

CHAPTER VII

LEGAL EQUIPMENT OF THE BENCH

Few of the justices of the inferior courts of colonial New York were widely read or had ever studied law seriously. Hailing from the districts within their jurisdiction, their knowledge of legal principles and court procedure had in general been gained through experience rather than from formal courses of study. And, yet, since intricate causes rarely came before them, they were well-qualified for their work. If a serious case did arise, it was referred to the Court of Oyer and Terminer and General Gaol Delivery, or to the Court for the Trial of Causes Brought to Issue in the Supreme Court—two circuit courts over which the Chief Justice of the Province presided.¹ Therefore, since the educational background of a majority of such justices was slight, if not negligible, a study of the contribution made by such officers to the colony's jurisprudence offers little that is important. The judges of the superior courts, on the other hand, were much more highly trained. Moreover, because they established the judicial atmosphere for the whole province, it is important to know something about them and their work.²

As originally planned in 1665, the General Court of Assizes was to have been presided over by the governor, and since this was as much a legislative body as a judicial tribunal, the chief executive did generally attend its sessions. At his side, however, upon nearly every occasion sat one or two trained lawyers. For years the outstanding character among these was Matthias Nicolls, barrister at law.³ During its existence (1665-1683) this court for the most part was, nevertheless, composed of laymen.

To the bench of the Court of Oyer and Terminer upon its establishment in 1683 Governor Dongan appointed two

barristers at law, Matthias Nicolls and John Palmer.⁴ Faithful in attendance and unassisted, these two lawyers continued to serve until 1689 when the Leisler Rebellion disrupted all regular judicial proceedings.⁵

The Supreme Court of Judicature of the Province of New York was first established in 1691 with Thomas Johnson, barrister at law,⁶ its only trained member.⁷ Following his death the next year, this court—until John Guest arrived in New York—was constituted exclusively of merchants and men of business.⁸ Guest was a graduate of both Cambridge and Oxford as well as a barrister at law. Moreover, he brought to the bench twenty-five years of experience at the London bar. While in the province he helped reorganize its judicial system, and for almost two years following his retirement from the bench, practiced regularly in New York City. His last appearance in the supreme court is recorded for the April Term of 1701.

Thereafter, in quick succession two lawyers of experience and legal education—William Atwood and John Bridges, both barristers and former students at Cambridge University—joined and vacated the supreme court bench.⁹ Atwood, of infamous reputation and conduct, contributed little to the growth of jurisprudence in the colony; rather, it is thought, he lowered judicial standards as well as the practice of law generally. Bridges died before he had an opportunity to institute the reforms so greatly needed in the legal establishment over which he presided. But what John Bridges began, his successor, Roger Mompesson, ably carried forward.¹⁰ This eminent practitioner of London and Southampton, after a rich and varied career, crossed the Atlantic in 1702 to become judge of the court of vice-admiralty and an associate justice of the supreme court. But almost immediately he was appointed chief justice of New York. There-

after for ten years he guided the colony's legal business, and gave to the province the benefit of his extensive experience. Although his two associates at that time, Robert Walters and Thomas Wenham, merchants, were men of ability, the colony was fortunate in having in office for so long a time two trained chief justices.

Following Roger Mompesson's death, the bench of the supreme court for fifteen years was filled by laymen who had read law but no one of whom had received special training or had engaged in legal practice. Then, in 1731, a native New Yorker, James DeLancey, barrister at law, was appointed one of its associate justices. Two years later he became chief justice replacing the able and learned Lewis Morris.¹¹ At first he was assisted by the large landowner, Frederick Philipse, but was joined in 1736 by another trained lawyer, Daniel Horsmanden, barrister at law, who, with one slight interruption, thereafter sat on the bench forty-two years, during twenty-six of which he served as chief justice of the province.¹² Within part of this period (1757-1762) the court was for the first time, it should be noted, constituted entirely of trained lawyers, with James DeLancey (1733-1760) and Benjamin Pratt (1761-1762), chief justices, and Daniel Horsmanden, David Jones, and John Chambers, associate justices, making up its personnel. Each had served his time at an Inn of Court, or in an office, and each had long been a regular practitioner. Moreover, thereafter until the end of the colonial era, every new appointee was a trained member of the bar and came into office only after long practical experience.¹³ Thus, during the last quarter-century of its existence, the Supreme Court of Judicature of the Province of New York through its bench represented quite accurately the status to which the legal profession of the colony had arrived.

The governors—also the lieutenant-governors—who pre-



William Smith, 1697-1769; Yale College 1719. Promoter of a public school system and a public library for New York City; trustee of the College of New Jersey (Princeton); judge of the Supreme Court of Judicature of New York; member for many years of New York's Executive Council; possessor of one of the largest private libraries in colonial New York. Courtesy of the New-York Historical Society, New York City.

sided over the High Court of Chancery of the Province of New York, rarely brought to their positions much judicial experience.¹⁴ However, since they were assisted by loyal councillors, trained assistants, and able counsel and, since most matters coming before them were referred to Masters, a ready knowledge neither of the principles of equity nor of the procedures for their enforcement was vitally necessary. Nevertheless, the records demonstrate that the prestige of this court rose or fell according to the preparation the governors had undergone for this phase of their work. Certainly, several of the chief executives had little or no desire to fill judicial office, and in more than one case a governor delayed taking the oath of Keeper of the Great Seal until positive orders from England had been received telling him that he must hold courts of chancery.¹⁵ The earliest chancellor with a legal background was William Burnet, son of Bishop Gilbert Burnet. He served from 1720 to 1727¹⁶ and, judged by the volume of business transacted and the decrees rendered, the High Court of Chancery of New York under his able administration enjoyed the highest reputation it ever attained. Indeed, not again until the closing years of the English Period did it achieve a place in the life of the colony at all comparable to that reached in 1725 under Governor Burnet. He and Lieutenant-Governors Clarke and DeLancey alone,¹⁷ out of the province's twenty chancellors, were educated lawyers, a situation which probably was seriously considered when in 1774 it was decided to appoint a young, but experienced practitioner, James Jauncey, Jr., Master of the Rolls.¹⁸ Despite the excellent performance of this new officer, war soon eliminated the need for his services.¹⁹

Maritime matters in New York prior to 1691 appear to have been controlled by its governors, and, since they delegated their authority to others—particularly to the

mayors of New York City²⁰—a complete list of the judges of the Court of Vice-Admiralty for New York has never been compiled. John Palmer and Matthias Nicolls, barristers, received commissions in 1684 and 1686,²¹ but during the 1690's²²—except for the one year, 1691-1692, when Thomas Johnson was a member of the court—laymen continued, as earlier, to adjudicate the province's maritime business.²³ However, for the remainder of the colonial period Lewis Morris (1715-1720) and Caleb Heathcote (1720-1721) were the only judges who came to the bench without legal training.²⁴ Thus the Court of Vice-Admiralty for New York had the benefit of expert guidance for a longer period than any one of the other courts in the province.²⁵

Broadly speaking, then, the judges of the more important courts of colonial New York were men of education and experience, a fact which may help to explain why the jurisprudence of New York has always elicited so much favorable comment. In their work, moreover, they had at all times the full support of a numerous and well-trained bar.

²⁰The Mayor's Courts of New York City, of Albany, of the Borough of Schenectady, and of the Borough of Westchester were presided over by the local mayor or local recorder for the time being, and, although important causes were heard in these courts, they enforced the law and procedures which had been determined by the superior courts of the province. Mayors usually lacked legal training, while recorders almost without exception were lawyers of experience; so that whatever decisions these courts made on matters within their jurisdiction constituted the law. The Prerogative Court of the Province performed many of the services now handled by a Surrogate's Court. It was presided over by the Secretary of the Province or by the governor's private secretary. The Court of Errors and Appeals, composed of the governor and his council, constituted the highest court in the province. Its authority was rarely, if ever, invoked after 1700. In general the justices of the county and town courts were landowners and merchants who were locally prominent. See Bibliography herein for books, manuscripts, and papers mentioned in this study.

²⁵For lists of the members of these courts see Appendix X, pp. 206-8.

¹⁹At times Matthias Nicolls presided over the court when the governor or commander-in-chief was absent.

²⁰John Palmer had studied at Cambridge.

²¹Upon nearly every occasion when special Courts of Oyer and Terminer were established, they were conducted by trained lawyers.

²²Thomas Johnson had studied at Oxford.

²³See *N. Y.: Absts. of Wills*, I, 211; 211-12. January, 1692/3.

²⁴At first the people of Pennsylvania refused to accept John Guest as their chief justice. In 1701, however, he returned to hold that office. He died at Philadelphia, in 1707. E. A. Jones, *American Members of the Inns of Court*, biographical note.

²⁵William Atwood had attended Cambridge in 1668-9. He was chief justice for a little over a year, 1701-2. John Bridges, M.A., LL.D., Cambridge University, 1665-6, was chief justice between 1702-4.

²⁶The Mompessons were an old and honored family of England. Before coming to America, Roger Mompesson had served two terms in Parliament and had been Recorder of Southampton. While serving as Chief Justice of both New York and New Jersey, he was, in 1706, appointed Chief Justice of Pennsylvania as well, but appears never to have served. One authority says that he took the oaths and became Chief Justice of Pennsylvania. See R. F. Field, *Provincial Courts of New Jersey*, 60 n.

²⁷James DeLancey was the first and only native son to achieve this distinction prior to the closing of the courts in 1776.

²⁸During the tenure-of-office controversy, 1761-3. See *Indices in Docs. Rel. Col. Hist. N. Y.*, and in *Iconography*.

²⁹Aside from those already mentioned, the justices appointed during this quarter-century were William Smith, Robert R. Livingston, George D. Ludlow, Thomas Jones, and Whitehead Hicks.

³⁰Of course several of the governors of New York were personages of education and culture. Although the majority were without formal legal education, there is evidence that a number were familiar with the principles of equity and the practice followed in the courts of chancery of England.

³¹Every governor from Thomas Dongan to and including Andrew Elliot took the oath of chancellor, although some appear not to have opened court. During the years 1778-1801, Robert R. Livingston held courts of chancery for the new state of New York—intermittently before 1784; thereafter, regularly.

³²William Burnet, M.A. (son of Bishop Burnet), Cambridge University 1702, barrister of Middle Temple, 1711.

³³George Clarke served his time to the law in Ireland and practiced there before coming to New York. James DeLancey attended Eton and Cambridge, and was a barrister of Lincoln's Inn.

³⁴James Jauncey, Jr., graduated from Princeton in 1763, studied law, and had engaged in practice.

³⁵No records are known to exist of the work of John Spragge, barrister, Cambridge University graduate, appointed Master of the Rolls by Governor

Thomas Dongan, December 29, 1684. After the death of James Jauncey, Jr., George Duncan Ludlow was in 1782 appointed Master of the Rolls. It appears that he was never called upon to perform any duties.

²⁰See James Sullivan, *History of New York State, 1523-1927*, V, 1926, 1931. See also Introduction in C. M. Hough, *Reports of Cases in the Vice-Admiralty*. Olaff Stephen Van Cortlandt, who was appointed on October 5, 1678, may be an exception, for he appears to have studied law. Lucas Santen, who served in 1683, was Collector of the Port of New York.

²¹John Palmer may have relinquished his office when he went to England in 1686 on government business.

²²See O'Callaghan, *Cal. Hist. MSS.*, Pt. II, 33:395; 34:21.

²³Within the years 1691-1701 four laymen—Joseph Dudley, William (Tangier) Smith, William Pinhorne, and Wait Winthrop—were commissioned judges in admiralty. The latter, a resident of Connecticut, presented his commission in 1699 and was sworn in office. New York City: *Minutes of the Common Council*, VII, 167.

²⁴See Appendix X, pp. 206-8, for a list of these judges.

²⁵See C. M. Hough, *op. cit.*, XXIII-XXVI, for a description of these men as well as for a discussion of the growth of maritime law in New York. Also see the introductory chapter in Towles, *Records of the Vice-Admiralty Court in Rhode Island*.

CHAPTER VIII

LAWYERS WHO WERE COLLEGE GRADUATES

During the time the British controlled New York over four hundred lawyers practiced in its courts. Although much is still to be learned concerning a number of these practitioners, it is known that many were persons of education and culture. What percentage of them, it may be asked, had received liberal educations? More pertinent still, how many of them were college graduates? An investigation of these interesting questions proves that the legal profession of the colony throughout its whole history included in its ranks a larger number of trained men than has heretofore been supposed. It shows that during the years 1664-1784 one hundred and eleven college graduates practiced at the bar of New York, or that, as law students, they were soon to apply for admission to practice.¹ It demonstrates also that New York parents understood the value of a college education and saw to it that their sons who were destined for the law received the advantages such an experience offered.² Although but three of the lawyers in practice before 1700 are known positively to have been college graduates, over twelve times that number were men of academic training and learning. They had been the recipients of considerable formal schooling, and a score or more of them had passed from three to seven years at one of the Inns of Court or of Chancery. It is safe to say, therefore, that by the time the judicial system was reorganized in 1699, more than forty regular practitioners with broad educations had resided in New York.

After the turn of the eighteenth century the number of trained men in the profession increased from year to year.³ The province was becoming more prosperous and attracted several lawyers with rich legal backgrounds. Not only did

the authorities in England send out attorneys of proved ability, but as time passed, native sons who hoped to practice law turned their steps toward college. Indeed, by the middle of the century the colony had acquired twenty-one counsellors at law with baccalaureate degrees, while at least seven others had spent from one to three years in university or in college.⁴ Thereafter, the number of practitioners holding liberal arts degrees increased to such an extent that by 1767 thirty-seven graduates of six colleges had directed their efforts to mastering the principles of the law and its practice. These, together with the thirteen college-trained lawyers already in the colony, gave the profession an atmosphere of learning and culture.⁵ Success at the bar was requiring a preparation more thorough than had ever before been necessary,⁶ and at the same time was also demanding that a prospective lawyer's time, money, and energy should be conserved.

Although during the first sixty years of the eighteenth century Yale College had been favored above other seats of learning by New Yorkers expecting to practice law, a study of the years 1750-1776 demonstrates that it lost this distinction immediately after the College of New Jersey and King's College had been founded. Such a study further shows that whereas twenty-two New York lawyers had been educated at Yale from the time it first enrolled students to 1767, fourteen of the fifty King's College men who completed their academic studies during the first thirteen years of its existence, and nine of the Princeton graduates of the same period, eventually were granted permission to practice in New York, thus, perhaps, indicating a trend away from attendance upon the college at New Haven. This proved to be true, for, when the years 1768-1777 are considered, it is learned that only one Yale graduate eventually became a New York practi-

tioner,⁷ while within the same period it is found that King's College had prepared sixteen future attorneys and the College of New Jersey seven. Unfortunately, due to the outbreak of hostilities in the War for Independence, several of these graduates were prevented from engaging in practice.⁸

There can be no doubt, then, that one of the most interesting facts to be noted about the New York bar of 1776 is the large percentage of college graduates found within its membership—67 practitioners to whom baccalaureate degrees had been awarded.⁹ Such a number out of a bar of some 175 members constituted an influential group. Thus the enviable reputation in which the practitioners of the province were held may be explained by the fact that one-third of its membership was composed of college graduates. Consequently, as far as formal legal education was concerned, the bar of New York in 1776 probably stood superior to any other colonial bar in British North America.¹⁰ Even more remarkable, however, was the composition of the New York bar during the Revolutionary War and immediately following that event, for, when 1785 came to a close, 71 of the 145 practitioners in the state were college graduates.¹¹ Never before had the bar of New York been comprised so exclusively of men holding A.B. degrees; nor, indeed, has it ever been since.¹²

Thus, a study of the educational background of the leaders in the legal profession of colonial New York shows that preparation for the successful practice of law in that day was considered to be more exacting than that for any other profession.¹³ It also demonstrates that if lawyers were to achieve success in their chosen field, they must have a sound formal education, and be thoroughly familiar with its literature.

¹The names of some ten law students who were serving clerkships in 1784, and who were subsequently admitted to the bar, are included in this number. All were college graduates. For lists of lawyers who at some time between the years 1664-1784 practiced in New York, arranged according to periods and under headings:—College Graduates; Attended College; Liberally Educated; and Barristers-at-Law,—see Appendix II. Seventeen college graduates of the years 1785 and 1786 were also in due time admitted to the New York Bar. See Bibliography herein for books, manuscripts and papers mentioned in this study.

²Fourteen of the twenty-one lawyers of New York within the years 1700-1750 who are known to have been college graduates were native sons.

³The year 1700 is chosen as a dividing line because only two lawyers holding A.B. degrees at that date have been identified as being in the colony, and because within the next ten years four college graduates and six who had attended college arrived in the province to practice law.

⁴The mid-century date, 1750, is chosen because at approximately that date William Smith, Jr., was complaining of the lack of lawyers with college backgrounds. See *History of New York*, II, 383 n. He says the following were the only college graduates in New York around 1750: Peter Van Brugh Livingston, John Livingston, Philip Livingston, William Livingston, William Nicoll, Benjamin Nicoll, Hendrick Hansen, William Peartree Smith, Caleb Smith, Benjamin Wooley, William Smith, Sr., John McEvers, John Van Horne, William Smith, Jr., and James Delancey, Sr. Theodore Sedgwick, Jr., accepting Smith's statement, wrote: "To the discredit of our ancestors it must be remembered that at this time [1741] there were only six persons in the province besides himself [William Livingston] and his brothers, those in orders excepted, who had received a collegiate education." (*op. cit.*, 47-8.)

⁵This period, 1751-67, is chosen because during it (a) the New York City Bar twice adopted regulations affecting admission to practice based upon college education, and (b) in the last year the Supreme Court of the Province for the second time in its history ordered a rule entered on its *Minutes* covering the training of law clerks. By this second rule clerks were not required to have attended college, although for those who held A.B. degrees the period of clerkship necessary to be served was shortened.

⁶A review of the institutions from which the college-trained lawyers, or students of the law, were graduated before 1767 shows the following: (a) Prior to 1700 all lawyers in the province holding A.B. degrees had been graduated from Cambridge University, while with one exception all those who are known to have attended college also studied at Cambridge. Thomas Johnson, barrister at law, had attended Oxford in 1680. John Spragge, A.B. Cambridge 1665-6, had been incorporated at Oxford in 1675. John Guest, A.B. Cambridge 1672-3, had attended Oxford in 1667. (b) Between 1700 and 1750, six of the twenty-one graduates in the colony had been awarded their A.B. degrees at Cambridge, while all the others had completed their work at Yale College. (c) An analysis of the affiliations of the 52 college graduates who were in the province some time between 1751-1767 shows that every one

had completed his undergraduate studies at one of the colleges in the colonies:—22 had been graduated at Yale; 14, at King's; 9, at Princeton; 4, at Pennsylvania, and 3, at Harvard. All but 4 of the 52 were still in active practice as the period closed. These four, all of whom had died, were Benjamin Pratt, John Roosevelt, Jr., Anthony Rutgers, and Benjamin Nicoll. Only three of the graduates of this period traveled to England to attend Inns of Court—Peter DeLancey, Pennsylvania 1762; Philip Livingston, King's 1760; Joseph Reade, Jr., King's 1758.

⁷Richard Sill, Yale 1775, admitted 1783.

⁸During this period, 1768-76, four men admitted to practice had attended college from one to three years.

⁹Only seven of those admitted after 1720 had died by 1776. These were Peter DeLancey, Benjamin Nicoll, William Nicoll, Benjamin Pratt, John Roosevelt, Jr., Anthony Rutgers, and William Smith, Sr.

¹⁰For one view of the New York bar as of 1765, see John Adams' *Diary*, II, 197-8. Within this period but one New York boy, Christopher Robert, traveled to England to study. He joined Inner Temple, August 24, 1771, but never practiced in New York. At some time during these years thirteen barristers at law were in the colony.

¹¹Forty-four of the 71 had engaged in practice prior to 1777, while 27 had been graduated within the years 1777-84. The names of ten who were serving clerkships or who were awaiting admission are included in this list. Six others had attended college, and some 68 had received what would be considered liberal educations. So far as is known, there were only two barristers at law in the new state,—Philip Livingston and Walter Livingston. The former was not readmitted until 1786; the latter lived in New Jersey, but practiced in New York. Five New Yorkers joined Inns of Court within the years 1777-86. For lawyers of this period see Appendix II, pp. 135-155.

¹²Seventeen graduates of the classes of 1785 and 1786 were in time admitted to the bar of New York. During these years, 1777-86, the college graduates were distributed as follows: Princeton 18, Yale 18, King's 3, Rutgers 3, and Harvard 2.

¹³See, for instance, the Bar Agreements of 1756 and 1764 in Appendix IV, pp. 160-4. See also the course of study outlined by William Smith, Jr., in 1756 and his comments upon the necessity for thorough preparation for the practice of law (Appendix VIII, pp. 197-200). That the legal profession attracted college men may be seen from an analysis of the students of King's College. Within the years 1758-76, of the 119 graduates receiving A.B. degrees, 31 went into law, 13 into the ministry, and 14 studied medicine. During the same time of the 78 students pursuing its liberal arts course who failed to graduate, 8 eventually practiced law; 4 became ministers, and 2 became doctors of medicine. Carrying the story a little further, when the War for Independence closed the doors of King's College, there were in its liberal arts college 36 students. Law, divinity and medicine each claimed two of these. Out of the 233 students at King's in 1754-81, 41 became lawyers, 19 became ministers of the gospel, and 18 eventually practiced medicine. (See Appendix I.)

CHAPTER IX

PROGRESS AFTER THE REVOLUTION

The education of prospective lawyers under the new State, as under the Crown, continued to be directed by the practitioners in whose offices clerks served their apprenticeships. The Constitution of 1777 provided that "all attorneys, solicitors and Counsellors at law, hereafter to be appointed, be appointed by the court, and licensed by the first judge of the Court in which they shall respectively plead or practice; and be regulated by the rules and orders of the said courts."¹ An authority such as this would, beyond doubt, include a power to prescribe educational standards. Accordingly, for the guidance of those seeking permission to practice before them, a number of the courts soon ordered rules spread on their *Minutes* which, with few exceptions, required the service of a clerkship followed by an examination. In no case, however, was a particular course of study specified.

The first regulation by the newly reorganized supreme court under the power given to it in the Constitution was made at its April Term, 1778. It was then provided that "no person shall be admitted to practice as an Attorney of this Court unless he shall previously have served as a Clerk to an Attorney of this Court for at least three years and shall on an Examination as to his qualifications be found of Sufficient Ability and Competent learning to practice as an Attorney of this Court and produce a Certificate of his Moral Character."² One year later, when it was found that the legal profession generally had suffered a widespread depletion in its membership, and that the bar of the supreme court particularly had almost ceased to exist, New York faced a situation unknown since 1720. A rule to meet it was at once ordered prepared.³ According to its terms, attorneys of

"Good Moral Character" from the inferior State tribunals who should "on due Examination be found . . . to be of sufficient ability and Competent learning to practice as an Attorney or Counsellor at Law of the Supreme Court,"⁴ were to be admitted to its bar. As liberal as this action was, only four practitioners availed themselves of the privilege thus extended. Never before had the profession been so weak; and it certainly never was afterward.⁵

These early rules of court, 1778-1779, only continued a practice of clerkship and admission long in force in the colony; but they are unique in that in them for the first time examinations were definitely prescribed for all candidates.⁶ Aside from this requirement and the failure to mention the need of a license, their arresting feature, however, was a clear recognition of a distinction between counsellors and attorneys.⁷ In both categories qualifying examinations were indeed necessary—but with a difference; for if an applicant failed to pass the tests entitling him to practice as a counsellor, he must content himself with being simply an attorney. Furthermore, although no period of time was prescribed during which a mere attorney must wait and grow in knowledge and experience before he might secure the right to plead in court, a rule covering this matter was soon promulgated.⁸

In the meantime, on January 18, 1782, the supreme court made additional regulations affecting clerkships by stating that "Whereas by a former rule of this Court a three years clerkship at least was amongst others made a necessary prerequisite to the admission of an attorney to practice in this Court and Whereas there are Several Young Gentlemen, who in the Course of their Education have directed their Studies to the profession of the Law, but upon the breaking out of the present War, entered into the Army in defence

of their Country, or in Consequence of the confused state of Affairs occasioned by the Irruptions of the Enemy into the State, have been prevented from prosecuting their Studies in Manner directed by the said rule—

“Ordered therefore that that part of the said Rule which requires a Clerkship of three years be and is hereby suspended until the last day of April Term.”⁹

This in turn was followed a few months later by a general rule regulating clerks, attorneys, and counsellors which, because of its inclusiveness, will be quoted at length. In it the court:

“Ordered that no person whatsoever after this term be admitted an Attorney of this Court unless he shall have previously served as a Clerk for at least three years with a practising attorney of the said Court actually residing in this State during the said Service and such Attorney shall certify to the Judges of the said Court that such Clerk is of good moral Character and he be found on examination sufficiently qualified to practice as an Attorney of the said Court Provided always that this rule shall not be Construed to extend to any inhabitant of this State who Commenced the study of the Law in this State while it was a Colony by entering as a Clerk into the office of a then practising Attorney of this Court and providing such inhabitant has been prevented from prosecuting his study during the war by being actually employed in the public service And provided that no service since the ninth day of July 1778 with any Attorney who has during the War resided within the British lines shall be considered as any part of the Clerkship required by this rule. And provided further that this rule shall not be construed to extend to any inhabitants of this State whilst it was a Colony residing within the same before the year 1776 who during that year or at any time since left

his place of abode and who has since that time and before the present Term served a Clerkship of three years with a practising attorney of any of the Supreme Courts or Superior Courts of any of the Neighboring States, but that such persons described in the above provisoes may be admitted to practice as Attornies of this Court in like manner as if they had served a regular Clerkship of three years within this State.

“Ordered that no person whatsoever after this Term be admitted to the Degree of Counsellor in the Court unless he shall have previously practiced in this State as an Attorney for at least two years at the Expiration of which time he may be admitted to the degree of Counsellor, if on Examination he be found duly qualified.”¹⁰

It was probably expected that these new rules would be applied generally throughout the State, and this was accomplished gradually, for although thereafter in no case did a local judge refuse to recognize a license granted by the supreme court, it was not until sometime after the opening of the nineteenth century that the inferior courts entirely ceased to exercise the privilege of determining the educational requirements for admission to practice at their bars.¹¹ Finally, in what may have been an endeavor to eliminate conflicting standards and to make the varying educational requirements uniform, the Legislature passed the act of February 20, 1787.¹² Unfortunately, however, its confusing and indecisive terminology did not greatly improve the situation, since the several courts were again recognized as the agencies best fitted to determine the training and educations of applicants for admission to the bar. On this point its third section provided: “That no person henceforth be admitted a counsellor, attorney, solicitor, advocate or proctor, in any court, but such as have been brought up in the same court,

or are otherwise well practised in soliciting causes, and have been found, by their dealings, to be skillful and of honest disposition; and that every person hereafter to be admitted a counsellor, attorney, solicitor, advocate or proctor of any court, shall, before such admission, be examined by the judges or justices of the same court, and such only as shall be found virtuous and of good fame, and of sufficient learning and ability, shall be admitted. . . ."¹³ Consequently, although some progress had been made, an adequate state-wide policy affecting legal education had yet to be adopted either by rule of court or by legislative act.

From an order of December 7, 1785,¹⁴ requiring John Lansing, Clerk of Court, to transmit to the Register "such of the Rules of this Court as may be in his possession together with all other Papers belonging to this Court . . .,"¹⁵ it may be inferred that the Court of Chancery of the new State, and those practicing before it, were likewise subject to regulations. Whatever the content of such rules may have been—and they have not been found—it was, however, in 1787: "Ordered by the Honorable the Chancellor that no person shall hereafter be admitted a Sollicitor of this Court unless he shall have previously served for the space of at least three years a Clerkship in the Office of one of the sollicitors of this Court, or in the office of any of the Officers of this Court—And that no person shall be so admitted unless upon due Examination it shall be certified to the Chancellor by the persons appointed to Examine him that it appears to them that he is of good moral character and competent ability—And it is further Ordered that every person heretofore or hereafter to be admitted a sollicitor of the Court shall after such Admission practice for at least the term of two years as a sollicitor before he shall be admitted to practice as a Counsellor of this Court—And that no Sollicitor shall in future be

admitted a Counsellor of this Court unless he shall on *Examination* by such Counsellors as the Chancellor shall appoint have proved himself qualified to Execute the duties thereof."¹⁶

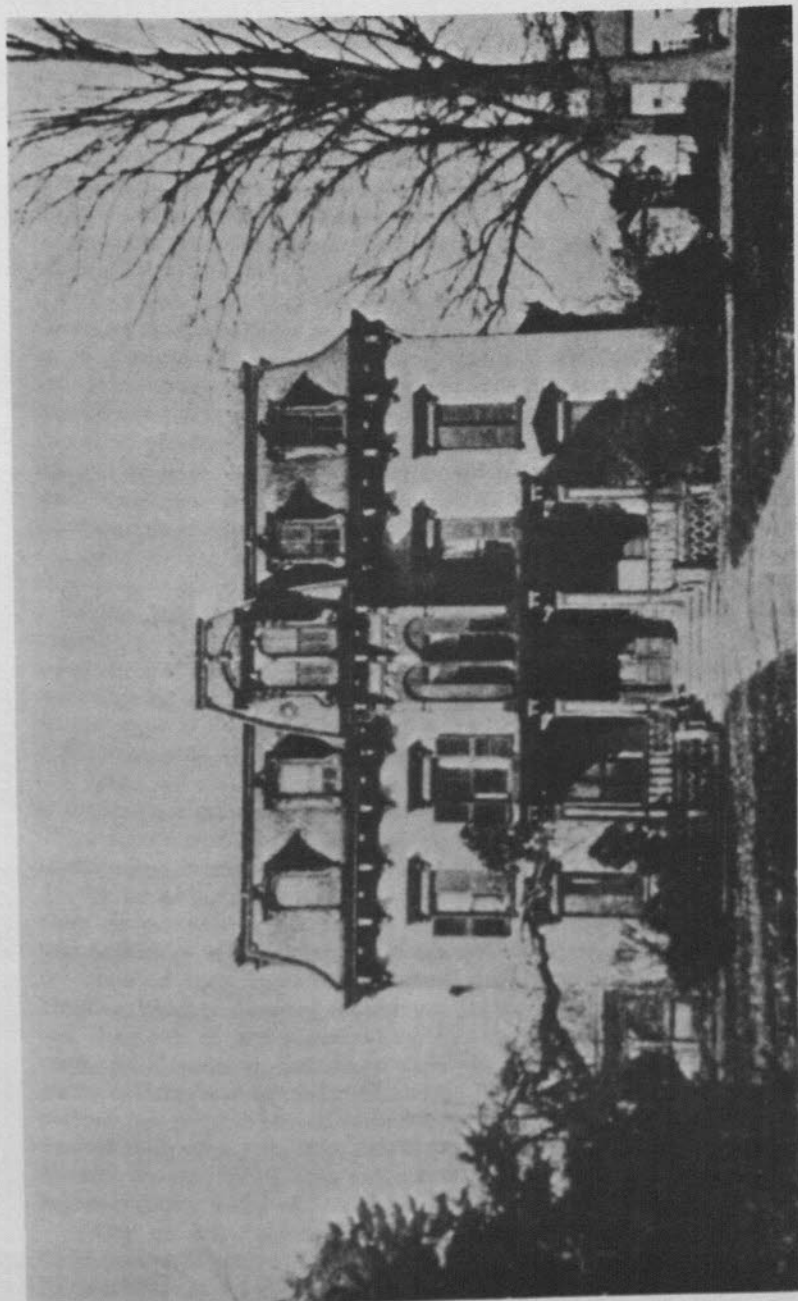
These rules were effective while they lasted, but the educational standards established by them again were changed the very next year,¹⁷ when the court further "Ordered that no person in future be admitted to practice as a Sollicitor in this Court unless he has served a Clerkship of three years with one of the Officers or Sollicitors of this Court and thereafter been Three Years admitted an Attorney of the Supreme Court of Judicature of this State; nor then but upon Examination in open Court."¹⁸ With this regulation Chancellor Livingston appears to have been satisfied, for not again during the eighteenth century are any changes in the education and training of sollicitors and counsellors in chancery known to have been instituted by him.

The rule which had been made by the supreme court at its 1783 April Term remained in force until October, 1797. Its judges then again materially changed the educational standards for admission to the bar by ordering that a seven-year clerkship—any portion of which not exceeding four years in length might be met by pursuing classical studies—must thereafter be served by all candidates petitioning to practice. Here, also, for the first time in New York a training secured in law schools was recognized. On that point the court ruled: "That every person who shall have regularly pursued juridical studies under the direction or instruction of a professor or a Counsellor at law for four years, or shall have been admitted to the degree of counsellor at law, either in this State or elsewhere, shall be admitted to practice as counsel in this court."¹⁹ Despite the absence of a requirement of an examination, this regulation did establish stand-

ards almost as high as those set by the 1756 Bar Association Agreement. Then a liberal college or university education, terminating in the award of an A.B. degree, had been made a requisite prior to the commencement of a clerkship. To this extent, however, the court in 1797 did not go. Nevertheless, the inducement it offered to pursue classical studies, or to study under a professor or a counsellor at law, is noteworthy, and shows that New York recognized the value of the training secured in the few law schools then existing. The adoption of these rules, however, did not end the court's attempt to solve the problem of clerkships and bar admissions. At different times thereafter new regulations affecting legal education were promulgated. At the November Term, 1803, for instance, it was ordered that juridical studies to be accepted must have been pursued within New York State—a requirement that was soon abandoned, fortunately. Finally, at its February Term, 1805, the supreme court made uniform the educational standards for admission to the bar. It then required that all attorneys, solicitors, counsellors, proctors and advocates should be licensed by its judges only.²⁰ The adoption of this rule certainly regularized a disordered situation. Thereafter until 1823 no noteworthy changes on this subject are known to have been effected.²¹ The portals to New York State's Legal Golden Age had at last been swung wide open.

²⁰See Article XXVII of the Constitution of 1777 (Appendix XI, p. 209).
See Bibliography herein for books, manuscripts and papers cited in this study.

²¹*Minutes of the Supreme Court of New York, 1775-1781*, p. 177. The first rule established by an inferior court of the new State was promulgated by the Mayor's Court of Albany on May 5, 1778. It required an affidavit certifying that the candidate had served a clerkship of three years; that he was of a "good moral character," and that he had undergone an examination in open court in the presence of two or more of the judges by attorneys appointed by



THE VAN SCHAACK LAW SCHOOL BUILDING

In 1785 Peter Van Schaack, King's College 1767, LL.D., Columbia College 1826, blind legal scholar, opened at Kinderhook, N. Y., the first law school to be established in New York. Thereafter for over forty years Van Schaack imparted more than one hundred students sound legal education. The building shown above is the original Peter Van Schaack house having been but slightly altered since it was constructed. Courtesy of Dr. E. J. Collier, Amsterdam, N. Y. From *A History of Old Kinderhook* by Edward A. Collier, D.D., (New York, G. P. Putnam's Sons, 1914), permission granted to reproduce by G. P. Putnam's Sons, New York City.

the court. See *Minutes of the Mayor's Court of the City of Albany, 1768-1778*, p. 234. The Court of Common Pleas of Dutchess County also early brought its practice into conformity with this rule. See *Minutes of the Court of Common Pleas in and for Dutchess County, 1775-80*, May Term, 1778.

*Part of the rule provided: "And Whereas by reason of the present State of this country most of the Attornies who have heretofore practised in this Court are absent insomuch that the subjects are liable to divers inconvenience to prosecute or defend their Causes for want [of] Counsel, for remedy Whereof—

"It is Ordered by the Court that any Attorney of the respective inferior Courts of Common Pleas who is of Good Moral Character and who shall on due Examination be found by the Justices of this Court to be of sufficient ability and competent learning to practice as an Attorney or Counsellor at Law of this Court may be admitted and licenced to practice as one, or both Capacities provided that such application and Examination be made before the end of next Term of July, until which time and no longer this rule shall remain in force." (*Min. Sup. Ct. N. Y., 1775-81*, p. 177.) Only ten attorneys transacted business in this highest tribunal during 1778 and 1779; *i.e.*, prior to the General Disbarment Act passed by the Legislature on October 9, 1779. These were John Bay, Egbert Benson, John Sloss Hobart, John Jay, John Lansing, John McKesson, John Strang, Matthew Visscher, Peter W. Yates, and Robert Yates. McKesson, Lansing, and Peter W. Yates—especially the last two—were employed more often than the others, whose names appear as counsel but once or twice. The *Minutes* indicate that each of the judges of the court—Hobart, Jay, and Robert Yates—represented clients at least one time each. See *Ibid. passim*.

⁴*Ibid.*, 177. The rules and practice of the Supreme Court of Judicature of the state are taken as typical of the rules and practices of the inferior courts of the state during the period 1776-87. As would be expected, the standards of the supreme court were higher than those of the lower courts.

*So far as the records show, but four attorneys, whose licenses permitted them to practice in the inferior courts only, applied for permission to take advantage of the order of the supreme court of April Term, 1779. In the order of their applications these were Leonard Gansevoort (b. 1751), Matthew Visscher, Leonard Gansevoort, Jr., (b. 1754), and James G. Livingston. Two only of these passed the examinations—Visscher and Leonard Gansevoort, Jr. Livingston had much difficulty. Having failed in his first examination, the rule was extended a full Term in order to give him an opportunity to prepare himself more fully. This rule of April Term, 1779, was decided upon after John Bay, Princeton, 1765, licensed locally for the Albany District, in January of 1779 applied for the privilege of practicing in the Supreme Court. *Ibid.*, 161 *et seq.*

That these and subsequent regulations affected every one, even a former Chief Justice of the State Supreme Court, may be seen from the following: "The affidavit of Egbert Benson being filed and John Jay and Governor Morris Esqr having taken and subscribed the oath required by Law Ordered that

the suspension of John Jay Esq^r. be taken off." (*Min. Supt. Ct. N. Y.*, 1786, Part "A", p. 15. January 25, 1786.)

¹Article XXVII of the Constitution of 1777 mentioned counsellors, attorneys, and solicitors. A lawyer was an attorney before he became a counsellor. The distinction between counsellors and attorneys had existed in practice if not by rule of the supreme court or by legislative act, through the whole colonial history of New York. References are frequently to be found—as, "Mr. Murray, Counsel, through his Attorney, Mr. Searle," which show that lawyers as counsel performed certain functions, and as attorneys other functions. Therefore, the separation made after the colony became a state merely recognized a situation long existent, and gave it uniformity.

²See pp. 122-3, herein. For illustrative orders and rules of the courts and acts of the state legislature during the year, 1779-97, concerning education and training for the legal profession, see Appendix XII, pp. 210-216.

³*Min. Sup. Ct. N. Y.*, 1781-3, pp. 92-3. This rule did not abrogate the requirement of an examination in open court. Although but few persons availed themselves of the privilege here offered, the court at its April Term, 1782, did extend until the succeeding October the suspension of this three-year-clerkship rule in favor of Alexander Hamilton. This it did upon his especial request. The entry covering it, dated April 26, 1782, reads:

"Whereas by a former rule of this Court, a Clerkship of three years at least was among other things made a necessary prerequisite to the admission of an attorney to practice in this Court. And Whereas by a rule of this Court made on the eighteenth day of January last that part of the said rule which required a Clerkship of three years was suspended until the last day of April Term in favor of such young Gentlemen who had directed their studies to the profession of the Law, but upon the breaking out of the present War had entered into the Army in defence of their country, and Whereas Mr. Alexander Hamilton has in Court declared that he had previous to the war directed his Studies to the profession of the Law and upon the breaking out of the present war entered into the Army in defence of his Country, that his Situation in the Army and his services to his Country were such as had prevented him from pursuing the Study of Law, and that being unprepared for an examination, he prayed of the Court that the said rule as to his admission to practice may be further suspended until October term next.

"Thereupon Ordered that that part of the said Rule which requires a Clerkship of three years be farther [sic] suspended as to the said Alexander Hamilton until October Term next." (*Ibid.*, 153.) Hamilton appears to have passed the examination for an attorney at law in the summer of 1782, for on October 26, 1782, a minute reads: "Alexander Hamilton Esquire having on Examination been found of sufficient Ability and Competent learning to practice as Counsel in this Court Ordered that he be admitted accordingly." (*Ibid.*, 289.)

Biographies of Aaron Burr claim that the supreme court waived for him a portion of the clerkship requirements. He is said to have been admitted

in January Term, 1782. There is no positive proof of these facts, since blank pages occur in the *Minutes* of the Supreme Court where such entries might have been made. The rule of January Term, 1782, was suspended at April Term, 1783, for William Popham and Richard Sill. See *Ibid.*, 366-7; 391. In 1779 the requirement of a three-year clerkship had been waived for James G. Livingston and Leonard Gansevoort, Jr.

¹⁰*Ibid.*, 367. April 16, 1783. According to this rule, every practitioner must undergo an examination as to his educational qualifications followed by a two year period of practical experience as an attorney before the privilege of being a counsellor could be acquired. The substance of the distinction seems to have been that an attorney could not plead a cause in court. In this respect it resembled the counsellor-solicitor distinction long familiar in chancery. Chief Justice Morris and Justice Yates were on the bench when the above order was entered.

¹¹The inferior courts derived their authority from Article XXVII of the Constitution of 1777, and from an act of the State Legislature passed in 1787. The records of several admissions in the inferior courts of the state, even into the last decade of the eighteenth century, show that clerks upon examination, or without examination, were at one and the same time admitted to be attorneys and counsellors, although in some instances the word attorney only is used. It was not until its February Term, 1805, that the Supreme Court finally adopted rules which made the educational requirements and the standards of admission uniform throughout the State. The action a county court might take upon the subject of clerkships and admission to the bar is illustrated by the order of the Court of General Sessions of the Peace of Washington County while sitting at Newperth the last Tuesday in February, 1785. The Justices present were Moses Martin, John McCollister, Samuel Crosset, and John Rowan. It ordered: "Whereas the dignity of the Courts of Justice in a great measure depends upon the Integrity & abilities of the Practisers at the bar therefore ordered that no person be admitted to practice the Law in this Court unless he shall immediately prior to his application have served a Clerkship of three years with one of the Gentlemen of this bar or of the bar of the Supreme Court of this State and shall produce to the Court a Certificate of such service and that such person sustains a good moral Character & upon examination by the bar in presence of the Court adjudged by the Court fully qualified, provided that this rule shall not extend to the practisers at the bar of the Supreme Court of this State or such as shall hereafter be admitted therein." (New York: *Minutes of the Court of General Sessions of the Peace, Washington County.*)

¹²The Legislature by acts passed on October 9, 1779; November 20, 1781; and April 6, 1786, disbarred all attorneys, solicitors, counsellors, proctors, and advocates of all courts, and established conditions under which former practitioners could be readmitted. None of these acts made any provision for the formal training of candidates. See *Laws of the State of New York passed at the Sessions of the Legislature held in the years 1777-1784 inclusive, being the First Seven Sessions.* Published by the Secretary of State of New York [Albany,

1886], I, 155-7; 420-1; 526-7; II, ch. 65, and III, 237. Mayor Duane on February 10, 1784, presiding over the Mayor's Court of New York City, ordered that "all Attornies of the Supreme Court be considered as Counsellors and Attornies of this Court." (*Minutes of the Mayor's Court of the City of New York, 1784-85*, p. 3.) These acts and the court rules based upon them required all lawyers to accept the new political philosophy of the day. Each candidate—applying either for readmission, or to be originally examined—had to undergo an examination by a jury of zealous citizens before his application could be certified. This applied to the lowest petitioner as well as to Chief Justice John Jay. For reports of these examinations see *Minutes of the Supreme Court of Judicature of New York, 1775-1781; 1781-1783, et seq., passim*. After 1785 he must also sign an oath of allegiance and abjuration. See *Rolls of Attornies, Counsellors, and Solicitors. Hall of Records, Borough of Manhattan, New York City*; also the act concerning readmission to the bar, passed 6 April, 1786, in "Laws of the State of New York passed at the Sessions of the Legislature held in the years 1785-1788 Inclusive" [Albany, N. Y., 1886], II, 237. This act—Chapter 29—repealing the acts of October 9, 1779, and November 20, 1781, stated: "Provided Always, that every attorney, solicitor or counsellor, the suspension of whose licence is hereby taken off, shall, previous to his being admitted to practice, prove to the satisfaction of the court, of which he shall be admitted attorney, solicitor or counsellor that he is of good moral character, shall be licensed by such court, and shall take the oath of abjuration and allegiance, and an oath for the faithful execution of his office."

On the back of the sheepskin parchment license dated 29 April, 1786, given to Samuel Jones under the hand of Richard Morris, readmitting him to practice, appears the following: "Be it remembered that on the twenty-ninth day of April in the Year one thousand seven hundred and eighty-six the within named Samuel Jones came before me and took and subscribed the Oaths of Allegiance and abjuration and of office as a Counsellor and Attorney at law as by law prescribed. J^a. Sloss Hobart." (*Samuel Jones Papers*.)

A typical oath taken by attorneys and prospective attorneys—in this case, that prescribed by a county court—immediately after the War for Independence, and for some time thereafter, was as follows: "I, A.B., do solemnly, without any mental reservation or equivocation, swear and declare (or affirm) that I renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and that I will bear faith and true allegiance to the state of New York, as a free and independent state, So help me God." (Book, "A." of "Officers for Dutchess County, 1816" [no pagination]. "Attornies & Counsellors." Local History Room, Severance Library, Poughkeepsie, N. Y.)

¹²In the entire history of New York prior to this date no other instance has been found where the General Assembly or the Legislature regulated clerks and clerkships. The Assembly in 1729 debated the subject but seems to have done nothing further. See *Journal of the Votes I*, . . . 600-1; 606.

¹³New York: *Minutes and Orders of the Court of Chancery, 1785*, p. 13.

¹⁵See the bills in chancery which were filed in the office of the clerks in chancery (John Lansing and Stephen Lush) for the nature of business the court was called upon to determine during the period of the War for Independence. Consult these in Chancery Room, Court of Appeals Hall, Albany, N. Y.

¹⁶*Minutes and Orders of the Court of Chancery, January 1787 to December 1787*, p. 179. In England for many generations before this date a distinction had existed between attorneys, solicitors, and counsellors (barristers). Apparently it was the intent of the leaders of the bar of the new state to imitate the English system but at the same time to make certain changes to meet the conditions in New York. The most noteworthy of these permitted solicitors to become counsellors, and in the law courts denied attorneys the privilege of pleading as counsellors until they had had experience. The preserved "Rolls of Attornies, Solicitors and Counsellors" show that a number of solicitors never qualified as counsellors in chancery. Consult these *Rolls in Hall of Records, Borough of Manhattan, New York City*.

¹⁷At this time the judges of the supreme court and the chancellor were endeavoring by rules to make uniform standards for the entire state.

¹⁸*Minutes of the Court of Chancery, 1787-89*, p. 144, October 20, 1788. In comparing this rule with that of the preceding year, two changes will be noticed: namely, after admission as a solicitor, three years instead of two must elapse before an examination to practice as a counsellor could be taken, and during those three years the candidate must have been an attorney of the supreme court of the state—not merely a solicitor in chancery. During the years 1783-1800, examinations in chancery were conducted by counsellors appointed by the chancellor. Generally they were given by the two chancery clerks, although practitioners also assisted. For instance: "On Motion of M^r. B. Livingston Ordered that M^r. Frederick Prevoost be examined by the Ex^r. [Examiner of witnesses] and Clerks in Chancery resident in the City of New York together with such Counsellors as will attend as to his Competency to practice as a solicitor of this Court and that they report thereon by the first day of next Term." (*Min. Ct. Chan.*, 1790, p. 132.) See also the order covering the examination of Josiah Ogden Hoffman under date of October 15, 1788, in *Min. Ct. Chan.*, Dec. 1787-Jan. 1789, p. 108; in Appendix XII, p. 215. At first Chancellor Livingston required that all examinations be held in his presence. In time, however, the examinations were held at such places and times as those deputized to conduct them chose. For orders illustrating such examinations see *Ibid*.

¹⁹See *Coleman's and Gaines Cases*, (New York, 1808), 7-9, for this entire rule. Section IV exempted clerks then in offices from its operations. Section V abrogated all previous rules regarding clerkships served outside the state. This applied especially to the rule of the court made April 16, 1783.

²⁰Acting under legislative enactment the Supreme Court licensed both attorneys and counsellors. This did not mean, however, that certain other courts, the court of chancery, for instance, did not establish rules and regulations and require examinations before allowing an attorney to practice

before them. In truth, they did so again and again after 1781. The *Minutes* of the court of chancery show numerous cases where Chancellor Livingston reserved the right to decide who should transact business before him. See *Min. Ct. Chan.*, 1787-89; 1790, and subsequent volumes, *passim*. In this respect there would at times seem to have been a conflict between the orders of the judges of the supreme court of the state and the chancellor of the state.

²That a real distinction between attorney at law and counsellor at law was made after 1779 seems clear from the rules and orders of the supreme court of the state. Authorities agree that no such distinction existed by rule under the Crown, and no license or admission during the colonial period—except that of William Livingston—refers to the candidate as a counsellor at law. The first clear reference to the distinction is in the court order of April 23, 1779. In April, 1783 the supreme court definitely established it by requiring two years service as an attorney before an examination to become a counsellor at law could be taken. The legislative act of February 20, 1787, continued the distinction as did the comprehensive rule of the supreme court of October Term, 1797. See its third section which, however, was repealed at the November Term, 1804. Thereafter, all attorneys of three years standing became counsellors without the necessity of undergoing an examination. At no time after 1776 was there clearly designated the courts in which a mere attorney at law might practice, nor of the kind of business he could handle. This would have been necessary in order to make the distinctions valid. In chancery a distinction between counsellor and solicitor had always existed.

APPENDIX I

STUDENTS OF KING'S COLLEGE, 1758-1781, WHO ENTERED THE
LEGAL PROFESSION, THE MINISTRY, OR THE MEDICAL
PROFESSION

	GRADUATES WHO EARNED ¹ A.B., M.B. OR M.D. DEGREES				NON-GRADUATES			SUMMARY		
	Law	Min-istry	Medi-cine	Total Grad-uates	Law	Min-istry	Medi-cine	Total Non-Grad-uates	Total Stu- Law	Total dents
1758	3	2	0	7	0	0	1	4	3	11
1759	1 ²	2 ²	0	2	0	0	0	5	1	7
1760	2	1	0	6	1	0	0	6	3	12
1761	0	1	0	3	3	1	0	8	3	11
1762	2	2	0	10	0	0	0	2	2	12
1763	1	0	0	2	0	0	1	2	1	4
1764	2	0	0	2	0	0	0	3	2	5
1765	2	0	0	5	0	1	0	2	2	7
1766	1	1	0	11	1	0	0	3	2	14
1767	1	0	0	2	0	0	0	2	1	4
1768	2	1	1	6	0	0	0	3	2	9
1769	0	0	2	3	0	0	0	0	0	3
1770	4	0	0	7	2	0	0	8	6	15
1771	1	0	3	8	0	0	0	2	1	10
1772	1	1	5	12	0	1	0	4	1	16
1773	2	1	1	6	0	0	0	2	2	8
1774	4	1	2	13	0	0	0	5	4	18
1775	2	0	0	7	0	0	0	6	2	13
1776	0	0	0	7	1	1	0	11	1	18
Totals	31	13	14	119	8	4	2	78	39 ³	197 ⁴
1777					0	0	0	9	0	9
1778					2	1	1	17	2	17
1779					0	1	1	8	0	8
1780					0	0	0	0	0	0
1781					0	0	0	2	0	2
Totals					10	6	4	114	41 ^{3,4}	233 ⁴

¹Between 1769 and 1774 King's College awarded the following degrees: A.B., Bachelor of Arts; M.B., Bachelor of Medicine; M.D., Doctor of Medicine. In some cases after 4 years of study a student would receive a M.B. degree, and the next year a M.D. degree. Certain students failed to complete their medical studies. In making up the totals for this chart all such cases are considered, but not duplicated. Four non-graduates of King's who secured their M.D. degrees elsewhere are listed as having entered the medical profession.

²William Hanna, 1759, at different times was both a lawyer and a clergy-