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The Honorable Stanley H. Fuld* BY Jack B. Weinstein

In the late forties, Judge Fuld's new law clerks were selected by Columbia's Law School Dean, Young B. Smith. His first such clerk was Maurice Rosenberg, Editor-In-Chief of the Law Review. For some reason I never could fathom, I, a poor somewhat confused boy from Brooklyn who had never met a judge before, was the second.

It was like being dropped onto Mount Olympus by parachute.

“He lights the way for all of us who seek, however inadequately, to emulate his love of the law and his enormous skill.”

The setting was impressive: Cardozo's former chambers in New York City; that magnificent Temple of Justice, the New York Court of Appeals Hall in Albany with probably the most beautiful courtroom in the country; and that benign, smiling, welcoming modest and brilliant judge with his law assistant, Virginia Hughes, and secretary Dorothy Houts, ready to help the newcomer feel comfortable.

Beneath that magnificent Albany courtroom were filed the unpublished memoranda of the Court of Appeals greats. Touching their work, you could almost feel the power, charged with the wisdom of New York's jurists going back to colonial times, and through the reception, to England's ancient court of law and equity.

Being helot to this god was dazzling but, as I soon found out, daunting.

There were the drafts. The first, by the clerk, based upon Fuld's dictation, was disdainfully thrown back across the desk. “Do you really expect me to sign my name to this?,” he would ask, with gritted teeth and a barely restrained urge to throw the inkwell or even the desk—or



*In Memoriam
Honorable Stanley H. Fuld
1903 – 2003*

perhaps a thunderbolt—at the offender. By draft 32 things looked better: a sow's ear had been transformed by the judge into a polished jewel of common law.

Between the first and thirty-second drafts terror ruled. “If you don't change your ways, Jack, you'll never be a lawyer.” (I had split an infinitive.) To Ken Feinberg: “Now I know why I have never chosen an N.Y.U. graduate as a clerk.”

To me he'd declare: “You're fired. Your work is impossible.”

Dejected, I'd walk from 44th Street to our apartment in London Terrace on 23rd Street to be greeted by my wife Evie and our toddler

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The Historical Society
of the Courts of the
State of New York
SPRING / SUMMER 2004

84 NORTH BROADWAY
WHITE PLAINS, N.Y. 10603

PHONE (914) 682-3222

FAX (914) 997-8982

E-MAIL: The_Historical_Society@courts.state.ny.us

WEB SITE:
www.courts.state.ny.us/history

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From the Executive Director

Dear Members

I AM PLEASED TO PRESENT YOU WITH THE SECOND VOLUME of the newsletter of The Historical Society of the Courts of the State of New York. In this newsletter, Jack B. Weinstein shares with us his personal reflections on the distinguished jurist Stanley H. Fuld (1903-2003). You will read of Judge Fuld's significant impact on American Law and his contribution to "making the Bill of Rights a living force in New York." John D. Gordan, III takes us back to the early 1800s to the trial of Francis Mezzara, a painter charged with public hatred, ridicule and contempt for painting and advertising a portrait of a local attorney with the ears of an ass. Gary D. Spivey provides an insider's view of the development of official court reporting in New York State and Penelope D. Clute explores, through original source material, the case of Peggy Facto, one of eleven women put to death by hanging in the period between 1639 and 1825.

Launched just a short time ago, The Historical Society of the Courts of the State of New York is dedicated to preserving, studying and celebrating what is surely among the nation's oldest and most vital legal histories. Through our website, newsletters and journal, the Society documents the history of New York's laws, courts, legal profession and culture. The oral history project, already underway, enables us to capture the voice and experience of some of New York's most distinguished jurists. The annual lecture, in its first year, explored New York's role in the ratification of the Federal Constitution and more recently, James Kent's contribution to the development of the common law in America. Our growing membership reflects a shared commitment to preserving this legal history. I thank you for your past generosity and look forward to your continuing support as we move forward with this exciting project. ■

Sue Nadel

*Executive Director,
The Historical Society of the Courts
of the State of New York*



Chief Judge Judith S. Kaye (right) and Judge Albert M. Rosenblatt (left) being presented with *The Documentary History of the Ratification of the Constitution, Volume XIX: Ratification of the Constitution by the States, New York, Volume 1* by Distinguished Professor John P. Kaminski (center) at the Historical Society's inaugural program, "Framing of the Constitution: New York's Role," held on April 22, 2003 at the Association of the Bar of the City of New York. The event drew a standing-room-only crowd of judges, attorneys and scholars.

Contributors to this Issue

Penelope D. Clute is the City Court Judge in Plattsburgh, New York. From 1989 to 2002 she was the District Attorney of Clinton County and from 1974-1988 a partner in the Plattsburgh law firm of Clute Clute & Thompson. She has been researching crimes in the North Country for the last several years.

John D. Gordan, III is a litigation partner in the New York office of Morgan, Lewis & Bockius LLP. He is currently vice president of the Historical Society and one of its founding trustees.

Gary D. Spivey has been State Reporter since 1999. Before that, he held editorial and executive management positions in the legal publishing industry.

Jack B. Weinstein is a Senior U.S. District Court Judge for the Eastern District of New York. He served as a law clerk for Chief Judge Stanley H. Fuld from 1949 to 1950.

THE PRICE OF VANITY *or* THE LAWYER WITH THE EARS OF AN ASS

This was a prosecution for criminal libel tried in the Court of General Sessions of the City of New York on August 4, 1817. Presiding at the trial at the City Hall was Jacob Radcliff, the Mayor, just as he did in civil actions in the Mayor's Court, the urban equivalent of a Court of Common Pleas. The Court of Sessions dated from the early days of English colonial supremacy; its existence was first codified by the Judicature Act passed by the New York Provincial Assembly in 1683 and extended by the Judicature Act of 1691, which established our present Supreme Court. By 1817, the composition of the Court of General Sessions was similar to the Old Bailey's, sitting for the City of London and the County of Middlesex—the Mayor, Aldermen and the Recorder. It existed here in some form until late in the 20th Century.

The defendant was a portrait painter named Francis Mezzara, lately of Rome, possibly a Frenchman. He was certainly not American, for according to the report of the case in the *New-York City-Hall Recorder*:¹

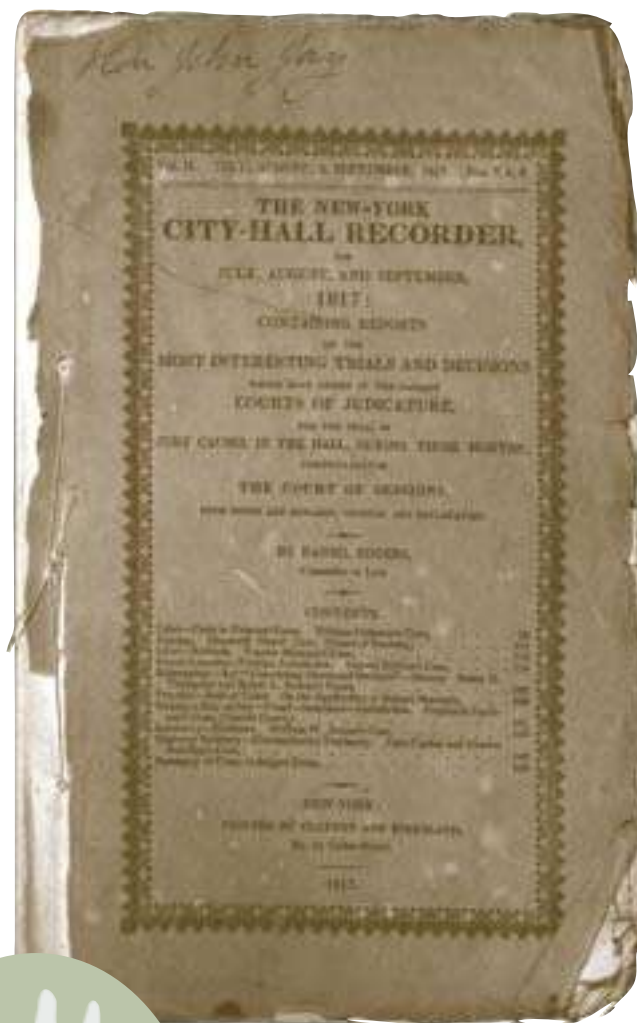
The defendant, by his counsel, had moved for a special venire to summon a jury *de medietate linguae*, under the statute, which motion was granted. On the return of the venire, a number of the jury were called who did not understand the English language. The court directed these to stand aside, and that the sheriff should summon a *tales* of such as spoke the language.

The case was prosecuted by Hugh Maxwell, District Attorney for New York County, assisted

Mezzara “falsely and maliciously did make, utter and publish a certain picture, portrait or resemblance of the said Aaron H. Palmer with the ears of an Ass....”

by three other counsel. In the standard reference work for the bar of the period, Maxwell is described as:

an eminent lawyer of the New York bar. He was first appointed [District Attorney]...in 1817, and again in 1821, after the adoption of the new Constitution. He continued in office until 1829. ... Deeply and thoroughly learned in the English and American criminal law, with rare elocutionary powers, a pleasing, genial manner, he was formidable before a jury. But his natural hatred of crime gave him that determination in the trial of criminals which sometimes rendered him



obnoxious to the charge of being vindictive in his efforts to convict persons indicted.²

A visitor to New York City ten years later described Maxwell as “a great tall gangling fellow, with a sly countenance, slippery tongue and slip slop gate; his face is fair, long and brazen....”³ One of the

lawyers assisting Maxwell, described in the report only as “Price,” is undoubtedly William M.

Price, a longtime associate of Maxwell's at the criminal bar who served as United States District Attorney for the Southern District of New York from 1834 to 1838, abandoning his post to flee to Europe with \$70,000 in stolen government funds and later committing suicide.⁴

The indictment included several counts, but the essence of the charge was that “contriving him the said Aaron H. Palmer to bring into public hatred, ridicule and contempt,” Mezzara “falsely and maliciously did make, utter and publish a certain picture, portrait or resemblance of the said Aaron H. Palmer with the ears

of an Ass....” Aaron H. Palmer was described in the indictment as “a counsellor and attorney at law in this city, and a master in chancery and public notary.”

At the trial Palmer testified that at a dinner given by a French nobleman residing in New York, he had been introduced to Mezzara, whom he subsequently invited to his home. On that occasion, Mezzara:

proposed to draw a portrait of the witness and was very solicitous that he should sit for that purpose; alleging that there was a very striking peculiarity in the forehead, and that the head of the witness was a head of study—expressing it in French as “*une tete d’etude.*”

Palmer, by his testimony “reluctantly,” sat for the portrait, but after it was exhibited, Palmer “considered it unworthy of an artist of eminence; and his friends pronounced it to be a caricature.” Palmer tendered Mezzara his fee of \$65.00 for painting the portrait and authorized him in writing to keep the picture as well. Mezzara, “considering his professional skill decried, and his feelings wounded, refused to receive the money, ... alleging that [Palmer] had wounded his self-[esteem], and that he would have satisfaction.” Later in the day, Mezzara had second thoughts and sent for the money from Palmer, who by this time had changed his mind and refused to pay it.

Mezzara sued Palmer for the fee in the Mayor’s Court and lost, with costs of \$24.00 awarded against him. The deputy sheriff testified that when he came to Mezzara’s studio to levy for the costs, Mezzara “represented that he had no other property to satisfy the execution except the picture . . . which the witness recognised as the likeness of Mr. Palmer.” When the deputy sheriff returned to take it away by carriage for public auction, he “found it disfigured by the appendage of Ass’s ears to the head.” Mezzara was also charged with putting an advertisement in the “Republican Chronicle”:



John Wesley Jarvis (1780–1840)

By Henry Inman, c.1822

Courtesy, Fogg Museum, Harvard University

Curious Sheriff’s Sale. We have been requested to mention, that there will be sold, this forenoon, at public vendue, at No. 133 Water-street, a PICTURE intended for the likeness of a gentleman in this city, who ordered it painted. But as the gentleman disclaimed it, it remained the property of the painter, and is now seized by execution. In order to enhance its value, the painter, who is an eminent artist from Rome, has decorated it with a pair of *long ears*, such as are usually worn by a certain stupid animal.

Palmer found out what was happening just before the well-attended auction began and sent an agent to bid on the picture for as much as \$30.00, but one of Mezzara’s friends got it for \$40.00, from which Mezzara himself cheerfully paid the deputy sheriff the \$24.00.

The final prosecution witness, “John W. Jarvis ... a portrait painter,” testified that when he had seen the portrait in its original state, “it was an imperfect likeness, and rather a botch than the performance of an accomplished artist.” When Jarvis next saw the picture, “it was in the possession of the defendant, who was exposing it, seemingly in a triumphant manner, in Pine-street, with the appendage of Ass’s ears.”

Mezzara called three witnesses, none of whom gave consequential testimony. All were French, “and Edmond C. Genet was sworn as an interpreter.” But Mezzara’s counsel defended strongly on the following grounds, among others:

- the portrait having been rejected by Palmer as no likeness, it could not form the basis for a libel of Palmer;
- Mezzara did not publish the libel if there was one: the deputy sheriff did when he offered the portrait for sale;
- Palmer having abandoned the portrait and refused to pay for it, Mezzara “had a right to make the best use of it he could.”

Following instructions from Mayor Radcliff, who charged them that their verdict depended on Mezzara’s intent and that the verdict in the Mayor’s Court meant only that the portrait “was not such a likeness as Palmer had a right to expect,” the jury stayed out all night, but in the morning returned a guilty verdict. Mezzara was sentenced to a \$100.00 fine.

In this little farce of a trial, there are glimpses of people, principles and publications of no little historical interest.

I. THE JURY *DE MEDIETATE LINGUAE*

In the chapter on trial by jury in his *Commentaries on the Laws of England*, Blackstone discusses the

jury de medietate linguae ... pursuant to the statute 28 Edw. III. c. 18. which enacts, that where either party is an alien born, the jury shall be one half aliens and the other denizens, if required, for the more impartial trial. A privilege indulged to strangers in no other country in the world; but which is as ancient with us as the time of King Ethelred, in whose statute *de monticolis Walliae* (then alien to the crown of England) cap. 3. it is ordained, that “*duodeni legales homines, quorum sex Walli et sex Angli erunt, Anglis et Wallis jus dicunt.*”⁵

The ancient statutory lineage of this right began a year earlier than Blackstone mentions, in the Statute of the Staple of 1353, dealing with disputes involving foreign merchants at fairs. In 1354, in the statute Blackstone cites, the mixed jury was extended to all disputes, including those to which the King was a party, thus embracing criminal cases as well as civil.

In New York, an alien's right to a mixed jury, half aliens and half citizens, was codified by the Legislature and enacted into law in section XXI of An Act for regulating Trials of Issues, and for returning able and sufficient Jurors, passed April 19, 1786:

[in] all Manner of Juries and Inquests hereafter to be taken or made between Aliens and Citizens of any of the United States of America, be they Merchants or others, in any Court, or before any Justice or Justices, and whether this State be Party, or interested, or not, except in Cases of Treason, the one Half of the Jury or Inquest shall be Citizens of this State, and qualified by this Act to serve on such Juries or Inquests, and the other Half of Aliens, if so many Aliens or Foreigners be in the City, County or Place where such Jury or Inquest is to be taken or made....

The practice in New York seems to have differed from what it had been in England, for the foreign veniremen here who could not speak English were set aside, while in England, at least in the seventeenth century, it appears that interpreters were sworn to translate for the foreign jurymen, and that the prisoner would be permitted to address the jury directly in his native tongue.⁷

No such right, of course, exists today, having fallen into disuse here and in England in the 19th century. Despite its ancient lineage and occasional calls for its revival by radicalized academics⁸ and others, it forms no part of the present right to a jury trial protected by the Sixth Amendment.⁹ The most recent comprehensive treatment of the subject¹⁰



DeWitt Clinton, (1769–1828)

The New York Historical Society

explains persuasively that the existence of the mixed jury is attributable to the existence of foreign mercantile enclaves in England whose inhabitants maintained their own laws and customs. Thus, its disappearance may reflect a political consensus that our society has become sufficiently integrated not to warrant such a safeguard.

II. PEOPLE

The main protagonists at the trial—Mezzara and Palmer—seem to have left no recognizable traces behind. Three others who participated in the trial did: Jacob Radcliff, the Mayor; John Wesley Jarvis, the portrait-painting witness; and Edmond C. Genet, the “interpreter.”

a. Jacob Radcliff

His was apparently a story of failed promise. Born in 1764, a graduate of what is now Princeton, Radcliff studied law in Poughkeepsie from 1783-1786 in the office of Egbert Benson, the attorney general, along with another student, James Kent. After service in the state Assembly and as assistant attorney general, in 1798 Radcliff was elevated to the then five-judge Supreme Court by Governor John Jay, joining Kent, who had been appointed earlier the same year, and Benson, appointed in 1794. In 1802

Radcliff and Kent published a two-volume revision of the *Laws of the State of New York*. However, in 1804 Radcliff resigned and resumed practice in New York City, according to Kent “ambitious & restless friendless & tormented by a malignant Jealousy.” Kent, who broke with him in 1813, described Radcliff as ultimately “sunk into Poverty & Contempt & ... at last miserably Destitute ... a sad Example of bad Temper, & perverted ambition, & want of Steadiness in Business....”

But there were some bright moments in Radcliff's long spiral down to death in 1844. In 1804 he was one of the founders of the company which leased and ultimately developed the land which today is Jersey City. In 1809-1810 and 1815-1818, the shifting tides of state politics led to Radcliff's

displacement of and his replacement by DeWitt Clinton as Mayor of the City of New York. In 1821 Radcliff served as a delegate to the New York Constitutional Convention, the debates at which reflect that he played a not-inconsiderable reformist role.¹¹

b. John Wesley Jarvis

Jarvis was a successful portrait painter of the second rank at a time when Gilbert Stuart held the first. Born in England in 1780, he came to America as a child and emerged in New York City as an engraver in 1802. Within five years he had moved to the painting of portraits and in 1815 succeeded in obtaining his single greatest commission—full-length portraits of naval heroes of the War of 1812 for display in City Hall. This occupied him into 1817, when he testified at Mezzara's trial, along with a portrait of the once and future mayor, DeWitt Clinton, followed the next year by a portrait of Ambrose Spencer, then a Justice of the New York Supreme Court and uncle by marriage of DeWitt Clinton, and the year after that by one of Major General Andrew Jackson. In the 1820s his competition seemed to gain an upper hand, and Jarvis's marriage fell apart, but his occasional trips south gained him commissions, including a striking portrait of Chief Justice John Marshall. He died in 1840.¹²

c. Edmond C. Genet

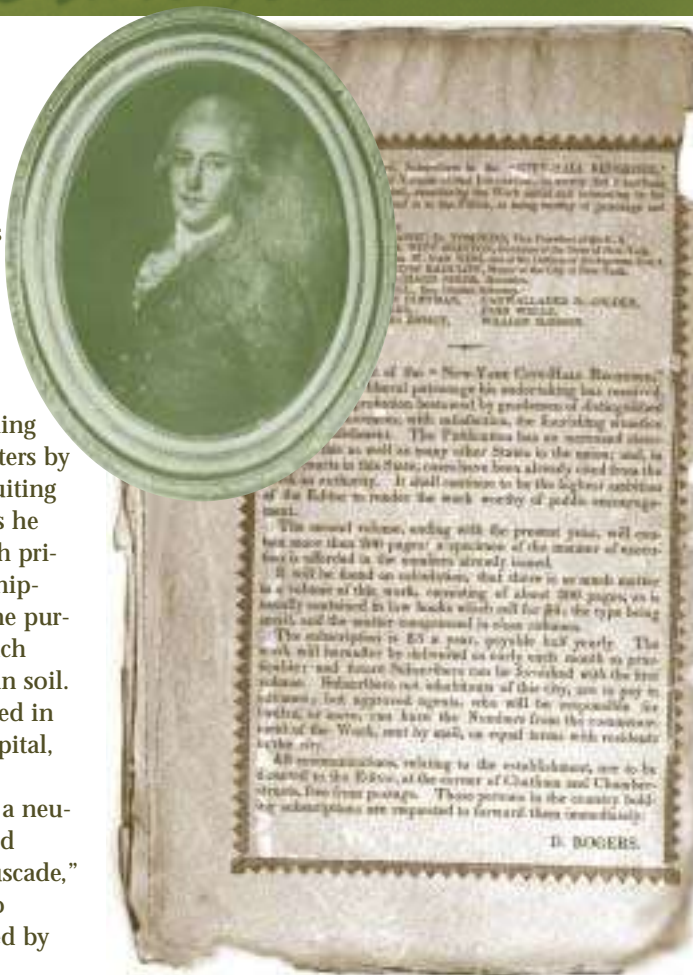
Genet (right) burst into the United States in the spring of 1793 as the ambassador of the Girondist revolutionary government of France. Landing at Charleston, he made a triumphant march northwards, turning out enthusiastic supporters by the thousands and recruiting Americans to man ships he commissioned as French privateers against British shipping, for whose prizes he purported to establish French prize courts on American soil. Even before Genet arrived in May at the American capital, Philadelphia, President Washington had issued a neutrality proclamation, and Genet's frigate, "L'Embuscade," had sent two prizes into Philadelphia, one owned by Americans. This highly inflamed situation continued for the balance of the year, during which Genet brazenly sought to raise support within the United States over the President's objection and traded insults in the press with arch-Federalists Chief Justice Jay and Senator Rufus King. The President demanded that France recall Genet, in Paris the Girondists gave way to Robespierre and the Terror, and the French government sent Fauchet, a new ambassador, to Philadelphia with orders to recall and arrest Genet. Genet came to believe that the warship that brought Fauchet carried a guillotine on board for use on him.

He did not go back. In November 1794, he consummated in marriage the romance he had begun as ambassador with Cornelia, daughter of Governor Clinton and first cousin of future Mayor DeWitt Clinton. After her death in 1810, he remarried—the daughter of the Postmaster General this time—and lived on as a gentleman farmer until his death in 1834.¹³

III. THE NEW-YORK CITY-HALL RECORDER

In the period before the Civil War, the City Hall in New York was the site not only of the executive government of the City but also of its courts. Apart from the Court of General Sessions and the Mayor's Court, in which the Mayor presided, the pages of the *Recorder* report proceedings there in these additional courts during the six-years of its publication:

- Marine Court (with Henry Wheaton presiding)
- Supreme Court (a single Justice on circuit)
- Chancery Court (Chancellor James Kent presiding)
- Court of Oyer and Terminer and General Gaol Delivery
- United States Circuit Court
- Supreme Court (en banc)



Publication of these monthly reports in pamphlet form began in January 1816; the publisher was Daniel Rogers, a lawyer, and his stated purpose was the reporting of criminal proceedings, which comprised the bulk but by no means the totality of the contents of the Recorder. The price to subscribe was \$3 per year. An annual index of cases was also published.

The printer for the 1816 year was Charles N. Baldwin, who used its covers to advertise non-legal publications he printed, and whose prosecution for criminal libel as proprietor of the "Republican Chronicle and City Advertiser" is reported in the November 1818 issue. From 1817 onwards, each issue carried a certification that the Recorder was "useful and interesting" and "worthy of patronage and support" signed by several luminaries including Daniel D. Tompkins

(Vice President of the United States and member of the New York bar), DeWitt Clinton (by then, Governor of the State of New York), Jacob Radcliff (at that time, Mayor of the City of New York) and other public officials including the Recorder, a Justice of the Supreme Court and the District Attorney. However, like so many other efforts of this kind, the Recorder proved ephemeral: the last evidence of its existence is the two-hundred page case index for 1821, in which digests of topical out-of-state cases are also inserted, along with a plea by Daniel Rogers to his subscribers, dated May 29, 1822, "that immediate payment of all arrears is indispensable." Although at least a portion of the Recorder was commercially reprinted in 1842, it remains inaccessible to historians.¹⁴ ■

Endnotes:

1. Vol. II, No. 8, at 113 (August 1817).
2. L.B. Proctor, *The Bench and Bar of New-York* (New York: Drossy, 1870), 11.
3. Patricia C. Cohen, *The Murder of Helen Jewett* (New York: Random House 1999), 333-34.
4. *The United States Attorneys for the Southern District of New York: The First Hundred Years* (New York: Federal Bar Council, 1987), 28-29.
5. William Blackstone, *Commentaries on the Laws of England*, III, 360 (1768).
6. 1 Laws of the State of New York 303, 311 (1789).
7. E.g., *The Trial of George Borosky et al.*, 3 State Trials 1 (1719).
8. L.H. LaRue, *A Jury of One's Peers*, 33 Washington & Lee L.Rev. 841 (1976) (discussing the American cases).
9. *United States v. Wood*, 299 U.S. 123, 145 (1936) (Hughes, Ch.J.).
10. Marianne Constable, *The Law of the Other* (Chicago 1991).
11. The substance of these paragraphs is taken from the note on Radcliff in the *Dictionary of American Biography* by Professor Don K. Roper, the leading scholar on the early history of the Supreme Court. Radcliff has fallen otherwise from grace into anonymity.
12. Harold E. Dickson, *John Wesley Jarvis American Painter 1780-1840* (New York 1949).
13. Meade Minnegerode, *Jefferson Friend of France 1793—The Career of Edmond Charles Genet* (New York 1928). William R. Casto, *French Cruisers, British Prizes and American Sailors* in (K.R. Bowling and D.R. Kennon, eds.), *Neither Separate nor Equal: Congress in the 1790s* (Ohio 2000). John D. Gordan, III, *United States v. Joseph Ravara* in M. Marcus (ed.), *The Judiciary Act of 1789* (OUP 1992).
14. E.g., Constable, *supra* note 10, at 183 n.2. A copy is available at the New York Law Institute.

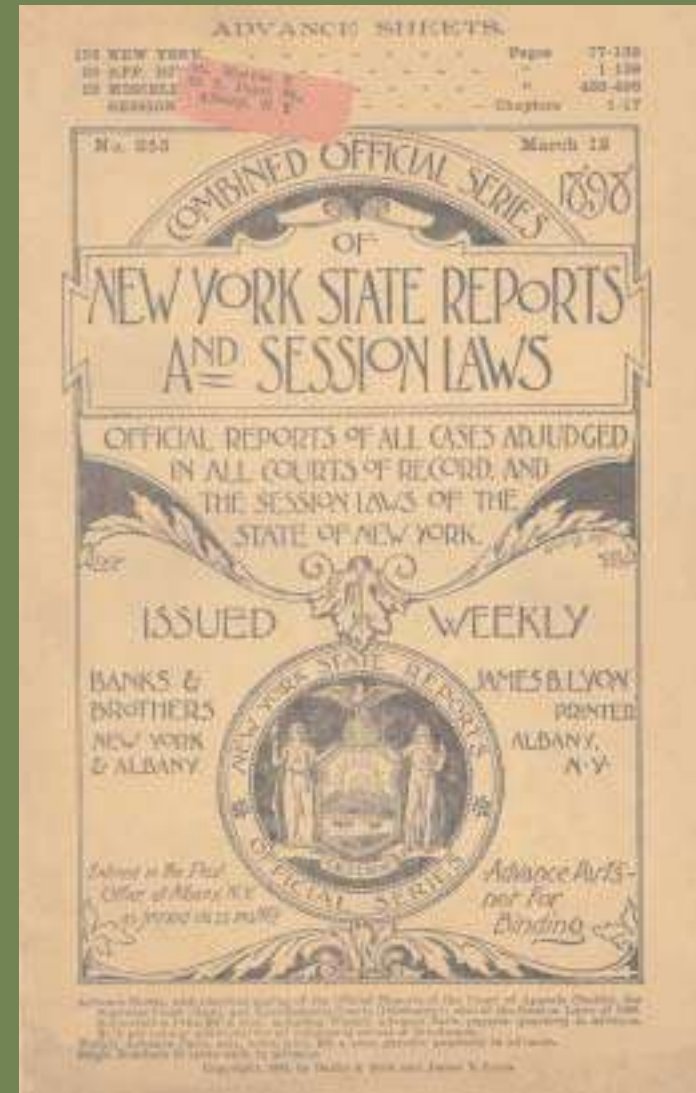
TWO CENTURIES OF LAW REPORTING

by Gary D. Spivey

On April 7, 1804, the New York State Legislature enacted a law¹ that provided for the designation of an official reporter to publish the decisions of the Supreme Court of Judicature and the Court for the Trial of Impeachments and the Correction of Errors (precursors to today's Court of Appeals). George Caines, a New York City author and attorney, was appointed to that position, and official law reporting commenced in New York. This year, as official law reporting in New York marks its 200th anniversary, the Law Reporting Bureau, under the twenty-fifth State Reporter, continues the tradition of officially publishing the decisions of the New York courts.

THE BEGINNINGS (1804-1845)

"It is unimaginable that there ever could have been law without law reporting, so vital is the recorded word to the very existence, progress and stability of our system of justice," writes Chief Judge Judith S. Kaye in a foreword to a newly-published booklet on the history of law reporting in New York.² Yet, during the colonial era and the early years of American independence, the common law was largely unwritten. Trial proceedings were rarely transcribed, and judges did not hand down written decisions as a matter of course. James Kent, who was appointed to New York's Supreme Court of Judicature in 1798 and was named Chief Justice in 1804, the same year that official law reporting was instituted, lamented the lack of law reporting in these words: "When I came to the Bench



The future consolidation of law reporting was foreshadowed by the publication of advance sheets combining the reports of the three separate reporters' offices. This early example bears the original address label for delivery to Supreme Court Reporter Marcus T. Hunn.

there were no reports or State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it was."³ As Chief Justice, and later as Chancellor of the Court of Chancery, Kent encouraged his colleagues to transcribe their decisions and sought to foster reliance on these written decisions. "The reports of judicial decisions," he wrote, "contain the most certain evidence, and the most

authoritative and precise application of the rules of common law."⁴

The Kent-Johnson Collaboration

The historical record does not reveal Kent's role, if any, in the passage of the 1804 statute that initiated official reporting, but his contribution to the origins of official law reporting in New York is undeniable.⁵ Kent influenced the appointment of his friend, William Johnson, to

succeed Caines as official reporter in 1806. Johnson's Reports were noted for their thoroughness and accuracy, and he is credited with setting the high standard of the official reports. Following Kent's appointment as Chancellor in 1814, Johnson was also named the first official reporter of the decisions of the Court of Chancery.

The personal and professional collaboration of Kent and Johnson established the foundation of official law reporting in New York and made the New York Official Reports a model for the nation. In admiration of their work, United States Supreme Court Justice Joseph Story was moved to remark: "No lawyer can ever express a better wish for his country's jurisprudence than that it may possess such a Chancellor and such a reporter."⁶

Kent wrote on the occasion of Johnson's retirement that "you retire with my gratitude, love, and admiration. If my name is to live in judicial annals, it will be in association with yours."⁷ In addition, he later dedicated his Commentaries to Johnson. In turn, Johnson would dedicate his Chancery Reports to Kent.

While these expressions of mutual admiration sound excessive to modern ears, the relationship between judges and reporters in the early nineteenth century was symbiotic, as later expressed in the observation that "[a]n official reporter is as essential to the usefulness and reputation of a judge as a poet is to a hero,"⁸ and in the unspoken corollary that a hero is essential to the work of the Homeric poet. The contents of the early reports were determined by

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James Kent



William Johnson
Supreme Court Reporter: 1806 – 1823



James M. Flavin
State Reporter: 1953 – 1976

the individual reporter. Reporters frequently attended court proceedings to gather information for their reports. They selected the cases they would publish, stated the facts, summarized the views of counsel, and provided the written opinion submitted by the court or summarized the views of those judges who gave oral opinions. The reporters also supplied annotations, including what today would be called headnotes, often printed in the margins, identifying the main issues discussed in the case.

Kent's Criticism of Caines

Whether Kent's admiration for Johnson colored his disdain for Johnson's predecessor, George Caines, is unknown. What is known is that Kent lobbied to have Johnson replace Caines, was highly critical of Caines as a reporter and as a person, and expressed his disgust over Caines' efforts to regain the reportership upon Johnson's retirement.⁹ The politics of the day may at least partially explain Kent's attitude toward Caines. Both Kent and Johnson were Federalists, while Caines appears to have been a Jeffersonian. Caines dedicated his *Lex Mercatoria Americana*, a commercial law treatise, to Jefferson and wrote admiringly to Jefferson requesting permission for the dedication (to which Jefferson replied in kind).¹⁰ Also, on the eve of his appointment as reporter, Caines argued for the prosecution in a New York Supreme Court of Judicature case in which a printer was accused of libeling Jefferson. Federalist icon Alexander Hamilton argued for the defense, and Kent wrote an opinion favoring the defense.¹¹ Furthermore, one of Kent's sharpest criticisms of Caines was for giving short shrift to the argument by Hamilton in *Vandervoort v Smith* (2 Caines 155 [1804]).

As the nineteenth century unfolded, the official reporting of decisions spread gradually to New York's other courts. Official reports of the New York City Superior Court commenced in 1828 and those of the Vice-Chancellors' courts 1831.

Official reports of this era are called "nominative" reports, since they are cited by the name of the reporter who compiled them. For example, the first volume of William Johnson's Chancery Reports is cited as "1 Johns Ch."

Establishing Roots in Albany

In the early days of official law reporting in New York, the reporters appear to have operated out of their private law offices. Caines and Johnson were located in New York City, and the third reporter, Esek Cowen (1823-1828), had an office in Saratoga Springs. But beginning with the fourth reporter, John L. Wendell (1828-1841), most reporters have maintained their offices in Albany. All of their known offices can be found within a quarter-mile radius of the site of old State Hall (now Court of Appeals Hall).

EXPANSION OF LAW REPORTING (1846-1916)

The New York Constitution of 1846 and related legislation initiated drastic reform of the court system and established the groundwork for a unified system of official reporting of cases on a statewide basis. Among other reforms, the Court for the Trial of Impeachments and the Correction of Errors and the Court of Chancery were abolished, the jurisdiction of the Supreme Court was radically altered, and a new court of last resort—the Court of Appeals—was created. The First Series of the New York Reports, covering cases decided by the Court of Appeals, commenced publication in 1847 under a reporter formally denominated the "State Reporter"¹² and appointed by the executive branch.

The Judiciary Article of 1869 continued the reorganization initiated by the 1846 Constitution. Four General Terms of the Supreme Court, the precursors to today's Appellate Division, were authorized. The Article also transferred the authority to appoint the State Reporter from the executive branch to the Court of Appeals and provided for official publication of the decisions of the Supreme Court by a separate Supreme Court Reporter.

In 1874, the most prolific reporter of the nominative reports, Marcus T. Hun, became Supreme Court Reporter. He would hold the position for 32 years, publishing 200 volumes. A resolution published in 108 App Div xlv upon his retirement states: "His long-continued efforts for the improvement of the reporting system of this State constitute a distinguished public service which merits and has received the

The Third Series of the Official Reports was introduced in January 2004, the bicentennial year for official law reporting in New York.

universal approval both of the bench and the bar.”

While the official reports of the New York City Superior Court had been issued since 1828 and those of the New York City Court of Common Pleas since 1850, there was as yet no statewide system for the publication of the decisions of the lower courts. Concern over the multiplicity of unofficial reports led to a broad condemnation of the “evils” of law reporting and to a bar association proposal to place law reporting under control of a council modeled after the English Council of Law Reporting.¹³ These concerns were assuaged, in 1892, by legislation creating the office of Miscellaneous Reporter.¹⁴ This new office was charged with reporting the opinions of all courts of record, other than the Court of Appeals and the General Terms of the Supreme Court, as were deemed to be in the public interest to be published. The Miscellaneous Reports soon commenced publication.

With the creation of the Appellate Division of Supreme Court under the Constitution of 1894, the Appellate Division Reports supplanted the Supreme Court Reports and were published by the Supreme Court Reporter, Marcus T. Hun continuing in that role. The 1894 Constitution also created the Appellate Term of Supreme Court, and from the beginning its opinions were reported in the Miscellaneous Reports.

Presaging the eventual consolidation of law reporting, advance sheets combining the reports of the reporters’ offices were authorized by 1894 legislation.¹⁵

An 1896 rule first imposed the requirement, which continues to this day, that “[a]ll cases cited in the briefs from the courts of the state shall be cited from the reports of the official reporters.”¹⁶

Thus, as the nineteenth century came to a close, the tripartite system of official statewide reporting of the decisions of New York’s courts was in place, and the preeminence of the Official Reports was firmly established.

CONSOLIDATION OF LAW REPORTING (1917-1956)

A 1917 law set up a Board of Reporters chaired by the State Reporter and authorized the Board—subject to

the approval of the Chief Judge of the Court of Appeals—to enter into a single contract for the printing and publication of its three publications and the combined advance sheets.¹⁷

Legislation enacted in 1924 abolished the office of the Miscellaneous Reporter and transferred its functions to the office of the Supreme Court Reporter.¹⁸

A constitutional amendment in 1925 created a State Law Reporting Bureau, under the direction of the State Reporter.¹⁹ The State Reporter was charged with publishing the decisions of all the courts of New York. The constitutional authority was exercised in 1938.²⁰ The offices of State Reporter and Supreme Court Reporter were merged, and the Law Reporting Bureau was established with Louis Rezzemini serving as the first State Reporter under the modern model of official reporting in New York.

Then as now, the Bureau operated under the general supervision of the Court of Appeals and under the direction and control of a State Reporter who is appointed and removable by the Court.²¹ A liaison Judge provided general oversight of the Bureau on behalf of the Court, consulted with the reporter on matters requiring Court approval and presented law reporting issues to the full Court as appropriate.

Official reporting was now centralized in the Law Reporting Bureau under the State Reporter. The Bureau was charged by the 1938 statute with publishing all the decisions of the Court of Appeals (New York Reports) and the Appellate Division (Appellate Division Reports) and any decision of the lower courts determined by the reporter to be worthy of reporting because of its usefulness as precedent or its importance as a matter of public interest (Miscellaneous Reports).

The introduction of a Second Series of the Official Reports in 1956 provided an opportunity to give a uniform appearance and format to what had previously been three separate publications. A Style Manual established a uniform style for all three publications.²² The New York Reports, Appellate Division Reports and Miscellaneous Reports were now components of a consolidated product line, produced by a common staff in

accordance with common editorial standards.

TECHNOLOGICAL INNOVATION (1957 - PRESENT)

The second half of the twentieth century was a period of technological innovation in the editorial production and publishing of the Official Reports.

New Editorial Technologies

During the tenure of the technologically progressive State Reporter James M. Flavin (1953 - 1976), electric typewriters came on the market and into the Law Reporting Bureau. The use of the IBM electronic typewriter, with its revolutionary design and increased typing speed, set the stage for the implementation of computer technology in the editorial process.

Computers became an integral part of the Law Reporting Bureau’s operations in the 1970s with the installation of two terminals remotely connected to the printer’s IBM minicomputer system. In the early 1980s, the office migrated to a Wang multiuser system with an on-site minicomputer. Ten years later, the Wang system was replaced by interconnected personal computers, a file server and networked printers. During the past decade, all Bureau employees have been equipped with computing equipment, and the Bureau utilizes technology in nearly every aspect of its editorial operations. In addition, the Bureau has become part of the Office of Court Administration’s CourtNet wide area network, greatly facilitating the exchange of decisions between Judges’ chambers and the Bureau.

New Law Reporting Technologies

In 1965, a novel approach to legal research—electronic retrieval of decisions from a computer database—piqued the interest of State Reporter Flavin. A contract was entered into between the State Reporter and International Business Machines Corporation “to test a pilot case retrieval system for New York State Court of Appeals cases.” This initiative gained some momentum in the following year with the New York State Senate’s approval of a \$7,500 appropriation to pursue the concept. Under a 1967 contract, an IBM workstation was provided to the Law Reporting Bureau for transmitting the text of New York Reports 2d volumes to the remote IBM Datatext System. While



Two Centuries of Law Reporting *continued*

the pilot case retrieval system did not immediately prove to be practicable, Flavin would continue to pursue the concept of a case retrieval system. As chair of the New York State Bar Association's committee on electronic legal research, he led the development of on-line legal services in the state. His early experiments with computerized case retrieval foreshadowed the next chapter in official reporting—the electronic publication of the Official Reports.

Authorization for electronic publication came in a 1988 statutory amendment providing for publication “in any medium or format” in addition to print, including “microfiche, ultrafiche, on-line computer retrieval data base, and CD-ROM.”²³

This authority was exercised in 1992 with the publication of the Second Series on CD-ROM. An Internet-based update service was developed in 1997 as an adjunct to the CD-ROM and print products to provide subscribers the most recent court decisions not yet available in the advance sheets or on CD-ROM. These developments were followed in 1999 with the on-

line publication of the Second Series on Westlaw (West being the contractor under the Official Reports publishing contract).

With the rapid expansion of the Internet at the dawn of the twenty-first century came an increasing public interest in obtaining current court opinions through this new medium. In response, the Law Reporting Bureau Web site was launched in 2000, providing free public access to a Slip Opinion Service database of recent decisions.

In 2001, the remaining gap in electronic coverage of the Official Reports was closed with publication of the First Series on Westlaw. In addition, coverage provided by the Slip Opinion Service was enhanced to include all otherwise unpublished Appellate Term opinions and all lower court opinions that the reporter deemed of interest but previously had been unable to publish in the printed reports because of space limitations.

A THIRD SERIES FOR A THIRD CENTURY

At the dawn of the third century of official law reporting in New York State, a Third Series of the Official Reports was introduced in January 2004. In the Third Series, the Official Reports were redesigned in all media to take advantage of the attributes of each medium in a manner consistent with valued traditional attributes. Content was expanded to include previously unpublished materials, the format and arrangement of materials were enhanced for greater clarity and improved utility, and the physical appearance of the bound volumes and advance sheets were modernized. Print and electronic materials were integrated, and research references to on-line materials were added.

Like the nominative reports and the First and Second Series that preceded it, the Third Series of the Official Reports will continue to serve the bench, bar and citizenry by providing a faithful rendering of the decisions of the courts of the State of New York. ■

Endnotes

1. L 1804, ch 68.
2. New York State Law Reporting Bureau, *But How Are Their Decisions to be Known?: Celebrating 200 Years of New York State Official Law Reporting* (2004). This article draws extensively from the booklet.
3. Letter from James Kent to Thomas Washington, Esq. (Oct. 6, 1828), reprinted in *An American Law Student of a Hundred Years Ago*, 2 Am L Sch Rev 547, 551 (1911).
4. James Kent, 1 *Commentaries on American Law*, at 473 (2d ed 1832).
5. See generally John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum L Rev 547 (1993); and Judith S. Kaye, *Commentaries on Chancellor Kent*, 74 Chi-Kent L Rev 11 (1998).
6. North Am. Rev (July 1820).
7. Letter from James Kent to William Johnson (Apr. 29, 1823) as quoted in William Kent, *Memoirs and Letters of Chancellor Kent*, at 127 (1898).
8. 2 Chester, *Courts and Lawyers of New York*, at 843 (1925).
9. Donald M. Roper, *The Elite of the New York Bar As Seen from the Bench: James Kent's Necrologies*, 56 New-York Hist Soc'y Q 199, 212-213 (1972).
10. Letter from George Caines to Thomas Jefferson (Mar. 1801) (Image 167) and Letter from Thomas Jefferson to George Caines (Mar. 21, 1801) (Image 338), both in *Thomas Jefferson Papers* at <<http://memory.loc.gov/ammem/mjthtml/mjtjhome.html>>.
11. *People v Croswell*, 3 Johns Cas 337 (1804).
12. Reporters of the Supreme Court of Judicature and the Court for the Trial of Impeachments and Correction of Errors were informally known as “State Reporters” from as early as 1814.
13. Editorial, *How Law Reports Are Made*, [New York City] Commercial Advertiser, June 13, 1873; *The Bar Association Scheme of Reporting*, 8 Alb LJ 389 (1874).
14. L 1892, ch 598.;
15. L 1894, ch 387.
16. General Rules of Practice rule 43, adopted pursuant to Code of Civil Procedure § 17, eff Jan. 1, 1896.
17. L 1917, ch 775.;
18. L 1924, ch 173.
19. 1925 amend to NY Const, art VI, § 22.
20. L 1938, ch 494.
21. Judiciary Law § 430.
22. This article is styled in accordance with the 2002 Edition of the Style Manual.
23. L 1988, ch 137, codified at Judiciary Law § 434 (5) (b).

Honorable Stanley H. Fuld

continued from page 1

Seth. “Judge Fuld just called to find out how we were. He’s looking for you. He needs you immediately to help him on an opinion.” So back I’d go.

It wasn’t that he didn’t love us. He did. It was that he was protecting this goddess, the common law, from a succession of bumpkins who were soiling her pristine garments with their inadequate research and lack of understanding of the law.

Then there was the Fuld oral manual of style. Among my favorites are:

“Remember, Jack, you’re writing for someone who reads and runs; try to write clearly.”

“Don’t waste words. Be succinct, but not cryptic.”

“Your repetitive subject, verb, object is boring. Try to be more inventive.”

“Dashes are best to emphasize a phrase. But colons, semicolons, and parentheses have their place.”

“Write the facts with impeccable accuracy, but slant them so the reader knows how the case must come out without reading the law part.”

“Don’t use the same exotic word twice in the same opinion.”

Ken Feinberg produced a great parody acting the part of Fuld on this or other matters at the Judge’s 65th birthday party thrown by his clerks. He imitated Fuld pontificating: “Do you have to repeat the same word over and over again? You’ve used ‘the’ on the 3rd, 18th and 32nd page. Try to develop a vocabulary, Ken.”

His deadpan humor leavened many of the chamber’s conflicts. At the 65th birthday party when we handed him his well tied up present, he could not unravel the knot. “If you can’t untie, cut,” he announced with droll Alexandrian mock seriousness.

When the Judge asked for a 48 state survey of a legal issue, the City Bar Association’s library next door was opened until midnight with now archaic tools of research:

ALR, the Digests, key numbers, Shepard's and endless shelves of law reports, statutes and law reviews. That was before the computer. I recently asked a law clerk for information on the nail polish industry. Two minutes later she returned with the latest monograph from Taiwan.

Despite the tensions, a bond of respect and affection developed between the jurist, and each of his many awed clerks in that wonderful fellowship of demanding work. We were helping him modernize American Law.

I still keep his old annual summer postcards from Switzerland and the Adirondacks. I know he intervened behind the scenes to help at critical stages of my career. Among my Fuld memorabilia is a set of audiotapes we recorded together to prepare for a presentation to the entire Columbia Law School; they are studded with self-deprecating humor.

Judge Fuld transformed jurisprudence. Choice of law, separation of church and state, elevation of state constitutional protections to defend against future denigration by the Supreme Court, and criminal substance and procedure reform are but a few examples. He burnished every part of the law the Court of Appeals dealt with during the quarter of a century he dominated it.

Encomia from the greats on the Supreme Court and other courts, professors, governors and many lawyers filled the pages of the law journals. Jurisprudence Professor Harry Jones rightly called him one of the handful of the greatest common law judges of all time. Justice William O. Douglas praised him for "making the Bill of Rights a living force in New York."

Fuld was a perfectionist. Only locking up an opinion in a bound volume stopped the polishing.

When I became a judge I tried, unsuccessfully, to measure up to Fuld's standards. As I finished each opinion I had a mental image of Fuld taking out his pen to improve it. I couldn't help thinking, "I know it should be better, Stanley. I did the best I could."

The New York State Reporter adored Fuld, so he would tolerate

almost infinite corrections of galleys and page proofs. When I tried that, a vice-president of West Publishing came in to see me. He was kind enough to point out that I was no Judge Fuld, but he made it clear that the West Reporting System could not afford such tinkering proofs.

My first case with Judge Fuld, *People v. Olah*,¹ presented a simple criminal issue. A defendant had been convicted in New Jersey on an indictment charging a \$200 theft as a felony. The New Jersey statute made the cutoff between a felony and a misdemeanor \$20. New York's dividing line was \$100. The question: was the New Jersey conviction a felony for purposes of New York's dreaded second felony penalty enhancement statute.

If the defendant knew that his fate depended on Fuld, the brilliant ex-prosecutor, the defendant would probably have been terrified.

After all, this Judge had been Thomas Dewey's law man as head of the Appeals Bureau in the Manhattan Special Prosecutor's office, where he had developed the legal theories that led to the destruction of the Schultz and other New York gangs. By the time then-Governor Dewey appointed him to the Court of Appeals in 1946, Fuld had become the nation's preeminent criminal law and prosecutorial theorist.

But the Judge was as protective of criminal defendants' rights as of others'. "It is the [operative words of the] statute upon which the indictment was drawn that necessarily defines and measures the crime,"² Fuld held, ruling for the defendant. "The analysis would have been the same," the Judge explained to me, "had he pleaded guilty to stealing a \$1,000 gold coin."

Fuld brushed aside language in earlier decisions that suggested a result opposite to his analysis as *obiter dicta*.

He had, however, a slightly different viewpoint about his opinions. He told his law clerk, who objected to citing as a holding what I thought was dictum, "If I wrote it, Jack, it's not dictum."

I saw him at work on *Dorsey v. Stuyvesant Town Corp.*³ He attempted to convince a majority of the Court that when an insurance company obtained federal funds to build a large housing

project on condemned land with tax rebates, it was engaged in state action and could not discriminate against minorities in selecting tenants. Fuld lost 4 to 3. But he established a rule that *Brown v. Board of Education*⁴ and many other cases mimicked years later.

The Judge's dissent begins: "Undenied and undeniable is the fundamental proposition that 'distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"⁵ It ends: "The mandate that there be equal protection of the laws, designed as a basic safeguard for all, binds us ... to put an end to this discrimination."⁶

With this case he brought to bear his mastery of the common law. He studied medieval property law at Columbia—earning the coveted Beck real property prize—so he understood how the law could transform villains into free landholders and African Americans from a segregated and discriminated-against minority into truly free and equal citizens.

The law would at last, he truly believed, fully enforce the constitutional rights of us all.

Stanley Fuld's work stands as a beacon. He lights the way for all of us who seek, however inadequately, to emulate his love of the law and his enormous skill; to follow his quest for equal treatment for all who seek protection under the rule of law. ■

Endnotes

* The Honorable Stanley H. Fuld died on July 22, 2003 at the age of 99. He served as a judge of the Court of Appeals for an unprecedented 27 years. First appointed to the Court as an Associate Judge by Governor Thomas E. Dewey in 1946, he was elected that year to a 14-year term and again in 1960. He was elected Chief Judge in 1966 and served in that position until his retirement from the bench in 1973.

1. *People v. Olah*, 300 N.Y. 96, 89 N.E.2d 329 (1949).
2. *Id.* at 98, 89 N.E.2d at 330.
3. *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949).
4. *Brown v. Board of Education*, 347 U.S. 483 (1954).
5. *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. at 536, 87 N.E.2d at 552 (Fuld, J., dissenting) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).
6. *Id.* at 545, 87 N.E.2d at 557.

Peggy Facto—Murderess or Victim?

by Penelope D. Clute



Judge Reuben H. Walworth

very short time....”

It appears that her trial was immediately followed the same day by that of her co-defendant, Francis Labare. The same witnesses testified again about Peggy Facto’s pregnancy, finding the dead child, and jail-house conversation with Peggy Facto. Peggy Facto, who did

not testify in her own trial, was then sworn to testify in that of Francis Labare. According to Judge Walworth’s notes, she swore that

On the night of the delivery she asked [Labare] to go find her mother & he refused. She then asked him to go find Mrs. Chandreau & he refused, and next asked him if he meant to let her die there & he said the damned old bitch, I can do better than she can. She then requested him to help her & he did & then the child was born & he took it out and went off & was gone an hour, and when he returned . . . he came towards her with a knife & threatened her life if she said anything about it.

She added that Labare never had anything to do with her except one night. The notes next state that Francis Labare was sworn, but give nothing of his testimony.

The verdict regarding Francis Labare was Not Guilty.

When he sentenced Peggy Facto to death, Judge Walworth sounded ferocious. The full text of the sentencing was printed in the January 29, 1825 edition of the local newspaper, the *Plattsburgh Republican*. Key passages are reproduced in the sidebar (*right*).

According to the April 23, 1825

In the 186 years between 1639 and 1825, eleven women are known to have been put to death by hanging. Peggy Facto was one of them. In Daniel Hearn’s *Legal Executions in New York State: A Comprehensive Reference 1639-1963*, the entry relating to her execution reads:

Peggy Facto, white. Murder. This young woman disposed of her illegitimate baby but denied criminal intent to the last. Few details survive about this case. She was executed at Plattsburgh on March 18, 1825.

Based on new research by the author using source documents, a more detailed picture is now available. But still the pivotal question remains: was Peggy Facto a murderess, or was she the victim of society’s prejudices?

On September 5, 1824, a new-born infant was found dead in a wooded area of Beekmantown in Clinton County, New York. A string was around its neck and much of its body had been consumed by fire. In October, the Grand Jury indicted Peggy Facto and Francis Labare with murder and with conspiracy and abetting in the first degree.¹

Trial was held before Circuit Court Judge Reuben H. Walworth of Saratoga Springs at the Court of Oyer and

Terminer in Plattsburgh on January 19, 1825. The defendants were tried separately on the same day, with Peggy Facto being first. According to Judge Walworth’s trial notes, the People called a witness who knew Peggy Facto, saw her in August when she was “far gone in her pregnancy,” and after the child was found, saw evidence of the delivery. Another witness told of finding the child about twelve to fourteen rods from Peggy Facto’s house, with a string tied around its neck, wrapped up in a linen cloth, burned, with the side of its head broken in. He, and another man who saw the child where it was discovered, stated they could not tell what sex it was, but that it appeared to be “full grown,” and there was hair on the head where not burned.

Mary Chandreau testified to Peggy Facto’s pregnancy and to a conversation she said she had with the defendant in the jail. She said that Peggy Facto told her that she took a string from her gown to tie the child’s neck. Mrs. Chandreau asked Peggy “why she did not send for her and she said the one that was with her would not go for her.”

The verdict against Peggy Facto was guilty. In his later communication to the Governor, Judge Walworth said that “the testimony on the trial being so irresistible that the jury was out but a

Judge Walworth's words to Peggy Facto

Plattsburgh Republican, "After conviction, a strong feeling prevailed in favor of having a pardon granted; and we were among the number who thought it desirable that the governor should commute her punishment." The article also referred to strong criticism of the judge and jury, and the claim of newly discovered evidence, which the newspaper referred to as "probably some old woman's story." Every death sentence imposed now is automatically reviewed by the Court of Appeals. But the Court of Appeals did not exist until 1847, and it appears that no appellate court reviewed Peggy Facto's conviction and sentence. Instead, the trial judge made an "official report" of the case to Governor DeWitt Clinton. That report was dated January 24, 1825 and is referred to in the Governor's letter denying clemency. The Governor quotes Judge Walworth as reporting to him that:

I became satisfied that the woman was perfectly abandoned and depraved and that she had destroyed this child and probably the one the year previous, not for the purpose of hiding her shame which was open and apparent to everybody that saw her but for the purpose of ridding herself of the trouble of taking care of them and providing for their support.

On February 28, 1825, Governor Clinton wrote to Peter Saily, Esq., of Plattsburgh, acknowledging a February 13 letter from Judge Walworth which enclosed a petition signed by Saily "and a number of respectable citizens soliciting a pardon for the said Peggy Facto either on condition of leaving the United States or otherwise. The petition stated three grounds for the interposition of the Executive—with many doubts as to (1) the guilt of the convict, (2) this being a case that requires a public example, and (3) the policy of executing any person for the crime of murder when the public opinion is much divided on this subject."

In his response to Saily, the Governor quotes Judge Walworth as reiterating in his February 13 letter that he has no doubt as to her guilt and

IT IS WITH EMOTIONS AND FEELINGS the most painful, that I enter upon the discharge of the important duty which devolves upon the court, and which I am now compelled to perform. It is to pronounce the sentence of the law, which is to deprive a fellow mortal of existence, and send her to the bar of her Creator and her God to answer for the conduct of her past life and where her destiny must be fixed for eternity.

If in the discharge of this most painful duty, which can ever devolve on those who are entrusted with the administration of human laws, I should in dwelling upon the enormity of the offenses which you have committed, and the unexampled wickedness of your past life, make use of strong language to show the aggravation of your guilt, and the depravity which you have exhibited; be assured it is not for the purpose of wounding your feelings, neither is it intended to oppress or afflict one on whom the righteous judgment of heaven is so heavily pressing. It is, if possible, to awaken you to a proper sense of your awful situation. It is, if possible, to reform you and prepare you to meet the ignominious death that awaits you. It is, that by contrition and repentance, you may be enabled to shun a punishment more dreadful than any which can be inflicted by human laws on the eternal ruin of your guilty soul.

From the testimony given in your trial, there can be no doubt of your guilt, or of the aggravated circumstances attending the commission of the crime. There is every reason to believe you were immediately and directly concerned in the murder of your helpless infant, whom you were bound by the laws of society, and the ties of nature, to cherish and protect. Yes, there are very strong reasons for the belief that your own wicked hands have perpetrated the horrid deed. And if there was any other guilty participator in the murder, that your own wickedness and depravity instigated and persuaded him to participate in your crime. To the crime of murder, you have added the crime of perjury, and that in the face of Heaven, and even on the very threshold of eternity. I am also constrained to say, it is much to be feared, that you will meet more than one murdered child, as an accusing spirit at the bar of Heaven.

Wretched and deluded woman! In vain

was the foul and unnatural murder committed under the protecting shade of night, in your lone and sequestered dwelling, where no human eye was near to witness your guilt. In vain did you endeavour to consume your murdered infant in the fire. In vain did you secrete the body, and endeavour to obliterate all traces of your wretchedness and shame.

Miserable and infatuated mortal! You forgot the eye of your God was fixed upon you. The eye of that God who suffers not even a sparrow to fall without his notice, and to whom the light of the day and the darkness of the night are one and the same.

Your crime with all its aggravations is now before you, and you are about to receive the sentence which is shortly to deprive you of life. . . . When again in the solitude of the prison, where you will be permitted to remain for a few short weeks, reflect upon all the circumstances of that horrid night when your infant was strangled by the hands of its mother. Reflect upon the situation of your husband whom your depravity has driven from your bed and from your bosom—upon your aged parents whom your crimes will send to their graves in sorrow. Reflect upon the situation of your poor orphan children, on whom you have entailed disgrace and infamy, and who are soon to be left friendless and unprotected, to the mercy of an unfeeling world. And when your feelings become softened by these reflections, let me again entreat you, before the curtain of life falls forever, and before the Judgment seat of your God, that you fly for mercy to the arms of a Saviour, and endeavour to seize upon the salvation of his cross.

Listen now to the awful sentence of the law which I am compelled thus to pronounce upon you. You are to be taken from hence to the prison from which you came, and from thence to the place of execution, and there on the 18th day of March next, between the hours of twelve at noon, and two o'clock in the afternoon, you are to be hanged by your neck until you are dead—and your dead body is to be delivered to the president and members of the Medical Society for dissection. And may that God whose laws you have broken, and before whose throne you must then appear, have mercy on your soul.

“ Miserable and infatuated mortal! You forgot the eye of God was fixed upon you!”

that “her execution would have afforded an example beneficial to the community.” However, he now has:

No hesitation in saying, after the feeling which has been produced, that the execution of this woman would be worse than useless...I do therefore join with the petitioners in recommending a pardon for this unfortunate woman.

Despite this urging, Governor Clinton denied the petition for clemency. He addressed each of the three reasons, disposing of the first two by stating that “The representation of the Judge and the facts of the case clearly establish the guilt of the convict and the frequency of the horrible crime of infanticide evinces the necessity of penal influence.”

He noted that “some enlightened and benevolent men disbelieve in the justice, and many doubt the expediency, of the punishment of death.” He agreed that it should be inflicted only “in flagrant cases.” However, he suggested that those who signed the clemency petition may well be wrong in questioning the efficacy of the example of execution, “[a]s their excellent character elevates them above those feelings which govern the conduct of the depraved and abandoned and they cannot realize in their own sentiments the motives that predominate with that of the community. If terror loses its influence with them then indeed the life of no man will be secure.” He concluded that “[i]f a pardon were granted in this case, it would be a virtual declaration of the impunity of infanticide.”

On March 18, 1825, the death sentence was carried out. As reported in the *Plattsburgh Intelligencer*:

At a few moments past twelve the prisoner was brought from the jail in a state of feebleness which required the assistance of the officers, by whom she was placed in the vehicle prepared for the purpose—when the procession moved on, formed by the Light Infantry company under the command of captain Saily, and the Rifle Company commanded by Lieut Couch—the whole under the command of captain Baily. A crowd preceded and followed the cavalcade on foot and in waggons—the latter class were a great part females of various ages from the decrepitude of the grandmother, down to the

rosy cheek’d maiden in her teens, all eager to witness the rare show, in which the death of a human being was to afford food for their curiosity. Many of these had come from a distance, in spite of the badness of the roads, which could scarcely be worse.

When the prisoner arrived at the gallows which was plated in a field west of the meeting house, she was taken from the waggon and placed upon the scaffold by her attendants—to whose honor it may be said—that not one of them could refrain from tears . . .

[After joining the Monsigneur in prayer] she declared she was innocent of the crime for which she was to suffer—and then she forgave all her enemies. She was then lifted up by one of the officers, who was about to proceed to the performance of his duty, that on her uttering a faint scream excited either by terror or hysterical affection, he allowed her to be seated for a moment, when she become composed, and signified her readiness, upon which she was raised, and the cord adjusted, during which she again declared herself innocent, and prayed for the forgiveness of her enemies, and while in the utterance of these words, the bolt was pulled, and the platform dropped, and with scarcely a convulsive motion, her soul was consigned to the land of spirits.

The crowd was orderly and quiet, and no fighting or disturbance took place among the lower order until late in the day.

Once her body was cut down, the crowd dispersed, many of the people making for local taverns and an afternoon of late-winter talk of the hanging and murder. A group from Grande Isle [Vermont] who walked across a frozen Lake Champlain to witness the execution, had to take boats back because the warm weather broke up the lake’s ice. Meanwhile, the woman’s body was turned over to the local medical society for dissection.

A women who later wrote her recollections commented that “[a] great many

went to see her body, although it had been agreed that it should not be seen. Many young men went. So much talk was made of this that they said that no other body should ever be given to the doctors.”■

Author’s Note

Locating records from this case has been a challenge. The Indictment was found in a cardboard box filled with old indictments in the basement of the Clinton County Government Center, but there were no other records from the trial. The Educator at the Kent-Delord House Museum had a typed reproduction of Governor DeWitt Clinton’s letter denying clemency, but not a copy of the original. Eventually the author found a handwritten draft of the letter with Governor Clinton’s papers held at Columbia University. The clemency petition has not been located. It may be with some petitions from the time period that are in the custody of the Executive Office at the Board of Parole. After extensive searching, the State Archives found Judge Walworth’s trial notes. Many issues of the *Plattsburgh* and *Malone* newspapers are on microfilm at Plattsburgh State University, but none could be found which described the discovery of the body, the arrest and charging of Peggy Facto and Francis Labare, nor any information about them, nor any articles about the clemency petition and controversy over the sentence, except the April article quoted above. For the full text of the Indictment, Judge’s sentencing remarks, Governor Clinton’s letter and newspaper articles, go to—
www.correctionhistory.org/northcountry/html/crimes/peggyfacto3.htm

Endnotes

1. The Indictment charged that Peggy Facto and Francis Labare . . . not having the fear of god before their eyes but being moved and seduced by the instigation of the devil . . . as soon as the said infant was born with force and arms . . . being alive then and there being in the peace of god . . . feloniously, willfully and with malice aforethought did make an assault . . . and did take a certain string . . . of the breadth of one inch and of the length of two feet . . . and . . . so being fixed drawn and tied around the neck of the said child . . . did choak and strangle . . . and did cast throw and push into a certain place then and there situate wherein there was a great quantity of fire and . . . the said infant child by the fire was then and there burned to death and killed roasted and in part consumed . . . and there instantly died.
2. Governor DeWitt Clinton’s letter is at Columbia University Rare Book and Manuscript Library, *DeWitt Clinton Papers, Letterbooks of DeWitt Clinton 1825*, Microfilm Reel 6, Special Collections Library, Call-Number X978 C-61, Stack 14.
3. Judge Walworth’s trial notes are in the New York State Archives, J3011 Transcripts of testimony in Circuit Courts and Courts of Oyer and Terminer, Box 3 - Clinton County - January 1825.
4. The Indictment is in stored records at the Clinton County Government Center.
5. All newspaper articles are in the Periodical Microfilm Collection at Plattsburgh State University Feinberg Library.

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