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CHRONOLOGY OF THE DEVELOPMENT OF THE DAVID DUDLEY FIELD CODE

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Stimulated by inquiries for a comprehensive list of sources which would outline the preliminary steps by which the New York Code of Procedure was evolved, the authors undertook the study which is summarized herein.

Investigation reveals a general lack of knowledge, a widespread uncertainty, and a total lack of any guide to the actions of the New York State Commissioners on Practice and Pleadings (1847-1850), and the New York State Commissioners of the Code (1847-1865). Descriptive help is wanting in the bound volumes. Nowhere is there a chronological statement of the steps in this evolution. Relatively few people seem to have gone to the trouble required in identifying these steps.

In the belief that such a statement will prove useful to any person who desires to make a critical study of this process, we have worked out what we believe to be a correct and orderly enumeration of the actions of these commissions.

Despite this care there may be inaccuracies or omissions in the list which we here present. We shall appreciate any suggestions which any reader cares to make.

I. NEW YORK STATE COMMISSIONERS ON PRACTICE AND PLEADINGS 1847-1850

The 1846 New York State Constitution directed that the whole body of the law of the State of New York be reduced to a written and systematic code and that there be a revision of the rules, practice and pleadings, forms and proceedings of the courts of record of the state.

Article VI, Section 24, of the 1846 Constitution provided:

“The Legislature at its first session after the adoption of this Constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record of this State, and to report thereon to the Legislature, subject to their adoption and modification from time to time.”

Chapter 59 of the 1847 Laws of New York (adopted April 8, 1847) was passed pursuant to the direction contained in the 1846 Constitution. This law appointed Arphaxed Loomis, Nicholas Hill, Jr., and David Graham as

commissioners, styled "commissioners on practice and pleadings." Their duties were to provide: for the abolition of the forms of actions and pleadings in cases at common law which were in use at that time; for a uniform course of proceeding in all cases whether legal or equitable; for the abandonment of all Latin and other foreign tongues, so far as deemed practicable, and of any form and proceeding not necessary to ascertain or preserve the rights of the parties. The term of office of these commissioners was to be until February 1, 1849. A provision was included for the filling of any vacancy should a commissioner die, be removed from office, resign, or refuse to serve.

On September 20, 1847, Nicholas Hill, Jr., tendered his resignation to the legislature as a commissioner on pleading and practice. His formal resignation¹ revealed that his resignation was based upon the fact that his associates desired to abolish the whole of the then present practice and rules of proceedings in courts of record, and to constitute a system entirely new. Mr. Hill stated that he could not co-operate with them consistently with his sense of duty "in recommending a change so purely experimental, so sudden and general, and at the same time so perilous as [he believed] it to be." He went on to say that he felt that the true mode of accomplishing the objects for which the Commission was designed, as he interpreted the language and intent of Article VI, Section 24, of the 1846 New York State Constitution, was not to destroy the then present system of practice and pleadings but to subject it to a free and thorough, though discriminating, process of revision and amendment and to retain such parts of it as experience had proved to be really useful, rejecting or reforming the rest.

On September 29, 1847, David Dudley Field, of New York City, was appointed by joint resolution of the legislature a commissioner on practice and pleadings in place of Nicholas Hill, Jr., resigned.²

Professor Oliver L. McCaskill, now of the College of Law of the University of Illinois, has made the following interesting suggestions to the writers:

"The problem as to why Nicholas Hill, Jr. resigned may lead some readers to the question, did David Dudley Field have a different concept of the problem from Hill, and did the new commissioners go ahead and do what Hill said Loomis and Graham wanted to do? The answer to this question necessarily involves interpretation, and interpretation over which there has been controversy. You may want to keep clear of con-

¹The formal resignation is contained in 1847 N. Y. ASSEMBLY JOURNAL at p. 1482, and in 1847 N. Y. SENATE JOURNAL at p. 679.

²The joint resolution effecting the appointment is found in volume 2 of the 1847 LAWS OF NEW YORK at p. 744.

troversial interpretation, or you may want to note the fact that there is difference of opinion as to whether the code of 1848 was a revolution in practice and pleadings, or whether it was practically what Hill said he wanted.

"Sec. 62 of the first report, abolishing the distinctions between the actions, and between actions and suits, and establishing one form of civil action, looks revolutionary, but put section 143 right beside it, and give effect to both, and you have only a slight modification in your common law rules as to remedies which may be joined in one suit, with no provision for union of what were formerly legal and equitable remedies. Supposedly, one of the great defects of the many actions and suits system was the inability to join claims of diverse natures between the same parties. At common law any number of claims falling under one form of action could be joined. Enlarge the scope of the form of action and you enlarged the number of claims which could be joined. Case and assumpsit are beautiful examples of the breadth of single forms of action. Supposedly, a single form of action should reach out and take in every known form of remedy, and not only provide a single uniform procedure for all, but permit all to be joined in one suit. Section 143 effectually prevented this, and set up partitions within the single form of action not unlike the partitions which existed before. Not by any stretch of the imagination can sec. 143 include any equitable remedy. Secs. 97-99 apply the equity rules on joinder of parties, supposedly to all types of claims, but they can have no application to cases where there is but one plaintiff and one defendant. They probably provide adequately for all joinders in equity cases, and do not subject the commissioners to the criticism aimed at them by Comstock, J., in *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592, but they do not bridge the gap between legal and equitable remedies. There was no attempt to do this. The complete report was made December 31, 1849. The counterclaim section of the complete report contained a clause: 'The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable or both. They must each be separately stated'. By amendment of the code in 1852, this counterclaim section of the final report was adopted, and immediately after it came an amendment of section 143, expressly providing for a joinder of legal and equitable remedies in one suit, under the limitations there prescribed. (See *Laws of N. Y. 1852*, p. 655, of which I think you should make specific mention. This was an important step in code procedure. It also caused a lot of confusion and debate). Ejectment, replevin, and other 'special proceedings', kept some remedies out of the one form of civil action almost from the beginning, and the number of these grew in later years.

"The one form of civil action, with or without the attending concept of abolishing distinctions between actions and suits, and between the forms of actions at law, was a co-ordinating ideal, easy to grasp and accept as an ideal. It was a welcome contrast to a rigid adherence to

traditionalism. But, to be effective, it was necessary to be geared as a control over machinery with many diversified functions. It could not remain an elusive ideal with as many hidden meanings and conflicting authorities as a modern New Deal administrative board, and accomplish anything more than such hoards. In these early days of code procedure men were playing with great ideals. Some wished to feel their way carefully. Others wished to cast tradition to the winds. Compromises were inevitable, and it is always difficult to chart the course of a compromise. The first report of the Commissioners, though it laid down the framework of the new reform, was never intended to be a completed work. It was a beginning, which was to be polished by a later full report, the result of more study and perspective. But by the time the full report was ready, an immunity had already been built up against the curative effects of this new deal idealism, and most of the full report was 'placed on file'. With only a sketchy framework with which to proceed, the ability of judges and lawyers to guide themselves by one fixed star was to be given a trial. They had always wanted signs in the shape of precedents and forms. They had been materialistic, accustomed to be led by the hand. Were they capable of surviving in a spiritual world, guided only by a balanced rationalism pointing to a star none too bright? This was the challenge. It is for history to record whether the challenge has been met."

The New York Assembly passed a resolution September 18, 1847, directing that the Commissioners on Practice and Pleadings report "the progress, if any, made in the discharge of their duty, and at what time they will probably be able to report the result of their doings for the consideration of the Legislature."

On September 25, 1847, the Commissioners on Practice and Pleadings submitted a progress report to the Assembly in answer to the resolution of the Assembly. This report is Assembly Document No. 202, dated September 25, 1847, and has 17 pages.

The commissioners reorganized upon the appointment of David Dudley Field to their membership and went to work in earnest. On February 29, 1848, the commissioners reported to the New York Legislature its first instalment of the Code of Procedure. This report was printed at Albany, New York, in 1848, by Charles Van Benthuysen, Public Printer, and is known as the *First Report of the Commissioners on Practice and Pleadings—Code of Procedure*. It contains 275 pages plus a page of errata and amendments, plus amendments dated March 31, 1848, and 31 single pages, plus a Supplement to the Code of Procedure known as Temporary Act in 20 pages, relating to the determination of existing suits.

The New York legislature on April 12, 1848, enacted, with very little

change, the Code of Procedure. This is Chapter 379 of the 1848 Laws of New York, passed at the 71st session of the legislature. It went into effect July 1, 1848, and constituted the practice act of the State of New York for nearly thirty years. This is known as the "Field Code." Amendments to the Code of Procedure were passed at the next session of the legislature on April 11, 1849, and are contained in Chapter 439 of the 1849 Laws of New York, 72nd session of the legislature. It was, however, but an instalment of the whole work which was contemplated, and the remainder of the work of the Commissioners of Practice and Pleadings was reported from time to time in additional reports as follows:

Second Report (dated January 29, 1848) of the Commissioners on Practice and Pleadings—Code of Procedure. Printed in Albany, New York in 1849, by Weed, Parsons & Co., Public Printers. Pp. 48.

The New York Senate by resolution of January 11, 1849, requested the commissioners to inform the Senate how soon and to what extent they would be able to make a report of their proceedings to the legislature and whether more time would be required to complete their work. The commissioners made a progress report, dated January 13, 1849, which was printed as 1849 New York Senate Document No. 6.

Third Report (dated January 30, 1849) of the Commissioners on Practice and Pleadings—Code of Procedure. Printed in Albany, New York, 1849, by Weed, Parsons & Co., Public Printers. Pp. 144.

Fourth Report (dated January 30, 1849) Code of Criminal Procedure. Pp. lxxi, 263.

On December 31, 1849, the Commissioners on Practice and Pleadings submitted to the New York legislature their complete and final reports of a Code of Civil Procedure and of a Code of Criminal Procedure, together with two special accounts in connection with them. These are found in the 1850 New York Assembly documents as follows:—

Code of Civil Procedure (dated December 31, 1849) Final Report. Published in Albany, 1850, by Weed, Parsons & Co., Public Printers. Pp. xcvi, 791. 1850 New York Assembly Document No. 16.

Dissent of David Graham, one of the Commissioners on Practice and Pleadings, from certain portions of the Code of Civil Procedure as was reported complete by the Commissioners, December 31, 1849. Published in Albany, 1850, by Weed, Parsons & Co., Public Printers. Pp. 24. 1850 New York Assembly Document No. 17.

Code of Criminal Procedure (dated December 31, 1849) Final Report. Published in Albany, 1850, by Weed, Parsons & Co., Public Printers. Pp. liii, 486. 1850 New York Assembly Document No. 18.

Drafts of two special acts, which were reported in connection with the Codes of Civil and Criminal Procedure by the Commissioners on Practice and Pleadings, are found in 1850 Assembly Document No. 19, dated January 2, 1850. These were:

1. An act to create a city judge in the city of New York.
2. An act to repeal certain portions of the revised and other statutes.

The only part of the work of the Commissioners on Practice and Pleadings which was accepted by the New York legislature was the Code of Procedure, known as the "Field Code," which was adopted by the legislature in Chapter 379 of the 1848 New York Laws, and amended in Chapter 139 of 1849 New York Laws. As mentioned above, this code of procedure constituted the New York practice act for nearly three decades.

II. NEW YORK STATE COMMISSIONERS OF THE CODE 1847-1865

The 1846 New York State Constitution, which had established the New York Commissioners of Practice and Pleadings, also made a provision for the establishing of the New York Commissioners of the Code. Article I, Section 17, of the 1846 Constitution provided:

"Such parts of the common law, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the Convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy seven, which have not since expired, or been repealed or altered; and such acts of the Legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated; and the Legislature, at its first session after the adoption of this Constitution, shall appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient. And the said commissioners shall specify such alterations and amendments therein as they shall deem proper, and they shall at all times make reports of their proceedings to the Legislature, when called upon to do so; and the Legislature shall pass laws regulating the tenure of office, the filling of vacancies therein, and the compensation of the said commissioners; and shall also provide for the publication of the said code, prior to its being presented to the Legislature for adoption."

Chapter 59 of the 1847 Laws of New York (adopted April 8, 1847) was passed pursuant to the direction contained in the 1846 New York State Constitution. Section 1 of Chapter 59 appointed Reuben H. Walworth, Alvah Worden, and John A. Collier as commissioners, styled "commissioners of the code." Their duties were set forth in Article I, Section 17 of the Constitution, as set forth above. The term of office for these commissioners was two years from the passage of this act. By Chapter 289 of the Laws of 1847, Anthony L. Robertson was appointed as commissioner of the code in place of Reuben H. Walworth, who declined to serve. Seth C. Hawley was appointed a commissioner in place of John A. Collier resigned.³

The term of office of the first commissioners of the code having expired, the 1849 Laws of New York, Chapter 312, appointed John C. Spencer, Alvah Worden, and Seth C. Hawley as commissioners of the code to perform the duties specified in the seventeenth section of Article I of the 1846 New York State Constitution. Their term of office was two years from the passage of this act, which was April 8, 1849.

In 1850, the sections of the Laws of 1849 which had continued the commissioners of the code were repealed.⁴

In 1855, an attempt was made in the New York Senate to recreate the office of the commissioners of the code to enable them to complete their work. A vote was taken on April 11, 1855, and the bill did not pass.

In 1857, David Dudley Field, William Curtiss Noyes, and Alexander W. Bradford, were appointed commissioners to prepare a civil code, as was required under the seventeenth section of Article I of the 1846 Constitution.⁵ This law required these commissioners to reduce into a written and systematic code the whole body of the law of the State of New York, or so much and such parts of it as should seem practicable and expedient, excepting such portions of the law as had already been reported upon by the commissioners of practice and pleadings, or were embraced within the scope of their reports. The commissioners were required to divide their work into three portions: one containing the political code, another the civil code, and a third the penal code. The political code was to embrace the laws respecting the government of the state, its civil polity, the functions of its public officers, and the political rights and duties of its citizens; the civil code must embrace the laws of personal rights and relations of property, and of obligations; the penal code must define all the crimes for which persons can be punished and the punish-

³The concurrent resolution of the 1848 legislature which effected the Hawley appointment is found at pp. 579-580 of the 1848 LAWS OF NEW YORK.

⁴1850 LAWS OF NEW YORK, c. 281. April 10, 1850.

⁵1857 LAWS OF NEW YORK, c. 266, p. 62.

ment for the same. No portion of either of the codes should embrace the courts of justice, the functions or duties of judicial officers, or any provisions concerning actions or special proceedings, civil or criminal, or the law of evidence. The term of office for these commissioners was five years, and they were to receive no compensation. The commissioners were required to report to the legislature at the next annual session a general analysis of the codes projected by them, and the progress made by them therein, and at each succeeding annual session the progress made to that time.

In 1862, the term of office of the commissioners of the code was extended to April 1, 1865.⁶

The General Analysis, their first report, was reported to the New York Legislature in 1858, but was never printed due to the fact that the New York Senate failed to concur on a resolution passed by the Assembly.

The following reports were published:

March 10, 1859	Political code, 1st draft. Albany, Weed, Parsons. Pp. xlviij, 389.
April 10, 1860	Political code, reported complete. Albany, Weed, Parsons, 1860. Pp. xlvij, 607.
March 30, 1861	Book of forms. Albany, Weed, Parsons, 1865, 1867. Pp. 272.
———— 1861	Draft of civil code which relates to the estates of deceased persons. Albany, Weed, Parsons. Pp. xviii, 166.
April 5, 1862	Civil Code, 1st draft. Albany, Weed, Parsons, 1862. Pp. x, 412, ci.
April 2, 1864	Penal Code, 1st draft. Albany, Weed, Parsons, 1864. Pp. lv, 285.
February 13, 1865	Penal Code, reported complete. Albany, Weed, Parsons, 1865. Pp. lxiv, 406, clxvii.
February 13, 1865	Civil Code, reported complete. Albany, Weed, Parsons. Pp. cxii, 776.

⁶1862 LAWS OF NEW YORK, c. 460, p. 859.