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Version Post print/accepted manuscript

Citation (published version) Angela Fernandez, "The Ancient and Honorable Court of Dover: Serious Mock, Solemn Foolery, and Sporting Wit in Nineteenth-Century New York State" (2012) 7 Australian & New Zealand Law and History E-Journal 194.

Publisher's Statement Angela Fernandez, "The Ancient and Honorable Court of Dover: Serious Mock, Solemn Foolery, and Sporting Wit in Nineteenth-Century New York State" (2012) 7 Australian & New Zealand Law and History E-Journal 194.
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The Ancient and Honorable Court of Dover: Mock Trials, Fraternal Orders, and Solemn Foolery in Nineteenth-Century New York State

Angela Fernandez*

ABSTRACT

This article is about a fraternal order operating in the first half of the Nineteenth Century in New York called “The Ancient and Honorable Court of Dover.” This group organized a mock trial, probably in 1834, to prosecute one of its members. A prosecutor was appointed and the President of the group gave a long speech. At issue was whether or not non-members could participate in the trial. After a description of these records and an account of their discovery, this article explains who the individuals involved in the trial were, Jacksonian politicians and lawyers with connections to the Custom House and the Tammany Society in New York City. It then describes what a “Court of Dover” was, asks about what the offence here was, and explores the connections between this group and the most famous “Ancient and Honorable” society, the Freemasons. It argues that the records of a group like this should be understood as a kind of “legal literature” that is best understood in relationship to the notion of “solemn foolery,” a phrase that has been used in connection to the legally-themed theatricals at the Inns of Court.

* Associate Professor, Faculty of Law, University of Toronto. In addition to the individuals named in the footnotes below, I wish to thank colleagues who responded to a presentation of this paper at a Faculty Workshop on December 6, 2010 at the Faculty of Law, University of Toronto. In particular, I am grateful to Simon Stern for his newspaper database advice, which helped immensely at key moments when the research process had otherwise stalled, and Markus Dubber for many conversations about both the details and the big ideas. I am grateful also to Yasmin Dawood, Karen Knop, and Mayo Moran for their feedback and encouragement. Also thank you to my husband, Matias Milet, for really getting into the spirit of the hunt this time.

INTRODUCTION

The past is full of many things that seem bizarre to modern eyes. This is certainly true of the behavior of elite American men in the Nineteenth Century and their participation in a wide variety of social, political, and fraternal orders. Some of the more famous of these groups like the Freemasons are both well-known and well-studied while at the same time paradoxically maintaining the status of a secret society. However, there were probably hundreds of lesser known clubs and societies operating in the period that shared similarities in the way that they were constituted and organized and the activities they engaged in but that were not at all secret or only quasi-secret. All of these organizations or associations had a legal dimension, in the sense that they had “fundamental laws,” the club constitution and by-laws, usually drawn up by lawyer members of the organizing committee based on the laws and rules of existing organizations.¹ However, some of these groups were more explicitly legal. The best known of these are the law clubs of groups of lawyers that became the early state bar associations.² There were, however, also associations of men, not at all necessarily lawyers, gathered together in the form of a mock court, engaging in a variety of amusements including drinking, singing, telling stories, debating serious and mock topics and also subjecting their members to mock prosecutions or mock trials. This article is about one such group that was apparently operating in New York City in the second quarter of the Nineteenth Century, the “Ancient and Honorable Court of Dover.”

¹ ROY V. PEEL, *THE POLITICAL CLUBS OF NEW YORK CITY* 146 (Ira J. Friedman 1968) (1935).

² See ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 205-206 (William S. Hein, 1986) (1921); PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 96 (1970).

I discovered some of the records of this group relating to a mock trial that probably took place in 1834. The appointed prosecutor was the future district attorney for New York City and the Southern District of New York and is certainly the most prominent lawyer in the story. There are other individuals involved who were not lawyers. However, they were all *pretending* to be lawyers in the sense that they were purporting to be members of a court. A Court of Dover, it turns out, is a very particular type of thing, which this article will explain.

I adopt the following organization in what follows: **Part I** recounts the discovery of these records; **Part II** explains who the people named in the records were; **Part III** explains what a “Court of Dover” was; **Part IV** sets out what we know about the offences for groups like this and what the offence here might have been; **Part V** describes anti-society sentiment in New York City in this period; and **Part VI** explores the connection between this group and Freemasonry, the most famous “Ancient and Honorable” fraternity.

For lawyers and legal scholars, mock trials and mock prosecutions might seem dangerously frivolous. They are not our regular courts with the familiar sober kind of cases and corresponding reports. Proceedings like this one were indeed frivolous in the sense that the people who participated in them were doing it primarily for enjoyment and to amuse themselves. This was, after all, a time before television and the internet. However, these gatherings were also serious. The rituals engaged in were enacted with a great deal of solemnity. In this case, we will see that members of this group took the time and trouble to enact a law to amend their constitution and appoint a prosecuting attorney. The President wrote an elaborate speech justifying the change to the constitution,

grounding it in a fake three hundred-year-old history, and there even seems to have been an attempt to encrypt or to pretend to encrypt part of the law in a foreign and little-known language. Such effort is not a casual appropriation of a solemn and formal (legal) tone. However, we should not lose sight of the frivolous content either. Helpful here is a term used in association with the revels organized at the Inns of Court, “solemn foolery.”³ This was foolery, yes; but it was also taken seriously enough to create the records we have here.

PART ONE: DISCOVERING THE RECORDS

I am a legal historian and I have been working for a number of years on the famous property law case *Pierson v. Post*.⁴ There have been some exciting developments in relationship to this, specifically document discovery of the original judgment roll in the case giving and a lively set of comments on the significance of that event.⁵ The question I have always asked about this case is why a court as prominent as the New York Supreme Court and lawyers as important as the lawyers who argued that case at the appeal level would have treated the case in the elaborate way that they did. As all law students will recall, the appellate report in the law school casebooks is full of lavish argument and citations to exotic authority.⁶ It is conspicuously and, indeed,

³ See PHILIP J. FINKELPEARL, JOHN MARSTON OF THE MIDDLE TEMPLE: AN ELIZABETHAN DRAMATIST IN HIS SOCIAL SETTING 37 (1969). Thanks to Karen Cunningham, a law and literature scholar at the University of California, Los Angeles, Department of English, for pointing me to the Finkelpearl text.

⁴ *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

⁵ See *Forum: Pierson v. Post Capturing New Facts about the Fox*, 27 LAW & HIST. REV. 145, 145-94 (2009). An account of the discovery is given in Angela Fernandez, *The Lost Record of Pierson v. Post, the Famous Fox Case*, 27 LAW & HIST. REV. 149 (2009). The judgment roll can be found at <http://www.historycooperative.org/journals/lhr/27.1/tompkins.html> (last visited October 9, 2010).

⁶ These include Justinian, Fleta, Bracton, Puffendorf, and Barbeyrac. See arguments of the lawyers, Nathan Sanford and David C. Colden, *Pierson v. Post* at 176-77. The judge who delivered the majority opinion, Daniel Tompkins, added Grotius, and the judge in dissent, Brockholst Livingston, referred to John Locke. See *Pierson v. Post* at 179, 180.

unnecessarily elaborate, as I have argued elsewhere.⁷ Why pay such intense effort and attention to a fight over a fox that we now know a jury decided was only worth 75¢?⁸

One of the lawyers involved in the case was a prominent attorney in early nineteenth-century New York State named Nathan Sanford. Sanford held lucrative posts as a result of his association with the Tammany faction of the Jeffersonian Republican Party after 1802, including the position of United States attorney for the district of New York. He went on to be a state Senator and then a United States Senator and was Chancellor, the state's highest judicial office, from 1823-26.⁹ He was also the only person involved at the New York Supreme Court level of *Pierson v. Post* with a local connection to the case. He grew up in the area where the fight over the fox took place: Bridgehampton, Long Island.

The New York State Library has a finding aid for the Nathan Sanford Papers and it includes the following entry: “Records of the Honorable and Ancient Court of Dover.”¹⁰ I was intrigued when I saw it listed there because I thought I knew all of the courts operating in New York at this time. I asked the librarian, Helen Weltin, whether she could describe it a bit for me. With respect to its date, she found the only clear date of 1834 and another barely legible date that could be 1804 or 1834. There was also one page “written in a cipher that looks like fake-Arabic,” as Helen put it.¹¹ This I had to see.

⁷ Angela Fernandez, *Pierson v. Post: A Great Debate, James Kent, and the Project of Building a Learned Law for New York State*, 34 LAW & SOC. INQUIRY 301, 303 (2009).

⁸ Fernandez, *The Lost Record*, *supra* note 5, at 158.

⁹ Edward Conrad Smith, *Nathan Sanford*, DICTIONARY OF AMERICAN BIOGRAPHY, Biography Resource Center, Gale Cengage Learning.

¹⁰ Nathan Sanford Papers SC14054, Folder 5, Manuscripts and Special Collections, New York State Library, Albany, New York [hereinafter RECORDS].

¹¹ Email from Helen E. Weltin, Senior Librarian, Manuscripts and Special Collections, New York State Library to Angela Fernandez, Associate Professor of Law, Faculty of Law, University of Toronto (September 16, 2009, 16:08 EST) (on file with author).

What arrived were twelve pages of text – some handwritten, some a typed transcription of what was handwritten – eleven of which were legible documents purporting to be records belonging to the Court of Dover.¹² Included was a copy of a law claiming to be issued under King James the Fifth and translated by one “[?J. or maybe I.?] Kinzastinski, Translator to the C.D. [Court of Dover]”.¹³ The law guaranteed to any member of the court charged with a “misdemeanor” a hearing before the presiding officers of the court “wheresoever situated.”¹⁴ The law was concerned primarily with whether or not prosecutions of court members could include non-members – both the testimony of witnesses who were not members and those who were associates of the accused. It stated that it would be lawful for the court to try all cases “having a direct or indirect bearing upon Food, raiment [clothing], Lodging (with ladies) heavy or light [?illegible word?] & transportation of Body – or on any other subject calculated to pour the balm of consolation to any members Bowels.”¹⁵

Whatever kind of court the Ancient and Honorable Court of Dover was, it was not a traditional court where real litigants, ordinary members of the public, came to have their claims heard.¹⁶ It was some kind of mock court, probably a fraternal association that Sanford belonged to, probably not composed specifically of lawyers.¹⁷ The word

¹² I have numbered them one through twelve for the purposes of citation here in the order in which I received them. The pages are not actually numbered.

¹³ RECORDS, *supra* note 10, at 3.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 3.

¹⁶ Although the finding aid listed the name of the court as the “Honorable and Ancient Court of Dover,” it is only referred to that way once in the records. I will call it the “Ancient and Honorable Court of Dover,” as it is referred to that way at least three times, except when referring to the finding aid or when quoting from the text in which the first formulation is used.

¹⁷ Members of the staff at the New York State Library do not know how these records found their way into Nathan Sanford’s papers or how a typescript was made or when. None of the handwriting matches Sanford’s. Email from Dr. A.K. Singla, Worldwide Forensic Services, Toronto, to Angela Fernandez, Associate Professor, Faculty of Law, University of Toronto (January 20, 2010, 16:35 EST) (copy on file with the author). Sanford was in the most senior stage of his career at the time of these events. He was

“brother” was used repeatedly in the records and “fraternity” appears, although it was crossed out and replaced with “court” at one point where the original read “our ancient and honorable fraternity.”¹⁸

One of the pages (reproduced below in Figure 1) was dated August 12, 1804 or maybe 1834 – the third digit was, as Helen put it, “a mysterious scribble.”¹⁹ It was signed and sealed by the President of the Court “[?Geo?] Davis. It was counter signed (and also accompanied by the seal) of the Court’s secretary, one “[?Mr G?] Black.” It appointed “our worthy and esteemed friend John [?McKeon?]” as prosecuting attorney to the court. The Davis seal has been completely worn off with the exception of the outer ring of the signet that was used. However, the smaller seal next to Black’s name contains a still legible impression of the letter “B” (see Figure 1).

Chancellor of New York State from 1823-26 and was a United States Senator from 1826-1831. He died in 1838, four years after this mock trial probably took place. *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 9.

¹⁸ *RECORDS*, *supra* note 10, at 7 (this is in the speech of President Davis).

¹⁹ *Id.* at 4. Email from Helen Weltin, *supra* note 11.

Know all men by these presents
 that We the Ancient and Honorable
 Court of Dover do by virtue of the
 power vested in us, and derived
 from the Grand Council of said
 Court do appoint our worthy &
 Esteemed friend John M^r Keen
 Esq. as prosecuting attorney to
 said Court. — In Testimony
 whereof we have hereunto set our
 hands and seal of office this 12th
 day of August 1802.

Countersigned
 N. M. Black
 Secy C. D.

Geo Davis
 Pres Court of D.

[Figure 1 – Reproduced from “Records of the Honorable and Ancient Court of Dover,”
 Nathan Sanford Papers SC14054, Folder 5, Manuscripts and Special Collections, New
 York State Library, Albany, New York]

It seems the group was gathered to prosecute one of their members for an infraction and the question arose as to the ability of non-members to participate in the trial. The accused was not named and the infraction was not identified – although it was described as a charge of “willful neglect of some important duty that had been entrusted to him and to his associates.”²⁰

Apart from the law and the commission appointing the prosecuting attorney reproduced above, there is a document which appears to be the handwritten text that President Davis delivered on this occasion, a speech.²¹ It was written in the first person, “I,” and in it he explained what he called “the present dilemma.”²² He assured those gathered that the decision to involve non-members was taken a long time ago, approximately three hundred to be more precise. At that time, specifically in 1529, “all the Kings, Emperors and Potentates of the Earth” were invited to a meeting of the “Grand Council” of this Court.²³ That Council was said to be composed of “all the Presidents and ex-presidents of the Court throughout the World” who meet once every 100 years.²⁴ The 1529 meeting was held at “Holrood Palace” (presumably Holyrood Palace in what is today Scotland’s capital, Edinburgh) when the presiding officer was King James the Fifth. At that time, Davis explained, “[i]n vain was the Constitution examined in the hope of discovering some clause by which authority could be vested in him [the presiding officer, King James] thereby rendering legal all proceedings in the Case – equally unavailing were all their efforts by reference to the most ancient Records of the Court to

²⁰ RECORDS, *supra* note 10, at 8.

²¹ See *id.* at 6-9 (handwritten), 10-12 (typescript).

²² *Id.* at 7.

²³ *Id.* at 6-7.

²⁴ *Id.* at 7.

discover a precedent on which they could act.”²⁵ Hence, the need to enact a law that expressly allowed for the participation of non-members. Davis viewed it as an amendment to the Constitution of the Court.

It is clear from the way that Davis asked for the forgiveness of the members of his audience that the decision to involve outsiders was contentious. “I fear I have trespassed too long upon your time and patience. I have been this minute in the detail of the historical facts connected with the amendments for the Constitution in order to do away any erroneous impressions that may have been formed in reference to the rights and powers of this Court. The prosecution will now be pleased to open his case.”²⁶

The law, allegedly three hundred years old, a “translated” copy of which was included in the records begins:

Whereas certain circumstances have arisen rendering necessary the passage of a Law, to preserve to all faithful Bros. of this Court their most valuable rights and privileges – Therefore to all Emperors, Kings and Potentates of the Earth Be it Known that we James V. for our royal Selves and in behalf of our Ancient and Honorable Court of Dover wherever found upon this Mundane Sphere do hereby Enact and Order that in all cases where the charge of misdemeanor shall be preferred against any Member of our Ancient and Honorable Court He shall be entitled to a hearing before the presiding officer of such Court wherever situated and also that all persons whether members or not who can give any useful information on such subject shall be admitted as witnesses.²⁷

²⁵ *Id.* at 6.

²⁶ *Id.* at 9.

²⁷ *Id.* at 1.

The law went on to stipulate that if the accused was unwilling to testify, the presiding officer must issue “a writ of fieri facies” that “command[s] the refractory member forthwith to make his appearance or he shall be deemed guilty and fined accordingly.”²⁸ Also any associates of the accused member “shall be brought forward whether members or not to answer to any charges that may be preferred against them as associates of the accused member.”²⁹

So what language does this “correct translation from the original law of the Honorable and Ancient Court of Dover” purport to be a translation of? Well, here is where the puzzling page of text comes in.

²⁸ *Id.* at 3.

²⁹ *Id.*

What on earth was this? Was it a real language? Given the fraternal association/secret society context, most people I showed it to were very quick to suggest that it was some kind of code or Masonic cipher. However, it turned out to be a natural language, Syriac.³⁰ The head of the Canadian Society for Syriac Studies, Amir Harrak, confirmed this. The first line said “the Acts of the Apostles 13:3” and something very close to what appears at this chapter and verse of the Bible, 13:2 (there is the number 2 in the text): “While they were fasting and begging they laid the hand and send them.” The “send them,” according to Amir, might also translate as “[signing with the] thumb.”³¹ And, indeed, the second seal on the page looks like it might well be a thumb print from someone’s left hand. It has a non-circular shape with no remnants of anything official that are present (if illegible) on the first seal on the page (see Figure 2 above). The rest of the text, starting underneath that first seal, was not proper Syriac. It is composed mostly of scribbles and Amir could only make out a word or two here and there that was completely out of context.³²

Syriac is an Aramaic language still spoken by a few thousand people in the Middle East. It dates back to the 5th Century B.C. and it is often said (with some pride by those involved in the promotion of the Syriac language) to have been the language spoken by Jesus Christ.³³ Both the Old and New Testament were available in Syriac

³⁰ Thank you to my brother-in-law, René Milet, for making this identification.

³¹ Email from Amir Harrak, Full Professor, Department of Near and Middle Eastern Civilizations, University of Toronto, to Angela Fernandez, Associate Professor, Faculty of Law, University of Toronto (February 8, 2010, 15:25 EST) (copy on file with the author).

³² Nothing in this chapter of the Bible deals with the prosecutions of members of a group and the participation of non-members – the points at issue in the law and being dealt with in the court records.

³³ See SEBASTIAN BROCK, AN INTRODUCTION TO SYRIAC STUDIES 1 (2006).

from an early date.³⁴ Syriac was used as the religious language for Christianity in the 3rd Century and became an important vehicle for spreading Christianity.³⁵ Syriac yielded to Islam and Arabic in the 7th Century and today is rarely used as a language in its own right.³⁶ Although it is mostly extinct or a “dead” language, Syriac is important as a script for religious documents, and as a liturgical language.³⁷

It looks as if the person who copied the text was not fluent with actual Syriac given the uneven quality of the transcription – it begins, like many copied texts, as a faithful reproduction and then breaks down as the task becomes laborious. As Amir put it, “[g]iven the fact that the script of the text is a bit unskilled not to say gross, it must not have some from the pen of a Syriac-speaking person.”³⁸

Another Syriac scholar I showed the text to, Jack Tannous, found that the script was almost certainly copied from a seventeenth-century edition of the Peshitta New Testament prepared by a person named Aegidius Gutbier or Gutbir (1617-1667).³⁹ The British Bible Society published a series of New Testament Bibles in various languages, often referred to as the “Bagster” bibles, including the New Testament in Syriac, of which there were multiple reprints in the Nineteenth Century.⁴⁰ While the copying

³⁴ See *id.* at 3-6.

³⁵ See <http://www.wisegeek.com/what-is-syriac.htm> (last visited December 13, 2010).

³⁶ *Id.*

³⁷ See BROCK, *supra* note 33, at 1.

³⁸ Email from Amir Harrak, *supra* note 31.

³⁹ Email from Jack Tannous, Post-Doctoral Teaching Fellow in Byzantine Studies, Dumbarton Oaks/George Washington University, Washington D.C., to Angela Fernandez, Associate Professor, Faculty of Law, University of Toronto (April 20, 2010, 14:46 EST) (copy on file with the author).

⁴⁰ See, e.g., THE SYRIAC NEW TESTAMENT ACCORDING TO THE PESHITO VERSION WITH AN APPENDIX OF VARIOUS READINGS (London: Samuel Bagster and Sons; New York: James Pott, 1895). There was an earlier London reprint in 1836 and one in 1828. There seems to have been eighteenth-century reprints also. These reprints were probably all from the original printing, putting a new title page and date on different editions. Email from Jack Tannous, Post-Doctoral Teaching Fellow in Byzantine Studies, Dumbarton Oaks/George Washington University, Washington D.C., to Angela Fernandez, Associate Professor, Faculty of Law, University of Toronto (June 14, 2010, 01:49 EST) (copy on file with the author).

begins accurately enough, the person doing it soon starts to put what seem to be random words from the same page and then from later pages.⁴¹ It might be an encrypted message; but looks more likely to be random copying by someone fascinated with an exotic text. As Jack put it, this copy of the Bible would have been readily available in New York City, Boston, and Philadelphia in the early Nineteenth Century. “It was, after all, the Bible. And after having a Bible in Greek, Hebrew and Latin, the fourth language you would go for would be Syriac.”⁴²

While Syriac language and script would not be familiar to most people, it would make sense to use it for a set of documents concerned to appear to be a part of some learned, *ancient and honorable* set of traditions and institutions. Other languages that might have looked equally elegantly enigmatic in a North American context like Hebrew would have been too recognizable. Amir thought that Arabic or Hieroglyphic Egyptian would also not have been secret enough.⁴³ As Jack put it, “people who knew some Syriac were probably not as rare as one might imagine in the Nineteenth Century.”⁴⁴ However, use of this language was nonetheless able to connote or communicate something that was in this case probably more important than content, namely, we (the members of this group) are the masters of some old and venerable craft, which does not include the average person, excluded for want of elite status (e.g. power, wealth, learning or even simply membership).

⁴¹ I cannot pretend to be able to follow all of what Jack found in his comparison that confirmed for him that the copying was from the Gutbier edition. There is an issue with a cut off word in the second line, the 274 in the text, as well as the 98. Most of the copying comes from p 305 and some from pp. 119-20. Email from Jack Tannous, *supra* note 39.

⁴² *Id.*

⁴³ Email from Amir Harrak, *supra* note 31.

⁴⁴ Email from Jack Tannous, *supra* note 40.

Why Sanford and his friends would have chosen a name for the translator that sounds Polish is curious. Armenians were a minority in Poland but Syriac Christians? Had any people with such a background settled in New York State during this period? Polish experts I consulted were dubious that “Kinzastinski” was a genuine Polish surname. The “inski” part, yes perhaps, but not the “Kinzast” part. A good deal of mangling happened to Polish names once they landed in North America, which might account for the weird spelling and disfigurement.⁴⁵ However, it might be completely made up – for some reason they wanted a name that sounded Polish or maybe even Jewish. What would that connote to them? Was it something racist or anti-Semitic?

Was “Kinzastinski” a real person? Were any of them real? Well, President Davis would appear to be. The records were kept in a “cover” or envelope addressed to “George Davis Esq. Deputy Collector, Custom House, New York” (the front is reproduced below in Figure 3). “Records of Court of Dover 1834” was written on the inside of the envelope, the clear date Helen had referred to. Unfortunately the seal, which would indicate who the sender was, is not legible. It seems to have been a genuine piece of mail, sent by someone whose handwriting is not in the records themselves.⁴⁶ In addition to an official looking stamp stating “2nd Delivery,” the number six in the top right-hand corner probably indicates the amount of postage paid. Before there were stamps, people sent letters in these stamp-less “covers” and the post office indicated the amount of postage in just this way.⁴⁷ It also contains the faint handwriting “Ship

⁴⁵ Conversation with Piotr Wrobel, Associate Professor, University of Toronto, Department of History (February 8, 2010).

⁴⁶ Email from Dr. A.K. Singla, Worldwide Forensic Services, Toronto, to Angela Fernandez, Associate Professor, Faculty of Law, University of Toronto (February 22, 2010, 12:33 EST) (copy on file with the author).

⁴⁷ For examples of stamp-less “covers” see J.C. ARNELL, *TRANSATLANTIC MAIL TO AND FROM BRITISH NORTH AMERICA FROM EARLY DAYS TO U.P.U.* (1996).

Switzerland,” indicating that it came on a ship with that name to New York City. At any rate, here was a genuine lead, a solid name and a location.



[Figure 3 – Reproduced from “Records of the Honorable and Ancient Court of Dover,” Nathan Sanford Papers SC14054, Folder 5, Manuscripts and Special Collections, New York State Library, Albany, New York]

As one might recall from Nathaniel Hawthorne’s prologue to *The Scarlet Letter*, “the Custom House,” these places were characterized by a lackadaisical enjoyment of what were thought to be comfortable federal government positions, at least in Hawthorne’s Salem, Massachusetts in 1850. However, this lolling about went hand-in-hand with intense anxiety on the part of custom house workers and appointees, since

every four years, with each presidential election, the house would be swept clean. The Custom House imposed tariffs on imports and ships coming into the United States, an important source of federal government revenue before there was an income tax.⁴⁸

Workers at a custom house might have some extra time on their hands, especially if they were occupying a position that was essentially reward for political support that did not have a great deal of actual duties attached to it. Recall here Hawthorne's description of how he came to find the "A" that purportedly inspired him to write his famous work:

[O]ne idle and rainy day, it was my fortune to make a discovery of some little interest. Poking and burrowing into the heaped-up rubbish in the corner ... I chanced to lay my hand on a small package, carefully done up in a piece of ancient yellow parchment. This envelope had the air of an official record of some period long past ... There was something about it that quickened an instinctive curiosity, and made me undo the faded red tape, that tied up the package, with the sense that a treasure would here be brought to light ... They were documents, in short, not official, but of a private nature [of a former Custom House Surveyor] ... The ancient Surveyor – being little molested, I suppose, at that early day, with business pertaining to his office – seems to have devoted some of his many leisure hours to researches as a local antiquarian, and other inquiries of a similar nature. These supplied material for petty activity to a mind that would otherwise have been eaten up with rust ... [T]he object that most drew my attention, in the mysterious package, was a certain affair of fine red cloth, much worn and faded. There were traces about it of gold embroidery, which, however, was greatly frayed and defaced; so that none, or very little of the glitter was left. It had been

⁴⁸ <http://www.oldnycustomhouse.gov/history/> (last visited March 18, 2010).

wrought, as was easy to perceive, with wonderful skill of needlework; and the stitch (as I am assured by ladies conversant with such mysteries) gives evidence of a now forgotten art, not to be discovered even by the process of picking out the threads. This rag of scarlet cloth, – for time, and wear, and a sacrilegious moth, had reduced it to little other than a rag, – on careful examination, assumed the shape of a letter. It was the capital letter A.⁴⁹

Was Davis, as Deputy Collector, in a similar position of having quite a lot of time to kill and instead of acting as a local antiquarian, set himself to drawing up elaborate records for an imaginary court, the Ancient and Honorable Court of Dover?

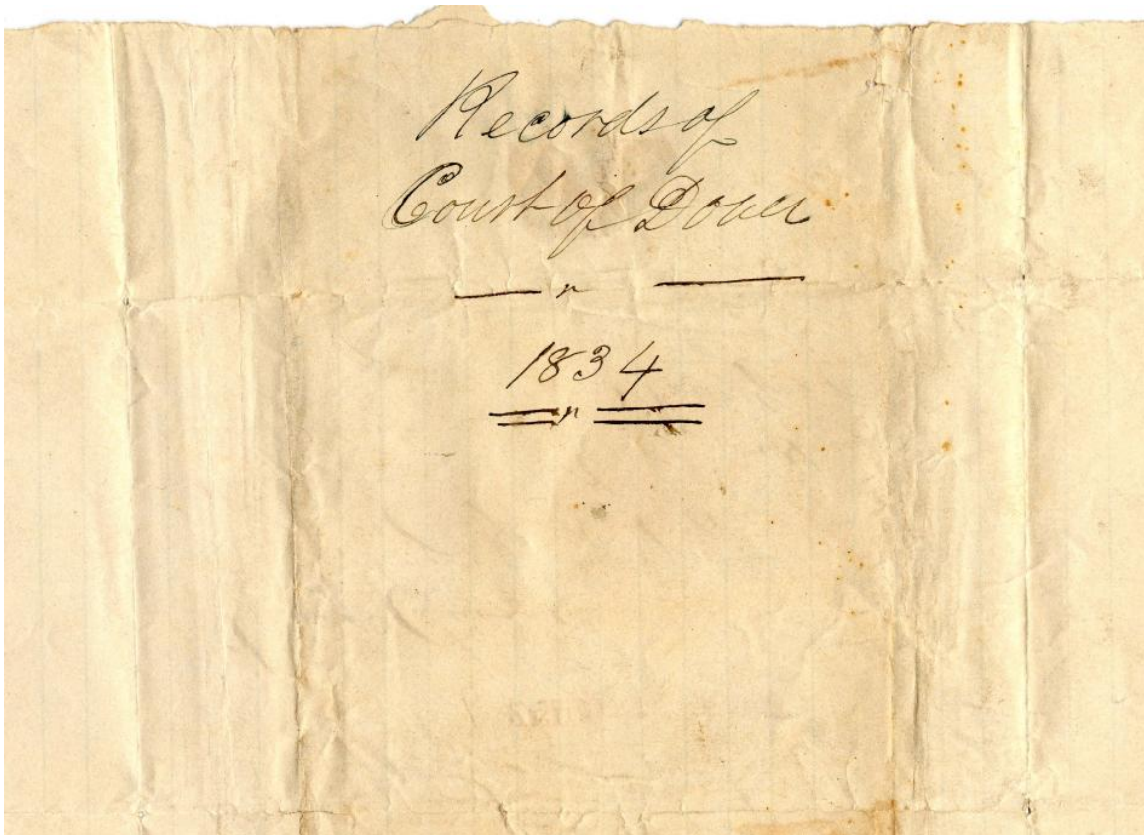
PART TWO: THE MOCK TRIAL – WHEN DID IT TAKE PLACE AND WHO WAS INVOLVED?

When did this mock trial take place? In his speech, President Davis referred to a meeting of the “Grand Council” in 1529 at which the decision to amend the constitution by adopting the law to allow non-members to participate in Court of Dover proceedings was made. That meeting, allegedly attended by “all the Presidents and ex-presidents of the Court throughout the World” was scheduled for every 100 years.⁵⁰ That would mean another such meeting (and probably in reality the first) took place in 1829. It is possible the mock trial took place then. A likelier date, however, would seem to be 1834. This is the date written on the commission appointing the prosecuting attorney – although this is admittedly not very clear (see Figure 1 above). However, the envelope the records were kept in did have this date written clearly on its inside (see Figure 4 below). This handwriting appears to be different yet again not only from the writing in the records

⁴⁹ Nathaniel Hawthorne, *The Custom House, Introduction to THE SCARLET LETTER* 1, 26-28 (Barnes & Noble Classics, 2003) (1850).

⁵⁰ RECORDS *supra*, note 10.

(presumably Davis's) but also from the writing on the front of the envelope of the person who was returning the records to Davis.⁵¹



[Figure 4 – Reproduced from “Records of the Honorable and Ancient Court of Dover,” Nathan Sanford Papers SC14054, Folder 5, Manuscripts and Special Collections, New York State Library, New York State Archives, Albany, New York]

⁵¹ Email from Dr. A.K. Singla, *supra* note 46 (this opinion was qualified as “not definite” given the amount of material available for comparison). Unfortunately, there is no handwriting sample or signature from Davis that can be used to compare to the Court of Dover records in the NEW YORK CUSTOM’S HOUSE RECORDS, 1792-1896; BULK DATES 1802-1854, Rare Books and Manuscripts Division, New York Public Library, New York City, New York.

If the Court of Dover was constituted in 1829 or some kind of significant meeting happened then, this was an important year at the Custom House in New York City. This was when Andrew Jackson was elected to his first term as President. He was supported by Tammany Hall in New York City and the spoils were distributed accordingly at places like the Custom House and the Post Office. However, Jackson actually appointed a National Republican and former Burr-ite, Samuel Swartwout, to the most coveted position at the Custom House, namely, Collector.⁵² Mordecai Manuel Noah, an interesting figure who had a long and complicated relationship with Tammany Hall, was made Surveyor of the Port as a compromise to local interests.⁵³ 1834 was one year after Jackson's re-election to a second term in 1833. Jackson did not re-nominate Noah as Surveyor due to conflicts of interest created by Noah's newspaper editorial work and his political opponents within Jackson's party, primarily Martin Van Buren.⁵⁴ Swartwout continued on for a second term and it then came to light in 1838 that he had been embezzling a great deal of money from the Custom House. He fled to Europe with his ill-gotten gains and returned to the United States with prosecutorial immunity in 1841.⁵⁵

What about the named members of the Ancient and Honorable Court of Dover: Davis, McKeon, and Black? The "President" of the Ancient and Honorable Court of Dover, George Davis, was a Republican politician and the son of Matthew L. Davis, who

⁵² See JEROME MUSHKAT, *TAMMANY: THE EVOLUTION OF A POLITICAL MACHINE, 1789-1865* 115-16 (1971).

⁵³ *Id.* at 116.

⁵⁴ Daniel J. Kleinfeld, *Mordecai Manuel Noah*, in *THE SELECTED WRITINGS OF MORDECAI NOAH* 5, 9 (Michael Schulinder & Daniel J. Kleinfeld eds., 1999). None of the handwriting in the Records matches Noah's. Email from Dr. A.K. Singla, Worldwide Forensic Services, Toronto, to Angela Fernandez, Associate Professor, Faculty of Law, University of Toronto (July 2, 2010, 13:44 EST) (copy on file with the author).

⁵⁵ See B.R. BRUNSON, *THE ADVENTURES OF SAMUEL SWARTWOUT IN THE AGE OF JEFFERSON AND JACKSON* (1989).

is chiefly remembered for his “forty years’ association with Aaron Burr, of whom he was an adoring friend, a zealous henchman, and an unwise biographer.”⁵⁶

Matthew L. Davis was a prominent Tammany Hall figure. In 1814 and 1815 he was Grand Sachem of the Tammany Society and was a Sachem for some years after.⁵⁷ His son, George Davis, was the Secretary of “the General Committee of Republican Young men,” which held a meeting at Tammany Hall in 1822.⁵⁸ He received appointments as Bank Commissioner in 1828 and again in 1830.⁵⁹ He was elected to the New York State Assembly from 1818-19, 1830-31, 1842-42, and was speaker of the house in 1831 and 1843.⁶⁰ He was always listed with the Jackson men in election results.⁶¹ The association with Tammany Hall goes back to his youth, given who his father was, and his early career. He formally joined the Tammany Society in 1833.⁶² In the 1840’s it was Whig pressure that was (unsuccessfully) brought to bear to have him removed from the Custom House.⁶³

George Davis’s father also held a position at the Custom House later in his life. One newspaper account reported that Matthew L. Davis had learned a trick from his son, George R. Davis, who avoided being removed from his office by refusing to open any

⁵⁶ George H. Genzmer, *Matthew Livingston Davis* DICTIONARY OF AMERICAN BIOGRAPHY, Biography Resource Center, Gale Cengage Learning (“... as biographer and as custodian of Burr’s papers scholars have shown a great deal of scorn. He destroyed the greater part of Burr’s correspondence, gave away letters for their autographs, and displayed scant knowledge of historical methods”).

⁵⁷ *Id.*

⁵⁸ THE NATIONAL ADVOCATE, FOR THE COUNTRY (N.Y.), January 4, 1822, Issue 933, at col A, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁵⁹ JOHN STILWELL JENKINS, HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK 354, 366 (1846).

⁶⁰ See <http://politicalgraveyard.com/bio/davis4.html> (last visited March 18, 2010).

⁶¹ See, e.g., JENKINS, *supra* note ?, at 365, 374.

⁶² See MEMBERSHIP LIST (1789-1924), Kilroe Collection, Rare Book and Manuscript Library, Columbia University, New York City, New York, p. 41 (Davis, George, May 6, 1833), signing order 2851 (hereinafter MEMBERSHIP LIST).

⁶³ *The Custom House*, THE N.Y. HERALD, August 9, 1845, Issue 197, at col C, 19th Century U.S. Newspapers, Gale Cengage Learning.

letter of dismissal that might arrive.⁶⁴ The father was reported to have said “No, Sir – I’ll be d –d if I leave the Custom House so long as I live!”⁶⁵

It is important to note for the purpose of understanding our records that Davis was not Deputy Collector in either 1829 or 1834. Swartwout’s Deputy Collector for both terms was a person named David S. Lyon.⁶⁶ This means that even though the records were dated 1834 (see Figure 4), and this is probably when the mock prosecution took place, they were not mailed to Davis then. An employee register for the Custom House shows an appointment of George Davis to the “Collector’s Office” on March 29, 1838, removed June 30, 1849.⁶⁷ Davis was at the Custom House before this appointment.⁶⁸ It was noted at the time of his appointment to Deputy Collector that he “had great experience in another branch of the business of the Custom House.”⁶⁹ That branch seems to have been on the Surveyor rather than Collector side, as the first entry for him in the employee register is as a “Temporary Inspector” appointed on January 7, 1831, resigning either March 2 or 29, 1837.⁷⁰ It seems likely then that the package would have been sent to him as *Deputy Collector* only after Swartwout’s exile in 1838.⁷¹

⁶⁴ *Id.*

⁶⁵ *Id.* Matthew L. Davis had a paralytic stroke not long after in 1848 and died at his son’s home in 1850. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 56.

⁶⁶ See BRUNSON, *supra* note 55, at 61, 135. Actually, there were three Deputy Collectors in 1834 (David S. Lyon, M.S. Swartwout, and Daniel Strobel). See EDWIN WILLIAMS, THE NEW YORK REGISTER 254 (1834).

⁶⁷ Email from Gregory J. Plunges, Archivist, National Archives at New York City to Angela Fernandez, Associate Professor of Law, Faculty of Law, University of Toronto (December 21, 2010, 14:47 EST) (on file with author).

⁶⁸ See, e.g., *Gallant Act*, THE HERALD (N.Y.), December 19, 1836, Issue 240, at col B (referring to “George Davis, of the Custom House, a son of Matthew L. Davis, the author of the Life of Burr”), 19th Century U.S. Newspapers, Gale Cengage Learning.

⁶⁹ See *From the Evening Post*, NEW-YORK SPECTATOR, April 2, 1838; col. F. 19th Century U.S. Newspapers, Gale Cengage Learning.

⁷⁰ Email from Gregory J. Plunges, *supra* note 67.

⁷¹ Swartwout’s position as customs collector ended on March 29, 1838 and he left for England on August 26, 1838. See BRUNSON, *supra* note 55, at 89.

This later date of the mailing of the package is confirmed by some facts relating to the ship it was sent on, the *Switzerland*. This was a mail packet operating between London and Portsmouth and New York City. It was bought by a New York City company for this purpose in the fall of 1841.⁷² It continued to operate in this capacity right through the 1840's and likely brought our package to New York City from London or Portsmouth sometime between 1841 and 1849, when Davis stopped being a Deputy Collector.

John McKeon was also a Democratic politician. Born in 1808, McKeon was a member of the New York State Assembly from 1832-34 and a United States Representative from 1835-37.⁷³ He was on the “regularly nominated Jackson Republican Assembly ticket” put forward by Tammany Hall in 1833, for example.⁷⁴ He joined the Tammany Society in 1831.⁷⁵ He was also a lawyer and so the choice to make him prosecuting attorney in the Court of Dover mock trial made sense. He went to Columbia College and studied law in the office of John L. Mason, who later became a state Supreme Court judge.⁷⁶ McKeon was admitted as attorney and counselor of the United States Supreme Court on February 24, 1836.⁷⁷ He acted in Court of Chancery

⁷² The ship was formerly of Boston and was bought by the New York City company to replace a ship called the *Samson* in their line of London packets. See *Maritime Herald Port of New York*, THE NEW-YORK HERALD, September 30, 1841, Issue 206, at col B, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁷³ See <http://politicalgraveyard.com/bio/mckeogh-mckibbin.html#R9MOJ656A> (last visited March 18, 2010).

⁷⁴ *Tammany Hall Proceedings*, N.Y. SPECTATOR, October 24, 1833, at col C, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁷⁵ MEMBERSHIP LIST, *supra* note 62, at 108 (McKeon, John, March 7, 1831; Sachem, 1857-58).

⁷⁶ *Hon. John McKeon Democratic Candidate for District Attorney of New York*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER, November 5, 1881, at 165, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁷⁷ *Supreme Court of the United States*, N.Y. SPECTATOR, March 3, 1836, at col E, 19th Century U.S. Newspapers, Gale Cengage Learning.

proceedings in 1838⁷⁸ and took part in a prominent criminal trial in the same year.⁷⁹ He was regularly reported as having appeared in the Court of Common Pleas⁸⁰ and occasionally before the United States Circuit Court.⁸¹

McKeon was a “loco foco,” a democratic pro-Jackson and Van Buren group that splintered from Tammany Hall from 1835-40, running for Congress on that ticket in 1838.⁸² He was also active that year in something called the “Democratic Young Men’s” group and was chosen to be their chairman.⁸³ He spoke on this occasion against anti-immigrant sentiment, receiving the approval of those gathered.⁸⁴ He belonged to a variety of Irish-American groups.⁸⁵ It was written of McKeon that once the Whigs came to power, the “spoils” he and other loco focos could expect to receive would include his

⁷⁸ *Court of Chancery*, N.Y. SPECTATOR, January 29, 1838, at col F, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁷⁹ *The Bambers*, MORNING HERALD (N.Y.), March 5, 1838, Issue 238, at col E, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸⁰ *Court of Common Pleas before Judge Ingraham*, MORNING HERALD (N.Y.), May 29, 1839, Issue 118, at col A; *Court of Common Pleas before Judge Ulshoeffter*, MORNING HERALD (N.Y.), March 24, 1840, Issue 261, at col D; *Common Pleas before Judge Inglis*, THE N.Y. HERALD, March 22, 1844, Issue 82, at col D; *Common Pleas*, THE N.Y. HERALD, June 24, 1845, Issue 172, at col E; *Common Pleas before Judge Ingraham*, THE N.Y. HERALD, September 20, 1845, Issue 249, at col F. All citations to 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸¹ *U.S. Circuit Court before Judge Betts*, THE N.Y. HERALD, July 27, 1844, Issue 207, at col E; *U.S. Circuit Court before Judges Brett and Nelson*, THE WEEKLY HERALD (N.Y.), April 19, 1845, p. 124, Issue 16, at col E; *Supreme Court – Circuit*, THE N.Y. HERALD, March 23, 1857, p. 8, at col B. All citations to 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸² *Multiple News Items*, N.Y. SPECTATOR, October 18, 1838, at col C; *Correspondence of Commercial Advertiser*, N.Y. SPECTATOR, December 13, 1838, at col E (describing McKeon as “certainly among the most agreeable of loco focos”), 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸³ *Democratic Young Men’s Meeting Law Night at Tammany Hall*, MORNING HERALD (N.Y.), April 7, 1838, Issue 264 at col A, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸⁴ *Id.* (“Mr. McKeon spoke in impassioned terms of Mr. Clark’s attempt to enlist prejudices against emigrants [sic], and even American born citizens who bore a foreign name. Mr. McKeon ceased amid the vigorous cheering of the meeting”). See also *Immense Meeting at Tammany Hall – Great Turn out of Adopted Citizens – The Hard Fists and Huge Paws in Their Glory*, THE N.Y. HERALD, October 16, 1840, Issue 23, at col B, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸⁵ These included the St. Patrick’s Society, the Brooklyn Republican Society for the Friends of Ireland, and the Hibernian Society, a group for Roman Catholics. See THE N.Y. HERALD, March 18, 1843 (a toast to McKeon’s health at a dinner of the St. Patrick’s Society); THE N.Y. HERALD, November 4, 1843, at col B (a reference is made in this article to the “Hibernian lungs” that produced “loud, deafening, and prolonged” cheers; McKeon was one of the eminent attendees on the stage); THE N.Y. HERALD, June 27, 1848, at col A. All citations to 19th Century U.S. Newspapers, Gale Cengage Learning.

appointment “to be driver of the City Hearse and to officiate as chief mourner whenever called upon.”⁸⁶ He obtained a position as Corporation Attorney with the Mayor’s Office and the Board of Aldermen.⁸⁷ He continued to be involved with important initiatives, including steps taken towards drafting a federal bankruptcy act.⁸⁸ He served as a judge advocate in naval court.⁸⁹ Despite the ascendancy of the Whigs, he was re-elected to Congress in 1841.⁹⁰ Like a true loco foco, he remained opposed to all banks.⁹¹ He was not re-elected to Congress in 1842.⁹²

Most interestingly from the perspective of the role he played in the Court of Dover records, McKeon became District Attorney for the City of New York in 1847.⁹³ He remained in this position until he was appointed to be United States District Attorney

⁸⁶ Jesse Humbug, Chairman, “*The Spoils*”, MORNING HERALD (N.Y.), April 17, 1839, Issue 82, at col D, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸⁷ *Board of Aldermen*, N.Y. SPECTATOR, May 16, 1839, at col B, 19th Century U.S. Newspapers, Gale Cengage Learning. McKeon resigned from this position nearly two years later. See *Common Council*, THE N.Y. HERALD, December 2, 1841, Issue 260, at col E, 19th Century U.S. Newspapers, Gale Cengage Learning. For disparaging comment, see the same issue *Corporation Movements* at col C.

⁸⁸ *Public Meeting*, N.Y. SPECTATOR, March 2, 1840, at col F. See also THE WEEKLY HERALD (N.Y.), January 15, 1842 at col A and B. Both citations to 19th Century U.S. Newspapers, Gale Cengage Learning.

⁸⁹ *Multiple News Items*, THE N.Y. HERALD, January 13, 1841, Issue 97, at col B, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁹⁰ *Twenty-Seventh Congress*, THE N.Y. HERALD, June 1, 1841, Issue 104, at col F, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁹¹ See *Large Meeting of the Locofocos in front of Jefferson Hall, Hudson Street – The Course of John Taylor on the Bank Question*, THE N.Y. HERALD, August 25, 1841, Issue 175, at col A, 19th Century U.S. Newspapers, Gale Cengage Learning. Loco focos were sometimes referred to as “hard money Democrats” because they were against all banks. In fact, the name came from an infamous meeting at Tammany Hall in 1835 where anti-bank dissidents used new friction matches, loco-focos, to light the hall in order to continue the meeting to vote in their candidates after the Tammany regulars left, extinguishing the gas lights as they did so in an attempt to stop the proceedings. See L. Ray Gunn, *From Factions to Parties: The Emergence of the Second Party System*, in THE EMPIRE STATE: A HISTORY OF NEW YORK 369, 378 (Milton M. Klein ed., 2001). McKeon wrote a Treasury report critical of all state banks. See *The Treasury Report on the Banks of the United States*, THE N.Y. HERALD, June 11, 1841, Issue 113, at col F, 19th Century U.S. Newspapers, Gale Cengage Learning (the report “contains some precious developments of the rascality and roguery of the banking system. It is full of swindling from beginning to end – and almost seems to be more like a State Prison report than one of State banks”).

⁹² *Multiple News Items*, THE N.Y. HERALD, November 17, 1842, Issue 308, at col C, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁹³ See, e.g., *Law Intelligence*, THE N.Y. HERALD, July 8, 1847, Issue 186, at col A, 19th Century U.S. Newspapers, Gale Cengage Learning (for his first listing as District Attorney in the Court of General Sessions).

for the Southern District of New York in 1854.⁹⁴ He served in this position for only three years and was afterwards appointed to be the District Attorney for the City and County of New York in 1881 where he remained until his death in 1883.⁹⁵ In other words, he was a district attorney of one kind or another for nine years of his long life and career. If the mock trial took place in 1834, McKeon would have been a prominent politician and a member of the New York assembly but not yet well-established as lawyer.⁹⁶ He went on to become a very important lawyer in the city, specifically as a prosecutor, the same role he played in the Court of Dover proceedings.

The Tammany Society or Columbian Order – associated most famously with “Boss” Tweed and corruption in New York City later in the Nineteenth Century – had been operating in the city since 1787. At that time, it was purely a fraternal order, complete with “mystical mumbo jumbo ... secret handshakes, outlandish costumes, and grandiloquent titles.”⁹⁷ Tammany Hall was the political wing of the organization. Brothers of the order of the Tammany Society were called “braves” and they elected the thirteen “sachems” that acted as a board of directors.⁹⁸ The sachems met separately as “the Grand Council of Sachems,” elected “the Grand Sachem,” and named a master of ceremonies, of which there were many, including parades in war paint and feathers.⁹⁹ All members attended a once a month meeting focused on holiday planning, followed by an adjournment to “the Committee of Amusements.” “Here conviviality reigned. It was a

⁹⁴ *Summary of News*, THE WEEKLY HERALD (N.Y.), July 15, 1854, p. 221, Issue 28, at col C, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁹⁵ *The Late John McKeon*, FRANK LESLIE’S ILLUSTRATED NEWSPAPER (N.Y.), December 1, 1883, p. 237, Issue 1,471, at col A, 19th Century U.S. Newspapers, Gale Cengage Learning.

⁹⁶ The earliest court appearance in the sources cited above is 1838.

⁹⁷ MUSHKAT, *supra* note 52, at 8.

⁹⁸ *Id.*

⁹⁹ *Id.* at 8-9.

time for toasts, formal debates, tall stories, and patriotic songs. Occasionally, members staged a lively debate on some current problem.”¹⁰⁰

Organizational offices of the Tammany Society included positions like “scribe” (a secretary) and “sagamore” (a protocol chief) and also a doorkeeper or master at arms given the title “wiskinsky.”¹⁰¹ This sounds a lot like our “Kinzastinski.” However, the Ancient and Honorable Court of Dover records use none of the Indian-related nomenclature that this society used. Both Davis and McKeon were members by 1834 (although they would not have been in 1829). “G. Black,” whoever he was, is not listed as ever being a member of the Tammany Society.¹⁰² This evidence suggests that while this group is Democratic and pro-Jackson, it is probably not specifically Tammany.

If the “G” stands for George, it is possible that this was the “George Black, of New York, [appointed] to be Consul of the United States at Santos, Brazil” in 1830.¹⁰³ That would have been a Jackson appointment. A George Black also appeared in this period in a series of letters published in the *New-York Spectator* written by a man with the initials “A.C.” while at sea to his mother.¹⁰⁴ One of the amusements A.C. describes is a Court that has been constituted on the ship – the ship is named *Oxford* – called “the Supreme Court of the Commonwealth of Oxford.”¹⁰⁵ The passengers established a bench of judges with the power to enact laws, appointed officers to enforce them, specifically to

¹⁰⁰ *Id.* at 9.

¹⁰¹ *Id.* at 8.

¹⁰² There are three men with the last name Black listed, all of whom joined in 1810, none of them with the first initial “G” (see Figure 1). MEMBERSHIP LIST, *supra* note 62, at 12 (Black, John, March 18, 1810; Black, Seson, May 7, 1810; Black, William, March 26, 1810).

¹⁰³ *Appointments by the President*, THE N.Y. HERALD, April 12, 1830, Issue 85, at col C, 19th Century U.S. Newspapers, Gale Cengage Learning.

¹⁰⁴ See *Letters from a Traveller to Friends at Home Nos. I-IV*, N.Y. SPECTATOR, October 27, 1836, 19th Century U.S. Newspapers, Gale Cengage Learning.

¹⁰⁵ *Letters from a Traveller to Friends at Home No. II*, N.Y. SPECTATOR, October 27, 1836, at col D, 19th Century U.S. Newspapers, Gale Cengage Learning.

try all persons accused of violating those laws. George Black seems to have been chosen to be Chief Justice – “his honor Barzillai Feathers.”¹⁰⁶ Black and an associate drew up a code of laws in one day. Appointments to the various offices were made: “Scratchwrist Fearnought, Esq., attorney general, Peter Littlewhiskers, Esq. counsel for prisoners and Hans Soda-bottle, high sheriff.”¹⁰⁷ And two sessions were held that day. “You will not wish a report of the various cases that have been tried as you are not a lawyer,” A.C. wrote to his mother, “though they have been regarded among us, as of great importance, and of thrilling interest.”¹⁰⁸

A.C. explained that the close confines of the ship voyage caused the men to become “wonderfully sagacious in discovering new occupations and amusements,” as had the art of “throwing new spirit into those with which we were familiar on shore.”¹⁰⁹ Now this might mean that lawyers on board, like journalists on board, would organize amusements in a parody of their on-shore endeavors. It might also mean, however, that those involved in this incident were familiar with mock practices like this on shore. In other words, making a court, writing up laws, making appointments to quasi-official positions for the purpose of trying pretend offences, this was all part of a recognized and established practice, one that Black in particular, if it was the same person, would have been familiar with from the Ancient and Honorable Court of Dover.

PART THREE: WHAT WAS A “COURT OF DOVER”?

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Letters from a Traveller to Friends at Home No. I*, N.Y. SPECTATOR, October 27, 1836, at col C, 19th Century U.S. Newspapers, Gale Cengage Learning.

There was an actual ancient Court of Dover in England that had jurisdiction over pleas arising in relationship to Dover Castle.¹¹⁰ Dover was one of the *Cinque Ports* in Kent, and the special jurisdiction of the Court of Dover had been seen as early as the Fourteenth Century as a “trouble spot ... a source of irritation, discontent, and controversy” due to the way in which it routinely exceeded its authority.¹¹¹ So, for instance, one Parliamentary petition claimed that “the Officers of the Court of Dover, in Kent, vex and arrest Men, in all Parts of the Country, upon untrue Actions and require great Fees of them for their Deliverance.”¹¹² There was also a Chancery Court of the ports at Dover.¹¹³

However, by the Nineteenth Century, the term “Court of Dover” seems to have become a generic way to refer to a debate or social club. For instance, the *New-York Herald* carried an advertisement in 1845 for a “Judge and Jury Club,” “[a]fter the manner of the celebrated Club of that name in London.”¹¹⁴ The club would be established not less for the purpose of enjoying the wit, mirth, and humor, which must necessarily abound in such association – if properly conducted – than for the purpose of encouraging a taste for friendly discussion, in a novel form, among gentlemen who are desirous of practicing as debaters, or obtaining experience as controversialists, for exercise in a more extended and useful field.¹¹⁵

¹¹⁰ See JOHN SMITH ROSKILL, *THE IMPEACHMENT OF MICHAEL DE LA POELE, EARL OF SUFFOLK IN 1336* 89-91 (1984).

¹¹¹ See *id.* at 89.

¹¹² 2 *THE PARLIAMENTARY OR CONSTITUTIONAL HISTORY OF ENGLAND* 282 (2d ed. 1761-63).

¹¹³ See K.M.E. Murray, *Faversham and the Cinque Ports*, 18 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* (4th ser.) 53, 77-82 (1935).

¹¹⁴ *Multiples Classified Advertisements*, *THE N.Y. HERALD*, April 17, 1845, Issue 106, at col F, 19th Century U.S. Newspapers, Gale Cengage Learning.

¹¹⁵ *Id.*

Hence, the aims were both to provide enjoyment and to create opportunities for debate for the up-and-coming and prominent men who belonged to them who wanted practice as debaters or to become good “controversialists.”¹¹⁶ The organizers of this particular club hoped that the sessions of this debate club would be “much more attractive, entertaining, and instructive than those of *any Court of Dover, which has ever been known in this city.*”¹¹⁷ In other words, Courts of Dover had been known before. Another in the same year – described as comprising of merry “wit, wine, fun and good humor” – included a magic trick involving an automated chess box.¹¹⁸

What was an English-style Judge and Jury Club? One American traveler around this time noted that a judge and jury club at the Garrick’s Head on Bow Street was being advertised on Regent Street by “a man parading its pavements with a board before and behind him, on which was painted the portrait of a stout-looking gentleman, decorated with a flowing judicial wig, bands, and robes.”¹¹⁹ All manner of people attended, the poet, the prize-fighter, the merchant, the composer, the Peer.¹²⁰ They might sit in the audience or step up to serve as jurors or witnesses.¹²¹ The room was set up in the manner of the Courts at Westminster Hall, with a desk for the judge, a table for the bar, a witness box, and benches for those in the audience.¹²² The barristers wore real wigs and gowns and entered “like the barristers in the real courts” – “their mock gravity is irresistibly ludicrous. They take their places, arrange their books and briefs, just as solemnly as

¹¹⁶ *Id.*

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ *How It Was Done and Who Did It – A Chess Story*, FRANK LESLIE’S ILLUSTRATED NEWSPAPER (N.Y.), March 3, 1869, p. 217, at col B, 19th Century U.S. Newspapers, Gale Cengage Learning (describing a chess match at a “Court of Dover” held in 1845).

¹¹⁹ *Etchings in England, by a Cosmopolitan, Letter X*, THE ATLAS (Boston), January 9, 1846, Issue 164, col B, 19th Century U.S. Newspapers, Gale Cengage Learning.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

those matters are arranged elsewhere.”¹²³ The Lord Chief Baron makes a grand entrance.¹²⁴ All the trials are “humorous, and the mock gravity constitutes much of the fun – yet they contain matter sufficiently grave for the exercise of serious eloquence.”¹²⁵ Those playing the roles may or may not be real lawyers. Here the judge was a prominent poet and newspaperman, and the lawyer was a judge, albeit of “a minor court.”¹²⁶

The theatrical dimensions of what was taking place are clear. The above visitor to London began his article by explaining that for “an evening’s amusement” one might go to a room in a hotel “fitted up in Imitation of the House of Commons” to listen to the debates on political or literary subjects.¹²⁷ Or one might go to a “Free and Easie” to hear singing and recitations, which theatre performers joined after their shows had finished.¹²⁸ The Judge and Jury Club was just one of the live performances to be seen, advertised by a man with a billboard on Regent Street.¹²⁹ The Ancient and Honorable Court of Dover was probably not that open – there was, after all, an argument going on about who could and who could not participate. However, the mock trial would certainly be part of this theatrical tradition, certainly a tradition of amusements for members.

One American collection of writings published in 1808 was titled *The American Magazine of Wit, a Collection of Anecdotes, Stories, and Narratives, Humorous, Marvelous, Witty, Queer, Remarkable, and Interesting, Partly Selected and Partly Original by a Judge of the Convivial Court of Dover aided by a Jury of Odd Fellows*.¹³⁰

In its preface, “the Judge” of this convivial Court of Dover writes to the reader “thou hast

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ THE AMERICAN MAGAZINE OF WIT (1808).

never known, heard, or read of a Judge of *so ancient, so honorable*, and so renowned a court as that of Dover, [who] relaxing from the habitual gravity of the bench” takes up the topics turned to here.¹³¹ The stories collected promise “to eradicate ... every symptom of spleen.”¹³² So, for example, we get a story about a dog that comes to church dressed up in a wig and gown,¹³³ a joke about a sleeping legislator who wakes to shout out an embarrassing sex-related comment,¹³⁴ another about a lady who pronounces her husband a “libertine” rather than a “son of liberty,”¹³⁵ a story of a young woman trying to bed Benjamin Franklin,¹³⁶ a morality tale in which a stingy man gets what is coming to him,¹³⁷ a story of a cheeky tailor,¹³⁸ heroic war stories,¹³⁹ a story called “Ingratitude Punished” in which an ungrateful son is bested by his old father,¹⁴⁰ and on and on for over three hundred pages.

At the end of the work, the Judge explains that a Court of Dover had been constituted in New York City forty-five years earlier, i.e. 1763 – “according to the hyperbolic phraseology of the court, forty-five centuries ago, (the court counted years centuries).”¹⁴¹ It “had its origin in a town of that name in England” and the Judge did not know how old it was.¹⁴² He wrote “for anything I know to the contrary [it might] have existed before the flood.”¹⁴³ This Court of Dover was held in a tavern.¹⁴⁴ Its officers

¹³¹ *Id.* at iii (emphasis added).

¹³² *Id.* at iv.

¹³³ See *id.* at 2-3.

¹³⁴ See *id.* at 9-10.

¹³⁵ See *id.* at 21.

¹³⁶ See *id.* at 28-29.

¹³⁷ See *id.* at 29-30.

¹³⁸ See *id.* at 40.

¹³⁹ See *id.* at 50-52.

¹⁴⁰ See *id.* at 59-62.

¹⁴¹ *Id.* at 331.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *id.* (for twenty-five years, it was held “at the Porter House of Mr. C ---- G-----r”)

were “a Lord Chief Justice, two associate Judges, an attorney General, a High Sheriff, Treasurer, Secretary, Master of the robes, Serjeant at Arms, Master of the Ceremonies, and others in stations subordinate.”¹⁴⁵ Its object was “to promote good fellowship.”¹⁴⁶ Members were identified as “persons of considerable standing in society, men of wealth, credit, good sense, and humour.”¹⁴⁷ Qualifications were that a candidate be attached to order, reason, and religion, “possess a sound constitution, be of a social turn, and an admirer of women, roast beef, and porter.”¹⁴⁸ Membership initiation involved a lot of drinking from “the book,” “usually a quarter pot of porter ” (see mug in figure 5 below).¹⁴⁹



¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

[Figure 5 – Frontispiece to *The American Magazine of Wit* (1808) “The Court of Dover in Full Session” by William Charles]¹⁵⁰

This particular Court of Dover was no longer operating in 1808. As its judge wrote, “most of the old members are now in their graves; and the court has for some time ceased to exist. It is in contemplation to revive it in the course of the present century.”¹⁵¹

What did this particular Court of Dover do? Well, drinking and singing were evidently central activities. Based on the type of material reproduced in the book, stories and jokes (often although by no means always of a sexual nature) were also important. One of the entries focuses on a figure in the cartoon above, John Richard Deborus Huggins (see figure 5).¹⁵² Huggins was named “emperor of Hairdressers and king of the Barbers” and identified as a poet who “contributed in no small degree to diffuse pleasure, harmony, and happiness around him.”¹⁵³ His song, reproduced to give an example of his “splendid talents,”¹⁵⁴ begins like this:

I’m Emperor of Barbers here,
 My name is John R. D. Huggins,
 I’m Shaver, Curler, and Friseur,
 In short I’m all but --- muggings!
 I dress a Head, I trim a Crop;
 At Shaving well my knack is!

¹⁵⁰ Reproduced from Lorraine Welling Lanmon, *American Caricature in the English Tradition: The Personal and Political Satires of William Charles* 11 WINTERTHUR PORTFOLIO 1, 13 (1976).

¹⁵¹ THE AMERICAN MAGAZINE OF WIT, *supra* note 130, at 332.

¹⁵² *Id.* at 63. Lanmon, *supra* note 150, at 44 gives “Huggins J.” as the first name on the picture frame from left to right.

¹⁵³ THE AMERICAN MAGAZINE OF WIT, *supra* note 130, at 63.

¹⁵⁴ *Id.* at 64.

I fit a Wig --- I queue a Fop --
 And eke a beard, and shave the chop
 Of little schoolboy Jackies [...] ¹⁵⁵

As indicated by its title, a *Convivial* Court of Dover, this group seemed to be more focused on the social than on the debate component of a Court of Dover. If there were debates, they would have to steer clear of certain serious topics, as “the standing rules of the court” (see the wall in figure 5) prohibited the introduction of “religious or political questions.” ¹⁵⁶ Any violation of this resulted in exclusion from the club room for one month, a second time for three months and the third expulsion. ¹⁵⁷

This issue of just how controversial topics for debate should be seems to have been an important one for groups like this. The ideal topic needed to be “sufficiently grave for the exercise of serious eloquence.” ¹⁵⁸ However, it would have to avoid leading to serious acrimony – after all, one of the principal aims of gathering together was to have fun. Serious offence or, indeed, fist fighting was not going to be conducive to this. So, for instance, a group of law students who created a debating society in the same period in Ontario, the “Juvenile Advocate Society,” learned to avoid controversial topics like the treatment of Irish Roman Catholics under British law. ¹⁵⁹ Its student leaders “came to favour the abolition of animated ‘political’ discussions” like this. ¹⁶⁰

The Juvenile Advocate Society was a group that in a very non-rule-of-law-respecting moment actually stormed and destroyed the printing press of an anti-

¹⁵⁵ *Id.* The song continues for another two and a half pages. See *id.* at 64-67.

¹⁵⁶ *Id.* at 332.

¹⁵⁷ *Id.*

¹⁵⁸ *Etchings in England, by a Cosmopolitan, Letter X, supra* note 119.

¹⁵⁹ G. Blaine Baker, *The Juvenile Advocate Society, 1821 to 1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class*, HISTORICAL PAPERS – CANADIAN HISTORICAL ASSOCIATION 74, 93 (1986).

¹⁶⁰ *Id.*

establishment newspaper editor.¹⁶¹ Senior members of the bar did not criticize the students' vandalism or "charivari."¹⁶² "Ungentlemanly" behavior towards those who were members of the group was frowned upon. So, for instance, "a strict regard to 'decorum and a gentlemanly and forbearing conduct' had to be urged upon them on several occasions to 'smooth away the acrimony that will always arise upon a difference of opinion.'"¹⁶³ However, the printing press incident suggests that it was acceptable to be "ungentlemanly" towards those on the outside, particularly a person who was using a foreign, Republican, rights-based, American style of invective that deeply offended the "older local *mentalité* of members of the ruling élite who had 'been born and brought up in Upper Canada.'"¹⁶⁴

Interestingly, however, some members of this "little Seminary of Law and Eloquence" wanted to open the group up to non-law students, as well as law students.¹⁶⁵ This was opposed on the grounds that the group would no longer be able to give "distinction" to its members in the way that was meant to. So, for instance, one senior member of the bar wrote on the question of "opening the door to indiscriminate admission":

The profession of the Law ... is guarded by particular statutes and decrees from indiscriminate admission to its honour which, as well as its emoluments, are confined to those who by education and a course of study qualify themselves to fulfill its duties ... In opening the door to indiscriminate admission the [Juvenile

¹⁶¹ See G. Blaine Baker, 'So Elegant a Web': *Providential Order and the Rule of Secular Law in Early Nineteenth-Century Upper Canada*, 38 U. Toronto L.J. 184 (1988).

¹⁶² See *id.* at 197 (for the types of things that were being printed), 185 (on the failure to criticize), 201-202 (for an exceptional condemnation of the behavior).

¹⁶³ Baker, *The Juvenile Advocate Society*, *supra* note 159, at 93.

¹⁶⁴ Baker, 'So Elegant a Web', *supra* note 161, at 185.

¹⁶⁵ Baker, *The Juvenile Advocate Society*, *supra* note 159, at 86.

Advocate] Society will lose all the incentive which distinction gives. The barrier placed by [the existing rule which restricts membership to students-at-law and articled clerks] ... gives a sort of legality to that necessary distinction.¹⁶⁶

Leveling Republicanism was clearly to be kept at bay.¹⁶⁷ Besides, if non-law students were allowed into the group, this would raise the danger that there would be an “abandonment of legal discussion ... in favour of promiscuous topics.”¹⁶⁸ One might say, in other words, that there was a danger the group would be transformed from a serious training group for junior lawyers into a fun-and-games Court of Dover. The problem with this way of understanding things, however, was that the junior lawyers did not always engage in serious debate. There are examples of mock debates in their records.

So, for instance, “the accused in a mock prosecution for usury was named by the juvenile advocates Grinder, and in another moot-court action against the tailor of a coat with holes in its pockets through which money fell, the defendant Thimble.”¹⁶⁹ These “offenses” were probably committed during term time, when law students from all over the province were boarding at Osgoode Hall in Toronto, in order to attend lectures and sit in the courts while they were in session, requirements for their admission to the bar. We can easily imagine one young man runs out of money and his neighbor lends him some

¹⁶⁶ See *id.* at 78.

¹⁶⁷ This closed attitude towards entry into the legal profession is probably related to the limited opportunities available to lawyers in Upper Canada when compared with more commercially prosperous parts of the United States, where attitudes towards bar admission were liberal. As Baker puts it, “[c]ommercial opportunities in the new colony were few or unreliable, and ... land was an ‘inferior good.’ Since neither land ownership nor commerce could provide a sufficient basis for power or gentility, a provincial bureaucracy supplied and supported by the legal profession was widely affirmed on material as well as ideological and spiritual grounds as the most suitable keystone for the province’s social pyramid.” Baker, ‘*So Elegant a Web*’, *supra* note 161, at 190.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 92.

but demands unexpected interest upon repayment. Another tries to help sew up a pocket but neither of them knew what they were doing.

The group's serious topics were both narrowly legal and more broadly political. So, for instance, there were "mooting" questions on commercial law (e.g. "whether a 'promise to pay Adam Boyle £8 15 S Currency on St. Yetmos Day for value received' could count as an instrument enforceable in law as a promissory note"),¹⁷⁰ the real estate involved in pretend succession scenarios (e.g. problems created by the absence of male heirs),¹⁷¹ and morality-related moots on seduction and criminal conversion and other issues (e.g. "whether one should be punished more severely for brawling in a church yard than elsewhere ... and whether bastard sons could inherit in the absence of other issue of a deceased father").¹⁷² Many of the political topics dealt with American influence, not surprising in a legal culture that was of Loyalist "High Tory" extraction. So, for instance, one topic for debate, surely animated by a concern with American slavery, was "whether a law that gives an individual absolute power over the lives, limbs and liberties of his fellow creatures can ever be just."¹⁷³ Another was "whether 'a monarchical government like that of Great Britain is more conducive to the liberty and happiness of a nation than a republican form of government like that of the United States.'"¹⁷⁴

Another Court of Dover newspaper advertisement stated that an afternoon "sitting" of "[t]he officers[,] jurors, and members generally, of this ancient and

¹⁷⁰ Baker, *The Juvenile Advocate Society*, *supra* note ?, at 95.

¹⁷¹ See *id.* at 95-96.

¹⁷² *Id.* at 97. See also KAREN S. CUNNINGHAM, IMAGINARY BETRAYALS: SUBJECTIVITY AND THE DISCOURSES OF TREASON IN EARLY MODERN ENGLAND 23-39 (2002) (on the imaginary worlds in moot court cases).

¹⁷³ Baker, *The Juvenile Advocate Society*, *supra* note 159, at 93.

¹⁷⁴ *Id.*

honourable convivial court” would be held on June 13, 1808.¹⁷⁵ It would be to celebrate the marriage of the “high-sheriff” of the court.¹⁷⁶ At this meeting of the Court, “the laws” would be executed “against a certain round of beef, two gammons, sundry bottles of wine, and several other articles which will be then and there brought forward for trial.”¹⁷⁷ The trial of inanimate objects, echoes with more well-known (but not very well-understood) instances of the mock trial of animals in the medieval and early modern period.¹⁷⁸ These were, at least sometimes, opportunities for “learned seriousness.”¹⁷⁹

It seems that a Court of Dover could also be a spontaneous event as captured in the fictional writing of a nineteenth-century American lawyer named William Post Hawes. Hawes wrote many articles and stories for a number of New York literary magazines using a character named “J. Cypress Jr.” Courts of Dover feature prominently in a series Hawes wrote about an all-male week-long hunting and fishing trip to the Fire Islands and the stories told during long nights of drinking and tall tales.¹⁸⁰ At one point, Cypress warns one man in the company, Raynor, who has not yet told a story that he must or else “I’ll summon a Court of Dover and have you fined.”¹⁸¹ Cypress finds himself the object of such a summons in the story described below.

The principal characters in this story are Cypress and his old friend, Ned Locus. Ned is “a young gentleman, who spends his money and shoots, fishes, and tells tough

¹⁷⁵ *Court of Dover*, NEW YORK COMMERCIAL ADVERTISER, June 13, 1808, vol. 11, Issue 4065, at 3, America’s Historical Newspapers.

¹⁷⁶ *Id.* The “high-sheriff” who was getting married was referred to as “D --- T---, Esq.” and the location is “the upper end of Broadway.” *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See William Ewald, *Comparative Jurisprudence I: What was it Like to Try a Rat*, 143 U. Pa. L. Rev. 1889, 1898-1916 (1994-95).

¹⁷⁹ *Id.* at 1901.

¹⁸⁰ FRANK FORESTER (ed.), 1 SPORTING SCENES AND SUNDRY SKETCHES: BEING THE MISCELLANEOUS WRITINGS OF J. CYPRUS 83-92 (1842).

¹⁸¹ *Id.* at 100.

yarns for a living.”¹⁸² Cypress says that there was always “an investiture of unearthliness about everything he [Ned] sees and hears. By day, and by night, he is contemplating a constant mirage.”¹⁸³ Evidently, Ned does not need to work for a living, as he has an estate his uncle manages for him.¹⁸⁴ Cypress is “a distant relation” from “one of the poorer branches of the family” and, in his own words, is “a kind of loafer.”¹⁸⁵ Ned lends Cypress money, which Cypress wins back in extravagantly improvident bets Ned makes with him. “I have thought of getting into some kind of business,” Cypress confesses, “but my affection for Ned will not permit me to leave him.”¹⁸⁶ Cypress also seems to be addicted to fishing and his connection to Ned allows him to pursue his passion.

On the particular occasion we are concerned with here, Ned was telling tall tales about his exotic travels in the Mediterranean. One of these involved being entertained in Suez by “the sister of the governor, Julia Kleokatrina,”¹⁸⁷ a kind of Cleopatra figure he was very taken with, who seemed to return the affection, at least in his imagination. He claimed she called him her “pet infidel poet.”¹⁸⁸ He was reporting one evening’s dinner-table conversation and describing the Siberian puppy dog sitting in her lap when Cypress alerted him to the fact that the other men around the campfire had fallen asleep.¹⁸⁹ The next night, Ned seeking to recommence his story, asks the company

“Well, boys . . . Where did I leave off, last night?”

¹⁸² *Id.* at 19-20.

¹⁸³ *Id.* at 20.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 21.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 80.

¹⁸⁸ *Id.* at 81.

¹⁸⁹ See *id.* at 81-83. This happens a lot in these stories and seems to operate as a euphemism for passing out.

“You stopped when you got ‘sleep in Julia Kle—cre – kle – cre –” [one of the men says]

“Kleokatrina’s lap,” finished I [Cypress]

“No, that was the Siberian puppy dog,” said Ned.¹⁹⁰

Cypress then says “It must have been yourself, Ned ... You like to take your comfort --”, and this was followed by a Greek aphorism that the note says is about a cat liking fish but being afraid to wet its feet – the inference being presumably that Ned would have liked to be the cat in Julia Kleokatrina’s lap but did not quite have the nerve to curl up there.¹⁹¹

Ned responds to this allegation angrily, calling for Cypress to be fined “a basket of Champagne” for “quot[ing] Heathen languages wrongly, or inappositely.”¹⁹² More specifically, he asks to make a complaint against Cypress and called for “the Court of Dover” to be summoned “straight off.”¹⁹³ Cypress says that will take too long and suggests that two of the other men in the company (Venus and Peter) be vested with the full powers of the court: “Each man state his case, and we’ll be bound by their judgment.”¹⁹⁴

Ned’s charge is that “we were talking of dogs; and I say that to make a quotation about cats, and apply it to the more noble canine tribe, is supremely inappropriate, not to say highly ridiculous.”¹⁹⁵ His complaint is not that Cypress questioned his courage. One of the judges says of the Greek phrase uttered by Cypress that “the poet simply intended to say that cats love to sleep ‘in pleasant places.’”¹⁹⁶ Ned further accuses Cypress of

¹⁹⁰ *Id.* at 88.

¹⁹¹ *Id.*

¹⁹² *Id.* at 89.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

having “bored us with a pretended illustration of his weak wit ... and has substituted the effeminacy of lazy cats, for ... high-spirited, hard-working pointers.”¹⁹⁷ It sounds like Ned is objecting to being called a pussy (as in a wimp) by Cypress and wants to be thought of as having pursued Kleokatrinka as bravely and manly as a hunting dog.

Cypress responds:

“I am charged with making an in-apposite quotation, contrary to the statutes of the Beach. I spoke of cats. Now, your Honors, are not cats four-legged animals? I appeal to the Court’s own sense of justice and physical fitness. ---”

“He talks like a book” [one judge, Venus, says to the other, Peter]

“Then here,” – holding up the fox I had shot, and who was my junior counsel on the argument, -- “has not this fox four legs?”

“An’t one of them fore legs shot off?” asked Judge Peter, *dubitans*.

“No, your Honor, it is only a little crippled. Now we all know, and there needs no argument to prove, that a dog runs on four feet; and so a cat is like a fox, and a dog is like a fox, and things that are equal to the same are equal to one another; and so a cat is a dog, and a dog is a cat; and so, your Honors, I trust I have established my defence, and that I have not misused words, and that Mr. Locus [Ned] must pay for the champagne.”¹⁹⁸

The judges agreed with Cypress. Ned was ordered to pay for the champagne. Cypress’s deft and very lawyerly argument equating dogs with foxes, and cats with foxes, and dogs with cats won the day, and the poke that Cypress took at Ned’s masculinity is excused by

¹⁹⁷ *Id.* at 90.

¹⁹⁸ *Id.* at 91-92.

this Jesuitical or casuistic flourish. Indeed, it looks like an example of a “discourse” lawyer joke, one in which lawyers are portrayed as “detached from ordinary canons of truth ... They are so enclosed in a world of talk that they miss substance for form and often descend into senseless bombast.”¹⁹⁹

The editor of the Cypress writings describes all of Hawes’s productions as of “a fugitive nature,” calling them “fugitive pieces.”²⁰⁰ Scholars who have commented on Hawes’s writing and the genre of “indigenous American comic realism” have pointed out that the majority of these stories are “simply awful,” consisting of “endless numbers of bad jokes about drunks, inept hunters, and country bumpkins.”²⁰¹ “J. Cypress Jr.” was identified as the author of some “long, horrific yarns.”²⁰² However, one scholar of the tall tale points out that Hawes was doing important experimentation with the tall tale in the late 1830’s that reached high literary form with Mark Twain.²⁰³ The important technique was putting the reader inside the story as if he or she was a participant in the audience of the story-teller “by carefully producing an illusion of the tall tale’s spontaneous drama of performance and response.”²⁰⁴ Hawes was “not a novelist”²⁰⁵ and so it is not surprising that he would do things like launch immediately into the telling of the tale, as if the person hearing and reporting it had just walked into the room (rather than engaging in the elaborate scene-setting and character development of a novel).

¹⁹⁹ MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 62 (2005).

²⁰⁰ Henry William Herbert, *Memoir of the Late William P. Hawes Esq.* in FRANK FORESTER (ed.), 1 *SPORTING SCENES AND SUNDRY SKETCHES: BEING THE MISCELLANEOUS WRITINGS OF J. CYPRUS* 9, 4 (1842).

²⁰¹ Richard Boyd Hauck & Dean Margaret Hauck, *Panning for Gold: Researching Humor in the Spirit of the Times*, 3:3 *STUDIES IN AMERICAN HUMOR* 149, 149 (1977).

²⁰² *Id.* at 151.

²⁰³ See Henry B. Wonham, *MARK TWAIN AND THE ART OF THE TALL TALE* 47-50 (1993).

²⁰⁴ *Id.* at 50.

²⁰⁵ *Id.* at 48.

However, one might say equally of Hawes that he emphasized the oral in the way that he did, the “spontaneous drama of performance and response,” because he was a lawyer.²⁰⁶

Hawes was a practicing lawyer who seemed to write these stories in his spare time.²⁰⁷ There are many legal allusions in the writing. So, for instance, Cypress writes of a hunting God’s “fee-simple foot-hold among the stars” and the fact that such a property interest could not be found in any mortal land title registry.²⁰⁸ One of Ned’s tall tales about fending off a multitude of sharks in Long Island Sound calls them “sea attorneys” and refers to their bait as “a retainer.”²⁰⁹ Ned calls it “the rule in Shelley’s case” to be ejected from a ship at the first landing after breaching one of the ship’s rules.²¹⁰ When a controversy arose about the categorizations Cypress used in an article for quail and partridge, Cypress responded to his critics by asking for “leave to amend – as the lawyers say – ‘on payment of cost.’”²¹¹ One of his critics charged him with having been misled in ornithology by his “Law Latin.”²¹² One of his bird-descriptions speaks about the ability to “bring an action of trespass and recover damages” from the animal.²¹³ A duck “may

²⁰⁶ *Id.* at 40.

²⁰⁷ Herbert in SPORTING SCENES, *supra* note 200, at 4 (“From the commencement of his [Hawes’s] practice as a lawyer at the age of 21, to his untimely end, he continued in that eminent profession; in which he occupied by his talents, industry, and kindly disposition, a highly honorable situation”), 7-8 (“without having attained perhaps the highest eminence [in his profession], he occupied a station highly respectable; to which his classical education, his natural acuteness, and his laborious habits fully entitled him to”).

²⁰⁸ SPORTING SCENES, *supra* note 180, at 161.

²⁰⁹ *Id.* at 37, 38. See also GALANTER, *supra* note 199, at 74-76 (using the *Oxford English Dictionary* to note that shark was seafarers’ slang by lawyers by the early Nineteenth Century and providing an array of modern-day lawyer shark images).

²¹⁰ SPORTING SCENES, *supra* note 180, at 77.

²¹¹ *Id.* at 123.

²¹² *Id.* at 136.

²¹³ *Id.* at 183.

grant, bargain, sell, devise, bequeath and run away from all and singular, his right, title, principal and interest in and to” intact.²¹⁴

The Court of Dover is obviously legal, one side prosecutes, the other defends, and the judges decide. It is performance-oriented in the way that a play is. Think, for instance, of the way in which Cypress used his hunted “beach fox”²¹⁵ to defend himself. It is the object he waves around as if it is evidence of his nonsensical argument and, indeed, he even presents it as his co-counsel. The very notion of “sporting” in the text obviously refers to hunting and fishing, the subject matter of so many of the sketches; however, the examples of the Courts of Dover we have seen here echo in other meanings of the word “sport.”

First, there is the primary definition of sport as “[d]iversion, entertainment, fun,” as in the notion of “good sport” or “good fun.”²¹⁶ The Convivial Court of Dover captures this in addition to a related kind of sport that is joking or jest.²¹⁷ A secondary meaning of sport as “[a] theatrical performance, a show, play, or interlude,” is captured in the English Judge and Jury Club kind of Court of Dover.²¹⁸ Sport can also be “a piece of intellectual or literary playfulness; a *jeu d’esprit* or a piece of writing characterized by this” as in “the sport of wit” or “a sport of words.”²¹⁹ When Cypress’s use of Latin in the quail/partridge controversy was criticized, one defendant wrote that Cypress’s article was “a very beautifully written, *sportive*, and humorous paper ... evidently written as a *jeu d’esprit*, laying no pretension to ornithological research ... the production of the leisure moments

²¹⁴ *Id.* at 190. This seems to be a reference to Samuel Swartwout flying the coop with his embezzled funds intact. Although there is some reference here also to Jackson’s opponent in the war on the national bank, Thomas Biddle.

²¹⁵ *Id.* at 84.

²¹⁶ OXFORD ENGLISH DICTIONARY.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

of a sportsman, scholar, and gentleman.”²²⁰ “Sporting wit” and “sporting words” certainly describes the sparring between Cypress and Ned in the Court of Dover fox argument.

One of the Cypress stories contains a footnote to Blackstone on the point that the pursuing and taking of “all beasts of chase” in England were subject to the rights of the King “or to those such authorized under him.”²²¹ In America, Cypress wrote, “[t]hank God! We have equal rights in matters of venation here. No puny-face spawn of a title, King or Queen, Duke or Squire” shall take away our game.²²² “[H]e is the King who is most eloquent to a bevy of quail getting up – talking with both barrels in quick succession.”²²³ This is not just the holding of *Pierson v. Post*, he who successfully seizes (e.g. shoots) takes; it also seems to be a comment on who rules in America, who is King, the one who, like Cypress, is “most eloquent” and does his shooting “talking with both barrels.”²²⁴ This is a world in which the lawyer, in other words, with his “talking, talking, talking,” is King.²²⁵

Such descriptions both trade in the authority of the law while simultaneously mocking and even criticizing it. So, for instance, when George Read, one of the signers of the Declaration of Independence, promised his friend John Dickenson that he, Read, would bring Dickenson’s objection to his tax assessment to the Court of Appeals the day after Christmas, Read wrote that yes he would bring it, “[h]owever, it is a place I seldom

²²⁰ SPORTING SCENES, *supra* note 180, at 139 (emphasis added).

²²¹ *Id.* at 176.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ GALANTER, *supra* note 199, at 63.

grace with my presence, as it may properly be styled a Court of Dover in England ... where they are all talkers and no hearers.”²²⁶

Courts of Dover imitate lawyers, judges, and courts of law and in doing so seem to be acknowledging their cultural importance. Like many lawyer jokes that attack lawyers, they are also simultaneously “infused with the sense that lawyers are clever, powerful, and important.”²²⁷ However, Courts of Dover are also clearly mocking the solemnity of the law (see Figure 5). In one of the stories in the *Convivial Court of Dover* collection, a lawyer gathered some friends together to hear him read from a treatise he had written on eloquence. He paused at the point in the text where he was about to state the most important requisite of an orator – an ink blot was covering over the word. And someone in the audience piped up with the following: “A very large and very well powdered periwig.”²²⁸ That this superficial feature of a lawyer’s presentation might be the most important is funny because it is a comment on how unimportant the substance of what he says is.

Cypress’s beach fox argument is a demonstration of a specious form of reasoning and the lawyer’s tendency to use talk to win the day, even undeservedly. As Cypress himself put it, luckily he “happened to know that it was not always rowing straight ahead that wins a race, or that talking sense and truth always gains a cause.”²²⁹ Why was this? Well, according to Cypress, “Judges and Juries, in spite of their affectation of stern, solemn, unfluctuating purpose, are like the tides. They have their currents and eddies and

²²⁶ WILLIAM THOMPSON READ, *LIFE AND CORRESPONDENCE OF GEORGE READ* 424 (1870).

²²⁷ GALANTER, *supra* note 199, at 176.

²²⁸ THE AMERICAN MAGAZINE OF WIT, *supra* note 130, at 202-3.

²²⁹ SPORTING SCENES, *supra* note 180, at 90.

under-currents.”²³⁰ One admires Cypress for knowing how to read the water and catch the fish/win the case. This is perhaps not the most noble or principled way of thinking about the legal process. However, it matches the way that many people feel about lawyers, combining their suspicion of the fast-talking operator with admiration for the skill in action, particularly if it is used to help them out of a jam they are in.²³¹

Begrudging admiration is not just something non-lawyers feel about lawyers. Lawyers too share in these perceptions.²³² In the same way that lawyers are often the ones who know the most and love to tell lawyer-jokes, one would expect to find lawyers being enthusiastic participants in Courts of Dover, making fun of themselves while at the same time participating in an activity that puts them on center-stage.²³³

So, for instance, John McKeon, the prosecuting attorney would have been on center-stage in the mock prosecution of the Ancient and Honorable Court of Dover. Unfortunately, what we have here are the “set up” or justification documents (the law, the speech justifying the law, and the appointment certificate) rather than a record or transcript of how the trial actually went. Perhaps even more frustrating, we have no list of members or evidence about what the group did when it was not disciplining members. Presumably it did more than meet occasionally to hold this kind of mock trial. Given the fact that McKeon did go on to become a district attorney, we must ask whether part of

²³⁰ *Id.*

²³¹ See Angela Fernandez, *Polling and Popular Culture (News, Television, and Film): Limitations of the Use of Opinion Polls in Assessing the Public Image of Lawyers*, in *IN THE PUBLIC INTEREST: THE REPORT & RESEARCH PAPERS OF THE LAW SOCIETY OF UPPER CANADA’S TASK FORCE ON THE RULE OF LAW & THE INDEPENDENCE OF THE BAR* (Lorne Sossin ed., 2007) 213-16 (on the way that people’s positive experience with actual lawyers is unable to displace their global negative perception of lawyers).

²³² See *id.* at 216-17 (on how lawyers themselves fall into stereotypes about lawyers drawn from popular culture).

²³³ See GALANTER, *supra* note 199, at 174-75 (on lawyers being the ones who love to tell lawyer jokes). See also 176 (noting that being the object of a joke, even a critical joke, “is a sign of high status and has the ultimate effect of boosting rather than lowering status.” It is as if lawyers are saying, “we have so much status we can endure a firestorm of jokes”).

what he was doing was trying to demonstrate to the other members of the group, likely to have included other Democrats connected to Tammany Hall, that he was well-suited to the role. If he could effectively play the part in the mock situation, he could do it in the real one, and this would have been an opportunity for him to show people that mattered that he had what it took. Perhaps he did not perform very well, since, after all, he was not actually given the position until twenty years later. He might nonetheless have been thought of for it and himself been thinking of it at an early date. In any event, if something like this was even remotely at stake, the solemn or serious aspects of “solemn foolery” are easy to appreciate.

The examples of Courts of Dover given here are obviously not exhaustive. It was evidently a fluid form, capable of presenting itself in a wide variety of ways, some spontaneously (as in Hawes’s literary example), others as a special event (as in the 1808 Ancient and Honorable Convivial Court of Dover wedding celebration), others for more regular meetings for drinking, debate, jokes, and stories (as in the pre-1808 *American Wit* Ancient and Honorable Convivial Court of Dover), and others that were heavily legally-themed in an open theatrical way (as in the 1845 English Judge and Jury Club). Probably our Ancient and Honorable Court of Dover did not look exactly like any of these. However, collectively, these examples help give a sense of the range and the kind of thing, the type of *sport*, we should be imagining.

PART FOUR: WHAT WAS THE OFFENCE?

Gatherings of social and debate clubs were apparently replete with opportunities for offense. At the Court of Dover with the chess show magic trick, the person writing the article remembering the event wrote, “woe betide the unhappy wight [sic ?wit?], who,

under circumstances no matter how tempting, should deliver himself of anything approximating to a pun – such offence being in the eyes of our worthy president the unpardonable sin, and its penalty an instantaneous fine.”²³⁴

Unlike Cypress’s particularly pointed use of an “in-apposite quotation” about cats that wounded Ned’s masculine pride,²³⁵ even an innocuous pun could land one in trouble in the wrong company. This trouble was likely to be everyone else’s gain and so all present would have an incentive to be on the lookout for offence. So, for instance, in the Cypress adventure, when Ned interrupts the judges at one point, he was fined “drinks all round, and a paper o’ tobacco.”²³⁶ However, alcohol was to be extracted whether there was obedience or disobedience. After the judges order Ned to pay the champagne for losing the case, they go on to require that “th’ rest o’ th’ company ... [will] pay a small glass to each o’ the judges a piece when they get ‘shore, on ‘count not making disturbance.”²³⁷

The fox Court of Dover story is full of ship/marine context. Ned was telling of his exotic travels “down the Red Sea, through the Straits of Babelmandel, and so around, by Ceylon and the Straits of Malacca, to the Lanjan Empire, stopping on the road, now and then, to have a fight or a frolic.”²³⁸ When Cypress hears that this this is the ground that will be covered in the evening’s program, he says of Ned: “He’ll talk to the end of next week. Good night.”²³⁹ Ned refuses to let him go to bed, stating that “[a] press-gang has got hold of you. You must go with me.”²⁴⁰ The group deputize Cypress as a

²³⁴ *How It Was Done and Who Did It – A Chess Story*, *supra* note 118.

²³⁵ SPORTING SCENES, *supra* note 180, at 91.

²³⁶ *Id.*

²³⁷ *Id.* at 92.

²³⁸ *Id.* at 85.

²³⁹ *Id.*

²⁴⁰ *Id.* at 86.

“steward’s mate” and give him his pay in advance, a refill on his champagne glass.

“Resistance was in vain. I was duly installed,” Cypress wrote.²⁴¹

The ship-related detail in this story may be no accident. It might be a carry-over from the English Court of Dover, which was, after all, most important as a port and shipping place. Perhaps the transatlantic tradition of invoking the Court of Dover, and the revelry built into that, stems from the sea-faring component of its history. One can see how the practice of invoking a “Court of Dover” when a ship started its voyage in Dover but was not actually any longer in Dover may have developed. This might have been a way to resolve serious dispute on a long trip. It seems very likely to have developed as a way for those on board to entertain themselves, as in the case of the “Supreme Court of the Commonwealth of Oxford,” in that case named after the ship.²⁴² Working ships were also of course all-male environments and so one would expect to see aspects of that culture replicating itself in all-male fraternities, social clubs, and other orders, especially those located in port cities like New York, Boston, and Philadelphia. Indeed, the Custom House in New York City was a place for regulating its ship trade and traffic, constituting the receiving end of the Port of Dover, as it were. It is not surprising that it would be a point of practice for aspects of a shared maritime culture and its peculiar traditions, quasi-literary amusements, as well as a custom of liberal drinking.

“The Supreme Court of the Commonwealth of Oxford” provides a number of examples of the kind of offences one might find in a Court of Dover on a ship. So, for instance, the first indictment was for sending to the ship newspaper, the Breeze (so named for its motto “A breeze! A breeze! My Kingdom for a Breeze!”), “a

²⁴¹ *Id.*

²⁴² *Letter from a Traveller to Friends at Home No. II, supra* note 105.

communication which the editors could not read.”²⁴³ Another was for repeating a joking anecdote from a certain work, which was not appreciated by the other passengers.²⁴⁴ A third was for “conversing with the man at the wheel.”²⁴⁵ And yet another was against a person who was “attempting to deceive the public, by styling an animal brought on board, a dog, whereas it was evidently not of that species, having no tail.”²⁴⁶ A motley assortment of issues, all of which were said not only to have broken “the laws” but also to have “seriously wounded” “the peace and dignity of the commonwealth.”²⁴⁷

We do not know what the offence at our Court of Dover was. It might have been something of a trivial order such as uttering a pun or an unappreciated anecdote, spilling a glass of wine, or maybe raising and engaging in a political topic of conversation that was deemed not in keeping with the light-hearted aims of the organization. However, Davis stated that it was a charge of “willful neglect of some important duty” that had been trusted to the accused member and his associates.²⁴⁸ This sounds like something more serious than the usual opportunity fabricated in order to extract a drinking tax from the errant member.

Davis wrote in his speech that “every member is immaculate and we are, therefore, the more willing and anxious to investigate all reports that may be circulated derogatory to his character . . . Our well behaved brother may have been led astray from the path of virtue. We hope not.”²⁴⁹ Whatever the accused was charged with having done, it was the “willful neglect” of an “important duty” that was capable of damaging

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 11.

²⁴⁹ RECORDS, *supra* note 10, at 11-12.

his reputation. Given the connection between this Court of Dover and the Custom House, we must ask if the “important duty” was a duty at the Custom House or some other public office.

Studies of civil service reform have identified the corruption under Swartwout at the Custom House as “Burrite.”²⁵⁰ George Davis’s father, Matthew L. Davis, who also held a position at the Custom House, had a long-time friendship with Burr. Jackson first met Swartwout through their mutual connection to Burr and his treason trial.²⁵¹ The president of the Court of Dover, George Davis, was at the Custom House at the time the trial probably took place. Given the sea-faring connection to Courts of Dover more particularly, this Court of Dover seems likely to have been intimately connected to the Custom House at a time when Davis was on the Surveyor rather than the Collector side. We must consider the possibility that this trial was related to the “Burrite” corruption at the Custom House under Swartwout as Collector and might have even been an early attempt to internally regulate that corruption.²⁵²

From a present-day perspective it is difficult to appreciate just how murky graft-related issues must have been to those living in the long period before civil service reform. Political plunder positions were occupied by the most eminent and respectable individuals of the day. Sanford, for instance, held the District Attorney position and

²⁵⁰ Dorman B. Eaton, *THE SPOILS SYSTEM AND CIVIL SERVICE REFORM IN THE CUSTOM-HOUSE AND POST OFFICE AT NEW YORK* (Publications of the Civil Service Reform Association, No. 3) 14-15, 19 (1881) in *POLITICS AND PEOPLE: THE ORDEAL OF SELF-GOVERNMENT IN AMERICA* (1974).

²⁵¹ See BRUNSON, *supra* note 55, at 35.

²⁵² We should note that the Deputy Collector, the position Davis later held when the records were mailed to him, “administered the non-political business of the customhouse which left the collector free for political action.” ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883* 105 (1961).

made a small fortune from it.²⁵³ These positions were meant to be somewhat entrepreneurial. Swartwout, for instance, was given a salary of \$6000 a year and could make between \$5000 and \$15,000 more from legitimate fees and charges.²⁵⁴ The temptation to make more through illegal means must have been enormous and what was and was not allowed would not always have been clear. Now Swartwout did things with public money that were fraud and embezzlement by the standards of his day, “borrowing” large amounts of money that he collected from merchants that he was supposed to be turning over to the Treasury Department and investing it in a coal and mining investment in Maryland and a land deal in Texas. However, at least two things must be said about this behavior.

First, the system was not set up to prevent corruption and one gets the sense that it was actually meant to sustain a certain level of abuse. So, for instance, there was no rule mandating that the Collector pass along the money he collected to the Treasury Department, no accounting of it there, and no oversight.²⁵⁵ There was a book at the Treasury Department but apparently no one knew what it was for.²⁵⁶ Second, Swartwout was not alone in his “corrupt” behavior. The minority report in his Congressional investigation noted that “some of the witnesses [in the investigation] were active agents, if not participants, in the frauds.”²⁵⁷ Among those condemned were then-District Attorney for the Southern District of New York, William M. Price. Also Swartwout’s

²⁵³ See Sanford, *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 9.

²⁵⁴ BRUNSON, *supra* note 55, at 61. The Collector position did not cease to be a plum position until 1874, when the “moiety system” (of dividing forfeited property, not just the duty but the value of the whole consignment, between the government, the informer, the Collector, the Naval Officer and the Surveyor of the port) ended and the salary dropped from \$56,000 a year to \$12,000. See HOOGENBOOM, *supra* note 252, at 130-31.

²⁵⁵ See *id.* at 151-52.

²⁵⁶ *Id.* at 152

²⁵⁷ Quoted in *id.* at 154.

assistant cashier, Joshua Phillips, who embezzled a large amount of the money Swartwout took.²⁵⁸ Swartwout comes out looking like something of a fall guy, who made at least two major mistakes. The first was taking way too much money, over a million dollars, an enormous sum for the day. So wherever the line was, this was on the other side of it. His second mistake was leaving the country. It was difficult, if not impossible for that not to look bad. However, as the similar shenanigans of his immediate successor, Jesse Holt, showed, problems at the Custom House went beyond the behavior of any particular individual.²⁵⁹

If the pre-reform system was meant to allow individuals who occupied plum political positions to exploit their opportunities and act entrepreneurially, even if that meant breaking a few eggs, one imagines that even in this relatively permissive culture there was a sense of what was socially (and legally) acceptable and what was not. Swartwout obviously misread this. Could our mock/serious trial have been an attempt to regulate similar but less serious behavior at the Custom House, perhaps the surveyor-side of the Custom House concerned about standards on the collector-side? Swartwout's Congressional investigation is full of witnesses like the cashier, Henry Ogden, the assistant cashier, Joshua Phillips, then Deputy Collector, David S. Lyons, and others who were surely also taking money they should not have been or turning a blind eye to the defalcations of others.²⁶⁰ Might any of these people have been the accused, or associates of the accused, or even the witnesses referred to in our Court of Dover records? Some of

²⁵⁸ See *id.* at 170 (\$609,525.71 was never accounted for by Phillips and his indictment in 1841 for almost half of what Swartwout was alleged to have taken was strangely virtually ignored by the press and produced no trial record, if there ever was a trial) .

²⁵⁹ See *id.* at 139-46 (on how Hoyt's uncooperative behavior allowed him to just barely manage to evade the Congressional investigation).

²⁶⁰ See *id.* 135 (for a list of witnesses and their positions at the Custom House).

these associates and witnesses might not have all been Custom House workers, hence the need to address the issue of whether non-members could participate in the proceedings.²⁶¹

It is interesting to note that one of the (many) later civil service reform proposals included a procedure for the trial of accused civil servants.²⁶²

There is a suggestion in the records that whatever this trial was about, the court was prepared to find that the associates of the accused rather than the accused himself were the ones who were truly to blame. The ellipses in the above quoted passage from Davis's speech replace a reference to a famous passage from Corinthians: "Evil communications corrupt good morals," essentially a warning about keeping bad company.²⁶³ There is also the sense that whatever the accused did, the group was ready to forgive, as long as he was penitent. Davis wrote that if the ordinarily "well behaved brother" was "led astray" by these associates from "the path of virtue," then "let us but be assured of his sincere penitence and we will be merciful."²⁶⁴

If this was a kind of internal investigation and censuring, however tokenistic, of bad behavior at the Custom House under Swartwout's reign by those associated with Tammany Hall and the Democratic Party that would be extremely interesting. It would have been an early internal attempt to deal with the problems raised by graft-taking at a time when the ethics on this was not very well worked out, certainly not in the zero tolerance way we currently think about these issues. Our Court of Dover trial might be providing a way for the relevant community to debate and determine what the boundaries

²⁶¹ See *id.* (The Congressional investigation included examination of William M. Price's successor as District Attorney for the Southern District of New York, Benjamin F. Butler. It also included bank tellers and merchants with information about the defalcations).

²⁶² See HOOGENBOOM, *supra* note 252, at 16.

²⁶³ RECORDS, *supra* note 10, at 11. 1 *Corinthians* 15:33.

²⁶⁴ RECORDS, *supra* note 10, at 11-12.

surrounding this type of behavior were. While it might look a little to us like they were all crooks, it was likely more complicated than this and was probably not a situation of anything goes, as Swartwout's prosecution indicates.

There might be a clue about what the offence was in the law's reference to "the writ of fiery faces."²⁶⁵ This was probably a play on the real writ, *fieri facias*. This writ, largely synonymous with the modern writ of execution, was a judicial writ directing a sheriff to satisfy judgment from a debtor's property, literally, you "cause (it) to be done."²⁶⁶ Local newspapers in nineteenth-century New York City often included the Sheriff sales. These began with the following standard phrase: "By virtue of a Writ of fieri facias, to me directed and delivered, I will expose to sale in front of the Tontine Coffee House," on a named date, the property of such and such person, followed by a description of the property, and signed by the Sheriff.²⁶⁷ However, in this context, it might well have been a reference to drunkenness.

Over one hundred years earlier, one Thomas Osborne of Grey's Inn, England, collected together a variety of entertaining pamphlets and tracts. One of these, *The Pennyless Parliament of Thread-Bare Poets: Or, All Mirth and Witty Conceits* (1608) contained the following piece of mock legislation:

It is farther established and agreed upon, that they that drink too much Spanish sack shall, about July, be served with a *Fiery-Faces*; but oh! you Ale knights, you that devour the Marrow of the Malt, and drink whole Ale-tubs into Consumptions;

²⁶⁵ *Id.* at 3.

²⁶⁶ BLACK'S LAW DICTIONARY 627 (6th ed. 1990).

²⁶⁷ See, e.g., *Sheriff's Sale*, NATIONAL ENQUIRER (N.Y.), January 8, 1827. Interestingly, the Tontine Coffee House was a tavern that also served as the location of the New York Stock Exchange during this period. See DIXON RYAN FOX, *THE DECLINE OF ARISTOCRACY IN THE POLITICS OF NEW YORK 1801-1840* 21 (1965).

that sing Queen Dido over a Cup, and tell strange News over an Ale-pot; how unfortunate you are, you shall piss out that which you have swallowed down so sweetly; you are under the Law, and shall be awarded with this Punishment, that the Rot shall infect your Purses, and eat out the Bottom, before you be aware.²⁶⁸

The footnote then explains that “Fiery faces” was “[a] burlesque on the Writ *Fieri facias*; for Drinking much Wine will not only give a Man a *red* or *fiery Face*, but also bring him into poverty, Debt, and so to be arrested.”²⁶⁹

Did “the refractory member” and his “associates” drink too much and as a consequence commit the offense they were charged with?²⁷⁰ Given the convivial nature of a Court of Dover and the way that charges were opportunities for entertainment, we cannot rule out the possibility that the charge of “willful neglect” of some “important duty” was something like forgetting to turn over the roasting pig at an important dinner or failing to provide wine that was up to snuff for an important dinner. I think though that the offence was unlikely to be drinking too much.

The “misdemeanors” listed in the law did not explicitly include cases involving drink or alcohol, just food, clothing, lodging, and transportation.²⁷¹ Although it is true that alcohol-related issues might be well be construed as related to a “subject calculated to pour the balm of consolation to any members bowels” and would provide grounds for prosecution and punishment under the law.²⁷² However, it is difficult to see how anything done while drunk would be difficult to characterize as “willful.” Moreover, the

²⁶⁸ 1 THOMAS OSBORNE, THE HARLEIAN MISCELLANY: OR, A COLLECTION OF SCARCE, CURIOUS, AND ENTERTAINING PAMPHLETS AND TRACTS 178 (1744).

²⁶⁹ *Id.* (emphasis in the original).

²⁷⁰ RECORDS, *supra* note 10 at 3.

²⁷¹ *Id.* at 3.

²⁷² *Id.*

writ of “fiery faces” was specified by the 1529 law for a situation in which the accused person was unwilling to testify on his own behalf. It would “command the refractory member forthwith to make his appearance or [... else ...] be deemed guilty and fined accordingly.”²⁷³

I think it is more likely that in this situation, fiery faces was a way to refer to the embarrassment one would inevitably have about being tried before one’s peers. In other words, it was as if to say “Cause it to be done, bring your red, fiery face before us and tell us what you have to say for yourself.” Given the amount of drinking that went on in these clubs, it might well have gone without saying that the refractory member and his associates were drunk at the time they committed the offence, if it was the usual Court-of-Dover type. Although this might not be fair as there are mixed attitudes towards drinking in the examples found here.

So, for instance, in the Convivial Court of Dover, “the book” used to initiate new members was actually a cup of grog (see Figure 5). However, the account given of the club was at pains to point that most of “the jury” (which I think means everyone but those occupying the high offices) did not have “an opportunity of seeing any more of the BOOK, than to admire at a distance the excellence of the binding,” at least at the initiation of new members.²⁷⁴ “If any member indulged too freely with the *book*, which was rarely the case,” he would be fined a money amount or “put into COVENTRY.”²⁷⁵ This seemed to be a probation state, the same referred to with respect to violations on the prohibition placed on raising religious or political questions.²⁷⁶

²⁷³ *Id.*

²⁷⁴ THE AMERICAN MAGAZINE OF WIT, *supra* note 130, at 332.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

Clubs like this were not always just legally-themed; they were also sometimes actually groups of lawyers. One early nineteenth-century group, a dinner and drinking club called the “Brothers-in-Law”, contained almost a third of Montreal’s then “fifty-five man legal community.”²⁷⁷ All but one of its sixteen members were lawyers.²⁷⁸ It was “Montreal’s only formal lawyer’s society of-the-day” and not just “a jocular compliment to more somber professional pedagogy or governance.”²⁷⁹ The group stood for “continuity, fraternity, exclusivity, conformity, and conviviality. To achieve these goals they engaged in ritualized, public drinking.”²⁸⁰ They had a formal constitution, appointed officers, and kept minutes of their meetings like other law clubs such as “the Moot” in New York.²⁸¹ The rules for the governance of this drinking society set out fines that were to be paid for in certain kinds and specific amounts of alcohol.²⁸² They placed bets, sang songs and wore funny hats.²⁸³ Indeed, the society’s President’s failure to furnish himself with a specific kind of hat resulted in his expulsion from the group.²⁸⁴ “Although the brothers’ formal minutes are replete with discussion of transgressions like absence and tardiness, those records are uniformly silent about everyone’s sobriety.”²⁸⁵ Perhaps unsurprisingly, there is nothing related to “degrees of inebriation and consequent embarrassment.”²⁸⁶

²⁷⁷ G. Blaine Baker, *Public Frivolity and Patrician Confidence: Lower Canada’s ‘Brothers-in-Law,’ 1827 to 1833*, in MÉLANGES OFFERTS PAR SES COLLÈGUES DE MCGILL À PAUL-ANDRÉ CRÉPEAU 43, 51-52 (1997).

²⁷⁸ *Id.* at 44.

²⁷⁹ *Id.* at 59.

²⁸⁰ *Id.* at 68.

²⁸¹ *Id.* at 44, 60 (for a comparison of these formal features with those of other contemporary societies, legal and non-legal).

²⁸² See *id.* at 45-46.

²⁸³ *Id.* at 46.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 70

²⁸⁶ *Id.*

The Juvenile Advocate Society had procedures for both expelling and fining its members. Expulsion was based on “a three-quarter vote of the society for ‘base, ungentlemanly crime’ and no person once expelled would ‘ever be admitted within the walls of the Society.’”²⁸⁷ Strong reprimands, fines, and being placed in the “custody of the sergeant-in-waiting” were imposed for conduct that was “indecent and improper.”²⁸⁸

If Court of Dover mock trials were really manufactured opportunities for debate and amusement, which seemed often to operate as a mechanism for extracting a round of alcohol from the “errant” member, then this was unlikely to be an occasion for seriously reprimanding and certainly not expelling him. I think, based on what we have here, there are reasons for suspecting that the clearing of the accused’s name in this case was a more serious affair. However, at the end of the day, it is impossible to say what exactly was at stake.

PART FIVE: ANTI-SOCIETY SENTIMENT AND ANTIMASONRY

Excessive drinking was very much on the public mind in these years. New York City established a temperance society in 1828, part of the nation-wide movement that began in Boston in 1826 when the American Temperance Society was founded.²⁸⁹ Newspapers weighed in, pro and con. Some associations, “Auxiliary Associations,” had their “articles of association contain a clause of some sort, obligating the members to abstain from ardent spirits, except when rendered necessary as a medicine.”²⁹⁰ Like Antimasonry, the other anti-movement generally opposed by Jacksonians in the period, anti-drinking was considered a “mania” by its critics. As one Democratic newspaper put

²⁸⁷ Baker, *Juvenile Advocate Society*, *supra* note 159, at 91.

²⁸⁸ *Id.*

²⁸⁹ *View of the Temperance Reformation by the Executive Committee of the New York City Temperance Society*, MORNING COURIER AND N.Y. ENQUIRER, June 13, 1829.

²⁹⁰ *Id.*

it, “[e]very time and age has its mania: We hope the world will sober down before dooms-day.”²⁹¹

Another piece later that summer in this newspaper argued that those who supported temperance were turning this issue into the equivalent of a political party, called by the author of this article, the “Water Drinkers,” who he accused of “carrying on a furious war against the Jackson men in Maine.”²⁹² As a threat to Jacksonian power, it was inappropriate for the paper to support the temperance movement, whatever individual readers might think about excessive drinking and its relationship to crime or anything else. The issue was a smoke screen for the larger political one, and besides which, this article argued, temperance societies did not reform drunkards, as only sober men joined them.²⁹³

Little pieces in the paper regularly announced the death of the Antimasons, clearly a worrisome group.²⁹⁴ There was also a running joke poking fun at “anti-societies” in general. One announcement concerned the possible establishment of the “Anti-Apple” and “Anti-Rye” society given that “a worthy gentleman in New Haven” was reported to have “ordered a fine apple orchard to be cut down, because the fruit may be converted into an article to promote intemperance.”²⁹⁵ Another could be “the anti-eating-over-too-much Society” “for gluttony kills as many, nay more, thousands than intemperance” and an “Anti-tobacco society” that was in fact afoot.²⁹⁶ Why has an “anti-going to sleep with a candle society” “not been organized for the purpose of putting out

²⁹¹ MORNING COURIER AND N.Y. ENQUIRER, July 2, 1829.

²⁹² *Temperance Societies*, MORNING COURIER AND N.Y. ENQUIRER, August 27, 1829.

²⁹³ *Id.*

²⁹⁴ See, e.g., MORNING COURIER AND N.Y. ENQUIRER, June 15, 1829; *Anti-Masonry*, MORNING COURIER AND N.Y. ENQUIRER, June 19, 1829; *Progress of Anti-Masonry*, MORNING COURIER AND N.Y. ENQUIRER, July 1, 1829.

²⁹⁵ MORNING COURIER AND N.Y. ENQUIRER, July 2, 1829.

²⁹⁶ *New Societies*, MORNING COURIER AND N.Y. ENQUIRER, June 30, 1829.

the practice of reading in bed by candle light,” another asked.²⁹⁷ And finally, “[t]he Anti-Masonics being nearly defunct, a rumor is started that a new society is about to be formed, entitled, ‘The anti-make-a-fool-of yourself-to-no-purpose society.’”²⁹⁸

This anti-anti-society sentiment was typical of Jacksonian Democrats in New York City, where Freemasonry had a strong presence. Generally speaking,

Masonry preached the virtues of cosmopolitanism over localism. It offered men on the move a familiar haven wherever ambitions and business took them. It provided a stream-lined, not very demanding version of Christianity . . . It legitimized a male form of middle-class sociability outside the home, and it enabled members of a newly emergent middle class to identify one another.²⁹⁹

Antimasonry was a movement based in deep ambivalence about the spread of the market economy, market instability, economic opportunity, in short, about modernization and the direction in which American society was moving.³⁰⁰ “Antimasonry sought to identify those half-hidden forces which people sensed radically altered their lives.”³⁰¹ The fact that Freemasonry was a consequence rather than a cause of these changes did not make much difference.³⁰² “It was possible to abolish Freemasonry, whereas one could hardly derail the powerful forces shaping the United States.”³⁰³ Displaced anxieties about increasing secularization and commercialism helped turn Antimasonry into what Paul Goodman has called the first mass movement in American history.³⁰⁴

²⁹⁷ *Anti-Societies*, MORNING COURIER AND N.Y. ENQUIRER, June 19, 1829.

²⁹⁸ MORNING COURIER AND N.Y. ENQUIRER, June 15, 1829.

²⁹⁹ PAUL GOODMAN, TOWARDS A CHRISTIAN REPUBLIC: ANTI-MASONRY AND THE GREAT TRANSITION IN NEW ENGLAND, 1826-1836 22 (1988).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 38.

³⁰³ *Id.*

³⁰⁴ *Id.* Preface at vii.

The movement was triggered by the abduction and presumed murder of William Morgan by a group of Masons in up-state New York who wanted to punish Morgan for the publication of an exposé he wrote on Masonic rituals in 1826.³⁰⁵ Masons swore an oath not to reveal the secrets of their craft and Morgan had violated this by publishing his book. They also swore an oath to help brothers in times of trouble. When subsequent investigations of the crime and jury trials resulted in very few convictions and light sentences for those involved, many people came to believe that justice had been scuttled by Masons in positions to influence outcomes and that Masonry had proven itself to be incompatible with good citizenship.³⁰⁶ People found it alarming that there could be a secret society powerful enough to establish its own system of justice and to prevent punishment of the Morgan collaborators.³⁰⁷ The Morgan affair created a crisis of confidence that caused many people to believe that Masons were violating equality under the law and due process of law and this fostered a militant spirit among Antimasons.³⁰⁸

Andrew Jackson was a prominent Mason, having served as Grand Master of the Grand Lodge of Tennessee from 1822-24.³⁰⁹ Antimasonry became anti-Jacksonian as a consequence, drawing support from those who were otherwise drawn to the National Republicans. John Adams spoke out strongly against Masonry. However, there were many Masons among the National Republicans, who refused to renounce their membership. Antimasonry became a separate third party, the first third party in the

³⁰⁵ See WILLIAM PRESTON VAUGHN, *THE ANTI-MASONIC PARTY IN THE UNITED STATES, 1826-1843* 1 (1983).

³⁰⁶ *Id.* at 8.

³⁰⁷ *Id.* at 5.

³⁰⁸ *Id.* at 8.

³⁰⁹ *Id.* at 32.

United States.³¹⁰ The Antimasonic Party, which held its first national meeting in 1831, was founded on a program of opposition to secret societies bound together by oaths.³¹¹ Despite the fact that this was an extremely narrow political platform, Antimasonry became a very powerful force in the period.

Antimasons argued that Freemasonry was the single greatest threat to the Republic since the American Revolution.³¹² Antimasonry's call to destroy Masonry in order to save the country was a second Declaration of Independence.³¹³ In addition to being anti-Republican, Antimasons claimed, Masonry was anti-Christian and mired in debauchery.³¹⁴ Masonic oaths were immoral, at odds with the constraints of Christianity and civic duty, and actually a form of blasphemy.³¹⁵ Many states, including Vermont, Pennsylvania, Massachusetts, Rhode Island, Ohio, and Connecticut, passed or attempted to pass laws prohibiting the swearing of any "extra-judicial" oath.³¹⁶ Other states held legislative investigations of Freemasonry.³¹⁷ Lodges started dying by the scores.³¹⁸ Even in sophisticated cities in the northeast like Boston, New York City, and Philadelphia, where Masonry was strongest, there were effects.³¹⁹ So, for instance, David C. Colden,

³¹⁰ Peter Eisen, *New York: An Introduction*, in THE ENCYCLOPEDIA OF NEW YORK STATE xxiv (Peter Eisen, ed., 2005).

³¹¹ WALTER S. SPOONER, 6 HISTORY OF THE STATE OF NEW YORK POLITICAL AND GOVERNMENTAL 69 (1922).

³¹² GOODMAN, *supra* note 299, at 5.

³¹³ *Id.* at 20.

³¹⁴ VAUGH, *supra* note 305, at 18 ("Masonry and debauchery went hand in hand").

³¹⁵ See GOODMAN, *supra* note 299, at 58.

³¹⁶ VAUGH, *supra* note 305, at 80 (Vermont); 99-103, 109 (Pennsylvania); 116, 124-26, 189 (Massachusetts); 135-36, 188 (Rhode Island); 160 (Ohio); 163 (Connecticut).

³¹⁷ See, e.g., in Rhode Island, LEGISLATIVE INVESTIGATION INTO MASONRY (1832).

³¹⁸ VAUGH, *supra* note 305, at 51.

³¹⁹ *Id.* at 184.

the lawyer who argued against Nathan Sanford in *Pierson v. Post* and Mayor of New York City from 1818-1820, renounced his Masonic ties.³²⁰

Central to the reasons why Freemasonry came under suspicion was the secrecy of its rituals.

Almost all Antimasonic literature dwelled upon the matter of secrecy to some extent. Masonry allegedly had to be an evil institution, for it restricted its rites and ceremonies to the membership, and those excluded could only guess at the horrible events taking place behind closed doors ... Antimasons viewed secret organizations as a threat to democrat society and declared that in a Republic there should be no secret orders. Mason's secrecy became synonymous with darkness, sin, immorality, intemperance, and the work of Satan.³²¹

The controversy the Ancient and Honorable Court of Dover was having about how secret or not secret its proceedings should be must be seen against this background. Secret societies were seen as synonymous with Freemasonry.³²² And secret societies had been thrown into disrepute by the Antimasonic movement. Perhaps Davis and other members of this group thought that allowing non-members to participate in its mock trials and generally by making the organization more open, this might help allay concerns people might have that it was actually a Masonic group. Was it?

PART SIX: A MASONIC GROUP?

³²⁰ See DELVA STAMWOOD ALEXANDER, 1 A POLITICAL HISTORY OF THE STATE OF NEW YORK 370 (1909, Reissued, 1969).

³²¹ VAUGH, *supra* note 305, at 14-15.

³²² See, e.g., *Fillmore against Free Masonry*, SEMI-WEEKLY MISSISSIPPIAN, August 8, 1856, Issue 11, col A, 19th Century U.S. Newspapers, Gale Cengage Learning. This article repeatedly places "secret societies" in brackets after referring to "Masonry." See also *Anti Masonic Convention*, NEW YORK SPECTATOR (N.Y.), October 4, 1831, col C, 19th Century U.S. Newspapers, Gale Cengage Learning. This article on the Antimasonic Convention refers to the group as those "opposed to secret societies."

The name of the Ancient and Honorable Court of Dover would lead one to believe the group was Masonic. The Masons were (and still are) very often referred to as “the Ancient and Honorable Society of Free and Accepted Masons.”³²³ A number of the individuals involved in our Court of Dover were known Masons, not surprisingly, as most prominent Jacksonians were very likely to also be Masons. There were a number of Lodges in New York City in this period. For instance, in 1803, there was St. Andrew’s Lodge, Warren Lodge, Howard Lodge, and Clinton Lodge.³²⁴ It seems that both Nathan Sanford, in whose papers I found the Ancient and Honorable Court of Dover records, and George R. Davis, the President of the group, were connected to a particular lodge in New York City, Holland Lodge No. 8.

Both Sanford and Davis were members and, indeed, past-Masters of Holland.³²⁵ Sanford was *raised*, as the Masons put it, to the third level of membership and made a full member in 1800, and he was elected Master of this Lodge in 1803.³²⁶ Davis was named in a newspaper listing as the “Secretary” of Holland in 1828.³²⁷ He was raised

³²³ Sometimes it is the “Ancient and Honorable Fraternity of Free and Accepted Masons.” See, e.g., J.W.S. MITCHELL, 1 THE HISTORY OF FREEMASONRY 674 (186?).

³²⁴ BICENTENNIAL COMMEMORATIVE VOLUME OF HOLLAND LODGE NO. 8 OF THE ANCIENT AND HONORABLE FRATERNITY OF FREE AND ACCEPTED MASONS 22 (1988).

³²⁵ See *id.* at 125, 135, 109.

³²⁶ See *id.* at 135 (giving the year for Sanford as 5800), 109 (giving the year of Sanford’s election as Master as 5803). 4000 must be subtracted from the years listed here, as the years are given in “Anno Lucis,” “a Masonic thing.” Email from Thomas M. Savini, Director of the Chancellor Robert R. Livingston Masonic Library of Grand Lodge, New York City to Angela Fernandez, Associate Professor of Law, Faculty of Law, University of Toronto (September 29, 2010, 15:55 EST) (on file with author). There is no asterisk next to Davis’s name, which means that he was made a Mason at Holland Lodge (as opposed to joining by affiliation), and the year is not the year he became a Mason but is likely the year he became a full member, i.e. after receiving his third degree through the ceremony of “raising.” Email from Thomas M. Savini, Director of the Chancellor Robert R. Livingston Masonic Library of Grand Lodge, New York City to Angela Fernandez, Associate Professor of Law, Faculty of Law, University of Toronto (September 30, 2010, 9:00 EST) (on file with author).

³²⁷ *The Memory of Clinton*, N.Y. SPECTATOR, February 26, 1828; col E, 19th Century U.S. Newspapers, Gale Cengage Learning.

there in 1822 and was elected Master in 1831 and again in 1832.³²⁸ This means that Davis actually served as Master of Holland Lodge in 1832 and 1833.³²⁹ On April 23, 1833, there was a fire that completely destroyed the City Hotel where the Lodge met.³³⁰ If the Court of Dover mock trial took place in 1834, this would be one year after the fire, when Holland Lodge was without a home. The fire came at a bad time. As the Lodge's history put it, "[t]he fire was the more discouraging as it occurred in the midst of the Antimasonry agitation due to the Morgan Affair and the result was that for twelve years the Lodge only had occasionally meetings, to elect officers and to transact essential business."³³¹

The Ancient and Honorable Court of Dover meeting in 1834 when the Holland Lodge was in disarray, calling that Lodge's immediate past Master, George Davis its President, produced records that ended up in the personal papers of another former-Master of the same Lodge. Was the Ancient and Honorable Court of Dover the unofficial replacement of Holland Lodge No. 8, forced underground given the troubles it was facing at that time? I do not think that it was but let us examine the evidence for and against.

Including "Ancient and Honorable" in the title of the new group would be an open reference to Freemasonry. Also telling is the fact that Freemasons used Syriac in some of their lore and rituals.³³² One source actually calls Syriac "the long lost Master Mason's

³²⁸ BICENTENNIAL, *supra* note 324, at 125 (giving the year for Davis as 5822), 109 (giving the year of Davis's election as Master as 5831 and 5832).

³²⁹ *Id.* at 109 (indicating that the officers listed "served during the year following year of election").

³³⁰ *Id.* at 87.

³³¹ *Id.*

³³² See, e.g., MITCHELL, *supra* note 323, at 84-85 ("Solomon renewed the league with Hiram, the King, and made him a present of the Sacred Scriptures, translated into the Syriac tongue, which is said still be extant among the Maronites and other eastern Christians, under the name of the Old Syriac Version"). It seems to have been associated especially with Royal Arch Masonry. See, e.g., JABEZ RICHARDSON, RICHARDSON'S MONITOR OF FREE-MASONRY 87 (where Syriac is identified as one of three languages used on the Ark of the Covenant corresponding to the three jewels placed on that ark, "well

word” of Royal Arch Masonry.³³³ This is certainly strong evidence of Masonic influence. There are at least two other features of the records that suggest a Masonic connection.

First, if “Kinzastinski” was meant to be Jewish and McKeon was Catholic, this would be typical of the open nature of religion in Freemasonry, which still requires its members to believe in a “Supreme Being” or “Divine Architect” but not necessarily the same one. Flexibility about religion was part of what made Freemasonry a target of established religion amongst Antimasons. The charge was that

Masonry insinuated itself as a substitute for revealed religion. By employing such trappings as the open Bible that graced the Lodge room and incorporating scriptural passages into its ritual, Freemasonry actually spread deism and infidelity. By admitting Jews, Moslems, and other non-Christians and by excluding any mention of Jesus from its oaths and rites, Masonry placed itself outside the Christian community.³³⁴

So, for instance, when Surveyor of the Custom House, lawyer, playwright, and newspaperman, Mordecai Noah, organized his celebration of the founding of a separate Jewish state called “Ararat,” a very unlikely plan he concocted in the 1820’s for Grand Island in upstate New York, he held the ceremony in a Christian church.³³⁵ Noah, who liked to play with the metaphor of Noah’s Ark, declared himself “Judge of Israel,” dressed in the robes of King Richard III borrowed from the Park Theatre in New York

knowing that a description of those jewels would be handed down to the latest posterity; and by those means the Royal Arch, or rather the ancient Master’s word, was finally discovered”).

³³³ RICHARDSON, *supra* note ?, at 79 (also calling Syriac the “Grand Omnific Royal Arch word”).

³³⁴ GOODMAN, *supra* note 299, at 57.

³³⁵ See *The Ararat Proclamation and Speech*, in THE SELECTED WRITINGS OF MORDECAI NOAH 105 (Michael Schulinder & Daniel J. Kleinfeld eds., 1999). For an assessment of Noah’s inability to resolve the tensions between Ararat and America, see JONATHAN D. SARNA, JACKSONIAN JEW: THE TWO WORLDS OF MORDECAI NOAH 61-74 (1981).

City and read the decrees of Ararat.³³⁶ The procession and marching band component of the ceremony was described as “Masonic” and “military,” with participants convening to a tavern afterwards.³³⁷ These mixtures of the Christian and the Jewish, religious and secular, are typical of Freemasonry, which would incorporate scriptural references into its rituals in a way that often offended people who were actually religious. Dropping a passage from the Acts of the Apostles in Syriac into a Court of Dover has a Masonic kind of playfulness about it, and certainly a lack of concern about offensiveness. Generally speaking, the Protestant wives of Freemasons and their ministers did not want their men (husbands and sons) to use a watered down and arguably blasphemous form of worship that would replace what they saw as legitimate forms of religion. Respectable men should give their time and their money to the traditional church, not the lodge. There therefore was “a reciprocal relationship between pious women and insecure ministers, who strengthened one another in the struggle against creeping secularism.”³³⁸

Second, a frequent charge made against Freemasonry was that it encouraged promiscuity.³³⁹ There might be a sexual reference in the list of our Court of Dover offences, “[l]odging (with ladies) heavy or light,” the “light” kind of lady being a loose lady or perhaps a prostitute.³⁴⁰ Sexual promiscuity was certainly one of the things that

³³⁶ Daniel J. Kleinfeld, *Mordecai Manuel Noah*, in *THE SELECTED WRITINGS OF MORDECAI NOAH* 5, 8 (Michael Schulinder & Daniel J. Kleinfeld eds., 1999). Noah’s newspaper, the *New York Enquirer*, founded in 1825, the same year as the opening of the Erie Canal and the Ararat project, used an image of Noah’s Ark for its logo, accompanied by the statement “A Free Press, the Ark of Public Safety.” Indeed, Noah tried to float an actual ark loaded with animals as part of the Erie Canal celebrations that year. See SARNA, *supra* note 335, at 78, 74. Noah’s interest in the bible, led him to publish one of the so-called “lost books,” the book of Jasher, which contains a very interesting version of the Noah’s Ark story. See copy at the American Jewish Historical Society, New York City.

³³⁷ See *The Ararat Proclamation and Speech*, *supra* note 335, at 105.

³³⁸ GOODMAN, *supra* note 299, at 92.

³³⁹ See *id.* at 88.

³⁴⁰ Email from Karen J. Cunningham, Senior Continuing Lecturer, UCLA Department of English to Angela Fernandez, Associate Professor of Law, Faculty of Law, University of Toronto (February 7, 2010, 16:59

the wives and mothers of men who joined Masonic lodges worried about. An all-male space, from which women were excluded, where men went to escape the authority women exercised in the domestic sphere, concerned women in their struggle to exercise their authority in that sphere.³⁴¹ This anxiety was exacerbated in the case of Freemasonry, as compared with other places men went when they were not at home or at work that exposed them to moral danger (e.g. bars and taverns), since husbands were sworn by oath not to reveal the activities of the lodge. “Women wondered what transpired in the secret precincts of Freemasonry. While they stayed home and discharged their domestic duties, men indulged their pleasures.”³⁴² This was a time in which, generally speaking, “[m]en flocked to theatres, women to churches.”³⁴³ And theatres were notorious for their encouragement of “vice,” prostitution commonly being built into the business model.³⁴⁴ Drinking, sexual jokes, prostitution – these were not things pious women wanted their husbands and sons involved with. The 1820’s and 1830’s were an age of female reform which aimed “to rescue fallen women, expose male licentiousness, and curb vice.”³⁴⁵ Like the temperance movement, Antimasonry was a part of this. “Even if Morgan’s murder was an aberration, the general tendency of Masonry was to encourage sensuality, overeating, drinking, ribaldry, indecency, and disrespect for women.”³⁴⁶

The evidence of Masonic influence here is interesting and given the ubiquity of Freemasonry in New York City and given the practice of multiple memberships in social

EST) (on file with author) (noting that one of the implications of “light” if it referred to ladies is sexual promiscuity).

³⁴¹ GOODMAN, *supra* note 299, at 86.

³⁴² *Id.* at 85.

³⁴³ *Id.* at 86.

³⁴⁴ See *id.* at 67.

³⁴⁵ *Id.* at 68.

³⁴⁶ *Id.* at 58.

clubs and fraternal orders is probably not surprising. However, it is one thing for men who were members of one group to participate in and carry over elements from Freemasonry and another to think that the Ancient and Honorable Court of Dover is Holland (or any other Lodge) gone underground. So, for instance, neither John McKeon nor George Black was listed as having been a member of Holland.³⁴⁷

The Court of Dover records share some terminology with Freemasonry, use of “brother” and “Grand council,” for instance. Masonic titles include “Grand Master,” “Worshipful Master,” “Warden,” and “Deacon.” None of these are present in our Court of Dover records. “President,” the title given to Davis in our records, is not a Masonic title. And, indeed, there was a Master of Holland Lodge listed for 1834, the year of the mock court, one B.R. Winthrop, who continued to formally occupy the role until the lodge revived in 1845.³⁴⁸

It is true that a Masonic lodge can be a court and try its members. However, the kind of court that does this is not a mock court. Censuring, reprimanding, and perhaps ultimately expelling a member is a serious matter. “Masonic law” is actually an extremely well worked out system, populated by texts that look a lot like legal treatises.³⁴⁹ And some of the principles articulated in this body of law were violated in

³⁴⁷ Nor do McKeon and Black appear on the rosters for St. John’s No. 1, Independent Royal Arch No. 1, or Washington No. 2. Email from Thomas M. Savini, Director of the Chancellor Robert R. Livingston Masonic Library of Grand Lodge, New York City to Angela Fernandez, Associate Professor of Law, Faculty of Law, University of Toronto (September 30, 2010, 15:06 EST) (on file with author). However, membership lists are notoriously incomplete. Email from Thomas M. Savini, Director of the Chancellor Robert R. Livingston Masonic Library of Grand Lodge, New York City to Angela Fernandez, Associate Professor of Law, Faculty of Law, University of Toronto (September 20, 2010, 15:39 EST) (on file with author).

³⁴⁸ See BICENTENIAL, *supra* note 324, at 109-10.

³⁴⁹ See, e.g., ALBERT GALLATIN MACKEY, *Preface* to THE PRINCIPLES OF MASONIC LAW: A TREATISE ON THE CONSTITUTIONAL LAWS, USAGES AND LANDMARKS OF FREEMASONRY (1856). Mackey wrote that “[t]he jurisprudence of Masonry is founded, like all legal science, on abstract principles, which govern and control its entire system.” He calls the work “an elementary treatise” and says he has followed Blackstone’s method in describing the system.

the Court of Dover proceedings. Firstly, a group acting under a different name could not purport to conduct a Masonic trial. A Masonic trial can only be held by a lodge that is regularly chartered, duly constituted and so on.³⁵⁰ Secondly, vague accusations like the one made in our records are frowned upon in Masonic trials.³⁵¹ Thirdly, “profane” witnesses (i.e. non-members) are allowed to testify.³⁵²

Now it might well be that these individuals, or at least some of them like the President George Davis, were feeling the absence of their Masonic Lodge and the squeeze of Antimasonry more generally. “The fraternal instinct was enduring and powerful.”³⁵³ As a consequence, some of the former members of Holland may have created a new alternative group with some Masonic features, either the year of the fire (1834) or at the earlier date (1829) when the law to admit non-members was purportedly passed. That influence would explain the inclusion of “ancient and honorable” in the group’s name, the use of Syriac, and the use of titles like “brother” and “Grand Council.” However, what they created was probably *less solemn and formal*, a Court of Dover, and *less secretive*, as indicated by the controversy we see recorded relating to opening the mock trial to non-members. Indeed, the fact of that controversy may have reflected a deeper disagreement about how Masonic, i.e. secret, the new alternative group should be.

Antimasonry had certainly made secrecy an undesirable feature for any group. The Morgan affair and the subsequent rise of Antimasonry meant that all members of the group would have been painfully aware of the set of problematic associations an

³⁵⁰ HENRY M. LOOK, MASONIC TRIALS: A TREATISE UPON THE LAW AND PRACTICE OF MASONIC TRIALS 20 (1871).

³⁵¹ The charge must be clear, certain regarding time, place, persons, and particulars so that the accused can prepare a defense. *Id.* at 30.

³⁵² See *id.* at 51. See also MACKEY, *supra* note 349, at 328-34 for an extended discussion of why non-members, or “profane” should be allowed to be witnesses and how their testimony is to be taken.

³⁵³ GOODMAN, *supra* note 299, at 9.

insistence on secrecy might bring. Some might well have wanted to move towards greater openness by allowing non-members to participate in their activities in order to demonstrate that they actually were not a Masonic group. At a time when legislation was being passed that actually outlawed “extra-judicial” oaths, one wonders if the very decision to take on the form of a *Court of Dover* was chosen so that any member who had sworn an oath could not be accused of having taken an oath that was “out of court.” If the Ancient and Honorable Court of Dover was a court, then its members would be immune from such a charge, however unlikely it was to be laid.

The fact that opening the mock trial up to non-members was controversial indicates that not everyone in the group felt the same way about bowing to the pressures of Antimasonry and, indeed, in New York City most people would have felt quite secure in their Freemasonry. This would have been true even if it was not a time for zealous activity or if you were a high-profile individual like Colden some advantage might not be gained from public renunciation.³⁵⁴ Certainly, the laws regarding prohibitions on taking extra-judicial oaths were never enforced, even in very strongly Antimasonic states.³⁵⁵

At least with respect to opening the group up to “witnesses” in the mock trials, this all makes sense. What we see in our records is the *open* Court of Dover orientation winning out over the *closed* and secret Masonic one, a sensible choice in both 1829 and 1834. However, the 1529 law also provided for trying associates of the accused who were not members. One would think that grabbing non-members for trial, who may or may not have wanted to participate in the proceedings, would have been considered

³⁵⁴ See, e.g., *Daniel O’Connell has just published a letter in the Dublin Pilot, declaring his renunciation of Freemasonry*, LIBERATOR (BOSTON MA), September 22, 1837, p. 156, Issue 39, col F, 19th Century U.S. Newspapers, Gale Cengage Learning.

³⁵⁵ See, e.g., VAUGH, *supra* note 305, at 80 (there is no record of the enforcement of the 1833 law outlawing “extrajudicial” oaths in Vermont where Antimasonry was arguably the strongest).

problematic given the shadow of Morgan's abduction.³⁵⁶ If the law was made in 1829, this would have been just a few years after that tremendous incident in 1826. The lack of sensitivity about this, especially given the "ancient and honorable" reference in the group's name, strongly suggests that generally this group was really about fun, amusement, theatre of a kind – sport. So even if the particular prosecution in this case was about something relatively serious, it was, after all, a Court of Dover.

CONCLUSION

Consider Hawthorne's description of what how his narrator felt after finding the scarlet letter A in the custom house:

It was the capital letter A. By an accurate measurement, each limb proved to be precisely three inches and a quarter in length. It had been intended, there could be no doubt, as an ornamental article of dress; but how it was to be worn, or what rank, honour, and dignity, in by-past times, were signified by it, was a riddle which ... I saw little hope of solving. And yet it strangely interested me. My eyes fastened themselves upon the old scarlet letter, and would not be turned aside. *Certainly, there was some deep meaning in it, most worthy of interpretation, and which, as it were, streamed forth from the mystic symbol, subtly communicating itself to my sensibilities, but evading the analysis of my mind.* While thus perplexed – and cogitating, among other hypotheses, whether the letter might not have been one of those decorations which the white men used to contrive, in order to take the eyes of Indians, – I happened to place it on my

³⁵⁶ This is so even though Morgan was a member of the Masons, not a non-member. When Masons were not denying that anything had been done to him, they argued that anything that might have been done was justified by the oath of secrecy any Mason took, including subjection to specifically horrific death for violating the oath.

breast. It seemed to me, – the reader may smile, but must not doubt my word, – it seemed to me, then, that I experienced a sensation not altogether physical, yet almost so, as of burning heat; and as if the letter were not of red cloth, but red-hot iron. I shuddered, and involuntarily let it fall upon the floor. In the absorbing contemplation of the scarlet letter, I had hitherto neglected to examine a small roll of dingy paper, around which it had been twisted. This I now opened, and had the satisfaction to find, recorded by the old Surveyor’s pen, a reasonably complete explanation of the whole affair. There were several foolscap sheets, containing many particulars regarding the life and conversation of one Hester Prynne.³⁵⁷

Would that we had such a helpful addendum here. However, the names, dates, and other information in the records have allowed us to piece together some sense of things.

This group was a Court of Dover, some kind of fraternal society connected to the Custom House in New York City and peopled by Democrats with connections to the Tammany Society. The group was certainly influenced by Freemasonry given its name and the use of Syriac in its records. This particular trial might have been dealing with a serious issue like defalcations at the Custom House under Samuel Swartwout’s tenure given the likely date of the trial, 1834, and the connection between the Custom House and the group’s president, George Davis. However, there is not enough evidence to say. The society was almost certainly wrestling with the problem of secrecy that would have been posed for any club, fraternity, or exclusive social group at the time. We know that after some controversy they erred on the side of openness, deciding to allow non-members to participate in a mock prosecution of a member and some associates handled by future New York City District Attorney, John McKeon.

³⁵⁷ Hawthorne, “Custom House,” 28-29 (emphasis added).

The beauty of a Court of Dover was that it would allow everyone for whom being a “controversialist” was important, lawyer or non-lawyer, to gather together and *pretend* to be lawyers and judges.³⁵⁸ Even if the Masonic connections were evident – and in New York City that would matter much less than in many other places – that would not be a problem. As a Court, swearing to be a member arguably did not constitute the taking of an “extra-judicial” oath. Moreover, allowing non-members to participate in the proceedings, and, indeed, even mockingly prosecuting a few, would demonstrate just how fun and harmless these meetings really were, nothing at all like what the misguided abductors of William Morgan took Masonry to be nor anything approximating the dire threat to the Republican project that militant Antimasonry warned about.

This group’s activities created some records, the ones that I discovered in Nathan Sanford’s papers. The suggestion is we should think of these records as a kind of “legal literature” of interest to legal scholars studying the humanities.³⁵⁹ In what sense are they legal literature? Well, obviously not in the ordinary sense of court reports, treatises, and statutes. Nor are they the kind of literature with law-related material or themes that one would study in a Law and Literature course, a Shakespeare play such as *The Merchant of Venice*, a story like Herman Melville’s “Bartleby the Scrivener,” or even a tall tale by William P. Hawes.

The records are obviously legally themed in the sense that they include a mock law, purport to amend a constitution and authorize a mock prosecution. The court part of a “Court of Dover” was meant to be a legal reference, as the wigs and gowns of even the most convivial versions of this kind of group demonstrate (see Figure 5). Real lawyers

³⁵⁸ *Multiples Classified Advertisements*, *supra* note 114.

³⁵⁹ *Etchings in England*, by a *Cosmopolitan*, *Letter X*, *supra* note 119.

like McKeon and Sanford were connected to this particular group. However, the records are also literary. Like the description of Ned's travels to the Lanjan Empire, they are filled with ridiculous fake-exotic content – the Syriac text, the references to King James V, Holyrood Palace, and so on. They also contain pompous and over-blown language like “to all Emperors, Kings and Potentates of the Earth Be it Known that we James V. for our royal Selves and in behalf of our Ancient and Honorable Court of Dover wherever found upon this Mundane Sphere do hereby Enact and Order ...”³⁶⁰

Yet, literary in this context does not mean fictional or not relevant to the real *serious* world. The mocking tone in our records co-exists with the formal and serious one. So, for instance, if McKeon was trying out his role as District Attorney in some way, that is something everyone would agree is serious business. Think also of the amount of effort that went into the creation of these records. Tracking down and copying script from a bible in Syriac, fabricating a three-hundred year old history, writing out the law and appointment certificate in formal language, affixing signatures, seals and so on. This was a group for whom their mock was serious business.

As a special form of legal literature, these documents record the occurrence of amusements or sport that were both real (they happened in the world) and fabricated (mock), both serious and playful, “solemn foolery.”³⁶¹ They are certainly, to use the phrase used to describe Hawes's work, “fugitive pieces.”³⁶²

Consider some of the mock provisions to be found in *The Pennyless Parliament of Thread-Bare Poets*:

³⁶⁰ RECORDS, *supra* note 10, at 1.

³⁶¹ FINKELPEARL, *supra* note 3, at 37.

³⁶² Herbert in SPORTING SCENES, *supra* note 200, at 4.

49. And it shall be lawful for Almanack-makers, to tell more Lyes than true Tales
50. And they that go to sea, without Victuals, may suffer Penury by the Statute
53. [...] let Maidens take Heed how they fall on their Backs, lest they catch a forty Weeks favour [a pregnancy]
64. [...] it shall be lawful for some to be lean, because they cannot be fat³⁶³

The pieces in this collection were also described as “fugitive pieces,” made even more so than the Cypress writings, as these were not even usually published.³⁶⁴ Every “learned Nation ... gives Birth to a Multitude of Performances, which would either not have been written, or could not have been made publick in any other Place.”³⁶⁵ These records of the Ancient and Honorable Court of Dover were certainly never meant to be published and so should certainly be understood as “fugitive pieces.”

Like legal jokes, legally-themed ephemera is easy to discount. It was not meant to be published, after all. It was just for the fleeting moment, reflecting passing amusement, not really serious and not meant to be taken seriously. However, we might do well here to think about what a communications scholar would say about the importance of television in the Twentieth Century or the internet in the Twenty-First. These all-male social groups and fraternal orders were an important part of the nineteenth-century world. Men, including important and serious men like the lawyers

³⁶³ OSBORNE, *supra* note 268, at 181-82.

³⁶⁴ *Introduction* to 1 THOMAS OSBORNE, THE HARLEIAN MISCELLANY: OR, A COLLECTION OF SCARCE, CURIOUS, AND ENTERTAINING PAMPHLETS AND TRACTS ii (1744).

³⁶⁵ *Id.*

and judges in *Pierson v. Post*, spent a lot of time in them, socializing, building what we would call networks today. These groups were part of the sea they swam in. To put the point in Masonic language, it was the culture in which they were “raised.” Tammany Society entertainments, Masonic Lodge gatherings, Court of Dover proceedings, these were places and spaces where these men learned how to behave in particular ways that relate to the development and exercise of what we might think of as a sporting wit. This style of engagement and debate expressed in what I am calling “solemn foolery” need not but might well spill over into more regular, serious legal proceedings if the circumstances were right.

Pierson v. Post should be understood as connected and related to this Court of Dover-type world. Livingston’s dissent in particular, with its references to the goddess of hunting, Diana, and to the fox as “reynard,” has a style very much like what Hawes would later write in relation to the hunting and fishing culture of Long Island where *Pierson v. Post* originated.³⁶⁶ There are even phrases in the records that echo in Livingston’s prose.³⁶⁷ Sanford, in whose papers these records were found and who was originally from Hawes’s Long Island, certainly gave a more serious argument in *Pierson v. Post* than Cypress’s use of his “beach fox.” Indeed, Sanford’s argument (and the elaborate scholarly treatment by the rest of the court) is actually too serious. The long Latin passages and references to exotic authority are conspicuous, unnecessary to the holding in the case, and the lengthy treatment of the issue by such senior lawyers in the

³⁶⁶ *Pierson v. Post* at 180. Hawes has a short piece on the Latin phrase *tempora mutantur*, a phrase that Livingston used in his dissent. See FRANK FORESTER (ed.), 2 SPORTING SCENES AND SUNDRY SKETCHES: BEING THE MISCELLANEOUS WRITINGS OF J. CYPRUS 142 (1842). See *Pierson v. Post* at 181.

³⁶⁷ See RECORDS, *supra* note 10, at 11 (in Davis’s speech when he is referring to the convention in 1529 where “after mature deliberation it was deemed expedient so to amend the Constitution as to provide a remedy for the present dilemma”); *Pierson v. Post* at 181 (where Livingston wrote, “[a]fter mature deliberation, I embrace that [opinion] of Barbeyrac”).

state's highest court seems to be completely out of proportion to a dispute over a 75¢ fox.³⁶⁸

When William Ewald wrote his article fifteen years ago asking what we are to make of the ancient Greek practice of putting inanimate objects on trial, or the Medieval and Renaissance practice of trying animals, he ultimately advised that such practices ought to be thought about as peculiar to their time and place. To understand such phenomena, we need to “recapture lost images, a forgotten range of experience: an entire way of thinking and feeling about the world.”³⁶⁹ Pluck such practices out of their context and they are truly baffling. Some seem serious, some seem silly, some both. Others look pedagogical, others whimsical, and others both. *Pierson v. Post* is an example of a case that I think was taken out of its original moot court (in the case of the lawyers) Court of Dover style-context (in the case of Livingston) and the process of turning it into serious “high law” was so successful that its dimensions of “solemn foolery” and its status as an object generated by sporting wit have been difficult to see.

William P. Hawes would have had less difficulty seeing those dimensions of the case. Indeed, one wonders if he was not familiar with it, either the report *qua* lawyer or a colloquial version of the dispute from local Long Island lore. Hawes's story was originally published in 1835.³⁷⁰ If Hawes did know about the case, it could have influenced his own story about the Court of Dover and the “beach fox.” The Convivial Court of Dover tradition would have been familiar to him, certainly more familiar that it is to us. Livingston's dissent would have been easily recognizable as a piece of a certain

³⁶⁸ See Fernandez, *A Great Debate*, *supra* note 7, at 303.

³⁶⁹ Ewald, *supra* note 178, at 1916.

³⁷⁰ See *Fire Island Ana – Ned Locus' Journey to the Lanjan Empire* 6 AMERICAN MONTHLY MAGAZINE 5 (1835).

style of literary lawyerly rhetorical prose. Serious lawyers, however, like James Kent and later Oliver Wendell Holmes, lifted the case out of that context and moved it far away from the world that generated it, rendering its “solemn foolery” invisible or at least making it secondary to its ability to generate a legal principle about first possession of unowned property, “he would seize takes.” However, if we have learned anything about this form of legal literature, it is that it does not stay obediently on one side or the other of the line between serious and silly. The trick in this might be to refrain from trying to place it firmly on one side and not the other. The notion of “solemn foolery” requires us to keep both dimensions in play, while at the same time recognizing the complimentary aspects of each.

This kind of fugitive legal literature provides us with a window in on a very different world, an all-male social space that would be very difficult to replicate today.³⁷¹ Yet there are aspects of this clubby masculine social space that are still very recognizable, especially in law, where one often finds oneself in what seems like exclusive and stuffy settings, mostly male, sprinkled with a light touch of ribaldry. Seeing an earlier unabashed version of this world is important. However, there is another point, which is to reflect on what we might think of as our atrophied ability to appreciate the complimentary components of serious and silly in law generally. Even (and perhaps even especially) our most serious ceremonies and sources have a pomposity about them, and a silliness if looked at a certain way. Legal texts are often pretentious in the pejorative sense, containing Latin phrases, for instance, that very few can understand. They and the lawyers (judges and legal scholars) who deal in them are also pretentious in

³⁷¹ The history of Holland Lodge notes the impact television has had on Lodge membership and activities. It also notes how events that include (rather than exclude) wives and children have been successful. See BICENTENIAL, *supra* note 324, at 61-62.

the French sense of *prétendre*, i.e. making a claim, to status and authority based on specialized learning amongst other things. Lawyer jokes show that these claims are not accepted without challenge or suspicion. Our ability to appreciate the complimentary components of serious and silly then is a matter of understanding legal culture and for those inside that culture, an issue of self-understanding. Serious silliness or “solemn foolery” is an important aspect of legal culture, past and present, that we should learn how to appreciate.