to such an extent, that in Dongan's time, it had become the settled practice to have the proof of all wills read before the governor. When Sloughter became governor, all papers filed with, or issuing from, the surrogate's office, were under a special seal, for that purpose established, and it became customary to refer to the office as the "Prerogative" Court.

## FURTHER ENACTMENTS.

Certain acts relating to the proof of wills and the management of intestate property were passed by the Assembly in 1692. It was therein provided that two freeholders should be appointed by the governor in each town, whose duty would be the care of intestates' property. By a reservation of power it was provided that the proof of all wills should be read before the governor, and he only had capacity to grant letters of administration. It

## THE COURTS OF THE STATE OF NEW YORK.

further authorized the governor to delegate some person to act in his name and stead, in granting administration papers, but effect could be given to this power of appointment only by the seal of the "Prerogative" Office.

### PROBATE PROCEDURE.

All records of wills, and all papers relating to the surrogate's office in New York, and its immediate vicinity, were required to be recorded at New York. In the localities more remote from New York, from which it would be inconvenient for witnesses to attend, delegates were appointed by the governor, and the Court of Common Pleas in each county was given jurisdiction in the probate of wills, and the matter of intestates' property. The governor appointed a representative to act for him at New York, and this was the first establishment of a Prerogative Court, presided over by another than the governor.

### ORIGIN OF THE TERM "SURROGATE."

As above stated, the governor had appointed delegates in all the localities of the province, and these delegates, in conjunction with two freeholders who had acted previously, came to be known as "surrogates," which term signifies delegates. From thence to the present time, the officers who succeeded to their office and duties have been referred to as surrogates.

## NEW COURT OF PROBATES.

### JURISDICTION OF PREROGATIVE COURT.

The Prerogative Court of New York entertained appellate jurisdiction in probate and intestate matters, over all the Courts of Common Pleas in the province, and could review the decisions of any of the delegates in the different parts of the province.

## NEW COURT OF PROBATES.

In 1754, a special judge of probates was appointed, distinct from the Prerogative Office which continued its separate existence. This special judge had power to take the proof of wills and grant letters testamentary, and of administration. He presided over a tribunal known as the "Probate Court," while the Prerogative Office, its predecessor, seems to have been continued and presided over by the secretaries of the province, until the Revolutionary War. The practice of this court was much similar to the corresponding court in England.



## CHAPTER XI.

### THE COURT OF EXCHEQUER.

EARLY EXCHEQUER BUSINESS—RIP VAM DAM'S CASE—OPPOSITION TO COURT OF EXCHEQUER—PUBLIC DEBATE—INTENSITY OF POPULAR FEELING—TRIAL OF ZENGER.

#### EARLY EXCHEQUER BUSINESS.

The first mention made of exchequer business was during Dongan's administration, when he established an ordinance stating that he would hear all exchequer business on the first Monday of each month, an intendment which embraced all matters in dispute between the Crown and colonists, as to rents, taxes, revenues, etc.

The act establishing courts for the province, which was passed in 1691, gave the Supreme Court jurisdiction in all exchequer matters, but it does not appear that a separate court of exchequer jurisdiction was established. Exchequer business was heard at the regular term of the Supreme Court, but business grew to such an extent that it could not well be handled at that time.

While Lieutenant-Governor Nanfan acted as chief officer in the colony, he was empowered to

## THE COURTS OF THE STATE OF NEW-YORK.

erect a separate Court of Exchequer; he accordingly issued an ordinance recommending its establishment, the business of the colony being deemed sufficient to warrant its erection; there is, however, no record that such a court was ever established. On the other hand we find that the chief-justice at that time continued to hear exchequer business at the regular terms of the Supreme Court, but when the business of the latter consumed the full term, exchequer matters were taken up after the regular business of the Supreme Court was terminated.

### RIP VAN DAM'S CASE.

We have no records of exchequer business previous to the year 1733, or thereabouts. It was then that the attorney-general of the province was directed by Governor Cosby to bring an action in the exchequer part of the Supreme Court against Rip Van Dam, as elsewhere stated, for half of the sums of money obtained by the latter during the interval between Montgomery's departure from the province and Cosby's arrival, during which time Van Dam had acted as governor of the province.

This matter involved the question of accounts, and was thus properly within the jurisdiction of the Court of Chancery, but the governor was unwilling to bring a case into the court of which he was chancellor; his only alternative was to have the action brought by the attorney-general before the judges of the Supreme Court, on the exchequer

side. This aroused much popular feeling against the prerogative right of establishing Courts of Equity in the province without legislative approval.

On the score of this insurrectionary agitation on the part of the populace, something has been said in our brief history of the Court of Chancery, and the same spirit of discontent now prevailed with respect to the Court of Exchequer.

Van Dam retained the services of Alexander and Smith, two of the most prominent attorneys of the day, to defend his interests. These attorneys demurred to the jurisdiction of the court, on the ground that the Crown had no right to establish a Court of Equity in the province; this demurrer was overruled by Judges Delancey and Phillipse, but Chief-Justice Morris did not concur, and wrote a dissenting opinion. As told in our history of the Supreme Court, this was one of the causes of the removal of Morris from his office, and the appointment of Delancey in his stead.

The decision of the judges, when pronounced in court before a great crowd, was received with much indignation; but the opinion of Morris was published broadcast in the newspapers, thus giving great offence to the governor; and Morris, who had for twenty years acted as chief-justice, was removed for it. This increased the excitement in the colony, and divided the inhabitants into two parties. One party sided with the governor, and maintained

## THE COURTS OF THE STATE OF NEW YORK.

that the court had equity jurisdiction; the other adhered to Van Dam, and denied that the court possessed such jurisdiction. The latter party comprised the great mass of common people, whereas the friends of Cosby were the aristocrats of the colony, and styled the "people of figure."

## OPPOSITION TO THE COURT OF EXCHEQUER.

The jurisdiction of the court in exchequer matters was brought to the attention of the General Assembly at its next session, and petitions submitted for the repeal of the Court of Exchequer, as a branch of the Supreme Court, and the general re-establishment of courts by acts of the Assembly, and not by arbitrary acts of the Crown. This measure was defeated in the Assembly by the gubernatorial majority, but so intense was the opposition that the governor was obliged to consent to a public debate of the question before the Assembly.

## PUBLIC DEBATE.

In accordance with this concession, two lawyers advocated each side of the question with force and ability; but in their zeal for their cause, they had marshalled such a maze of learning and sophistry, replete with astute constitutional arguments and philosophical dissertations, that they overshot their mark, and nothing was achieved.

## TRIAL OF ZENGER.

### INTENSITY OF POPULAR FEELING.

The feeling in the colony was at so high a pitch that it did not end here; the newspapers took a partisan stand in the matter, which occasioned still more trouble. The publisher of *The New York Weekly Journal* sided with Van Dam, and in four numbers of this paper published matter inimical to the interests of the governor and his party; in fact so offensive was the matter that the governor, by special ordinance, caused all copies of the paper to be publicly burned, and Zenger, the publisher, was arrested, and an information filed against him in the Supreme Court for seditious libel.

### TRIAL OF ZENGER.

Attention was drawn from Van Dam's case to this new matter which promised to be more readily settled than the other. Alexander and Smith, who had taken the popular side of the question from the beginning, now volunteered to defend Zenger.

Their first move was to demur to the commission of the judges of the Supreme Court; but its jurisdiction was not challenged. The counsel for the defendant wisely saw that an attack on the Supreme Court which had been established for so many years might involve endless trouble. The demurrer which called into question the commission under which the judges were acting, so enraged Delancey, that he caused both of their names to be stricken from

the roll of attorneys, and they were forthwith disbarred.

Finally a Mr. Hamilton, a prominent lawyer of Philadelphia, championed the cause of Zenger. The latter was tried before a jury, and Hamilton interposed a defence of justification, and argued for the truth of the statements published. The judge refused to admit the evidence, but Hamilton contended that the jury was sole judge of both the law and fact in a libel suit. This was a new principle of law, and established a precedent in advance of England. The jury retired for deliberation, and contrary to the judges' charge, returned a verdict of not guilty, and Zenger was thereupon acquitted.

This was a great triumph for the Democratic party of the colony, and Hamilton was made much of, and hailed as a hero. This put an end to Van Dam's case, and no more business was brought into the Court of Exchequer as a distinct tribunal, until the Revolutionary War.

## CHAPTER XII.

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### CRIMINAL COURTS.

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EARLY CRIMINAL COURTS—COURT OF OYER AND TERMINER—CRIMINAL COURT IN NEW YORK CITY—PROCEDURE—COURT OBLOQUY—LEISLER'S TRIAL—OPPOSING FACTIONS—INFLUENCE AND EFFECT OF ZENGER'S TRIAL—COLONIAL LEGISLATION—JURISDICTIONAL ACT.

#### EARLY CRIMINAL COURTS.

We will now devote some space to a short review of the criminal courts of the province. Under the Duke's Laws, all the courts, including the small town courts, had both criminal and civil jurisdiction in all cases except capital offences, or treason against the established government. In the latter case Nicolls was empowered by the Duke's Laws to issue a special commission of Oyer and Terminer to try the offender; such commission was to be issued only upon information by the Court of Sessions, before which the prisoner had been brought, that a capital offender was under arrest, and that there would be no meeting of the Court of Assize, which had jurisdiction in such cases, within a period of two months. It was under

## THE COURTS OF THE STATE OF NEW YORK.

these conditions only, that the governor was empowered to appoint a commission of Oyer and Terminer.

### COURT OF OYER AND TERMINER.

No criminal court was established in the province of New York until the arrival of Dongan in 1683; the act of that year relating to the establishment of courts made provision for a Court of Oyer and Terminer and General Gaol Delivery, to consist of one judge and four justices of the peace especially commissioned for the separate terms of the court. The court was to be convened by the governor upon information of any criminal offence.

In 1691, when the entire judiciary was re-organized, the Legislature provided that a court bearing the same name as the above was to be held at least once a year in each circuit, and was to be composed of one of the judges of the Supreme Court, who was especially assigned to that circuit, and commissioned by the governor and council; this judge was to call to his assistance some of the county judges in his circuit.

### CRIMINAL COURT IN NEW YORK.

In New York City proper, the mayor and four aldermen were authorized to sit with the circuit judge, instead of the county judge. This bench of five constituted the personnel of this court, which was merely the criminal branch of the Supreme

#### LEISTER'S TRIAL.

Court, and by this designation it was known until its abolishment in 1896.

#### PROCEDURE.

Prosecution was mainly by information to the Supreme Court, or to the governor and his council, and seldom by grand jury indictment. The governor and council very often committed a prisoner under their warrant, and frequently the judge commissioned to try the prisoner was a member of the council; this equivocal procedure led to much scandal, and many complaints were made that warrants were at times issued by the council, after the grand jury's refusal to indict.

#### COURT OBLOQUY.

In reviewing the history of the Supreme Court, it must be admitted that it left an unclean record in its criminal branch. Two important cases that were tried before it but tend to confirm this belief; noticeably the almost farcical trial of Leisler in 1691.

#### LEISLER'S TRIAL.

The alleged loyalists managed to get the ear of Governor Sloughter when he arrived, and persuaded him that Leisler was guilty of treason against the government for his own private gain; as a matter of fact, Leisler's action was consistent with the popular feeling of the day, engendered by the disturbances in England. The governor, concurring in belief with Leisler's accusers, ap-

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pointed a special commission of Oyer and Terminer, composed of Dudley, Smith and Phillipse, all three of whom, subsequent to this trial, were appointed judges of the newly erected Supreme Court.

Leisler heard the charge, but refused to plead on the ground that a fair trial was not to be had; in fact, contrary to the principles and practices of the common law of England, no jury was allowed in the case. Leisler was condemned to be hung, and his property confiscated. Before he or his friends had an opportunity to appeal to England, sentence was executed, although the confiscated land was later restored to the family.

### OPPOSING FACTIONS

As a result of this trial, public feeling was stirred up to a high pitch, and the proceedings denounced by the populace, as "Murder." The direct aftermath of this illegal and vindictive execution was the formation of two hostile parties, one in sympathy with Leisler, and the other with his accusers. The latter faction soon incurred the disfavor of the new governor, and the Leislerites had the satisfaction of seeing Nicholas Bayard, chief among the prosecutors of Leisler, indicted for high treason. But it appears that Bayard was never executed.

Noteworthy in connection with this trial, is the circumstance that even at this early date, a person

## COLONIAL LEGISLATION.

accused of a felony was allowed counsel at his trial. This practice was not legalized in England until about one hundred years after Leisler's case.

### INFLUENCE AND EFFECT OF ZENGER'S TRIAL.

The second of the trials to which allusion was above made, was the trial of Zenger, who had been indicted for seditious libel in 1735. A sketch of this case has been given in our history of the Exchequer Court, where mention was made of the important results directly due to this case.

The most important ruling in this case established the principle that in a case of libel the jury had full power to decide both the law and the fact in the case. Zenger's case was extensively published in England, and an act was passed by Parliament in 1792, which allowed juries to give final verdict in libel cases. Another feature of the case was the establishment of the absolute freedom of the press.

The history of the criminal branch of the Supreme Court will be taken up more fully in relating its existence after the Revolutionary War.

## COLONIAL LEGISLATION.

Some legislation relative to criminals, enacted by the Assembly during the colonial period, we deem worthy of mention.

On October 4th, 1732, an act "For the speedy punishing and releasing such persons from imprisonment as shall commit no criminal offences," was

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passed. Under this act a person charged with a petty criminal offence was to be kept in prison no longer than forty-eight hours; if by that time the prisoner could not furnish bail to secure his attendance at the next Court of Sessions, a justice of the peace in the locality where the offence was committed, was authorized to call in two of his nearest associates, and bring the prisoner to immediate trial.

Prior to the passage of this act, a prisoner who was unable to furnish bail was remanded to jail until the next meeting of the Court of Sessions; in this way a man sometimes remained in prison two or three months before his case came to trial.

Further legislation passed by the Assembly prior to the Revolutionary War, relative to the inferior courts, always tended to expedite the practice of the several law courts of the colony, with a view to promoting the greatest good to both justice and the litigants.

### JURISDICTIONAL ACT.

On December 16th, 1737, "An act for establishing and regulating courts to determine causes of forty shillings and under, in the colony" was passed.

As of old it gave the justices of the peace for the several districts or counties jurisdiction over all actions involving the above mentioned amount; but the act goes on to say, that whereas a summons was to be served on a defendant two days previous to

his appearance, this gave warning to an offender who, not having much property, was able to remove into some other part of the country, so that plaintiff would thereby lose just debts.

To prevent the continuation of this practice, the Assembly inserted a clause in the act, stating that if any person was indebted to another for a sum up to the value of forty shillings, and neglected or refused to pay such debt, the plaintiff was to go to any justice of the peace, and having shown the latter, under oath, that he had made such a demand on a defendant for the sum due him, it was lawful for such justice of the peace to issue a warrant, addressed to the constable or deputy-constable, nearest to the defendant, commanding him to immediately arrest the defendant, and bring him before the justice of the peace.

The justice was empowered to grant bail in such a case, and was to set the trial over for a specified date, when judgment was to be rendered.

If security were not furnished by the defendant for his appearance at the trial, the justice of the peace was empowered to immediately proceed to try and finally determine the case in a summary way, unless either party required a jury at the trial.

This act also provided that an action in replevin could thereafter be commenced in any of the county Courts of Common Pleas, or the Mayor's Court, where the amount involved did not exceed the sum of forty shillings.



## CHAPTER XIII.

### COURT OF ADMIRALTY.

ORIGIN—TEMPORARY PRIZE COURT OF ADMIRALTY—COURT OF ADMIRALTY DULY CONSTITUTED—ATTWOOD, SPECIAL JUDGE OF ADMIRALTY — ENLARGED JURISDICTION — MARINE COMMISSION—CONDITIONS IN THE COLONY—APPELLATE JURISDICTION.

#### ORIGIN.

The origin of the Court of Admiralty can be traced back to the time of the Dutch dominion; the Court of Schout and Burgomasters, and previous to that, the Court of Director-General and Council, was authorized to hear and determine all admiralty matters that might be brought before them.

The Dutch were very well acquainted with the maritime law of that period, as their mother country was at that time a great sea power; in fact Holland had about five or six separate colleges of admiralty, distributed throughout its relatively small country, wherein this branch of law was systematically taught to future officers of the navy and judges of the admiralty courts.

By the "Duke's Laws," Nicolls was authorized to

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erect a separate Admiralty Court, and accordingly he granted a commission to Luke Santon, to act as judge of the Court of Admiralty, but we have no record showing that a distinct court was erected by Nicolls; it is on record, however, that Santon heard several cases pertaining to maritime affairs, in which he acted as sole judge.

The Mayor's Court, as established by the charter granted by Andros to the city of New York in 1675, was given jurisdiction over all maritime affairs, and the governor was also empowered to issue special commissions to hear cases. By Dongan's commission, he was authorized to establish a separate Admiralty Court, but he went no further than to appoint one judge of admiralty to hear a few cases.

### TEMPORARY PRIZE COURT OF ADMIRALTY.

When Leisler took forcible possession of the government, about 1690, some French vessels that had been captured on the high sea were brought into the port of New York as prizes of war, for England was then at war with France. It was therefore necessary that a Court of Admiralty should take cognizance of the captures, and render judgment as to their disposition; accordingly, Leisler issued a commission to De Lanoy to act as judge of a Court of Admiralty, and also appointed eight associates to aid De Lanoy in his duties; six of this number, besides De Lanoy, who

#### TEMPORARY PRIZE COURT OF ADMIRALTY.

was always to be present, were necessary to constitute a full bench. A registrar and marshal of the court were also appointed. The court continued its session for five days, when the business in hand having been completed, it was discontinued.

#### COURT OF ADMIRALTY DULY CONSTITUTED.

The first regular Court of Admiralty for the province was erected by Governor Fletcher, who was instructed by a special warrant from the Lords of Admiralty, to do so. The governor and his council appointed William Pinhorne as the first judge of admiralty, in 1696.

Fletcher, in a letter to the Lords of Admiralty in England, stated that the colony of New York, and in fact most of the other English colonies in America, held regular Admiralty Courts without having been erected by proper commission. He also protested that, though the King gave him authority to erect a Court of Admiralty, yet the commission he received from the Lords restrained him from appointing a judge, registrar, and marshal of such a court, which officers were absolutely necessary to its existence. Accordingly, on the 29th of April, 1697, the Lords in England sent a special commission to the province, authorizing the governor to appoint William Smith as judge of the Court of Admiralty, John Tudor as registrar, and James Marshall as marshal of the court; it also named James Graham as advocate-general of the Court of Vice-Admir-

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alty of New York, Connecticut, and East Jersey. The commission further stated that in case of the death or inability of any of the above mentioned officers of the court, the governor was to appoint others in their place, and was to notify the Lords of Trade in England of such appointments, for the purposes of ratification or change.

### ATTWOOD, SPECIAL JUDGE OF ADMIRALTY.

When Lord Bellamont was commissioned as governor, he was given power to appoint judges and other necessary officers for this court, and was to submit the names to England for approval. When Attwood came out as chief-justice of the Supreme Court, he bore a commission to act as judge of admiralty.

Attwood received his commission as special judge in admiralty, because the Lords had been apprised of a certain case which was tried here by a Court of Admiralty, of whose action they did not approve. When Attwood got here, he found that judgment had already been given, and as there was no tribunal in the colony that had jurisdiction to review a decision of the Court of Admiralty, he found himself in a dilemma.

He escaped from his predicament by claiming that as the matter in question involved the property of the Crown, the exchequer branch of the Supreme Court had cognizance of the case. Attwood, who consulted only his own caprice, proceeded to

#### MARINE COMMISSION.

review the decision of the Admiralty Court, and passed judgment.

#### ENLARGED JURISDICTION.

At this time the court had been permanently established, and it was considered advisable that the offices of advocate-general of the court, and attorney-general of the province, should be united. This was done in Lord Cornbury's time. On the 13th of June, 1702, he appointed John Bridges to act as the judge.

On April 1st, 1703, Roger Mompesson was commissioned from England to act as the judge of the Admiralty Court of Massachusetts, New Hampshire, Connecticut, Rhode Island, Pennsylvania, New York, and New Jersey.

It was thought that one court and one set of officers could transact all the admiralty business of the provinces mentioned, but this extensive jurisdiction was later reduced, and when, in 1721, Francis Harrison was commissioned to act as judge, his jurisdiction covered only New York, Connecticut, and the Jerseys. The next judge of admiralty of whom we have mention was Lewis Morris, who was commissioned in 1738.

#### MARINE COMMISSION.

On November 5th, 1760, a special commission was issued to try and punish all crimes committed on the high seas. It was composed of Lewis, John

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Chambers, Daniel Horsmanden, David Jones, William Smith, John Cruger, Simon Johnson, and Robert R. Livingston.

This commission continued in existence until August 2nd, 1762, when Governor Monchton and his council appointed Richard Morris to act as judge and to hold office during the governor's pleasure.

In 1763, Richard Nicholls was especially appointed by the High Court of Admiralty in England, to act as registrar and clerk of the respective Courts of Vice-Admiralty in existence in New York, Connecticut, and the Jerseys. From that time we have no court records.

### CONDITIONS IN THE COLONY.

When Tryon became governor of the province, he was requested by the Lords of Trade in England to report to them concerning conditions in the colony. In the report is to be found some mention of the Courts of Admiralty, and we note that Morris and Nicholls still held their offices at that time; it was also stated in the report that the conditions under which the judges and other court officers held office was by commission from the Crown, and that no salary was granted them; that the court's procedure was in conformity with the civil law of England, and by that time had assumed cognizance of practically every branch of the trade laws then existent in England.

## APPEALS FROM ADMIRALTY COURTS.

### APPELLATE JURISDICTION.

Up to or about 1763, all appeals from the Courts of Admiralty within the colony were heard by the High Court of Admiralty in England; but in that year an act was passed by Parliament that any disputes arising between the Crown and the colonies relative to revenues or trade, could be brought to trial in any court of record or Courts of Vice-Admiralty in the province. It also recommended that a High Court of Admiralty for all America be established to hear all appeals in matters relating to maritime affairs, and trade in general. This court was finally established in 1768.

The original act of Parliament had provided for the establishment of only one court, to be known as the Court of Vice-Admiralty, or Court of Admiralty for all America, with jurisdiction over all matters pertaining to maritime affairs.

It was found inconvenient to hear all cases in one court, and the act was so amended as to read that an action could be brought in any Court of Vice-Admiralty in the colony nearest to the location where the cause of action arose, and a High Court of Admiralty for the entire continent was established, to hear appeals from the lower courts.

Morris was the last judge of Admiralty in the province of New York. In 1774, he resigned his office because his sympathies were with the patriots,

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and he did not feel that he could hold any position under the Crown.

The history of the Admiralty Court will be continued hereafter, from the war up to its abolishment by federal act.

## CHAPTER XIV.

### PERIOD BEFORE THE WAR.

BENCH AND BAR—DISTRUST OF THE COLONIAL BAR  
—COLDEN'S LETTER—AFFILIATION OF JUDGES—  
SUBJECT UNDER CONSIDERATION.

#### BENCH AND BAR.

For a period of twenty years immediately prior to the opening of hostilities between the colonies and Great Britain, much disorder existed among the bench and bar. The calm before the approaching storm seems to have instilled, as though by premonition, an unsettled and restless condition of affairs which could be settled and adjusted only by the issue of war.

In a country so rich in natural resources, and so commercially progressive, the bar had early assumed the ascendancy, and was at this culminating epoch the dominant class in the province.

A perusal of contemporary history but lends confirmation to this statement; the vigorous agitation against English rule had been fostered for the greater part by the colonial lawyers, who by their influence and eloquence urged the colonies to declare their independence, and assert it, if needs be, by an appeal to arms.

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### DISTRUST OF THE COLONIAL BAR.

About ten years before the actual declaration of hostilities, and during the official term of Lieutenant-Governor Colden, the government was forcibly impressed by the pernicious influence which the lawyers of the day exerted over the people of the colony.

#### COLDEN'S LETTER.

In a letter to England, written in 1765, Colden says: "The dangerous influence which the profession of the law has obtained in this province more than in any other part of His Majesty's dominions is a principal cause of disputing appeals to the King, but as that influence likewise extends to every part of the administration, I humbly conceive that it has become a matter of state, which may deserve your Lordship's (the letter was written to the Earl of Halifax) particular attention. After Mr. Delancey had, by cajoling Mr. Clinton, received the commission of chief-justice, during good behavior, the profession of the law entered into an association, the effects of which I believe your Lordship had formerly opportunity of observing some striking instances. They proposed nothing less to themselves than to obtain the direction of all measures of government by making themselves absolutely necessary to every governor in assisting him while he complied with their meas-

ures and by distressing him when he did otherwise. For this purpose every method was taken to aggrandize the power of the Assembly where the profession of the law must always have great influence over the members, and to lessen the authority and the influence of the governor. In a country like this where few men, except in the profession of the law, have any kind of literature, where the most opulent families in our memories have arisen from the lowest ranks of the people, such an association must have more influence than can be easily imagined. By means of their profession, they become generally acquainted with men's private affairs and necessities; every man who knows their influence in the courts of justice is desirous of their favor and afraid of their resentment. Their power is generally strengthened by enlarging the powers of the popular side of government, and by depreciating the powers of the Crown. The proprietors of the great tracts of land in this province have united strongly with the lawyers, as the surest support of their enormous and iniquitous claims, and thereby this faction has become the more formidable and dangerous to good government. Mr. Prat, who had no family or private connection in this province, while he was chief-justice, discovered the dangerous influence of this faction in the administration of justice, as well as otherwise, and he begged the assistance of government to have it crushed, but he was prevented by death. Many

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who have felt or perceived the bad effects of the domination of lawyers, lament the loss of such a judge. All associations are dangerous to good government; more so in distant dominions and associations of lawyers—the most dangerous of any next to the military. Were the people freed from the dread of the dominion of lawyers, I flatter myself with giving general joy to the people of this province. I never received the least opposition in my administration, except when I opposed the views of this faction. I am confident their views would be entirely defeated by the means I humbly proposed in my preceding letter with the concurrent assistance of His Majesty's ministers, when it becomes necessary." (New York Colonial Documents, Vol. VII, 705.)

In fact the nation as a whole had by this time learned to regard the profession of the law and its champions as the palladium of liberty and safeguard of their rights and privileges. Many read law-books as literature, and Blackstone's Commentaries are said to have had as great a sale in America as in England.

### AFFILIATION OF JUDGES.

The judges who had been appointed by the Crown, viz.: The judges of the Supreme Court, with the exception of Robert R. Livingston, the mayor of New York and the master of the rolls, all remained loyal to the Crown; but the inferior

#### AFFILIATION OF JUDGES.

judges and justices, and the great bodies of lawyers, took up the cause of the colonists, and many of them attained positions of great trust in the new government that was formed during the war.

After the British obtained possession of New York City, Long Island, and parts of Westchester, the royalist judges continued to exercise their judicial functions within these boundaries. Justices Jones and Ludlow retired to their estates on Long Island, where they held court. Chief Justice Horsmanden remained in New York City, where he endeavored to perform the duties of his office in trying cases until his death, in 1778.

General Howe appointed Ludlow as chief-justice, and in 1780 the latter was also made master of the rolls, and empowered to hear and determine controversies until civil government should be restored. Ludlow also acted in the capacity of admiralty judge and superintendent of police for Long Island.

Many have maintained that the subject of contention between the colonists and royalists, from the drafting of the Stamp Act to the Declaration of Independence, was the legal right or wrong of taxation without representation. The lawyers were the ones who fanned sparks of dissension into a flame that razed English sovereignty in America to the ground.

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SUBJECT UNDER CONSIDERATION.

We are now arrived at the crucial period in the history of the courts of this state, and before proceeding with the subject, it is essential that the reader have a complete understanding of the courts of the colony of New York, their jurisdiction and general powers, because, as we shall see, the newly created state merely re-established, with some amendments, all the courts that had existed previous to the war.

## PART II.



CONSTITUTIONAL PERIOD—1777-1909.



## CHAPTER XV.

### EFFECT OF WAR ON THE COURTS.

LOYAL JUDGES—NEW YORK CITY UNDER MARTIAL LAW—GENERAL ROBERTSON IN COMMAND OF NEW YORK—PATRIOTIC CONVENTION—COMMITTEES OF SAFETY—DISTRICT COMMITTEES—INIQUITOUS SYSTEM—CONVENTION OF REPRESENTATIVES OF THE STATE OF NEW YORK—FIRST CONSTITUTION OF NEW YORK—CONSTITUTIONAL PROVISIONS—COMMISSION FOR SOUTHERN DISTRICT.

#### LOYAL JUDGES.

The judges who had remained loyal to the Crown made every effort to continue in the faithful discharge of their judicial duties. So far as practicable, the several sessions of court were continued in the different localities; but as the great mass of the people espoused the patriotic cause, they ignored the tory judges, and refused to bring any action before them.

The great mass of litigation was brought before the ex-officio judges who had seen fit to resign because their sentiments were with the people, and these judges were forced to try all manner of

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cases, even though but one judge constituted the entire bench.

The last circuit of the Supreme Court under the provincial government was held by Thomas Jones, at White Plains, New York, in April, 1776, and history tells us that the session was not much of a success, and did not last the usual length of the term.

## NEW YORK CITY UNDER MARTIAL LAW.

After the outbreak of hostilities, and when Washington was in possession of the city of New York, he did not interfere with the local administration of the law and the courts of justice, but allowed them to continue as previously.

After the capture and occupation of the city of New York by the British under General Howe, the latter issued an edict closing all the civil courts, and declared the city under martial law. Thieves and criminals of all descriptions went unpunished, and the helpless inhabitants groaned under the military yoke, without redress of their grievances. A petition to re-establish civil government, addressed to the general, was ignored. During the war a semblance of justice was maintained in the city, but, as has been previously said, the people would countenance no judge who was loyal to the English king; indeed, in some localities, the inhabitants themselves tried to form a local judiciary, but this was not approved of by the military rulers.

## PATRIOTIC CONVENTION.

### GENERAL ROBERTSON IN COMMAND OF NEW YORK.

When General Robertson was given command of the forces at New York in 1780, he listened to the earnest appeals of the people, and established Courts of Police to try petty criminal offences; he also made some pretence of re-establishing the Supreme Court on lines similar to those before the Revolution, appointing William Smith as the chief justice thereof; but the people never recognized Smith because of his loyalty to the Crown, and we have no records showing that any cases were tried before him.

Robertson, however, held Courts of Chancery, he acting as chancellor. From January, 1781, until June, 1783, a session of court was convened once each month. We have absolutely no records of either Supreme Courts or Courts of Chancery held during the war, because the British took all records with them when they evacuated New York. The only exception is the opinion of Governor Tryon, which was delivered while Jauncey was master of the rolls.

## PATRIOTIC CONVENTION.

When the battle of Lexington was noised throughout the thirteen colonies, a convention of republicans of the state of New York was called. All the convention accomplished was to recommend that the inhabitants of each county choose delegates

## THE COURTS OF THE STATE OF NEW YORK.

to a general convention. Instead, the people chose electors who in turn elected county committees of safety to name delegates to a "Provincial Congress." This "Congress" first met on May 22nd, 1775, but gave no attention to local matters, devoting itself to the consideration of the more momentous and pressing concerns of the republican cause within the colony. Civil government within the separate colonies was entrusted to the committees of safety.

### COMMITTEES OF SAFETY.

The committees were accountable for their action to the provincial congress, of whom they were expected to take counsel, and by whose inspiration their measures were to be dictated.

These committees seem to have generally relieved themselves of this accountability, and to have exercised legislative, executive, and judicial powers in accordance with their own conceptions of the public weal.

On account of the large number who composed the committees, it was found inconvenient to refer minor matters to the committees as a whole; hence sub-committees of two or three were appointed for each locality. The power they exercised in the settling of disputes was similar to that of the general committee, but subject to the latter's control and supervision.

## INIQUITOUS SYSTEM.

### DISTRICT COMMITTEES.

These sub- or district committees usually had jurisdiction of all judicial affairs, and until the meeting of the convention of the people of the state of New York, after the signing of the Declaration of Independence, they acted in a summary manner. Their chief function seems to have been to arrest and imprison persons suspected of espousing Tory sentiments. These unfortunates were subjected to a political martyrdom which can be explained only by the strenuous partisanship which permeated all institutions and classes in the colonies. Patriotic zeal, which was now at a premium, led the eager colonists on the "hunt for suspects," and when one was found, a complaint was lodged against him with the committee, which was, in effect, to seal his doom.

### INIQUITOUS SYSTEM.

Bail was not accepted, and gross injustice was thus perpetrated on many innocent victims. Should investigation show that the prisoner was wrongfully apprehended, he was accordingly acquitted, but he was nevertheless forced to pay a heavy fine and all costs. This led to many complaints, and the presentation of an earnest appeal for a convention to organize a more righteous form of government.

## THE COURTS OF THE STATE OF NEW YORK.

### “ CONVENTION OF REPRESENTATIVES OF THE STATE OF NEW YORK.”

This resulted in the election of a body styling itself, “ A Convention of Representatives of the State of New York.” A meeting was called for July 9th, 1776, at White Plains, but on account of the imminent danger from the proximity of the enemy at New York, it shifted from place to place, until it was finally able to hold an undisturbed session on April 20th, 1777, at Kingston.

### FIRST CONSTITUTION OF NEW YORK.

This convention framed the first constitution of the state of New York, establishing a republican form of government. After citing the fact that the Continental Congress adopted the Declaration of Independence, which was made a part of the constitution, the document, in about fifty sections, organized the new government.

Sections 24, 25, 27, 28, 32, 33, 34, 35, and 41 relate to the establishment of courts within the state. But one new court was created, the constitution recognizing the existence of all the courts in the colony of New York prior to the Declaration; thus was legislative sanction finally given to these hated tribunals, against which the colonists had struggled for so many years.

## THE CONSTITUTION OF 1777.

### CONSTITUTIONAL PROVISIONS.

The constitution provided that the governor, chancellor, the judges of the Supreme Court, or any two of them, should constitute a council of revision to accept or amend all laws passed by the Legislature.

It prohibited the chancellor or judges of the Supreme Court from actively filling any office other than that of delegate to the Continental Congress, and the first judges of the several County Courts from holding any office other than that of delegate to the Continental Congress, or senator. Should any of them be elected to any other office, he was allowed to exercise his option as to which office he preferred to fill.

By constitutional provision, the officers of the different courts were to be appointed by the judges of the respective courts at their pleasure.

The constitution also provided that in all trials of indictments or impeachments the defendant might retain or be assigned counsel, for his defence. By a section of the constitution it was declared that all laws in existence in the colony prior to the battle of Lexington, April 19th, 1775, were to continue in force in the state of New York, subject to any limitation and amendment that might be enacted by the Legislature. This same section legally recognized the courts then in being, and declared as

## THE COURTS OF THE STATE OF NEW YORK.

part of the common law of the state, any laws passed by the convention of the state of New York; these were to be later formally ratified by legislative sanction.

Trial by jury was rendered inviolate, and the Legislature was prohibited from passing an act of attainder for any crime other than those committed before the termination of the late war, and from creating any new courts except as shall proceed according to the common law.

On the 8th of May the council of revision appointed Robert R. Livingston first chancellor. Judges of the Supreme Court and inferior courts, and an attorney-general, were also appointed. On the 17th of October, these officers were formally commissioned, and entered upon their active duties.

### COMMISSION FOR SOUTHERN DISTRICT.

On October 23rd, 1779, the council passed an act which appointed a commission for the southern district of the state, including New York City, to be composed of the governor, members of the Legislature, the chancellor, Supreme Court judges, the attorney-general and county judges of the district. This body was to govern the district in the interval that would ensue between the evacuation of New York by the British, and the first meeting of the Legislature. Any seven of the above, of whom the governor was to be one, were empowered to act for

COMMISSION FOR SOUTHERN DISTRICT.

a period of sixty days, unless the Legislature should meet in the meantime. This commission was formally organized shortly after the evacuation, November 25th, 1783, and continued in power until February 12th, 1784, during which time it enacted some important ordinances which were later ratified by the Legislature of the state.



## CHAPTER XVI.

### THE COURT OF COMMON PLEAS OF THE CITY OF NEW YORK, OR THE MAYOR'S COURT.

DURING WAR—DAVID MATHEWS—FIRST MAYOR UNDER CONSTITUTION—RULES OF PRACTICE ADOPTED—FORMAL OPENING OF COURT—STATUS OF COURT—POPULARITY OF COURT—PROMINENT LAWYERS—ALEXANDER HAMILTON—RUTGERS vs. WADDINGTON—STATE SOVEREIGNTY—HISTORY OF THE CASE—INDEMNITY ENACTMENT—SENSATIONAL TRIAL—CONSTITUTIONAL ARGUMENT OF HAMILTON—THE COURT'S DECISION—POPULAR INDIGNATION—ABLE AND UPRIGHT JUDGES—RECORDER AS JUDGE OF MAYOR'S COURT—OFFICIAL DESIGNATION OF COURT OF COMMON PLEAS—MAYOR DEPRIVED OF JUDICIAL POWER—JUDGE IRVING—COURT OF SESSIONS—APPELLATE JURISDICTION—CONSTITUTIONAL ENACTMENT—JURISDICTION OF COMMON PLEAS—COURT ABOLISHED.

DURING WAR.

In 1766, Whitehead Hicks, an eminent and well known lawyer of his time, was appointed by the

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governor to act as mayor of the city of New York. He held this position for a period of about ten years, and presided in the Mayor's Court. When, in 1776, a vacancy was created in the Supreme Court by the resignation of Robert R. Livingston, who had espoused the popular cause, Hicks resigned the office of mayor, and was appointed a justice of the Supreme Court in Livingston's place; but as soon as the Declaration of Independence was published broadcast throughout the thirteen colonies, Hicks, who at heart sympathized with the patriotic cause, retired from active duty as a judge, and died shortly after, while the war was still at its height.

### DAVID MATHEWS.

David Mathews was appointed mayor in his stead in 1776. Mathews had previously been an alderman in the city council, and subsequently, having been indicted by the committee of safety for the county of New York, as a conspirator against the patriotic cause, he was condemned to death; but he either escaped the clutch of the committee or was pardoned, for records show that he acted in the capacity of mayor as late as 1780.

### FIRST MAYOR UNDER CONSTITUTION.

When the English evacuated the city of New York and its vicinity, in 1783, the inhabitants immediately took measures to organize a municipal

#### FORMAL OPENING OF COURT.

government under the new constitution. In the early months of 1784, the commission for the southern district of the State of New York appointed James Duane as mayor of the city, and Richard Varick was made recorder.

#### RULES OF PRACTICE ADOPTED.

Duane immediately promulgated rules of practice for the Mayor's Court and the Court of Sessions, consisting of thirty-five sections. He convened the Mayor's Court for the 10th day of February, 1784. On this day he publicly adopted the rules that he had composed, breaking up the monopoly of the eight lawyers, who, previous to the Revolutionary War, had been the only ones licensed by the governor to practice in the Mayor's Court; instead he proclaimed an order authorizing all attorneys who practiced in the Supreme Court, to practice before the Mayor's Court. He then adjourned the session of the court for a period of three weeks, to allow time for the issuing and returning of processes.

#### FORMAL OPENING OF COURT.

On the 24th of February, 1784, the court formally opened for business, with Duane and Varick on the bench. On that day one hundred sixteen processes were returned and some of the attorneys who then appeared before the court were men like

## THE COURTS OF THE STATE OF NEW YORK.

Alexander Hamilton, Aaron Burr, Colonel Troup, William B. Livingston and William S. Livingston. On the next adjourned day one hundred sixty-seven writs were returned, and at a later session, in July of the same year, one hundred ninety-eight were returned.

### STATUS OF COURT.

This court, from the date of its establishment by Duane, accomplished four times as much business as the Supreme Court, and extended its functions to include actions of every nature. The reasons ascribed for this were the great confidence felt in the legal ability of Duane, and the frequency of the sessions of the Mayor's Court, which to a great extent facilitated business.

Duane had become very prominent in the legal profession before the Revolutionary War, by his learning, integrity, and capacity for business, and his legal practice was very considerable. During the war he took a very active part in the business of the colonial cause, and acted as a member of the Provincial Congress, of the committee of safety for his county, of the convention that adopted the first constitution of the state, and also of the Continental Congress. He was one of the members of the latter body when it adopted the Declaration of Independence.

Such a reputation and character naturally attracted into the court where he presided, every

#### PROMINENT LAWYERS.

lawyer of ability in the city and neighborhood. This court became during his term, and during the terms of his able successors, not only the leading court in the city, but one of the most important tribunals within the state.

#### POPULARITY OF COURT.

After Duane and Varick, men like Sam Jones, James Kent, and Richard Harrison were respectively the recorders of the city, up to the year 1800, and the leading lawyers of the state came before this tribunal; amongst them, deserving of special mention, were Alexander Hamilton, Aaron Burr, Colonel Troup, the Livingstons, Egbert Benson, Morgan Lewis and Josiah Ogden Hoffman, all of whom made their first forensic efforts in the Mayor's Court, and later became famous in the history of the jurisprudence of the state; in fact this court gained so much popularity that, although it was the privilege of a defendant to remove an action from it to the higher tribunals, if the amount involved exceeded twenty pounds, this right was rarely invoked, for the records of the court show that it tried cases of the highest importance, involving large sums of money and the title to important property.

#### PROMINENT LAWYERS.

At that period, the prominence and practice of a lawyer was judged by the number of writs he sued

out, or to which he appeared. The three attorneys, who, to judge from the records of the Mayor's Court, seem to have been in the largest practice, were Burr, who appeared to seventeen writs at one session, Harrison, who appeared to thirteen at another, and William S. Livingston, who exceeding both of them, appeared to sixty-seven writs at a session in July, 1784.

At the preceding May term, we have the first instance of an attorney being specially admitted to practice in the court. Cornelius Bogert, upon his production of a license from the Supreme Court, was admitted at that term.

ALEXANDER HAMILTON.

Alexander Hamilton had not had much practice as an attorney before the war; during the war he had rendered active and meritorious service to the patriotic cause, and it was only after the conclusion of hostilities that he took up the study of law. The first cause in which he appeared was one of which we must make special mention, for it not only involved important principles affecting the life of the entire nation, but we have the opinion of Duane in that case, considered at all times as one of the most important decisions ever rendered in the judicial history of the state.

RUTGERS VS. WADDINGTON—STATE SOVEREIGNTY.

The case in question was the matter of Rutgers

vs. Waddington, and it brought into discussion the powers and rights of the confederated and of individual states. It was this question that attracted Hamilton's attention to the case, and led to his bringing forth the principles growing out of the union of the states, and the establishment of independence—principles which he afterwards brought forth at the National Convention in 1787, and which were subsequently embodied in the Constitution of the United States.

#### HISTORY OF THE CASE.

The cause of this action was an act which was passed in 1783, providing that anyone who, by reason of the invasion of the enemy, had left his place of residence, might bring an action for trespass and damage against anyone who had occupied or injured his property or who had received his goods while the same were under the control of the enemy; it prohibited the defendant from pleading or giving any evidence that the property was occupied, injured, or destroyed by a military command.

The action was brought under the statute to recover six years' rent, for the occupation by the defendant of an ale-house in the city of New York, while the British were in possession here. The defendant pleaded the possession of the city by the British army, and a license from the general in command in 1778, given to him, a British subject, for

## THE COURTS OF THE STATE OF NEW YORK.

the purpose of commerce, to use and occupy the premises until the 30th day of April, 1780.

He brought forth, as additional evidence, the authority from Sir Henry Clinton (the last of the British generals here) to carry on the business after 1780; also the Treaty of Peace, by which all claims that the citizens who were subject to either of the contracting parties might have against each other for indemnity for damages or injuries done to the public and individuals during the war, were relinquished and released. To all of this the plaintiff demurred on the ground of the statutory act before mentioned.

### INDEMNITY ENACTMENT.

This act, the gist of which was that one belligerent might commence an action against another after articles of peace had been agreed upon, to recover damages for loss of, or injury to, property, occasioned during the war, was without precedent in the history of the nations of the world. The passage of such an act can be explained by a review of the extreme hatred and dislike felt towards the royal adherents by those who had espoused the patriotic cause, and who had suffered so much from a monetary standpoint, both in real and personal property, on account of the war.

The time was just ripe for such action on the part of the Legislature; absolutely no consideration was felt for any Tory and any measure against

## INDEMNITY ENACTMENT.

their interests and in favor of the patriots was considered fit and proper by the latter. The principles involved in this case were so near the hearts of all the inhabitants, and on the outcome of this trial depended the final adjustment of property of such enormous values, that the interest excited was general and widespread.

Probably no other single case in this state has ever drawn such throngs to a courthouse, nor has it had such distinguished men of the legal profession of any one period, to argue the points at issue.

## SENSATIONAL TRIAL.

The defendant in addition to engaging Hamilton for his counsel, also retained William S. Livingston and Morgan Lewis. Hamilton had every stimulant for putting forth his utmost effort, for the opinion of the public at large was against his side, and the excitement and interest in the outcome of the case were not confined merely to those who had a pecuniary interest at stake, but extended to the entire population of the state.

The Revolutionary War had just been brought to a happy finish; the city was still in a disordered state, and the antagonistic features in respect to the course and principles of government, which later led to the formation of the different political parties, had already become the subjects of discussion and agitation. Besides all these interests, the relative positions of the parties to this action added

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especially to the deep interest felt in the proceedings of the trial; the defendant was a worthy merchant of the town and a loyalist, who had lived in the city for many years, and had adhered to the British cause throughout the entire war, while the plaintiff was a poor widow, who had lost her all during the war, and sought to regain some of her possessions by this action.

As a finishing touch to all this the attorney-general of the state, Egbert Benson, volunteered his services on behalf of the plaintiff, thus making the number of counsel on each side equal, for Colonel Troup and Mr. Lawrence also appeared for the plaintiff.

The courthouse used for this great occasion was a hall that had been ravished during the war by the British troops. A great audience gathered within its four walls, and the windows were jammed with eager faces, waiting to catch every word that fell from the lips of the learned counsel. Six of the latter engaged in the case were heard in the argument, but the leading points were brought out mainly by Egbert Benson on the one side, and Alexander Hamilton on the other.

### CONSTITUTIONAL ARGUMENT OF HAMILTON.

Hamilton argued in opposition to the attorney-general, who placed his main reliance upon the statute aforementioned, and the sovereign capacity of the state to pass any act.

CONSTITUTIONAL ARGUMENT OF HAMILTON.

Hamilton contended that the act passed by the legislature was in direct violation of international law, which, by the constitution of 1777, had become part of the common law, and thus an integral part of the law of the state. This he followed up with a pithy discussion upon the general rights of war, and the relations of belligerents to each other in their capacity as individuals, after the close of the war.

He claimed that the defendant was protected by the terms of the treaty, and that the state had no power to deprive him of any right or privilege that the treaty granted; that the Continental Congress was one of the parties to that treaty, and it had no right to violate any of its terms; surely then, the state had no such right.

In answer to this the attorney-general argued that each state was an independent sovereignty in respect to its own citizens and their property; that it had the power to pass laws to regulate their rights, and to fix their liabilities; that it might enact a law affecting the property or person of anyone within its jurisdiction; in that respect, he claimed the sovereignty of the people in each and every state was absolute and beyond control of even the Continental Congress.

Hamilton answered this argument by one that has gone down the pages of history, and which laid the basis for the arguments which men like Webster advanced against states' rights. Hamilton said that if what the learned attorney-general

stated were really the case, then the union of states was but a fiction, and he went into a deep examination of the nature of the union established by the thirteen colonies, and the general principles governing a popular government.

The sovereignty of the people, he claimed, began with the compact which united them together in their attempt to cast off the yoke of England and establish their own government. They were not an aggregation of states, each independent of the other; they had united themselves for a common end and purpose, by the Articles of Confederation, and had vested in a general and national Congress those powers which were essential to the proper administration of their affairs in their united capacity. The external sovereignty of the United States could be recognized only by a foreign nation. It was represented by the states in their united characters and it was through the National Congress, composed of delegates sent from each of the states who represented the people as a whole. By the Articles of Confederation, any state was prohibited from declaring war except in a case of actual invasion of its territories, or a threatened invasion by the Indians. It had no right to make treaties with foreign countries; the general power of declaring war, or that affecting peace, or of entering into any treaties was vested exclusively in the Continental Congress. The making of a treaty, therefore, was within the power of Congress; it bound each

state; and no state could pass a law violating such a treaty, or repudiating any of its provisions.

To this Benson answered that whatever might be claimed as the nature of the confederation, it could exist only by the consent of the states, as long as they saw fit to continue members of it, and that if a state thought fit to return again to its individual sovereignty, it had the power to do so at any time.

It was here that Hamilton put forth his strongest argument in answer to the attorney-general. He claimed that the state of New York was a party to the Declaration of Independence and also to the Articles of Confederation. The first was a league entered into by thirteen colonies, by which they threw off their allegiance to the British crown, and as united colonies declared themselves free and independent of any government but their own, which they might establish. The other was an agreement entered into by these thirteen colonies, which, by its terms, was for the promotion of perpetual union; as separate states they had therefore entered into a contract for purposes expressed by the instrument by which the contract was formed, and, like any other contract, no one part of it could be withdrawn or released from its obligations without the general consent of the whole.

To the argument that the Mayor's Court, as a state tribunal could not disregard the laws of the state, although such laws might be in conflict with what had been agreed to by the National Congress,

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he made answer that the Articles of Confederation having made no provision for the establishment of a judiciary, except in case of dispute between individual states, or in cases of captures or crimes committed upon the high sea, the state tribunal must recognize and carry out the measures of the National Congress.

### THE COURT'S DECISION.

In delivering his judgment, Duane mentioned the uncommon ability with which the case was argued, particularly by Hamilton and the attorney-general. He held that the defendant was liable for the rent of the premises for three years, as their use during that period could not be regarded as having any relation to the war; the license from the commissary-general conferred upon the defendant no right to the possession, that officer having no authority to grant one. For the remaining three years, during which the property was held under an order from Sir Henry Clinton, by whom or whose agent the rent had been annually claimed, he held that the defendant was not liable. By the law of nations, restitution of the rents, issues of houses or lands collected in good faith under the authority of a commander-in-chief while in possession of the city during a state of war could not be enforced; the law of nations had become, by the constitution of the state, the law of the state, and it must be regarded as a fundamental law, applicable to, and in force,

## THE COURT'S DECISION.

throughout the confederacy. By the federal compact, the different states were united into one body; in respect to one another and in their national affairs, they exercised a joint sovereignty, the will of which could only be expressed by the acts of the delegates of the different states convened in a Continental Congress. Abroad, the states could only be recognized in their federal capacity, and having joined together and having formed a nation, they could only be recognized and governed by the law of nations; no one state could arrogate to itself the right to change, at pleasure, those laws which are received by the common consent of the whole civilized world; for a separate state to alter or abridge any one of the known laws of nations was contrary to the nature of the confederacy, in conflict with the nature of the articles and dangerous to the life of the Union. The judge goes on to say that, in his opinion, the state's rights should not prevail above the national rights.

## POPULAR INDIGNATION.

When the decision was made known, it was followed by a burst of popular indignation. A public meeting was called a few days later, and an address to the people of the state was adopted, said to have been prepared by Melancton Smith, a prominent lawyer who was later reputed to be the leader of the Anti-Federal Party in the state convention which ratified the national constitution.

## THE COURTS OF THE STATE OF NEW YORK.

In the address it was acknowledged that there was uncommon ability and learned display in the argument, and it conceded the independence of courts of justice, of the people, and the Legislature; but it denounced the decision as a violation of the privileges of the people, and an act of judicial tyranny, and it closed with a resolve to carry the case on behalf of the people to the Court of Errors.

The agitation did not stop with the adoption of this address, but the subject was further brought up before the Legislature, and a resolution was passed declaring the decision to be subversive of all law and order, and calling upon the council of appointment to appoint as mayor and recorder, persons who would be governed by the law of the state.

The defendant, in view of the threatened appeal, compromised, on the claim that the decision of Duane settled the law on that point, and an act based on principles above set forth was afterwards put into effect by a motion of Hamilton in the Legislature, in 1787. He also had the original statute upon which the plaintiff based her case repealed the same year.

## ABLE AND UPRIGHT JUDGES.

Duane continued to preside in this court until he was appointed by Washington, after the United States had been organized in 1789, as district judge of New York, when Colonel Varick succeeded him

#### ABLE AND UPRIGHT JUDGES.

as mayor. The latter held office for about six years, during which time he rendered some important decisions, all of which were affirmed by the Supreme Court. Some of these decisions may be found in Johnson's Cases in the first volumes, but our reports do not commence until ten years after he ceased to act in the capacity of mayor.

For the next thirty-five years, in the persons of the mayors and recorders of the city of New York, this state boasted a list of the most eminent men and lawyers of the time; to this there was but one exception. During this period, the mayors of the city were Edward Livingston, De Witt Clinton, Marinus Willett, Jacob Radcliffe and Cadwellader D. Colden; the recorders were Samuel Jones, James Kent, Richard Harrison, John B. Prevoost, Maturin Livingston, Pierce G. Van Wyck, Josiah Ogden Hoffman, Jacob Radcliffe, Peter A. Jay and Richard Riker.

#### RECORDER AS JUDGE OF MAYOR'S COURT.

While De Witt Clinton was the mayor and Maturin Livingston was recorder, the former, either through choice, or from the increasing duties of his office, ceased to preside in the Mayor's Court, and from that time until 1821, the recorder sat as the presiding judge of that court, and the mayor presided in the Court of Sessions, the recorder being the recognized head of the one, and the mayor of the other.

## THE COURTS OF THE STATE OF NEW YORK.

### OFFICIAL DESIGNATION OF THE COURT OF COMMON PLEAS.

In 1821, owing to the increasing importance of the Mayor's Court, and the mayor having long ceased to preside, it was deemed appropriate that its title be changed from "Mayor's Court" to "Court of Common Pleas for the City and County of New York."

An act was passed which effected this change, and created a first judge, to hold his office during good behavior, or until he should attain the age of sixty years; but by the constitution adopted one year later, the tenure of the office was limited to five years, and the power of appointment was vested in the governor. The mayor, recorder and aldermen were authorized to sit in it, but the first judge was empowered to hold court without them, and it was made his especial duty to hold the court.

### MAYOR DEPRIVED OF JUDICIAL POWER.

John T. Irving was appointed the first judge of the court, and upon his being appointed, Stephen Allen, who was the mayor, ceased to preside in the Court of Sessions, although no provision to that effect was contained in the act.

Recorder Riker who had sat for some years in the Mayor's Court, took the mayor's place as presiding judge of the Sessions and Judge Irving presided alone in the Court of Common Pleas. Neither the

#### COURT OF SESSIONS.

mayor, recorder, nor the aldermen, although authorized to do so, ever took any part in the court's proceedings thereafter, except when all the judges were convened in what was denominated a County Court.

This tribunal, composed of the first judge, the mayor, recorder, and all the aldermen, was occasionally convened for the impeachment and trial of officers of the municipal government, the first judge acting as the presiding officer, until it was finally abolished by act in 1826.

#### JUDGE IRVING.

Judge Irving presided alone for thirteen years, during which period very eminent and learned members of the bar appeared before him in cases tried in the court. Irving continued to preside as first judge until his death, serving in all, seventeen years. He was a man who was honored and respected by the profession as a whole; he was a lover of justice, and withal, a good business man, having a weakness for letters, like his famous brother, Washington Irving. Upon his death, the bar erected a handsome marble tablet in the courtroom, to his memory.

#### COURT OF SESSIONS.

In 1800, the terms of the Court of Sessions were directed to be held six times a year, and in 1813, once a month.

## THE COURTS OF THE STATE OF NEW YORK.

In 1850, a city judge was created, with the same powers as the recorder. In 1847, the power of the aldermen to sit in the Court of Common Pleas was taken away; in 1853, they were also deprived of their right to sit in the Court of Sessions.

### APPELLATE JURISDICTION.

Under the old laws, any cause might be removed from the Mayor's Court to the Supreme Court, where the amount involved exceeded twenty pounds, but in 1789, an act was passed forbidding the removal, except in certain cases, unless the amount exceeded one hundred pounds, or two hundred and fifty dollars.

In 1823, the amount was doubled. In 1837, it was further increased to twenty-five hundred dollars and in 1844 the power to remove any cause was taken away, and the jurisdiction of the court remained thereafter unlimited as to amounts.

### JUDGES OF COMMON PLEAS.

In 1834, an associate judge of the Court of Common Pleas was created, who was vested with all the powers of the first judge, and Michael Ulshoeffler was appointed to this office. In 1838, upon the death of Judge Irving, Michael Ulshoeffler was appointed judge, and Daniel P. Ingraham associate judge of the court. In 1839, an additional associate judge was created and vested with all the

## JUDGES OF COMMON PLEAS.

powers of the two other judges, and William Inglis was appointed to hold that office.

## CONSTITUTIONAL ENACTMENT.

In 1844, Charles P. Daly was appointed in place of Judge Inglis, and the court as thus constituted, of a first judge and two associates, remained in force until the adoption of the constitution of 1846; by that instrument the Court of Common Pleas and Superior Court of the city of New York, were especially excepted from the general judicial reorganization of the state, but by an act passed in the following year (Laws 1847—79) it was provided that the terms of the judges of both courts should expire on the 17th of January next ensuing, and that an election of judges by the people for each of the courts should take place at the general elections; that the terms of the judges elected should be classified in terms of two, four and six years respectively, to be determined by lot, and that the election of all judges thereafter, in either of the courts, should be for a term of six years.

In June, 1847, all the existing judges of the Court of Common Pleas were elected, and the allotment of terms resulted as follows: Michael Ulshoefffer, two years; Daniel P. Ingraham, four years; Charles P. Daly, six years.

In 1849, Louis B. Woodruff was elected in place of Ulshoefffer, and in June, 1850, Daniel P. Ingraham was appointed first judge. In 1851, Judge

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Ingraham was re-elected for a term of six years, and Charles P. Daly was elected for a similar term, in 1853.

### JURISDICTION OF COMMON PLEAS.

By the judiciary act of 1847, by the code passed in 1848, and as amended in 1849, 1851 and 1853, the Court of Common Pleas exercised unlimited jurisdiction, both in law and equity, where the defendants resided or were personally served with process in the city of New York, or where one or more of the defendants who were jointly liable on contract, so resided, or were personally served in the city.

It also had jurisdiction against corporations created by the law of the state, who transacted their general business or kept an office for the transaction of business in the city of New York; and against foreign corporations upon any cause of action arising within the state, or for the recovery of any debt or damages, whether liquidated or not, arising upon a contract made, executed, or delivered within the state.

By the code, certain actions were required to be tried "in the county where the subject-matter of the action was situated or the cause of action has arisen in that county, of which action the court has jurisdiction, irrespective of the residence of the parties, or the personal service of the process."

They embraced "actions for the recovery of real

## JURISDICTION OF COMMON PLEAS.

property, or of an estate, or interest therein, or for the determination, in any form, of such right or interest; for injuries to real property, for the protection of real property, for the foreclosure of mortgage on real property, for the recovery of personal property distrained, for the recovery of a penalty or forfeiture imposed by statute, except where imposed for an offence committed on a lake, river or other stream of water situated in two or more counties, in which case the action might be brought in any of the counties bordering on such water, and opposite to the place where the offence was committed.”

It also had jurisdiction in all “actions against a public officer, or person specially delegated to perform his duties, or for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such office”; and by the judiciary act, and under a special act passed in 1854 (Laws of 1854—464), “the court also possessed jurisdiction in special proceedings for the disposition of real estate of infants, where such real estate is situated in New York City; the care and custody of the persons and estates of lunatics, persons of unsound mind, or habitual drunkards, residing within the city; the mortgage or sale of the real estate of religious corporations, and in the adjustment of dower in lands within the city.”

Any appeal from its judgment or determination,

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except in an action originally commenced in the "Marine or the Justices' Court, lies directly to the court of last resort—the Court of Appeals." The code made the Court of Common Pleas the court of refuge from the judgment of the Marine or the Justices' Court of the city, and a decision by it of such an appeal was final.

"It also has exclusive jurisdiction upon liens against real estate by virtue of an act passed in 1851, except that when the lien is docketed for a sum not exceeding one hundred dollars, the proceedings may be commenced in the Marine Court or in the Justices' Court in the district where the dwelling is situated." (Laws of 1851—953.)

"It also has exclusive power of remitting fines imposed by the Courts of Sessions as penalties, or of relieving against or remitting judgment entered upon forfeited recognizances under the statutes. (Laws of 1844—469, Laws of 1845—250, Laws of 1854—464.) It also has jurisdiction of proceedings supplementary to execution upon judgments recovered in the Marine and District Courts of the city, where a transcript of the judgment was docketed with the County Clerk and the amount recovered exceeded (exclusive of costs) twenty-five dollars."

In 1854, an act was passed creating a clerk of the court to be appointed by the judges, the clerk of the county having theretofore acted as both clerk of the Supreme Court and of the Court of Common

## JURISDICTION OF COMMON PLEAS.

Pleas; and, to remove all doubt as to the jurisdiction of the court, it re-affirmed its powers in remitting fines and recognizances; in creating and discharging dockets of liens and judgments entered upon recognizances, it affirmed all its previous powers; it conferred upon it all the powers then and thereafter to be vested in the county courts, and generally confirmed its powers as a court of original and general jurisdiction to the same extent as they were had and exercised before the adoption of the constitution of 1846. (Laws of 1854—464.)

### COURT ABOLISHED.

Article VI, section 5, of the constitution of 1895 reads as follows: "The Superior Court of the city of New York, the Court of Common Pleas for the city and county of New York, the Superior Court of Buffalo, and the City Court of Brooklyn, are abolished from and after the first day of January, 1896, and thereupon the seals, records, papers and documents of, or belongig to such courts, shall be deposited in the offices of the clerks of the several counties in which said courts now exist; and all actions and proceedings then pending in such courts shall be transferred to the Supreme Court for hearing and determination. . . ."



## CHAPTER XVII.

### THE SUPREME COURT.

RECOGNITION OF COURT—REGULATIONS OF COURT—FIRST SESSION OF COURT—SALARY—TERMS OF COURT—COURT PROVISIONS—VENUE—ADDITIONAL JUDGES—COURT RULES—CHANCELLOR KENT—STATE REPORTER—DUTIES OF CLERK—NEW TERMS OF COURT—JUDGES' SALARIES INCREASED—CONSTITUTIONAL ENACTMENT—OFFICIAL TENURE OF OFFICE—CHANGE IN TERMS OF COURT—CLERKS—REPORTER—OFFICE OF JUDGE MADE ELECTIVE—POPULAR ELECTION—GRADUAL EVOLUTION OF SUPREME COURT—CONSTITUTION OF 1846—JURISDICTIONAL CHANGES—CONSTITUTION OF 1895—SUPREME COURT, HOW CONSTITUTED—JUDICIAL DISTRICTS—TERMS OF OFFICE, VACANCIES, HOW FILLED—JUDGES TO HOLD NO OTHER OFFICE—REMOVAL OF JUDGES—COMPENSATION, AGE, RESTRICTION, ASSIGNMENT BY GOVERNOR.

#### RECOGNITION OF COURT.

The convention that was convened for the purpose of ratifying the constitution of 1777, adopted at the outset of the American Revolution, made no

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alterations in the manner of selecting judges of the Supreme Court. However, a council of revision and appointment was elected, to consist of the governor, the chancellor, the justices of the Supreme Court, and the senators. The constitution recognized the existence of the Supreme Court, and on May 3rd, 1777, John Jay was elected chief-justice, and Robert Yates and John Marin Scott, associate judges.

Scott declined the office, and John Schloss Hobart, who had received the next largest number of votes, was declared elected to the office of associate judge. The convention also elected Robert R. Livingston as first chancellor and Egbert Benson, first attorney-general, all of whom were approved by the council of appointment.

### REGULATIONS OF COURT.

The judges of the Supreme Court were to hold office during good behavior, and until the age of sixty years, and all proceedings to which the public was a party were to be brought in the name of the People of the State of New York, instead of in the name of the King as formerly.

On the 5th of June, 1777, it was decided that because of the occupancy by the enemy, of southern New York, the term of the Supreme Court should be held at Kingston, as in 1774, until the Legislature should see fit to make a change.

## TERMS OF COURT.

### FIRST SESSION OF COURT.

On the 9th of August, 1777, the first session of the Supreme Court of the State of New York was held at Kingston, and Chief-Justice John Jay delivered the first charge to the grand jury.

### SALARY.

In 1778, the judges were empowered to devise a seal, and on April 4th, of the same year, the salaries of the judges were fixed. The chief-justice was to receive three hundred pounds or seven hundred and fifty dollars, New York currency, and the puisne judges, two hundred pounds or five hundred dollars, New York currency, and forty shillings per day for attendance on the circuits and oyer and terminer, besides their travel fees.

In October, 1779, Richard Morris was appointed to the office of chief-justice, made vacant by the appointment of John Jay as United States ambassador to the Spanish Court.

## TERMS OF COURT.

The first session of the Supreme Court in its Oyer and Terminer branch was held in New York City after the Revolutionary War, on May 18th, 1784. James Duane, who was mayor, and Judge Hobart, commissioned for the oyer and terminer, delivered the charge to the grand jury.

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The terms of the Supreme Court for the different counties were settled in 1785 by act of the Legislature. Two terms were to be held each year in New York, and two in Albany. The court was to sit on the third Tuesdays of January and April at New York, and on the last Tuesday in July, and third Tuesday in October in Albany. The April and October terms were to continue for three weeks and the January and July terms for two.

### COURT PROVISIONS.

It was at the same time provided that the office of the clerk of the court should be at New York, and that of the clerk's deputy at Albany, the latter to be appointed by the clerk. All the court records and papers at Albany were to be removed once every six months, to the New York office, and there placed on file.

### VENUE.

On the 19th of April, 1786, an act passed the Legislature to the effect that all issues joined in the Supreme Court should be tried in the counties where the lands were situated, or the cause of action arose, or the offence was committed, unless the court should order a trial at the bar of the court, a practice resorted to only in cases of great difficulty, or wherein an extended examination was required. This act was not to apply to an action merely transitory, nor to prevent the court from ordering trials by foreign juries.

## COURT RULES.

### ADDITIONAL JUDGES.

In 1792 an additional associate judge, in the person of Morgan Lewis, was added to the bench. In 1794 Egbert Benson was made the fifth judge of the court, thus increasing the number of Supreme Court judges to what it had been under the original act of 1691.

### COURT RULES.

Judge Benson drew up the first rules of court at the April term of 1796. These rules were the foundation of all the subsequent rules for the regulation of the Supreme Court procedure.

These original rules provided that any person might practice before it as an attorney, who had served seven years actual clerkship with a practicing attorney. A period not exceeding four years was deducted from this requirement, if the applicant for admission to practice had spent the time in classical studies after the age of fourteen.

An attorney who had four years practice before the court, could be admitted to practice as counsel. This period was later changed to three years at the November term, 1804.

On February 10th, 1797, it was enacted that the judges of the April term of each year designate one of their number to hold Circuit Courts, one in the western, one in the eastern, one in the middle, and one in the southern districts of the state.

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In this same year the judges' salaries were fixed at two thousand dollars per annum. The salary had been gradually increased for the ten years last past.

On the 10th of March, 1797, the judges were authorized to appoint an additional clerk, with an office in Albany, and to direct from time to time, the removal from the clerk's office in the city of New York, to the office in Albany, of any record or paper deemed advisable. The judge was also to prepare an additional seal for use in the office at Albany.

### CHANCELLOR KENT.

In 1798 James Kent, whose name has since become synonymous with early American jurisprudence, as the author of "Kent's Commentaries," and as a great chancellor, was appointed a justice of the court. He initiated the custom, since followed, of handing down written opinions in cases which might be later cited as precedents or leading cases.

### STATE REPORTER.

On the 7th of April, 1804, a legislative enactment authorized the justices of the Supreme Court to appoint a reporter with a fixed salary of eight hundred fifty dollars per annum, whose duty it should be to report and publish all decisions of the Supreme Court, and of the Court for the Correction of Errors. George Caines was accordingly appointed the first reporter.

## JUDGES' SALARIES INCREASED.

### DUTIES OF CLERK.

On the 4th of April, 1807, the judges were authorized, in their discretion, to establish an additional clerk's office in the county of Oneida, and appoint a clerk. Accordingly the court clerk appointed a clerk to maintain an office in the city of Utica. It was made the duty of the clerks of the three counties to deliver to each other, on or before the last day of every term, at the place where the court should then be held, a transcript of the docket of all judgments that had been docketed in each office during the preceding term and vacation.

### NEW TERMS OF COURT.

It became the law that after the 30th of April, 1811, the terms of court were to be held on the third Monday in October and the first Mondays in January, May and August, and thence continued every day except Sunday, until and including Saturday in the next ensuing week. The May and October terms were to be held at New York, and the January and August terms at Albany.

## JUDGES' SALARIES INCREASED.

The salaries of the judges were again increased on the 19th of June, 1812, when it was enacted that they were to receive the sum of three thousand dollars each, for three years. Further changes were

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made as follows: In 1816 the salary was increased to four thousand five hundred dollars, with no time limit; in 1820, the salary was reduced to three thousand five hundred dollars, indefinitely, and in 1821 further indefinitely reduced to three thousand dollars.

### CONSTITUTIONAL ENACTMENTS.

Under the constitution of 1821, no alteration was made in the manner of selecting justices of the Supreme Court, and they continued to be appointed by the governor with the consent of the Senate (Constitution of 1821, Art. IV, sec. 7).

However, some important changes were wrought by the constitution of 1821. By a provision therein contained, the judges of the Supreme Court were to convene four times a year to review their decisions and determine questions of law. Each justice was empowered to hold Circuit Courts, as were circuit judges, and might also preside in Oyer and Terminer. All processes issuing from the Supreme Court must, by law, be in the name of the chief-justice, or if there were none, in the name of any justice of the court.

To the court was given the quasi-legislative power to amend practice in cases not covered by statute; to revise its rules every seven years; to ultimately abolish fictitious and unnecessary process and proceedings, expedite decisions of causes, diminish costs, and remedy abuses and imperfections in practice.

## APPOINTMENT OF JUDGES.

### OFFICIAL TENURE OF JUDGES.

The procedure followed in the selection and choice of judges was appointive and not elective; the persons nominated for this honor were appointed by the governor, by and with the advice and consent of the senate, to hold office during good behavior, or until sixty years of age.

If guilty of malfeasance in office, or impeached for other cause, their removal from the bench was procured by a joint resolution of the Legislature, concurred in by a two-third majority vote of the senate and assembly.

During their incumbency of office the judges were disqualified from holding or participating in any other office; they were exempted from military service; were prohibited from receiving fees or perquisites, and precluded from sitting in any case in which they were directly or indirectly interested, or from being a party to the decision of any case passed on by them in any other court, and enjoined from practising as attorneys and counsellors, or being associated with, or partners of, those who had previously appeared in such case.

The number of judges was later reduced to three, and from 1823, their annual salary was two thousand dollars, which was in 1835 increased to two thousand five hundred dollars, and in 1839 to three thousand dollars. By an act of 1835, the

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compensation of judges for travel and attendance, as members of the Court of Errors, was abolished.

### CHANGE IN TERMS OF COURT.

By virtue of an act passed in 1823, the terms of court for the city of New York were to be held on the third Mondays of February and October, and on the first Mondays of May and August.

An August term was appointed for the city of Utica; terms in February and October were appointed for Albany. If the business of court so warranted, the terms of court continued for four weeks, otherwise, and in case of no returns, the term was terminated at the end of two weeks.

The terms of court were subsequently set for the first Mondays of January, May and July, and the third Monday of October. The January and October terms were to be held at the Capitol in Albany, the May term at the City Hall, New York, and the July term at the Academy in Utica.

The terms of court lasted for five weeks, but no argument was heard during the last week, except by consent of parties and counsel, and no process issued or returned after the second Saturday, except subpoenas, attachments, and habeas corpus.

In 1841, the October term was changed from Albany to Rochester, and one of the justices required to sit at the Capitol in Albany, and hear and decide such non-enumerated cases as should arise, except those to be heard at term time.

## OFFICE OF JUDGE MADE ELECTIVE.

### CLERKS.

The clerks' offices were continued at New York, Albany, and Utica, but in 1829 a new one was established at Canandaigua, which in 1831 was removed to Geneva, and in 1841 to Rochester.

Each clerk was furnished with an official seal of office, was appointed by the justices of court for three years, unless sooner removed, and was allowed to select and appoint his own deputy. Court papers might be transferred from one office to another, upon the justice's order.

### REPORTER.

By concurrence of the lieutenant-governor, chancellor, and chief-justice, a reporter for the Supreme Court and the Court of Errors was appointed, who was to be a counsellor at law or in chancery, of at least five years' standing.

## OFFICE OF JUDGE MADE ELECTIVE.

Under the constitution adopted in 1821 for the state of New York, a provision was embodied for the popular election of the justices of the Supreme Court, in Art. VI, sec. 12, thereof, and also by the amendments of 1869, Art. VI, sec. 13.

In the constitutional amendments of 1869, was one for submitting the question of the election of judges to popular vote. This was done in 1873,

## THE COURTS OF THE STATE OF NEW YORK.

with the popular verdict in favor of the election, rather than the appointment of judges.

### POPULAR ELECTION.

The American judiciary, with the exception of the United States Supreme Court, and the filling of vacancies due to the death or disability of judges, rests upon an elective basis; and so strongly repugnant are democratic American institutions to whatever savors of aristocracy, and tends to abridge or trammel the voice of the people, that even the organization of the Supreme Court of the United States, as now constituted, has furnished political capital to agitators and people's rights advocates, in recent national political campaigns.

### GRADUAL EVOLUTION OF THE SUPREME COURT.

Besides a change in the manner of selecting judges, the number, terms of office, qualifications and compensation of judges of the Supreme Court have undergone modifications.

Originally there were but three justices of the Supreme Court, one chief-justice and two associate justices, who by the constitution of 1777 (Art. XXIV) were authorized to "hold their offices during good behavior or until they shall respectively attain the age of sixty years." No change was wrought by the constitution of 1821, in the number of judges of the Supreme Court or their tenure of office.

## ADDITIONAL JUDGES.

### UNDER THE CONSTITUTION OF 1846.

Under the constitution of 1846 (Art. VI, sec. 4), the state was divided into eight judicial districts with four justices to each district, except that composed of the city of New York, to which were assigned five justices, by article VI, section 6, of the constitutional amendments of 1869.

Thus was the number of judges, originally three, by 1869 increased to thirty-three; and at present by virtue of the constitution of 1895, "The Supreme Court is composed of the justices now in office, of the judges of the Superior Courts of the cities of New York and Buffalo, of the Court of Common Pleas for the city and county of New York, and the City Court of Brooklyn, which have been abolished, and of twelve additional judges from the eight judicial districts." (Constitution 1895, Art. VI, sec. 1.)

Under the constitution of 1846 it was provided that judges of the Supreme Court should hold office for ten years (Art. VI, sec. 4) and the constitutional amendments re-affirmed the provisions of the constitution of 1846 relating to the term of office. (Constitution of 1895, Art. VI, sec. 4.)

Under all the constitutions since that of 1777, adequate provision has been made for the removal of delinquent judges, for the filling of vacancies in office, and against judges holding other offices of public trust.

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### JURISDICTIONAL CHANGES.

Having thus traced the evolution and development in the Supreme Court organization from its primitive beginnings, it is proper and interesting to briefly note the modifications in its jurisdiction and powers.

Originally the Supreme Court had jurisdiction over civil and criminal matters, co-extensive with that of the King's Bench and Common Pleas of England. Its jurisdictional amount in civil cases was twenty pounds, or about one hundred dollars; to-day it is many times that amount.

The Supreme Court still has jurisdiction of a civil and criminal nature, as originally, but its civil jurisdiction has been circumscribed as to amount.

Under the constitution of 1821, article V, section 5, provision was made for Circuit Courts for each of the circuits into which the Legislature should divide the state. For each of such circuits, which were to be not less than four nor more than eight, a circuit judge was provided, who was chosen, held office, and exercised authority similar to Supreme Court justices.

Under the amendments of the constitution of 1846, adopted in 1869, provision was made for the holding of general and special terms of the Supreme Court, and justices of the Supreme Court were empowered to preside over Special Terms, Circuit Courts, and Courts of Oyer and Terminer.

## JURISDICTIONAL CHANGES.

Circuit Courts and Courts of Oyer and Terminer, which existed since colonial times, were abolished by the constitution of 1894, and their jurisdiction was thereby conferred upon the Supreme Court. Numerous other courts of a subordinate nature, before enumerated (Art. VI, sec. 5), were abolished by the present constitution, and their jurisdiction transferred to the Supreme Court.

We have thus roughly outlined the development of the Supreme Court from its rudimentary stages, noting the gradual changes in its organization and jurisdiction from the time when its justices, originally three in number, were appointed, to the present time, when its justices, numbering seventy-six, are elected.

Merely directing attention to the abolition of many courts long existing, as subsidiary to the Supreme Court, and the vesting of their jurisdictional powers in those of the Supreme Court, and noting the substitution of the Appellate Division of the Supreme Court, for the General Term of former times, it may not be inappropriate to append article VI entire of the constitution of 1894, providing for the organization and powers of the judiciary of the state of New York, leaving the reader to draw such further conclusions respecting the evolution of the Supreme Court as it will undoubtedly suggest.

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### SUPREME COURT — HOW CONSTITUTED — JUDICIAL DISTRICTS.

Article VI, section 1, of the constitution of 1894 reads as follows:

“The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this article. The existing judicial districts of the State are continued until changed as hereafter provided. The Supreme Court shall consist of the justices now in office, and of the judges transferred thereto by the fifth section of this article, all of whom shall continue to be justices of the Supreme Court during their respective terms, and of twelve additional justices who shall reside in, and be chosen by the electors of, the several existing judicial districts, three in the first district, three in the second, and one in each of the other districts; and of their successors. The successors of said justices shall be chosen by the electors of their respective judicial districts. The Legislature may alter the judicial districts once after every enumeration under the constitution, of the inhabitants of the State, and thereupon re-apportion the justices to be thereafter elected in the districts so altered.”

### TERMS OF OFFICE—VACANCIES, HOW FILLED.

In relation to terms of office and vacancies, section 4 of the same article says:

#### REMOVAL OF JUDGES.

“The official terms of the justices of the Supreme Court shall be fourteen years from and including the first day of January next after their election. When a vacancy shall occur otherwise than by expiration of term in the office of justice of the Supreme Court, the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs; and, until the vacancy shall be filled, the governor by and with the advice and consent of the senate, if the senate shall be in session, or if not in session, the governor, may fill such vacancy by appointment, which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.”

#### JUDGES TO HOLD NO OTHER OFFICE.

Section 10 prohibits judges to hold any other office, as follows:

“The judges of the Court of Appeals and the justices of the Supreme Court shall not hold any other office or public trust. All votes for any of them, for any other than a judicial office, given by the Legislature or the people, shall be void.”

#### REMOVAL OF JUDGES.

Section 11 treats of removal of judges from office:

“Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent

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resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices of inferior courts not of record, may be removed by the senate, on the recommendation of the governor, if two-thirds of all the members elected to the senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal."

### COMPENSATION, AGE RESTRICTION, ASSIGNMENT BY GOVERNOR.

Regarding salary, age, and assignment by governor, we refer to section 12:

"The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided in section five of this article. No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age. No judge or justice elected after the first day of January, one thousand eight hundred and ninety-four, shall be entitled to receive any compensation

## REMOVAL OF JUDGES.

after the last day of December next after he shall be seventy years of age, but the compensation of every judge of the Court of Appeals or justice of the Supreme Court elected prior to the first day of January, one thousand eight hundred and ninety-four, whose term of office has been, or whose present term of office shall be, so abridged, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder of the term for which he was elected, but any such judge or justice may, with his consent, be assigned by the governor, from time to time, to any duty in the Supreme Court while his compensation is so continued."



## CHAPTER XVIII.

### COURT OF CHANCERY.

EXISTENCE RECOGNIZED — RE-ORGANIZATION OF COURT—SUCCESSIVE CHANCELLORS—WRITTEN OPINIONS — CHANCELLOR WALWORTH — LAST CHANCELLOR—EFFECT OF CONSTITUTION OF 1821—VICE-CHANCELLOR FOR FIRST CIRCUIT— COURT OF CHANCERY ABOLISHED.

#### EXISTENCE RECOGNIZED.

The original constitution of 1777 took cognizance of the Court of Chancery as an established and properly existing tribunal, but appointed Robert R. Livingston as the first constitutional chancellor, and on October 17th, 1777, he was formally commissioned by the council of appointment.

The constitution provided that the chancellor should hold no other office, except that of delegate to General Congress upon special occasions—but if elected or appointed to any other office, he was to exercise his option as to which office he choose. Livingston was re-appointed to the chancellorship on June 22nd, 1783, because some doubt had arisen as to his vacation of the office of chancellor, upon his appointment to the secretaryship of foreign affairs, in 1781.

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### RE-ORGANIZATION OF COURT.

In May, 1788, the Court of Chancery was re-organized by the Convention of Representatives of the State of New York. Masters and examiners were to be appointed by the council of appointment, and register and clerks by the chancellor. The office of assistant register was established in New York City, in 1814.

### SUCCESSIVE CHANCELLORS.

The first rules of court were framed in 1787 by Livingston, who continued in office as chancellor until 1801, when he resigned upon his appointment as minister to France. He left no written records. His successor was John Lansing, Jr., who was at this time chief-justice of the Supreme Court; he served until October, 1814, when he was retired by the age limit of sixty years.

Lansing was succeeded by the illustrious James Kent, already alluded to in the main text of our work as the author of "Kent's Commentaries," and generally considered the greatest of the chancellors. Born in Dutchess County, July 31st, 1763, he early matriculated at Yale College, from which institution he was graduated in 1781. He thereupon entered the law office of Egbert Benson, to prepare for admission to the bar, and was admitted in 1783. In 1787 he was nominated counsel, and

#### SUCCESSIVE CHANCELLORS.

admitted to practice in the Court of Chancery in 1794, on motion of Edward Livingston. In 1796 he was made master of chancery; in 1797 was appointed recorder of New York City; succeeded Lansing as associate justice of the Supreme Court, and became chief-justice in 1804.

#### WRITTEN OPINIONS.

Chancellor Kent inaugurated the practice of handing down written opinions, which has since been followed. In 1814 he succeeded Lansing as chancellor, and remained in office until he reached the age limit of sixty years, in 1823. After his retirement from the bench, he removed to the vicinity of New York, where he passed the remainder of his days, and where his opinions on legal questions were much sought.

Through his efforts an act was passed in the Legislature, on April 13th, 1814, designating the same official reporter for both the Supreme Court and the Court of Chancery. This officer was appointed by the chancellor, and licensed all attorneys and counsellors of the court.

Kent was succeeded by Nathan Sanford, who remained in office only four years, owing to ill health, and was succeeded by Samuel Jones, whose term of office extended from January 24th, 1826, to April, 1828.

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### CHANCELLOR WALWORTH—LAST CHANCELLOR.

Reuben H. Walworth, at the age of thirty-eight, succeeded Jones, and remained in office until the court was abolished in 1846. Upon his appointment to office, in an address to the members of the bar, he modestly confessed his diffidence in his own ability to satisfactorily fill the high office. That he had underrated himself was later proved by his excellent record in office, as he made a very good chancellor.

Walworth was to have been appointed to the chief-justiceship of the United States Supreme Court, but was rejected for a whimsical reason. Contrary to his display of modesty on the occasion of his elevation to the chancellorship, he openly boasted of his descent from Walworth, mayor of London in the reign of Richard II, which pride of ancestry had a most disastrous effect on his judicial aspirations. It so happened that President Tyler was a descendant of that Watt Tyler, who, as history tells us, had some civic difficulty with the above mentioned Mayor Walworth, and the president taking up the ancient grudge of his ancestor, refused to appoint Walworth to the office.

### EFFECT OF THE CONSTITUTION OF 1821.

The constitution of 1821 provided that the chancellor should be appointed by the governor, with

## EFFECT OF THE CONSTITUTION OF 1821.

the consent of the senate, to hold office during good behavior, or until sixty years of age.

On an appeal from the chancellor's decision to the Court for the Correction of Errors, of which he was a member, the constitution provided that the chancellor should give his reasons for his decision, but should have no voice in final sentence.

The constitution also provided that equity powers vest in circuit judges created by it, subject to appeal to the chancellor. In accordance, an act was passed April 17th, 1823, conferring upon circuit judges, eight in number, the same powers and jurisdiction as the chancellor, in all equity cases, subject to the latter's appellate jurisdiction. Each judge was to appoint a clerk for the Court of Equity at which he presided, who should also perform the duties of a register in said court. To the judge was assigned the part of devising a seal for the use of the clerk in all equity proceedings. These courts were subsequently abolished, and the chancellor invested with general equity jurisdiction, the circuit judges acting as equity judges in their respective circuits only.

By other constitutional provisions, masters and examiners in chancery were to be appointed by the governor and senate for three years, unless sooner removed, and registers and assistants were appointed by the chancellor during pleasure. These latter were formerly appointed by the council of appointment. In 1752, during Governor Hardy's rule,

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there were two masters, two clerks, one examiner, a register and sergeant-at-arms, all without salary. In 1823 there were five hundred ten masters and twenty-five examiners, and in 1846 their number was one hundred eighty-eight masters and one hundred sixty-eight examiners.

### VICE-CHANCELLOR FOR FIRST CIRCUIT.

In January, 1831, a separate vice-chancellorship was established for the first circuit, which included New York City; this officer was appointed by the governor and senate, and held office under the same conditions as the chancellor. On March 16th, 1831, W. T. McCoun was appointed to this office.

On March 27th, 1839, an assistant vice-chancellor for the first circuit was created by act of the Legislature, whose office was to continue for three years, and the incumbent was appointed in the same manner as the chancellor and the vice-chancellor.

Murray Hoffman was the first appointee to this new office, in April of the same year. In 1840 the office was made permanent, and the vice-chancellor directed to hold special terms by order of the chancellor, within the municipal limits of the city of New York, in addition to regular terms in the city. By the same act a vice-chancellorship was created for the eighth circuit, who was to hold court at Rochester, and whose appointment and tenure were to be the same as that of the vice-chancellor for the first circuit.

## TRANSFER OF JURISDICTION.

### COURT OF CHANCERY ABOLISHED.

Pursuant to the constitution of 1846, the Court of Chancery was to end its existence on the first Monday of January, 1847. The powers of chancery were generally transferred to the Supreme Court organized under the constitution of 1846, and the records deposited with the clerk of the newly created Court of Appeals.



## CHAPTER XIX.

### CONSTITUTION OF 1821.

ARISTOCRACY — CIRCUIT COURTS — CONSTITUTIONAL CHANGES — REVISED STATUTES — SUPERIOR COURT OF THE CITY OF NEW YORK.

#### ARISTOCRACY.

From the chaotic conditions which existed long after the subjugation and settlement of the colony of New York, a condition of almost feudal society had evolved itself. The opulent and powerful had become the governing class, and the large landed proprietors wielded the patronage and privilege of office. The governor was still looked upon as possessing a “divine right” to rule, and he exercised almost royal power, especially in the appointment of officers. The chancellor was also looked upon as a vestige of royal power and the office became very unpopular, though several of our ablest men filled the position.

Political preferment was extended to those of the wealthy and native-born classes, often to the exclusion of the majority, who were of the foreign-born and dependent classes. To remedy this unequal condition of political affairs, the constitution

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of 1821 was adopted for the state at large. But very little was really effected by this instrument. The constitution of 1846 was also a result of this feeling, and the people were finally somewhat mollified by having their judges elected instead of appointed.

### CIRCUIT COURTS.

Under the constitution of 1821, the state was divided into circuits for each of which was organized a Circuit Court. These were an offshoot of the old Supreme Court, and substituted for the former itinerant sessions. As a condition precedent to holding office, the judge was required to be a resident of the circuit within which he presided. The reason for this prerequisite was the undesirability of having courts of first instance at the seat of government. In the life and government of the state, there still lingered some of the vestiges and traditions of royalty, which were obnoxiously regarded by the rank and file of the inhabitants, as hostile to, and irreconcilable with, democratic institutions.

In the course of time the complexion of the newly created Circuit Court underwent a change; from a court of state institution, it became a contracted and local county tribunal. In fact the state was becoming more democratic and there was a universal feeling against anything that resembled in any way the old colonial customs and privileges of the prerogative right.

#### REVISED STATUTES.

In the year 1823, a radical innovation was effected in the jurisdiction of the Circuit Courts, by which the equity jurisdiction of the court was abrogated, and relegated exclusively to the chancellor, save that circuit judges might act as vice-chancellors within their circuits.

By a further amendment in 1826, the equity jurisdiction for the first district was conferred on a legal officer called vice-chancellor. This step was necessitated by the increased litigation of the district.

#### CONSTITUTIONAL CHANGES.

By chapter 70, of the Laws of 1823, the Court of Probates which had been founded in 1778 was formally abolished, and its jurisdiction transferred to the surrogates of the various counties, subject to the right of appeal to the chancellor, in whom was vested the residuum of probate jurisdiction not otherwise delegated.

Under the constitution of 1821, the chancellor and judges were to be appointed by the governor and senate, instead of by the council of appointment, as theretofore. Otherwise the courts were continued, under the constitution, substantially as they were prior to its adoption.

#### REVISED STATUTES.

The Revised Statutes of 1829 made no attempt to define the jurisdiction of the Court of Chancery,

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which had never been specifically established, although the act of 1683 gave it general equity powers. The Revised Statutes vested equity power in the chancellor.

By the statutes, the new Court of Chancery was vested with the ancient jurisdiction of the English court. This subject was discussed in 1810, in the case of *Yates vs. People*, which involved a conflict of jurisdiction between the chancellor and Supreme Court, and in which it was held that the New York Court of Chancery possessed only those common law powers of the court, which in England were exercised in the "officina justitiæ," or that part from which writs issued, "ex debito justitiæ," and that the chancellor of New York possessed the powers exercised by the lord-chancellor in that branch of the Equity Court called "Court of Equity in Chancery."

The constitution of 1821 continued the Court of Chancery as it had been under the English Crown, and the Revised Statutes of 1829 declared to this effect.

The jurisdiction of the minor courts of Justices of the Peace was fixed by the Revised Statutes, although of much more ancient origin. The same applies to the County Courts of Common Pleas, which were re-organized by the Revised Statutes.

## SUPERIOR COURT OF THE CITY OF NEW YORK.

A congested condition of affairs in the Court of

Common Pleas led to the erection in 1828, of the Superior Court of the City of New York. (Laws of 1828, p. 141, C. 137; 3 R. S. 261.) This condition was due to a number of long protracted conspiracy cases which grew out of a heavy bank failure in 1826, and clogged the calendar of the Court of Common Pleas.

Cognizance of local actions was the general scope of its jurisdiction. Unlike most of the New York courts, its jurisdiction was statutory, and not defined by a cross-reference to some established jurisdiction of a common law court of England.

Under the constitution and the Revised Statutes, the Court for the Trial of Impeachments and Correction of Errors had supreme appellate jurisdiction in both law and equity.

The constitutional enactment of 1821 established the practice and procedure of courts of both law and equity, conformable to that of England, with some local variations, which had grown up under the Crown government.

The disposition of the judges, however, seems to have tended rather to obliterate these distinctions, which were of a provincial character, and follow ancient precedents rather than innovations.

The Revised Statutes did not revise practice; they systematized many of the old statutes, and embodied some new provisions as to limitations of actions in courts; but no great reform in practice was effected prior to 1846.

## THE COURTS OF THE STATE OF NEW YORK.

What changes were made by the judicial establishment of 1821 were insufficient to accomplish much good. In a few years complaints concerning delays and expense in legal proceedings finally led to the convention of 1846.

The new circuit judgeships, created by the constitution of 1821, proved in the end, unsatisfactory, because many of their decisions were reviewed by the Supreme Court "in banc," and reversed.

From 1821 to 1846, the constitution of the state underwent few organic changes or amendments. However, in 1826, the office of justice of the peace was made elective.

## CHAPTER XX.

### COURT OF APPEALS.

RELATION TO SUPREME COURT—ORIGIN OF COURT  
—AS AT PRESENT CONSTITUTED—AMENDMENTS  
—UNDER CONSTITUTION OF 1895—VACANCY,  
HOW FILLED—JURISDICTION OF COURT OF AP-  
PEALS—JUDGES NOT TO HOLD ANY OTHER  
OFFICE—REMOVAL OF JUDGES—COMPENSATION,  
AGE RESTRICTION, ASSIGNMENT BY GOVERNOR.

#### RELATION TO SUPREME COURT.

A complete and systematic outline of the Court of Appeals of the State of New York must be traced from the gradual extension of the appellate jurisdiction of the Supreme Court, of which it is the legal emanation.

As already shown in our history of the Supreme Court, its original appellate jurisdiction was most comprehensive in all matters which came before it on appeal; it was the court of last resort, and knew no higher tribunal of review, prior to the Revolution, than direct royal adjudication by the monarch or the home government.

Up to that time, the Supreme Court, as constituted by the Colonial Assembly in 1691, with its

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general appellate jurisdiction, was the final arbiter of judicial controversies, until the ever growing complexities of litigation indicated the necessity for an appellate tribunal, capable of reviewing final decisions of the Supreme Court, at the instance of dissatisfied litigants.

### ORIGIN OF COURT.

In the constitution of 1777 may be discerned the first dim rudiments of our present Court of Appeals. Article XXXII of the constitution of 1777 provides for the creation by the Legislature, of a court "for the trial of impeachments and the correction of errors," such court to be composed of "the president of the senate for the time being, and the senators, chancellor, and judges of the Supreme Court."

The article further provides that such court may affirm or reverse a cause "brought up by writ of error on a question of law, in a judgment in the Supreme Court," with the sole qualification that that portion of the court composed of the judges of the Supreme Court rendering the decision would be disqualified to review it, though they might explain their reasons for rendering it.

Under the constitution of 1821, article V, section 1, provision of a similar nature, in almost the exact words, is made.

In both constitutions may be observed the prototype of our present Court of Appeals, consisting

#### AMENDMENTS.

of a court for the trial of impeachments, as well as for the review of final decisions in law and equity, and composed of legislative officers, as well as the judges of the Supreme Court.

#### AS AT PRESENT CONSTITUTED.

As a distinct branch of the judicial system of the state, and under its present title and functions, the first authorization of a well defined Court of Appeals, composed of separate judges, and with a jurisdiction distinct from that of courts for the trial of impeachments, occurs in the constitution of 1846.

Under this constitution a differentiation was established between the trial of impeachments and the review of cases on appeal; and thenceforth there existed a Court for the Trial of Impeachments and a Court of Appeals.

Article VI, section 2, of the constitution of 1846, provides for a Court of Appeals as follows: "There shall be a Court of Appeals composed of eight judges, of whom four shall be elected by the electors of the state for eight years, and four selected from the class of justices of the Supreme Court, having the shortest time to serve."

#### AMENDMENTS.

Article VI, section 2, of the amendments to the constitution of 1846 (adopted in 1869) provides for seven judges of the Court of Appeals, to be chosen

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by election for a term of fourteen years, any five of whom shall constitute a quorum. To quote: "There shall be a Court of Appeals, composed of a chief judge and six associate judges, who shall be chosen by the electors of the state, and shall hold their office for the term of fourteen years from and including the first day of January next after their election. At the first election of judges under this constitution, every elector may vote for the chief and any four of the associate judges. Any five members of the court shall form a quorum and the concurrence of four shall be necessary to a decision."

Section 25, of article VI of the constitution of 1846, provides as follows: "The Legislature at its first session after the adoption of this constitution shall provide for the organization of the Court of Appeals, and for transferring to it the business pending in the Court for the Correction of Errors and for the allowance of writs of errors and appeals to the Court of Appeals, from judgments and decrees of the present Court of Chancery and Supreme Court, and of the courts that may be organized under this Constitution."

The election, limitations, compensation, and removal of judges of the Court of Appeals, and the filling of vacancies caused by their death or disability, are provided for by sections 7, 8, 11, 12, and 13 respectively of article VI, of the constitution of 1846, and by sections 3, 10, 11, 14, and 24 of article

## AMENDMENTS.

VI of the amendments to the constitution of 1846, adopted in 1869.

### UNDER CONSTITUTION OF 1895.

By the constitution adopted for the state of New York in 1895, the Court of Appeals is provided for in the following terms, article VI, section 7: "The Court of Appeals is continued. It shall consist of the chief judge, the associate judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors who shall be chosen by the electors of the state. The official terms of the chief judge and associate judges shall be fourteen years from and including the first day of January next after their election. Five members of the court shall form a quorum, and the concurrence of four shall be necessary to a decision. The court shall have power to appoint and to remove its reporter, clerk, and attendants. Whenever and as often as a majority of the judges of the Court of Appeals shall certify to the governor that said court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the governor shall designate not more than four justices of the Supreme Court to serve as associate judges of the Court of Appeals. The justices so designated shall be relieved from their duties as justices of the Supreme Court and shall serve as associate judges of the Court of Appeals until the

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causes undisposed of in said court are reduced to two hundred, when they shall return to the Supreme Court. The governor may designate justices of the Supreme Court to fill vacancies. No justice shall serve as associate judge of the Court of Appeals except while holding the office of justice of the Supreme Court, and not more than seven judges shall sit in any case."

(Amended by vote of the people, November 7th, 1899.)

Source—Art. VI, sec. 2, of amended constitution of 1846, with language somewhat changed.

### VACANCY IN COURT OF APPEALS, HOW FILLED.

Section 8 reads: "When a vacancy shall occur otherwise than by expiration of term, in the office of chief or associate judge of the Court of Appeals, the same shall be filled for a full term, at the next general election happening not less than three months after vacancy occurs; and until the vacancy shall be filled, the governor, by and with the advice and consent of the senate, if the senate shall be in session, or if not in session the governor may fill such vacancy by appointment. If any such appointment of chief judge shall be made from the associate judges, a temporary appointment of associate judge shall be made in like manner; but in such case the person appointed chief judge shall not be deemed to vacate his office of associate judge any longer than until the expiration of his appointment as chief judge. The powers and jurisdiction

## VACANCY IN COURT OF APPEALS, HOW FILLED.

of the court shall not be suspended for want of appointment or election when the number of judges is sufficient to constitute a quorum. All appointments under this section shall continue until and including the last day of December next after the election at which the vacancy shall be filled.”

Source—Art. VI, sec. 3, of amended constitution of 1846, with slight change in language.

## JURISDICTION OF COURT OF APPEALS.

Section 9, referring to the court's jurisdiction, is as follows: “After the last day of December, 1895, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgment or orders entered upon the decision of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law, which in its opinion, ought to be reviewed by the Court of Appeals.

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“The Legislature may further restrict the jurisdiction of the Court of Appeals and the right of appeals thereto, but the right of appeal shall not depend upon the amount involved.

“The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of December, 1895, but appeals therefrom may be taken under existing provisions of law.”

Source—Mostly new.

## JUDGES NOT TO HOLD ANY OTHER OFFICE.

Section 10 says: “The judges of the Court of Appeals and the justices of the Supreme Court shall not hold any other office or public trust. All votes for any of them, for any other than a judicial office given by the Legislature or the people, shall be void.”

Source—Art. VI, sec. 10, of the amended constitution of 1846, without change.

## REMOVAL OF JUDGES.

As to removal from office we refer to section 11: “Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices of inferior courts not of record, may be removed by the

## REMOVAL OF JUDGES.

senate, on the recommendation of the governor, if two-thirds of all the members elected to the senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal."

Source—Art. VI, sec. 11, of amended constitution of 1846.

## COMPENSATION; AGE RESTRICTION; ASSIGNMENT BY GOVERNOR.

Section 12: "The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided in section five of this article. No person shall hold the office of judge or justice of any court longer than until, and including, the last day of December next after he shall be seventy years of age. No judge or justice elected after the first day of January, 1894, shall be entitled to receive any compensation after the last day of December next after he shall be seventy years of age, but the compensation of every judge of the Court of Appeals or justice of the Supreme Court elected prior to the first day of January, 1894, whose term of office has been, or whose pres-

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ent term of office shall be, so abridged, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder of the term for which he was elected; but any such judge or justice may, with his consent, be assigned by the governor, from time to time, to any duty in the Supreme Court while his compensation is so continued.”

Source—The first sentence was taken from the first sentence of Art. VI, sec. 14, of the amended constitution of 1846, without change in language; the sentence relating to age limitation is a re-enactment of a similar provision contained in Art. VI, sec. 13, of such constitution. The remainder of the section was added by the convention of 1894.

## CHAPTER XXI.

### APPELLATE DIVISION OF THE SUPREME COURT.

NATURE OF COURT—JUDICIAL DEPARTMENTS—  
APPELLATE DIVISION—HOW CONSTITUTED—  
GOVERNOR TO DESIGNATE JUSTICES—JURISDIC-  
TION—REPORTER—TIME AND PLACE OF HOLD-  
ING COURTS—JUDGE OR JUSTICE NOT TO SIT IN  
REVIEW—TESTIMONY IN EQUITY CASES.

#### NATURE OF COURT.

This branch of the Supreme Court is vested with appellate jurisdiction of appeals immediately brought before it from the trial courts, as provided by law. Its decisions, with some few exceptions, are not final, and may be reviewed by the Court of Appeals. It is an intermediary appeal tribunal, or court of first resort.

This court as now constituted originated with the constitution of 1895, and succeeded what was officially designated as the General Term of the Supreme Court.

That part of the constitution which gave it being is found in article VI, section 2, of the constitution of the state of New York, and reads as follows:

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### JUDICIAL DEPARTMENTS; APPELLATE DIVISION, HOW CONSTITUTED.

“The Legislature shall divide the state into four judicial departments. The first department shall consist of the county of New York; the others shall be bound by county lines and be compact and equal in population as nearly as may be. Once every ten years the Legislature may alter the judicial departments, but without increasing the number thereof. There shall be an Appellate Division of the Supreme Court consisting of seven justices in the first department, and five justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case.”

### GOVERNOR TO DESIGNATE JUSTICES.

“From all the justices elected to the Supreme Court, the governor shall designate those who shall constitute the Appellate Division in each department; and he shall designate the presiding justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other justices shall be designated for terms of five years, or the unexpired portions of their respective terms of office, if less than five years. From time to time as the terms of such designations

## GOVERNOR TO DESIGNATE JUSTICES.

expire, or vacancies occur, he shall make new designations. A majority of the justices so designated to sit in the Appellate Division in each department shall be residents of the department. He may also make temporary designations in case of the absence or inability to act of any justice in the Appellate Division, or in case the presiding judge of any Appellate Division shall certify to him that one or more additional justices are needed for the speedy disposition of the business before it. Whenever the Appellate Division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments at a meeting called by the presiding justice of the department in arrears, may transfer any pending appeals from such department to any other department for hearing and determination. No justice of the Appellate Division shall exercise any of the powers of a justice of the Supreme Court other than those of a justice out of court, and those pertaining to the Appellate Division or to the hearing and decision of motions submitted by consent of counsel."

## JURISDICTION—REPORTER—TIME AND PLACE OF HOLDING COURTS.

"From and after the last day of December, 1895, the Appellate Division shall have the jurisdiction now exercised by the Supreme Court at its General Terms and by the General Terms of the Court of

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Common Pleas for the city and county of New York, the Superior Court of the city of New York, the Superior Court of Buffalo and the City Court of Brooklyn, and such additional jurisdiction as may be conferred by the Legislature. It shall have power to appoint and remove a reporter. The justices of the Appellate Division in each department shall have power to fix the times and places for holding Special and Trial Terms therein and to assign the justices in the departments to hold such terms; or to make rules therefor."

(Amended by vote of people, Nov. 7th, 1899.)

Source—Mostly new. The Appellate Division is a substitute for and has the jurisdiction of the former General Term.

### JUDGE OR JUSTICE NOT TO SIT IN REVIEW; TESTIMONY IN EQUITY CASES.

As to the judges' rights to sit on appeal, section 3 of the same article says: "No judge or justice shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member. The testimony in equity cases shall be taken in like manner as in cases at law; and except as herein otherwise provided, the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity, that it has heretofore exercised."

Source—Art. VI, sec. 8, of the amended constitution of 1846.

## CHAPTER XXII.

### COUNTY COURTS.

THEIR NATURE—NEW YORK COUNTY COURT—  
PRESENT STATUS—COUNTY COURTS AS NOW  
CONSTITUTED—COURTS OF SESSIONS ABOLISHED.

#### THEIR NATURE.

These courts, as their name implies, are those whose jurisdiction and powers are confined to the counties in which they are situated. Courts of a local and limited jurisdiction, known as Courts of Sessions, were almost contemporaneous with the establishment of a system of judicature for the state. When the state was subdivided into counties as it now exists, these courts gave place to the County Courts.

County Courts were first created by the constitution of 1691, and re-established in 1777; they were again continued by the constitution of 1821, with the new provision that the judges were to hold office for a term of five years.

#### NEW YORK COUNTY COURT.

The County Court of the city of New York was known as the "Court of Common Pleas for the

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City and County of New York." Originally this court was designated as the "Mayor's Court," and the mayor usually presided at its sessions; but during the mayoralty of De Witt Clinton, from 1805 to 1821, the recorder of the city sat as the presiding judge of the Mayor's Court.

By an act of the Legislature in 1821, as heretofore mentioned, the name of the court was changed to the "Court of Common Pleas for the City and County of New York." The act created a first judge, to hold office during good behavior, or until the age limit, which was sixty years; but the constitution that was adopted during the year changed the length of the term of office to five years, and empowered the governor to appoint the judges of this court.

### PRESENT STATUS.

The County Court is the subject of a special enactment of the constitution of 1846, in the following terms, article IV, section 14: "There shall be elected in each of the counties of this state, except the city and county of New York, one county judge who shall hold his office for four years. He shall hold the County Court and perform the duties of the office of surrogate. The County Court shall have such jurisdiction in cases arising in Justices' Courts, and in special cases, as the Legislature may prescribe; but shall have no original civil jurisdiction, except in such special cases.

#### PRESENT STATUS.

“The county judge with two justices of the peace to be designated according to law, may hold Courts of Sessions, with such criminal jurisdiction as the Legislature shall prescribe, and perform such other duties as may be required by law.

“In counties having a population exceeding forty thousand, the Legislature may provide for the election of a separate officer to perform the duties of the office of surrogate.

“The Legislature may confer equity jurisdiction in special cases upon the county judge.”

#### COUNTY COURTS AS NOW CONSTITUTED.

Article VI, section 14, of the present constitution of the state of New York, in relation to County Courts, is as follows: “The existing County Courts are continued, and the judges thereof now in office shall hold their offices until the expiration of their respective terms. In the county of Kings there shall be two county judges and the additional county judge shall be chosen at the next general election held after the adoption of this article. The successors of the several county judges shall be chosen by the electors of the counties for the term of six years. County Courts shall have the powers and jurisdiction they now possess and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The

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Legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended so as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant."

### COURTS OF SESSIONS ABOLISHED.

The article goes on to say, "Courts of Sessions, except in the county of New York, are abolished from and after the last day of December, 1895. All the jurisdiction of the Court of Sessions in each county, except the county of New York, shall thereupon be vested in the County Court thereof, and all actions and proceedings then pending in such Courts of Sessions shall be transferred to said County Courts for hearing and determination. Every county judge shall perform such duties as may be required by law. His salary shall be established by law payable out of the county treasury. A county judge of any county may hold County Courts in any other county when requested by the judge of such other county."

Source—See Art. VI, sec. 15, of the amended constitution of 1846. The limitation of jurisdiction was raised from one to two thousand dollars, and Courts of Sessions were abolished and their jurisdiction conferred upon County Courts by the convention of 1894.

## CHAPTER XXIII.

### SURROGATES' COURTS.

SURROGATES, WHEN TO BE ELECTED—SEPARATE COUNTY JUDGE AND SURROGATE—WHEN THEY ENTER UPON THEIR DUTIES—SURROGATES' COURT UNDER PRESENT CONSTITUTION.

This court has existed from the origin of courts in the state of New York, though its powers and jurisdiction, until the adoption of the constitution of 1846, and even later, were exercised as a branch of other courts.

Under the constitution of 1846, except as otherwise provided, the office of surrogate was blended in that of county judge, by the following extract from article VI, section 14 thereof, which relates to judges of County Courts: "He shall hold the County Court and perform the duties of the office of surrogate."

Provision was made for an extra surrogate in the following terms of the same article and section: "In counties having a population exceeding forty thousand, the Legislature may provide for the election of a separate officer to perform the duties of the office of surrogate."

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The surrogate is essentially a county officer, and as the business of the office increased, it became necessary to commit this important branch of the law to a single judge. This devolution of jurisdiction in the different counties was gradually effected as probate business required.

### SURROGATES, WHEN TO BE ELECTED.

The election of surrogates, in special cases, is provided for, by the Laws of 1847, chapter 276, section 2, as follows: "There shall be elected a separate officer to perform the duties of the office of surrogate, in each of the counties of this state (except New York), having a population exceeding forty thousand in which such separate officer shall be determined upon, as hereinafter provided."

### SEPARATE COUNTY JUDGE AND SURROGATE.

Section 11 goes on to say: "They (the board of supervisors in the several counties of the state, except New York) shall also at the same meeting (May 25th, 1847, at the office of the county clerk in their respective counties) in those counties having a population exceeding forty thousand, determine whether the office of county judge and surrogate shall be separate, and if separate, they shall fix the salary of such separate officer. This section does not effect separate officers and determined salaries."

## SURROGATES' COURT UNDER PRESENT CONSTITUTION.

### WHEN THEY ENTER UPON THEIR DUTIES.

Section 12, of the same chapter, provides as follows: "Such elected separate officers are to enter upon their duties the first Monday in July, 1847, for four years."

## SURROGATES' COURT UNDER PRESENT CONSTITUTION.

By the constitution of 1895, the existing Surrogates' Courts were embraced in article VI, section 15, which is as follows: "The existing Surrogates' Courts are continued, and the surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the surrogates and existing Surrogates' Courts now possess, until otherwise provided by the Legislature. The county judge shall be surrogate of his county, except where a separate surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate surrogate, the Legislature may provide for the election of a separate officer to be a surrogate, whose term of office shall be six years. When the surrogate shall be elected as a separate officer his

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salary shall be established by law, payable out of the county treasury. No county judge or surrogate shall hold office longer than until, and including, the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of county judge or surrogate shall be filled in the same manner as like vacancies occurring in the Supreme Court. The compensation of any county judge or surrogate shall not be increased or diminished during his term of office. For the relief of Surrogates' Courts the Legislature may confer upon the Supreme Court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases."

Source—See Art. VI, sec. 15, of the amended constitution of 1846.

## CHAPTER XXIV.

### SPECIAL COURTS FOR THE CITY OF NEW YORK.

CITY COURT OF THE CITY OF NEW YORK—MUNICIPAL COURTS—INFERIOR COURTS OF CRIMINAL JURISDICTION — COURT OF MAGISTRATES — ORGANIZATION AND POWERS OF THE COURT—ESTABLISHMENT OF PART FOR CHILDREN'S CASES IN FIRST DIVISION—COURT OF SPECIAL SESSIONS—CHILDREN'S COURT—JURISDICTION—COURT AND OFFICE OF JUSTICE OF THE PEACE ABOLISHED—THE SUPERIOR COURT—JURISDICTION—PURELY A STATUTORY COURT.

#### CITY COURT OF THE CITY OF NEW YORK.

The origin and creation of this distinctively local court has been elsewhere given in the general development and growth of the different state and municipal courts of New York.

Its present existence and organization is authorized and regulated by the Greater New York Charter, chapter XX, title 1, section 1345, as follows: "The City Court of the City of New York, continued."—"The City Court shall be continued; the said court and the justices thereof shall have the

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same powers and jurisdiction as are now conferred upon them by law; etc.”

The remainder of the section we omit as not being material; it merely prescribing the qualifications and manner of election of the judges.

### MUNICIPAL COURTS.

Owing to the extensive jurisdiction which the consolidation of the constituent parts of Greater New York entailed, a corresponding change in the local municipal judicial system was deemed essential. This was effected by the creation of municipal courts for the different districts, which were, with enlarged jurisdiction, a continuation of the district courts.

The Greater New York Charter provided for the creation of the Municipal Courts, by chapter XX, title 2, section 135, as follows: “On and after the first day of January, 1898, the district courts of the city of New York, and the Justices’ Courts of the first, second, and third districts of the city of Brooklyn, are hereby continued, consolidated and re-organized under the name of ‘The Municipal Court of the City of New York,’ which said court shall be a local civil court within the city of New York as constituted by this act, and shall not be a court of record, or have any equity jurisdiction; powers, duties, and organization hereinafter prescribed.”

Though established under, and by virtue of, the

## MUNICIPAL COURTS.

municipal charter, and of only local jurisdiction, it has been held by the Supreme Court that the Municipal Courts are a part of the judicial system of the state, and its justices accordingly are not officers of the city government. This was decided in the case of *Quinn v. The Mayor*, How. Pr. 266, aff'd in 53 N. Y. 627.

By another decision of the same tribunal, it has been held that the Municipal Courts of the city of New York are a continuance, consolidation, and re-organization of the District Courts of the old city of New York, and the Justices' Courts in the first, second, and third districts of the old city of Brooklyn under the new name, and is not a new local inferior court within section 18 of article VI of the constitution, authorizing the Legislature to establish inferior local courts, but prohibiting it from "hereafter conferring upon any inferior local court of its creation, any other equity jurisdiction in any other respects than is conferred by or under this article." (*Worthington v. London G. & A. Co.*, 164 N. Y. 80.)

## INFERIOR COURTS OF CRIMINAL JURISDICTION.

Chapter XX, title 3, section 1390, of the Greater New York Charter has the following provision: "For the purpose of administration of criminal justice, the city of New York, as hereby constituted, is divided into two divisions, as follows: The first division embraces the Boroughs of Bronx

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and of Manhattan; the second division embraces the Boroughs of Brooklyn, Queens, and Richmond; and the Borough of the Bronx in the first division shall be divided into two City Magistrate's Court districts by the mayor, commissioner of police and the president of the Court of City Magistrates of the first division in such manner as to make access to the courts convenient to the residents of that borough and otherwise conserve public interests. The original district thus to be made shall be known as the Eighth District City Magistrate's Court."

(As amended by Laws of 1903, chap. 410.)

### COURT OF MAGISTRATES.

Section 1391 of the same chapter and title provides as follows: "In each of the said districts there shall be a board of city magistrates composed of the magistrates therein in office on the first day of January, 1902, and such as thereafter may be appointed or elected pursuant to law. The board for the first division shall consist of fourteen magistrates, each of whom shall be a resident and elector within said first division. The board of the second division shall consist of fifteen magistrates, ten of whom shall be residents and electors of the Borough of Brooklyn, three of the Borough of Queens, and two of the Borough of Richmond, which said board shall be created as hereinafter provided."

(As amended by Laws of 1903, chap. 410.)

## CHILDREN'S CASES IN FIRST DIVISION.

### ORGANIZATION AND POWERS OF THE COURT.

The following provision is found in section 1393, same chapter and title: "Each board of the city magistrates may elect a president from their own number, and at pleasure remove him and elect a successor. All the meetings of such board shall be public and its proceedings shall be recorded in its books of minutes by the secretary and shall be preserved. Each board may designate a police clerk to act as its secretary, and from time to time substitute any other; and the salary of such police clerk, as such secretary, shall not exceed five hundred dollars per annum. Each board shall establish public rules relative to its meetings, which, as far as possible, shall be held at regular times for the order and transaction of its business thereat; for the keeping and preservation of the minutes of its doings; for the appointment of employees; and for the public inspection of its minutes, under the care of the secretary, at reasonable times. The concurrence of a majority of all the members of the board of city magistrates shall be necessary to adopt any resolution of said board."

### ESTABLISHMENT OF PART FOR CHILDREN'S CASES IN FIRST DIVISION.

Under section 1399, same chapter and title, provision is made as follows: "The board of city mag-

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istrates of the first division shall assign a part for the hearing and disposition of cases now within the jurisdiction of said magistrates, involving the trial or commitment of children, which part may for convenience be called the Children's Court; and in all such cases the magistrate holding said court shall have all the powers, duties, and jurisdiction now possessed by the city magistrates within said first division. Said Children's Court shall be held by the several magistrates in rotation in such manner as may be determined by said board, and shall be opened on such days and during such hours as the said board shall in its rules provide. Whenever under any provision of law, a child under sixteen years of age is taken before a city magistrate in the first division sitting in any court other than the Children's Court, it shall be the duty of such magistrate to transfer the case to the Children's Court. If the case falls within the jurisdiction of said court, as herein provided, it shall be the duty of the officer having the child in charge to take such child before that court, and in any such case the magistrate holding said Children's Court must proceed to hear and dispose of the case in the same manner as if it had been originally brought therein. The board of city magistrates shall appoint a clerk for the Children's Court, and such assistants as may be necessary, whose salaries shall be fixed by the board of aldermen, on the recommendation of the board of estimate and apportionment, and said

## CHILDREN'S CASES IN FIRST DIVISION.

court shall be held, if practicable, in the building in which the offices of the Department of Public Charities for the examination of dependent children are located, or if this shall not be practicable, the court shall be held in some other building as near thereto as practicable, to be selected by the commissioners of the sinking fund. Nothing herein contained shall affect any provisions of law with respect to the temporary commitment by the magistrates, of children charged with crime or held as witnesses for the trial of any criminal case, or the existing jurisdiction of the Court of Special Sessions."

## COURT OF SPECIAL SESSIONS.

Under the provision of section 1405, chapter XX, title 3, of the Greater New York Charter, the following provision is made: "The Court of Special Sessions of the city of New York is hereby continued, with all the powers, duties, and jurisdiction it now has by law, and such additional powers, duties, and jurisdiction as are contained in and covered by section 1419. The justices of the Court of Special Sessions of the first and second divisions of the city of New York are hereby continued in office until the expiration of the terms for which they have been appointed, and their successors shall be appointed by the mayor for the term of ten years. There shall be six justices of the Special Sessions for the first division and six for the second

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division for a term of ten years, whose powers, duties, jurisdiction, and compensation shall be the same; whose successors shall be elected in like manner and who shall possess all the requirements for appointment as those hereby continued in office.”

(As amended by Laws of 1903, chap. 159.)

CHILDREN'S COURT, JURISDICTION.

Section 1418, same chapter and title, provides: “The justices of the Special Sessions of the first division shall assign a separate part for the hearing and disposition of cases heretofore within the jurisdiction of city magistrates, involving the trial or commitment of children, which part shall be called the Children's Court; and in all such cases the justice or justices holding said court shall have all the powers, duties, and jurisdiction as are contained in the following sections.”

COURT AND OFFICE OF JUSTICE OF PEACE ABOLISHED.

Section 1350 of the same chapter and title, is to the following effect: “From and after midnight of the 31st day of January, 1898, the Justices' Courts and the office of justice of the peace in the city of Brooklyn and Long Island City are abolished \* \* \* \* \* and from and after the passage of this act, no person shall be elected to the office of district court justice or justice of the peace in any portion of the territory included within the city of New York as constituted by this act.”

## CREATION OF SUPERIOR COURT.

### THE SUPERIOR COURT.

Owing to the increased business of the Supreme Court, which had multiplied to an enormous extent throughout the state, it was deemed fit, by the Legislature, to erect a special court for the county of New York, with the same powers and jurisdiction as the Supreme Court.

Another reason for the creation of the Superior Court of the county of New York was the crowded calendar of the Court of Common Pleas. There had been a heavy bank failure at about this time, and the resultant actions at law tended to clog the regular calendars of both the Supreme and Common Pleas Courts.

It therefore established by act of March 31st, 1828, a Superior Court for the county of New York, which exercised, in all civil cases, the same jurisdiction as the Supreme Court.

Previous to the establishment of this court, the calendar of cases ready for trial both in the Supreme Court and Court of Common Pleas, was far in arrears; from twelve to fifteen months' delay was entailed, after issue joined, before cases were reached for trial.

The first chief-justice of the Superior Court was Samuel Jones, who, at the time of his appointment to this office, resigned the chancellorship to assume the duties of his new office. The associate judges were Josiah Ogden Hoffman and Thomas J. Oakley.

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### JURISDICTION.

The governor, by and with the advice and consent of the senate, was vested with the power of appointing the judges of this court, who were to hold office for the term of five years. The court was given jurisdiction in all actions at law, without limitation as to amount, if the action were commenced in New York City. It had the power to grant new trials, and exercise all the powers usually exercised by the courts of record. It heard appeals from the judgments of the Marine Court, and the Assistant-Justices' Courts; but this appellate jurisdiction was afterwards transferred to the Court of Common Pleas. The business of the court must have assumed large proportions, for by acts of the Legislature, the number of its judges was increased from three to six.

### PURELY A STATUTORY COURT.

It is important to mention that this was the first court that was not modeled on a like court in England. Originally all the courts were created by the English colonists, but were based on the courts they were accustomed to at home. These courts, with perhaps some slight changes, were continued by the successive constitutions of the state. But the Superior Court was created by statute of the Legislature, and no mention was made that its jurisdiction was defined by a similar court in England.

## CHAPTER XXV.

### JUSTICES OF THE PEACE.

POPULAR COURTS—COURT PROCEDURE—JURY TRIALS—COSTS—AMENDED JURISDICTION—ASSISTANT-JUSTICES' COURT—PRESENT STATUS.

#### POPULAR COURTS.

These ancient courts seem to have been co-eval with nearly all developing systems of judicature. The courts nearest to the popular vein seem to have been, under most conditions, those of justices of the peace. Their jurisdiction over the petty affairs of life brought them into the closest contact with the great mass of the populace.

From the first settlement of the English in the province of New York, justices of the peace held Town Courts, and were members of all the other tribunals held in the colony. After the Revolutionary War, these courts were continued by different legislative enactments.

Chapter 44 of the Laws of 1780, passed February 26th of that year, empowered justices of the peace, mayors, recorders, and aldermen to try all cases involving one hundred pounds or less; all actions as cases of debt, slander, trespass, replevin,

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or for damages, where the amount demanded was less than one hundred pounds, were heard before one of the justices of the peace of any of the counties, or mayor, recorder, or alderman for the cities of New York and Albany and the Borough of Westchester.

### COURT PROCEDURE.

The practice of the Justices' Courts required that the defendant appear forthwith if he were served by warrant, but if by summons, he was to appear not less than six days, nor more than twelve days after service. Judgment was to be rendered four days after the trial.

If the magistrate who issued the warrant or summons was absent on the day when the defendant made his appearance, the latter was brought before any other magistrate of the same city, town, borough, or district. The process against freeholders and inhabitants having families was by summons only, and served on the defendant personally, or, if he could not be found, a copy could be left at his house in the presence of some member of his family, of suitable age and discretion, who was to be informed of the contents thereof, at least six days before the time of appearance as mentioned in the summons. The officer who served the summons was required to endorse upon it the manner of its execution.

Upon the defendant's default in appearance, and no good and sufficient reason being assigned there-

## COURT PROCEDURE.

for, the court proceeded with the trial if the defendant had been personally served; but if a copy of the summons had been left at his residence, a warrant was issued for his immediate appearance.

Upon the plaintiff filing an affidavit with the court, to the effect that he was in danger of losing his demand by the issuance of a summons, it was customary for the magistrate to issue a warrant although the defendant was a freeholder. Upon defendant's application, and upon furnishing security therefor, an adjournment of the trial would be granted.

## JURY TRIALS.

Either party might demand a jury of six freeholders to try the case.

The following oath was required of jurors, the parties' names being inserted in their proper places: "You shall well and truly try this matter in difference between A B, plaintiff, and C D, defendant, and a true verdict give according to the evidence, So Help You God."

Witnesses were sworn, under a form of oath which has survived to our own day: "The evidence which you shall give in this matter in difference between A B, plaintiff, and C D, defendant, shall be the truth, the whole truth, and nothing but the truth, So Help You God."

After the close of the case, and when all the proofs had been heard, the jury retired to some con-

venient place until a verdict was agreed upon; their decision was thereupon announced to the court, and the judge rendered judgment accordingly.

The penalty for non-attendance of jurors, after having been regularly summoned, was a fine of not more than forty pounds and not less than ten pounds, in the court's discretion. These fines were applied to the use of the poor of the district where levied.

Should the plaintiff be non-suited, or discontinue or withdraw his action without the consent of the defendant, judgment was given against the plaintiff for the costs, and if the defendant proved that the plaintiff was indebted to him, judgment was given against the plaintiff for the amount of his indebtedness and the costs.

After judgment, execution was issued to the constable, to levy on the debtor's goods, and should there not be sufficient to cover the amount, he could take the debtor's body into custody. This continued to be the practice until 1831, when it was finally abolished.

#### COSTS.

The costs charged up in an action seem, on first glance, to be excessive: The cost for a summons was sixteen shillings; a warrant, twenty shillings; administering every oath or affirmation, ten shillings; execution, thirty shillings; subpoena for each witness, ten shillings; venire facias to summon a jury, twenty shillings; swearing a jury, thirty shil-

## COSTS.

lings; witness attending on summons, or otherwise, forty shillings per day, and so in proportion for a longer time; constable or other officer, for serving summons, subpœna, or other execution, for each mile traveled, or under, twenty shillings, and for every extra mile ten shillings; serving every execution, for every pound, one shilling, and summoning every jury, sixty shillings. Jurors received twenty shillings per man for each case tried, and when attending court, and not serving, ten shillings per man. But the act provided that the costs in any one case should not exceed the sum of forty pounds.

No writ of certiorari or of error could be issued unless an affidavit showing reasonable cause was presented to the justice within one month after judgment. A copy of such affidavit was given to the adverse party when required. Upon the affirmation or reversal of judgments in the higher courts, the prevailing part was awarded costs.

## AMENDED JURISDICTION.

The Supreme Court was authorized to order the attorney-general to prosecute all justices guilty of unjust practice. Chapter 9 of the Laws of 1780 reduced the jurisdiction of the justices of the peace, and the mayor, recorder, etc., to actions involving the amount of ten pounds only, and the fees were reduced to one-twelfth.

In 1807, the Justices' Court was established for the city of New York, to consist of three judges,

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whose jurisdiction extended to cases involving an amount from twenty-five dollars to fifty dollars, and to all marine cases between master and mariner, though in excess of the amount above mentioned. (Laws of 1807, chapter 139.)

In 1817, the jurisdiction of the Justices' Court was increased to one hundred dollars; in 1819, the name of this court was changed to the Marine Court of the City of New York, and by the statutes of 1846, the Marine Court was authorized to try actions of assault and battery, false imprisonment, miscellaneous prosecutions, libel and slander, and the general jurisdiction was increased to five hundred dollars. From this court was finally evolved the present City Court of the City of New York.

### ASSISTANT-JUSTICES' COURTS.

The act of 1807, which created Justices' Courts for the city of New York, also provided for the establishment of Assistant-Justices' Courts in each of the wards of the city of New York. The jurisdiction of these courts was limited to actions not exceeding twenty-five dollars; they were the subject of much litigation, and after having undergone many changes, became finally known as "District Courts," one being established in each district of New York City. An appeal from the courts of assistant-justices, or from the Marine Court, was taken to the Mayor's Court, afterwards called the "Court of Common Pleas."

## CONSTITUTIONS OF 1846 AND 1895.

### PRESENT STATUS.

As at present organized and authorized, this court is provided for by the amended state constitution of 1846. Quoting from article VI, section 17, of the constitution of 1846, we have the following: "The electors of the several towns shall at their annual town meeting, and in such manner as the Legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law."

The provision of the constitution of 1895 which gives these courts their present status, is article VI, section 17, as follows: "The electors of the several towns shall at their annual town meetings, or at such other time and in such manner as the Legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior courts not of record, and their clerks, may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law. Justices of the peace and district court

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justices may be elected in the different cities of this state in such manner, and with such powers, and for such terms respectively, as are or shall be prescribed by law; and all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities or appointed by some local authorities thereof.”

Source—Art. VI, sec. 17, of the amended constitution of 1846.

## CHAPTER XXVI.

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### CIRCUIT COURTS AND COURTS OF OYER AND TERMINER.

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SUPREME COURT CIRCUITS—OYER AND TERMINER  
—DIVISION OF STATE INTO CIRCUITS—FOREIGN  
COUNTIES—SPECIAL OYER AND TERMINER.

#### SUPREME COURT CIRCUIT.

By act of April 19th, 1786, one or more justices of the Supreme Court were required to hold during vacation, and oftener if necessary, Circuit Courts in each of the counties of the state for the trial of all issues triable in their respective counties. Proceedings were to be returned to the Supreme Court for record, and final judgment rendered according to law. The justices were also empowered to take Assizes of Novel Disseizen, or any other assizes in their discretion, at the circuit.

In 1789, the Legislature enacted that all issues triable by jury might be tried either at Circuit or at the bar of the Supreme Court, without an order to that effect. In 1797 an order became necessary for such trial. This finally led to the abolition of this class of circuit judges, for most litigants preferred to have their cases tried before the Supreme Court

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in banc. The office of clerk of the circuit was abolished on February 12th, 1796, and its duties devolved on the clerk of the County Courts.

On February 10th, 1797, the Legislature passed a law directing the court to designate, at its April term, one of their number to hold Circuit Courts, one in the western, one in the eastern, one in the middle, and one in the southern districts.

### OYER AND TERMINER.

An act of February 22nd, 1788, directed that justices also held Courts of Oyer and Terminer at the same time as Circuit, and continue such courts until all its business was completed. Two or more of the judges or assistant-judges of the Court of Common Pleas were to sit with the justice in Oyer and Terminer. In the city of Albany the mayor, recorder, and aldermen were to sit with the justice and judges of the Court of Common Pleas.

In New York City, the mayor, recorder, and aldermen, or at least two of them, sat alone with the justices. These local magistrates could sit in Oyer and Terminer only in their own counties. The court, however, had power to direct process in any city or county. In the governor was vested power to issue commissions of Oyer and Terminer whenever he deemed it advisable, always naming the justice of the Supreme Court in the commission with the others whom the governor and council saw fit to appoint. Once in each year the records were

## OYER AND TERMINER.

to be sent to the exchequer, to remain on record. The office of clerk of Oyer and Terminer was abolished February 12th, 1796, and the duties thereof devolved upon the county clerks.

## DIVISION OF STATE INTO CIRCUITS.

The constitution of 1821, by article V, section 5, provided that the state be divided into a convenient number of circuits, not less than four nor more than eight, subject to alteration by the Legislature from time to time, as the public good dictated. For each circuit a judge was to be appointed in the same manner, to hold office by same tenure as justices of the Supreme Court; their powers were those of justices of the Supreme Court in chambers, and in the trial of issues joined in Supreme Court. Circuit Courts were held at least twice in the year in every county of the state, except in New York, where there were four. Each circuit judge appointed the time and place for holding Circuit Courts in his circuit, for the ensuing two years, to be held for as many days as the judge in his discretion should designate. The court's jurisdiction extended to the trial of all such issues, and the taking of all depositions by default or otherwise as were to be tried or taken before such court; to the recording of all non-suits and defaults before them, and to return all proceedings had before them into the Supreme Court, or the court directing same.

Each judge of the Supreme Court, as well as

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circuit judges, had power to hold any Circuit Court, either for the whole time for which such court should continue, or for any part of that time. The clerks of the several counties were clerks of the Circuit Courts, except in New York City and County, where the clerk of the Supreme Court was also clerk of the Circuit Court.

A Court of Oyer and Terminer and General Jail Delivery was also organized under this constitution. At least two courts of this description were directed to be held each year in every county, except New York, where court was to be held at least four times.

Circuit judges could preside over such courts, and the judge appointed the time and place for holding same, which usually coincided with those of the Circuit Court. In the city and county of New York, court was held by one or more of the justices of Supreme Court, or of the circuit judges, or by the first judge of the Court of Common Pleas, together with the mayor, recorder, and aldermen, or any two of them. In all other counties of the state, they were held by a justice of the Supreme Court or circuit judge, together with at least two of the county judges.

### FOREIGN COUNTIES.

In the counties of Albany, Columbia, and Rensselaer, the mayor, recorder, and aldermen, or any two of them, and in Schenectady the mayor and aldermen, or any two of them, might sit and act in a

## FOREIGN COUNTIES.

Court of Oyer and Terminer, with or instead of the county judges.

The court had power by inquest of the grand jury of the county, to inquire into all crimes and misdemeanors within the county, to hear and determine crimes and misdemeanors, and deliver the jail to all prisoners according to law. It was the court's duty to try all indictments found by the grand jury, and triable at General Sessions of the peace, and which had been sent by order of the latter to Court of Oyer and Terminer, or which had been removed there.

## SPECIAL OYER AND TERMINER.

The governor, with the consent of the senate, could issue commissions of Oyer and Terminer, as often as required. The judge was named in the commission, and no proceedings could be had unless such judge was present. Every such commission named the time and place where court was to be held, and was recorded in the office of the secretary of state, and a copy thereof sent by the secretary of state to the district-attorney of the county for which such commission was issued. (District-attorneys had been appointed for each district.)

A special Court of Oyer and Terminer for any county was also to be called by the judge of the circuit in which the county was situated, by warrant under his official hand and seal, whenever the number of prisoners in the jail of any county, or the

importance of the offences charged upon such prisoners rendered the court necessary.

The judge transmitted such warrant to the district-attorney of the county, who, at least twenty days before holding said court, was required to issue a precept, directed to the sheriff of the county, requiring the latter to summon grand and petit jurors; bring before court all persons in the county jail, and publish a proclamation, notifying all necessary parties to appear at said court; and requiring all officers to return all their recognizances, inquisitions, and examinations to the said court on its opening.

Every Court of Oyer and Terminer had a seal, and all processes were tested in the name of the circuit judge, or in his absence, in the name of the chief-justice of the Supreme Court. Courts of Oyer and Terminer could direct writs into any county of the state. In all counties except New York, the county clerk was clerk of the court. In New York the clerk of General Sessions officiated.

Circuit judges had jurisdiction in equity matters on their circuits, and appointed a clerk of Equity Court who was to act as register of said court, with an official seal for all equity proceedings. The salary of circuit judges in 1827 was one thousand two hundred fifty dollars, and by 1835 it had increased to one thousand six hundred dollars. Attorneys and counsellors were admitted to practice on the same terms as prescribed in the rules, prepared by Benson in 1796.

SPECIAL OYER AND TERMINER.

The Circuit Courts were originally substituted for the old itinerant sessions of the Supreme Court. The judges were required to reside within their circuits, and in time these courts narrowed down to county rather than state tribunals. In 1823 the Circuit Courts were given equity powers, but this power was soon taken away, and re-transferred to the chancellor, but circuit judges could act as vice-chancellors within their circuits.



## CHAPTER XXVII.

### COURT FOR THE TRIAL OF IMPEACHMENTS AND THE CORRECTION OF ERRORS.

ONLY NEW COURT UNDER CONSTITUTION—IMPEACHMENT PROCEDURE—CORRECTION OF ERRORS.

ONLY NEW COURT UNDER CONSTITUTION.

A court officially designated as the Court for the Trial of Impeachments and Correction of Errors was the only new court established by the constitution of 1777. By the thirty-second section thereof, the constitution provided that such a court be instituted under regulations to be established by the Legislature, and to consist of the president of the senate pro tempore, senators, chancellor, and judges of the Supreme Court, or a majority of them.

IMPEACHMENT PROCEDURE.

Impeachment proceedings were regulated by sections 33 and 34, which provided that power to impeach all officers of the state for official malfeasance and corrupt conduct in their respective offices

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be vested in representatives of the people in the assembly, upon a majority vote of two-thirds of the members present.

Before proceeding to sit as a Court of Impeachment, each member of the court was sworn under a prescribed oath, similar to that administered to jurors, to truly and impartially determine the charge in question, according to the evidence. No judgment of the court was valid unless assented to by two-thirds of the members then present. A judgment of impeachment worked as a forfeiture of office, and debarred the guilty person from again holding or enjoying any office, or place of honor, trust or profit, under the state. The party so convicted was liable to indictment, trial, judgment, and punishment according to the criminal and civil law of the land.

In every trial of impeachment or indictment for crime or misdemeanor, the party impeached or indicted was allowed counsel as in civil cases. Should an impeachment be prosecuted against the chancellor or any of the judges of the Supreme Court, the official so impeached was enjoined from exercising the functions of office, until his acquittal.

## CORRECTION OF ERRORS.

In the Correction of Errors, the constitution provided that when an appeal from a decree in equity should be heard, the chancellor should inform the court of the reasons for the decree, but was not

## CORRECTION OF ERRORS.

vested with the right to vote at the trial or in the final sentence. If a judgment of the Supreme Court were under review, the judges were to assign reasons for the judgment, but have no voice in the final affirmance or reversal of their decision.

In pursuance of these articles of the constitution, the Legislature passed an act on November 23rd, 1784, organizing said court. It authorized sessions to be held during the meeting of the Legislature, and at such other times and places as might be ordered. It directed a seal to be prepared, and a clerk to be appointed, and prescribed the manner of trying impeachments.

In regard to the Correction of Errors, appeals were allowed to it from the Court of Chancery, Supreme Court, Court of Probates, and Admiralty Court, except in cases of capture. All appeals from probate or admiralty decisions, and decretal orders of chancery, were to be made in fifteen days. All appeals from final decrees in chancery, and writs of error upon judgments in the Supreme Court, were to be brought within five years after judgment rendered, or decree made. The president of the senate presided, and had a vote only in case of a tie.

Writs of error in civil cases and in criminal cases not capital, were writs of right and issued of course, but in capital cases they were writs of grace. The chancellor issued the writs in all cases, but in capital cases, only granted an order upon motion or petition, with notice to the attorney-general or state prosecutor.

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Under the constitution of 1821, the court remained the same as previously, except that a majority of the members of assembly present at the session were sufficient to impeach.

This court ceased with the constitution of 1846, after an existence of nearly seventy years. Its powers in cases of impeachment were transferred to a new court, composed of the president of the senate, the senators or a majority of them, and the judges of the Court of Appeals or a majority of them. Its appellate jurisdiction was delegated to the Court of Appeals.

## PART III.

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A GENERAL REVIEW OF ALL THE COURTS,  
BEING A BRIEF SKETCH OF EACH FROM  
1623 TO THE PRESENT TIME.



## CHAPTER XXVIII.

### COURT OF GOVERNOR AND COUNCIL.

EARLY DUTCH—COURT ESTABLISHED BY STUYVESANT—BODY OF NINE MEN.

#### EARLY DUTCH.

The demands of the original settlers of what is now the state of New York, for justice, were met by the institution, in 1626, of a legal body already referred to as the governor and council. It consisted of the governor and five assistants, to whom was attached an officer known as the schout fiscal, who exercised the duties of attorney-general, prosecuting officer, and sheriff.

This tribunal, as thus organized, continued until 1637. The records of this period are lacking. In 1640, under a charter of exemptions and privileges, recommendation was made for a court to consist of the governor and council, to hear all claims and disputes, assume the functions of an Orphans' and Surrogates' Court, take cognizance of all religious and criminal offences, and administer justice in general. The sessions of court were set for every Thursday for the hearing and determining of civil and criminal processes.

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### COURT ESTABLISHED BY STUYVESANT.

The arbitrary tactics of Governor Kieft in the conduct of this court led to a popular remonstrance, which resulted in its giving place to a new court established by Governor Stuyvesant in 1647.

This new court was composed of the governor, who was to be presiding justice, and in his absence a vice-director, so called, was to preside in his stead, with unlimited jurisdiction, subject to the governor's opinion on momentous questions. In criminal trials, two citizens of good standing, of the locality in which the crime was committed, were to assist the governor, as associate judges.

### BODY OF NINE MEN.

Dissatisfaction with this court resulted in judicial reform. The people elected eighteen representatives, from whom nine were selected by Stuyvesant, to constitute a permanent council to advise the governor in all public affairs. This select body became known as the "Body of Nine Men," and was vested with judicial powers. By rotation of three, they attended each session of court, and their decision was final, except that appeal lay to the governor and council, upon payment of one pound costs. This court was continued for seven years.

## CHAPTER XXIX.

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### 'PATROONS' COURTS.

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GRANT OF LAND TO PATROONS—JURISDICTION AND  
PROCEDURE—PATROONS' COURTS ABOLISHED.

#### GRANT OF LAND TO PATROONS.

In the very early years of the Dutch possession, the West India Company, practically the proprietor of New Netherlands, saw the necessity of encouraging emigration from Holland to the New World. It therefore devised the following plan to further its object: It proposed to wealthy citizens of Amsterdam and neighboring cities, to grant them princely tracts of land in New Netherlands, upon condition that they induce a certain number of men, usually fifty, to go to the New World to live. These wealthy men, styled patroons, were to defray all expenses of the voyage, but were to be free from all but special taxes. They were permitted by their grants to establish courts of justice, of which they were to be the judges. Deputies, however, could be appointed by the patroons, in case the latter were unable to hold court personally. In fact, these patroons were given the general powers of feudal lords with complete jurisdiction over

## THE COURTS OF THE STATE OF NEW YORK.

the property and lives of their tenants, who were no more than bond-slaves.

### JURISDICTION AND PROCEDURE.

These grants were given in 1630, and upon their arrival, the patroons began exercising their rights as judges with a high hand. Court day was appointed by them, and all actions were arbitrarily tried. The limit of their jurisdiction was fifty guilders. From any action, involving a sum greater than the above mentioned amount, an appeal was allowed to the director-general and council of the province. But this right of appeal, as mentioned in another part of this book, was abrogated by the patroon in a manner worthy of the iron rule of a manorial lord. Before any tenant was permitted to enter the property of the patroon, the latter exacted a written promise that, under no condition, was the right of appeal to be invoked by the tenant.

There was a Patroons' Court established in each locality outside of the populated vicinity of New Amsterdam. For seven years, these high-handed dispensers of justice held sway, taking cognizance of all manner of actions, criminal and civil. Their powers did not even stop at a matter of life and death, and it was nothing to witness a poor wretch being strung up to the highest tree at the order of the patroon.

ABOLISHED BY WEST INDIA COMPANY.

PATROONS' COURTS ABOLISHED.

Fortunately, the West India Company, the recipient of many complaints about this abuse of power by the patroons and the resultant injustice and cruelty, finally saw fit to admonish the tyrants. The power of the latter seems to have dwindled away by about 1637, and in a short time thereafter, the West India Company arranged for a judicial system throughout New Netherlands, corresponding to the tribunals of justice the Dutch were accustomed to in their native land.



## CHAPTER XXX.

### COURT OF SCHOUT, BURGOMASTER AND SCHEPENS.

POPULAR COURT ESTABLISHED—CHANGE OF NAME  
—JURISDICTION OF COURT—PROCEDURE AT  
TRIAL—DEPOSITIONS OF WITNESSES—DEGREES  
OF EVIDENCE—EXECUTION OF JUDGMENT—AD-  
DITIONAL JURISDICTION—CRIMINAL BRANCH OF  
COURT—ADDITIONAL COURTS.

#### POPULAR COURT ESTABLISHED.

In 1650 the States General of Holland ordered the institution of a court composed of two burgomasters, five schepens and a schout.

Its first session was held on February 7th, 1653, when, for its future regulation, it was announced that sessions of court would be held for “the hearing and determining of all disputes between parties, in the building heretofore called the City Tavern and now the Stadt House (City Hall), on every Monday morning, at nine o’clock.” At its next meeting the court was formally organized as a court of law.

#### CHANGE OF NAME.

On June 12th, 1665, by official proclamation,

## THE COURTS OF THE STATE OF NEW YORK.

Governor Nicolls declared this court disestablished, and it evolutionized into the Mayor's Court.

During its existence this court was the most important tribunal yet established for the colony, and the earliest on record. The records of court were kept by a regular clerk or secretary, and to-day afford most interesting and valuable reading. The historical features have been considered in the principal text of this volume.

### JURISDICTION OF COURT.

The magistrates were often laymen. The court's jurisdiction was unlimited in all but capital offences. A stated term of court was set for every fortnight, unless oftener required.

Upon the plaintiff's complaint, the court messenger summoned the defendant to attend court on the next court day. His default in attendance incurred a fine, and operated as a waiver of any demurrer to the court's jurisdiction, and led to the issuance of a new mandate. A second default increased the costs, and divested the defendant of all objections to jurisdiction and procedure. Should the defendant again fail to obey the court's mandate, and upon the issuance of a third citation and default thereto, judgment absolute and final was rendered against the defendant. In cases in which the defendant's presence at court was necessary, it was compelled by an order of arrest.

## DEPOSITIONS OF WITNESSES.

### PROCEDURE AT TRIAL.

The trial of a case was conducted according to the usual rules of procedure, which prevail in most courts. The plaintiff stated and proved his case and the defendant answered. A material issue of fact might be proved by the sworn testimony of a witness, or if further evidence were required, an adjournment was had until the following court day. Written depositions of the witnesses were taken before a notary public, for filing with the court, or the former were subpoenaed to testify on the adjourned day.

Cases of difficulty which required ability and special fitness, were referred to arbitrators of the parties' own choice, or were designated by the court. If the arbitrators were unable to effect a settlement of the difficulty, the matter was brought into court and there disposed of.

Alternative procedure was for the defendant to move that the plaintiff's case be reduced to writing and entered on the court record; one day's time was given for this purpose. Upon resorting to this practice, all subsequent pleadings were to be in writing; these consisted of defendant's answer, plaintiff's reply, and defendant's rejoinder.

## DEPOSITIONS OF WITNESSES.

It was the duty of the notary before whom depositions were taken, to keep a record thereof. The

## THE COURTS OF THE STATE OF NEW YORK.

deposition of a non-resident witness could be taken upon a requisitory letter, before a magistrate of the locality where he resided. This testimony with the other pleadings, formed the memorial, and was filed with the court. To either party was given the right within a limited time, to examine an adverse witness upon cross-interrogatories, on any matter disclosed by the depositions. In rebuttal or reply, either party was at liberty to introduce contradictory evidence.

A presumption of law was in favor of the authenticity of documentary evidence purporting to be in a party's handwriting, if not repudiated by the other party under oath. Account books, free from clerical or technical objections, were admissible in behalf of the proponent.

### DEGREES OF EVIDENCE.

The kinds and degrees of evidence were classified into full proof and half proof. The former was primary or original evidence, supported by not less than two credible witnesses, or documentary evidence at first hand, or of original entry; the latter classification included direct evidence, or that of an eyewitness. Hearsay partook of the degree of half proof, and was admissible in corroboration of direct evidence. Dying declarations were admitted as full proof.

### EXECUTION OF JUDGMENT.

After judgment was rendered, a defendant was

## EXECUTION OF JUDGMENT.

granted fourteen days within which to pay one-half the amount of the judgment, and one month for the payment of the balance. Further arrears in satisfying judgment led to more summary action for its collection. The court messenger, in full panoply of legal power, exhibited to the delinquent judgment-debtor, a copy of the judgment, and demanded payment within twenty-four hours. Further delinquency caused an attachment to issue against the movable property, in the presence of a schepen. But the attachment could be vacated at the end of six days, upon payment of the judgment and all costs. Should the property not be so redeemed, it was offered at public auction on a designated law-day, and sold to the highest bidder.

A sale of real estate, or immovable property, was conducted with more formality, and in accordance with an unique national custom transplanted to the colony from Holland. The equity of redemption was longer extended than in the sale of chattels, and the bidding continued during the burning of a lighted candle; at the extinction of the candle, the property was allotted to the highest bidder.

The civil business of the court included actions for money due and owing; attachment of absconding debtors' property; actions relating to real estate; actions to recover damages for injuries to land or personal property; and actions in replevin.

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### ADDITIONAL JURISDICTION.

In actions for seamen's wages, and for breach of promise of marriage, the defaulting party was subjected to imprisonment. Actions of separation between man and wife were adjusted by allotting the children equally to either parent, and an equal division of the property after payment of debts.

In bastardy proceedings, the male was obliged to furnish security for the child's support, and both parties were liable to fine or imprisonment, unless public retraction were made in open court. Damages of a pecuniary nature were not allowed for injuries to person or property.

The court's powers included those of a Court of Admiralty, and a Court of Probates. The probate branch of its jurisdiction gave it general supervision of decedent's estates, through curators appointed by the court. An adjunct of this court was the Court of Orphan Masters, not dissimilar, in its scope and object, to the Surrogates' Courts of the present day. The masters were three in number, but were later reduced to two.

On January 25th, 1658, Stuyvesant established a schedule of statutory fees for the purpose of regulating and checking the exorbitant exactions of licensed or public officers.

### CRIMINAL BRANCH OF COURT.

The criminal side of the court took cognizance

#### CRIMINAL BRANCH OF COURT.

of all crimes. The executive limb of the law in criminal cases was the schout. On his requisition, and upon good cause shown, a defendant might be summoned or arrested at the discretion of the court. In all cases, except those of murder, treason, arson, or rape in the first degree, the defendant might be released on bail. The manner of trial was either public or private.

The former was conducted according to the rules of evidence, and otherwise like public trials; the latter form of trial was held in secret, and conducted upon written interrogatories, before two schouts. Fines, imprisonment, whipping, the pillory, banishment, and death were the penalties inflicted. The infliction of the death penalty required the concurrence of the director-general and his council. The general act of disestablishment of June 12th, 1665, put an end to this court.

#### ADDITIONAL COURTS.

Separate courts were established for each of the "Five Dutch Towns," as they were called, on Long Island. These courts formed a circuit over which a schout presided, whose residence was at Breukelen, now Brooklyn.

In 1652, a court for the English at Beverwyck was established by Governor Stuyvesant. In 1656 and 1659, he created similar courts among the English settlers at Canorasset (Jamaica), and Middle-

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burgh (Newton). The foregoing courts composed the colonial judiciary until the English occupation on September 6th, 1664.

The procedure of these Town Courts was practically the same as that in vogue in the Court of Burgomasters and Schepens at New Amsterdam.

## CHAPTER XXXI.

### MAYOR'S COURT.

#### FIRST ENGLISH COURT—FUNCTIONS OF COURT— DIVIDED INTO THREE TRIBUNALS.

##### FIRST ENGLISH COURT.

This court was of distinctively English origin, being the first regularly established court for the city of New York, and supplanted the Court of Burgomasters and Schepens which had previously existed. It was officially instituted on June 15th, 1665, by the mayor and aldermen, to whom special authority had been given for that purpose.

Its records were in Dutch and English, and no radical departure from the existing procedure was attempted. The Dutch procedure had taken deep root in the colony, and it was considered impolitic to make any changes, with the sole exception of trial by jury.

In this court all cases were tried by jury, on Tuesday of each week. Petty cases were to be tried or settled out of court, by arbitrators, a practice which greatly curtailed the number of jury trials.

In 1669, a double set of magistrates was nominated, which was in conformity with the Dutch cus-

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tom. The judges in office nominated two persons for each office, to serve for two years, from whom the governor selected those for office. In 1670 the official term was reduced to one year, and two magistrates were annually appointed by the governor, until Governor Dongan's time.

By the terms of what is known as the "Dongan Charter," it was provided that the mayor and recorder, or three or more of the aldermen, not exceeding five, should be justices of the peace, and any three, of whom the mayor or recorder should be one, were empowered to hear and determine all manner of petty larcenies, riots, oppressions, extortions, and other trespasses and offences in the city.

### FUNCTIONS OF COURT.

Heretofore the Mayor's Court had acted as a city council and court of justice. Precedence was given to litigation or the legal business of the court, and then municipal affairs were taken up.

The charter observed a distinction between the legislative and judicial functions of the mayor, recorder and aldermen, which differentiated their functions as criminal magistrates from those they exercised as judges. This led to the organization of three different subordinate branches of court, with the same set of officers for all three.

DISTINCT FUNCTIONS OF COURT.

DIVIDED INTO THREE TRIBUNALS.

These branches were the Common Council, the Mayor's Court, and the Sessions.

To the Mayor's Court was committed the civil business, and the Sessions was the criminal side of the court. From this period dates the Court of Quarter Sessions, which after 1688 was known as the Court of Sessions. In 1821 the Mayor's Court became the Court of Common Pleas for the city and county of New York, of which more is said hereafter.



## CHAPTER XXXII.

### THE GENERAL COURT OF ASSIZE.

#### COMPOSITION OF COURT—ORIGIN—JURISDICTION —JURY TRIALS.

##### COMPOSITION OF COURT.

The General Court of Assize was composed of the governor, his council, and two justices of the peace from each of the three ridings. This court convened at the Fort in New York, on September 28th, 1665; its sessions were held annually, but a special session might be convoked when an emergency arose. The Court of Oyer and Terminer, or criminal branch, could be convened for securing a more speedy trial, if a longer interval than two months would intervene before the next term of the Court of Assize. The direct grounds for this summary procedure were a violation of the Navigation Laws, and public crimes of a serious nature.

The powers of the Court of Assize were legal and legislative, and its jurisdiction, which was both original and appellate, was wide and comprehensive. Its records show a varied class of litigation, and business of a public nature.

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### ORIGIN.

The origin of the court is shrouded in mystery, but it seems to have been an evolution of the Court of the Director-General and Council, under Stuyvesant's administration.

### JURISDICTION.

By the Duke's laws provision was made for an annual term of court to be held at New York. To it was given original and appellate jurisdiction, which included all appeals from inferior courts. Its original jurisdiction extended to all criminal actions, including capital cases and infractions of the laws of navigation; the court also had cognizance of civil and equitable actions which involved not less than twenty pounds. A prominent feature of this court was its legislative aspect. The governor and council often acceded to its suggestions for legal reform, or for direct legislation.

### JURY TRIALS.

Jury trials prevailed in all cases. At first six constituted the jury, but this number was eventually increased to twelve. It was customary to empanel the jury even when an appeal was heard by the court. For each day's attendance at court, jurors received ten shillings.

In 1684, the Court of Assize was abolished by act of the assembly for reasons given in Part I of this work.

## CHAPTER XXXIII.

### COURTS OF SESSIONS.

COURTS FOR THE THREE RIDINGS—JURISDICTION—  
PROCEDURE—THE JURY—PRESIDING JUSTICE—  
APPEALS FROM SESSIONS—UNDER STATE GOV-  
ERNMENT.

#### COURTS FOR THE THREE RIDINGS.

The original act of establishment which authorized the Court of Sessions is set out in full in Part I of this work. Terms of court were appointed to be held three times each year in each riding. The first Tuesday in June was set for the East Riding, the second Tuesday in June for the North Riding, and the third Tuesday in June for the West Riding. The second Court of Sessions was held the first, second, and third Wednesdays of December, and the third sessions on the first, second, and third Wednesdays of March, in the East, North, and West Ridings, respectively, and were not to exceed three days.

#### JURISDICTION.

The venue in actions on contract and tort was laid in the county where the cause of action arose.

Bail was accepted in cases of assault and battery, breach of the peace, and like offences, and if not furnished, the prisoner was remanded for the next session of court.

Petty actions for less than five pounds sterling were referred to two arbitrators, who were generally the town overseers, for settlement out of court. If for any reason the overseers were unable to act, the constable of the locality was to select two impartial persons. Should the decision of the latter prove unsatisfactory to the parties, three other impartial persons, chosen at the cost of the party protestant, were to render final judgment.

Actions of not less than five, nor more than twenty pounds, were the jurisdictional limitations as to amount, and no appeal was permitted in cases under twenty pounds. Upon tender of costs before final judgment, the plaintiff might withdraw his action.

PROCEDURE.

The plaintiff's complaint was to be in writing, and filed in the clerk's office, eight days before the trial. The judgment was endorsed on the complaint or answer, as the case might be, and all papers in the case filed with the clerk of the court.

Cases were tried by a jury selected chiefly from the neighboring overseers, or in lieu of them, from the best citizens of the locality. A list of the cases for trial was given to the clerk, sheriff or undersheriff, who was to issue warrants requiring the

## PROCEDURE.

attendance of jurors at court. The jury decided the case according to the evidence submitted, and the established facts. After having instructed the jury as to points of law which may have arisen during the course of the trial, the governor or senior justice then rendered the decision of the court, upon receipt of the jury's verdict.

## THE JURY.

The compensation of jurors was at the rate of three shillings, six pence per day, paid from the court fees and charges, or if need be, from the public treasury. The jurors were not to exceed seven, nor be less than six. In capital cases, it was within the judges' discretion to appoint a jury of twelve.

In those cases in which the jury could not agree upon a verdict, a special or hypothetical verdict, addressed to the sound discretion of the court, was submitted, for the judges' interpretation of the law and facts. If the jury were not clear on a point of law or fact, they might require the assistance of the bench. The concurrence of a majority of the jury was sufficient for a verdict, except in capital cases, in which an unanimous verdict was necessary.

Relationship or interest disqualified a juror from service; but if once accepted and sworn, he could not be challenged. The deliberations of the jury were conducted in secret, and any infraction of the rule of secrecy was ground for a fine of ten shil-

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lings, and such further punishment as the justices saw fit to administer.

### PRESIDING JUSTICE.

The oldest justice of the peace was to officiate as presiding judge, in the absence of the governor, lieutenant-governor, or any of the council. If he were unavailable, the justices selected one of their number to discharge this function. A privilege of the court allowed justices of the peace to preside at any of the town courts within their jurisdiction.

Legal fees were allowed the justices of the peace, and the sheriff and his subordinates. For nominating three arbitrators in a case involving less than forty shillings, a justice was paid seven shillings, six pence; in actions of slander and the like, one shilling; for subpœnaing a party, six pence; no fee was allowed for criminal or capital warrants, or for officiating as a justice on the bench.

Justices of the peace were ineligible to act as attorneys, unless specially assigned by the court. For absence from his duties on the bench, he was fined at the rate of ten pounds per day. Petty constables were fined five pounds for each day's absence. However, justices might, on proper grounds, remit these fines.

### APPEALS FROM SESSIONS.

An appeal from the Court of Sessions lay directly to the Court of Assize, but a justice was

#### APPEALS FROM SESSIONS.

disqualified from officiating in both the appellate and lower court. The appellant was required to indemnify the respondent, should his appeal prove unsuccessful, and before appealing, the former was to furnish security for costs.

Criminal appeals could be taken by the appellant giving security for good behavior. In capital cases the appellant remained in jail until the next assize, if held within two months. The grounds of appeal, and the security on appeal, were filed with the clerk six days, at least, before court day. Ten shillings was the charge for an appeal, and two shillings, six pence for entering the same.

#### UNDER STATE GOVERNMENT.

Courts of Sessions for the several counties were continued under the state government until finally abolished in all counties except New York, by the constitution of 1895.



## CHAPTER XXXIV.

### COURT OF ADMIRALTY.

ORIGINAL ADMIRALTY JURISDICTION—FIRST REGULAR COURT—APPEALS FROM COURT—STATE COURT OF ADMIRALTY.

#### ORIGINAL ADMIRALTY JURISDICTION.

A temporary prize court of admiralty was established in 1690, to take cognizance of some French vessels captured on the high seas.

Governor Leisler commissioned one De Lanoy as judge of a Court of Admiralty, with eight associates to aid him, six of whom, with De Lanoy, to constitute a full bench. A registrar and marshal were also appointed. At the end of five days, for lack of further business, this court was discontinued.

#### FIRST REGULAR COURT.

The regular Court of Admiralty for the province was established by Governor Fletcher, under special authorization from the Lords of Admiralty, on April 29th, 1697, and included a judge, registrar, and marshal. Upon the disability of any of the officers to act, the governor was to appoint

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others in their place, subject to ratification by the Lords of Trade in England.

On November 5th, 1760, a special commission was issued for the trial of crimes committed on the high seas.

A report on this court, made by Governor Tryon to the Lords of Trade, shows that the judges and other officers held their office by commission from the crown; that they received no salary; that the procedure followed was in conformity with that of England, and that its jurisdiction had been extended to assume cognizance of every breach of the trade laws then in force in England.

### APPEALS FROM COURT.

Up to 1763, appeals from the Court of Admiralty were heard by the High Court of Admiralty in England. In the same year, this appellate jurisdiction was bestowed on any court of record in the province. A High Court of Admiralty for all America was established thereafter, to hear all appeals relating to maritime affairs.

### STATE COURT OF ADMIRALTY.

This court existed for a brief period under the state government. Its origin is to be traced to the maritime conditions resulting from a state of war. On November 25th, 1775, the Continental Congress recommended that the colonies establish courts to adjudicate questions that might arise on

## STATE COURT OF ADMIRALTY.

the seas during the war. All trials were to be by jury. The High Court of Admiralty of the state of New York was accordingly authorized.

Pursuant to an act of Congress passed October 13th, 1777, appeals could be taken from this court to a committee of their body. Under the Articles of Confederation an act was passed establishing a court to hear appeals, termed the Court of Appeals in Cases of Capture.

On February 14th, 1787, the State Legislature passed an act to prevent encroachments of the Federal Courts, providing that they should not have cognizance of transactions within the state boundaries. The present United States Constitution vested admiralty jurisdiction exclusively in the Federal Courts, and consequently the state court ceased to exist, upon the adoption of that instrument by the state in 1789. The powers of the court have since been exercised by the United States District Courts.



## CHAPTER XXXV.

### COLONIAL APPELLATE COURTS.

#### EARLY APPELLATE JURISDICTION—UNDER STATE CONSTITUTION.

##### EARLY APPELLATE JURISDICTION.

Among the Dutch, appeals were to be taken to the governor and council and from them to the States-General in Holland.

When the English obtained possession, it was provided by the Duke's laws, that the General Court of Assize have appellate jurisdiction in all actions involving an amount above twenty pounds. Besides this appellate jurisdiction, it also had original jurisdiction in criminal prosecutions, and especially in capital and treasonable offences.

When the Court of Assize was abolished in 1684, appellate jurisdiction devolved upon the governor and council, in any actions involving an amount of one hundred pounds or over, and an appeal was allowed to the king and privy council if the amount exceeded three hundred pounds. All these points are more fully discussed in the first part of this work. The territory over which the colonial courts for appeals had jurisdiction, covered that part of

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the New World originally granted to the Duke of York, subject to the many changes in the boundaries of the colonies, that took place prior to the Revolution.

### UNDER STATE CONSTITUTION.

Immediately after the war, the people, flush in their newly acquired power, wished to deprive the governor of some of his prerogative rights. Therefore, a separate court, known as the Court for the Trial of Impeachments and Correction of Errors, where the governor still retained his seat as judge, but in conjunction with many other state officials, was created by the first constitution of the state. The state appellate courts are separately treated in another part of this book.

## CHAPTER XXXVI.

### EXCHEQUER COURT.

#### COLONIAL EXCHEQUER JURISDICTION—STATE COURT.

##### COLONIAL EXCHEQUER JURISDICTION.

How Chief-Justice Attwood inferred that the Supreme Court of Judicature had exchequer jurisdiction in the admiralty case, is fully treated in Part I of this work. There never was a separate Exchequer Court during the colonial period. Actions concerning fines and debts due the government, were sometimes brought in the Supreme Court, and as often in the Court of Chancery, but always hotly contested by the colonists as an abuse of the powers of both courts to hear such actions. The nature of an Exchequer Court is solely equitable and at one time when the feeling against the Chancery Court ran high, and it looked as if no equity court would exist in the colony, the judges of the Supreme Court made it known that they would hear all equitable actions in their exchequer branch. But the astute governor of the time was able to override this crisis and the Court of Chancery continued to exercise exchequer jurisdiction. The last men-

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tion of exchequer business during the colonial period is the matter of Governor Dunmore against Lieutenant-Governor Colden in 1770.

### STATE COURT.

On February 9th, 1786, the Exchequer Court was re-organized as a branch of the Supreme Court, for the better levying and accounting of fines, forfeitures, issues, amercements, and debts due the people of the state. The junior justice of the Supreme Court, or any of the associate justices, in his absence, was constituted judge of the court, to determine all causes involving above, and proceed according to course of exchequer. A seal was directed, and a clerk appointed. William Popham was the only clerk of the court, holding office from the date of his appointment, July 17th, 1786, until January 1st, 1830, when the court was abolished pursuant to the general act of repeal of December 10th, 1828.

## CHAPTER XXXVII.

### COURT OF PROBATES.

#### PROBATE JURISDICTION AMONG DUTCH—UNDER STATE GOVERNMENT—LATER PROBATE JURISDICTION.

##### PROBATE JURISDICTION AMONG DUTCH.

From the first establishment of a judiciary in New Netherlands, the director-general had probate jurisdiction and charge of intestates' property. Later some jurisdiction of decedents' property was vested in the Schout, Burgomasters and Schepens Court. But about the year 1655, a separate Court of Orphan Masters was created by Stuyvesant, which continued in existence until the English occupation.

Among the English, in the early colonial period, the governor granted probates through his Prerogative Office, but he had the power to appoint a surrogate, or deputy, to act in his stead in remote sections of the province. The secretary of the province often acted in the governor's place in the discharge of the duties of the Prerogative Office. About twenty years prior to the Revolution a separate judge of probates was appointed, although

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the probate of wills was required to be heard by the governor or his secretary up to the Revolution.

### UNDER STATE GOVERNMENT.

During the war, the Legislature by act of March 16th, 1778, divested the governor of the powers he possessed in the Surrogate and Probate Courts and transferred them to a separate judge of a Court of Probates, who was vested with all and singular the powers and authorities that the governor for the time being had and exercised as judge of the Prerogative Court. The only reservation was as to the nomination of surrogates for the several counties, who were to be appointed by the Council of Appointment and commissioned under the Great Seal. The same act directed the judge of the Court of Probates to have a seal of his court made. By an act passed in 1787, a surrogate for each county was authorized, to be designated by appointment.

The judge of the Court of Probates had jurisdiction in cases of decease of citizens without the state, or of non-residents within the state, and in all appeals from the Surrogates' Courts in the entire state. All appeals from the decisions of the judge of the Court of Probates could be brought to the Court for the Correction of Errors.

### LATER PROBATE JURISDICTION.

An act of March 10th, 1797, provided that court

#### LATER PROBATE JURISDICTION.

be held at Albany, and that the judge and clerk remove all papers and documents to that city, and reside there. This court was abolished March 21st, 1823, and its records deposited with the clerk of the Court for the Correction of Errors, and its jurisdiction conferred on the chancellor. But the Surrogates' Courts continued, and are still in existence.



## CHAPTER XXXVIII.

### COURT OF CHANCERY.

EARLY EQUITY PRACTICE — ESTABLISHMENT OF COURT—RE-ORGANIZATION BY NANFAN—RECOGNITION BY FIRST CONSTITUTION OF STATE—CHANGES BY CONSTITUTION OF 1821—SUCCESSIVE CHANGES AND ABOLITION.

#### EARLY EQUITY PRACTICE.

The forms and jurisdiction of chancery had been originally exercised by the Town Courts, the Court of Sessions, and the Court of Assize, which conformed their procedure as closely as possible to the High Court of Chancery in England. In the exercise of chancery jurisdiction, it was customary to grant divorce on the ground of adultery, a continuation of a Dutch custom. The prevalent procedure in all equitable actions in these courts was by bill in equity; an answer was interposed, witnesses were examined as in England, and trial by jury was waived.

#### ESTABLISHMENT OF COURT.

In 1683, a High Court of Chancery was established, which was vested with exclusive chancery

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### CHANGES BY CONSTITUTION OF 1821.

By the constitution of 1821, it was provided that the chancellor be appointed by the governor with consent of the senate, during good behavior, or until the age limit of sixty years. On an appeal from the chancellor's decision to the Court for the Correction of Errors, of which the chancellor was a member, it was provided that he should be given an opportunity to justify his decision, but should have no voice in the final judgment. Provision was likewise made for vesting equity powers in circuit judges, subject to the right of appeal to the chancellor. An act was accordingly passed on April 17th, 1823, which conferred on the eight circuit judges the powers and jurisdiction of the chancellor in equity cases, subject to the latter's appellate jurisdiction. A clerk of the court, who was also to act as register, was to be appointed by the judges for their respective circuits; and to the judge was assigned the duty of devising a seal for the use of the clerk in equity proceedings. These courts were subsequently abolished, and general equity jurisdiction was vested in the chancellor; but the circuit judges acted as vice-chancellors in their respective circuits.

Provision was also made by the constitution for the appointment of masters and examiners in chancery by the governor and senate, for the term of three years, unless sooner removed; on the chan-

## CHANGES BY CONSTITUTION OF 1821.

cellor was conferred power to appoint registers and assistants to hold office during the former's pleasure.

## SUCCESSIVE CHANGES AND ABOLITION.

On March 27th, 1839, the Legislature created an assistant vice-chancellor for the first circuit, for the term of three years, to be appointed in the same manner as the chancellor and vice-chancellor. In 1840 this office was made permanent and the vice-chancellor directed to hold special terms by order of the chancellor, within the municipal limits of the city of New York. The same enactment made provision for the appointment of a vice-chancellor for the eighth circuit, to hold court at Rochester.

The constitution of 1846 officially terminated the Court of Chancery, and its existence ceased on the first Monday of January, 1847. Its powers were transferred to the Supreme Court organized under the constitution of 1846, and its records filed with the newly created Court of Appeals.

## THE COURTS OF THE STATE OF NEW YORK.

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## CHAPTER XXXIX.

### SUPREME COURT.

COLONIAL SUPREME TRIBUNALS—CREATION OF COURT—FIRST CHIEF-JUSTICE—CHANGES IN SALARY—TERMS OF COURT—CIRCUITS—LEGISLATIVE CHANGES—COURT UNDER FIRST CONSTITUTION—SESSIONS OF COURT—FIRST RULES—APPOINTMENT OF REPORTER AND CLERK—CONSTITUTIONAL CHANGES, 1821 — CHANGES IN TERMS—CHANGES IN CLERKS' OFFICES—ELECTIVE JUDGES—NUMBER OF JUDGES—CONSTITUTIONAL CHANGES.

#### COLONIAL SUPREME TRIBUNALS.

A complete history of this court having been already given, any further information is intended to be merely supplemental to what has already been related, and for the purposes of the general review of all the courts of the state.

Its growth has been traced from the Court of Assize, established in 1665, and the Court of Oyer and Terminer, which was instituted in 1683.

#### CREATION OF COURT.

In 1691, the committee for the establishment of

## THE COURTS OF THE STATE OF NEW YORK.

Courts of Judicature created a Supreme Court, composed of five judges. An innovation to the existing procedure was the inauguration of trial by jury, a practice which was waived in case of defendant's default to plaintiff's pleading.

On November 11th, 1692, the provincial assembly continued these courts for two years. An immediate offshoot of this court, was that of Oyer and Terminer, established by Governor Dongan in 1683, with criminal jurisdiction, and civil jurisdiction for amounts in excess of five pounds. Provision was made for an annual session of court in each county.

As established in 1691, and modified by ordinances of 1699 and 1704, this court continued until 1777. The constitution of 1777 re-organized and perpetuated this court, providing for the appointment, qualification and tenure of judges.

### CHANGE BY ORDINANCE.

The modification of 1699 provided that a justice of the Supreme Court, in conjunction with two justices of the peace, should hold an annual term of circuit court in each county, and that the Supreme Court convene in New York City on the first Tuesdays in April and October, for sessions of five days each.

The modification effected by the ordinance of 1704, vested the Supreme Court with the jurisdiction and powers of the English court of Queens

## CREATION OF COURT.

Bench, Common Pleas and Exchequer. An amendment of 1692, ordained a circuit of the Supreme Court for the remoter districts, to be held once a year, by a judge under special commission. Unless notices of appeal and complaints were filed previously to the term, court was not held for that year.

To further the ends of justice, two local justices of the peace acted as associates of the judge. The procedure of the Supreme Court in the city of New York prevailed.

Sessions of court, were, under the act authorizing the Circuit Courts, set for the first Tuesdays in April and October, for the county of Orange; for the first Tuesday in May for the city and county of Albany; for the last Tuesday in June for the county of Westchester; for the first Tuesday in August for Kings county, and for the second Tuesday in June for Richmond county. Court was to continue for two days, and the New York term was reduced from eight to five days.

The courts were extended under act of October 24th, 1695, for two years longer, and another act of April 21st, 1697, made provision for an additional year. Because of failure to pass an extension act in 1698, all existing courts had ceased for want of legislative sanction. Governor Bellamont arose to this unusual emergency by issuing an ordinance, ratified by the council in 1699, which re-established all the courts. Owing to the resignation of former associate justices of the court during Attwood's

## THE COURTS OF THE STATE OF NEW YORK.

chief-justiceship, the court now consisted of only two associate justices, who, with the chief-justice, constituted a full bench.

### FIRST CHIEF-JUSTICE.

The first chief-justice, who was Joseph Dudley, was commissioned to hold office during the royal pleasure, and the associate judges were commissioned by the governor. In 1746, the chief-justice received his commission during good behavior. The salary of the chief-justice was, in 1698, made one hundred thirty pounds annually, prior to which year no compensation had been allowed for that office. The first assistant received one hundred pounds. In 1702 the official salary was increased to three hundred pounds per annum for the chief-justice; to one hundred fifty pounds for the first associate judge, and the second associate judge was the recipient of fifty pounds per annum.

### CHANGES IN SALARY.

The assembly, in 1715, fixed the chief-justice's salary at three hundred pounds per annum for five years, for holding circuit courts. In 1765 the General Assembly voted the chief-justice three hundred pounds for one year, and the other justices two hundred pounds for a like period. Instead of salary, this was a provision for the expenses of going the circuit. In 1774 this salary was raised to five hundred pounds sterling, payable by the

#### CHANGES IN SALARY.

Royal Exchequer, and three hundred pounds in New York currency payable by the colony; the associate judges were to receive two hundred pounds in New York currency.

#### TERMS OF COURT.

The terms of court had been officially regulated by an ordinance of Lord Cornbury, issued on April 3rd, 1704. It was there enacted that court be held on the first Tuesdays in June and September; and the second Tuesdays in October and March each year, at the city of New York, or other designated places. The official proclamation convening court, was issued at least twenty days before the term, which was to continue not longer than five days.

The terms of court were subsequently appointed for the third Tuesdays in October, January and April, and the last Tuesday in July of each year; the April and October terms were to be held every day except Sunday, from Thursday to Thursday of the following week. On October 30th, 1730, this ordinance was repealed, and the April and October terms extended for two days. This same ordinance enabled any one or more of the justices to hold court in any county of the province, for the purpose of trying causes brought on for trial in the Supreme Court. Trial was to be had at the first term of court, and judgment rendered at any subsequent term. Court was to last until its business was despatched, and was in no event to exceed six days.

## THE COURTS OF THE STATE OF NEW YORK.

Under this ordinance court was appointed for Albany, Dutchess, Ulster, and Orange counties, in June; for Kings, Queens, Suffolk, and Westchester counties in September, and for Richmond county in May. Two clerks were in charge of the business of court. The office of the chief-clerk was located at the city of New York, and the deputy-clerk officiated on the circuits. All court records and processes were to be transmitted by the deputy-clerk to the chief-clerk's office for official filing.

### CIRCUITS.

An act of November 27th, 1741, enabled justices of the Supreme Court to hold Circuit Courts under commission from the governor, to which commission the official seal of the colony was made appurtenant. Previously, special appointment by the crown was required. This authorization, at first limited to six years, was made perpetual in 1746.

In May, 1746, justices of the Supreme Court were empowered to commission persons at discretion, to take affidavits to be read in any causes depending in the Supreme Court, as Masters of Chancery extraordinary in England were accustomed to do.

### LEGISLATIVE CHANGES.

An official schedule of fees was promulgated by the assembly, on May 24th, 1708, which regulated the fees of all public officers. This schedule has

## LEGISLATIVE CHANGES.

been printed in full in the principal part of this work, hence we will not take up the reader's attention further, by republishing it at this time.

A jurisdictional limitation passed on October 11th, 1709, made the minimum amount involved in actions triable in the Supreme Court on a case brought on appeal from the Mayor's Court, wherein the title to real property was in question, twenty pounds. The growing spirit of litigation in the colony resulted in the passage on September 4th, 1714, of "An act preventing Multiplicity of Lawsuits," and "An act for the shortening of Lawsuits and Regulating the Practice of Law." On October 29th, 1730, was passed "An act for the Relief of Insolvent Debtors."

## COURT UNDER FIRST CONSTITUTION.

The convention of 1777 elected a council of revision and appointment, to consist of the governor, chancellor, justices of the Supreme Court, and members of the senate. The regulations of this council, which were approved, provided that the judges of the Supreme Court were to hold office during good behavior, and until the age of sixty years, and that all proceedings to which the public was a party, were to be brought in the name of the people of the state of New York, and not, as formerly, in the king's name. On June 5th, 1777, the Legislature appointed Kingston as the place for holding court, owing to the enemy's presence in

## THE COURTS OF THE STATE OF NEW YORK.

southern New York. There, on August 9th, 1777, was held the first term of the Supreme Court, for what was thenceforth the state of New York.

In 1778 the judges were empowered to devise a seal, and in April of that year, the salary of the chief-justice was fixed at three hundred pounds, (or seven hundred fifty dollars, New York currency) and the puisne, or associate, judges were to receive two hundred pounds, (or five hundred dollars, New York currency) ; and in addition to their travel fees, forty shillings per day for attendance on the circuits, and Oyer and Terminer.

### SESSIONS OF COURT.

An act passed by the Legislature in 1785, settled the terms of the Supreme Court for the different counties of the state. Two terms were to be held in New York, and two in Albany. The New York terms were to convene on the third Tuesdays of January and April; the last Tuesday of July and third Tuesday of October were the times set for the Albany terms. The April and October terms were to continue for three weeks, and the January and July terms for two. This act directed that the clerk's office be located at New York, and that of the clerk's deputy at Albany; the latter was to be appointed by the former. Court records and papers at Albany were to be removed from Albany, and filed in the New York office, every six months.

Further legislation, enacted on April 19th, 1786,

## SESSIONS OF COURT.

was to the effect that all issues joined in the Supreme Court, were triable in the counties where the lands were situated, or the cause of action arose, or the offence was committed, unless a change of venue were ordered by the court, which practice was resorted to in cases of great difficulty, or which involved an extended examination. Actions merely transitory, and trials by foreign juries were not contemplated by this act.

In 1792 an additional associate judge was added to the bench, and in 1794, the addition of a fifth judge increased the personnel of court to what it had been under the original act of 1691.

## FIRST RULES OF COURT.

Rules of court drafted in 1796, provided that a person who had served seven years actual clerkship in the office of a practicing attorney, might engage in practice before it. If the applicant for admission to the bar had spent the time in classical studies, after the age of fourteen, a period of not more than four years was deducted from this requirement. After four years practice before the court, an attorney was eligible to practice as counsel; this period of probation was later reduced, at the November term, 1804, to three years.

On February 10th, 1797, the judges for the April term of each year, were authorized to designate one of their number to hold circuit courts, one in the western, one in the eastern, one in the middle, and

## THE COURTS OF THE STATE OF NEW YORK.

one in the southern districts of the state. In this year the judges' salaries were fixed at two thousand dollars per annum. On March 10th, 1797, an additional clerk was authorized, to be appointed by the judges, with an office in Albany, who was to direct from time to time, the removal from the clerk's office at New York, to his office in Albany, of any record or paper deemed advisable. An additional seal, prepared by the judges, was to be used in the office at Albany.

### APPOINTMENT OF REPORTER AND CLERK.

On April 7th, 1804, the justices of the Supreme Court were directed to appoint a court reporter, at a salary of eight hundred fifty dollars per annum, whose duty would be to report and publish all decisions of the Supreme Court, and of the Court for the Correction of Errors. Discretion was given the judges, in April, 1807, to appoint a clerk and establish an additional clerk's office for Oneida County, and a clerk was accordingly appointed for that county, with an office at Utica.

The clerks' duties required them to deliver to each other, on or before the last day of every term, at the place where court was in session, a transcript of the docket of all judgments that had been docketed in their respective offices during the preceding terms and vacation. After April 30th, 1811, the terms of court were to be held on the third Monday in October, and the first Mondays in January,

#### APPOINTMENT OF REPORTER AND CLERK.

May and August, and continued with the exception of Sunday, until Saturday of the following week.

The judges' salaries were further increased, on June 19th, 1812, to three thousand dollars for three years. The salary was again increased in 1816 to four thousand five hundred dollars without a limitation as to time; in 1820 the salary was indefinitely reduced to three thousand five hundred dollars, and in 1821 further indefinitely reduced to three thousand dollars.

#### CONSTITUTIONAL CHANGES, 1821.

The constitution of 1821 made no alteration as to the manner of selecting justices, and it provided for their appointment by the governor, with the consent of the senate. By virtue of a constitutional enactment of 1821, the judges of the Supreme Court were to assemble four times a year for the purpose of reviewing their decisions, and determining questions of law. To each judge was given authority to hold circuit courts in the same manner as circuit judges, and they were also empowered to preside in Oyer and Terminer. All court process was, by law, to be in the name of the chief-justice, or in lieu of him, in the name of any justice of the court.

To the court was delegated the power to amend practice in cases not covered by statute; to revise its rules every seven years; to ultimately abolish fictitious and unnecessary process and proceedings,

expedite decisions of causes, and remedy abuses and imperfections in practice.

Under the constitution the office of judge was appointive and not elective. The governor, by and with the advice and consent of the senate, filled the office by appointment during good behavior, or until the age of sixty years. A joint resolution of the Legislature, concurred in by a two-thirds majority of the senate and assembly, was necessary to procure the removal of a judge from the bench, if guilty of malfeasance in office, or impeached for other cause.

While in office, judges were disqualified from holding any other office; were exempted from military service; were prohibited from accepting fees or perquisites; and were not to participate in any case wherein they were in any manner interested. A further disqualification excluded them from being a party to the decision of any case passed on by them in other courts, and enjoined them from practicing as attorneys and counselors, or being associated with, or partners of, those who had previously appeared in such case.

The number of judges was reduced to three, and from 1823 their annual salary was made two thousand dollars, which, in 1835, was increased to two thousand five hundred dollars, and in 1839 made three thousand dollars. An act of 1835 abolished the allowance to judges as members of the Court of Errors, for travel and attendance.

## CHANGES IN CLERKS' OFFICES—ELECTIVE JUDGES.

### CHANGE IN TERMS.

By virtue of an act passed in 1823, terms of court were set for the third Mondays of February and October, and for the first Monday of May and August. An August term was appointed for the city of Utica, and terms in February and October were appointed for Albany.

The terms of court lasted from two to four weeks, as the amount of business required. Terms of court were subsequently set for the first Mondays of January, May and July, and the third Monday of October. The terms appointed for January and October were to be held at the Capitol in Albany, the May term at the City Hall, New York, and the July term at the Academy in Utica.

The sessions of court were to continue for five weeks. During the last week, unless by consent of parties, no argument was heard; after the second Saturday, no process was issued or returned, except a subpoena, attachment, or habeas corpus. The October term was changed in 1841, from Albany to Rochester, and a justice required to sit at the Capitol in Albany, to try such non-enumerated cases as should arise, except those for hearing at term time.

## CHANGES IN CLERKS' OFFICES—ELECTIVE JUDGES.

Clerks' offices were continued at New York, Albany, and Utica, and in 1829, one was established at Canandaigua, which in 1831, was removed to

## THE COURTS OF THE STATE OF NEW YORK.

Geneva, and in 1841 to Rochester. To each clerk was allotted an official seal of office, and he was appointed by the justices of the court for three years, unless sooner removed, and allowed to select and appoint his deputy. Upon an order of a justice, court papers might be transferred from one office to another. By the concurrence of the lieutenant-governor, chancellor, and chief-justice, a reporter was appointed for the Supreme Court, and the Court of Errors, of the degree of counselor at law or in chancery, of at least five years' standing.

Among the constitutional amendments of 1869, was one which recommended the submission of the election of judges to popular vote. This was tested in 1873, with a popular verdict in favor of the election, rather than the appointment, of judges.

### NUMBER OF JUDGES—CONSTITUTIONAL CHANGES.

Originally there were three justices of the Supreme Court. A chief-justice and two associate justices were authorized by article XXIV of the constitution of 1777, "To hold their offices during good behavior or until they shall respectively attain the age of sixty years." The constitution of 1821 in no wise affected the number or tenure of office of the Supreme Court judges.

The constitution of 1846, by article VI, section 4, divided the state into eight judicial districts with four justices to each district; by article VI, section 6, of the constitutional amendments of 1869, five

justices were assigned to the city of New York. These provisions increased the number of judges to thirty-three.

The official tenure of office for Supreme Court judges, under the constitution of 1846, article VI, section 4, was made ten years. The original jurisdiction of the Supreme Court in civil and criminal matters, was co-extensive with that of Kings Bench and Common Pleas in England. From its original jurisdictional limitation of twenty pounds in civil cases, it has increased to many times that amount.

Under article V, section 5, of the constitution of 1821, Circuit Courts were provided for each circuit; for each of these circuits, which were not less than four, nor more than eight, a circuit judge with like authority as Supreme Court justices, was allotted.

The amendments of 1869 authorized the holding of general and special terms of Supreme Court, and empowered the justices of the Supreme Court to hold special terms, Circuit Courts, and Courts of Oyer and Terminer. The Courts of Oyer and Terminer and Circuit Courts were abolished by the constitution of 1894, and their jurisdiction conferred upon the Supreme Court.



## CHAPTER XL.

### CIRCUIT COURTS AND COURTS OF OYER AND TERMINER.

SUPREME COURT CIRCUITS—LEGISLATIVE ENACTMENTS—CONSTITUTION OF 1821—JURISDICTION OF COURT—EQUITY JURISDICTION.

#### SUPREME COURT CIRCUITS.

Prior to the Revolution, the Supreme Court judges were wont to go the circuit of the province of New York, and commissions of Oyer and Terminer were held regularly and specially.

Circuit Courts were re-established by an act of April 19th, 1786. One or more of the Supreme Court justices were directed to hold Circuit Courts during vacation, and oftener, if necessary, in each county, for the trial of all issues triable in the respective counties. The records of trial were to be returned to the Supreme Court, and final judgment rendered according to law. In the justices was vested power, on the circuit, in assizes of every nature.

In 1789 the Legislature enacted that all issues triable by jury, might be tried at circuit, or at the bar of the Supreme Court, without an order to that

## THE COURTS OF THE STATE OF NEW YORK.

effect. In 1797 an order was rendered mandatory. These courts were abolished in 1796, and their duties delegated to the County Courts.

### LEGISLATIVE ENACTMENTS.

On February 10th, 1797, the Legislature passed an act to the effect that the Supreme Court judges designate one of their number to hold Circuit Courts, one in the western, one in the eastern, one in the middle, and one in the southern districts.

On February 22nd, 1788, it was enacted that the justices also hold Courts of Oyer and Terminer at the same time as Circuit Courts, to continue until the completion of all business before it. Two or more of the judges or assistant judges of the Court of Common Pleas were to be associated with the justice of Oyer and Terminer.

On the governor was conferred power to convene a Court of Oyer and Terminer whenever, in his opinion, it was deemed advisable. In the commission convening court, the governor and council named the justice of the Supreme Court who was to preside at the circuit. Once in the year the records were sent to exchequer for final record. The office of the clerk of Oyer and Terminer was abolished February 12th, 1796, and its duties devolved upon the clerk of the County Courts.

### CONSTITUTION OF 1821.

Article V, section 5 of the constitution of 1821,

## CONSTITUTION OF 1821.

divided the state into not less than four, nor more than eight circuits, subject to legislative regulation. A judge was appointed for each circuit, with the same powers, and under the same terms and conditions as Supreme Court justices. Four terms of Circuit Court were set for New York county; in all other counties of the state the number of terms was limited to two.

It was discretionary with each judge to appoint the time and place of holding court in his circuit, for the year next ensuing, to continue as long as the judge should decide. The court's jurisdiction embraced the trial of all issues, and the taking of all depositions had before it, by default or otherwise; and the recording of all non-suits and defaults. It was the duty of the court to return all its proceedings to the Supreme Court, or the court directing same.

Each judge of the Supreme Court, and circuit judges, were authorized to hold any Circuit Court for the whole or any part of its sessions. The clerks of the several counties were also clerks of the Circuit Courts, except in New York, where the clerk of the Supreme Court was also clerk of the Circuit Court.

The constitution of 1821 organized a Court of Oyer and Terminer and General Jail Delivery. In each county, these courts were to be held twice annually, except in New York, where provision was made for four terms.

## THE COURTS OF THE STATE OF NEW YORK.

Circuit judges were to preside over such courts, and they usually appointed times and localities for holding same, coincident with Circuit Courts. In the city and county of New York, one or more of the Supreme Court judges, or circuit judges, or first judge of the Court of Common Pleas, together with the mayor, recorder, and aldermen, or any two of them, presided.

In the counties of Albany, Columbia, and Rensselaer, the mayor, recorder and aldermen, or any two of them, might sit and act in Oyer and Terminer, with, or instead of, county judges.

### JURISDICTION OF COURT.

The court had power by inquest of the grand jury of the county, to enquire into all crimes and misdemeanors within the county; to hear and determine crimes and misdemeanors, and deliver the jail to all persons according to law. It was the duty of the court to try all indictments found by the grand jury, and triable at General Sessions of the Peace, and which had been sent by order of the latter court to Oyer and Terminer, or which had been removed there.

Commissions of Oyer and Terminer might be designated by the governor, with the consent of the senate, as often as occasion demanded. In the commission convening court, the time and place for holding court was named, and the same filed with the secretary of state, and a copy transmitted to

## JURISDICTION OF COURT.

the district-attorney of the county for which such commission was issued.

Should the number of prisoners in any county jail, or the importance of the offence charged render it necessary, a special Court of Oyer and Terminer might be called by the judge of the circuit in which the county was situated, upon a warrant bearing his official hand and seal.

Such warrant was transmitted to the district-attorney, who, at least twenty days before holding said court, was required to issue a precept to the sheriff of the county, requiring him to summon grand and petit jurors; bring before court all persons confined in the county jail, and publish a proclamation, notifying all necessary parties to appear at said court; and requiring all officers to return their recognizances, inquisitions, and examinations to court at its opening.

Each Court of Oyer and Terminer possessed a seal, and all processes were tested in the name of the circuit judge, or in his absence, in the name of the chief-justice of the Supreme Court. Writs could be issued into any county of the state. In New York county, the clerk of General Sessions officiated; in all other counties the county clerk was clerk of the court.

## EQUITY JURISDICTION.

All matters in equity lay within the jurisdiction of the Circuit Court. The clerk of this court acted

• THE COURTS OF THE STATE OF NEW YORK.

as court register, and was furnished with a seal for all equity proceedings. The salary of circuit judges in 1827 was one thousand two hundred fifty dollars, and by 1835 had increased to one thousand six hundred dollars. Attorneys and counselors were admitted to practice on the same terms as prescribed for the Supreme Court, by Benson, in 1796.

## CHAPTER XLI.

### COURT FOR THE TRIAL OF IMPEACHMENTS AND CORRECTION OF ERRORS.

ONLY NEW STATE COURT—IMPEACHMENTS—  
CORRECTION OF ERRORS—CONSTITUTIONAL  
CHANGES, 1821.

#### ONLY NEW STATE COURT.

The above court was the only one created under and by virtue of the constitution of 1777. The thirty-second section of the constitution provided that such a court be established under regulations to be imposed by the Legislature, and that it should consist of the president of the senate, pro tempore, the senators, chancellor, and judges of the Supreme Court, or a majority of them.

The regulations governing impeachment proceedings were included in sections 33 and 34, wherein and whereby the assembly was vested with power of impeaching for malfeasance or incompetence in office, all state officials, upon a concurrence of two-thirds of the members present.

#### IMPEACHMENTS.

On the trial of impeachments, a prescribed oath,

## THE COURTS OF THE STATE OF NEW YORK.

similar in form to a juror's oath, was administered to each member of the court, whereby he engaged himself to truly and impartially try and determine the charge under consideration, according to the facts and evidence; validity could be given to a judgment only upon the assent of two-thirds of the members who constituted the Court of Impeachment. The effect of a judgment of impeachment was to remove the offender from office, and debar him from any position of honor, trust, or emolument under the state. The convicted party was also liable to indictment, trial, and punishment according to the criminal and civil law.

On the trial of an impeachment or indictment, the defendant was allowed counsel. Upon the prosecution of an impeachment wherein the chancellor, or any of the judges of the Supreme Court was defendant, the official on trial was suspended from exercising the functions of office, until acquitted.

### CORRECTION OF ERRORS.

In the correction of errors, it was provided that on appeal from a decree in equity, the chancellor was to inform the appellate court of the grounds for his decision, but was deprived of a decisive voice at the trial, or in the final decision.

On November 23rd, 1784, the Legislature, pursuant to these articles of the constitution, proceeded to organize the court. Sessions were authorized

## CORRECTION OF ERRORS.

during the meetings of the Legislature, at times and places appointed. A seal was to be prepared, and a clerk appointed. The method of trying impeachments was also prescribed.

Appeals to this court were permissible from the Court of Chancery, Supreme Court, Court of Probates, and Admiralty Court, except in cases of prize captures. Fifteen days were allowed within which to bring appeals from probate or admiralty, and decretal orders in chancery. Appeals from final decrees in chancery, and writs of error upon Supreme Court judgments, were to be brought within five years after the rendition of final judgment or decree. The president of the senate presided, and cast the decisive vote in case of a tie.

In civil cases, and in all but criminal capital cases, writs of error were of right, and issued of course; in capital cases they were writs of grace. Writs were issued by the chancellor in all cases; in capital cases they were issued upon motion or petition, with notice to the attorney-general or state prosecutor.

## CONSTITUTIONAL CHANGES, 1821.

The only change wrought in the procedure of this court under the constitution of 1821, was one that made a majority of the members of assembly present at the session, sufficient to impeach. The constitution of 1846 terminated the existence of this court, and transferred its powers in cases of

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impeachment, to a new court composed of the president of the senate, the senators, or a majority of them, and the judges of the Court of Appeals, or a majority of them. Its appellate jurisdiction was vested in the Court of Appeals.

## CHAPTER XLII.

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### COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK.

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ORIGINALLY MAYOR'S COURT—CITY OFFICIALS IN  
COUNTY COURT—APPOINTMENT OF ASSOCIATE  
JUDGE—ELECTION OF JUDGES—JURISDICTION OF  
COURT—APPEALS—APPOINTMENT OF CLERK—  
ABOLITION OF COURT.

#### ORIGINALLY MAYOR'S COURT.

After a perusal of the chapter on the historical features of the Mayor's Court, its importance and extensive jurisdiction must be apparent to the reader.

In 1821, after the mayor no longer continued to discharge the functions of a judge of this court, its title lost its significance and was changed to that of the "Court of Common Pleas for the City and County of New York."

The act which wrought this change made provision for the organization and equipment of the court. A first judge was to be appointed, who was to hold office during good behavior or until reaching the age of retirement, which was limited to sixty years. In the following year an act was

## THE COURTS OF THE STATE OF NEW YORK.

passed which reduced the term of office to five years. By this same act, the appointive power was vested in the governor, and the mayor, recorder, and aldermen were authorized to sit on the bench with the judge; but the first judge was commissioned to hold court in person and without them if necessary, and it was made his particular duty to hold such court.

### CITY OFFICIALS IN COUNTY COURT.

Neither the mayor, recorder, nor aldermen ever availed themselves of the above right, or participated in the proceedings of the court, except when all the judges were convened in a County Court. Thus organized, consisting of the first judge, the mayor, recorder, and all the aldermen, this court was occasionally convened for the impeachment and trial of those who were recreant in their duties to the municipal government. On such occasions the first judge acted as the presiding officer. This branch of the court was finally abolished by an act in 1826.

### APPOINTMENT OF ASSOCIATE JUDGE.

In 1834 an associate judge was appointed for the Court of Common Pleas, and vested with all the powers of the first judge. A further addition was made to its number in 1838, in the person of another associate judge vested with the functions and powers of the other judges. As thus constituted, consisting of a first judge and two associate

## JURISDICTION OF COURT.

judges, the Court of Common Pleas continued to dispense justice until the adoption of the constitution of 1846. The constitution of that year, by special exceptions, eliminated the Court of Common Pleas from the general judicial re-organization of the state.

## ELECTION OF JUDGES.

In the following year, an act of the Legislature was passed (Laws of 1847—79), which terminated the existing terms of office of the judges, on January 17th next ensuing, and provided for a popular election of judges for each of the courts at the next general election. The terms of office were respectively classified in terms of two, four, and six years, to be determined by lot. In June of that year the judges of the Court of Common Pleas were elected for terms of two, four, and six years.

## JURISDICTION OF COURT.

The jurisdiction of the Court of Common Pleas was unlimited. By the judiciary act of 1847, by the code of 1848, and the amendments of 1849, 1851, and 1853, unlimited jurisdiction in law and equity was conferred on this court if the defendant were a resident of the city, and personally served with process therein. If one, two, or more, defendants jointly liable on contract resided within the city, or were personally served within the city limits, the court acquired jurisdiction.

## THE COURTS OF THE STATE OF NEW YORK.

The court's jurisdiction extended to corporations, organized under the laws of the state, which transacted their general business, or maintained an office for the transaction of business, in the city of New York. The corporate jurisdiction of the court included cognizance of actions against foreign corporations upon any cause of action arising in the state, or for the recovery of any debt or damages, liquidated or not, arising upon a contract made, executed, or delivered within the state.

The procedure of court was specifically regulated by provisions of the code, which required certain actions to be tried in the county wherein the subject matter of the action was situated, or the cause of action arose. In such cases the court acquired jurisdiction, irrespective of the parties' residence, or the personal service of the process. "Actions for the recovery of real property, of an estate or interest therein, for the determination in any form of such right or interest, for injuries, to real property, for the protection of real property, for the foreclosure of mortgage on real property, for the recovery of personal property distrained, for the recovery of a penalty or forfeiture imposed by statute, except where imposed for an offence committed in a lake, river, or other stream of water, and opposite to the place where the offence was committed."

"And actions against a public officer, or person specially delegated to perform his duties, or

## JURISDICTION OF COURT.

for any act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such office;” and by the judiciary act, and under a special act passed in 1854 (Laws of 1854—464), “the court also possessed jurisdiction in special proceedings for the disposition of real estate of infants, where such real estate is situated in New York City; the care and custody of the persons and estates of lunatics, persons of unsound mind, or habitual drunkards, residing within the city; the mortgage or sale of the real estate of religious corporations, and the adjustment of dower in lands within the city.”

### APPEALS.

“Any appeal from its judgment or determination, except in an action originally commenced in the Marine or the Justices’ Courts, lies directly to the court of last resort—the Court of Appeals.” The code allows an appeal from the judgment of the Marine or the Justices’ Courts of the city, to the Court of Common Pleas, and on such an appeal its decision is final.

“It also has exclusive jurisdiction upon liens against real estate by virtue of an act passed in 1851, except that when the lien is docketed for a sum not exceeding one hundred dollars, the proceedings may be commenced in the Marine Court, or in the Justices’ Court of the district where the dwelling is situated.” (Laws of 1851—953.)

## THE COURTS OF THE STATE OF NEW YORK.

Among the powers of this court was that of naturalizing and granting citizenship papers to those of foreign birth who had complied with the United States Naturalization Laws.

### APPOINTMENT OF CLERK.

An act of 1854 ordained the appointment of a clerk of the Court of Common Pleas, an office which heretofore had been filled by the county clerk, who acted in the dual capacity of clerk of the Supreme Court, and that of the Court of Common Pleas. The act consolidated the court's jurisdiction by re-affirming its powers in remitting fines and recognizances, in creating and discharging dockets of liens and judgments entered upon recognizances, and in effect affirmed all its previous powers; it conferred upon it all the powers then and thereafter to be vested in the county courts, and generally confirmed its powers as a court of original and general jurisdiction, to the same extent as they were had and exercised before the adoption of the constitution of 1846. (Laws of 1854—464.)

### ABOLITION OF COURT.

The Court of Common Pleas was officially abolished by the constitution of 1895, in the following form and effect: "The Superior Court of the city of New York; the Court of Common Pleas for the city and county of New York, the Superior Court

#### ABOLITION OF COURT.

of Buffalo, and the City Court of Brooklyn, are abolished from and after the first day of January, 1896, and thereupon the seals, records, papers, and documents of or belonging to such courts shall be deposited in the offices of the clerks of the several counties in which said courts now exist; and all actions and proceedings then pending in such courts shall be transferred to the Supreme Court for hearing and determination.”



## CHAPTER XLIII.

### JUSTICES OF THE PEACE—MARINE COURT.

JURISDICTION OF JUSTICES IN COLONY—POWERS OF JUSTICES IN STATE—PROCEDURE—FEES—JUSTICES' COURT FOR CITY—MARINE COURT—ASSISTANT-JUSTICES' COURTS — CONSTITUTIONAL CHANGES, 1846—CONSTITUTION OF 1895—JUSTICES' COURTS ABOLISHED.

#### JURISDICTION OF JUSTICES IN COLONY.

From the earliest period in the history of the colony of New York, the Courts of Justices of the Peace were a part of the judicial system. Justices of the peace held Town Courts and were members of all the other tribunals of the colony. Subsequently to the Revolutionary War, different acts of the state Legislature continued these courts.

#### POWERS OF JUSTICES IN STATE.

Chapter 44, of the Laws of 1780, passed February 26th of that year, vested jurisdiction of one hundred pounds or less in justices of the peace, mayors, recorders, and aldermen. Their jurisdic-

## THE COURTS OF THE STATE OF NEW YORK.

tion likewise embraced all actions, as cases of debt, slander, trespass, replevin, or for damages, if the amount involved were less than one hundred pounds. These matters were tried before one of the justices of the peace of any of the counties, or the mayor, recorder, or aldermen of the cities of New York and Albany and the Borough of Westchester.

### PROCEDURE.

The procedure in vogue in Justices' Courts required the defendant to appear forthwith, in a case of service by warrant, but if service were by a summons, he was given not less than six and not more than twelve days after service within which to appear. Four days after trial were allowed for final judgment. Every magistrate possessed jurisdiction, in case the summoning magistrate were absent on the return day of the process. This jurisdiction was extended to each magistrate of the same city, town, borough, or district. Freeholders and those with families could be proceeded against by summons only, which had to be served personally, or in lieu thereof, and in case of inability to make such service, the process might be left with a member of the defendant's family, of suitable age and discretion. In this event, information of the contents and purport of the process was to be given to the person so served, at least six days before the time of appearance mentioned in the summons.

## PROCEDURE.

The officer making service was required to endorse upon it the manner of execution.

If no good and sufficient cause for defendant's failure to appear were shown, the court proceeded with the trial as if the defendant had been personally served; if a copy of the summons had been left at defendant's residence, a warrant for his immediate appearance was issued.

Should plaintiff make affidavit to the court that he was likely to lose his demand by issue of a summons, a warrant was generally issued although defendant were a freeholder. Upon application, and sufficient security, an adjournment of trial was granted. To either party was accorded the right to demand a jury of six freeholders. The following form of oath was administered to jurors: "You shall well and truly try this matter in difference between A. B., plaintiff, and C. D., defendant, and a true verdict give according to the evidence. So Help You God." To witnesses was tendered the familiar form of oath, still prevalent: "The evidence which you shall give in this matter in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth, So Help You God."

When the evidence had been fully submitted and the case closed, the jury retired to some convenient place and agreed upon their verdict, which was announced to the court, who rendered judgment accordingly.

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Should a juror fail to attend the term of court for which he was summoned, he was subjected to a fine of not less than ten pounds, nor more than forty pounds. The fines thus collected were turned over to the local overseers for the relief of the poor.

Should the plaintiff be non-suited, or discontinue or withdraw his action without the defendant's consent, the former was liable for costs, or should defendant prevail in the trial, and establish a counterclaim, judgment was given against plaintiff for the amount of the counterclaim and costs.

### FEEES.

The cost for a summons was sixteen shillings; a warrant, twenty shillings; administering an oath of affirmation, ten shillings; execution, thirty shillings; subpœna for each witness, ten shillings; venire facias to summon a jury, twenty shillings; swearing a jury, thirty shillings; witness attending on summons or otherwise, forty shillings per day, and so on in proportion, for a longer time; constable or other officer, for serving summons, subpœna, or other execution, for each mile traveled, or under, twenty shillings, and for every extra mile, ten shillings; serving every execution for every pound, one shilling; and summoning every jury, sixty shillings. When empaneled on the trial of a case, each juror received twenty shillings for attendance at court, and if not empaneled, ten shillings was paid to each juror per day. The act pro-

## JUSTICES' COURT FOR CITY—MARINE COURT.

vided, however, that in no case should costs exceed forty pounds.

No certiorari or writ of error could be issued unless on affidavit therefor, presented to the justice within one month after judgment. When required a copy of such affidavit was given to the adverse party. Upon the affirmation or reversal of judgments in the higher courts, the prevailing party was awarded costs.

By chapter 9, of the Laws of 1780, the jurisdiction of justices of the peace, mayors, recorders, etc., was reduced to actions involving not more than ten pounds, and the fees were reduced to one-twelfth. The attorney-general was authorized by the Supreme Court to proceed against all justices guilty of unjust practice.

## JUSTICES' COURT FOR CITY—MARINE COURT.

A Justices' Court for the city of New York was established in 1807, to consist of three judges, with jurisdiction in cases involving amounts from twenty-five to fifty dollars and in marine cases, between master and mariner, though in excess of the amount above mentioned. (Laws of 1807, chapter 139.)

The jurisdiction of this court was further extended in 1817 to one hundred dollars; and in 1819 it became known as the Marine Court of the city of New York; and the statutes of 1846 authorized the Marine Court to try actions of assault and bat-

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tery, false imprisonment, miscellaneous prosecutions, libel, and slander, and its general jurisdiction was increased to five hundred dollars.

### ASSISTANT-JUSTICES' COURTS.

Assistant-Justices' Courts were officially created by the act of 1807, which provided for Justices' Courts. Provision was made for the establishment of an Assistant-Justices' Court in each of the wards of the city of New York. Twenty-five dollars was the maximum jurisdictional amount of these courts. After a busy existence subject to many changes and vicissitudes, this court finally became known as "The District Court," and one was established for each district of New York City. From these three different courts, appeals lay to the Mayor's Court, later known as the "Court of Common Pleas."

### CONSTITUTIONAL CHANGE, 1846.

The following provision concerning justices of the peace is to be found in article VI, section 17, of the constitution of 1846, which is as follows: "The electors of the several towns shall at their annual town meeting, and in such manner as the Legislature may direct, elect justices of the peace, whose terms of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law."

## JUSTICES' COURTS ABOLISHED.

### CONSTITUTION OF 1895.

Article VI, section 17, of the constitution of 1895, relates to justices of the peace, and is to the following effect: "The electors of the several towns shall at their annual town meetings, or at such other time and in such manner as the Legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior courts not of record, and their clerks, may be removed for cause, after due notice and an opportunity of being heard by such courts as are or may be prescribed by law. Justices of the peace and District Court justices may be elected in the different cities of this state in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law; and all other judicial officers in cities whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities or appointed by some local authorities thereof."

Source—Art. VI, sec. 18, of the amended constitution of 1846.

## JUSTICES' COURTS ABOLISHED.

Chapter XX, title 3, section 1350, of the Greater

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New York charter, is to the following effect: "From and after midnight of the 31st day of January, 1898, the Justices' Courts and the office of justice of the peace in the cities of Brooklyn and Long Island City, are abolished, and from and after the passage of this act, no person shall be elected to the office of District Court justice or justice of the peace in any portion of the territory included within the city of New York as constituted by this act."

## CHAPTER XLIV.

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### CONSTITUTION OF 1821 AND REVISED STATUTES.

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#### EARLY CONDITIONS—COURT OF PROBATES ABOLISHED—REVISED STATUTES.

##### EARLY CONDITIONS.

The conditions which brought about the constitution of 1821 are fully treated in the chapter on that subject which is to be found in the historical section of this work. It divided the state into circuits, and established a Circuit Court for each circuit, which was in itself an evolution of the Supreme Court, and succeeded the former itinerant sessions. A requirement for holding office was that the judge who was to preside in the circuit should be a resident thereof. The year 1823 saw a radical innovation effected in this court; its equity jurisdiction was abrogated and vested in the chancellor, except that circuit judges might act as vice-chancellors in their circuits. An amendment of 1826 conferred equity jurisdiction in the first district on a legal officer called the vice-chancellor, a step necessitated by increased litigation.

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### COURT OF PROBATES ABOLISHED.

Chapter 70, of the laws of 1823, abolished the Court of Probates which had been founded in 1778, and transferred its jurisdiction to the surrogates of the various counties subject to an appeal to the chancellor, to whom was reserved all probate jurisdiction not otherwise delegated.

The constitution regulated the offices of chancellor and judge and made them appointive by the governor and senate instead of by the council of appointment, as was the practice formerly. Otherwise no change was made which affected the courts.

### REVISED STATUTES.

By the revised statutes of 1829 an attempt was made to define the jurisdiction of the Court of Chancery, although by the act of 1683 it was given general equity powers. The chancellor was vested with equity powers under the revised statutes.

On the new Court of Chancery was conferred the ancient jurisdiction of the English Court. Under the constitution of 1821, the Court of Chancery was continued as it had been under the English crown, and it was so specifically regulated by the revised statutes.

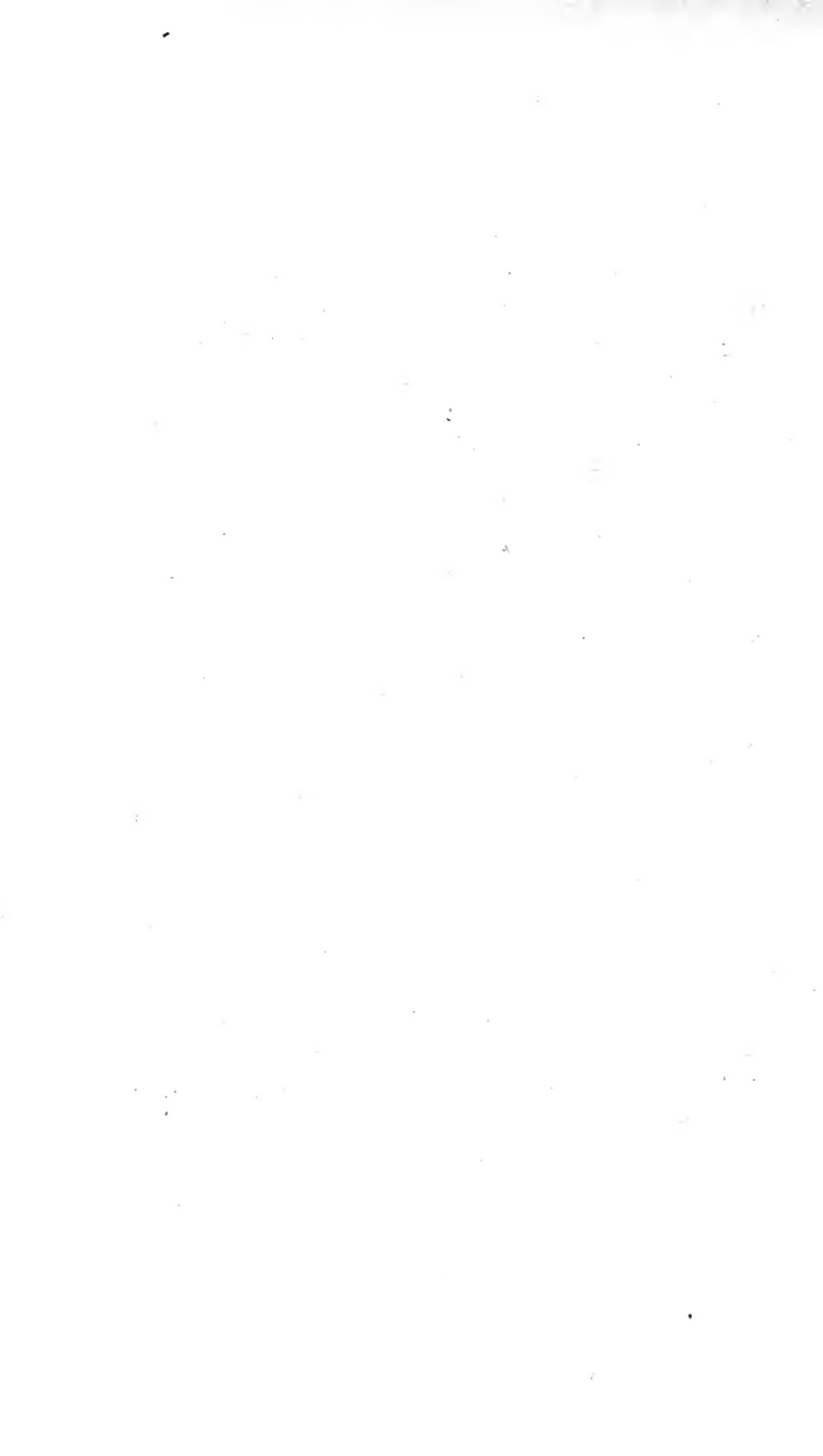
Courts of Justices of the Peace and the County Courts of Common Pleas were officially recognized and regulated by the revised statutes.

Both the constitution and the revised statutes conferred on the Court for the Trial of Impeachments and Correction of Errors supreme appellate jurisdiction in law and equity. Under the constitution and revised statutes the practice and procedure of the New York courts were made to conform, with some local variations, to that of the courts of England.

A revision of practice was not contemplated by the revised statutes; what they effected was some amendments as to limitations of actions in courts; but no reform in practice was effected prior to 1846.

The results of the constitution of 1821 had proved but inadequate to the amelioration of conditions in the courts. In time, legal grievances were heard against the complications and vexations appurtenant to the lax and dilatory methods in force. The culmination of all this was the convention of 1846. The circuit judges created under the constitution of 1821 proved in the end unsatisfactory, for many of their decisions were reversed by the Supreme Court "in banc."

From 1821 to 1846, the state constitution underwent few organic changes or amendments; but in 1826, the office of justice of the peace was made elective.



## CHAPTER XLV.

### COUNTY COURTS.

FOUNDATION—NEW YORK COUNTY COURT—CONSTITUTION OF 1846—AS CONSTITUTED AT PRESENT—COURTS OF SESSIONS ABOLISHED.

#### FOUNDATION.

These courts are exclusively of local or county jurisdiction. The primitive Courts of Sessions as they were formerly known, were the origin of the present County Courts.

County Courts date from the colonial constitution of 1691, and were continued and re-established in 1777, and again by the constitution of 1821, with the additional provision that the judges' terms of office were to be extended for a term of five years.

In New York county, it was officially designated as the "Court of Common Pleas for the City and County of New York." At first, it was known as the "Mayor's Court" and the mayor presided at the sessions of the court; but from 1805 to 1821, the recorder of the city sat as the presiding judge.

#### NEW YORK COUNTY COURT.

In 1821, an act of the Legislature changed the

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name from the "Mayor's Court" to that of the "Court of Common Pleas for the City and County of New York." This act designated a first judge to officiate as such during good behavior, or until the age limit of sixty years. The constitution of the same year limited the official term of the judge to five years and vested the appointive power in the governor.

### CONSTITUTION OF 1846.

As now constituted, the County Court is authorized under the following terms of the constitution of 1846, article IV, section 14: "There shall be elected in each of the counties of this state, except the city and county of New York, one county judge, who shall hold his office for four years. He shall hold the County Court and perform the duties of the office of surrogate. The County Court shall have such jurisdiction in cases arising in Justices' Courts and in special cases as the Legislature may prescribe; but shall have no original civil jurisdiction, except in such special cases.

"The county judge with two justices of the peace to be designated according to law, may hold Courts of Sessions with such criminal jurisdiction as the Legislature shall prescribe, and perform such other duties as may be required by law.

"In counties having a population exceeding forty thousand, the Legislature may provide for

## CONSTITUTION OF 1846.

the election of a separate officer to perform the duties of the office of surrogate.

“The Legislature may confer equity jurisdiction in special cases upon the county judge.”

### AS CONSTITUTED AT PRESENT.

Article VI, section 14, of the present constitution of the state of New York in relation to County Courts is as follows: “The existing County Courts are continued, and the judges thereof now in office shall hold their offices until the expiration of their respective terms. In the county of Kings there shall be two county judges and the additional county judge shall be chosen at the next general election held after the adoption of this article. The successors of the several county judges shall be chosen by the electors of the counties for the term of six years. County Courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The Legislature may hereafter enlarge or restrict the jurisdiction of the County Courts, provided however, that their jurisdiction shall not be so extended so as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant.”

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COURTS OF SESSIONS ABOLISHED.

“Courts of Sessions except in the county of New York are abolished from and after the last day of December, 1895. All the jurisdiction of the Court of Sessions in each county, except the county of New York, shall thereupon be vested in the County Court thereof, and all actions and proceedings then pending in such Courts of Sessions shall be transferred to said County Courts for hearing and determination. Every county judge shall perform such duties as may be required by law. His salary shall be established by law, payable out of the county treasury. A county judge of any county may hold County Courts in any other county when requested by the judge of such other county.”

Source—See Art. VI, sec. 15, of the amended constitution of 1846. The limitation of jurisdiction was raised from one to two thousand dollars and Courts of Sessions were abolished and their jurisdiction conferred upon County Courts by the convention of 1894.

## CHAPTER XLVI.

### SUPERIOR COURT OF THE CITY OF NEW YORK.

#### REASONS FOR ESTABLISHMENT—FIRST JUDGES.

##### REASONS FOR ESTABLISHMENT.

The heavy bank failures and conspiracy cases about the year 1826, resulted in a congestion of the calendars of both the Supreme Court and the Court of Common Pleas. It was impossible to reach a trial in either of the above courts in less than twelve or fifteen months after the return of the process. To remedy this condition, the Legislature passed an act, March 31, 1828, creating the Superior Court of the City of New York. It was given the same jurisdiction as the Supreme Court possessed in all civil causes, if either the defendant or plaintiff were a resident of the city, or the property involved were situated within the city limits. This was the first court, established by a statutory act, that did not have its jurisdiction defined by a cross-reference to an English court. It was to be composed of a chief-justice and two associates, to be appointed by the governor with the consent of the senate. Their terms of office were to be five years.

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### FIRST JUDGES.

The first chief-justice of the court was Samuel Jones, who resigned from the chancellorship to accept his new office. Josiah Ogden Hoffman and Thomas J. Oakley were appointed as associate judges.

The Superior Court continued to aid the Supreme Court for a period of about sixty-seven years, the former being finally abolished by the constitution of 1895, which by its provisions increased the number of Supreme Court judges, thus doing away with the necessity for the Superior Court.

## CHAPTER XLVII.

### COURT OF APPEALS.

ORIGIN OF COURT—CREATION OF COURT—AMENDMENT OF 1869—CONSTITUTION OF 1895—VACANCY IN COURT OF APPEALS, HOW FILLED—JURISDICTION—JUDGES NOT TO HOLD ANY OTHER OFFICE—REMOVAL OF JUDGES—COMPENSATION, AGE RESTRICTION, ASSIGNMENT BY GOVERNOR.

#### ORIGIN OF COURT.

The historical aspects of this court have already been fully considered in the main part of our work. As there shown, it is to be traced through the entire judicial organization of the state until its constitutional establishment in 1846. Its immediate predecessor was the Court for the Trial of Impeachments and Correction of Errors, which was composed of the president of the senate, for the time being, the senators, chancellor, and judges of the Supreme Court.

The Court for the Trial of Impeachments and Correction of Errors was created under the constitution of 1777, and the article which authorized it provided that it might affirm or reverse a cause

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“brought up by writ of error on a question of law in a judgment in the Supreme Court.” The judges who rendered the decision in the first instance were disqualified from participating in the final judgment, though they might justify their grounds for pronouncing judgment. The constitution of 1821, article V, section 1, provided for such a court in similar terms.

### CREATION OF COURT.

As at present constituted, separate and distinct in its title, jurisdiction, and functions, this court originates in the constitution of 1846. A differentiation is made in the article, therein, between the trial of impeachments and the review of cases on appeal, and separate courts established for these different branches of appellate cognizance. By article VI, section 2, of the constitution of 1846, the provision for the Court of Appeals is in the following words, “There shall be a Court of Appeals composed of eight judges, of whom four shall be elected by the electors of the state for eight years, and four selected from the class of justices of the Supreme Court, having the shortest time to serve.”

### AMENDMENT OF 1869.

Amendments to the constitution of 1846, by article VI, section 2, adopted in 1869, authorize the election for a term of fourteen years of seven judges of the Court of Appeals, of whom any five

## AMENDMENT OF 1869.

shall constitute a quorum. This amendment is as follows: "There shall be a Court of Appeals, composed of a chief judge and six associate judges, who shall be chosen by the electors of the state and shall hold their office for the term of fourteen years from and including the first day of January next after their election. At the first election of judges under this constitution, every elector may vote for the chief and any four of the associate judges. Any five members of the court shall form a quorum and the concurrence of four shall be necessary to a decision."

Section 25, article VI, of the constitution of 1846 is to the following effect: "The Legislature at its first session after the adoption of this constitution shall provide for the organization of the Court of Appeals, and for transferring to it the business pending in the Court for the Correction of Errors, and for the allowance of writs of errors and appeals to the Court of Appeals from judgments and decrees of the present Court of Chancery and Supreme Court, and of the courts that may be organized under this constitution."

By sections 12, 8, 7, 11, and 13 respectively of article VI, of the constitution of 1846, and by sections 24, 10, 14, 11, and 3, of article VI, of the amendments to the constitution of 1846, adopted in 1869, provision is made for the election, limitations, compensation, and removal of judges of the Court of Appeals, and the filling of vacancies caused by their death or disability.

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CONSTITUTION OF 1895.

The last state constitution adopted in 1895, provides for the Court of Appeals, by article VI, section 7, in the following terms: "The Court of Appeals is continued. It shall consist of the chief judge, the associate judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors, who shall be chosen by the electors of the state. The official terms of the chief judge and the associate judges shall be fourteen years from and including the first day of January next after their election. Five members of the court shall form a quorum, and the concurrence of four shall be necessary to a decision. The court shall have power to appoint and to remove its reporter, clerk, and attendants. Whenever, and as often as, a majority of the judges of the Court of Appeals shall certify to the governor that said court is unable by reason of the accumulation of causes pending therein to hear and dispose of the same with reasonable speed the governor shall designate not more than four justices of the Supreme Court to serve as associate judges of the Court of Appeals. The justices so designated shall be relieved from their duties as justices of the Supreme Court, and shall serve as associate judges of the Court of Appeals until the causes undisposed of in said court are reduced to two hundred, when they shall return to the Supreme Court. The gov-

## CONSTITUTION OF 1895.

ernor may designate justices of the Supreme Court to fill vacancies. No justice shall serve as associate judge of the Court of Appeals except while holding the office of justice of the Supreme Court and not more than seven judges shall sit in any case.”

(Amended by vote of the people, November 7th, 1899.)

Source—Art. VI, sec. 2, of amended constitution of 1846, with language somewhat changed.

### VACANCY IN COURT OF APPEALS—HOW FILLED.

Should a vacancy occur in the personnel of the Court of Appeals, section 8, of the same article becomes operative, as follows: “When a vacancy shall occur otherwise than by expiration of term, in the office of chief or associate judge of the Court of Appeals, the same shall be filled, for a full term, at the next general election happening not less than three months after vacancy occurs; and until the vacancy shall be so filled, the governor, by and with the advice and consent of the senate, if the senate shall be in session, or if not in session, the governor may fill such vacancy by appointment. If any such appointment of chief judge shall be made from among the associate judges, a temporary appointment of associate judge shall be made in like manner; but in such case, the person appointed chief judge shall not be deemed to vacate his office of associate judge any longer than until the expiration of his appointment as chief judge. The powers and jurisdiction of the court shall not be suspended

## THE COURTS OF THE STATE OF NEW YORK.

for want of appointment or election, when the number of judges is sufficient to constitute a quorum. All appointments under this section shall continue until and including the last day of December next after the election at which the vacancy shall be filled.”

Source—Art. VI, sec. 3, of amended constitution of 1846 with slight change in language.

### JURISDICTION.

Regarding the jurisdiction of the court, section 9 says: “After the last day of December, 1895, the jurisdiction of the Court of Appeals except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon the decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law, which in its opinion ought to be reviewed by the Court of Appeals.

## REMOVAL OF JUDGES.

“The Legislature may further restrict the jurisdiction of the Court of Appeals, and the right of appeals thereto, but the right of appeal shall not depend upon the amount involved.

“The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of December, 1895, but appeals therefrom may be taken under existing provisions of law.”

Source—Mostly new.

## JUDGES NOT TO HOLD ANY OTHER OFFICE.

Section 10 reads as follows: “The judges of the Court of Appeals and justices of the Supreme Court shall not hold any other office or public trust. All votes for any of them for any other than a judicial office, given by the Legislature or the people, shall be void.”

Source—Art. VI, sec. 10, of the amended constitution of 1846 without change.

## REMOVAL OF JUDGES.

In relation to removal of judges we refer to section 11: “Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices of inferior courts not of record, may be

## THE COURTS OF THE STATE OF NEW YORK.

removed by the senate, on the recommendation of the governor, if two-thirds of all the members elected to the senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal."

Source—Art. VI, sec. 11, of amended constitution of 1846.

## COMPENSATION, AGE RESTRICTION, ASSIGNMENT BY GOVERNOR.

Finally, section 12 states: "The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided in section five of this article. No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age. No judge or justice elected after the first day of January, 1894, shall be entitled to receive any compensation after the last day of December next after he shall be seventy years of age, but the compensation of every judge of the Court of Appeals or justice of the Supreme Court elected prior to the first day of

#### ASSIGNMENT BY GOVERNOR.

January, 1894, whose term of office has been, or whose present term of office shall be, so abridged, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder of the term for which he was elected; but any such judge or justice may, with his consent, be assigned by the governor, from time to time, to any duty in the Supreme Court, while his compensation is so continued.”

Source—The first sentence was taken from the first sentence of Art. VI, sec. 14, of the amended constitution of 1846 without change in language. The sentence relating to age limitation is a re-enactment of a similar provision contained in Art. VI, sec. 13, of such constitution. The remainder of the section was added by the convention of 1894.



## CHAPTER XLVIII.

### SURROGATES' COURTS.

AS CONSTITUTED IN 1846 — SEPARATION OF  
COUNTY OFFICERS—CONSTITUTION OF 1895—  
VACANCIES, HOW FILLED.

AS CONSTITUTED IN 1846.

As previously stated, this court has existed from early colonial days, but its constitutional existence emanates from the constitution of 1846 by article VI, section 14, relating to County Court judges, as follows:

“He shall hold the County Court and perform the duties of the office of surrogate.”

An extra surrogate was provided for as follows: “In counties having a population exceeding forty thousand, the Legislature may provide for the election of a separate officer to perform the duties of the office of surrogate.”

The election of surrogates in special cases, under the Laws of 1847, chapter 276, section 2, is as follows: “There shall be elected a separate officer to perform the duties of the office of surrogate in each of the counties of this state (except New York) having a population exceeding forty thousand in

## THE COURTS OF THE STATE OF NEW YORK.

which such separate officer shall be determined upon as hereinafter provided.”

### SEPARATION OF COUNTY OFFICERS.

The offices of county judge and surrogate are differentiated from each other by the laws of 1847, chapter 276, section 11: “They (the Board of Supervisors of the several counties of the state, except New York) shall also at the same meeting (May 25th, 1847, at the office of the county clerk in their respective counties), in those counties having a population exceeding forty thousand, determine whether the office of county judge and surrogate shall be separate, and if separate, they shall fix the salary of such separate officer. This section does not affect separate officers and determined salaries.”

Section 12 of the same chapter provides as follows: “Such elected separate officers are to enter upon their duties the first Monday in July, 1847, for four years.”

### CONSTITUTION OF 1895.

As now constituted, existing Surrogates' Courts are authorized by article VI, section 15, of the constitution of 1895, which reads: “The existing Surrogates' Courts are continued, and the surrogates now in office shall hold their offices until the expira-

## CONSTITUTION OF 1895.

tion of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the surrogates and existing Surrogates' Courts now possess, until otherwise provided by the Legislature. The county judge shall be surrogate of his county, except where a separate surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate surrogate, the Legislature may provide for the election of a separate officer to be a surrogate, whose term of office shall be six years. When the surrogate shall be elected as a separate officer, his salary shall be established by law, payable out of the county treasury. No county judge or surrogate shall hold office longer than until and including the last day of December next after he shall be seventy years of age."

### VACANCIES, HOW FILLED.

"Vacancies occurring in the office of county judge or surrogate shall be filled in the same manner as like vacancies occurring in the Supreme Court. The compensation of any county judge or surrogate shall not be increased or diminished during his term of office. For the relief of Surrogates'

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Courts, the Legislature may confer upon the Supreme Court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases.”

Source—See Art. VI, sec. 15, of the amended constitution of 1846.

## CHAPTER XLIX.

### CORONERS' COURTS.

#### FUNCTIONS OF CORONER—COUNTY LAW, 1892— CORONER IN ERIE COUNTY.

##### FUNCTIONS OF CORONER.

The coroner is a county officer, and his functions are those of a medical examiner in all cases where a decedent has met death through violence or under such circumstances as to create a suspicion that his death was compassed or caused by other than natural means or agencies, and in violation of law.

The office of coroner has existed since the inauguration of a regular system of judicature for the colony and state of New York, and has been made constitutional in each county, by the different state constitutions.

##### COUNTY LAW, 1892.

The county law of 1892, article XI, section 180, has the following provision in relation to this office: "There shall continue to be elected \* \* \* \* in each of the counties containing a population of one hundred thousand and over, four coroners, and in all other counties such number of coroners, not

## THE COURTS OF THE STATE OF NEW YORK.

more than four, as shall be fixed by the Board of Supervisors, who shall respectively hold their offices for three years from and including the first day of January succeeding their election.”

The procedure in cases within the coroner's jurisdiction is by autopsy or post-mortem examination. Should a question of fact arise, it is the coroner's duty to summon a jury, known as a coroner's jury, and proceed by inquest. For this purpose, witnesses may be subpoenaed and examined under oath, when in the judgment of the coroner reasonable grounds exist therefor. Upon information duly laid, warrants may be issued for the apprehension of any person or persons deemed responsible or accessory to the violent or unlawful death of the deceased.

This office now exists in each county of the state, except the county of Erie, where the office of coroner has been abolished, and instead, that of county medical examiner created under an act of the Legislature, laws of 1902, chapter 577, which is herewith printed in full.

### CORONER IN ERIE COUNTY.

AN ACT abolishing the office of coroner of the county of Erie, and creating the office of county medical examiner, and prescribing its duties.

Became a law, April 14, 1902, with the approval of the governor. Passed, three-fifths being present.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

## CORONER IN ERIE COUNTY.

Section 1. The office of coroner of the county of Erie is hereby abolished.

Sec. 2. The board of supervisors of the county of Erie shall appoint a county medical examiner, who shall be a duly qualified practitioner of medicine and surgery, and graduate of a medical college, and shall have at least five years' actual experience in the practice of his profession, and a deputy medical examiner, who shall also be a duly qualified medical practitioner of medicine and surgery and graduate of a medical college, and shall have had at least five years' experience in the practice of his profession. The first term of office of such medical examiner, and deputy medical examiner shall continue until the first day of January, nineteen hundred and six, and shall thereafter be for a term of three years, and he shall be subject to removal by the board of supervisors for cause, stated in writing, after an opportunity to be heard in his defense. The said medical examiner shall receive an annual salary of three thousand dollars, and the said deputy medical examiner shall receive an annual salary of two thousand dollars, each to be paid in the same manner as other officers of such county, and they shall receive in addition thereto all of their actual and necessary expenses incurred in the performance of their official duties, to be audited and paid in the same manner as other charges against the said county.

Sec. 3. Such county medical examiner, together with such deputy county medical examiner, shall have an office in the city of Buffalo, which shall be furnished and supplied in the same manner as the other county offices.

Sec. 4. The said medical examiner and the said deputy medical examiner before entering upon the duties of their office shall take the constitutional oath of office, and shall each give a bond, with sureties, to the people of the state of New York, the said medical examiner in the sum of

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five thousand dollars, and the said deputy medical examiner in the sum of five thousand dollars, for the faithful performance of their duties, said bond to be approved as to its form and sufficiency by the county judge of Erie county.

Sec. 5. If the condition of any such bond be broken to the injury of any person, the officer who gave it shall be liable to removal from his office, and be subject to like penalties as sheriffs, in like cases, and actions may be brought by the injured person upon such bond, in like manner as upon the official bonds of sheriffs.

Sec. 6. The said medical examiner and the said deputy medical examiner under the direction of the said medical examiner, shall make examinations as hereinafter provided upon the view of the dead bodies of such persons only as are supposed to have come to their death by violence.

Sec. 7. When the medical examiner, or the said deputy medical examiner has notice that there has been found, or is lying within the county of Erie, the dead body of a person, who is supposed to have come to his death by violence, he shall forthwith repair to the place where such body lies, and take charge of the same, and if on view thereof and personal inquiry into the cause and manner of the death, he deems a further examination necessary, he shall, upon being thereto authorized in writing by the district-attorney of Erie county, or by a justice of the peace of the town, where such body lies, make an autopsy, and shall then and there carefully reduce, or cause to be reduced to writing every fact and circumstance, tending to show the condition of the body, and the cause and manner of death, which record he shall subscribe.

Sec. 8. If upon such view, personal inquiry or autopsy the said medical examiner or his deputy is of the opinion that the death was caused by violence, he shall at once notify the district-attorney and the police justice of the

## CORONER IN ERIE COUNTY.

city of Buffalo, or a justice of the peace of the town in which the body lay when found, or the county judge of Erie county, or a justice of the Supreme Court, and shall file a duly attested copy of the record of his autopsy in the office of the clerk of the county of Erie, and a like copy with the district-attorney of the county of Erie, and shall in all cases certify to the clerk or registrar having in custody the records of births, marriages, and deaths in the city of Buffalo or the town in which the person deceased came to his death, the name and residence of the person deceased, if known, or when the name and residence cannot be ascertained, a description of the person deceased, as fully as may be, for identification, together with the cause and manner by and in which he came to his death.

Sec. 9. The justice or judge shall thereupon hold an inquest, which may be private, in which case any or all the persons, other than those required to be present by the provisions of this chapter, may be excluded from the place where such inquest is held, and said justice or judge may also direct the witnesses to be kept separate, so that they cannot converse with each other, until they have been examined. The district-attorney or some person designated by him may attend the inquest and examine all witnesses.

Sec. 10. The justice or judge holding such inquest, or the district-attorney, may issue subpœnas for witnesses returnable before such justice or judge; the attendance of persons served with such process may be enforced in the same manner, and they shall be subject to the same penalties as if served with a subpœna in behalf of the people, in a criminal prosecution pending in a court held by such justice or judge.

Sec. 11. The justice or judge presiding at such inquest shall, after hearing the testimony, draw up and sign a report in which he shall find and certify when, where, and

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by what means the person deceased came to his death, his name, if known, and all the material circumstances attending his death, and if it appears that his death resulted wholly or in part by the unlawful act of any other person or persons, he shall further state the name or names of such person or persons, if known to him, and he shall file such report in the office of the clerk of said county of Erie.

Sec. 12. If the said justice or judge finds that murder, manslaughter, or an assault in any degree has been committed, he may bind over, as in criminal prosecutions, such witnesses as he deems necessary or as the district-attorney may designate, to appear and testify at the court in which an indictment for such offense may be found or presented.

Sec. 13. If a person charged by the report of such justice or judge with the commission of an offense is not in custody, the justice shall forthwith issue process for his apprehension, and such process shall be made returnable before any court or magistrate having jurisdiction in the premises, who shall proceed therein in the manner required by law, but nothing herein shall prevent any such justice or judge from issuing such process before the finding of such report, if it is otherwise lawful to issue the same.

Sec. 14. If said medical examiner, or his deputy, reports that a death was not caused by violence and the district-attorney is of the contrary opinion, the district-attorney may, notwithstanding such report, direct an inquest to be held, in accordance with the provisions of this chapter, at which inquest he or some person designated by him, shall be present and examine all the witnesses.

Sec. 15. Such county medical examiner shall take charge of any money or other property found on the body of a person, the death of whom was investigated as provided in this act, and immediately deliver the same to the county treasurer, who shall hold the same subject to the

## CORONER IN ERIE COUNTY.

demand of the legal representatives of such person. Unless such money or other property is called for within sixty days from such delivery, the county treasurer shall deposit such money in the manner provided by the code of civil procedure in case of money paid into court; or in case of other property he shall sell it at public auction upon reasonable public notice, and deposit the proceeds thereof in the same manner. The money so deposited with interest, shall be paid to the legal representatives at any time, within six years from the time of the delivery of such money or property to the county treasurer, upon an order of a justice of the Supreme Court or the county judge of Erie county.

Sec. 16. This act shall take effect immediately.



## CHAPTER L.

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### APPELLATE DIVISION OF THE SUPREME COURT.

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SUCCESSOR TO GENERAL TERM—JUDICIAL DEPARTMENTS—APPELLATE DIVISION, HOW CONSTITUTED—GOVERNOR TO DESIGNATE JUSTICES—JURISDICTION—REPORTER—TERMS—JUDGES NOT TO SIT IN REVIEW—TESTIMONY IN EQUITY CASES.

#### SUCCESSOR TO GENERAL TERM.

This particular branch of the judicial organization of the state is of recent creation, dating from the constitution of 1895. It is the successor of a like appellate branch of the Supreme Court which was formerly known as the General Term.

The section of the constitution in which it originates is found in article VI, section 2, and is as follows:

#### JUDICIAL DEPARTMENTS—APPELLATE DIVISION, HOW CONSTITUTED.

“The Legislature shall divide the state into four judicial departments. The first department shall consist of the county of New York; the others shall

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be bound by county lines, and be compact and equal in population as nearly as may be. Once every ten years the Legislature may alter the judicial departments, but without increasing the number thereof. There shall be an Appellate Division of the Supreme Court, consisting of seven justices in the first department, and of five justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case."

### GOVERNOR TO DESIGNATE JUSTICES.

"From all the justices elected to the Supreme Court, the governor shall designate those who shall constitute the Appellate Division in each department; and he shall designate the presiding justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other justices shall be designated for terms of five years, or the unexpired portions of their respective terms of office, if less than five years. From time to time as the terms of such designations expire, or vacancies occur, he shall make new designations. A majority of the justices so designated to sit in the Appellate Division in each department shall be residents of the department. He may also make temporary designations in case of the absence or inability to act of any justice of the Appellate Division, or in case the presiding justice of

#### GOVERNOR TO DESIGNATE JUSTICES.

any Appellate Division shall certify to him that one or more additional justices are needed for the speedy disposition of the business before it. Whenever the Appellate Division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments at a meeting called by the presiding justice of the department in arrears may transfer any pending appeals from such department to any other department for hearing and determination."

#### JURISDICTION.

"No justice of the Appellate Division shall exercise any of the powers of a justice of the Supreme Court other than those of a justice out of court, and those pertaining to the Appellate Division or to the hearing and decision of motions submitted by consent of counsel. From and after the last day of December, 1895, the Appellate Division shall have the jurisdiction now exercised by the Supreme Court at its General Terms and by the General Terms of the Court of Common Pleas for the city and county of New York, the Superior Court of the city of New York, the Superior Court of Buffalo, and the City Court of Brooklyn, and such additional jurisdiction as may be conferred by the Legislature."

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REPORTER—TERMS.

“ It shall have power to appoint and remove a reporter. The justices of the Appellate Division in each department shall have power to fix the times and places for holding Special and Trial Terms therein, and to assign the justices in the departments to hold such terms; or to make rules therefor.”

(Amended by vote of people, November 7th, 1899.)

Source—Mostly new. The Appellate Division is a substitute for, and has the jurisdiction of, the former general term.

JUDGES NOT TO SIT IN REVIEW—TESTIMONY IN  
EQUITY CASES.

Section 3 goes on to say: “ No judge shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any other court of which he was at the time a sitting member. The testimony in equity cases shall be taken in like manner as in cases at law; and except as herein otherwise provided, the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised.”

Source—Art. VI, sec. 8, of the amended constitution of 1846.

## CHAPTER LI.

### COURT OF MAGISTRATES OF THE CITY OF NEW YORK.

CREATED BY NEW YORK CHARTER—ORGANIZATION AND POWERS OF THE COURTS—CHILDREN'S PART IN FIRST DIVISION—INFERIOR COURTS OF CRIMINAL JURISDICTION.

CREATED BY NEW YORK CHARTER.

Chapter XX, title 3, section 1391, of the Greater New York Charter, provides for the above court in the following terms: "In each of said districts there shall be a Board of City Magistrates composed of the magistrates therein in office on the first day of January, 1902, and such as thereafter may be appointed or elected pursuant to law. The board for the first division shall consist of fifteen magistrates, ten of whom shall be residents and electors of the Borough of Brooklyn, three of the Borough of Queens, and two of the Borough of Richmond, which said board shall be created as hereinafter provided."

(As amended by Laws of 1903, Chap. 410.)

ORGANIZATION AND POWERS OF THE COURTS.

In chapter XX, title 3, section 1391, of the

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Greater New York Charter, occurs the following provision: "Each Board of the City Magistrates may elect a president from their own number, and at pleasure remove him and elect a successor. All the meetings of such board shall be public and its proceedings shall be recorded in its books of minutes by the secretary and shall be preserved. Each board may designate a police clerk to act as his secretary and from time to time substitute any other; and the salary of such police clerk as such secretary shall not exceed five hundred dollars per annum. Each board shall establish public rules relative to its meetings, which as far as possible shall be held at regular times for the order and transaction of its business thereat; for the keeping and preservation of the minutes of its doings; for the appointment of employees; and for the public inspection of its minutes, under the care of the secretary at reasonable times. The concurrence of a majority of all the members of the Board of City Magistrates shall be necessary to adopt any resolution of said board."

CHILDREN'S PART IN FIRST DIVISION.

Chapter 20, title 3, section 1399, of the charter, is to the following effect: "The Board of City Magistrates of the first division shall assign a part for the hearing and disposition of cases now within the jurisdiction of said magistrates involving the trial or commitment of children, which part may

## CHILDREN'S PART IN FIRST DIVISION.

for convenience be called a Children's Court and in all such cases the magistrate holding said court shall have all the powers, duties, and jurisdiction now possessed by the city magistrates within said first division. Said Children's Court shall be held by the several magistrates in rotation in such manner as may be determined by said board and shall be opened on such days and during such hours as the said board shall in its rules provide. Whenever under any provision of law, a child under sixteen years of age is taken before a city magistrate in the first division sitting in any court other than the Children's Court, it shall be the duty of such magistrate to transfer the case to the Children's Court. If the case falls within the jurisdiction of said court as herein provided, it shall be the duty of the officer having the child in charge to take such child before that court, and in any such case, the magistrate holding said Children's Court must proceed to hear and dispose of the case in the same manner as if it had been originally brought therein. The Board of City Magistrates shall appoint a clerk for the Children's Court and such assistants as may be necessary, whose salaries shall be fixed by the board of aldermen on the recommendation of the board of estimate and apportionment, and said court shall be held, if practicable, in the building in which the offices of the Department of Public Charities for the examination of dependent children are located, or if this shall not be practicable, the court

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shall be held in some other building as near thereto as practicable to be selected by the commissioners of the sinking fund. Nothing herein contained shall affect any provisions of law with respect to the temporary commitment by the magistrates of children charged with crime, or held as witnesses for the trial of any criminal case, or the existing jurisdiction of the Court of Special Sessions.”

### INFERIOR COURTS OF CRIMINAL JURISDICTION.

Chapter 20, title 3, section 1390, of the Greater New York Charter contains the following provision: “For the purpose of administration of criminal justice, the city of New York as hereby constituted, is divided into two divisions, as follows: The first division embraces the Boroughs of Manhattan and the Bronx; the second division embraces the Boroughs of Brooklyn, Queens, and Richmond; and the Borough of the Bronx in the first division shall be divided into two City Magistrates’ Court Districts by the mayor and commissioner of police and the president of the Court of City Magistrates of the first division, in such manner as to make access to the courts convenient to the residents of that borough and otherwise conserve public interests. The original district thus to be made shall be known as the Eighth District City Magistrates’ Court.”

(As amended by Laws of 1903, Chap. 410.)

## CHAPTER LII.

### COURT OF SPECIAL SESSIONS.

Chapter 20, title 3, section 1405, of the Greater New York Charter, contains the following provision in reference to the above court: "The Court of Special Sessions of the city of New York is hereby continued with all the powers, duties, and jurisdiction it now has by law, and such additional powers, duties, and jurisdiction as are contained in and covered by section 1419. The justices of the Court of Special Sessions of the first and second divisions of the city of New York are hereby continued in office until the expiration of the terms for which they have been appointed; and their successors shall be appointed by the mayor for the term of ten years. There shall be six justices of the Special Sessions for the first division and six for the second division for a term of ten years, whose powers, duties, jurisdiction, and compensation shall be the same; whose successors shall be elected in like manner and who shall possess all the requirements for appointment as those hereby continued in office."

(As amended by Laws of 1903, Chap. 159.)



## CHAPTER LIII.

### COURTS CODIFIED.

#### COURTS OF RECORD—COURTS NOT OF RECORD.

In this chapter, as a logical deduction from the scheme which we have endeavored to keep before the reader, we shall set forth as officially and legally recognized by the New York Code of Civil Procedure, the two classes of existing courts, both state and local, designated respectively, courts of record and courts not of record.

Chapter 448, of the Laws of 1876, chapter 1, of the Code, title one, article first, enumerates the courts as follows:

#### COURTS OF RECORD.

- (1) The Court for the Trial of Impeachments.
- (2) The Court of Appeals.
- (3) The Appellate Division of the Supreme Court in each department.
- (4) The Supreme Court.
- (5) The Court of General Sessions of the Peace in and for the city and county of New York.
- (6) The City Court of Long Island City.
- (7) The City Court of Yonkers.

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- ( 8 ) A County Court in each county except New York.
- ( 9 ) The City Court of the city of New York.
- (10) The Mayor's Court of the city of Hudson.
- (11) The Recorder's Court of the city of Utica.
- (12) The Recorder's Court of the city of Oswego.
- (13) The Justices' Court of the city of Albany.
- (14) A Surrogate's Court in each county.
- (15) The Court of Claims.

COURTS NOT OF RECORD.

- (1) Courts of Justices of the Peace in each town, and in certain cities and villages.
- (2) Courts of Special Sessions of the peace in each town and in certain cities and villages.
- (3) The District Courts in the city of New York.
- (4) The Police Courts in certain cities and villages.
- (5) The Justices' Court of the city of Troy.
- (6) The Municipal Court of the city of Rochester.
- (7) The Municipal Court of the city of Syracuse.
- (8) The Municipal court of the city of Buffalo.

In the principal text, many of the courts here

#### COURTS NOT OF RECORD.

enumerated have formed the objects of special attention, and require no further notice at our hands. Others of sufficient importance, we will now consider from the act of establishment by virtue of which they now exist and exercise their legal functions, giving in full that section, or portion of the legislative enactment constituting the enacting clause.



## CHAPTER LIV.

### CITY COURT OF YONKERS.

Beginning with the courts of record and taking them in their codified order, we come first to the City Court of the city of Yonkers, established by the Laws of 1873, chapter 61. Amended act in relation to the establishment of the City Court of the city of Yonkers, passed March 8th, 1873, section 1 is as follows: "The City Court of Yonkers, as heretofore constituted by law, and as constituted by this act, shall be a court of record, to and for all intents and purposes, and shall continue to be vested with, and shall have, the same jurisdiction and power within the city of Yonkers, as is by law conferred upon it and vested in said city by this act or any other act.

"The city judge of Yonkers shall be the judge of said court, and shall have and possess all the powers and jurisdiction heretofore conferred upon him. He shall also have the powers within said city of Yonkers, which any justice or judge of the Municipal Court of the city of New York hath by law within the city of New York. He shall also have the same jurisdiction and power as a justice of the peace of towns.

THE COURTS OF THE STATE OF NEW YORK.

“The said City Court of Yonkers shall have civil jurisdiction in all actions for the recovery of money only, where the amount demanded in the summons, or for which judgment shall be asked or entered or rendered, shall not exceed one thousand dollars, and the interest thereon exclusive of costs, provided that one of the parties to the action shall be a resident of the city of Yonkers, or a resident of a town in the city of Westchester adjoining said city; or the defendant shall have property within said city which may be taken upon attachment in said city, and the summons shall be served within the limits of said city, or within the limits of the adjoining town.”

## CHAPTER LV.

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### MAYOR'S COURT OF THE CITY OF HUDSON.

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By an act passed March 8th, 1791, and embraced in the Laws of 1791, chapter 352, seventh clause thereof, the following provision is made for reviving the Mayor's Court of the city of Hudson: "Be it further enacted by the authority aforesaid, that it shall and may be lawful for the mayor, recorder, and aldermen of the said city, or any two of them, whereof the mayor or recorder shall be one, to hold such court according to the directions of the said court, as if said court had been regularly held according to the said act, and adjourned to the first Tuesday of May next, and all the processes and proceedings depending in the said court on the said first Tuesday of February in the present year, shall be and hereby are revived and continued until the said first Tuesday of May next."



## CHAPTER LVI.

### THE RECORDER'S COURT OF THE CITY OF UTICA.

Referring to the Laws of 1844, chapter 319, "An act to establish a Recorder's Court in the city of Utica, and for other purposes, passed May 7th, 1844," we find:

"There shall hereafter be a Recorder's Court in the city of Utica; and a recorder of said city who shall be appointed in the manner provided by the constitution, for the appointment of judges of the county courts, and who shall hold his office for the same term, and by the like tenure, and be subject to removal in like manner, and shall be of the degree of counselor of law in the Supreme Court at the time of such appointment.

"The said recorder shall hold a court of civil jurisdiction to be called 'The Recorder's Court of the City of Utica,' which shall be a court of record; the several terms thereof shall commence on the first Mondays of January, March, May, August and November in each year; the first of said terms shall be on the fourth Monday of May next, and each term may continue for two weeks. The said court shall have power to hear, try, and deter-

THE COURTS OF THE STATE OF NEW YORK.

mine according to law all local actions arising in said city and not elsewhere; and shall have jurisdiction concurrently with the Court of Common Pleas of the county of Oneida in all cases of appeals from and certioraris on judgments rendered by any of the justices of the peace in said city. In all transitory actions where the defendant resides in said city, said court shall have concurrently with the said Court of Common Pleas, the same power, authority, and jurisdiction, as is now vested in said Court of Common Pleas, and said Recorder's Court shall possess all the powers and authority of the Courts of Common Pleas of the several counties in this state in suits commenced or prosecuted therein pursuant to this act, and all laws regulating the processes, practice, and proceedings of the said courts, and regulating the removal of suits commenced or prosecuted therein, shall be applicable to and binding on the said Recorder's Court, and suits may be commenced by the filing and service of a declaration in the manner now authorized in Courts of Common Pleas.

“The said recorder, with two aldermen of said city, to be selected by him from time to time, may and shall at all times aforesaid, hold a court of criminal jurisdiction, which shall also be called the Recorder's Court of the city of Utica, which shall have criminal jurisdiction to the same extent and in the same manner and with the same powers as the Court of General Sessions of the

RECORDER'S COURT OF UTICA.

Peace in the several counties of this state, in the indictment and trial of all offences committed in said city, whenever any bill of indictment for any offence committed in said city shall have been transmitted to the said court pursuant to the provisions of the next section, and the proceedings therein shall be in all respects the same as in an indictment in a Court of General Sessions."



## CHAPTER LVII.

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### RECORDER'S COURT OF THE CITY OF OSWEGO.

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Laws of 1849, chapter 134, containing "An act to amend an act entitled an act to organize and establish a Recorder's Court in the city of Oswego," passed April 12th, 1849, section 1, thereof, says: "All the provisions of the act entitled, 'An act to simplify and abridge the practice, pleadings, and proceedings of the courts of the state,' passed April 12th, 1848, applicable to the Recorder's Courts therein named, and such amendments and additions as shall be made thereto, shall apply to the Recorder's Court of the city of Oswego, and shall apply to all cases and proceedings now pending, or herebefore commenced in said court."



## CHAPTER LVIII.

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### JUSTICES' COURT IN THE CITY OF ALBANY.

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Mention of the above court is made in the Laws of 1821, chapter 47, containing, "An act for establishing a Justices' Court in the city of Albany," passed February 16th, 1821, as follows:

"Be it enacted by the people of the state of New York, represented in senate and assembly, that it shall and may be lawful for the person administering the government of this state, by and with the advice and consent of the council of appointment, from time to time, to appoint and continue three proper and discreet persons to be called and known by the name of 'The justices of the Justices' Courts in and for the city of Albany'; and one other proper and discreet person, to be called and known by the name of 'The clerk of the Justices' Courts in and for the city of Albany,' to hold their said offices respectively, for and during the pleasure of the said council; and the said commission of the judges aforesaid shall issue once at least in every three years; and in their said commissions said justices shall also be appointed justices of the peace in and for the county of Albany, with all and singular

powers in criminal cases, incident to the offices of justices of the peace.

“And be it further enacted that the said justices of the said Justices’ Courts shall have power and authority to hold a court at the capitol, in the city of Albany, or at such other or proper and convenient place in said city, as the common council thereof may, at any time direct and appoint; and such court shall be called ‘The Justices’ Court of the city of Albany,’ and it is hereby declared to be a court of record, and shall have exclusive jurisdiction in the said city, to hear, try, and determine all actions which are now cognizable before a single justice of the peace in said city, and shall in all respects proceed in like manner, except as is otherwise provided by this act.”

## CHAPTER LIX.

### COURT OF CLAIMS.

Laws of 1883, chapter 205, including "An act to abolish the office of canal appraiser and the state board of audit and to establish a board of claims and define its powers and duties," passed April 7th, 1883, reads: "The governor by and with the advice and consent of the senate shall appoint three persons commissioners of claims, who shall be citizens of this state, and of whom two, but no more, shall be practising attorneys and counselors of the Supreme Court; they shall constitute a Court of Claims, said commissioners to be first appointed shall be appointed for the term of two, four, and six years, respectively, from the first day of January next ensuing their appointment, and until their successors shall be appointed and have qualified, and shall enter upon the duties of their office on the first day of June, 1883. Two of said commissioners shall constitute a quorum for the transaction of business; the commissioner having the shortest time to serve, and who is a counselor of the Supreme Court shall act as prosecuting officer of the court. Whenever the tenure of office of any commissioner of claims shall expire, the governor in like manner

shall appoint a successor for the full term of six years. When a vacancy in the office shall occur before the expiration of its term, the same shall be filled for the unexpired term by appointment of the governor, by and with the advice and consent of the senate, if the senate shall be in session, or if not in session, the governor may appoint some suitable person to fill such vacancy the first day of January next succeeding such appointment, and the remainder of the unexpired term shall be filled in like manner, as if such vacancy had occurred during a session of the senate. The governor may remove any commissioner of claims within the term for which he shall be appointed, but before removing him, he shall give to such officer a copy of the charges against him, and an opportunity of being heard in his defence. Each of said commissioners shall take and subscribe the oath of office required by the constitution and file the same in the office of the secretary of state, and shall receive a compensation of five thousand dollars per annum, payable quarterly, and his necessary expenses, not exceeding five hundred dollars per annum for each commissioner. The persons appointed under this act shall possess the same qualifications as the commissioner whose place such person is appointed to fill."

## CHAPTER LX.

### MUNICIPAL COURT OF THE CITY OF ROCHESTER.

Laws of 1876, chapter 196, section 1, is as follows: "A court of civil jurisdiction to be called and known as the 'Municipal Court of the City of Rochester,' is hereby created and established in and for the said city with the jurisdiction and powers hereinafter provided. Immediately upon the passage of this act there shall be appointed by the governor, by and with the advice and consent of the senate, two judges of said court, whose duties shall be to organize and hold said court in said city as hereinafter provided."



## CHAPTER LXI.

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### MUNICIPAL COURT OF THE CITY OF SYRACUSE.

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Laws of 1892, chapter 342, section 1, reads: "A court of civil jurisdiction to be called and known as the 'Municipal Court of the City of Syracuse,' is hereby created and established in and for said city, with the jurisdiction and powers hereinafter provided immediately after this act shall take effect. There shall be appointed by the governor two judges of said court, not more than one of whom shall belong to the same political party, whose duties shall be to organize and hold said court in said city as hereinafter provided."



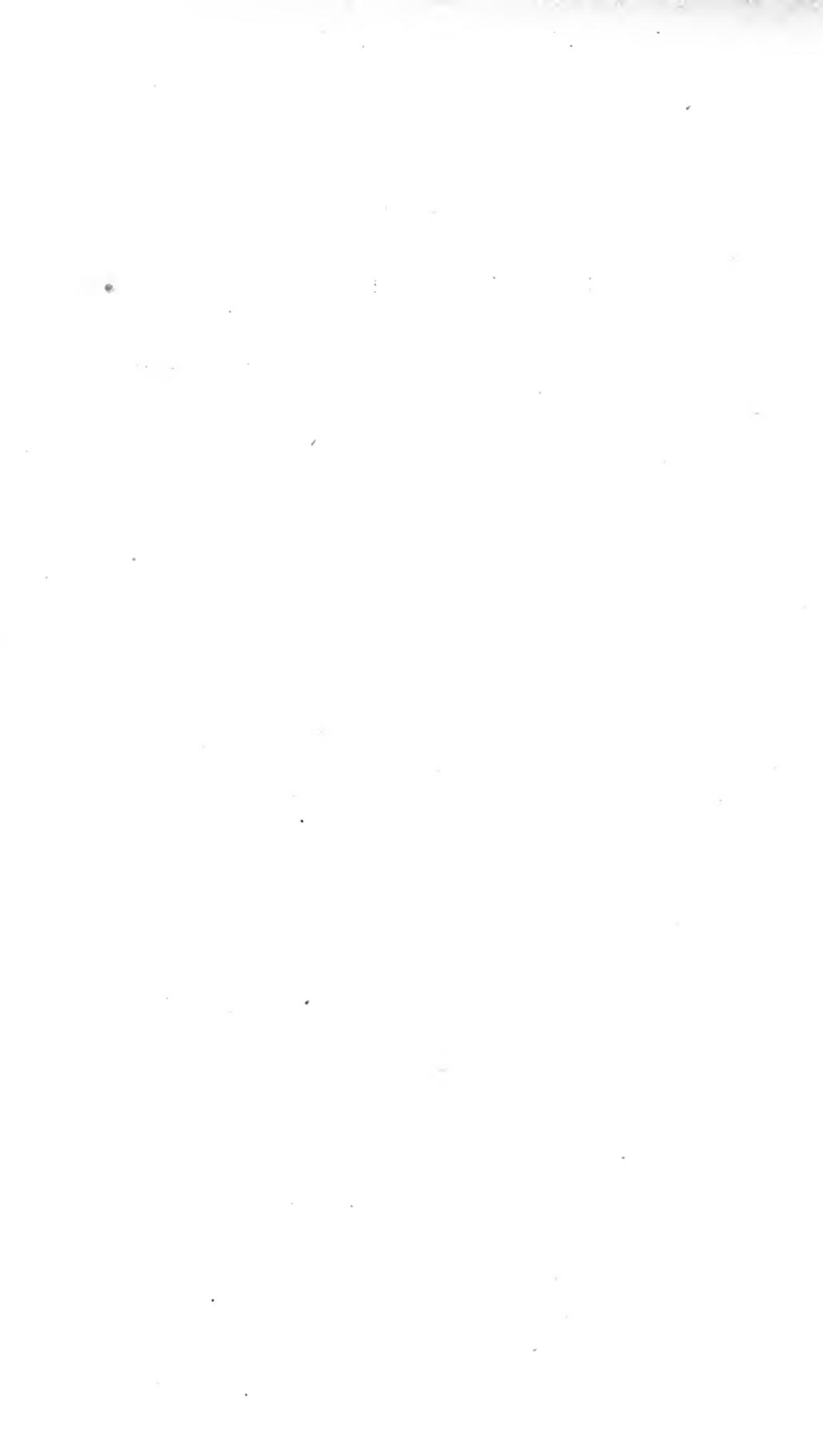
## CHAPTER LXII.

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### MUNICIPAL COURT OF THE CITY OF BUFFALO.

---

Laws of 1880, chapter 344, section 1, says: "The court of civil jurisdiction to be called and known as the 'Municipal Court of Buffalo,' is hereby created and established in and for the city of Buffalo with the jurisdiction and powers hereinafter provided. Immediately upon the passage of this act, there shall be appointed by the mayor of the city of Buffalo, by and with the consent of the common council of said city, two judges of said court in said city as hereinafter provided; etc., etc."



## CHAPTER LXIII.

### INVESTIGATION OF CRIMINAL COURTS.

To maintain the proper equilibrium of the scales of justice between the community and those charged with the enforcement of the criminal law; to assure the swift and impartial administration of justice to high and low; to protect the weak and helpless from injustice and oppression; the Legislature has from time to time, appointed commissions to investigate the efficiency and practice of the Criminal Courts.

Below is printed in full the last act, Laws of 1908, chapter 2111, passed by the Legislature for this purpose. Its work in this direction is still under way, and what its investigations will develop, we must await from the rendition and publication of its final report.

AN ACT to authorize the appointment of a commission to inquire into the manner in which justice is administered in courts of inferior criminal jurisdiction in cities of the first class, including their methods of procedure, and directing said commission to report to the Legislature thereon, with recommendations, and making an appropriation therefor.

Became a law, May 6th, 1908, with the approval of the governor. Passed, three fifths being present.

## THE COURTS OF THE STATE OF NEW YORK.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. A commission to inquire into inferior criminal courts in cities of the first class is hereby established. Such commission shall consist of seven members, two to be appointed by the governor, two members of the senate to be appointed by the temporary president of the senate and three members of assembly to be appointed by the speaker of the assembly. Such commission shall, from its members, elect a chairman and a secretary. Any vacancy in its membership shall be filled by the officers authorized to make the original appointments, respectively. The total expenses of the commission shall not exceed the sums hereinafter appropriated.

Sec. 2. The commission shall make careful inquiry into the manner in which justice is administered in courts of inferior criminal jurisdiction in cities of the first class and their methods of procedure, the system of records, the conduct and duties of clerks, attendants, and other employees, the arrangement and condition of the court houses, and all other matters connected with the administration of justice in said courts, and, so far as in the discretion of the commission may seem necessary, the methods employed in other cities. It may appoint and at pleasure remove any counsel, secretary, or other employee deemed by it necessary for the purposes of the inquiry, and may adopt rules, not inconsistent with the provisions of this act, regulating its sessions, hearings, and work. It shall be the duty of the proper local authorities, upon request of the commission, to place a convenient room or rooms in a public building in said city at the disposal of the commission for the purpose of its public sessions and other meetings.

Sec. 3. The commission shall have full power and authority and it shall be its duty to prosecute its inquiries in any and every direction, in its judgment necessary and proper, to enable it to obtain information in regard to and

## INVESTIGATION OF CRIMINAL COURTS.

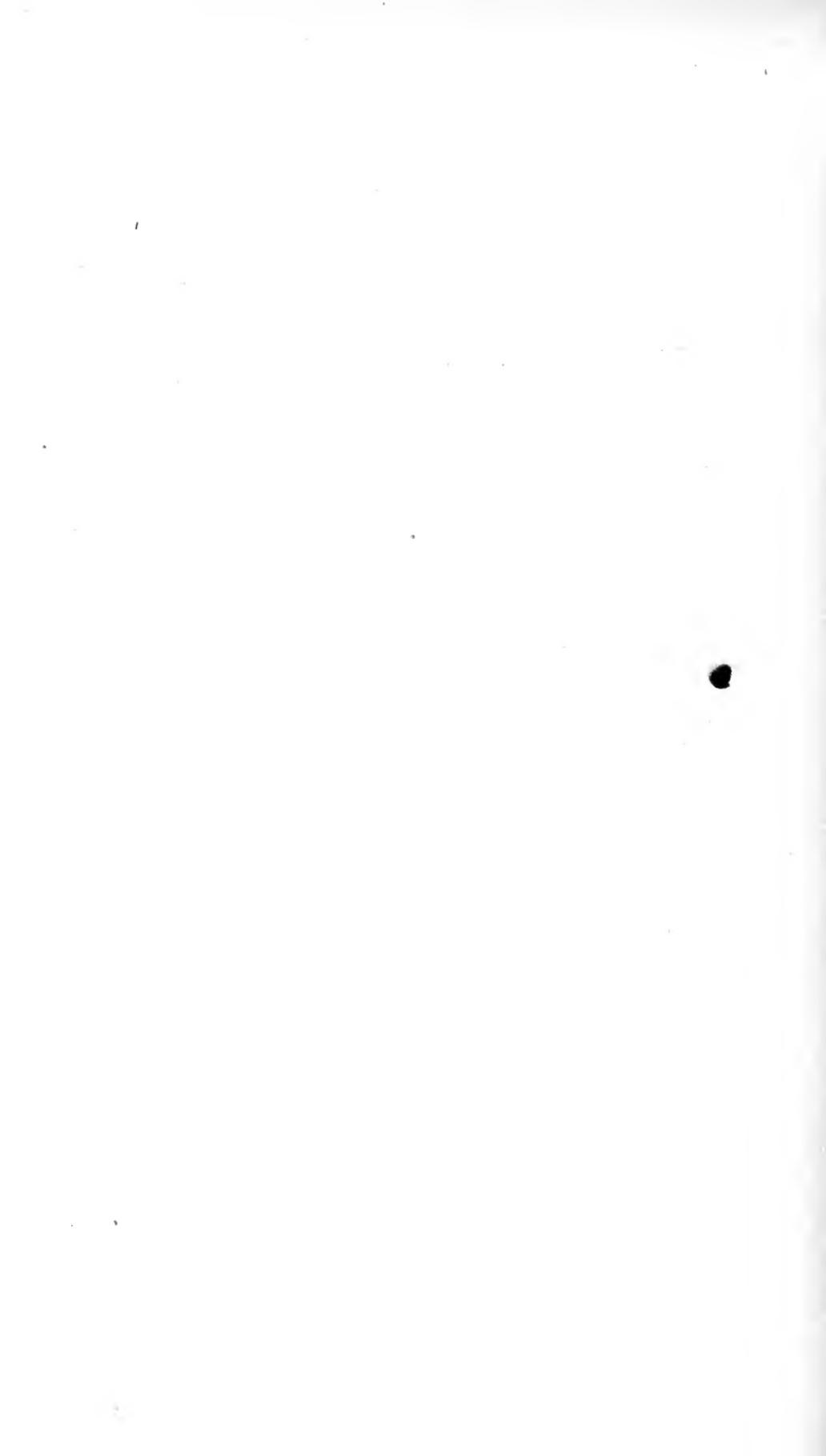
report upon the matters referred to in this act. The members of the commission, its secretary, counsel and other proper employees, when so directed by the commission, shall have access to all court rooms, court and other records of such inferior criminal courts, and to the records of all departments of said cities which, in its judgment, it may be necessary to examine for the purposes of this inquiry. The commission shall have power to subpoena witnesses, with or without directions to produce papers, to administer oaths to and examine witnesses, and to compel their attendance by attachment to be issued on order of the commission and served by any policeman of said cities; witnesses shall be paid the fees to which witnesses in courts of record are by law entitled and shall be entitled to all the privileges and immunities of witnesses in courts of record. The said commission shall have such further powers as are conferred by law upon a committee of the Legislature of the state of New York.

Sec. 4. The members of the commission shall receive no compensation for their services, but the necessary expenses and disbursements incurred by them in the discharge of their duties hereunder shall be paid. The commission shall have the power to fix the compensation of its counsel, secretaries, and other employees.

Sec. 5. The commission shall make a full report of its inquiry to the governor for submission to the Legislature in nineteen hundred and nine, or as soon thereafter as practicable, with such recommendations of legislation or otherwise as it deems desirable.

Sec. 6. The sum of fifteen thousand dollars is hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the purpose of carrying out the provisions of this act. The expenses, disbursements, payment of counsel fees and compensation of employees of the commission shall be made on the approval of the chairman of the commission and the audit of the comptroller.

Sec. 7. This act shall take effect immediately.



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