The Spectre of Attainder in New York (Part 1)

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THE SPECTRE OF ATTAINDER IN NEW YORK*

I. INTRODUCTION

The average American citizen has come to accept the liberty which he enjoys under the Constitution as a matter of course and of which there could be not the slightest doubt. This results from the fact that the average citizen, except for voting or paying income taxes, has little direct contact with the government in its day-to-day operation. Under these circumstances, the decision in the recent case of United States v. Lovett,1 in which the Supreme Court was called upon to declare unconstitutional, as amounting to a bill of attainder, an act of Congress barring three American citizens from ever again holding public office, came as a surprise to our people and as a distinct shock to the members of the legal profession. Surmising that the spirit which made such an occurrence possible has always been present in the social order, though usually submerged, the present writer set out to investigate the matter generally, but in this article with specific reference to developments in New York from Colonial times up to the present. What had been found is not only intensely interesting, but in these troublous times, when the whole world threatens to break loose from its customary moorings, gives cause for a serious searching of souls, and reemphasizes the importance of the old adage that eternal vigilance is the price of liberty.

* To be published in two parts. Part 2 will be contained in Vol. XXIII, No. 2, April 1949.
1 328 U. S. 303, 90 L. ed. 1252 (1946).
II. COLONIAL DEVELOPMENTS

A. The Leisler Rebellion and Treason Trial

On October 17, 1683, or forty-two years after Massachusetts had abolished forfeitures, the Charter of Libertyes and Privileges granted by His Royal Highness, the Duke of York, to the inhabitants of New York and its Dependencyes, provided: "That all lands and Heritages within this Province . . . shall be free from all fines . . . and forfeitures upon the death of parents and Ancestors . . .; Cases of High Treason only excepted." From this Act it appears that the harsh doctrine of forfeiture, one of the incidents of attainder, was to be outlawed in New York, except in cases of treason. As of that time no colonial treason statute had been enacted, although the need for one soon developed.

The years 1688 and 1689 were marked by great political agitation in the colonies generally and in New York specifically. In New York the source of difficulty, according to Sparks, seems to have arisen out of the "misgovernment of the broken-down courtiers, whom the profligate Charles, and his public-minded brother had sent to rule over it." Nicholson was still Governor, but the object of distrust, because of his connection with the government of the unpopular James the Second. The local office holders, whose tenure depended upon the Governor's tenure, supported the Crown. The period was filled with rumors of popish plots and republican cabals. This was apparently the situation when word reached New York that King William had ascended the

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2 ANCIENT CHARTERS AND LAWS OF MASSACHUSETTS BAY 147 (1814).
3 The title to this Act is misleading, as it was not a charter from the Duke of York, but merely an act of the New York Colonial Legislature.
4 1 Colonial Laws of New York 115 (1894).
6 William Smith, The History of the Province of New York 80 (1786), declared:
   "A general disaffection to the government prevailed among the people. Papists began to settle in the colony under the smiles of the governor. The collector of the revenue, and several principal officers, three off the mark, and openly avowed their attachment to the doctrines of Rome. A Latin school was set up, and the teacher strongly suspected for a Jesuit . . . The whole body of the people trembled for the protestant cause. Here the leaven of opposition first began to work."
throne. Apparently Governor Nicholson was slow in declaring his allegiance to the new Prince. On June 2, 1689, exasperated by the Governor's delay, the populace assembled in arms for the purpose of overthrowing the government. They repaired to the house of Jacob Leisler, then a Judge of the Court of Admiralty, elevated him to leadership, and took possession of the fort which contained the government's money. This was followed by a declaration for William and Mary, as Leisler said, to preserve the Protestant religion. On June 8th a Committee of Safety was formed, and its first action was to commission Leisler as "captain of the fort," in which capacity he repaired the fort, strengthened it by the addition of a battery of six guns beyond its walls, thus originating the public fort now known as the Battery. Having failed in their efforts to prevent the uprising, Nicholson, the Lieutenant-Governor, alarmed for his own safety, sailed for England, while the Mayor and other public officials took refuge in Albany. On August 16th, the Committee of Safety appointed Leisler as Commander-in-Chief of the Province, and vested him with the full power of a governor in both civil and military affairs. His first attempt to assume jurisdiction over Albany and the Northern portions of the Colony was repulsed, but after the Indian attack on Schenectady in 1690, Albany finally submitted. In December, 1690, a dispatch from William and Mary arrived, addressed to "Francis Nicholson, Esquire, or in his absence, to such as for the time being, takes care for preserving the peace, and administering the laws in His Majesty's Province of New York." Leisler construed this letter as an appointment of himself as the King's Lieutenant-Governor. Accordingly, he dissolved the Committee of Safety, swore in a Council and in general assumed the rule and functions of a Royal Lieutenant-Governor and Commander-in-Chief, engaging with great energy in the expeditions against the French. In the course of these activities he equipped and dispatched against Quebec the first fleet of warships ever to leave the port of New York. Shortly thereafter, in January, 1691,

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7 See note 5, supra at 209, 210.
Major Richard Ingoldsby arrived from England, bringing the news that Colonel Henry Slaughter had been appointed by the Crown as Governor. A demand for possession of the fort was rejected. So, likewise, on Governor Slaughter's arrival, was such a demand refused, until Leisler was convinced of the new Governor's identity, and the latter had sworn in his Council. Thereupon Leisler was arrested, imprisoned, and charged with treason and murder.

B. First Colonial Statute of Treasons

On May 6, 1691, the Colonial Legislature, because of "late hasty and inconsiderate violacon" of allegiance to the Crown of England enacted a treason statute which provided "That whatsoever person or persons shall by any manner of way or upon any pretense whatsoever endeavour by force of arms or otherwise to disturbe the peace good and quiet of this their Majestyes Government as it is now Established shall be Deemed and Esteemed as Rebells and Traitors unto their Majestyes and incurr the pains penalties and forfeitures as the laws of England hath for such offenses made and provided."  

C. Leisler's Trial and Attainder for Alleged Treason

Shortly thereafter, before a Special Commission of Oyer and Terminus, composed of Joseph Dudley, Thomas Johnson, Sir Robert Robinson, Chidley Brooke, William Smith, William Pinhorne, John Lawrence, Captain Gaspar Hickes,
Major Richard Ingoldsby, Colonel John Youngs and Captain Isaac Arnold—the Governor's own officers and old political enemies of the accused—Leisler was summarily tried and attained, the trial being held in New York City. At the same time his son-in-law and Secretary, Jacob Milbourne, was also attained on the same charges, along with twenty-eight other defendants. Leisler and his son-in-law, when arraigned, rejected the jurisdiction of the court as constituted, Leisler declaring that "he was not holden to plead to the indictment, until the power be determined whereby such things have been acted." 10 "But," to quote Sparks, "the insolent mockery of justice proceeded, and he and Milbourne were condemned to death as rebels and traitors; rebels to the laws, whose dignity Leisler had, to the last, so nobly asserted in his own person; traitors to the King, whose standard he had been the first to rear among his subjects far away." 11

In due course and at the time of the imposition of the sentence, his property was confiscated, and his blood attainted or corrupted, according to the English law of high treason and the local statute. The execution of Leisler and Milbourne took place on May 16, 1691, but the other eight defendants were not executed, and were subsequently given their freedom. It developed later that this trial had been promoted at the suggestion of Leisler's personal and political enemies, Nicholas Bayard being the chief culprit. For this reason the Governor long refused to sign the death warrants, but it is said was finally prevailed upon to do so while under the influence of liquor. Through the activities of Leisler's son the British Parliament in 1692 passed an Act for Reversing the Attainder of Jacob Leisler and others, 12 and this was followed by a similar reversal on May 16, 1699, in New York, 13 coupled with a restoration of the confiscated estates to the heirs of those attainted, and

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10 See note 5 supra at 226.
11 Ibid.
12 6 & 7 Wm. III, c. 30 (1692).
13 See "A Bill for the Indemnifying of all Such Persons as were Excepted out of ye General pardon made by Act of General Assembly in this province in ye year of our Lord 1691." 1 Colonial Laws of New York 384-385 (1894).
the release of those defendants not executed with Leisler and Milbourne, his son-in-law.  

Evidently then, the Act of May 6, 1691, was made to fit the Leisler case, as he was executed just ten days later. The treason part of the statute was probably not necessary, as the English Statute of Treasons applied in the colonial possessions. The provision as to the application of the doctrine of forfeiture was necessary perhaps in view of the Act of October 17, 1683, which had declared lands and heritages free of forfeiture upon the death of parents and ancestors. It is therefore surprising to find, on May 13, 1691, or only three days before Leisler’s execution, that the original statutory provision, freeing lands and heritages from forfeitures, was carried down and reenacted by “An Act Declaring what are the Rights and Privileges of their Majesties Subjects inhabiting within their Province of New York.” Evidently the legislators in Albany, in incorporating into the Act of May 13, 1691 the provisions as to forfeiture in the Act of 1683, were oblivious to what was going on in New York City. It is equally evident that the Special Commission of Oyer and Terminer, sitting in New York City, in attainting Leisler and confiscating his property and that of his followers on May 16, 1691, or within three days after the enactment of the above mentioned Act, was overlooking its express provisions. This was particularly true in view of the fact that the provisions of the Act of May 6, 1691, prescribing forfeiture for treason “as the Laws of England hath for such offenses made and provided,” had invoked the law of forfeiture in England as superior to any colonial statutory provision.

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14 This was accomplished on May 16, 1699, by a statute entitled, “A Bill for Selling ye Estate of Jacob Milbourne, Esq. Dece’d.” 1 Colonial Laws of New York 395-396 (1894).

15 25 Edw. III, c. 2 (1350).

16 See “An Act declaring what are the rights and Privileges of their Majesties Subjects inhabiting within their Province of New York.” 1 Colonial Laws of New York 244-248 (1894).
D. Efforts to Eliminate the Effects of the Leisler Rebellion

Ironically, on the very day of Leisler’s execution, May 16, 1691, efforts to eliminate the effects of the rebellion began. The Colonial Legislature passed an act pardoning those who had been active in the recent disturbances.\(^\text{17}\) Obviously, this statute was designed to rescue certain loyal subjects who were in danger of being subjected to “great penalties and forfeitures.”\(^\text{18}\) Doubtless, in the excitement of the moment, many people had thoughtlessly participated in the so-called rebellion, not measuring the consequences, and perhaps out of idle curiosity. Accordingly, the Act provided that all subjects “shall be and are by the Authoritie of this present Assembly Acquitted pardoned released and discharged against their Majesties their heirs and successors and every one of them of and from all manners of Treasons felonies Misprisons of Treason Treasonable or seditious words and libell, whereby any person may be charged with the penalty and danger of praemunire.”\(^\text{19}\) On September 30, 1691, another act provided that those subjects who had aided Jacob Leisler, lately attainted and executed for usurpation of power and government, might appear before five commissioners appointed by the King, have their damages assessed against them, and upon payment thereof, be discharged.\(^\text{20}\)

E. The King v. Legget Case (1696)

It was at about this time that the famous case of King v. Legget\(^\text{21}\) arose. On December 5, 1693, Legget had been indicted for stealing a hog in the Town of Westchester. He pleaded the Act of General Pardon as a defense,\(^\text{22}\) but the

\(^{17}\) See “An Act for the pardoning of such as have been active in the late Disorders.” 1 Colonial Laws of New York 255-257 (1894).

\(^{18}\) Id. at 255.

\(^{19}\) Id. at 256.

\(^{20}\) See “An Act for regulating the Damages done in the time of the late disorders and for the uniting of the minds of their Majestyes Subjects that have lately absented themselves from their abode.” 1 Colonial Laws of New York 262-264 (1894).

\(^{21}\) Mins. Westch. Ct. of Sess. 1657-96. GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 257 n. 26 (1944), state: “The entire record on this case has fortunately been preserved in H. R. Parch. 209, c. 8.”

\(^{22}\) See note 17 supra.
court held that this Act had no relation to writs occurring prior to the Leisler rebellion. Thereupon, Legget argued that the indictment was defective in that the prosecutor, Thomas Williams, who testified against Legget before the grand jury, was incompetent as a witness, because he had been convicted and attainted of high treason, hence was incapable of holding title to the chattel in question. This same type of defense—that is, based on the theory that one could not steal from an attainted person in possession of personal property—was later invoked in the case of Isaac Jacobs. These two cases are interesting as an early illustration of the collateral and disruptive effects of the application of the doctrine of attainder.

March 24, 1694, the Assembly enacted a statute under which certain by-laws of the City of New York calling for forfeitures of “any Flower or Bread” brought to New York for exportation, were declared void. This Act, as opposed to the Act of 1688, abolishing forfeitures, seems to have been the first Act expressly invoking the doctrine of forfeiture, aside from the Treason Act of May 6, 1691.

On May 16, 1699, a general indemnification act was enacted to cover those excepted out of the pardoning Act of May 16, 1691. This latter act had excepted from pardon those who had been attainted and convicted of treason and murder by the Special Commission of Oyer and Terminer held in New York City. Those excepted included Jacob Leisler, his son-in-law, Jacob Milbourne, Gerardus Beekman, Abraham Brasher, Thomas Williams, Mynart Cpertem, Joannes Vermelse, Nicholas Blank, Garret Duyking, Hendrick Jansen, John Coe, William Lawrence of East Jarsey, Cornelius Plevier, William Churchill, Joost Stoll, Samuell Staates, Jacob Mauritz, Robert Lecock, Michael Hansen,

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23 This case was reversed on writ of error in 1696.
24 GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 368 n. 163, 719 (1944).
26 See "An Act for the Indemnifieing of all Such persons as were excepted out of ye general pardon made by Act of General Assembly in this province in the year of our Lord 1691." 1 Colonial Laws of New York 384-385 (1894).
27 See note 17 supra.
Richard Pondon, Joseph Smith, John Baily, Roelof Swartwont, Anthony Swartwont, Joannes Provost, Jacob Melyen, Benjamin Blagg, Joachim Staates, and Richard Pretty—thirty in all. Of these Jacob Leisler and his son-in-law, Jacob Milbourne, had been executed for attainder.\textsuperscript{28} By this Act these judgments and attainders were reversed and declared to be null and void, Leisler's son having in 1695 secured from the English Parliament the reversal of the bill of attainder.\textsuperscript{29} The current Act was therefore a mere local recognition of the earlier fact. Leisler's estates, confiscated in 1691, were also subsequently restored to his heirs. As to the remaining persons excepted, their attainders were also reversed and it was provided that no corruption of blood or any other forfeiture of lands should be incurred.\textsuperscript{30}

On May 16, 1699 the Colonial Legislature repealed the Act of September 30, 1691, which permitted those who had aided Jacob Leisler in the recent rebellion to have their damages assessed and upon payment be discharged. The reason for this seems to have been that the statute “hath not in ye least measure answered ye design for which it was made and ye continuance thereof would be very prejudicial to all his Ma'tys said good Subjects for remedy whereof.”\textsuperscript{31}

Another statute, also passed on May 16, 1699,\textsuperscript{32} sought to eliminate the many vexatious suits and controversies which had troubled the colony since the Leisler rebellion. It appeared that during this period, many persons, assuming the legality of the existing government, had aided that government. After the rebellion was suppressed they were sued by the individuals whose property or persons had been interfered with. The instant Act sought to obviate this difficulty

\textsuperscript{28} See note 13 supra.
\textsuperscript{29} See note 12 supra.
\textsuperscript{30} Ibid.
\textsuperscript{31} See “A Bill for ye repealing an Act of Assembly entitled An Act for ye regulateing Damages done in ye time of ye late disorders & for ye Uniting ye minds of their Maj'ties Subjects within this province & for calling home such of their Ma'tyes Subjects yt have lately absented themselves from their habitacons & their usual place of their abode.” 1 Colonial Laws of New York 386 (1894).
\textsuperscript{32} See “A Bill for preventing vexatious Suits & Settling & quieting ye minds of his Ma'ties peacable Subjects within this province.” 1 Colonial Laws of New York 393-394 (1894).
by declaring that "all personal actions Suites molestacons or prosecucons . . . done in ye late happy Revolucon in this province for their Ma'ties Service & ye Safety of this Gov'ment be and are hereby discharged. . . ." 33

Still another statute, passed on the same date of May 16, 1699,34 was designed to rectify the wrong done to Leisler's wife and heirs. Accordingly, after noting that the wife of Jacob Milbourne had prevailed upon Parliament to reverse the attainer of her husband, together with the penalties and forfeitures which ensued, that the said Jacob had died seized of lands and tenements in the City and County of New York and in the County of Ulster, that she had been deprived of his books, hence could not determine what debts were owing and what debts were void, decreed that she should be "invested into ye right of said Mary Milbourne and Jacob Milbourne her only Son and ye Survivor of Y'm. . . . as if no such Conviction or forfeiture had ever happened." And pending an opportunity to examine her husband's account books, she was exempted from "all Actions & Suites for or Concerning any Debts or Dues owing by her said husband for one year and a Day." 35

F. The King v. Bayard Treason Trial (1702)

The next development came in January, 1702 in the form of the King v. Bayard36 trial for treason, which Goebel & Naughton declare "was a more or less inevitable result of the Leisler affair, as the province had been rent for ten years by quarrels between two political groups, the Leislerians and the anti-Leislerians." 37 The Council, having been informed that Nicholas Bayard and his son had made derogatory remarks concerning the government, and had secured signatures by misrepresentation at the tavern of Alderman John Hutchins, ordered a Special Commission of

33 1 Colonial Laws of New York 394 (1894).
34 See "A Bill for Settling ye Estate of Jacob Milborne, Esq., Dec'd."
35 1 Colonial Laws of New York 394 (1894).
36 14 Howell, State Trials 471 (1816).
37 Goebel & Naughton, Law Enforcement in Colonial New York 93 (1944).
Oyer and Terminer, as was done in the Leisler case. This was ironical because Bayard, one of those instrumental in securing the provincial statute of treason on May 6, 1691, was now not to be tried under the English Statute of Treasons, but under the very colonial statute which those opposed to Leisler, including Bayard himself, had caused to be enacted. Both Bayard and Hutchins were convicted and took an appeal to the Privy Council, and finally escaped the gallows.

On April 30, 1702, a statute was enacted subjecting two persons to outlawry. This was the result of the practice of persons charged with serious crimes to withdraw from the province and take refuge in neighboring colonies. And for failure to return and submit to trial, they were to be "outlawed to all Intents and purposes according to the Effect of Outlawries within the Kingdom of England." If carried into effect, outlawry invoked the doctrines of forfeiture and corruption of blood. This is interesting, when coupled with another act which provided for forfeiture upon conviction of forgery, as indicating a general tendency on the part of the legislature to invoke the application of this undesirable doctrine.

Following these acts, on June 19, 1703, a statute was passed declaring the proceedings against Bayard and Hutchins void. Obviously, the purpose of this Act was to re-

38 25 Edw. III, c. 2 (1350).
39 "The judicial conduct of the case was prejudiced and unfair, even although Chief Justice Atwood who presided was a well-trained lawyer who should have better known how to demean himself. King v. Bayard is, nonetheless, a landmark in New York law not merely because the reports demonstrate a familiarity with a rather remarkable range of English precedents, but because despite the unfairness of the bench, the trial discloses a much closer adherence to common law usage than had been the case a decade earlier." Goebel & Naughton, Law Enforcement in Colonial New York 85 (1944).
41 1 Colonial Laws of New York 477 (1894).
42 See "An Act Against Forging, Counterfeiting and Clipping of Foreign Coyn, which is Current Money in the Colony of New York." 1 Colonial Laws of New York 521-522 (1894).
43 This Act was entitled, "An Act Declaring the Illegality of the Proceedings agst Coll Nicholas Bayard & Alderman John Hutchins for pretended High Treason, and for Reversing and making null and void the said judg-
lieve Colonel Bayard and his co-defendant from the consequences of conviction for treason in 1702, in *King v. Bayard*, which, as has been previously noted, was finally reversed on appeal to the Privy Council. Accordingly, it was ordered "that all Judgments & sentences, records Process and Proceedings and all other matters and things relating thereunto be wholly obliterated cancelled and utterly destroyed, any Law statute or Custome to the contrary in any waise notwithstanding." 44

During the following year, on June 27, 1704, the repercussions of the Leisler revolt appeared to be drawing to a close, as we find that the Legislative Assembly repealed the Act of Treason which had been enacted on May 6, 1691,45 to fit Leisler's case. Evidently Bayard, who had been instrumental in securing its passage, but who subsequently fell afoul of its provisions, now desired to repeal. This explains the complaint in the preamble of the statute to the effect that the treason clause in the Act of 1691 "hath been of late misinterpreted to the oppression of her Subjects." 46 Notwithstanding the earlier 1703 statute for the relief of Colonel Bayard previously mentioned and the repeal of the treason statute under which he had been convicted, apparently they were insufficient to bring a stop to efforts on the part of his enemies to discredit him, for we find a second statute, dated August 4, 1705, declaring that the said Nicholas Bayard and John Hutchins "to be as to their Honour & Property in the Same State Plight & Condition as if no Such Prosecutions tryall Judgment or Sentence had been." 47

Between the time when the effects of Leisler's revolt died out with the close of the Bayard case in 1705 and 1773 there occurred a relative period of tranquility in the Province of New York, but as we approach the latter year evidences of disorder and discontent again begin to appear.

44 1 Colonial Laws of New York 531-532 (1894).
45 Id. at 223-224.
46 Id. at 575-576.
47 Id. at 590-591.
Thus, on February 16, 1771, we find an Act to prevent trespasses in New York, Albany and the Township of Schenectady. The trespasses complained of included the breaking of "any Glass Window or Windows, Porch or Porches, Knocker or Knockers, or ... any outside Fixtures of any House or damage any Sign...". Establishment of guilt before the Justice of the Peace was to entail a forfeiture for each offense of ten pounds, the same to be collected by distress and sale.

On February 6, 1773, we have an Act which was specifically designed to prevent injury to the statutes of the King, and the Right Honorable William Pitt, known as the Earl of Chatham, on peril of forfeiting "the sum of five hundred Pounds current Money of this Colony... and if the said Forfeitures be not immediately paid, the person or persons who shall commit said Offense, shall be committed to the Common Gaol, there to remain one whole Year without Bail or Mainprize unless the Forfeiture be sooner paid."

Apparently things were going from bad to worse, for only one month later, on March 8, 1773, we discover a statute to prevent the discharge of firearms within the Colony on peril of forfeiting the sum of twenty shillings, said forfeiture to be levied by distress and sale of the offender's goods and chattels.

G. Proposed Attainder of Ethan Allen (1774)

Just a year and a day later, on March 9, 1774, we come to the famous Act for preventing tumultuous and riotous assemblies. It appeared according to the preamble that

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49 The title of the statute read: "An Act to prevent the Defacing the statues which are erected in the City of New York." 5 Colonial Laws of New York 457 (1894).
50 See "An Act to prevent the firing of Guns and other Fire Arms Within this Colony." 5 Colonial Laws of New York 532-533 (1894).
51 The full title of the statute read: "Act for preventing tumultuous and riotous Assemblies in the Places therein mentioned, and for the most speedy and effectual punishment of the Rioters." 5 Colonial Laws of New York 647-655 (1894).
these rioters had committed many acts of outrage and cruelty, that assembling in arms they had insulted and menaced magistrates and other civil officers, rescued prisoners for debt, assumed military and judicial powers, burned and demolished houses and other property, beaten and abused certain of his Majesty's subjects, expelled others from their possessions and spread terror and destruction throughout that part of the country exposed to their oppression. More specifically, it appeared from the body of the Act that Ethan Allen, Seth Warner, Remember Butler, Robert Cockrow, Pelig Sunderland, Sylvarius Brown and John Smith, the first two of whom had been late of Bennington in the County of Albany, "have been the Ringleaders of, and Actions in the Riots and Disturbances Aforesaid." To remedy this situation the Act prohibited assemblies of more than three persons, authorized the Sheriff or any Justice of the Peace to order the dispersal of such assembly, or upon conviction for such offense such persons to "suffer twelve months imprisonment without Bail or Mainprize, and such further Corporal Punishment as the respective Courts before which he she or they shall be convicted, shall judge fit, not extending to Life or Limb..." It was further enacted that the order for dispersal should consist of a special form of proclamation, that anyone who interfered with the person making such proclamation, should be adjudged guilty of a "Felony without Benefit of Clergy;... and shall suffer Death . . .;" that the Governor could order such offenders to surrender within seventy days after a certain published date, to one of his Majesty's Justices of the Peace, who were required to deliver them to the Gaol in Albany or New York City to answer charges. In the event that said offenders refused to surrender pursuant to the order of the Governor, they were, from the day appointed for surrender, to be adjudged and taken "to be convicted and attainted of Felony, and shall suffer Death as in Cases of Persons convicted and attainted of Felony by Verdict and

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52 Id. at 651.
53 Id. at 648.
54 Id. at 649.
Judgment without Benefit of Clergy.” As is well known this order was never carried out, as Ethan Allen and his followers successfully carried on their war for the severance of the Bennington region of Vermont from the County of Albany, New York. And ironically enough, as we shall see, they lived to see the Colonial Legislature of New York attain Lord Tryon, the last Royal Governor of New York, and the very person who ordered the attainder of Allen and his adherents, if they failed to surrender.

The whole situation was made more difficult by the fact that an economic depression began to appear in late 1784 and early 1785. Prices, wages and rents were maladjusted. To complicate the matter the British closed the ports of the British West Indies to American trade, which resulted in shipping being reduced to about one-third of the normal rate—the normal rate being about fifteen ships arriving per day. There were many bankruptcies and on April 3, 1775, doubtless as a result of the economic conditions, the Legislature enacted a very detailed statute to afford relief against absconding debtors.

The legislation directed against Ethan Allen, together with the economic complications added thereto, made it obvious that the brewing storm was soon to break, and break it did on April 25, 1775, when during the Battle of Lexington, the shot was fired at Concord that was heard around the world.

The inception of the struggle now begun found New York infested with loyalists, the greatest concentration being in Dutchess, Tryon and Westchester Counties, and in Long Island, while in New York City it was estimated that they held title to two-thirds of the property. In reference to this period, Thompson declared:

The workings of this class became manifest early in the history of the movement toward independence. In October, 1775, it was reported to the New York Provincial Congress that a conspiracy was

55 Id. at 653.
56 See SPALDING, NEW YORK IN THE CRITICAL PERIOD 1783-1789 18 (1932).
57 Id. at 19-21.
58 5 Colonial Laws of New York 807-826 (1894).
on foot in New York and vicinity to disavow the acts of Congress and the Committees, and as soon as British forces arrived to seize upon the members of the committees and of the Congress. On Long Island in Queens and Richmond counties in December, 1775, the Loyalist element prevented the election of representatives to the Provincial Congress, which inspired a resolution on the part of that body requiring the inhabitants of Queens and Richmond counties to appear by a committee and give satisfaction for their conduct. The matter was serious enough to require the attention of the Continental Congress, which on January 3, 1776, took action, publicly naming a list of delinquents, declaring them to be out of the protection of the United Colonies and forbidding all trade and intercourse with them.\(^{59}\)

On December 26, 1775, in response to a demand for aid against the loyalists, Congress passed a resolution recommending measures to frustrate the plans of the loyalists, and suggested that the most dangerous ones should be disarmed, kept in custody, or required to give security for good behavior.\(^{60}\) It was during the autumn of this same year as we have just seen, that the people of Queens County, Long Island, rejected an opportunity to elect members to the Provincial Congress. At about the same time Congress authorized the Provincial Assemblies, Conventions, Committees, or Councils of Safety, to send to their aid continental troops in the immediate vicinity. This was probably the result of a collision early in January, 1776, between the New York Committee of Safety and the authority of Congress. Temporarily as a result of this conflict the central government yielded to the state. However, this difficulty was evidently ironed out, as we find Washington subsequently promising aid in accordance with the resolves of the New York Assembly of May 10, 1776. The situation deteriorated steadily, necessitating in September, 1776, the appointment of a special commission for "inquiring into, detecting and defeating all conspiracies which may be formed in this state

\(^{59}\) Thompson, *Anti-Loyalist Legislation in the American Revolution*, 3 ILL. L. Rev. 81, 82 (1908).

\(^{60}\) 1 Resolution in Journal of the Provincial Congress 131-132.
against the liberties of America.” 61 Speaking of this com-
m ission, Thompson declared:

Jay was chairman. The commission was practically unlimited
in power and many Loyalists were seized and jailed, their property
being forfeited to the state. Of this commission it has been truly
observed: “It will scarcely be credited that powers so undefined and
extraordinary should have been entrusted to a few individuals by a
people so jealous of encroachments.” 62 [Van Schaak’s Life of Peter
Van Schaak, p. 67.] The transition from republican institutions to
such absolute authority reminds one of the powers of the Committee
of Public Safety under the National Convention in France in 1793-4.
This commission continued to act for a number of years and was
confirmed in its powers by the Legislature, February 6, 1778. 62

On May 1, 1775, the Committee of Sixty, which had been
organized in November, 1774, was reorganized as the Com-
mittee of One Hundred, which was supposed to represent the
merchants, as opposed to the mechanics. 63 It was ineffec-
tive, and its activities were superseded by the First Provin-
cial Congress which was organized by the people later in the
same year. 64 This Congress, which replaced the loyalist
legislature and quickly passed through the First, Second,
Third and Fourth Sessions, displayed the same division
which prevailed in the Committee of One Hundred.

III. FROM THE DECLARATION OF INDEPENDENCE TO THE
TREATY OF PEACE IN 1783

A. Situation at the Beginning of the Revolutionary
Struggle

Thus was the scene set for the reception in New York
of the Declaration of Independence, which was the signal
for a series of measures against the loyalists, in the form of
resolutions by Committees of Safety and by Conventions,
Statutes, and State Constitutional Conventions, the effects

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62 See note 56 supra.
63 Id. at 84-86.
64 See Alexander, A Political History of the State of New York I,
3f (1906).
of which were not to be terminated until long after the close of the Revolution or even after the year 1789 in which the Federal Constitution was adopted.

The Fourth Provincial Congress met at White Plains on July 9, 1776, as the Convention of the Representatives of the State of New York, and framed the first New York State Constitution.\(^65\)

In the meantime, on July 16, 1776, the members of the same New York State Convention, prior to the entry of the British into New York City, passed a resolution postponing consideration of the establishment of an independent civil government, providing that in the interim, all magistrates and other civil officers should exercise their respective offices, under the authority of the State of New York. The Resolution further provided that all persons residing in New York, or deriving protection therefrom owed allegiance to the laws of the state; that persons passing through the state owed the same allegiance; and that all persons who should levy war against the state, or adhere to the King of Great Britain, within the state, or give to the enemies of the state aid or comfort, were to be guilty of treason, subject to the pains and penalties of death, upon conviction.\(^66\) Finally, on December 27, 1776, the Convention by Resolution provided that the inhabitants of Westchester were to be treated as open enemies, said policy to be enforced by the militia and committeemen.\(^67\)

This was followed by the enactment of legislation by the New York Provincial Congress on March 7, 1777, which anticipated the amercement, taxation or confiscation of loyalist estates.\(^68\)

B. New York Adopts Its First Constitution

The next development in New York came when in response to a suggestion by the Congress, the Convention of

\(^{65}\) See note 56 supra at 87.

\(^{66}\) See reference to this Resolution in Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 7 L. ed. 617 (1830).

\(^{67}\) VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION 320 (1929).

\(^{68}\) Id. at 337.
the Representatives of the State of New York adopted a constitution at Kingston, on April 20, 1777. Section XLI of the New York Constitution provided: 

"... That trial by jury, in all cases in which it hath heretofore been used in the Colony of New York, shall be established, and remain inviolate forever. And that no acts of attainder shall be passed by the legislature of this state, for crimes other than those committed before the termination of the present war; and that such acts of attainder shall not work a corruption of blood..." \(^{69}\) We shall see how the exception in the statute as indicated by the italics, permitting attainder, for crimes alleged to have been committed before the end of the war, was later exercised by the State Legislature to the detriment of its enemies, many of whom were doubtless innocent of any crime.

C. Anti-Loyalist Legislation

1. First Efforts

On February 5, 1778, the legislature enacted a statute with the object of promoting the detection and destruction of conspiracies.\(^{70}\) Another act, on March 5, 1778, required persons holding public office to swear allegiance.\(^{71}\) Then came the statute of March 27, 1778, which regulated elections.\(^{72}\) In addition to regulating elections, this Act incidentally disfranchised the loyalists. This was followed almost immediately on April 1, 1778 by a statute\(^{73}\) authoriz-

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\(^{69}\) See 1 Laws of New York 14 (1798).

\(^{70}\) This statute was entitled, "An Act appointing commissioners for detecting and defeating conspiracies and declaring their powers." *Van Tyne, The Loyalists in the American Revolution* 331 (1929). This Act was amended on April 3, 1778, 1st Sess., c. XXXI; October 29, 1778, 2d Sess., c. III; and June 14, 1780, 3d Sess., c. LXII.

\(^{71}\) This Act was entitled, "An Act requiring all Persons holding Offices or Places under the Government of this state to take the Oaths therein prescribed and directed." 1 Laws of New York, c. VII, p. 22 (1789). This statute was repealed at the 11th Session, c. XLIII, § 2.

\(^{72}\) See "An Act to regulate elections within this State." 1 Laws of New York, c. XVI, p. 26 (1789). This statute was repealed at the 10th Session, c. XV, § 26.

\(^{73}\) The statute was entitled, "An Act to enable the Person administering the Government of this state for the Time being, to remove certain disaffected
ing the Governor to remove disaffected or dangerous persons to localities where they could do no harm. On April 3, 1778, came another act, amendatory of the Act of March 5, 1778, to increase the members of the commissioners to guard against conspiracies.74

Approximately one year after the Province of New York became a State under the Constitution of April 20, 1777, on June 30, 1778, the First Session of the Legislature enacted legislation to defeat conspiracies against the liberties of America.75 This Act ordered the commissioners previously appointed on February 5, 1778 for "enquiring into, detecting and defeating all conspiracies" to "cause all such persons of neutral or equivocal characters in this State, whom they shall think have influence to do mischief in [i]t," to appear before them and take the oath of allegiance to the State; that if they refused to take the oath, they were to be sent into the enemy's lines, and a record of their names certified to the Secretary of State; that persons absconding to avoid the operation of the Act, should be treated as refusing to take the oath; that if absconding persons, or persons sent into the enemy's lines were found in the state, they were, on conviction, to be adjudged guilty of treason; that, by way of compensation to the state, for injuries sustained by such persons, all lands held by persons refusing to take the oath should "forever thereafter be charged with double taxes, in whosoever hands the said lands may hereafter be"; that the commissioners had power to detain and confine such persons for the purpose of exchanging them for any of the subjects of the state in the power of the enemy.

From this time on, the wind of revolution blew stronger and stronger, and no one was above suspicion. The issue as

74 See "An Act for increasing the number of commissioners, for detecting and defeating Conspiracies within this State." 1 Laws of New York, c. XXX, p. 28 (1789). This Act was continued, the 2d Sess., cc. III and X; revived, 3d Sess., cc. VII and LXII; and expired with the War.

75 This Act was entitled, "An Act more effectually to prevent the mischiefs arising from the Influence and Example of Persons of equivocal and suspected Characters in this State." 1 Laws of New York, c. XLVII, pp. 30-31 (1789); 1 Laws of New York 20-21 (1848). This Act was amended, 2d Sess., c. X, February 17, 1779.
to the final disposition of forfeited land had arisen as early as 1776.\textsuperscript{76} James Jay, on October 15, 1778, urged before the General Assembly the enactment of "an act to confiscate and make sale of all real and personal estates of such inhabitants and others who have forfeited the same to the state."\textsuperscript{77} In response to this urging a bill asserting the states' control over all forfeited estates was actually passed on February 26, 1779.\textsuperscript{78} The Council of Revision described the act as repugnant to the "plain and immutable laws of Justice." Flick, in his splendid work on Loyalism in New York During the Revolution, in referring to this incident, declared:

They [the Council of Revision] object to the punishment of persons without trial by jury, and the indictment of absentees for high treason. They complained that there was no provision for the return of property to the innocent, no definite instructions to the commissioners, no provision for debts due citizens of New York by the loyalists, and that even persons who were dead when the act was passed were declared guilty of high treason and a decree of confiscation was issued against their property.\textsuperscript{79}

As showing that no one was free of suspicion, the Act of October 9, 1779,\textsuperscript{80} requiring attorneys, solicitors and counsellors-at-law to certify to their attachment to the liberties and independence of America, was symptomatic. This Act was followed almost immediately—October 15, 1779—by another designed to put a stop to violent and frequent robberies within the state.\textsuperscript{81} Thus, was the fiscal scene set for the enactment of a bill designed along the lines previously proposed by William Jay on October 15, 1778 and passed on

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\item \textsuperscript{76} 5 Ms. Revolutionary Papers 143211.
\item \textsuperscript{77} 2 J. of Assembly 7, 40-46, 58, 64-67, 74-79, 81.
\item \textsuperscript{78} Id. at 83-85, 98.
\item \textsuperscript{79} Flick, Loyalism in New York During the American Revolution 146 (1901).
\item \textsuperscript{80} See "An Act making it necessary for Attornies, Solicitors and Counsellors-at-Law, who have been licensed to plead or practice in any of the Courts of Law, or Equity within the late Colony of New York, to produce Certificates of their Attachment to the Liberties and Independence of America." 1 Laws of New York, c. XII, p. 38 (1789). This Act was amended, 5th Sess., c. XIX; repealed, 9th Sess., c. XXIX.
\item \textsuperscript{81} "An Act more effectually to prevent robberies within this State." 1 Laws of New York, c. XIX, p. 39 (1789). This Act was amended, 3d Sess., c. LXXVII; expired April 10, 1784.
\end{itemize}
February 26, 1779, only to be rejected in the form in which it then stood, because of objections interposed by the New York Council of Revision.

2. Attainder Act of October 22, 1779 and Its Effect

The long impending storm, which had been accumulating since the days of Jacob Leisler, broke in all its fury when, on October 22, 1779, the Legislature passed the famous Attainder Act of October 22, 1779. After reciting in the Preamble that the public safety required that certain "notorious offenders should be immediately hereby convicted and attainted of the offense aforesaid [adhering to the British Crown], in order to work a forfeiture of their respective estates, and vest the same in the people of this state," the act ordered the attainder of fifty-nine individuals of great prominence and property, and the for-

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82 This Act was drawn by John Morin and James Jay. According to Flick the Act, though passed in 1779, was not actually enforced until 1783, and then in plain violation of the Fifth Article of the Treaty of Peace of 1783. Flick, Loyalism in New York During the American Revolution 148 (1901).

83 The Act was entitled, "An Act for the Forfeiture and Sale of the Estates of Persons who have adhered to the Enemies of this State, and for declaring the Sovereignty of the People of this State, in respect to all Property within the same." 1 Laws of New York, c. XXV, pp. 26-38, 39-51 (1789).

84 The Act, attainting persons by name, provided:

"That John Murray, Earl of Dunmore, formerly Governor of the Colony of New-York; William Tryon, Esq.; late Governor of the said Colony; John Watts, Oliver De Lancey, Hugh Wallace, Henry White, John Harris Cruger, William Axtell and Roger Morris, Esquires, late Members of the Council of the said Colony; George Duncan Ludlow, and Thomas Jones, late Justices of the Supreme Court of the said Colony; John Tabor Kempe, late Attorney-General of the said Colony; William Bayard, Robert Bayard, and James De Lancey, now or late of the City of New-York, Esquires; David Matthews, late Mayor of the said City; James Jauncey, George Folliot, Thomas White, William McAdam, Isaac Low, Miles Sherbrook, Alexander Wallace and John Wetherhead, now or late of the said City, Merchants; Charles Inglis, of the said City, Clerk, and Margaret his Wife; Sir John Johnson, late of the County of Tryon, Knight and Baronet; Guy Johnson, Daniel Claus, and John Butler, now or late of the said County, Esquires; and John Joost Herkemer, now or late of the said County, Yeoman; Frederick Philipse, and James De Lancey, now or late of the said County, Gentleman; David Colden, Daniel Kiffam, the Elder, and Gabriel Ludlow, now or late of Queen's County, Esquires; Philip Skeene, now or late of the County of Charlotte, Esq.; & Andrew P. Skeene, Son of the said Philip Skeene, late of Charlotte County; Benjamin Seaman, and Christopher Billop, now or late of the County of Richmond, Esquires; Beverly Robinson, Beverly Robinson, the Younger, and Malcolm Morrison, now or late of the County of Dutchess, Esquires; John Kane, now or late of the said County, Gentleman; Abraham C. Cuyler, now or late
feiture of their real and personal estates, "whether in possession, reversion or remainder, within this state, on the day of the passing of this act."

Section II of the Act banished the said persons from the state and provided that if at any time thereafter any of them were found in the state, they "are hereby adjudged and declared guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy."

Section III provided that other offenders not specifically named, might be indicted by the grand jury at any supreme court of judicature held in the state, or at any court of oyer and terminer and general gaol delivery, or general or quarter sessions of the peace, whenever it appeared on oath of one or more credible witnesses, that any person had been guilty of the offense aforesaid, and that every indictment should charge an offense to have been committed in the county where the indictment was taken, even though the offense were committed elsewhere; nor was it necessary to charge that the person indicted was deceased or in full life, or held real or personal property in the state.

Section IV required notice by publication in the county where the indictment was issued.

Section V provided that for failure to appear and traverse to the sheriff's notice; the persons indicted were to be declared guilty, and should forfeit their estates. However, persons pardoned under an ordinance of the convention of the state, passed May 10, 1777, offering pardon to those who had committed treasonable offenses, if they returned to their of the County of Albany, Esq; Robert Leake, Edward Jessup, and Ebenezer Jessup, now or late of the said County, Gentlemen; and Peter Du Bois, and Thomas H. Barclay, now or late of the County of Ulster, Esquires; Susannah Robinson, Wife to the said Beverly Robinson, and Mary Morris, Wife to the said Roger Morris; John Rapalje, of King's County, Esq; George Muirson, Richard Floyd, and Parker Wickham, of Suffolk County, Esquires; Henry Lloyd, the Elder, late of the State of Massachusetts-Bay, Merchant; and Sir Henry Clinton, Knight, be, and each of them are hereby severally declared to be, Ipso Facto, convicted and attainted of the Offence aforesaid; and that all and singular the Estate, both real and personal, held or claimed by them the said Persons severally and respectively, whether in Possession, Reversion or Remainder, within this State, on the Day of the passing of this Act, shall be, and hereby is declared to be forfeited to and vested in the People of this State."
allegiance, or as a result of any proclamations issued by the Commander-in-Chief of the Army of the United States of America, might plead their pardons to indictments as they could to indictments for high treason. This section further provided that every person who had taken the oath of allegiance before April 4, 1778, before the convention or councils of safety, or before the commissioners appointed for like purpose, might plead such oath in bar of any such indictment.

Section VI provided that all indictments under the Act, taken in other courts, should be returnable into the Supreme Court of the state, and there tried.

Section VII required the several sheriffs to file the several numbers of the newspapers containing the notices published by them respectively.

Section VIII required indictments under the Act to charge generally that the defendants had adhered to the enemies of the state, and that the grand jurors were to deliver into the court the examinations or deposition of the witnesses.

Section IX set out the several matters by the law of England declared to be evidence and overt acts of treason, and what other acts should be deemed evidence and overt acts of adhering to the enemies of the state.

Section X mentioned two classes of persons, those forced to flee the British invasion, and those who deserted their habitations for similar cause, only subsequently to return within the power of the enemy, and provided that such persons, forced to return out of economic necessity, were not to be construed as within the purview of the Act, unless subsequent to their return, they were guilty of some conduct amounting to adherence to the enemy.

Section XI provided that no attainder under the Act was to exempt any persons from attainder and execution for high treason according to the ordinary course of the law.

Section XII declared that conveyances made since July 9, 1776, were presumed to be fraudulent, and the burden of proof of their being otherwise was to lay upon the claimant.
Section XIII stated that estates and interests by executory devise or contingent remainder should, like all other estates, be forfeited upon conviction.

Section XIV provided that property of every description vested on July 9, 1776 in the British Crown should since that day be deemed to be vested in the people of the State of New York, "in whom the sovereignty and seigniory thereof are and were united and vested."

Section XV authorized the Governor to appoint three Commissioners of Forfeiture for the purpose of selling the forfeited estates, within their respective districts, at public sale and to the highest bidder, after eight weeks' notice of each sale in one or more of the newspapers of the state. It further provided that deeds of sale given by the Commissioners should operate as a warranty from the people of the state. Such sales were not to be in excess of five hundred acres, were not to include more than one farm at a time, and were not to be made before October 1, 1780.

Section XVI provided that compensation of the Commissioners should be "as shall hereafter by the legislature, be deemed just and reasonable."

Section XVII authorized the State Treasurer to advance to the Commissioner for each district the sum of two thousand pounds to defray the expense of the business committed to them.

Section XVIII made provision whereby the tenants of lands, the reversion or remainder of which had become forfeited to the state, could enjoy the improvements on the land which they had made, "until the fee simple of said lands shall be sold, they paying their respective rents."

Section XIX provided that tenants could avail themselves of the advantages of the preceding section only if certified by twelve reputable inhabitants that since July 9, 1776, they had demeaned themselves as a friend to the freedom and independence of the United States.

Section XX provided that the Commissioners, upon sale of forfeited property, should give the purchasers the deeds
to the property upon payment to the treasury of the state, of the purchase price, within three months of the date of the sale.

Section XXI authorized the Commissioners to sue the purchasers of the forfeited estates for the nonperformance of their contracts.

Section XXII made null and void any purchase of a forfeited estate by the Commissioners and required an oath on their part to execute their offices to the benefit and advantage of the people of the state.

Section XXIII forbade the sale of forfeited property which at the time was within the power of the enemy.

Section XXIV directed the State Treasurer to keep a record of the names of the persons to whom the forfeited estates belonged, so that in the future, provision might be made for the payment of their debts out of the proceeds of the sale.

Section XXV set out the various forms of the proceedings to be had in pursuance of the Act.

Section XXVI permitted representatives of the persons whose property had been forfeited to be admitted to traverse the indictment, upon filing an affidavit of claim.

The immediate effect of this statute was to free New York and its vicinity of the loyalist landlords, the Bayards, the De Lanceys and the De Peysters, although some of this group with great land interests, such as the Livingstons, Schuylers, Van Cortlandts and Van Rensselaers, had switched to the patriot side early enough in the struggle to save their necks and their estates. The great bulk of the former group remained loyal to the Crown, and it was primarily at their estates that the Confiscation Act of 1779 was directed. It wiped out and ultimately redistributed the large Tory estates in the southern counties, particularly in Long Island, New York and Westchester. By the same token, the great manors in the upper Hudson remained intact.85 The day following the enactment of the Attainder

85 Spaulding, New York in the Critical Period 1783-1789 57, 121 (1932).
Act of October 22, 1779, another statute made provision for the establishment of a temporary government for the southern part of the state, the same to become effective upon evacuation of the enemy, and to continue until changed by the Legislature.86

3. Legislation Between the Years 1779-1783

In view of the apparent implications of the Attainder Act of October 22, 1779, with its sweeping and detailed provisions, the year 1780 might well have produced an avalanche of legislative activity. The contrary appears to be true, possibly because the spirit of revenge and retaliation, usually rampant in the early stages of every revolutionary struggle, had exhausted itself temporarily or found expression in the Act itself.

The earliest statute in the new year came on March 6, 1780. It was an amendment to an earlier Act of June 30, 1778, and merely provided that the lands of persons sent within the enemy's lines under authority of the previous act, were not to be double taxed until further provision. The provisions of the prior bill had obviously been too broad.87 In the meantime it developed that the action taken under the Attainder Act of October 22, 1779, had not been expeditious enough to satisfy popular demand, for on March 10, 1780, we discover a new statute calling for swifter results.88 March 13, 1780, a statute was passed for the purpose of relieving the citizens of Westchester county from the penalty provided for in the Resolution of the Convention of December 27, 1776, and requiring an oath of allegiance.89 A few

86 This Act was entitled, "An Act to provide for the Temporary Government of the Southern Parts of this State, whenever the Enemy shall abandon or be dispossessed of the same, and until the Legislature can be convened." 1 Laws of New York, c. XXVIII, p. 51 (1789). This Act was added to by a Supplementary Act of March 27, 1783, 6th Sess., c. LIV, p. 96.
87 1 Laws of New York, c. XLVI, p. 55 (1789).
88 This Act was entitled, "An Act for the Immediate Sale of Part of the Forfeited Estates." 1 Laws of New York, c. LI, p. 55 (1789). This Act was subsequently amended on October 7, 1780, 1 Laws of New York 39 (1848).
89 The title of this Act read: "An Act for Relieving certain Persons in the County of Westchester, against the Penalty contained in a Resolution of Convention, passed the 27th of December, 1776, requiring the Inhabitants of
months later, on June 15, 1780 another act approved an Act of Congress of the 18th day of March, 1780, concerning the Finances of the United States, which made provision for redeeming Bills of Credit to be emitted by the state in pursuance of the said Act of Congress. This statute provided that certain forfeited property belonging to Sir John Johnson, John Butler, Phillip Skeene, and his son, Andrew P. Skeene, Frederick Phillips, and his son, Frederick Philipse, William Bayard, James De Lancey, Oliver De Lancey, should be mortgaged for the redemption and security of the new bills. This Act was amended on June 30, 1780.

Next came a statute, on July 1, 1780, which provided for the removal of families of persons who had fled inside the enemy's lines, and this legislation was followed by another statute which again sought to expedite the sale of confiscated properties.

By early 1781, difficulty in administering the confiscation laws had developed. It became necessary, on March 15th, to pass a statute to relieve those who had been loyal to the patriot cause, but whose sons had joined the enemy, from the penalties.

March 20, 1781, saw the Governor authorized to exchange any inhabitant of the state as a prisoner of war, for any persons subjects of the state who were prisoners of war. And the person so selected to be exchanged was to be treated

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the said County to take an Oath of Allegiance.” 1 Laws of New York, c. LIX, p. 56 (1789).

90 This statute was entitled, “An Act approving of an Act of Congress of the 18th Day of March, 1786, relative to the Finances of the United States, and making Provision for redeeming the Properties of this State of the Bills of Credit, to be emitted in Pursuance of the Said Act of Congress.” LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 28-30 (1786); 1 Laws of New York, c. LXIV, p. 57 (1789).

91 By “A Supplementary Act to the Act, entitled, An Act approving of the Act of Congress of the 18th Day of March, 1780, relative to the Finances of the United States, and making provision for redeeming the Proportion of the State of the Bills of Credit to be emitted in Pursuance of the said Act of Congress.” 1 Laws of New York, c. LXXII, p. 58 (1789).


93 The Act was entitled, “An Act for the Amendment of the Law directing the Sales of forfeited Lands.” 1 Laws of New York, c. XIII, p. 60 (1789).

94 See “An Act for relieving such Persons as have manifested their attachment to the Cause of the United States, and whose sons have joined the Enemy, from the Penalties of a Law therein mentioned.” 1 Laws of New York, c. XXVIII, p. 62 (1789). The law referred to in the title was 4th Sess., c. XIV.
as a prisoner of war and his real estate forfeited to the state.96

Next came the statute of March 22, 1781, entitled "An Act to accomodate the Inhabitants of the Frontiers with Habitations, and for other Purposes therein mentioned." 96

Six days later, on March 26, 1781, all public officers and electors were required to take an oath, otherwise they were to be disfranchised and held incapable of holding public office, such act to be enforced by the presiding officer at elections.97

Only four days thereafter another statute, designed to provide more effective punishment for disloyalty, was passed on March 30, 1781.98 It provided that any person who, by preaching, maintaining that the King of Great Britain had any authority over New York State or should seduce any inhabitant to renounce allegiance to the State, should, upon being tried and convicted of felony, punishable by three years confinement on board of any ship of war; and on desertion, suffer death. The following day, March 31, 1781, another act to further expedite the sales of forfeited estates, was passed.99

November 13, 1781, the legislature passed an act to remedy the mistakes and defects in the proceedings under the Attainder Act of October 22, 1779. What this statute did was to cure deficiencies in the indictments as to facts, descriptions, and notices by the sheriff, and it also declared

96 This Act was entitled, "An Act to enable the Person administering the Government to exchange Persons applying for that Purpose, as Prisoners of War, for the Subjects of this State, Prisoners of War with the Enemy." 1 Laws of New York, c. XXXIII, p. 65 (1789). This Act was amended, 5th Sess., c. XXXIV. 1 Laws of New York 43 (1842).
96 1 Laws of New York, c. XXXV, p. 66 (1789). This Act was amended, 5th Sess., c. XXXIV.
97 1 Laws of New York, c. XXXVI, p. 66 (1789). The Act was entitled, "An Act for the better securing the Independence of this State, and to that end requiring all public officers and electors within this State, to take the Test Oath therein contained." This Act was repealed, 11th Sess., c. LXXIII, § 2.
98 This Act was entitled, "An Act more effectually to punish adherence to the King of Great Britain, within this State." LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 110-111 (1786). This Act was repealed, 12th Sess., c. XLV, § 2.
99 See "An Act for the further Amendment of the Laws directing the Sales of Forfeited Estates." 1 Laws of New York, c. LI, p. 67 (1789). As to the powers of the Commissioners this Act was repealed, 7th Sess., c. LXIV, § 54.
valid the notices made by Henry I. Wendell, as to whom there was some dispute as to whether he was the lawful sheriff of Albany County.\textsuperscript{100} The next statute, enacted November 20, 1781,\textsuperscript{101} merely amended the Act of October 9, 1779, requiring lawyers to produce certificates of their attachment to the liberties of the United States. This was followed two days later, on November 22, 1781, by an act which gave specific relief to one John Platt, and to the tenants of confiscated estates.\textsuperscript{102}

Another statute\textsuperscript{103} was enacted on April 8, 1782, in order to prevent the continuation of a suit by one Benjamin Smith of Newburg, who was apprehended while attempting to join the enemy, and subsequently threatened the Commissioners for the damages sustained. The statute therefore barred suit against the Commissioners for any alleged damages resulting from the sale of Smith's real or personal property, and declared said sale valid. This was immediately followed by a statute designed to open up the frontier lands which had been confiscated.\textsuperscript{104}

Then came the Act of April 11, 1782, requiring suitors in the courts of the state to take the oath of allegiance, otherwise they were incapable of suing.\textsuperscript{105} April 14, 1782, another statute provided further relief for the tenants of forfeited land.\textsuperscript{106}

Difficulty in the settlement of debts due and owing to persons within and without the enemy's lines led to the pass--

\textsuperscript{100} This Act was entitled, "An Act to remedy the mistakes and defects in the proceedings under the Attainder Act of October 22, 1779." 1 Laws of New York, c. IV, p. 69 (1789); 1 Laws of New York 44 (1842).
\textsuperscript{101} 1 Laws of New York, c. XIII, p. 71 (1789). The Act was entitled, "An Act to amend an Act passed the 19th Day of October, 1779, relative to Attorneys, Solicitors and Counsellors at Law." This Act was repealed, 9th Sess., c. XXIX.
\textsuperscript{102} The Act read: "An Act for the Relief of John Platt, and farther to grant Relief to the Tenants of confiscated Lands." 1 Laws of New York, c. XV, p. 71 (1789).
\textsuperscript{103} This Act was entitled, "An Act to stay certain Proceedings at Law against the late Commissioners of Sequestration, in Ulster County." 1 Laws of New York, c. XXXI, p. 77 (1789).
\textsuperscript{104} This Act read: "An Act to amend an Act, entitled, An Act to accommodate, on April 10, 1782, the inhabitants of the Frontiers with Habitations, and for other Purposes therein mentioned." 1 Laws of New York, c. XXXIV, p. 77 (1789).
\textsuperscript{105} Van Tyne, The Loyalists in the American Revolution 320 (1929).
\textsuperscript{106} 1 Laws of New York, c. XLV, p. 81 (1789).
age, on July 12, 1782, of an act concerning debts due to creditors within the enemy's lines. 107 Section I provided that suits for debts on simple contract, bills single or plural, or any other obligation, security or demand due by or from any person not within the enemy's power or lines to any person sent within the enemy's lines, should be stayed until further provision by the legislature.

Section II, after observing that citizens remaining without the enemy lines were deprived of an opportunity to pay their debts with paper currency, then legal tender, and hence were apt to have their money depreciate in their hands, provided as to suits against those without the power of the enemy, for the appointment of referees to try the issue, with opportunity for the defendant to secure abatement, upon a showing of "any special matter." But execution of any judgment was "not to be levied until the expiration of three years, next after the enemy shall be expelled from, or shall have abandoned the City of New York."

Section III made lawful as payment any certificates or notes signed by any commissioner of loans of the United States according to the value thereof as settled by the continental scale of depreciation.

Section IV prescribed the time when certain debtors of persons with the power of the enemy could cite their creditors before the courts of the state to have a settlement, to wit, any time after the enemy had been expelled from New York City and the legislature had removed its stay of suits. Creditors refusing to appear were barred from recovering their debts.

Section V provided that debts from subjects without the power of the enemy were discharged from interest becoming due since January 1, 1776, to January 1st, following after the conclusion of the war. Debts incurred since January 1, 1776, were not discharged from interest. And no person was permitted the benefit of this section unless he had taken

107 The title of this Act was, "An Act relative to debts due to Persons within the Enemy's Lines." 1 Laws of New York, c. I, p. 82 (1789).
the oath of objuration, and the oath of allegiance to the state, plus a certificate signed by twelve reputable freeholders of the state, certifying attachment to the freedom of the United States of America.

July 12, 1782, saw the passage of a statute to abolish estates-tail and to remedy certain defects in conveyances to joint tenants. The most important effect of this Act was to convert estates formerly held in fee-tail into fee-simple estates. The Act was specifically aimed at the Manor of Philipsburg, one of the most valuable in the Province of New York, and held by Frederick Philipse, for life, with remainder to his son, Frederick, in tail, provision for whose attainder by name had been included in the Act of October 22, 1779, although the son was still a minor. On March 4, 1783, the legislature passed another act to stop the sale of certain estates. This was followed on the same day by a statute designed to aid those whose homes had been destroyed by enemy action to secure lumber for rebuilding.

The Act of March 4, 1783, just mentioned, was apparently the last New York statute dealing with attainder, forfeiture and corruption of blood, and their consequences, prior to the conclusion of the Treaty of Peace, the preliminary articles of which had been signed in Europe on November 30, 1782.

4. The Famous Trespass Act of March 17, 1783

As a result of the preliminary agreement, evacuation of New York City began early in 1783, and Adjutant General De Lancey had, by February, taken the first steps in the direction of restoring property within the British lines to its rightful owners. Almost immediately thereafter, on March 17, 1783, came the now famous Trespass Act which

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109 The Act was entitled, "An Act to prevent the Sale of Certain Estates therein mentioned." 1 Laws of New York, c. XX, p. 92 (1789).
110 See "An Act to enable certain Persons whose Buildings have been destroyed by the Enemy to procure timber for building." 1 Laws of New York, c. XXI, p. 92 (1789).
111 Spaulding, New York in the Critical Period 115 (1932).
112 The Act was entitled, "An Act for granting a more effectual Relief in
authorized any person who had left his home on account of the British invasion and who had not voluntarily placed himself in the enemy's power, to bring trespass against any person who had occupied, injured or destroyed his property. More specifically, the statute provided that if any person purchased, took or received for his or her use, or for the use of any other person, from any noncommissioned officer or private of the Army of the United States of America, any arms, accoutrements, clothing or other munition of war, such person was to forfeit treble the value of the same to be sued for and recovered by any person who will sue for the same, one moiety to the prosecutor, the other to the poor of the district where the conviction shall happen.

On March 18, 1783, there was an act of little consequence, which authorized the sale of two lots of land. Two days later, on March 20, 1783, another statute sought to guard the property and persons of Westchester County from harm. One day later, on March 21, 1783, followed the act suspending prosecutions of those who, during the conflict, had been guilty of acts in support of freedom and independence, but which were not strictly within the letter of the law. On the same day of this Act, another statute prohibited purchases of public property from American soldiers, on peril of forfeiting treble damages. The Act of March 24, 1783, continued the powers of the Commissioners as provided by the earlier statute of April 13, 1782.

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Cases of Certain Trespass.” 1 Laws of New York, c. XXXI, p. 93 (1789). The remedy was extended, 7th Sess., c. LIV, § 2. 
113 See “An Act authorizing the Commissioners of Forfeitures for the Middle District to sell two Lots of Land therein mentioned.” 1 Laws of New York, c. XXXV, p. 94 (1789). 
114 This Act was entitled, “An Act to protect the Persons and Property of the Inhabitants of the County of Westchester, from Injury and Abuse.” 1 Laws of New York, c. XXXVIII, p. 94 (1789). 
115 This Act was entitled, “An Act suspending the Prosecutions therein mentioned.” 1 Laws of New York, c. XL, p. 94 (1789). 
116 See “An Act more effectually to prevent the purchasing or receiving Articles of public Property, from the Soldiery.” 1 Laws of New York, c. XLIII, p. 95 (1789). 
117 This Act was entitled, “An Act to continue the Powers of the Commissioners appointed by an Act entitled, An Act to stay certain Prosecutions, and for the Remission of Certain Fines in the County of Tryon.” 1 Laws of New York, c. XLVI, p. 96 (1789). The statute referred to in the title was passed on April 13, 1782, 5th Sess., c. XXXVIII. The principal Act expired March 1, 1784.
IV. FROM TREATY OF PEACE IN 1783 TO THE ADOPTION OF THE CONSTITUTION IN 1789

A. The Treaty of Peace of 1783

Finally, on September 3, 1783, the Definitive Treaty of Peace and Friendship Between His Brittanic Majesty, and the United States of America, consisting of a Preamble and Ten Articles, was signed.\(^{118}\)

By Article IV of the Treaty it was agreed "That Conditions on either side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."

Article V provided:

That Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of all Estates Rights, and Properties which have been confiscated, belonging to real British Subjects: and also of the Estates, Rights and Properties of Persons resident in Districts in the Possession of His Majesty's Arms, and who have not borne Arms against the said United States: and that Persons of any other Description shall have free Liberty to go to any Part or Parts of any of the Thirteen United States, and therein to remain Twelve Month unmolested in their Endeavours to obtain the Restitution of such of their Estates, Rights, and Properties as may have been confiscated: and that Congress shall earnestly recommend to the several states, a Reconsideration and Revision of Acts or Laws perfectly consistent, not only with Justice and Equity, but with that spirit of Conciliation, which, on the return of the Blessings of Peace, should universally prevail. And that Congress shall also recommend to the several states, that the Estates, Rights, and Properties of such last-mentioned persons shall be restored to them, they refunding to any persons who may now be in Possession the bona fide Price (where any has been given) which such Persons may have paid on purchasing any of the said Lands, Rights, or Properties since the Confiscations.

And it is further agreed, that all Persons who have any interest in confiscated Lands, either by Debts, Marriage Settlements, or

\(^{118}\) Laws of the Legislature of the State of New York in Force Against the Loyalists 157-164 (1786).
otherwise, shall meet with no lawful Impediment in the Prosecution of their just Rights.

Article VI provided:

That there shall be no future Confiscations made, nor any prosecutions commenced against any Person or Persons, for or by Reason of that Part which he or they may have taken in the present War; and that no Person shall, on that Account, suffer any future loss or Damage, either in his Person, Liberty or Property; and that those who may be in confinement on such charges, at the time of the Ratification of the Treaty in America, shall be immediately set at liberty, and the Prosecutions so commenced be discontinued.\textsuperscript{119}

We shall now see how well we carried out these provisions of the Treaty.

The first year thereafter—1784—opened in January with an appeal by Governor Clinton to the legislature, in which he not only opposed any change in the laws affecting loyalists, but also sought to prevent the return to the state of those who had been in exile.\textsuperscript{120} This antagonistic attitude on the part of the Governor, although opposed by men like Duane, Hamilton, Livingston and Schuyler, found expression on April 6, 1784, in an act to promote the immediate sale of confiscated estates.\textsuperscript{121} On April 17, 1784, there was another act\textsuperscript{122} designed to make it possible for creditors to get at the property of the imprisoned debtors.

B. The Absconding Debtors’ Act of May 4, 1784

On May 4, 1784, apparently in view of the prospective permanent removal of the loyalists, the legislature passed a statute giving relief against absconding creditors, and ex-

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\textsuperscript{119} Id. at 161-162.
\textsuperscript{120} SPAULDING, NEW YORK IN THE CRITICAL PERIOD 1783-1789 126 (1932); 1 HAMILTON’S WORKS 550 (Lodge ed. 1885); 1 CLINTON, PUBLIC PAPERS 168 (1899-1914). See also JOURNAL OF THE SENATE 14 (1784).
\textsuperscript{121} This Act was entitled, “An Act for the immediate sale of certain forfeited estates.” 1 Laws of New York, c. XX, p. 110 (1789).
\textsuperscript{122} The title of the Act read: “An Act for the Relief of insolvent Debtors within this State.” 1 Laws of New York, c. XXXIV, p. 131 (1789). This Act was revived and amended, 8th Sess., c. 14; further amended, 10th Sess., c. 67.
tending the remedy afforded under the Trespass Act of March 17, 1783.123

Section I of this Act provided that citizens to whom ten pounds or more were owed by absconding debtors might apply to the supreme court of judicature or the court of common pleas of the county in which the debtors' property was located, the judge of said court could grant relief as directed by "An Act for Relief against Absconding and absent debtors," passed on April 3, 1775.

Section II authorized persons who had suffered injury to their real or personal property by persons now absent from the state but leaving property within the state, to issue process out of any court of record in the state, against such persons, and after such process was returned by the officer to whom it was directed, not found, to file a declaration against the defendant or defendants, issue notice by publication to run in one newspaper for ten weeks, after which, if the defendant failed to appear, to have judgment entered against him, followed by an inquisition and assessment of the plaintiff's demands. Such judgment was not to be secured against any ship or vessel, or the cargoes thereof, nor against any property forfeited to the state.

Section III provided that before suit under the preceding section the plaintiff should notify the person in whose hands they may find the property, and if, on final judgment the property was not found, it should be lawful for the court to bring such persons into court by attachment, examine them on interrogatories, and to commit them without bail or mainprize, pending compliance with rule or order of the court.

Section IV ordered that property acquired by the trustee or sheriff over and above the debt should be paid over to the state treasurer, there to be held subject to further claims of creditors.

123 The official title of this Act read: "An Act to amend an Act, entitled, An Act for Relief Against Absconding and Absent Debtors; and to extend the Remedy of the Act [March 17, 1783] entitled An Act for granting a more effective Relief in Cases of certain Trespasses; and for other purposes therein mentioned." 1 Laws of New York, c. LIV, p. 147 (1789).
Section V gave a like remedy to all citizens to recover damages for injuries done to their property by persons who had left the state.

Section VI repealed the Act of July 12, 1782, which stayed suits relative to debts to persons within the enemy's lines.

Section VII cured certain defects in the aforesaid act, by inserting certain omitted words.

Section VIII extended the benefit of the proviso in the original act to include prisoners.

C. The Act to Distribute the Burdens of the War

On May 6, 1784, came an act \(^{124}\) which was designed to distribute the burdens and expenses of the war borne by the Middle Western and Eastern districts of the state and a part of Westchester county by levying an assessment of £100,000 upon the Southern District, which was occupied for most part by the British forces during the war. Lands vested in the state by forfeiture were not to be taxed. This procedure was said to have been done by consent of those taxed, but the detailed provisions for collection cast great doubt upon its voluntary character.

D. The Attainder Act of May 12, 1784

The anti-loyalist spirit may be said to have reached its peak in the comprehensiveness of the legislation as expressed in the Attainder Act of May 12, 1784.\(^{125}\) The immediate occasion for the act was the urgent necessity, in view of the prospects of peace, of converting into money the goods and

\(^{124}\) The title of the Act read: "An Act for raising £s 100,000 within the several Counties mentioned." 1 Laws of New York, c. LVIII, p. 152 (1789).

\(^{125}\) This Act was entitled, "An Act for the speedy Sale of the confiscated and forfeited Estates within this State, and for other Purposes therein mentioned." 1 LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 127-149 (1786). This same statute is reported as of the date of May 19, 1784, in 1 Laws of New York, c. XIV, p. 159 (1789).
chattels, lands and tenements, which had been vested in the people of the state by attainder and forfeiture.

Section I authorized the Governor to appoint seven Commissioners of Forfeiture, to dispose of all property confiscated and forfeited in their respective districts, to deliver to the purchasers thereof good deed and conveyance, that such deed was to operate as a warranty from the state, against all claims, titles or incumbrances.

Section II provided for sale of said property at either private sale or at public vendue to the highest bidder. It was provided, however, for adjournment of the sale, if the lands were not bid up to their value.

Section III directed the Commissioners to sell the equity of redemption, where forfeited lands were mortgaged, declared assignments by attainted mortgagors to be valid, provided for proof of said assignments before the Chancellor. Mortgages from one convicted or attainted person to another convicted or attainted person were declared void. And where lands forfeited were incumbered by judgment prior to July 9, 1776, sale of the same was subject to said judgment.

Section IV provided the method by which forfeited lands, claimed in consequence of a bargain in writing, but which had not been completed, were to be conveyed. Such claim, however, had to be submitted within six weeks after the passing of the Act.

Section V prescribed the kinds of money receivable in payment for lands sold, the interest due thereon, and made related notes, certificates or securities negotiable.

Section VI set out the Commissioners' and Treasurer's duty not to receive more than five millions of dollars in Bills of Credit emitted by the authority of Congress in payment for forfeited property.

Section VII directed that purchasers in all sales were to pay one-third of purchase price down, and the remainder before June 1, 1785; in failure to pay the remainder, the first payment was to be forfeited and the lands sold again.
Section VIII made it the duty of the Commissioners to transfer the monies so received to the State Treasurer, and enjoined an accounting every six months.

Section IX provided how, for what, and how much of the lands mortgaged for the redemption of certain Bills of Credit, were to be sold.

Section X directed that the amount of appraisement of located and appraised lands was to be delivered in two days after such appraisement to the Commissioners, who were instructed to sell the land within ten days for a higher sum in specie, and repay the owner of the certificates.

Section XI removed the inhibitions of sales of forfeited lands for certain certificates, excepting lands mortgaged for the new-emission of Bills of Credit.

Section XV provided for partition of forfeited lands between the People of the State and others interested in them, and prescribed the methods by which the Commissioners were to adjust the respective interests.

Section XVI directed that in case of delinquency of parties, certain judges were to appoint agents for making the partition, such order of appointment to be recorded, and where so recorded was to be conclusive evidence.

Section XVII provided that previous to any division a quantity of undisputed lands was to be set aside and sold to defray the expenses of partition.

Section XVIII set out the procedure by which the partition should be made more equitable in case of disputes as to the extent of the boundaries.

Section XIX authorized the payment of the Agents, their surveyors, out of the sale of the forfeited property, and required an account of the expenses of partition.

Section XX repealed all prior laws vesting powers in the Commissioners of Sequestration. Their work done, the burden was being taken up by the new Commissioners of Forfeitures.

Section XXI made the Commissioners of Sequestration accountable for the due execution of their respective offices.
Section XXII made the monies arising from the sale of sequestered property the property of the state.

Section XXIII confirmed all prior forfeitures and confiscations, notwithstanding any errors in the proceedings thereon.

Section XXIV decreed that all purchases directly or indirectly made by the Commissioners void, the obvious intent being to eliminate fraud.

Section XXV required an oath by the Commissioners in which they swore to execute the said office for the benefit of the People of the State.

Section XXVI directed the Commissioners to make abstracts of sales, and file the same in the County Clerk’s office every three months.

Section XXVII required the Commissioners to report such sales made and of any difficulties encountered in the execution of their said offices.

Section XXVIII authorized the Commissioners to collect rents due from tenants of forfeited estates, and, if necessary, to prosecute any action of assumpsit for the recovery of said rents.

Section XXIX made lawful bills in Chancery for compelling the discovery of rent, and provided the procedure for abatement of rent, where found to be due.

Section XXX provided that persons possessing forfeited lands to the injury of the state, might be proceeded against under the statutes of forcible entry and disclaimer, and that purchasers of forfeited lands could also sue under the same statutes.

Section XXXI authorized the Attorney General to defend suits against purchasers of forfeited estates, and required him to account to the Creditor once every six months.

Section XXXII empowered the Commissioners by summons to compel the giving of evidence, and for refusal of any person to give evidence, to have said person before any Justice of the Peace, to enforce a forfeiture of ten pounds, the same to be paid into the State Treasury.
Section XXXIII authorized the Commissioners to demand certain copies of extracts of records, maps, from the Keeper of any public or county records of the state, to be paid for by the Treasurer in certificates from the Commissioners.

Section XXXIV authorized the Commissioners of Forfeiture to demise any forfeited lands for a term not exceeding one year.

Section XXXV authorized the Commissioners of Forfeiture for the southern district of New York, in “Consideration for the eminent Services rendered to the United States in the Progress of the late War by Thomas Paine, Esquire, and as a Testimony of the Sense, which the People of this State entertain of his distinguished Merit,” to grant to Thomas Paine and to his Heirs and Assigns forever, in fee simple, a certain farm situated in the Township of New-Rochell, in Westchester County, usually called the farm of Captain Bailey deceased, and later called Devoe’s lower farm, containing about three hundred acres, which became forfeited upon the conviction of Frederick Devoe.

Section XXXVI ordered that a house and lot of ground in the City of New York, formerly the property of James Jauncey, late merchant of said City, who was attainted, to be conveyed by the Commissioners of Forfeiture for the Southern District to John McKesson, Esquire, on account for monies due to him as a Clerk of the Supreme Court, and of the Courts Oyer and Terminer and General Gaol Delivery, and for service in prosecutions in behalf of the People of the State.

Section XXXVII authorized the conveyance of a lot of ground in the City of New York and a farm near the same to Robert Watts and John Watts, Jr., which property had been forfeited to the state upon the attainder of John Watts, the elder.

Section XXXVIII directed the Commissioners to release to Anna White, widow and relict of the late Thomas White, merchant, the several lots of ground called the Vineyard, which became vested in the People of the State upon
the attainder of Thomas White. Such release was to be on the terms provided in Section XXXVII.

Section XXXIX required appraisers of forfeited property to take an oath to faithfully execute the trust reposed in him.

Section XL provided that lands or the equivalent thereto which Johannes Mutts devised to a Free School in Haverstraw, Orange County, but which were seized upon his death as an escheat to the Crown of Great Britain, which lands were seized by John Labor Kempe, Attorney General of the Colony of New York, as an escheat to the Crown of Great Britain, and, subsequently sold by the Commissioners of Forfeiture, as the estate of John Labor Kempe, confiscated by his attainder, should be conveyed to Andries Onderdonck, in trust to the use of a free school. The original lands not being available an amount equal thereto of the estate of William Bayard, confiscated by reason of his attainder, and remaining unsold was applied in lieu thereof.

Section XLI authorized the Commissioners to provide for slaves of persons whose estates had been forfeited.

Section XLII provided for the settlement and discharge of debts due residents of New York from persons convicted and attainted, and whose estates had been forfeited.

Section XLIII authorized an audit of all debts and claims against forfeited estates, and directed the Treasurer to discharge the amount of such claims and debts by giving certificates on interest at six per cent per annum, said certificates to be receivable for certain forfeited and unappropriated lands, and in payment of taxes.

Section XLIV provided that the proceeds of forfeited estates insufficient to satisfy the creditors should be divided among the creditors in proportion to their claims.

Section XLV made such creditors or claimants chargeable to pay reasonable fees to the auditors or judges for their services in auditing.

Section XLVI provided that debtors to persons whose estates were forfeited by conviction or attainder to pay their
debts to the Treasurer of the State within six months after the passing of the instant act, in specie and certain proper securities as provided in the fifth section hereof. Moreover, the Commissioners were authorized to sue for the debts due to persons attainted or convicted.

Section XLVII, after reciting the lease of certain lands by Oliver De Lancey and Peter Dubois to Thomas Clark, subject to an annual rent, and that the right and estate of these men had become vested in the state, by the attainder of Oliver De Lancey and that the said Thomas Clark had petitioned the legislature to be discharged from his covenants to pay the rent, and other tenants had prayed for remission of their rents in arrears, authorized the Commissioners of Forfeitures for the Eastern District to require the said Thomas Clark to account for the moiety of the rents received, and upon release by Thomas Clark of his right to the state, the Commissioner was to accept the same.

Section XLVIII provided that the collection of the moiety due from the tenants occupying such lands should be stayed until the legislature directed otherwise.

Section XLIX prohibited the Commissioners from selling or leasing certain estates.

Section L prescribed the manner and amount to be received by the Commissioners of Forfeitures for their services.

Section LII authorized the State Treasurer to advance monies in certain sums to the Commissioners.

Section LII authorized the Commissioners to give deeds to vest the purchasers of forfeited estates with all the rights and interests of the People of the State.

Section LIII made a majority of the Commissioners for the Western District sufficient for action.

Section LIV repealed all former power granted to the Commissioners under the Act of October 22, 1779.

Section LV added an exception to Section LIV as to locations for forfeited lands which had been received, but not carried into execution.
Section LVI authorized the Commissioners to convey a certain farm of John Kane, since attainted, and held during the war by John H. Slight, to John Marin, who had made a location in said farm and deposited certificates given for the depreciation of the pay of some of the troops of the state.

Section LVII required conveyance of certain lands to Epenetus White, upon payment of the sum agreed between Isaac Loward and himself.

Section LVIII prohibited the Commissioners from receiving locations on certain buildings appropriated to public use, the same having been acquired by the attainder of William Axtel, late a member of the Council of the King of Great Britain for the Colony of New York, and by the attainder of Henry White, also a member of said Council.

The statute, whose provisions we have just outlined in detail, speaks for itself and was obviously designed to liquidate the forfeited estates and the problems related thereto, but, as we shall see, the final chapters of this sordid story were to be written in blood and tears over a period of fifty years.

E. The Act of Disfranchisement of May 12, 1784

On the very same day and in the same year as the prior statute, that is, on May 12, 1784, the legislature passed a statute to preserve the freedom of the state. After a preamble reciting the necessity of preventing persons inimical to the Constitution from holding public office, and noting that some of the citizens of the state entertained sentiments hostile to its independence, Section I described the various categories of persons who were to be adjudged guilty of misprison of felony, with an exception as to insane persons and minors. This section also permitted certain persons to enter and remain in the state in order to defend suits.

126 The Act was entitled, "An Act to preserve the Freedom and Independence of this State, and for other Purposes therein mentioned." 1 Laws of New York, c. LXVI, p. 179 (1789). This statute was repealed, 11th Sess., c. LXXIII, § 2.
Section II described the characters who were disqualified to hold office or places, and to vote in any election within the state. This provision was so broad in scope as to disfranchise thousands of voters who had served the enemy forces or held office under the enemy, as well as those who had left the state during the conflict or joined the British forces. Accordingly, the act became popularly known as the Disfranchisement Act.

Section III permitted certain banished persons to return and remain in the state for a certain time or until further legislative provisions should be made respecting them.\(^{127}\)

Here it should be observed that although the Treaty made the loyalists dispunishable for their allegiance to the Crown, this statute went further and enacted a perpetual banishment, even of those who, under the Act of June 30, 1778, were entitled to return and abide in the state, with a full restoration of their rights. It is not surprising, therefore, to find that this act was vigorously opposed by the New York Council of Revision as being directly repugnant to the Treaty of Peace. The opinion of the Council given on the same day the statute was delivered to the House by Mr. Chief Justice Morris, declared:

First, Because, by the First enacting Clause, the voluntarily remaining with the Fleets and Armies of the King of Great Britain, is made an Offence highly penal; Whereas by the known Laws of all Nations, Persons who remain with their Possessions when the Country is over-run by a conquering Army, are at least excused, if

\(^{127}\) This section naming the persons banished and now permitted to return, read: "III. Be it therefore further enacted by the Authority aforesaid, That Gysbert Marselius, Henry Staats, John Stevenson, Henry Van Dyck, John Van Allen, Henry Van Schaack, David Van Schaack, Harman Pruyun, William Rea, Myndert Viele, William Lupton, Cadwallader Colden, Walter Dubois, Cornelius Lyuster, Andrew Graham, John Thurman, Samuel Fowler, Joseph Mabbit, John Green, Dirck Van Vlect, Jost Garrison, John Booth, Rolef Elting, Solomon Elting, Richard Harrison, James Smith, and Benjamin Lapham, shall be, and every of them are hereby permitted to return to and reside within this State, without any Molestation, and therein to remain until the End of the next Meeting of the Legislature, or until further legislative Provision shall be made in the Premises; any Thing in the Act, entitled, 'An Act more effectually to prevent the Mischiefs arising from the Influence and Example of Persons of equivocal and suspected Characters in this State.' Passed the 30th Day of June, 1778, to the Contrary thereof in any Wise notwithstanding." LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 115 (1786).
not justified; and should our Laws be made to retrospect in a Man-
ner so directly contrary to the received Opinions of all civilized
Nations, and even the known Principles of common Justice, it will
be highly derogatory to the Honor of the State, and fill the Minds of
our fellow citizens with the Apprehension of suffering in future some
heavy Punishment for that Conduct which at present is perfectly
innocent.—Besides, was this Bill free from the Objections which lye
against all retrospective and *ex post facto* Laws, the inconvenience
which must unavoidably follow, should it become a Law of this State,
are fully sufficient to shew that it is totally inconsistent with the pub-
lic Good; for so large a Proportion of the Citizens remained in the
Parts of the Southern District which were possessed by the British
Armies, that in most places it would be difficult, and in many abso-
lutely impossible, to find Men to fill the necessary Offices, even for
conducting Elections, until a New set of Inhabitants could be
procured.

Secondly, Because the Persons within the several Descriptions
of Offences enumerated in the First enacting Clause, cannot be ad-
judged guilty of Misprision of Treason, but on Conviction; and such
Conviction cannot be had but on a Prosecution to be commenced, in
the Course of which it will be necessary to shew, that the Defendant
comes within one or other of the Descriptions in the said Clause.
This must be a Prosecution, by Reason of the Part the Defendant
may have taken during the War, directly in the Face of the Sixth
Article of the Definitive Treaty, by which it is stipulated, “That no
future Prosecutions shall be commenced against any Person or Per-
sons, for, or by Reason of the Part which he or they may have taken
in the War, and that no Person shall on that Account suffer any
future Loss or Damages, either in his Person, Liberty, or Property.”

Thirdly, Because by the Second enacting Clause of the said Bill,
the Inspectors and Superintendents of the Election are constituted a
Court, they being by the said Bill expressly authorized to enquire
into, and determine the several Matters in the First enacting Clause;
and their Judgment is conclusive to disfranchise; This is instituting
a New Court, which does not proceed according to the Courts of the
Common Law, and is expressly against the Forty-first Section of the
Constitution.\(^{128}\)

Notwithstanding these justifiable objections, the bill be-
came the law of the state.

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\(^{128}\) *Laws of the Legislature of the State of New York in Force
Against the Loyalists* 171-173 (1786).
F. Rutgers v. Waddington

1. Significance of Decision

The next development came in the form of the famous case of Rutgers v. Waddington,\textsuperscript{120} which, although decided by a court of inferior jurisdiction, was deemed of great significance throughout the United States as they then existed. The case was famous because of its importance as a test case under the statute; the outcome of which could be used as a precedent by the courts in disposing of a large number of pending and prospective suits involving claims of a similar character; because of its bearing on the relationship of the State to the National Government; because it negatively raised an issue as to the right of judicial review in America; and because, coming just after the Treaty of Peace terminating the war and establishing the independence of the former colonies it was decided under the Act of Trespass of March 17, 1783 \textsuperscript{130} which, in the domestic scene involved the proper relationship of the State to the Nation, and in the international field, a possible conflict between the National Government and the British Crown, as to their respective rights under the treaty, the disposition of which might result in a revival of the conflict with Great Britain.

\textsuperscript{120} See Arguments and Judgments of the Mayor's Court of the City of New York in a cause between Elizabeth Rutgers and Joshua Waddington: New York, printed by Samuel London, 1784. This report was reprinted by Henry B. Dawson, The Case of Elizabeth Rutgers versus Joshua Waddington with an historical introduction (Marreseania, New York, 1866). The case is excellently reported and commented upon in Morris, Select Cases of the Mayor's Court of New York City 1674-1784 302-327 (1935).

For the aspect of the case as applied to judicial review, see Boudin, Government by Judiciary 56-58 (1932); Corwin, The Doctrine of Judicial Review 75 (1914); Cox, Judicial Power and Unconstitutional Legislation 223-234 (1893); Ralston, Study and Report for the American Federation of Labor Upon Judicial Control Over Legislation as to Constitutional Questions (1909); Rudolph, The Case of Rutgers v. Waddington: A Study of Judicial Review (an unpublished manuscript); Thayer, Cases in Evidence 72-73 n. 1 (1892).

\textsuperscript{130} For a discussion of this statute in its original setting at the time of its enactment, see supra p. 32.
2. Statutory and Military Background of the Case

As we have seen, the statute which gave rise to the case and the case itself came into issue at a moment when the struggle between loyalist and anti-loyalist forces was most bitter and violent. The Trespass Act was enacted early in 1783 after the Preliminary Articles of Peace were signed, and while the British, under Adjutant General De Lancey, were making the first efforts to restore property within their lines to the prior owners, which property had been seized during the period of the war. As such, this Act was merely another in a long line of obnoxious legislative acts designed to bait the Tories and destroy their civil and political rights. The Rutgers case came shortly after the Act of May 12, 1784, which was designed to expedite the closing out of all confiscated and forfeited estates. The impetus and spirit of this statute gave encouragement to those in a position to bring suit for trespass upon real or personal property against those in possession of the same during the British occupation and in their absence. The Act of Trespass was particularly objectionable as it came after the close of hostilities, after the Preliminary Treaty of Peace had been signed in Europe on November 30, 1782, and in direct violation of the spirit, as well as the letter, of the Treaty, which provided that the creditors on either side were not to be obstructed in seeking recovery of all bona fide debts;\(^{131}\) that Congress would recommend that the states restore all confiscated estates belonging to real British subjects, as well as estates of persons resident in districts in the possession of His Majesty's Arms, where they had not borne arms against the United States, and that persons of any other description were to be at liberty to go anywhere in the thirteen United States for a period of twelve months, and unmolested in an effort to secure restitution of their confiscated estates;\(^{132}\) and that there should be no further confiscations made, nor any prosecutions against any persons by reason of their activities in the war, that no person should suffer any future

\(^{131}\) Article IV of the Treaty of Peace of 1783.

\(^{132}\) Article V of the Treaty of Peace of 1783.
loss or damage to his person or property, and that persons confined in prison should be released and prosecutions begun should be discontinued.

3. The Pleadings and the Issue

It was against this background that the Rutgers case may be interpreted. The plaintiff, declaring in trespass, and seeking to state a cause of action within the purview of the Trespass Act of March 17, 1783, alleged that by reason of the British invasion she, on September 10, 1776, left her abode in the City of New York, that she did not voluntarily place herself within the power of the enemy, that her brewery and one malt-house had been seized by Joshua Waddington, with force and arms, on August 13, 1778, remaining in possession until March 17, 1783; that on the same day, August 13, 1778, the said defendant also occupied one other brewery and one other malt-house, remaining in possession until March 17, 1783; that she demanded rent for the premises for the period of occupation, that Waddington refused to pay, wherefore she was damaged in the sum of eight thousand pounds.

The defendant pleaded as to the whole trespass, except as to occupation of the plaintiff's brewery and malt-house from September, 1778 to March, 1783, not guilty.

As to the occupancy from September 28, 1778 to April, 1780, the defendant pleaded no action, and by way of justification military orders, to wit, that on September 16, 1776, the British took possession of New York, remaining in possession until April 17, 1783, that by virtue of the authority of the British Commander, on June 10, 1778, the Commissary-General of the said army took possession of the said houses, in accordance with the laws of the nations in time of war, that said Commissary-General permitted the defendant to occupy the premises under a license, as a British merchant, from September 28, 1778, to April 30, 1780.

As to the occupancy from April, 1780, to March 17, 1783, the defendant also pleaded military orders in justification, to wit, that the plaintiff being out of possession, the Commander-in-Chief of the said army, in April, 1780, licensed
him (according to the law of nations) to occupy the premises from April, 1780, until the license was revoked, for a rental of one hundred and fifty pounds per year in quarterly payments, that he entered into possession on May 1, 1780, and continued until March 17, 1783, paying the rent to the person designated by the British Commander to receive it.

In her replication the plaintiff, as to the residue of the trespass, pleaded that the defendant should not, under the terms of the Act of Trespass, be permitted to plead in justification any military order, or command whatsoever of the enemy for such occupancy; that the Commander-in-Chief and Commissary-General, at the time of issuing the license, were British subjects; that since Waddington had admitted the trespass, she was entitled to judgment.

To the further plea of the defendant, to the whole of the trespass aforesaid by him pleaded in bar, the plaintiff demurred.

And the defendant in his part demurred to the plea of the plaintiff last above pleaded.

The issue of law thus presented was whether the plaintiff, suing under the Act of Trespass, which authorized suits to recover property within the enemy lines which had been occupied, injured or destroyed by any person other than the owner, could maintain an action against the defendants, one, for occupation of the plaintiff's property from September 28, 1778, to April, 1780, under order of the British Commissary-General; two, for occupation from April, 1778 to March 17, 1783, under authority of the British Commander-in-Chief, at a rental of one hundred and fifty pounds, in view of Article VI of the Treaty of Peace, by which it was agreed that no future prosecution should be commenced against any person by reason of the part he may have taken during the war.133

133 The court stated the issue in the form of three questions: "1st. Whether the Plaintiff's case is within the letter and intent of the statute on which this action is grounded? 2dly. Whether the laws of nations give the captors, and Defendant under them, rights which controul the operation of the statute and bar the present suit? 3rdly. Whether there is such an amnesty included or implied in the definitive treaty of peace, as virtually or effectually relinquishes or releases the Plaintiff's demand under the said statute?" Morris, Select Cases of the Mayor's Court of New York City 1674-1784 307 (1935).
With a great display of knowledge of both the common and civil law, accompanied by copious citations from such civilians as Grotius, Pufendorf, Wolfius, Burlemaqui and Vattell, and such authorities on the common law as Coke and Plowden, the court made a decision which belied either their knowledge or their intellectual honesty, allowing Mrs. Rutgers to recover for the period of defendant's occupancy between September 28, 1778 and the last day of April, 1780, and disallowing recovery for the period between the last day of April, 1780, and March 17, 1783.

That part of the decision permitting Mrs. Rutgers to recover for the period between September 28, 1778 and the last day of April, 1780, during which time the defendant Waddington was in possession of the property in question by virtue of the authority of the Commander-in-Chief of the British Army, who had ordered the Commissary-General on June 10, 1778, to take possession "for the use of the said army—by the laws, etc., of nations in time of war he might lawfully do," was based on the theory that the license given to Waddington for use in a private business was clearly violative of the orders of the Commander-in-Chief, that possession was to be taken "for use of the said army." Accordingly, the court held that this period of occupancy was within the purview of the statute, and that the order of the Commissary-General, in violation of his superior's order to take possession only "for the use of the said army" was a nullity, and without color of right. The defendant's contention that his occupancy was in relationship to the war, using the analogy of a prize ship which was condemned and sold, was rejected, the court distinguishing between the case of a merchant purchasing a prize lawfully condemned, in which, by international law, the owner has no further interest, and that of a merchant purchasing a license for his own private commercial purposes, and which, therefore, bore no relation to the war. In so holding the court in effect admitted that the Trespass Act was in derogation of Article VI of the Treaty, but avoided its effect by holding that the Commissary-General had exceeded his authority in licensing the brewery to an individual whose activities were not directly related to
the prosecution of the war. As the Treaty forbade prosecutions against any person for reason of the part which he had taken in the war, and the statute authorized suits against any person who may have occupied, injured or destroyed the complainant’s estate, the court, in holding the statute applicable nevertheless, and because the purchase was not related to the war, was guilty of resorting to a most brazen technicality. The most charitable view which may be taken of this aspect of the case is that it was regarded as a necessary concession to the general popularity of widow Rutgers’ cause, and as a necessary foundation to support the remaining part of the decision. On this part of the decision it may be said that the statute was found operative, but not in conflict with the provisions of the Treaty. This was done by a process of statutory construction, hence no problem of judicial review was raised.

The court next raised and disposed of the issue whether the plaintiff was entitled to recover for the same period of occupation from 1778 to 1780 under the rules of international law. On this issue the court reasoned that since the constitution declared the common law to be part of the land, and the *Jus gentium* was a branch of the common law, it was bound by the rules of international law. Accordingly, the usages and customs of nations were not to be abrogated by the authority of a single state. This brought the court to the defendant’s contention that the war was of such a nature and the capture of New York City such a conquest as “to transfer, under the idea of an usufruct, the rents and issues of houses and lands to the British Commander, during his occupancy of the city.” After long discussion the court concluded that the capture and occupancy of the City of New York was of such a character as to vest the British Commander with the disposal of the rents and profits of real property, making a distinction, however, between the rents and profits, which had been *bona fide* and collected under authority of the British Commander according to the law of nations, and those not collected under authority of the British Commander. Accordingly, the defendant was said not to be helped, as the act of the Commissary-General, in
disposing of the rights in question, for purposes other than for the “use of the said army,” was guilty of an act of usurpa-
tion, and not within the scope of the rights of the British
Commander as the effect of a temporary conquest.

In holding that the plaintiff could not recover for the
period of occupation from the last day of April, 1780 to
March 17, 1783, the court said that the issue was whether
the amnesty implied in the Treaty of Peace was such as to
relinquish or release the plaintiff’s demand. The defendant,
contended that the Treaty imported an oblivion of damages
and injuries in the war, invoking the shades of Grotius, Bar-
beyrac, Barburaqui and Burlemaqui and Vattel. Remark-
ing that the amnesty extended only to “things done in the
war,” noting a distinction between the authority and oper-
ation of the Treaty, the court held its authority could not be
altered by any state, but that its operation was subject to
inquiry and decision. Accordingly, the court held that the
amnesty relied upon by the defendant was an implied one,
thus eliminating any necessity of dealing with “the intrinsic
sense of the treaty and the rules for its interpretation.”

Passing from this, the court then considered whether it
ought to be governed by the statute where it clearly mili-
tated against the law of nations. After observing that the
persons described as subject to be sued by the statute were
described in general terms, extending to all who damaged the
property of the exiles, within the power of the enemy, pointed
out that that being so, the statute could not be construed as
extending to all cases, but must admit of some exceptions
as, for example, the situation where American prisoners
were quartered in the houses of the exiles, yet were included
within the general description by the statute. Therefore,
concluded the court, it was subject to reasonable interpreta-
tion. Rejecting the attempt of the plaintiff to have the

\[134\] The court declared: “But when a law is expressed in general words,
and some collateral matter, which happens to arise from those general words
is unreasonable, there the Judges are in decency to conclude, that the conse-
quences were not foreseen by the Legislature; and therefore they are at lib-
erty to expound the statute by equity and only quod hoc to disregard it.”
MORRIS, SELECT CASES OF THE MAYOR’S COURT OF NEW YORK CITY 1674-1784
323 (1935).
court treat the objections to the statute as advanced by the Council of Revision as binding as a decision, as a violation of the doctrine of separation of powers, the court concluded that while the statute was in some parts inconsistent with the Treaty, it was not the intention of the legislature to repeal the law of nations, hence that law was exempted from the operation of the statute.  

This being true, as the defendant's occupation during the period between the last day of April, 1780 to March 17, 1783, constituted acts done in relation to war, which according to the law of nations, are buried in oblivion by a definitive treaty, the plaintiff could not recover.

4. Reception of Decision

This decision, allowing recovery for one period and denying it for another, on the technical ground that the acts in one period were related to war, while those in the other were not, was an obvious straddle, for, clearly, the statute, although general in its description as to the persons included, was sufficiently specific to include both periods of occupation, and thus subject the defendant to liability in both instances, as it extended to all who had occupied, injured or destroyed the real or personal property of the exiles, within the power of the enemy. Doubtless the straddle was due to public pressure, and in an effort to recognize the public clamor in favor of widow Rutgers on one side, and yet not appear to override the Treaty on the other, the court left both the parties, the public and the law in a muddled state.

It is not surprising, therefore, to find that the decision was received with dismay by the anti-loyalists, and resulted in a resolve of the legislature which characterized the decision as "subversive of law and order."  

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135 COXE, JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION 223, 229 (1893), in reference to this issue, quotes a statement from Chief Justice Marshall's opinion in Murray v. The Charming Betsey, 2 Cranch 64, 118, 2 L. ed. 208, 226 (U. S. 1804). "An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."

136 See "An Address to the People of the State," issued by the New York General Assembly on November 4, 1784, which read:

"Resolved, That the judgment, aforesaid, is, in its tendency, subversive of all law and good order and leads directly to anarchy and confusion, because
court, Hamilton wrote his now famous Phocian Letters, which were replied to by Isaac Ledyard under the pen name of "Mentor." More temperate citizens, such as Washington, took the view that the decision represented a reasonable compromise. In a letter dated April 10, 1785, to Duane, who presided over the trial, he declared: "Reason seems very much in favor of the opinion of the court, and my judgment yields a hearty assent to it." 137

5. The Decision as Involving Judicial Review

There has long been a diversity of opinion as to whether Rutgers v. Waddington may legitimately be cited as an example of judicial review prior to the adoption of the Constitution. Coxe, in his famous essay in Judicial Powers and Unconstitutional Legislation, 139 said that the court "did not pass upon the nature of the conflict between the state statutes and the state constitution," but felt compelled to support the specific legislation in "... terms fully securing the supremacy of the legislature and the subordination of the judiciary. If its exposition of the law was correct, it was certainly a necessary consequence that no court could hold any statute void, because judicially ascertained by it to be unconstitutional." 140 The modest claim on behalf of the judiciary was merely to a judicial discretion within the limits of Blackstone's tenth rule for construing statutes. 141 Thus, observes Coxe, Blackstone's tenth rule for the construction of statutes in England under an unwritten constitution was adopted by a New York court under a written constitution. Corwin, writing in the Michigan Law Review, 142 and in his Doctrine of Judicial Review,

if a court instituted for the benefit and government of a corporation may take upon themselves to dispose of it and act in direct violation of a plain and known law of the state all other courts, either superior or inferior, may do the like and therewith will end all our dear-bought rights and legislature becomes useless." Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. L. Rev. 147, 168 (1908).

137 10 Ford, Writings of Washington 448-450 (1905).
138 See note 129 supra.
140 Ibid.
141 Id. at 230.
142 See note 129 supra.
regards the decision as “a marked triumph for the notion of legislative supremacy,” thus in effect sustaining the earlier view of Coxe. Boudin, in his work on Government by Judiciary confirms the view of Coxe and Corwin. This seems to have been the view of Hamilton also. Professor Morris in his distinguished contribution to legal history in Select Cases of the Mayor’s Court of New York City, seems to imply that the doctrine of judicial review was impliedly involved. If the court had rejected Blackstone’s doctrine of the supremacy of the legislature, there might indeed have arisen a conflict between the judicial and legislative branches of the state government. If it refused to give recognition to the Treaty, it might have precipitated a conflict between the state and the nation, which would have been unfortunate. As actually decided there seems little doubt that Hamilton’s, Coxe’s and Corwin’s views that no problem of judicial review was involved, is correct. It is submitted that if the issues had been squarely faced there would at least have been a conflict between the statute and the Treaty, which might have precipitated a struggle for supremacy as between state and nation, as it was undeniably the intention of the New York Legislature to subject to liability those persons “who had occupied, injured or destroyed the real or personal estates of those exiles, within the power of the enemy.” Moreover, while construction may have been justified in excluding certain persons, as for example, an American prisoner of war, there was little justification on principle in excepting the defendant from liability as to one period of occupation and not the other. In retrospect it seems perhaps that the straddle on principle was the best solution, as, after a short but vigorous outcry on the part of some, the issue soon died away.

143 Ibid.
144 Ibid.
145 Ibid.
146 Ibid.
5. Legislation Subsequent to the Rutgers Case

1. Miscellaneous Problems Before the Legislature

The first statute on our topic after the Rutgers case was passed on November 24, 1784. It said that doubts had arisen as to whether the Act of July 12, 1782, which it purported to amend, had extended to executors and administrators of both debtors and creditors, especially those who had died since the passing of the Act. Accordingly, the instant act provided for such extension and the procedure incident thereto, as to claims of legatees not having been within the power of the enemy during the war, were excepted. Finally, the original act was to be extended to include assignees or trustees of insolvent debtors' estates, so far as concerned with monies due to persons who remained within the British lines in New York.

The next, Act of November 24, 1784, was an amendment of the Act of July 12, 1782, and authorized debtors confined in the prisons of the state to petition a court and exhibit an account of their estates, advertise the same, so as to permit creditors to appear, and accept an assignment for their benefit, after which the debtor could be discharged.

On November 26, 1784, the Act of May 6, 1784, directing the raising of a £100,000 tax in the Southern District of the State, was amended because it appeared that certain localities had not paid their share. Accordingly, the amendment prescribed the ways and means by which their arrears could be collected, and required the sheriffs to give security for the due execution of their offices. It also discharged

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147 This Act was entitled, "An Act to explain and amend the Act entitled 'An Act relative to Debts due to Persons within the Enemy's Lines.'" 1 Laws of New York, c. XII, p. 186 (1789). This statute was an amendment to the Act of April 17, 1784. This Act in turn, was amended, 10th Sess., c. 94.

148 The title of the Act read: "An Act for the Relief of Insolvent Debtors Within this State." LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 99 (1786). This was an amendment of the Act of July 12, 1782.

149 See "An Act to compel the Payment of the Arrears of Taxes for enforcing the Payment of Fines and Amerciaments, obliging Sheriffs to give Security for the due Execution of their Offices, and for other Purposes." LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 151-153 (1786).
certain persons improperly taxed upon proof that they were not within the description of persons liable to be taxed by the preceding acts.

Next in order came, on November 27, 1784, an act which obviously was designed to wipe out the equities of redemption vested in the State of New York as a result of the forfeiture of mortgaged property, by permitting proof before some judge as to the payments made on such mortgages, upon the basis of which a certificate as to the arrears issued, which upon filing with the clerk of the county, operated as a bar to all such mortgages, excepting mortgages discharged prior to May 12, 1784. The author of the pamphlet on Laws of the Legislature of the State of New York in Force Against the Loyalists bitterly observes that by this law, in the face of the Treaty, the personal funds of the loyalists were wasted, whether attainted or not attainted before the Peace, thus throwing them entirely upon the bounty of Great Britain to save them from total ruin.

The next statute, passed on November 29, 1784, is exceedingly interesting as presenting one of the earliest statutory evidences that the tide which had been running against the loyalists was beginning to subside. Section X of this Act first authorized the Commissioners of Forfeitures in the Western District to set apart a certain house and lot for a school. Section XI required the Commissioners to account for the personal estates by them seized or sold, on peril of forfeiting the penal sum of five hundred pounds for failure so to do. Section XXVII capped the climax by making it lawful for any person to prosecute the said commissioners for any act in connection with the trust reposed in them.

150 The title of this Act read: "An Act to enable the Clerks of the respective Cities and Counties within this State, to cancel the Records of certain Mortgages." 1 Laws of New York, c. XVII, p. 186 (1789).
151 (London, 1786) p. 104.
152 This statute was entitled, "An Act for the Payment of Certain Contingent Expenses and for other Purposes therein mentioned." 1 Laws of New York, c. XVIII, p. 188 (1789).
With the new year, there was enacted a new statute, on March 14, 1785, which indemnified the Commissioners of Sequestration for leases made by them, provided that no suits could be maintained against them, extended the same safeguards to the Commissioners of Forfeitures, and authorized the latter to lease certain lands for one year.

This statute was followed by the Act of March 15, 1785, which, while treaty negotiations were in progress, sought to levy duties on the goods, wares and merchandise which came in on British ships. This statute was objected to by the New York Council of Revision, because every attempt to regulate trade by one state, without the agreement of the others, injured the state, because it was thought it would obstruct pending peace negotiations, and because partial restraints upon the trade of England might produce partial restraints upon the trade of the state, which might have a ruinous effect before a remedy could be applied. Some fifteen days later, on March 31, 1785, another statute extended to nine months the time within which future sales of confiscated property could be paid for, after a down payment of one-third.

By a statute enacted on April 4, 1785, persons holding leasehold estates at the time of the British invasion, which they were forced to abandon, were exonerated and discharged of all arrearages of rents, incurred while out of possession, and the act was made pleadable in bar of all suits to recover such arrearages. Finally, the lessors were

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153 See "An Act for the Indemnification of the Commissioners of Sequestration, and the Commissioners of Forfeitures, and the Lessees under them, and for other Purposes therein mentioned." 1 Laws of New York, c. XXXIII, p. 196 (1789).
154 The title of the Act read: "An Act to explain an Act entitled, 'An Act imposing Duties on Certain Goods, Wares and Merchandise imported into this State.'" 1 Laws of New York, c. XXXIV, p. 196 (1789). The Act hereby amended was dated November 18, 1784. The instant Act was repealed, 10th Sess., c. 81, § 38.
155 See "An Act for giving relief to Lessees deprived of the Benefit of their Leases during the late War." 1 Laws of New York, c. LIX, p. 215 (1789).
given a remedy against those who occupied the premises during the period in question.

The next act sought to facilitate the settlement of the unappropriated lands within the state, declaring that lands purchased from Indians prior to October 14, 1775, should not be allowable, that persons claiming such lands should have their claims determined in a given day, such claims to be heard and determined by the commissioners, and that persons permitted to settle on such lands should be required to take an oath of allegiance as prescribed by the Act of March 26, 1781. This statute reveals the extreme severity of the legislature against the loyalists, even though they had not been attainted. Many had made Indian purchases prior to the war, hence this statute flew directly in the face of the Treaty, making the equitable titles null and void and grantable only to citizens of the state.

The next statute provided for the specific relief of Thomas Clarke and was dated April 20, 1785. It provided that an estate which had formerly been owned by Oliver De Lancey and Peter Du Bois, had vested in the state by their attainder, but which had been conveyed to Thomas Clarke in fee, Clarke in turn subleasing said lands, subject, however, to a mortgage given by Du Bois which might be transferred, one-half to the state and the other one-half to the trustees of Du Bois' creditors, for the settlement of all outstanding claims. The trustees were to account to the Treasurer for any surplus and Thomas Clarke was to be compensated for his aid in promoting the settlement of said lands.

The Act of April 20, 1785 was an amendment to the Act of May 6, 1784, and authorized the relief from the tax

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158 The Act was entitled, "An Act to facilitate the Settlement of the waste and unappropriated Lands within this State, and for repealing the Act therein mentioned." 1 Laws of New York, c. LXVI, p. 218 (1789). The statute repealed was passed, 7th Sess., c. 60. The principal Act was repealed, 9th Sess., c. 67, § 36.

159 1 Laws of New York, c. XXXVI, p. 66 (1789).

160 See "An Act for the Relief of Thomas Clarke, and for other Purposes therein mentioned." 1 Laws of New York, c. LXXIII, p. 220 (1789). In this connection, see also 7th Sess., c. 64, §§ 47, 48.

161 This Act was entitled, "An Act for the Relief of Persons Improperly taxed." 1 Laws of New York, c. LXXVI, p. 222 (1789). This Act was repealed as to New York City, 10th Sess., c. 86, § 6.
imposed by the original act, as to any person making proof that he was improperly included within the prescribed list of taxable persons. The original act levied taxes on those citizens of the Southern District of the State occupied by the British during the war in an effort to apportion the burden which other citizens of the state had borne in the same period.

2. Agitation Against Loyalists Show Signs of Abatement

A survey of the activities of the legislature during 1785 shows that while the agitation against the loyalists showed signs of abatement, sufficient opposition remained to compel the legislature to reject bills seeking permission for exiles to return to the state, and it refused to repeal the Act of October 9, 1779, suspending from practice all loyalist lawyers. Van Schaack felt that the reluctance of the legislature to act was partly attributable to a desire to bar competition by loyalist lawyers, of which group he was one of the most distinguished.

The legislature of 1786 reflected a more conciliatory attitude, early sustaining Lansings' motion to repeal the Act of October 9, 1779, which disbarred loyalist lawyers.162

In the same session the assembly voted to repeal the Disfranchisement Act of May 12, 1784, with only sixteen dissenting votes.163 Actually, however, the Disfranchisement Act was not repealed until March 12, 1788.164

The Act of April 26, 1786 finally repealed the Act of October 9, 1779, which had suspended loyalist lawyers from practice.

Then came, on May 1, 1786, an act amending the Act of May 12, 1784, following upon the close of the war. It

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162 See Spaulding, New York in the Critical Period 1783-1787 130 (1932).
163 Id. at 130.
165 This Act was entitled, "An Act to repeal Certain Acts respecting Attorneys, Solicitors and Counsellors at Law; and also Part of the Act, entitled, An Act for the Regulation of Sales by Public Auction." 1 Laws of New York, c. XXIX, p. 280 (1789).
166 See "An Act to further amend an Act, entitled, An Act for the speedy sale of the confiscated and forfeited Estates within this State, and for other Purposes therein mentioned." 1 Laws of New York, c. LVIII, p. 222 (1789).
provided, consistent with the new conciliatory spirit, that upon discovery of lands vested in the state, by attainder or conviction, such lands should be located in trust for the widow, if her attainted husband was dead, and for the division of said estate by descent or distribution. However, if the wife was still the wife of the person attainted, then the property was to be divided as if she were dead. The statute also provided machinery for the appraisal, sale of and payment for such estates.

Section XXIV of the Act clarified the title of property held by Ann White, widow of Thomas White of New York City, deceased, and an attainted person.

Section XXIX provided that Negro slaves of persons attainted should be manumitted and the elder ones cared for by the state.

Section XXXI postponed settlement of the sundry mortgages in the forfeited estates of Phillip S. Keene and Andrew S. Keene, as the records of Washington County, where the lands were located, had been carried to Canada and had not been recovered.

As a result of these developments, the year 1787 found Hamilton in the legislature with a program for removal of all discriminatory legislation against the loyalists. The first development came on January 27, 1787, in the negative form of a defeat of a bill which sought to bar all loyalists from their seats in the legislature.\textsuperscript{167}

The act\textsuperscript{168} passed February 3, 1787, has a bearing on our topic, as, in addition to eliminating some of the harshest features of outlawry, it limited forfeiture to the plaintiff. On February 5, 1787, another act\textsuperscript{169} merely authorized the Commissioners to hold a public sale of forfeited estates at the coffee-house in New York City, after proper advertisement.

\textsuperscript{167} SpaULDING, NEW YORK IN THE CRITICAL PERIOD 1783-1789 131 (1932).
\textsuperscript{168} See "An Act declaring what Process may be issued in certain personal Actions for regulating Outlawry." 2 Laws of New York, c. IX, p. 13 (1789).
\textsuperscript{169} This Act was entitled, "An Act for the further Direction of the Commissioners for the Eastern District." 2 Laws of New York, c. XI, p. 20 (1789).
The “Act for Regulating Elections,” passed February 13, 1787, still disqualified from public office persons who took up arms with the British troops, but repealed the Act of March 26, 1781, requiring public officers to take the test oath therein provided.

On February 16, 1787, the state was given a new and much less stringent treason act. Attainder, based upon aid or comfort, given to the enemies of the state or the United States, was still to be regarded as treason. This seems queer in view of the Constitutional provision of 1777 abolishing attainders in New York, except as to those attainted incident to the pending war.

On March 22, 1787, the legislature passed a statute designed to ease the burden of paying certain arrears of taxes as to those who were in exile during the war.

April 4, 1787, saw that part of the original Act of Trespass of March 17, 1783, which made actions thereunder transitory, and prohibited pleading of military orders in justification of trespasses, repealed.

3. Repeal of Law Inconsistent with Treaty of Peace

On April 13, 1787, matters had proceeded to a point, where in response to an appeal from the President of Congress to the States asking a repeal of all laws inconsistent with the Treaty, Samuel Jones proposed, “An Act to repeal all the Laws of this State, inconsistent with the Treaty of Peace between the United States and the King of Great Britain.” According to Spaulding, this bill passed the assembly five days later, but did not become law until February 22, 1788.

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170 2 Laws of New York, c. XV, p. 27 (1789).
172 The Act read: “An Act for the Relief of Persons who were in Exile during the late War, in Respect to the Payment of certain Arrears of Taxes.” 2 Laws of New York, c. LXIV, p. 127 (1789).
174 SPAULDING, NEW YORK IN THE CRITICAL PERIOD 1783-1789 119 (1932).
An act passed April 20, 1787, amended the Act of July 12, 1782, discharging the debts of all persons described in the Fifth Section of the original act, which accrued since January 1, 1776, and repealed the said Act as amended where in any wise repugnant to the instant Act.

The Act of April 21, 1787 authorized the State Treasurer to reimburse those persons who had paid monies unto the Treasury in consequence of a resolution of the Committee of Safety on March 1, 1777, but no certificate for the amount due was to be given to any person whose estate had been forfeited.

The conciliatory spirit of 1787 continued into 1788, laws as to the debts of the loyalists being eased, while a proposal to abolish the oath of allegiance was lost by only nine votes.

By the Act of February 21, 1788, the privilege or benefit of clergy theretofore allowed in criminal cases, was abolished.

Not until February 22, 1788, did the legislature, in response to Congressional suggestion, finally consent to repeal the state laws in conflict with the Treaty. The legislation was entitled, "An Act to repeal all the Laws of this State, inconsistent with the Treaty of Peace between the United States of America and the King of Great Britain." Section 1 provided:

That such of the Acts and Parts of Acts of the Legislature of this State, as are repugnant to the Treaty of Peace between the United States and his Britannic Majesty, or any Article thereof,

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175 See "An Act to amend an Act, entitled, An Act relative to Debts due to Persons within the Enemy's Lines; and another Act, entitled, An Act to explain and amend the Act, entitled, An Act relative to Debts due to Persons within the Enemy's Lines, passed the 12th of July, 1782." 2 Laws of New York, c. XCIV, p. 166 (1789).

176 See "An Act for the Relief of Persons who paid Money into the Treasury of this state, in Consequence of a Resolution of the Committee of Safety, of the first day of March, One Thousand Seven Hundred and Seventy-seven, and for other Purposes mentioned therein." 2 Laws of New York, c. CII, p. 171 (1789).

177 SPAULDING, NEW YORK IN THE CRITICAL PERIOD 1783-1789 131 (1932).

178 The title of this Act read: "An Act for punishing Treasons and Felonies; and for better regulating the Proceedings in Cases of Felony." 2 Laws of New York, c. XXXVII, p. 242 (1789).

179 2 Laws of New York, c. XLI, p. 256 (1789).
shall be, and hereby are repealed. *And further,* That the Court of Law and Equity, within this State, be, and they hereby are directed and required, in all Causes and Questions cognizable by them respectively, and arising from or touching the said Treaty, to decide and adjudge according to the Tenor, true Intent and Meaning of the same; any Thing in the said Acts, or Parts of Acts, to the Contrary thereof in any wise notwithstanding.

Thus was brought to an end the period between the date of the Treaty of 1783 and 1788—a period of five years in which the loyalists had been persecuted by a series of vindictive confiscation acts clearly repugnant to the Treaty, and designed to delay reconstruction and the growth of unity. It has been estimated by Dr. Flick that by reason of the Disfranchising Act of May 12, 1784, enacted in this period, two-thirds of the inhabitants of Kings, New York and Richmond, all in the Borough of Westchester, nine-tenths of those in Suffolk, and one-fifth of those in Suffolk sacrificed their ballots as a result of loyalist tendencies. The same authority estimated that fifteen thousand persons were forced to flee to Canada and to Nova Scotia.\(^\text{180}\)

By an act\(^\text{181}\) of March 21, 1788, it was provided that the Office of Commissioners of Forfeitures should cease after September 1, 1788, his duties thereafter to be performed by the Surveyor-General, who was given authority to convey or dispose of remaining forfeited estates. All papers and records were to be turned over to the Surveyor-General. The Act also provided that thereafter only securities signed by the Treasurer were to be received in payment for forfeited estates; that persons owing debts to attainted persons

\(^{180}\) See Flick, Loyalty in New York During the American Revolution 161-182 (1901). Professor Flick declares (p. 171): "The New York loyalists for the most part went to one of three places—England, Nova Scotia or Canada. They began to cross the Atlantic in 1775, and continued to do so for a decade. Those who took this course were persons in high civil office, like John Tabor Kempe, Judge Thomas Jones, William Axtell, Andrew Elliot and Abraham C. Cuyler; military officers of advanced rank, like Oliver DeLancey, John Harris Cruger and Archibald Hamilton; men of wealth, like James DeLancey and James Jauncey; Anglican clergymen, like Dr. Myles Cooper and Dr. Thomas B. Chandler; and professional men, like Peter Van Schaeck. They represented the aristocracy, and before and after the treaty of peace went to England to secure safety and compensation."

\(^{181}\) This Act was entitled, "An Act relating to the forfeited Estates." 2 Laws of New York, c. XC, p. 372 (1789).
could pay the same into the Treasury, but such privilege was not to extend to obligations, where one or more of the obligors resided in Great Britain, or where the amount involved exceeded fifty pounds. Finally the Act made provision for relieving persons who had been joint partners and creditors with attainted or convicted persons.

Thus, New York was among the last of the states to dismantle the machinery of attainder, confiscation, forfeiture and corruption of blood.

On the same day another statute \(^{182}\) authorized the Commissioners of Forfeitures for the Western District of the State to convey lands mentioned therein to those then in possession.

It would seem that the enactment of the instant statute and the abolition of the Office of Forfeitures, in which New York was among the latest of the Colonies, would have brought to an end the forces which were set in motion when the first confiscation statute was enacted in 1779. But, many long years were yet to pass before the forces so enthusiastically unloosened at the beginning of the struggle had spent their destructive strength.

4. Summary of Results of Statutory Enactments

With the abolition of the Office of Commissioner of Forfeitures on February 23, 1788, the statutory phase of our story is substantially complete. Beginning in 1775 and running until 1788, it covered a period of thirteen years, in which the land was rent with civil strife, and in which attainder for treason, confiscation of property, and the separation of men, women and children, from their homes and occupations, and from each other, was the order of the day. In the course of this debacle, it is estimated by Flick \(^{183}\) that at least 35,000 loyalists found new homes in Nova Scotia. At least 30,000 of these came from New York, and it is be-

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\(^{182}\) See "An Act to empower the Commissioners of Forfeitures for the Western District of this State, to convey the lands therein mentioned to the present Possessors." 2 Laws of New York, c. XCI, p. 375 (1789).

\(^{183}\) See Flick, LOYALISM IN NEW YORK DURING THE AMERICAN REVOLUTION 161-182 (1901).
lieved that some 20,000 of these were bona fide inhabitants of the state. It is also estimated by Flick that 20,000 loyalists settled in Upper Canada, and that at least 15,000 of these were inhabitants of New York. Of approximately 60,000 persons who fled from or through New York, some 35,000 had been former residents of the Province of New York.

On the property side, Flick\textsuperscript{184} estimated that the loyalists lost some $40,000,000 in value, but as set forth in their claims, before the English Commission on Losses and Services of Loyalists, the amount was reduced to $10,000,000. Awards of the Commission ranged from a low of $50 to a high of $221,000, the latter amount being allowed to Sir John Johnson.

These are at best only rough estimates as to the loss to the state in resources of property and population. What the losses were to the state in terms of spiritual and cultural value, will never be known, but any impartial investigator of this episode in our history must conclude that the loss was tremendous, to say nothing of the animosities that were engendered among those who fled to Canada, where repercussions of the hatreds there developed can still be heard among the descendants of those loyalists who were once citizens of the State of New York.

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[To be concluded in Vol. XXIII, No. 2.]

\textsuperscript{184} Id. at 183-214, together with the Appendix, listing confiscated property in New York as far as available records permit, pp. 215-272.

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