

The Fusion of Law and Equity in the Field Code of Civil Procedure: New York, 1846-1876

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Introduction

In 1848, New York enacted a code of civil procedure that powerfully influenced the common law world. The Field Code, named after one of its drafters, David Dudley Field, systematized New York's procedural law and combined the previously separate systems of common law and equity. In the following decades, thirty other American states enacted versions of the Code, and English legal reformers studied New York's experience to inform their efforts at fusion.

Although scholars agree on this general outline,¹ they differ regarding what the Code really accomplished. Writing in 1948,² Roscoe Pound argued that the characteristics of the modern Federal Rules of Civil Procedure "could have been attained at least eighty years [earlier] if Field's Code of Civil Procedure had been developed and applied in its spirit instead of the spirit of maintaining historical continuity."³ Pound particularly praised the "equitable shortcuts" of the Code.⁴

More recently, Stephen Subrin has contended that Pound's view was a "myth."⁵ In the Federal Rules, according to Subrin, "equity conquered common law,"⁶ but the Field Code

¹ See, e.g., LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 293-97 (3d. ed., 2005); ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 54-55 (1952).

² For the centennial of the Field Code, Professor Alison Reppy organized a conference on the Code at New York Law School. See DAVID DUDLEY FIELD: CENTENARY ESSAYS (Alison Reppy ed., 1949) [hereinafter CENTENARY ESSAYS]. The presentations typically celebrated more than they clarified, however. The presenters frequently relied on Henry Martyn Field's biography of his brother, HENRY MARTYN FIELD, THE LIFE OF DAVID DUDLEY FIELD (1898) [hereinafter LIFE OF FIELD], and they occasionally retain Henry's extreme rhetoric. For instance, Reppy concluded that Field "believed that with righteousness on his side, he would gather strength as he fought the battle to cut a passage through the labyrinth of judicial myth and precept and 'cast up a highway that should lead straight to the Temple of Justice.'" Alison Reppy, *The Field Codification Concept*, in CENTENARY ESSAYS, *supra*, at 52 (quoting LIFE OF FIELD, *supra*, at viii).

³ Roscoe Pound, *David Dudley Field: An Appraisal*, in CENTENARY ESSAYS, *supra* note 2, at 14.

⁴ *Id.* The two main drafters of the FRCP, Charles Clark and Edson Sunderland, largely agreed. See Charles E. Clark, *Code Pleading and Practice Today*, in CENTENARY ESSAYS, *supra* note 2, at 55; Edson R. Sunderland, *Modern Procedural Devices*, in CENTENARY ESSAYS, *supra* note 2, at 83.

⁵ Stephen Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 312 (1988).

“leaned as much, or more, toward the view of common law procedure as to equity.”⁷ Subrin argued that the Field Code restricted judicial discretion and constrained the use of pleading, joinder, and discovery in ways that the Federal Rules would disavow.⁸

Unfortunately, neither side in this debate examined the historical sources closely. The Field Code consisted of multiple (sometimes inconsistent) drafts,⁹ but these scholars confined their analysis to only the first version enacted in 1848, a Code that the drafters thought was incomplete and inadequate for their purposes. Further, New York lawyers of the time produced abundant commentary in over a dozen treatises,¹⁰ form books,¹¹ and case reports,¹² all of which Pound and Subrin largely ignored.¹³ Both accounts also overlook the features of New York practice prior to the Code. Instead, they speak in broad statements about, for instance, the

⁶ Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective* 135 U. PENN. L. REV. 909 (1987).

⁷ Subrin, *supra* note 5, at 338.

⁸ *See id.* at 337-38.

⁹ *See* Section I.C. *infra*.

¹⁰ *See, e.g.*, CLAUDIUS L. MONELL, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK (1849); JOHN TOWNSHEND, THE NEW PRACTICE IN CIVIL ACTIONS IN THE COURTS OF JUDICATURE IN THE STATE OF NEW YORK (1848); GEORGE VAN SANTVOORD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS UNDER THE NEW YORK CODE OF PROCEDURE (1852); HENRY WHITTAKER, PRACTICE AND PLEADING UNDER THE CODES (1852). Treatise literature became especially abundant after other states began adopting the Code. *See, e.g.*, JOHN L. TILLINGHAST & THOMAS G. SHEARMAN, PRACTICE, PLEADINGS, AND FORMS IN CIVIL ACTIONS IN COURTS OF RECORD IN THE STATE OF NEW YORK . . . ADAPTED ALSO TO THE PRACTICE IN CALIFORNIA, MISSOURI, INDIANA, WISCONSIN, KENTUCKY, OHIO, ALABAMA, MINNESOTA, AND OREGON (1865); WILLIAM ANGUS SUTHERLAND, A TREATISE ON CODE PLEADING AND PRACTICE: ALSO CONTAINING 1900 FORMS ADAPTED TO PRACTICE IN CALIFORNIA, ALASKA, ARIZONA, IDAHO, MONTANA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH, WASHINGTON, AND OTHER CODE STATES (1910).

¹¹ *See, e.g.*, COMMISSIONERS OF THE CODE, BOOK OF FORMS, ADAPTED TO THE CODE OF PROCEDURE (1860); HENRY STRONG MCCALL, PRECEDENTS OR PRACTICAL FORMS IN ACTIONS AT LAW IN THE SUPREME COURT OF THE STATE OF N. YORK ADAPTED TO THE CODE AND RULES OF 1852 (1852); HENRY WHITTAKER, PRACTICE AND PLEADING UNDER THE CODE, ORIGINAL AND AMENDED, WITH APPENDIX OF FORMS (2d. ed., 1854).

¹² *See, e.g.*, 1 CODE REP. 1 (1849); AUSTIN ABBOTT & BENJAMIN VAUGHAN ABBOTT, REPORTS OF PRACTICE CASES, DETERMINED IN THE COURTS OF THE STATE OF NEW YORK (1855).

¹³ Pound and the other centennial scholars looked solely to Charles Clark’s treatise on code pleading to explain the achievements of the Code. *See generally* CENTENARY ESSAYS, *supra* note 2 (citing CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (1928) over twenty times); *cf.* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 6 (1989) (noting that “Clark’s work may have served well as reform strategy, but it served poorly as history,” and “the few existing procedure histories suffer from too much reliance on the work of Charles Clark”). Subrin relied primarily on late twentieth-century procedural treatises and textbooks to explain the Code. *See, e.g.*, Subrin, *supra* note 5, at 346-47, n.1, n.3, n.4, n.9, & n.11.

“hallmarks of equity practice at the time.”¹⁴ However, an understanding of the Code must account for the Code’s multiple drafts, the contemporary literature, and prior New York practice, especially because a code by its comprehensive nature easily obscures its origins and influences.

By examining contemporary sources, this essay provides a fuller understanding of what Field and his fellow codifiers imagined they were doing. New York had a significant history of fusion reforms that are obscured when scholars too readily assign all the novelties of fusion to Field’s Code. Pre-Code legislation granted common law courts equitable powers over document discovery and the administration of some equitable remedies. The constitution of 1846 eliminated the Court of Chancery and established a uniform procedure for taking witness testimony at trial. Nevertheless, the tradition that Field was the first to consolidate common law and equity procedure systematically is largely correct, because it was the Code that contributed uniform procedures in pleading, discovery, and trial. Part I of this essay traces this story of New York’s pre-Code fusion efforts and the origins of the Field Code.

The type of fusion the Code achieved differed markedly from the later Federal Rules in one central respect: The Code restricted pretrial discovery in favor of pleading and courtroom trial. Other accounts of the Code focus on the supposed jury- and democracy-enhancing provisions of the Code. This essay argues that democratic values were not a primary motivator for the Code’s jury provisions. Rather, Field’s conception of pleading became the center of his fusion project. Part II illustrates the importance of pleading in the Code’s intended changes and the adoption of the Code’s reforms in actual practice.

¹⁴ Subrin, *supra* note 5, at 338. Among these hallmarks Subrin includes “long, detailed pleadings; oath not required on all pleadings; broad joinder; emphasis on discovery; written, rather than oral testimony; judge instead of jury; heavy reliance on masters; extreme flexibility; and judicial discretion.” *Id.* at 368, n.239. New York chancery, however, required short pleadings, see note 157 *infra* and accompanying text; and allowed oral testimony, see notes 255-256 *infra* and accompanying text. Moreover, common law practice in New York was not necessarily the reverse of Subrin’s list. See, e.g., notes 312-313 *infra* and accompanying text.

Despite Field's differing vision for pleading and discovery, the Code significantly foreshadowed the reforms of the FRCP in its preference for equity. In fact, the Code restricted equitable discovery as an attempt to gain a more important power from equity, the power to bring sworn party statements into the trial. Part III concludes by explaining Field Code discovery in light of the drafters' project to abolish the disqualification of party testimony.

I. Advent of the Field Code of Procedure

The Field Code constituted the first attempt by a common law jurisdiction to transform procedural law from judicial precedent into a terse yet comprehensive statute. It was also the first attempt to fuse the two systems of courts and procedures that had operated in New York for over a century. Initially, these two objectives were unconnected: Some reformers pursued codification before fusion became a serious suggestion, and some supporters of fusion partially succeeded without a code. The Code drafters saw in each movement a common concern with cost and delay in the civil justice system, and they combined codification and fusion into a single program.

A. Changes in New York Practice, 1820-1846

1. Early Careers of Field, Loomis, and Graham

Despite its colloquial name, the "Field Code" was drafted by three men: David Dudley Field Jr., Arphaxad Loomis, and David Graham Jr. Each drafter had over twenty years of experience in New York legal practice before work on the Code began. Loomis was born in 1798 and was the son of a moderately wealthy Connecticut farmer. After studying law privately,

Loomis entered practice in New York in 1822.¹⁵ Before his work on the Code, Loomis served as both a surrogate (New York's probate judge) and a county court judge; he also held office in the New York State Assembly and was a delegate to the state constitutional convention of 1846.¹⁶

Field was born in 1805 to a family that was said to have "no parallel in [American] history except the Adams family."¹⁷ Field's father was a Congregational minister in western Massachusetts and New York. Among Field's family were two Supreme Court justices, several prominent clergymen, and the creator of the trans-Atlantic telegraph.¹⁸ In 1825 Field began an apprenticeship with two prominent New York City lawyers, Henry and Robert Sedgwick. Field joined Robert as partner after Henry retired three years later.¹⁹

Graham was born in 1808. David Sr., a clergyman and a lawyer, trained both of his sons in the law.²⁰ David Jr. became prominent at the New York bar for his *Treatise on the Practice of the Supreme Court of the State of New York*, which he published when he was twenty-four years old.²¹ Graham became the first professor of law at New York University in 1838, where he taught courses on pleading.²² In addition to his *New York Practice*, which concentrated on the courts of common law, Graham edited an American edition of John Sidney Smith's *Treatise on the Practice of the Court of Chancery*, and he wrote a book for students describing the jurisdiction of New

¹⁵ THE TODD FAMILY IN AMERICA 255 (George Iru Todd & John Edwards Todd eds., 1920).

¹⁶ *Id.*

¹⁷ Irving Browne, *David Dudley Field*, 3 GREEN BAG 49, 49 (1891).

¹⁸ See Subrin, *supra* note 5, at 314. For biographies of Field, see Philip J. Bergan, *David Dudley Field: A Lawyer's Life*, in THE FIELDS AND THE LAW 21 (1986); Michael Joseph Hobor, *The Form of the Law: David Dudley Field and the Codification Movement in New York, 1839-1888* (Aug. 1975) (unpublished Ph.D. dissertation, University of Chicago) (Field's codification efforts); and Daun Van Ee, *David Dudley Field and the Reconstruction of the Law* (1974) (unpublished Ph.D. dissertation, Johns Hopkins University) (Field's legal practice).

¹⁹ LIFE OF FIELD, *supra* note 2, at 38. In the 1850s Field established his own firm to manage the contracts and litigation arising from his brother Cyrus's trans-Atlantic cable construction; this firm was the predecessor to the modern Wall Street firm of Shearman & Sterling. See Van Ee, *supra* note 18, at 214-15. On the Sedgwicks, see PERRY MILLER, *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 135-36 (1969).

²⁰ *Obituary of John Graham*, N.Y. TIMES, Apr. 10, 1894.

²¹ DAVID GRAHAM, *A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK* (1832).

²² See *Obituary*, *supra* note 20

York's many courts.²³ Graham published a third edition of his *New York Practice* in 1847—less than a year before he joined Loomis and Field on the drafting commission.²⁴ Although Graham regretted producing a new edition “at a period when so many . . . changes . . . are about to go into immediate effect,” his treatise provides a detailed description of New York practice on the eve of the Field Code reforms, supplying a benchmark for understanding the Code's departures.²⁵

2. New York Practice in the Early Nineteenth Century

The New York civil justice system that Graham described followed the English model, in which separate courts of law and equity applied distinct procedures and remedies. The common law courts—which heard claims sounding in contract, tort, or property—used jury trial for fact-finding and awarded money damages for remedy. Common law pleading followed specific “forms of action” that employed highly stylized and sometimes fictitious language to present triable issues to the court.²⁶ Lawyers examined witnesses in open court, but both parties and witnesses interested in the litigation were barred from testifying.²⁷

In the court of chancery—which heard claims regarding trusts, corporations, and guardianship issues—the judge made all findings of fact and rulings on law, and he administered specific remedies. Pleadings were typically brief, factual accounts of the controversy, and pleadings for discovery allowed a party to obtain statements from his

²³ See DAVID GRAHAM, A TREATISE ON THE ORGANIZATION AND JURISDICTION OF THE COURTS OF LAW AND EQUITY IN THE STATE OF NEW YORK (1839) [hereinafter GRAHAM, JURISDICTION]; JOHN SIDNEY SMITH, A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY: WITH AN APPENDIX OF FORMS AND PRECEDENTS (David Graham Jr. ed., 2d. American ed. 1842).

²⁴ DAVID GRAHAM, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK (3d. ed. 1847) [hereinafter GRAHAM, PRACTICE].

²⁵ *Id.* at v. Equally fortuitous for legal historians is that a clerk to New York's last Chancellor, Reuben Walworth, produced a two volume treatise on New York equitable practice in 1844. OLIVER L. BARBOUR, A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY (1844).

²⁶ For an example of a plea in trover, see notes 160-164 *infra* and accompanying text.

²⁷ For details on New York practice before the Codes, see Part II *infra*.

adversary without breaching the rule of disqualification against party testimony. A court-appointed examiner questioned (again, disinterested) witnesses, recording testimony in writing, sometimes over the course of multiple hearings.²⁸

Into the nineteenth century, critics of the New York system concentrated not on the dual procedure system, but on the cost and delay in both branches of the courts.²⁹ Suits could take years to resolve, especially in New York's understaffed chancery system in which certain cases became inside jokes like *Jarndyce v. Jarndyce* of Charles Dickens's *Bleak House*.³⁰ In one equity suit, a witness from Troy was summoned to appear before the chancellor in Saratoga; the case dragged on for so long that it was said the witness fell in love with a local, "married her, and was a father before he left the stand."³¹ Such suits also resulted in large costs. One lawyer later recalled a suit in which the pleading alone cost a defendant \$13,000 in lawyers' fees.³² Field—who had a penchant for statistics³³—estimated that chancery in a single year adjudicated about \$9.2 million in claims at a cost of over \$920,000. During the same year, according to Field, common law courts adjudicated \$28.8 million in claims at a cost of \$1.9 million in court and lawyers' fees.³⁴

In response to the cost and delays of chancery, the New York legislature conducted a major reform in the 1820s that foreshadowed the fusion of law and equity. In order to lessen the

²⁸ *Id.*

²⁹ See, e.g., ARPHAXAD LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS 5-6 (1879) (describing the genesis of law reform within complaints about the New York fee system and the long delays of chancery).

³⁰ CHARLES DICKENS, BLEAK HOUSE 1-7 (1853).

³¹ The originator of the anecdote, the prominent social reformer Henry B. Stanton, contended that such cases "threw Jarndyce vs. Jarndyce of Bleak House fame quite into the shade." HENRY B. STANTON, RANDOM RECOLLECTIONS 50 (1885).

³² CHARLES EDWARDS, PLEASANTRIES ABOUT COURTS AND LAWYERS OF THE STATE OF NEW YORK 30-31 (1867).

³³ In his youth, Field was a keen student of math and science. See Van Ee, *supra* note 18, at 8. For other instances of Field's use of statistics in arguments about law reform, see note 152 *infra* and accompanying text (Field's figures on the different sections of the Throop Code); and note 123 *infra* and accompanying text (Field Code requirement for statistical recordkeeping).

³⁴ See David Dudley Field, Letter to Representative John O'Sullivan, in 5 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 65th Sess., No. 81, at 28-29 (1842) [hereinafter, Field, Letter to O'Sullivan].

amount of litigation brought before the chancellor, the legislature allowed seven common law circuit judges to act as vice chancellors. These judges then assumed original jurisdiction in chancery cases and applied equitable procedures.³⁵ Over time, the legislature created additional vice chancellors, giving chancery a bench of eleven judges by the 1840s.³⁶

These were notable changes in the common law world at this time. England had, in addition to the chancellor, only one vice chancellor, whose office was a recent creation and who mostly served as a substitute when the chancellor was not sitting.³⁷ Several American states never established separate courts of equity but allowed their common law courts to implement a few basic equitable rules.³⁸ Alone among the states, New York after 1828 maintained two sophisticated yet disparate procedural systems in the same tribunal, similar to practice in the federal courts.³⁹ If a plaintiff chose the wrong jurisdiction, the judge would non-suit the claim, assess costs, and send the plaintiff back to the beginning to re-plead.⁴⁰

³⁵ 2 REVISED STATUTES OF THE STATE OF NEW YORK 168, § 2 (1829) [hereinafter REVISED STATUTES]; see also JOSEPH PARKES, THE STATUTES AND ORDERS OF THE COURT OF CHANCERY AND THE STATUTE LAW OF REAL PROPERTY OF THE STATE OF NEW YORK at xxxvi-xxxix (1830) (recounting the history of equity reform in New York).

³⁶ After the caseload for the circuit judge in New York City (First Circuit) became unmanageable, New York exempted that circuit judge from chancery jurisdiction and designated a separate vice chancellor for the circuit. See GRAHAM, JURISDICTION, *supra* note 22, at 348. Two additional vice chancellors were commissioned in the early 1840s. By 1846, the chancery bench included the chancellor, three vice chancellors, and seven circuit judges who exercised chancery jurisdiction. See *Civil Officers*, N.Y. EVENING POST, July 13, 1846, at 2 (on file with the Beinecke Rare Book and Manuscript Library, Yale University).

³⁷ England appointed its first vice chancellor in 1813, but soon afterwards the chancellor ceased to hear original causes, so the English tradition of having only a single judge presiding over the chancery system continued. See Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery*, 22 LAW & HIST. REV. pts. I & II, 389, 565, at 393 (2004).

³⁸ See Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in LAW IN AMERICAN HISTORY 257, 264-65 (Donald Fleming & Bernard Bailyn eds. 1971).

³⁹ See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1202-07 (2005) (explaining the history of the distinct equitable practice in the federal courts).

⁴⁰ See LOOMIS, *supra* note 29, at 9; see also, e.g., *Livingston v. Van Ingen*, 15 Fed. Cas. 697 (1811) (federal case discussing the separate procedures for federal justices sitting at law or equity); see generally Part II.E.3. *infra*.

3. Moves Toward Codification

Field argued that merging the courts alone was an inadequate reform, because high fees and delay were symptoms of a deeper problem: the rapid expansion of legal regulation being developed in case reports and statute books. Although American legal printing was scarce at the turn of the century, by the 1840s New York lawyers had too much legal literature, rather than too little.⁴¹ One practitioner in 1846 observed that a minimally adequate library should contain 800 to 1,000 volumes; a good library would have upwards of 3,000 volumes.⁴² In Field's experience, "[t]he lawyer's library had become a collection of books from the Old World and the new, reports of all the courts in England and in all our States, and treatises from every legal authority in America or Europe. It was therefore to have been expected that the law would become, what it really was, a vast irregular mass, without unity or assimilation."⁴³ "Who can guess what he may have to meet in a law suit," complained another attorney, "as no lawyer can afford to buy or read all the [legal] books in the world?"⁴⁴ Field thought the "multiplication of law-books" had increased the research work of the bar to unprecedented levels, and "[t]hose who [had] the best practice [were] tasked almost beyond endurance."⁴⁵

Beside the research burden on lawyers, Graham and other lawyers argued that advances in legal printing swelled the length of court filings, increasing cost and delay. Although New York regulated the fees that a lawyer could collect on filings, the calculation of lawyers' fees and

⁴¹ On the development of New York law reporting, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 573-84 (1993).

⁴² See Michael Hoffman, *Letter on Reforms Necessary in the Body of Law, in the Written Pleadings, and in the Practice of the Courts* (Mar. 21, 1846), in CONSTITUTIONAL REFORM IN A SERIES OF ARTICLES CONTRIBUTED TO THE DEMOCRATIC REVIEW 63, 64 (Thomas Prentice Kettell ed., 1846)

⁴³ David Dudley Field, *Reform in the Legal Profession and the Laws*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 494, 507 (A. P. Sprague ed., 1884) [hereinafter SPEECHES].

⁴⁴ HIRAM P. HASTINGS, AN ESSAY ON CONSTITUTIONAL REFORM 27 (1846).

⁴⁵ David Dudley Field, *Study and Practice of the Law*, in 1 SPEECHES, *supra* note 43, at 438, 485.

court costs was based on the page count.⁴⁶ Acting on this incentive, lawyers drafted and courts accepted lengthy, expensive filings.⁴⁷ Some practitioners used print rapidly to produce routine – and especially lengthy – form-type filings that required a clerk to fill in only a few blanks to be filled in by a clerk.⁴⁸ As New York judges more actively and carefully wrote their opinions for printed case reports, delay further increased.⁴⁹

One solution to the problems posed by the swift increase of regulation, some argued, was to codify the substantive law. “A code will lessen the labor of Judges and lawyers in the investigation of legal questions,” Field wrote. “Instead of searching, as now, through large libraries . . . it will be sufficient to examine the articles of the Code relating to the subject.”⁵⁰ Not only would a code simplify and organize research for practitioners, it would also cut away “all temptation to indulge in useless verbiage,” in the opinion of one common law judge.⁵¹ The brief, simple statements of a code would be reflected in brief, less stylized pleadings.⁵²

The profusion of regulation was not the only impulse for codification proposals in nineteenth-century New York. Theoretical critiques of the common law system also gave rise to interest in codification, and Field was involved in this movement from the beginning of his career. Henry Sedgwick, Field’s mentor, was a critic of New York practice, which he perceived

⁴⁶ See, e.g., 2 REVISED STATUTES, *supra* note 35, at 630-33, §§ 15 & 18 (allowing extra solicitors’ and attorneys’ fees “for every folio” of work product).

⁴⁷ See JOHN W. EDMONDS, AN ADDRESS ON THE CONSTITUTION AND THE CODE OF PROCEDURE 16 (1848) (complaining that the legal “practitioner became merely an expert seeker after precedents” to fill pleas with “numerous fictions and precedents” instead of “concise, and luminous aids in the investigation of truth”); see also Appendix *infra* (containing a sample form pleading).

⁴⁸ These documents were popularly known as “Law Blanks.” For example forms and catalog listings of Law Blanks, see M. H. Hoeflich, *Law Blanks and Form Books: A Chapter in the Early History of Document Production*, 11 GREEN BAG 2d 189 (2008). A judge of the Supreme Court, John Worth Edmonds, complained that form pleadings and motions limited the educational value of apprenticeships, because they taught students “no more of actual pleading than how properly to fill out blanks.” EDMONDS, *supra* note 47, at 16.

⁴⁹ See GRAHAM, JURISDICTION, *supra* note 23, at 151.

⁵⁰ David Dudley Field, *Reasons for the Adoption of the Codes*, in 1 SPEECHES, *supra* note 43, at 361, 371.

⁵¹ EDMONDS, *supra* note 47, at 17.

⁵² See Field, *Reform in the Legal Profession and the Laws*, *supra* note 43, at 508 (comparing New York’s law of real property which “lies buried [in] the digests, old and new, the glosses and the text” of “ponderous tomes” in contrast to the real property sections in the Code of Napoleon, which did “not exceed a hundred” sections).

as needlessly more technical than the procedure in his home state of Massachusetts.⁵³ At Sedgwick's urging, Field studied the writings of codification supporters such as Jeremy Bentham, Edward Livingston, and especially an Irish immigrant to New York named William Sampson.⁵⁴

In 1823, Sampson delivered a widely noted address calling for the development of a distinctively American jurisprudence under a code in which "the law [would] govern the decisions of the judges, and not the decisions the law."⁵⁵ Sedgwick wrote a highly favorable review and endorsed Sampson's call for a code.⁵⁶ Whereas William Blackstone had thought the early common law possessed a "pristine vigor," Sampson and Sedgwick saw early common law as "a feeble, tottering, unstable thing, till the reason, wisdom, humanity, and experience of more modern times [developed] civilized and settled governments."⁵⁷ Sedgwick was particularly critical of the New York's perpetuation of English property law with its many fictions in trespass actions.⁵⁸ These and other ideas from Sampson and Sedgwick appear often in Field's later writings, although Field never advocated a total replacement of the common law in a code. Instead Field expected the law to cycle between periods of common law development and periods of consolidation in codes.⁵⁹

⁵³ See MILLER, *supra* note 19, at 135-36; see also DAVID DUDLEY FIELD, A THIRD OF A CENTURY GIVEN TO LAW REFORM 1 (1873) [hereinafter FIELD, THIRD OF A CENTURY]; see generally [Henry Sedgwick], *The Common Law*, 19 NO. AM. REV. 411 (1824).

⁵⁴ JEREMY BENTHAM, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION (1817); EDWARD LIVINGSTON, REPORT MADE TO THE GENERAL ASSEMBLY OF THE STATE OF LOUISIANA ON THE PLAN OF A PENAL CODE FOR THE SAID STATE (1822); see FIELD, THIRD OF A CENTURY, *supra* note 53, at 1. For a discussion of the similarities between Livingston's Code of Procedure for Louisiana and the Field Code, see David S. Clark, *The Civil Law Influence on David Dudley Field's Code of Civil Procedure*, in THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920, 63 (Mathias Reimann ed., 1993).

⁵⁵ William Sampson, *Anniversary Discourse on the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law, Delivered Before the New York Historical Society, December 6, 1823*, in SAMPSON'S DISCOURSE AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS UPON THE HISTORY OF THE LAW 38 (Pishey Thompson ed., 1826).

⁵⁶ [Sedgwick], *supra* note 53.

⁵⁷ *Id.* at 411.

⁵⁸ *Id.* at 422-23.

⁵⁹ See FIELD, THIRD OF A CENTURY, *supra* note 53, at 1. Field frequently repeated Sedgwick's objections to the use of fictions. See, e.g., Field, Letter to O'Sullivan, *supra* note 34, at 23, 34 (Field's proposal for "a salutary check upon the

4. Fusion and Codification Before 1846

Field's first public effort to change procedural law advised codification, but only by the right authors. In 1839, Field wrote to New York State Senator Gulian Verplanck opposing the creation of a code commission composed of the chancellor and three judges of the supreme court.⁶⁰ Field argued that judges would be apathetic codifiers. Similar commissions had been attempted in the past, but judges had proven reluctant to "report any vice inherent in the system in which they were the chief officers."⁶¹

Field's movement towards fusion was likewise cautious. In 1842, Field wrote to John O'Sullivan, a member of the Assembly Judiciary Committee, proposing three bills to reform New York procedure.⁶² Although "[t]here will never be an administration of the law without delay, and without expense," Field conceded, "[a]ny system would be better than the present."⁶³ Field argued that delay in the common law courts was a result of the common law style of pleading, whereas the chancery court was overcrowded with actions for discovery.⁶⁴ Field would have abolished the forms of action and replaced common law pleading with the brief, simple statements of equitable pleading; he also would have allowed parties and witnesses to testify orally at common law.⁶⁵ By thus unifying standards for pleading and allowing party

prosecution of fictitious claims"). Field also used Sampson's rhetoric against the common law at times. See, e.g., Field, *The Study and Practice of Law*, *supra* note 45, at 490 (describing the forms of action as "old jingles of words, invented somewhere about the times of the Edwards"). On Field's theory of common law development, see Field, *Reform in the Legal Profession and the Laws*, *supra* note 43, at 513; LIFE OF FIELD, *supra* note 2, at 73-74.

⁶⁰ DAVID DUDLEY FIELD, A LETTER TO GULIAN C. VERPLANCK ON THE REFORM OF THE JUDICIAL SYSTEM OF THIS STATE 68 (1840) [hereinafter FIELD, LETTER TO VERPLANCK]. The letter was prompted by a speech Verplanck delivered and with which Field largely agreed. See GULIAN C. VERPLANCK, SPEECH WHEN IN COMMITTEE OF THE WHOLE IN THE SENATE OF NEW YORK ON THE SEVERAL BILLS AND RESOLUTIONS FOR THE AMENDMENT OF THE LAW AND THE REFORM OF THE JUDICIARY SYSTEM 6-7 (1839).

⁶¹ FIELD, LETTER TO VERPLANCK, *supra* note 60, at 71.

⁶² See Field, Letter to O'Sullivan, *supra* note 34.

⁶³ *Id.* at 23, 42.

⁶⁴ *Id.* at 24-27.

⁶⁵ *Id.* at 48-49, 51.

testimony – but otherwise leaving the dual system in place – Field hoped to address the chief causes of delay.⁶⁶

At the time of Field's writing, Loomis chaired the Assembly Judiciary Committee and had prepared a reform bill of his own. His proposal continued to disqualify parties from testifying, but other features were similar to Field's, including simplified pleading.⁶⁷ The committee's final report attached Field's letter and his draft bills in an appendix,⁶⁸ but the legislature ignored both Loomis's report and Field's proposals. Both men later blamed the legislature's inaction on the New York constitution, which preserved separate courts of law and equity with distinct jurisdictions and modes of trial.⁶⁹

B. The Constitution of 1846

1. The Convention of 1846

Disappointed in their efforts in 1842, Field and Loomis saw their prospects improve as the decade progressed and New Yorkers became increasingly dissatisfied with the state constitution. Facing mounting state debt and unrest from western farmers forming an anti-rent movement, the legislature summoned a constitutional convention to meet in 1846 to draft a replacement for the constitution of 1821.⁷⁰ Field ran for election to the convention, but failed to

⁶⁶ See *id.* at 51. To deal with expense, Field proposed calculating lawyers' fees based on the amount in controversy rather than by the number of pages of work product. *Id.* at 68.

⁶⁷ See *Report in Part of the Committee on the Judiciary in Relation to the Administration of Justice*, in 5 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 65th Sess., No. 81, at 1 (1842) [hereinafter *Judiciary Committee Report*]. See also, Loomis, *supra* note 29, at 8.

⁶⁸ See *id.* at 23-62.

⁶⁹ N.Y. CONST. of 1821, art. IV, § 12 (establishing the offices of master and examiner in chancery); art. V, § 1 (establishing a Court of Errors composed of the chancellor and supreme court justices); art. V, § 5 (requiring all equity matters be appealable to the chancellor); see LOOMIS, *supra* note 29, at 8; DAVID DUDLEY FIELD, RE-ORGANIZATION OF THE JUDICIARY: FIVE ARTICLES ORIGINALLY PUBLISHED IN THE EVENING POST ON THAT SUBJECT 1 (1846) [hereinafter FIELD, RE-ORGANIZATION].

⁷⁰ See CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865, at 121-27 (2001); 2 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK FROM THE BEGINNING TO 1905, at 73 (1906).

win a seat.⁷¹ Other proponents of procedural change, including Loomis and the elderly Jacksonian lawyer Michael Hoffman, were elected.⁷²

Both Loomis and Field recalled having influenced the new constitution. “[I]f I was not permitted to influence the Convention by my voice within its walls,” Field wrote, “I could influence it from without, and I did so to the utmost of my power, by conversation and correspondence with the members, and by articles in the newspapers.”⁷³ From January, 1846, through the end of the convention in the fall, Field published nearly twenty editorials in the *New York Evening Post* urging structural changes to the judiciary.⁷⁴ Loomis was appointed to the Judiciary Committee, where he sought to exert “influence in favor of Law Reform in the protracted sessions and discussions.”⁷⁵ The constitution was completed by November, and it made significant steps towards fusion.

2. Fusion in the Constitution of 1846

The constitution of 1846 unified the New York court system. The chancery courts were abolished and their jurisdiction transferred to “one supreme court, having general jurisdiction

⁷¹ Although a Democrat, Field opposed slavery and the annexation of Texas, and tended to be unpopular as a politician. See *Life of Field*, *supra* note 2, at 107-20.

⁷² For a lists of the delegates to the constitutional convention broken down by party affiliation and occupation, see Hobor, *supra* note 18, at 480 tbl.9; and Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1085 n.143 (2010). Shugerman notes that a plurality of seats at the convention went to Barnburner Democrats – the radically laissez-faire wing of the Democratic Party, of which both Field and Loomis were members. The Barnburners, although a minority within the Democratic Party, were thus enabled to set the agenda of the convention and pass sweeping reforms in their effort to enact a “People’s Constitution.” Shugerman, *supra* at 1084-88.

⁷³ FIELD, *THIRD OF A CENTURY*, *supra* note 53, at 2.

⁷⁴ For the first five articles of 1846, see FIELD, *RE-ORGANIZATION*, *supra* note 69. Later in his career, Field recalled that “the Evening Post alone had nine or ten articles from me” during the summer. FIELD, *THIRD OF A CENTURY*, *supra* note 53, at 3. Three articles appear throughout the June issues of the *Evening Post* signed “D.D.F.” on June 1, June 9, and June 23. No other signed articles appear in 1846; however, nine unsigned articles appear later in the summer that are similar in style to Field’s writing, and one unsigned article (August 17) refers back to the signed June 23 article as coming from the same author. The unsigned articles appear on July 31 (pt. 1), August 1 (pt. 2), August 5, August 13, August 17, September 8, September 12, September 23, and September 29. One very short editorial appearing on August 28 also appears to be written by Field. The 1846 issues of the *New York Evening Post* are on file with the Beinecke Rare Book and Manuscript Library, Yale University.

⁷⁵ LOOMIS, *supra* note 29, at 12.

in law and equity.”⁷⁶ The constitution did not, however, abolish the distinction between legal and equitable procedure. Thus, just as seven circuit judges had exercised joint jurisdiction before 1846,⁷⁷ so now thirty-two first-instance judges would apply distinct procedures from law or equity in one tribunal. By thus increasing the number of judges available to dispose of equity cases, the convention sought to address in a structurally unified court system critics’ complaints about the delays of chancery.⁷⁸

In addition to merging the court systems, the convention fused the procedures of common law and equity with regard to the collection of witness testimony. The constitution declared that “testimony in equity cases shall be taken in like manner as in cases at law.”⁷⁹ The exact meaning of this provision even some convention delegates admitted to be unclear.⁸⁰ Through the course of debate, some delegates expressed their intent to abolish equity’s written witness examinations and replace them with oral testimony in open court,⁸¹ but the delegates could not agree whether to expand the use of the jury to equity cases, a move that Field encouraged in his pre-convention articles.⁸² Ultimately, the delegates decided that the requirement’s wording meant only that examinations had to be conducted orally in court.⁸³ A

⁷⁶ N.Y. CONST. of 1846, art. VI, §3; *see also id.* at art. XIV, § 8 (abolishing offices of chancellor, vice chancellor, and master and examiner in chancery); art. XIV, § 5 (transferring former chancery business to the new supreme court).

⁷⁷ *See* notes 35-36 *supra* and accompanying text.

⁷⁸ *See* LOOMIS, *supra* note 29, at 10. The convention also replaced the Court of Errors—which comprised the chancellor, three supreme court justice, and New York’s thirty-three member senate—with a Court of Appeals composed of eight judges, thus removing both the chancellor and the legislature from the court system. N.Y. CONST. of 1846, art. VI, § 2.

⁷⁹ N.Y. CONST. of 1846, art. VI, §10.

⁸⁰ *See* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 783 (1846) [hereinafter CONVENTION DEBATES] (“Mr. STOW said that if they (the members of the Convention) could not agree as to what was the true meaning of [the Testimony Clause], how could they expect the people would understand them.”).

⁸¹ *See id.* at 781-83.

⁸² *See, e.g., id.* at 783 (statement of Morris); *see also* FIELD, RE-ORGANIZATION, *supra* note 69, at 3 (“[E]xperience has made us now regard it as a first principle, that every common law judge, whether in the highest courts or the lowers, should sit at trials with juries; a principle which I would extend to equity judges also.”).

⁸³ *See id.* at 783-84.

separate clause preserved jury trial “in all cases in which it has been heretofore used.”⁸⁴

Common law and equity thus retained separate modes of adjudication, but they gained a uniform method of witness examination.

Although Field encouraged the convention to consider codification or, on other occasions, fusion,⁸⁵ an early proposal by Campbell White, a New York City merchant, first explicitly linked these reforms. White’s proposal required the governor to assemble a commission to “reduce into a written and systematic code, the laws of this state, and also the civil and criminal procedure.”⁸⁶ In the process of codification, the commissioners were to advise the legislature on “amendments and alterations” to the law, including “the abolition of the distinct forms of action at law” and the creation of “an uniform mode of pleading, without reference to the distinction between law and equity.”⁸⁷

White’s plan encountered opposition not only from delegates who wished to leave common law pleading unchanged, but also from delegates who thought the clause attempted too much by requiring both codification and procedural reform.⁸⁸ White eventually withdrew his proposal, and the convention compromised by adopting a clause that empowered a three-member commission to “revise, reform, simplify, and abridge the rules of practice, pleadings, forms and proceedings of the courts.”⁸⁹ The constitution thus required procedural change, but it

⁸⁴ N.Y. CONST. of 1846, art. I, §1.

⁸⁵ D.D.F., “The Convention,” N.Y. EVENING POST, June 1, 1846; “The Convention – Reports of the Judiciary Committee,” N.Y. EVENING POST, Aug. 13, 1846.

⁸⁶ Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York 838 (1846).

⁸⁷ *Id.*

⁸⁸ See Hobor, *supra* note 18, at 172-83.

⁸⁹ N.Y. CONST. of 1846, art. VI, §24. Years later, Field declared that this clause “owed [its] existence very much to my voice and pen.” FIELD, THIRD OF A CENTURY, *supra* note 53, at 3. Unfortunately, the documentary evidence supporting this claim has been lost. Field’s influence over the constitutional convention should not be overstated. Cf. Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. OF INT’L L. 435, 505 (2000). Although several reforms aligned closely with Field’s advice – including the abolition of chancery, the reorganization of the Court of Errors, and the requirement that all witness testimony be taken orally in court; see FIELD, RE-ORGANIZATION, *supra* note 69, at 3-5 – the convention ignored other proposals of Field’s, most notably by instituting an elective

left the details—including the extent of codification and fusion—to a future commission to determine.

Field hoped to be named to the constitutionally mandated Practice Commission and shape procedural reform.⁹⁰ In 1847, before the appointment of the commission, Field published a tract provocatively titled “What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?”⁹¹ Large portions of the document were copied from his 1842 letter to O’Sullivan and combined with more far-reaching rhetoric.⁹² “[G]reat changes in legal proceedings are now inevitable,” Field declared, “and . . . in making them it is as easy to build anew from the foundation, as to add to and repair what is old.”⁹³ By 1847, Field demanded what his earlier proposal had only cautiously hinted at: “*nothing less than a uniform course of proceeding, in all cases, legal and equitable.*”⁹⁴

C. The Practice Commission and the Code of Procedure

1. The Commission on Practice and Pleadings

After the publication of his tract early in 1847, Field drafted a memorial to the legislature proposing specific instructions for the practice commissioners. The constitution offered few

judiciary. Compare, e.g., D.D.F., *Officers and the Appointing Power*, N.Y. EVENING POST, June 23, 1846, at 2; with N.Y. CONST. of 1846, art. VI, §12; see generally Shugerman, *supra* note 72, at 1083-86.

⁹⁰ See FIELD, *THIRD OF A CENTURY*, *supra* note 53, at 4. The constitution of 1846 mandated that the legislature establish two commissions: one to reform practice and procedure, and one to consider the feasibility of codifying the substantive law. N.Y. CONST. of 1846, art. I, § 17 & art. VI, § 24. Field eventually served on both commissions, and drafted multiple codes both as a Practice Commissioner and a Code Commissioner. See note 133 *infra* and accompanying text. This Article, however, concerns only the Practice Commission, and “commission” refers solely to that body.

⁹¹ DAVID DUDLEY FIELD, *WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS: SHALL IT BE WHOLLY REFORMED?* 1-2 (1847) [hereinafter FIELD, *PRACTICE OF THE COURTS*].

⁹² Compare Field, Letter to O’Sullivan, *supra* note 34, at 23-62; with FIELD, *PRACTICE OF THE COURTS*, *supra* note 91.

⁹³ FIELD, *PRACTICE OF THE COURTS*, *supra* note 91, at 37.

⁹⁴ *Id.* at 7.

details on what form procedural change should take,⁹⁵ so Field sought to turn the commissioners' legislative mandate towards his ideal of reform. "[D]eclare," advised Field, "that it shall be their duty to provide for the abolition of the present forms of action and pleadings in cases at common law, for a uniform course of proceeding in all cases, whether of legal or equitable cognizance, and for the abandonment of every form of proceeding not necessary to ascertain or preserve the rights of the parties."⁹⁶ Fifty prominent members of the New York City bar signed Field's memorial.⁹⁷

Compromise among the legislators disappointed Field. Critics of common law pleading were able to gather enough votes to adopt Field's memorial as the mandate for the Practice Commission virtually word for word.⁹⁸ However, the legislature appointed commissioners who were unlikely to make the changes Field was advocating, and neither Field nor any signers of his memorial were appointed to the commission.⁹⁹ Instead, the legislature chose Loomis, who, although an advocate for simpler pleading standards, had focused his criticism on lawyers' fee structures. In his earlier reform proposals Loomis had made clear that he was "too conscious of the immense benefits derived from the[] usages, known as the common law, to seek to abrogate them."¹⁰⁰ For the second position, the legislature appointed Graham, who sometimes referred to the common law as "the perfection of human reason" in the course of his lectures.¹⁰¹ The third position was filled by a member of New York's small appellate bar, Nicolas Hill, whose

⁹⁵ See notes 88-89 *supra* and accompanying text.

⁹⁶ *Memorial of Members of the Bar in the City of New York Relative to Legal Reform*, in 2 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 70th Sess., No. 48 (1847).

⁹⁷ See *id.*

⁹⁸ 1847 N.Y. Laws 67-68.

⁹⁹ The New York Senate was made up disproportionately of older lawyers opposed to procedural changes besides fee restructuring. See Hobor, *supra* note 18, at 200-02.

¹⁰⁰ See *Judiciary Committee Report*, *supra* note 67 at 2.

¹⁰¹ David Graham Jr., *The Practice of the Law, As Illustrated in the Study of Pleading and Practice*, in INAUGURAL ADDRESSES DELIVERED BY THE PROFESSORS OF LAW IN THE UNIVERSITY OF THE CITY OF NEW YORK AT THE OPENING OF THE LAW SCHOOL OF THAT INSTITUTION 51, 60 (E.B. Clayton ed., 1838).

resistance to procedural reform was well known.¹⁰² To further limit the chance of significant change, the legislature gave the commission only a little over a year to finish its work and provided meager compensation that guaranteed the commissioners would have to maintain their law practices concurrently with their procedural work.¹⁰³

In light of the “public sentiment” expressed in Field’s memorial, however, Graham and Loomis decided to turn Field’s instructions into a code of procedure that would “possess the redeeming merit of being neither superficial [n]or inadequate.”¹⁰⁴ Finding his views ignored, Hill resigned in September, 1847, informing the Senate that he refused to participate in “so purely experimental” a project.¹⁰⁵ When a legislator asked Loomis to name a replacement, Loomis recommended Field, and the legislature officially appointed Field to the Practice Commission the same week.¹⁰⁶

2. The 1848 Code of Procedure

The commissioners agreed that each would draft a version of a procedure code and meet in Albany in January, 1848, to amalgamate their drafts and finalize a report for the legislature.¹⁰⁷ When they re-convened, the commissioners agreed to use Field’s draft as their working copy, to which each commissioner then proposed amendments.¹⁰⁸ The commission sent to the legislature

¹⁰² See Van Ee, *supra* note 18, at 60. On the legislative maneuverings to appoint the Practice Commissioners, see Hobor, *supra* note 18, at 207.

¹⁰³ 1847 N.Y. Laws 68; see Van Ee, *supra* note 18, at 60. On the legislative maneuverings to appoint the Practice Commissioners, see Hobor, *supra* note 18, at 207.

¹⁰⁴ *Report of the Commissioners on Practice and Pleadings*, in 7 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 70th Sess., No. 202, at 3 (1847).

¹⁰⁵ N. Hill, Letter to Albert Lester, President of the Senate, Sep. 20, 1847, in JOURNAL OF THE SENATE OF THE STATE OF NEW YORK 679, 679 (1847); see also LOOMIS, *supra* note 29, at 15 (“[Hill] was influenced by advice from a high judicial source, not to connect his name and impair his high standing at the bar, by being a party to the sweeping changes proposed, which it was believed would never come into practice.”).

¹⁰⁶ See LOOMIS, *supra* note 29, at 15.

¹⁰⁷ See LOOMIS, *supra* note 29, at 15-17.

¹⁰⁸ See *id.* at 17 (“Mr. Field presented a chapter and requested that it be taken up as the basis for the Board to commence upon. His wishes were acceded to by his colleagues.”) and 22 (“I believe that more of Mr. Fields’ [sic]

a completed report which contained a proposed code of 391 sections, supported by lengthy explanatory notes.¹⁰⁹ Intending to enlarge and amend their work in the coming year, the commission emphasized that the code was “but a report in part.”¹¹⁰ Nevertheless, the code contained the changes that Field and Loomis had promoted earlier, including the abolition of common law forms of action and a restructured cost system; in addition, the code contained uniform provisions for trial, discovery, witness examination, and multi-issue and multi-party joinder (provisions detailed below).¹¹¹ The legislature, eager especially to adopt the new cost system offered by the code, deliberated upon the proposed code for three weeks, made minor amendments, and voted to enact the code.¹¹² The initial Code of Procedure (hereinafter the 1848 Code) went into effect on July 1, 1848.¹¹³

3. The 1849 Amended Code

The commissioners returned to their practices but carefully watched the Code’s enforcement in the courts. Early in 1849, the commissioners drafted three more reports for the legislature. The Second Report contained forty pages of proposed amendments to the Code with explanatory notes; most of the proposals, the report explained, sought to resolve “various [differing] constructions of the same rule by different judges,” such as the extent to which pleadings could be amended.¹¹⁴ The report further indicated that some differing constructions

manuscripts than those of either of the other Commissioners were used as the basis of the action of the board from day to day.”).

¹⁰⁹ See FIRST REPORT OF THE COMMISSION ON PRACTICE AND PLEADINGS (1848) [hereinafter FIRST REPORT]. Liberal extracts of Field’s 1842 letter to O’Sullivan appeared throughout the notes. See 1 SPEECHES, *supra* note 43, at 269, editor’s note.

¹¹⁰ FIRST REPORT, *supra* note 109, at iv.

¹¹¹ Because neither the Constitution of 1846 nor the legislature had delineated the jurisdiction of New York’s new court system, the Practice Commissioners took it upon themselves to perform this task in Part I of the Code, covering fifty-three sections, 1848 N.Y. Laws 498-510. For the reforms fusing legal and equitable procedure, see Part III *infra*.

¹¹² For the detailed legislative history, see Hobor, *supra* note 2, at 219-20, 227-29.

¹¹³ 1848 N.Y. Laws 497 [hereinafter 1848 Code].

¹¹⁴ SECOND REPORT OF THE COMMISSIONERS OF PRACTICE AND PLEADINGS 10 (1849) (on file with the Rare Books Collection, Lillian Goldman Law Library, Yale University) [hereinafter SECOND REPORT]. On the power to amend, see note 171 *infra* and accompanying text.

came from “eminently conservative” judges and practitioners who “still pore[d] over the musty volumes of antiquity in search for *precedent*” – precedent that the Code was supposed to have overridden.¹¹⁵ The Third Report contained over a hundred pages of new proposals for codification, mostly clarifying the jurisdiction of the courts and instituting new procedures to replace prerogative writs.¹¹⁶ The Fourth Report supplied a procedural code for criminal trials.¹¹⁷

The legislature accepted most of the proposals in the Second Report and re-enacted an amended version of the Code that ran to 473 sections (hereinafter the 1849 Amended Code).¹¹⁸ Neither house, however, took any action on the Third or Fourth Reports,¹¹⁹ but the legislature did extend the Practice Commission to the end of 1849.¹²⁰ Field, Loomis, and Graham thus had an additional seven months to complete their work and persuade the legislature to enact a complete codification of procedural law.

4. The 1850 Completed Code

The commissioners finished their final drafts late in the day on December 31, 1849, the last day of their commission. The commissioners’ Final Report, printed in January, 1850, contained a revised and expanded Code of 1,884 sections (hereinafter the 1850 Completed Code)¹²¹ – over 1,400 sections longer than the 1849 Amended Code. In the 1850 Completed Code, the commissioners incorporated many of the reforms from their Third Report,¹²² and

¹¹⁵ *Id.* at 7.

¹¹⁶ See THIRD REPORT OF THE COMMISSIONERS OF PRACTICE AND PLEADINGS (1849) (on file with the Rare Books Collection, Lillian Goldman Law Library, Yale University) [hereinafter THIRD REPORT].

¹¹⁷ See FOURTH REPORT OF THE COMMISSIONERS OF PRACTICE AND PLEADINGS (1849) (on file with the Rare Books Collection, Lillian Goldman Law Library, Yale University).

¹¹⁸ See 1849 N.Y. Laws 613 [hereinafter 1849 Amended Code].

¹¹⁹ See Hobor, *supra* note 2, at 233-47.

¹²⁰ See 1849 N.Y. Laws 453.

¹²¹ See FINAL REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS, in 2 DOCUMENTS OF THE ASSEMBLY OF NEW YORK, 73rd Sess., No. 16 (1850) [hereinafter 1850 Completed Code].

¹²² See note 116 *supra* and accompanying text.

codified the law of evidence.¹²³ In addition, the Final Report offered a Code of Criminal Procedure, running to some 1,000 sections.¹²⁴

The New York legislature took no action on the 1850 Completed Code. By some accounts, the commissioners had been too successful in their earlier revisions, and most legislators were content with the 1849 Amended Code as it was.¹²⁵ One commentator has argued that the Completed Code alienated lawyers in the legislature by lowering lawyers' fees from the levels set in the Amended Code.¹²⁶ Moreover, the sheer length of the Code allowed the legislature to take no action for want of time even to read the report.¹²⁷ The Code fared no better in subsequent legislative sessions; the state never enacted Field's final Code of Civil Procedure.¹²⁸

5. Terminology

The New York Code of Procedure thus appeared in several versions from 1848 to 1850.¹²⁹ Since the nineteenth century, lawyers and scholars have used the term "Field Code"

¹²³ Another addition was the requirement that the attorney general keep detailed statistics on litigation in the state, explaining that "[t]he worst of all legislation is that which makes a general law to suit a particular case Without a view of the whole subject, neither the magnitude of an existing evil nor the benefit of an existing provision is seen." *Id.* at 147-59, §§ 353-54 and accompanying note.

¹²⁴ See 3 DOCUMENTS OF THE ASSEMBLY OF NEW YORK, 73rd Sess., No. 18 (1850). To ensure the two Codes became the sole source of procedural law, the commission proposed a bill to repeal the Revised Statutes and subsequent session laws that conflicted with either Code, an action the legislature had not taken with the previous codes. See 3 DOCUMENTS OF THE ASSEMBLY OF NEW YORK, 73rd Sess., No. 19 (1850).

¹²⁵ See, e.g., John T. Fitzpatrick, *Procedural Codes of the State of New York*, 17 LAW LIBR. J. 12, 16 (1924).

¹²⁶ Hobor, *supra* note 2, at 253-54.

¹²⁷ See, e.g., *Report of the Committee on the Code*, in 6 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 73^d Sess., No. 149, at 6 (1850) (reporting that the Assembly Judiciary Committee had perused only 635 sections of the 1,884-section Code of Civil Procedure and none of the Code of Criminal Procedure).

¹²⁸ The legislature made minor amendments to the Code nearly every year after enactment. See GENERAL INDEX OF THE LAWS OF THE STATE OF NEW YORK 193 (1859). When a set of amendments were passed in 1851, see 1851 N.Y. Laws 876, the legislature reprinted the Code in full with the 1851 amendments inserted. See 1851 N.Y. Laws 3. Some scholars give undue weight to the 1851 amendments, as if the legislature had re-enacted the Field Code in a similar fashion as 1849. See, e.g., FRIEDMAN, *supra* note 1, at 295. Unlike the 1849 Amended Code, the 1851 amendments did not make any substantial changes to the Code's major reforms (the amendments dealt primarily with the jurisdiction of the courts and with special proceedings), nor were the amendments suggested by the Code's drafters.

¹²⁹ One other version of the Field Code should be mentioned. In 1853, Loomis was once again elected to the legislature, and Field supplied him with a slightly shorter version of the 1850 Completed Code. See *An Act to Establish*

somewhat loosely. Sometimes the reference is to the original 1848 Code of Procedure,¹³⁰ sometimes to the 1849 Amended Code,¹³¹ and sometimes to the unenacted 1850 Completed Code.¹³² Later in his career, Field joined commissions to codify New York's substantive law, producing a civil code, penal code, and political code;¹³³ and these works sometimes fall under the appellation "Field Code" as well.¹³⁴ Distinguishing between the 1848, 1849, and 1850 versions of the Code of Procedure is important, because despite assertions to the contrary,¹³⁵ significant changes in the fusion of law and equity appear from version to version.¹³⁶

D. The Fusion Project After 1850

1. Fusion and Codification Beyond New York

The commissioners' project to fuse law and equity in a code gained wide attention outside New York. Missouri adopted a version of the original 1848 Code less than a year after

the Code of Civil Procedure, in 3 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 76th Sess., No. 55, at 1 (1853). Loomis was unable to generate sufficient interest in the legislature to pass the Code. See J. Newton Fiero, *David Dudley Field and His Work*, 51 ALB. L.J. 39, 42 (1895).

¹³⁰ See, e.g., Subrin, *supra* note 5, at 317.

¹³¹ See, e.g., Fitzpatrick, *supra* note 125, at 15.

¹³² See, e.g., MILLAR, *supra* note 1, at 54-55.

¹³³ See THE POLITICAL CODE OF THE STATE OF NEW YORK REPORTED COMPLETE BY THE COMMISSIONERS OF THE CODE (1859); THE CIVIL CODE OF THE STATE OF NEW YORK REPORTED COMPLETE BY THE COMMISSIONERS OF THE CODE (1865); THE PENAL CODE OF THE STATE OF NEW YORK REPORTED COMPLETE BY THE COMMISSIONERS OF THE CODE (1865); see also THE CODE OF EVIDENCE OF THE STATE OF NEW YORK REPORTED COMPLETE BY THE COMMISSIONERS (reproducing many of the sections on evidence proposed in the 1850 Code of Civil Procedure). See generally, CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 187-95 (1981). Still later in his career, Field attempted to codify international law as well. See DAVID DUDLEY FIELD, DRAFT OUTLINES OF AN INTERNATIONAL CODE (1872).

¹³⁴ See, e.g., Andrew P. Morriss et al., *Debating the Field Civil Code 105 Years Late*, 61 Mont. L. Rev. 371, 280 (2000).

¹³⁵ See, e.g., MILLAR, *supra* note 1, at 54 (distinguishing between the 1848 Code's "basic ideas" and the "imperfections" corrected by later amendments); Fitzpatrick, *supra* note 125, at 16 ("The essential features of the original [1848] Code were retained unchanged [by the 1850 Completed Code]."); Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 242 (1942) (speaking of the 1848 Code as an "installment" and the other codes as additional—rather than amendatory—material).

¹³⁶ See, e.g., notes 171 (amendment), 209-210 (joinder) and 347-351 (party testimony and discovery) *infra* and accompanying text.

New York.¹³⁷ California was the first state to adopt the Completed Code in 1851,¹³⁸ and by the end of the century, a total of twenty-six states had enacted one or another version of the Code.¹³⁹

Four states were drawn more to codification than to fusion and thus maintained separate procedures for law and equity in their codes.¹⁴⁰ The English, on the other hand, were more interested in fusion. After hosting an address by Field in 1850, the Law Amendment Society created a committee to consider the possibility of fusion in England.¹⁴¹ Under the direction of Lord Brougham, the Society surveyed New York lawyers during the 1850s on their reaction to fusion.¹⁴²

2. Reversal in New York

As interest in fusion spread, New York nearly abandoned the project. In 1870, the New York legislature appointed a commission under the direction of Montgomery Throop to “revise, simplify, arrange, and consolidate” New York’s procedural law.¹⁴³ The commission produced a new code that restored distinct procedures for law and equity with regard to pleading, joinder,

¹³⁷ See 1849 Mo. Laws 73. For a general history of the spread of the Field Code around America, see CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* (1897).

¹³⁸ 1851 Cal. Laws 51. In fact, it was Field’s brother Stephen who introduced the code to the California legislature to which he had recently been elected. See William Wirt Blume, *Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History*, 17 *Hastings L.J.* 701 (1966).

¹³⁹ The code states (and territories), by date, were Missouri (1849), California (1850), Iowa (1851), Minnesota (1851), Kentucky (1851), Indiana (1852), Ohio (1853), Washington (1854), Nebraska (1855), Wisconsin (1856), Oregon (1854), Kansas (1859), Nevada (1861), Dakota (1862), Idaho (1864), Arizona (1864), Montana (1865), North Carolina (1868), Wyoming (1869), South Carolina (1870), Utah (1870), Colorado (1877), Arkansas (1868), Oklahoma (1890), New Mexico (1897), and Alaska (1900); see MILLAR, *supra* note 1, at 54-55; for citations to the various statutory codes, see HEPBURN, *supra* note 137, at 93-113.

¹⁴⁰ The states were Arkansas, Kentucky, Iowa, and Oregon. See MILLAR, *supra* note 1, at 54-55.

¹⁴¹ See Lobban, *supra* note 37, at 584; LIFE OF FIELD, *supra* note 2, at 53-55.

¹⁴² See note 349 *infra*.

¹⁴³ 1870 N.Y. Laws 109. Because New York never repealed the Revised Statutes that governed procedure, see note 124 *supra*, judges were left to decide how the Code and the Revised Statutes were to be enforced together, leading to confusion. See DAVID DUDLEY FIELD, *THE LATEST EDITION OF THE NEW YORK CODE OF CIVIL PROCEDURE: CORRESPONDENCE BETWEEN CEPHAS BRAINERD AND OTHERS AND DAVID DUDLEY FIELD* 10 (1878) [hereinafter FIELD, LATEST EDITION].

and trial.¹⁴⁴ After public outcry – particularly from Field – the legislature revised the “Throop Code” the following year to remove the distinction between law and equity.¹⁴⁵ This revised Throop Code thus left the substance of the 1848 reforms intact within its 3,300 provisions.¹⁴⁶

Field’s declining reputation in New York likely contributed to the overthrow of the Code associated with his name. During the 1860s, Field became counsel to a number of notorious tycoons and politicians, including Jay Gould, Jim Fisk, and William “Boss” Tweed.¹⁴⁷ Over time, aggravation with Field and his clients transferred to Field’s codes as well. In 1882, the *New York Times* declared one of Field’s substantive codes to be a “Code with a purpose: more help for the elevated railroads.”¹⁴⁸ Thomas Nast, the political cartoonist, targeted Field in many of his Tweed Ring cartoons. In one, Field throws the Hounds of Justice “off the scent” by tying their necks in red tape and scattering large books of procedural law in their path.¹⁴⁹ To several practitioners, Field appeared to exploit weaknesses in his Procedure Code by locking up litigation with injunctions and counter-injunctions issued from multiple district courts.¹⁵⁰

¹⁴⁴ “The first enactment of the new revision of the [Throop] Code in 1876, in effect renewed the distinction abolished by the Code of 1848. By it the plaintiff was required to designate in his complaint whether the relief sought belonged to the one or the other system. The reason given for this was that the one was triable by a jury, the other by the courts.” LOOMIS, *supra* note 29, at 27. The new code further prohibited joinder of legal and equitable claims. THE CODE OF REMEDIAL JUSTICE, SUBMITTED TO THE LEGISLATURE BY THE COMMISSIONERS TO REVISE THE STATUTES, AND PASSED JUNE 2, 1876, WITH FULL EXPLANATORY NOTES BY MONTGOMERY H. THROOP 161-62, § 484 (1876).

¹⁴⁵ See WILLIAM WAIT, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK, ENACTED 1876, AND AMENDED 1877, 151-54, art. 1 (1877).

¹⁴⁶ Scholars sometimes compare the Throop Code unfairly with the 1848 Code – which had only 391 sections – as evidence of prolixity and over-complication. See, e.g., Subrin, *supra* note 6, at 940. One must keep in mind that the 1848 Code was only a partial report. The 1850 Completed Code ran to 1,885 sections, so although the Throop Code was significantly longer than the Field Code, it was not ten times longer as is sometimes reported.

¹⁴⁷ See Van Ee, *supra* note 18, at 89-98 (Fisk and Gould) and 293-95 (Tweed).

¹⁴⁸ N.Y. TIMES, June 20, 1882.

¹⁴⁹ See Thomas Nast, *Off the Scent*, HARPER’S WEEKLY, Aug. 14, 1875, at 656.

¹⁵⁰ See Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. OF LEGAL HIST. 191, 194-95 (1977).

The enactment of the Throop Code occurred during the period of greatest criticism of Field for defending Tweed.¹⁵¹ A count by “[a] friend” of Field’s found that only three sentences of the Field Code had carried over word-for-word into the Throop Code.¹⁵² Nevertheless, many of the changes were purely formal,¹⁵³ and Field speculated that these changes had been made only “so that [the Code] should not appear to be the same thing as before.”¹⁵⁴ Field’s minister brother, whose biography of Field bears no mention of Field’s notorious clients, explained simply that “[a] prophet is not without honor save in his own country.”¹⁵⁵ Thus, whereas some thirty states had adopted the Field Code by 1900, New York was no longer among them.

II. Fusion in the Field Code

The constitution of 1846 specified the procedures for taking witness testimony at trial and preserved the right to jury trial “in all cases in which it has been heretofore used.”¹⁵⁶ The legislature’s instructions to the Commission required the abolition of common law forms of action, but the commissioners were otherwise free to adopt the procedures they considered best suited to provide civil remedies with less expense and delay. In general, the commissioners favored equitable procedure, a trend that New York lawmakers had already begun in previous decades with regard to document discovery and the administration of civil remedies. Pleading

¹⁵¹ A few years before the Throop Commission, Field had caused an uproar in New York by helping Tweed reduce a criminal sentence from twelve years to one; at the time of the Commission, Field was defending Tweed’s civil suits. See Van Ee, *supra* note 18, at 295-301.

¹⁵² *Id.* at 14.

¹⁵³ *Id.* at 14-21.

¹⁵⁴ *Id.* at 21. Ironically, it was the Throop Code that gave the Field Code its popular name. The label first appeared as a term of derision, but it stuck through the debates between the supporters of the “Throop Code” and those of the “Field Code.” See, e.g., Note, 29 ALB. L.J. 141, 142 (1884) (“Mr. Throop spoiled Mr. Field’s Code. Let us be careful to avoid another voluminous and obscuring glossary of this kind.”); *Current Topics*, 1 KAN. L.J. 385, 393 (1885) (“The Field code of my youth has given way to the Throop code of my later life—a tiny pop-gun supplanted by a mighty cannon.”). By the time of the Throop Code, Loomis had retired from public life, and Graham, suffering from illness and exhaustion after the codification effort, had died in 1852, so only Field continued to hold public notoriety as a procedural codifier.

¹⁵⁵ LIFE OF FIELD, *supra* note 2, at 68.

¹⁵⁶ N.Y. CONST. of 1846, art. I, §1.

reform was at the heart of Field's conception of fusion, and Field's views of pleading affected every other major area of fusion.

A. Pleading

1. Pleading in New York Equity Before 1848

To initiate a suit in New York's chancery system, a plaintiff had only to provide a short statement of the relief desired and the circumstances justifying such relief.¹⁵⁷ Because a party could amend an equitable bill or answer rather freely, any misstep in the initial pleadings was not fatal to the case.¹⁵⁸ Moreover, no oath or form of verification was required at the pleading stage. One particular pleading, the bill for discovery (discussed further below), had to state a party's reasons for seeking discovery – a requirement that substantially lengthened the bill.¹⁵⁹

2. Pleading at New York Common Law Before 1848

New York procedural rules at common law required a plaintiff to use one of ten forms of action.¹⁶⁰ In theory, the common law adhered to traditional maxims that "pleadings must not be double" and "pleadings must not be in the alternative."¹⁶¹ In Field's experience, these maxims had little force in practice. Because a discrepancy between the facts proved at trial and the original plea would result in a non-suit, plaintiffs offered – and courts accepted – multiple pleas

¹⁵⁷ It was the chancellor's duty to order a solicitor to pay any costs "occasioned by . . . unnecessary prolixity" in the solicitor's pleadings. 2 REVISED STATUTES, *supra* note 35, 175, § 47. *See also* 1 JOSEPH W. MOULTON, THE CHANCERY PRACTICE OF THE STATE OF NEW YORK 174 (1829) ("[T]here can be no allowance . . . for repetition of statements . . . or any unnecessary or improper matter.")

¹⁵⁸ A plaintiff was free to amend the bill at any time before answer; after answer, a material change to the pleadings required a supplemental bill rather than an amendment. *See* 1 MOULTON, *supra* note 157, at 235-36.

¹⁵⁹ *See id.*; *see also* FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 9 ("The bill is itself made much longer than it would be if it were intended merely as a statement of the plaintiff's case."). In all other equity pleadings besides bills for discovery, the parties could waive the oath requirement. *See* 2 REVISED STATUTES, *supra* note 35, 175, § 44.

¹⁶⁰ *See* GRAHAM, PRACTICE, *supra* note 24, at 395-96; FIRST REPORT, *supra* note 109, at 139.

¹⁶¹ *See* HENRY JOHN STEPHEN, TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS ch. 2, § 1 (1824); *cf.* 1 ALEXANDER M. BURRILL, TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK 196 (1846); FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 15-16.

arising from the same incident or transaction.¹⁶² By Field's day, a plaintiff or defendant could supplement a specifically pleaded action or defense with a general plea, in which the plaintiff vaguely alleged wrongdoing on the part of a defendant, or the defendant generally denied any wrongdoing whatever.¹⁶³ Even the most specific claim in the pleadings could be fictional, however. For example, using trover, a plaintiff claimed to have possessed goods, lost them, and then discovered that the defendant found the goods and converted them. "[T]he conversion is the gist of the action, the remainder being a mere fiction," explained Graham's treatise.¹⁶⁴

New York pleading thus gave court and parties notice of litigation, but the precise nature of a claim was usually obscured. One judge admitted that he no longer read the pleadings at trial, "simply because it was so frequently useless to look there for a statement of the issue or of the facts on which it was sought to ground either the action or the defence to it."¹⁶⁵ Because parties could not be certain what proofs would emerge at trial, the impulse according to Loomis was to plead a "multiplicity of words to meet every possible contingency of testimony."¹⁶⁶ After proofs were developed at trial, the judge would then non-suit pleas the facts did not support.¹⁶⁷

3. Field Code Pleading

The Field Code adopted equitable pleading with some modification. Like typical equity procedure, the Code required of the plaintiff only a short statement of the facts constituting the

¹⁶² In the 1820s, legislation explicitly permitted defendants to enter multiple pleas. See 2 REVISED STATUTES, *supra* note 35, 352, § 9.

¹⁶³ See FIELD, RE-ORGANIZATION, *supra* note 91, at 14-24.

¹⁶⁴ GRAHAM, *supra* note 21, at 172.

¹⁶⁵ EDMONDS, *supra* note 47, at 14.

¹⁶⁶ LOOMIS, *supra* note 29, at 6. The rule disqualifying parties from testifying caused litigation frequently to turn on a party's ability to produce disinterested witnesses. Because of the vagueness of common law pleading, a party frequently had to secure "the attendance of many witnesses," unsure of who's testimony would actually be necessary at trial. *Report in Part of the Committee on the Judiciary in Relation to the Administration of Justice*, *supra* note 67, at 6.

¹⁶⁷ See FIELD, RE-ORGANIZATION, *supra* note 69, at 14-24.

cause of action and a request for relief, “in such a manner as to enable a person of common understanding to know what is intended.”¹⁶⁸ Common law forms of action were explicitly abolished.¹⁶⁹ Like an equitable bill for discovery, all pleadings had to be verified under oath.¹⁷⁰ The Code further expanded upon equity’s practice by allowing material amendments to the pleadings, noting there was “little danger of the courts going too far, in allowing amendments.”¹⁷¹

The commissioners’ expressed purpose for pleading was to prevent surprise at trial.¹⁷² Because the constitution of 1846 mandated that proof had to be taken orally in court,¹⁷³ it was essential for the new procedural system to allow parties to prepare adequately before trial. New York’s former system of common law pleading was, in its way, intended to prevent surprise,¹⁷⁴ but Field thought that this goal could be reached more easily and with less guesswork if the forms of action were abolished and “the story . . . told in the ordinary language of life, in the only language intelligible to the juries who are to decide the causes.”¹⁷⁵ By requiring all pleadings to be verified by oath, fictions would be eliminated, and pleadings would have “at

¹⁶⁸ 1848 Code, *supra* note 113, at 521, § 120; *accord* 1849 Amended Code, *supra* note 118, at 645, § 142; 1850 Completed Code, *supra* note 121, at 263, § 639. The Code placed a similar requirement on the defendant. *See, e.g.*, 1848 Code, *supra* note 113, at 522, § 128.

¹⁶⁹ 1848 Code, *supra* note 113, at 521, § 118; *accord* 1849 Amended Code, *supra* note 118, at 645, § 140; 1850 Completed Code, *supra* note 121, at 262, § 636.

¹⁷⁰ 1848 Code, *supra* note 113, at 523, § 133; *accord* 1849 Amended Code, *supra* note 118, at 648, § 157; 1850 Completed Code, *supra* note 121, at 461, § 1092.

¹⁷¹ SECOND REPORT, *supra* note 114, at 30. *See also id.* at 44 (“It was supposed, that the power of amendment, given by the code, was so ample, that no doubt could be entertained about this case.”). Although the 1848 Code followed equity practice in requiring that an amendment “shall not change substantially the cause of action or defence,” 1848 Code, *supra* note 113, at 526, § 149; 1 MOULTON, *supra* note 157, at 289, the 1849 Code dropped this language after the commissioners found that judges were interpreting the provision narrowly. 1849 Code, *supra* note 113, at 650, § 173; SECOND REPORT, *supra* note 114, at 29-30. The official comments to the 1849 amendments made clear that “the intention of the commissioners [was] to allow and encourage amendments of every kind.” SECOND REPORT, *supra* note 114, at 30. *Contra* Subrin, *supra* note 5, at 331 (“Although the court might allow amendments ‘in furtherance of justice,’ this could only be done ‘whenever the amendment shall not change substantially the cause of action or defense’ – a limitation that does not appear in the Federal Rules.” (citations omitted)).

¹⁷² SECOND REPORT, *supra* note 114, at 11 (describing that pleading had “been accordingly reduced to a few plain and explicit rules, carefully guarded to prevent surprise”).

¹⁷³ N.Y. CONST. of 1846, art. VI, § 10; *see* notes 79-84 *supra* and accompanying text.

¹⁷⁴ Although precision was obscured, the forms of action set the boundaries of a dispute and allowed lawyers to prepare for several possible contingencies. *See* notes 162-166 *supra* and accompanying text.

¹⁷⁵ FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 17.

least the same regard to truth, that prevails between members of society, in their daily communications with one another.”¹⁷⁶ These more businesslike pleading standards would inform parties for trial, and “enable them to dispense with unnecessary proofs, and to be prepared with those which are necessary.”¹⁷⁷

Field intended to grant judges more managerial power at the inception of a case. Field thought that the ideal method of pleading was the oral pleading that had been conducted during the time of the English yearbooks (c. 1292-1535). What made that system successful was the judge’s early involvement in framing the case. “When the presence of the judge was withdrawn, [pleading] lost an essential part of its original character. The substitute for that now is the trial,” Field observed.¹⁷⁸ Field intended a judge under the Code to force parties to be candid about their controversy from the outset: The 1849 Amended Code allowed a court to require amended pleadings that removed “irrelevant and redundant matter” and made claims “definite and certain.”¹⁷⁹ In a manual written in 1856, Field admonished judges to be more active in amending prolix and evasive pleadings.¹⁸⁰ Clear and definite pleadings would then aid a judge in decisions about proof-taking and jury instruction.¹⁸¹

4. Pleading Practice Under the Code

The commissioners’ project to reform New York pleading was largely successful in practice. Between 1852 and 1860, treatise writers – including Field’s law partner Thomas G.

¹⁷⁶ FIRST REPORT, *supra* note 109, at 153.

¹⁷⁷ FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 22.

¹⁷⁸ *Id.* at 24.

¹⁷⁹ 1849 Amended Code, *supra* note 113, at 648, § 160.

¹⁸⁰ [DAVID DUDLEY FIELD], A SHORT MANUAL ON PLEADING UNDER THE CODE 30 (1856) [hereinafter FIELD, PLEADING MANUAL].

¹⁸¹ FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 25.

Shearman – produced several “books of forms” supplying model pleadings for practitioners.¹⁸² The books presented brief complaints and answers and made no reference to common law forms of action.¹⁸³ Before the Code, basic litigation such as an action to recover a debt could take up several pages of a form book.¹⁸⁴ After 1850, a similar model complaint required only two or three paragraphs.¹⁸⁵

Some practitioners and judges resisted the Code’s oath requirement for all pleadings. One treatise writer argued that, despite the language and intention of the drafters, it was not necessary for parties to verify their pleadings on oath.¹⁸⁶ John Townshend, compiler of case reports arising from the Code, asserted that requiring an oath for pleadings was unconstitutional, and in subsequent cases judges struggled to enforce both the Code’s requirement and the constitution’s prohibition of self-incriminating statements.¹⁸⁷ The commissioners responded in 1849, stating that the oath requirement was “of indispensable necessity in the system adopted by the code” because it helped to reveal “the real question of fact in controversy.”¹⁸⁸ Nevertheless, the legislature in 1849 essentially made the oath verification optional.¹⁸⁹

¹⁸² See, e.g., COMMISSIONERS OF THE CODE, BOOK OF FORMS, ADAPTED TO THE CODE OF PROCEDURE (1860); HENRY STRONG MCCALL, PRECEDENTS OR PRACTICAL FORMS IN ACTIONS AT LAW IN THE SUPREME COURT OF THE STATE OF N. YORK ADAPTED TO THE CODE AND RULES OF 1852 (1852); WHITTAKER, *supra* note 11.

¹⁸³ See Appendix.

¹⁸⁴ See, e.g., 2 BURRILL, *supra* note 161, at 268-272 ((reproduced in the Appendix).

¹⁸⁵ See, e.g., COMMISSIONERS OF THE CODE, *supra* note 182, at 25-26 (reproduced in the Appendix).

¹⁸⁶ JOHN TOWNSHEND, THE NEW PRACTICE IN CIVIL ACTIONS IN THE COURTS OF JUDICATURE IN THE STATE OF NEW YORK AS ESTABLISHED BY THE NEW CODE OF PROCEDURE 28 (1848).

¹⁸⁷ See 1 CODE REP. 2 (1848); N.Y. CONST. of 1846, art. VI, § 6 (no one compelled to be a witness against himself). On the troubled case law regarding the oath requirement and the threat of criminal prosecution, see GEORGE VAN SANTVOORD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS UNDER THE NEW YORK CODE OF PROCEDURE 584-89 (2d. ed., 1855).

¹⁸⁸ See SECOND REPORT, *supra* note 114, at 12.

¹⁸⁹ See 1849 Amended Code, *supra* note 118, at 648, § 157. The language adopted for § 157 was not the language suggested by the commissioners, who on the contrary, made the oath requirement all the more explicit and forbade the use of civil pleadings “in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.” SECOND REPORT, *supra* note 114, at 28.

B. Multi-Issue and Multi-Party Joinder

1. Joinder in New York Equity Before 1848

New York equity encouraged joinder. “It [was] a general object of equity,” commented one treatise, “to prevent a multiplicity of suits, by determining in one the rights of all persons legally and beneficially interested in the subject.”¹⁹⁰ A chancery court could bring in as a party anyone who had a material interest in a suit and would be affected by the outcome, and in most cases, such joinder was mandatory.¹⁹¹ If the number of people having an interest in a case was excessively large, the chancellor could allow a class action.¹⁹²

Regarding joinder of issues, the chancellor could in one trial hear all actions in “a connected series of acts of the same nature, tending to the same injury, and in which all the defendants were more or less concerned.”¹⁹³ New York chancellors applied this standard broadly to resolve all controversies between the same parties in a single suit.¹⁹⁴

2. Joinder at New York Common Law Before 1848

New York common law mandated joinder of parties in certain cases. A plaintiff was required to name all interested parties to a contract in a suit arising from the contract.¹⁹⁵ In certain tort claims, a plaintiff had to name those jointly interested in injuries to property, but plaintiffs suffering similar personal injuries arising from the same incident could not be joined.

¹⁹⁰ 1 MOULTON, *supra* note 157, at 98.

¹⁹¹ *See id.*

¹⁹² *See id.* at 100.

¹⁹³ *Id.* at 98.

¹⁹⁴ *Id.*

¹⁹⁵ *See* GRAHAM, PRACTICE, *supra* note 24, at 457-58.

The plaintiff had the option to join multiple defendants in a tort action.¹⁹⁶ Any deviation from these rules allowed a defendant to plead misjoinder or nonjoinder and so dismiss the suit.¹⁹⁷

Causes of action “of the same nature” could be joined in common law suits arising out of the same transaction between the same parties.¹⁹⁸ Typically this rule meant that forms of action arising in contract could be joined to other contract claims, but forms of contract could not be joined to forms of tort, for instance.¹⁹⁹

3. Field Code Joinder

The Commission intended “to allow . . . great latitude in respect to the number of parties who may be brought in” to a suit.²⁰⁰ It therefore adopted “the rules which prevailed in equity . . . with scarcely any modification.”²⁰¹ Specifically, the Code provided that “[a]ll persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs,” and that “[a]ny person may be made a party defendant, who has an interest in the controversy, adverse to the plaintiff.”²⁰²

A key objective of the Code’s rules relating to parties was to eliminate the widespread use of fiction in common law pleading. The Code required that only “real parties in interest” be the named parties in a suit, thus preventing fictional assignments often used at common law.²⁰³ Further, with an attitude that seems out of place in modern practice, the commissioners

¹⁹⁶ *See id.* at 459-61 (“the rule is, that wherever, from the nature of the injury, two or more are jointly prejudiced, they must be joined: but two persons cannot join in an action for false imprisonment, assault and battery, or slander, except for slander of title”).

¹⁹⁷ *See* 1 BURRILL, *supra* note 161, at 64-69.

¹⁹⁸ *See* GRAHAM, PRACTICE, *supra* note 24, at 463-64.

¹⁹⁹ Graham remarked that the most common joinders were debt with assumpsit, and trover with case. Non-joinable categories included trespass with trover, or assumpsit with case. *See id.*

²⁰⁰ FIRST REPORT, *supra* note 109, at 123.

²⁰¹ 1 WHITTAKER, *supra* note 11, at 58.

²⁰² 1848 Code, *supra* note 113, at 516, §§ 97-98; *accord* 1849 Amended Code, *supra* note 118, at 639, §§ 117-18; 1850 Completed Code, *supra* note 121, at 248, §§ 608-09.

²⁰³ 1848 Code, *supra* note 113, at 515, § 91; *accord* 1849 Amended Code, *supra* note 118, at 638, § 111; 1850 Completed Code, *supra* note 121, at 247, § 597.

disapproved of arguing in the alternative, viewing the practice as an avenue through which fictions might return to pleading. “[A]s there can be but one true statement of one transaction, and as the Code requires the pleadings to be true” – and verified by oath – “it should seem to follow, that different ways of stating the same claim are no longer permissible,” explained Field in a manual on pleading.²⁰⁴

Through joinder rules, the commissioners sought to maintain a balance of allowing broad joinder while restricting pleading in the alternative. The Code enumerated seven categories of actions and explained, somewhat confusingly, that “the plaintiff may unite several causes of action in the same complaint” provided that “the causes of action so united must all belong to one only of the [enumerated] classes.”²⁰⁵ A plaintiff thus could not allege both a breach of contract and a breach of trust arising from the same transaction with the same party and join the two claims – effectively arguing in the alternative.²⁰⁶ The commissioners did intend that a plaintiff could claim a breach of contract against one party and join it to a claim against the party’s trustee, for example.²⁰⁷

4. Joinder Practice Under the Code

Some judges used the complicated joinder provision to restrict joinder of issue. In a contract-trust suit in which Field appeared as counsel, one Judge Barculo, a former vice chancellor well-acquainted with equity procedure, forbade the joinder of actions on the ground that the Code was “merely an embodiment of the rules of pleading as they existed” at common

²⁰⁴ FIELD, PLEADING MANUAL, *supra* note 180, at 13.

²⁰⁵ 1848 Code, *supra* note 113, at 525, § 143. The seven classes were contract, injuries by force, injuries without force to person or property, injuries to character, claims to recover real property, claims to recover personal property, and claims against a trustee. *Id.*

²⁰⁶ See [DAVID DUDLEY FIELD,] ADMINISTRATION OF THE CODE 21-24 (1852) [hereinafter FIELD, ADMINISTRATION].

²⁰⁷ See *id.*

law.²⁰⁸ Shortly after, Field publicly condemned the decision and responded that “the plaintiff should be left free to unite, in the same action, all his controversies with the same parties, if he be so inclined.”²⁰⁹ In 1852 the New York legislature amended the joinder section of the Code to reflect the commissioners’ intentions. The Code as clarified provided that plaintiffs could join “several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both.”²¹⁰

C. Pretrial Discovery

1. Discovery in New York Equity Before 1848

Both common law and equity prohibited testimony from a party or witness interested in the outcome of the case.²¹¹ The answer to an equitable bill for discovery, however, was supplied by a party (in writing) and verified by oath, and the opposing party could then use the sworn statement in an equity suit or admit it into evidence at common law.²¹² In contrast to modern practice, nineteenth-century discovery had a narrow purpose: to compel a defendant’s admission to a material element of a case when other evidence was unobtainable.²¹³ Equity courts intended discovery “to enable the applicant to prove his case: not to get information as to whether he had a case, much less to explore his adversary’s case.”²¹⁴ It was the task of the

²⁰⁸ *Id.* at 24-29 (quoting *Alger v. Scoville*, 4 CODE REP. 303-08 (1851)).

²⁰⁹ FIELD, ADMINISTRATION, *supra* note 206, at 24.

²¹⁰ 1852 N.Y. Laws 655, § 167.

²¹¹ See George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 657 (1997) (noting that civil parties and interested persons “remained ineligible to testify in every jurisdiction” of the Anglo-American legal world through the mid-nineteenth century).

²¹² See 1 MOULTON, *supra* note 157, at 181.

²¹³ See 1 AUSTIN ABBOTT, NEW CASES SELECTED CHIEFLY FROM THE DECISIONS OF THE COURTS OF THE STATE OF NEW YORK 333 (1877); see also CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF EQUITY PLEADING 196 (1877).

²¹⁴ *Id.*

pleadings to prove that a requested discovery was material and necessary and not “a mere fishing bill.”²¹⁵

In answering a bill for discovery, a party spoke only through the written pleadings. One party requested specific information in the bill,²¹⁶ and the other party had to provide the information under oath, or else dispute the bill as immaterial to the case.²¹⁷ If the requesting party believed the answer was insufficient, or if objections arose over materiality, a master would determine how much information had to be provided.²¹⁸ Only after a party’s third failure to comply with the master’s instructions would an examiner be allowed to conduct a deposition to complete the discovery.²¹⁹

A chancery official could compel a party to deliver “books, deeds, letters, accounts, and other papers relating to the matters at issue” to the court for the other party’s pretrial inspection.²²⁰ At times a plaintiff requested document discovery after asking the defendant in the original bill for discovery about the existence of any relevant documents. Relevance depended on a party having an “interest” in the document, for instance if the party were named in a deed or receipt of payment, or if he sought the accounting books for a business in which he was a partner.²²¹ For documents held by a non-party witness, either party could request a subpoena *duces tecum* ordering a witness to produce the documents for examination by a master

²¹⁵ 1 MOULTON, *supra* note 157, at 182-83. Joseph Story provided a classic definition of fishing bill as the effort of a plaintiff to “file a bill, and insist upon knowledge of facts wholly impertinent to his case, and thus compel disclosures in which he had no interest, to gratify his malice or his curiosity or his spirit of oppression.” 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 822 (1836).

²¹⁶ *See id.* at 182-83.

²¹⁷ *See id.* at 283; *see generally* LANGDELL, *supra* note 213, at 99-100.

²¹⁸ *See* 1 MOULTON, *supra* note 157, at 292-94.

²¹⁹ *See id.* at 297. Depositions were conducted in the same manner as equitable examinations of witnesses, *see* notes 252-258 *infra* and accompanying text.

²²⁰ 2 BARBOUR, *supra* note XX, at 431.

²²¹ *See* 1 BARBOUR, *supra* note XX, at 229-32.

or chancellor, but neither the documents nor any non-party witness was made available for pretrial examination by parties.²²²

2. Discovery at New York Common Law Before 1848

With regard to discovery of documents, New York had achieved fusion before the Field Code. Under the Revised Statutes of 1828, common law judges had discretion to compel pretrial discovery of documents between parties, guided by “the principles and practice of the court of chancery in compelling discovery.”²²³ A defendant could request discovery even before filing the reply in order to furnish admissions for his pleading; after joinder of issue, either party could seek discovery of documents from the other party in order to prepare for trial.²²⁴

For witness testimony, a court could permit the deposition of a disinterested witness likely to be absent at the time of trial (a conditional deposition, or deposition *de bene esse*), either because of travel or illness.²²⁵ This procedure, like the inspection of documents, appears to have originated in and migrated over from the court of chancery – another example of fusion in the later 1820s.²²⁶ The deposition was supposed to be taken orally under oath and administered by a judge, who would record the testimony in the presence of parties and counsel.²²⁷ In actual practice, the examining party’s counsel was usually the one that conducted and recorded the deposition, sometimes outside the presence of the judge; objections from an adverse party were reserved for the judge to resolve at trial.²²⁸

²²² See *id.* at 279-80.

²²³ See 2 REVISED STATUTES, *supra* note 35, 199-200, §§ 21-27.

²²⁴ See RULES OF PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK AT LAW AND EQUITY 12, Rules 27-28 (1847).

²²⁵ See 2 REVISED STATUTES, *supra* note 35, at 392, § 5.

²²⁶ See 1 MOULTON, *supra* note 157, at 94; see also 2 REVISED STATUTES, *supra* note 35, at 398-99, §§ 35-41.

²²⁷ See 2 REVISED STATUTES, *supra* note 35, at 392, § 5.

²²⁸ A party could take a deposition in a judge’s chambers or at any other location agreeable to both parties. See 1 WHITTAKER, *supra* note 11, at 632. Although Whittaker concentrates on practice under the Code, he states that the particulars of conditional depositions differed little from prior practice. See *id.*

Despite the 1820s fusion of these few aspects of pretrial procedure, common law litigants did not gain the ability to question parties and offer their statements into evidence. For this purpose, a separate suit initiated in chancery was still required.

3. Field Code Discovery

Because courts of law and courts of equity already had comparable powers of document discovery, the commission made only minor changes.²²⁹ The 1848 Code likewise perpetuated the process of subpoena *duces tecum*, as did the 1850 Completed Code, which dropped the term²³⁰ (as part of a general pruning of Latin phrases, which included even the revered *habeas corpus*²³¹). A significant change came from judges, who extended document discovery to cases in which a plaintiff needed a document for the initial complaint, a limited form of pre-action discovery.²³²

A form of pre-Code fusion had already occurred for pretrial discovery of party statements as well, because the 1846 constitution had mandated that “testimony in equity cases shall be taken in like manner as in cases at law,” that is, through oral, party-conducted examination.²³³ Extending the constitutional principle from trial to pretrial, the commissioners

²²⁹ *Contra* Subrin, *supra* note 5, at 333 (“unlike the comparable Federal Rules, the opposing side did not have to produce [the document], the only penalty being that the court could, if it wanted, on motion, ‘exclude the paper from being given in evidence.’”) (citations omitted)). The 1848 Code includes the words “or punish the party refusing, or both.” 1848 Code, *supra* note 113, at 558, § 342. Exclusion of favorable evidence was only one sanction available for the court to punish an uncooperative party, not the sole sanction.

²³⁰ See 1850 Completed Code, *supra* note 121, at 779, § 1853.

²³¹ Over Graham’s dissent, see 2 DOCUMENTS OF THE ASSEMBLY OF NEW YORK, 73rd Sess., No. 17, at 53 (1850), Field and Loomis changed the term *habeas corpus* to “deliverance from jail.” See 1850 Completed Code, *supra* note 121, at 533, § 1266 and accompanying notes. The changes were based upon the legislative instructions to the commission, which, in addition to the provisions drafted by Field, see notes 96-98 *supra* and accompanying text, also called for “the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable.” 1847 N.Y. Laws 68. “They tell me it was proposed to call the old process of ‘*ne exeat*’ a writ of ‘no go,’” joked the novelist, James Fenimore Cooper. JAMES FENIMORE COOPER, THE WAYS OF THE HOUR: A TALE 183 (1850).

²³² See RULES OF PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, 15-16, Rule 8 (1849). The conventional standard of relevance on party “interest” applied, and pre-action discovery was not granted “without strong affidavits, showing its necessity to enable the plaintiff to obtain redress.” WHITTAKER, *supra* note 11, at 613.

²³³ N.Y. CONST. of 1846, art. VI, § 10.

retained the conditional deposition as it had been conducted at common law, with lawyers in control of *viva voce* questioning. As before, courts could permit the pretrial deposition only of a witness unable to attend trial.²³⁴

The 1848 Code declared that “[n]o action to obtain discovery under oath in aid of [either party] shall be allowed,” except in one circumstance.²³⁵ To make up for the loss of equity’s bill of discovery, the 1848 Code partially lifted the disqualification of party testimony and allowed a party to be examined at trial only by opposing counsel.²³⁶ The examining party could make its examination in a pretrial deposition instead of calling the party to the stand, but as at common law, the examination was conducted by lawyers instead of a court-appointed examiner.²³⁷

Compared to the later Federal Rules, the Code’s provisions for discovery appear restrictive²³⁸ — parties had to have a material interest in documents for pretrial inspection, and a deposition was to be taken only in the case of a witness or party not called to the stand at trial. Discovery was not to inform a party of his adversary’s case or to impeach a witness who gave testimony on separate occasions.²³⁹ The commissioners argued that a single examination in open court was sufficient to do justice between the parties.²⁴⁰ With efficient trial as the goal, depositions were unnecessary, or worse. The official comment to the Code explained that “if the examination be once had, we would not permit it to be repeated, else it might become the means of annoyance.”²⁴¹ To the commissioners, anything more than one examination of a witness was excessive.

²³⁴ *Id.* at 560, § 355.

²³⁵ 1848 Code, *supra* note 113, at 559, § 343.

²³⁶ *Id.* at 560, § 344; *see also* notes 345-353 *infra* and accompanying text.

²³⁷ *Id.* at 559, §§ 344-45; WHITTAKER, *supra* note 11, at 631-32.

²³⁸ *See, e.g.,* Subrin, *supra* note 5, at 332.

²³⁹ *See* 1848 Code, *supra* note 113, at 560, § 354 (materiality requirement) & 559, § 345 (pretrial examination in lieu of examination at trial).

²⁴⁰ *See* FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 11; FIRST REPORT *supra* note 109, at 244, notes to § 350.

²⁴¹ FIRST REPORT *supra* note 109, at 245, notes to § 350.

Field held discovery in low regard because of his belief that pleading could adequately inform adversaries of each other's case and supply necessary admissions of fact. Although Field believed that equitable discovery had been valuable for this purpose,²⁴² he maintained that the fact-laden, oath-verified pleadings required by the Code obviated the need for additional pretrial labor. So long as the judge saw to it that the pleadings were properly conducted, the pleadings would "bring before the court, and to the knowledge of one's adversary, the precise questions in dispute, and . . . insure truthful allegations by the sanction of an oath."²⁴³

Field and the other commissioners saw in both pleading and discovery the value only of admission—that is, informing the court and the adverse party of what one already knows. They appeared to have little appreciation of the modern value of discovery for investigation—informing oneself of what one does not know.²⁴⁴ In this regard, the design of the Field Code was the reverse of the Federal Rules, in which, as Charles Clark explained, extensive pretrial discovery paired with generalized pleading did "away with 'surprise' as a tactical advantage in litigation."²⁴⁵ Field's choice for pleading over discovery and apparent blindness towards the value of investigation can be partially explained by the fact that most litigation in the mid-nineteenth century concerned breach of contract; such cases lent themselves to short, straightforward factual recitations in pleading, and document discovery was adequate for pretrial preparation.²⁴⁶ Field's thinking of discovery was shared by Lord Brougham's Law Amendment Society, which noted in a contemporaneous report that "the real circumstances are

²⁴² See FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 9-10; FIRST REPORT *supra* note 109, at 244-46, notes to § 350.

²⁴³ FIELD, ADMINISTRATION, *supra* note 206, at 17; see FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 11; see also notes 172-179 *supra* and accompanying text.

²⁴⁴ In a note attached to the 1850 Completed Code, the commissioners discussed and reproduced other reports on the interaction of discovery and party testimony. Throughout the note, both the commissioners and their correspondents assume that both parties have a relatively clear idea of the underlying facts and use discovery only to secure confession from their adversaries, not to inform themselves. See 1850 Completed Code, *supra* note 121, at 715-25.

²⁴⁵ Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959).

²⁴⁶ One study of state supreme court business has found that over half of all cases in the 1870s dealt with contract, debt, or real property, compared to only ten percent of cases in tort, and ten percent in criminal law. See Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 133-35 (1977).

usually best known, and are often only known, to the litigating parties themselves” – an assumption that accords best with contract litigation.²⁴⁷ Further, as I argue in Part III, the commissioners may have overlooked the value of discovery for pretrial investigation because they were focused on using discovery procedure to bring about a controversial reform to abolish the disqualification of party testimony at trial.

4. Discovery Practice Under the Code

Actual practice departed from what the commissioners envisioned. Judges interpreted the Code narrowly to forbid only the use of a deposition for impeachment of a party at trial.²⁴⁸ Under this interpretation, lawyers began to conduct pretrial depositions of adverse parties for investigative purposes, and then call parties to the stand at trial, where the previous examination became a “nullity, and, even if [the examined party were] called to testify on one point only, the whole ground [had to] be gone over again.”²⁴⁹ Moreover, several judges saw in the Code’s provisions an analogue to the equitable bill for discovery, and they allowed depositions of parties before the pleadings closed to inform the complaint and answer.²⁵⁰ Thus, although the commissioners intended the Code provisions to foreclose duplicative examination in favor of in-court testimony, lawyers engaged in duplicate examinations to better investigate their cases. The Federal Rules would later expand lawyers’ powers of pretrial investigation—

²⁴⁷ 1850 Completed Code, *supra* note 121, at 719.

²⁴⁸ See 1 WHITTAKER, *supra* note 11, at 434 (“At the actual trial, however, the adverse party may, it would seem, be called as a witness, in all cases; though, if so called, his previous examination cannot then be used.”). The same treatment did not develop towards non-party witnesses, because of proof of impending absence was required to initiate a deposition. See *id.* at 586.

²⁴⁹ *Id.* at 586. A literal reading of the Code overlooks this development in practice. See, e.g., Subrin, *supra* note 5, at 333 (“Unlike the broad array of oral depositions authorized by the Federal Rules, the only oral deposition permitted by the Field Code was of the opposing party. In contrast to the Federal Rules, the Code deposition was in lieu of calling the adverse party at trial. . . .”); Kessler, *supra* note 39, at 1235, n.291.

²⁵⁰ See WHITTAKER, *supra* note 11, at 627-30, and cases cited therein.

by, among other developments, instituting a broad standard of relevance²⁵¹ – but early practice under the Field Code nevertheless resembled modern American pretrial practice.

D. Trial

1. Trial in New York Equity Before 1848

Once chancery pleadings were complete, a case would proceed to a hearing before either a vice chancellor or a master, who could refer specific tasks of fact-finding to an examiner.²⁵² A master or examiner could subpoena documents and direct the parties to develop the written record in the case.²⁵³ The traditional mode of examining witnesses involved an equity official administering written interrogatories in secret.²⁵⁴ Chancellor Kent, however, in 1817 established the precedent that examinations could be conducted orally in the presence of parties.²⁵⁵ Although a chancery examiner remained in control of the questioning, the solicitor requesting examination usually recorded and certified the testimony, subject to objections and review by a master.²⁵⁶ Examination of witnesses proceeded over the course of as many hearings as necessary;²⁵⁷ indeed, a common complaint against the chancery system was that the absence of a jury allowed equity courts to administer a less disciplined schedule, inviting delay.²⁵⁸ At the conclusion of examinations, an equity judge decided all issues of fact and law; by the 1840s,

²⁵¹ See FED. R. CIV. P. 26(b)(1).

²⁵² See 2 MOULTON, *supra* note 157, at 164-65.

²⁵³ See 1 MOULTON, *supra* note 157, at 43.

²⁵⁴ *Id.* at 320.

²⁵⁵ See Kessler, *supra* note 39, at 1225-26; see also 1 MOULTON, *supra* note 157, at 320.

²⁵⁶ See 1 MOULTON, *supra* note 157, at 322-23.

²⁵⁷ See *id.* at 322.

²⁵⁸ See, e.g., Field, Letter to O'Sullivan, *supra* note 34, at 25-26 (demonstrating that a master's discretion to hold as many proof-taking conferences as he liked could drag out a basic case for more than five years); STANTON, *supra* note 31, at 50 (ridiculing the examination schedule conducted by Chancellor Walworth, New York's last chancellor before the Field Code).

masters and examiners formed a de facto corps of trial judges, whereas the chancellor and vice chancellors acted mostly as appellate judges.²⁵⁹

2. Trial at New York Common Law Before 1848

After the pleadings closed, common law trial proceeded in the form that remains familiar today. Beginning with the plaintiff, each party presented the proofs for his or her case, most often through witnesses testifying under oath and subject to cross-examination.²⁶⁰ At the close of the case, each party's lawyer presented a summary of the evidence and a closing argument for his client.²⁶¹

Only the jury was responsible for findings of fact. The judge could charge the jury on "the legal results of the evidence," according to Graham's treatise, but "he [was] not authorized to give them any positive direction" on questions of fact.²⁶² A jury could return either a special verdict stating the facts found, or if instructed on the law by the judge, it could return a general verdict on the whole case.²⁶³ A single judge presided over the jury trial,²⁶⁴ whereas a panel of three judges would hear arguments and rule on disputed issues of law.²⁶⁵ Parties could motion a trial court for a new trial, and such motions were granted in cases of jury misconduct, misdirection of the judge, discovery of new evidence, and jury findings against evidence or against law.²⁶⁶

²⁵⁹ See FIELD, RE-ORGANIZATION, *supra* note 69, at 4-5.

²⁶⁰ See GRAHAM, PRACTICE, *supra* note 24, at 731-37.

²⁶¹ See *id.* at 742.

²⁶² *Id.*

²⁶³ See *id.* at 772.

²⁶⁴ See FIRST REPORT *supra* note 109, at 185-86, notes to § 210. With the number of masters and examiners factored in, the workforce available in both common law and equity appears roughly equal, as each system had about 350 adjudicators at its disposal. See *Civil Officers*, N.Y. EVENING POST, July 13, 1846, at 2.

²⁶⁵ See DAVID GRAHAM, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, 324-29 (2d. ed., 1836).

²⁶⁶ 1 BURRILL, *supra* note 161, at 468.

3. Field Code Trial

The commissioners were bound by the 1846 constitutional provision that declared: “The testimony in equity cases shall be taken in like manner as in cases at law.”²⁶⁷ Even apart from this mandate, the commissioners explained, “[W]e should still prefer . . . oral examination. A written deposition taken in private, is not the best means of eliciting the truth. . . .”²⁶⁸ Elsewhere, Field explained why the final product of equity’s interrogatories was rarely as satisfactory as the product of cross-examined testimony: “He must be a dull person indeed,” observed Field, “who, when he has written questions to answer [in equity proceedings] and ample time for it, cannot contrive to conceal as much as he discloses.”²⁶⁹ Moreover, delay occasioned by the use of written interrogatories over the course of multiple hearings provoked complaints throughout the profession.²⁷⁰ Field estimated that examination by interrogatory could last over three years if the parties took full advantage of equity’s scheduling provisions and appeals to the chancellor.²⁷¹ By adopting common law examination, the commissioners expected the civil justice system to run more efficiently.²⁷²

As regards adjudication, the Code in all its iterations from 1848 to 1850 contained two provisions for making determinations of fact. In any case in which the remedy envisioned was

²⁶⁷ N.Y. CONST. of 1846, art. VI, § 10. Neither the 1848 Code nor the 1849 Amended Code included specific provisions for in-court examination; instead the constitutional provision and any related acts by the legislature were left to guide practitioners. The 1850 Completed Code, as part of the project to codify the law of evidence, included detailed provisions for examination at trial. See 1850 Completed Code, *supra* note 121, at 773-77, art. 6.

²⁶⁸ FIRST REPORT *supra* note 109, at 244, notes to § 350.

²⁶⁹ See FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 10.

²⁷⁰ See *id.* at 9 (“None need be told what delay [equity’s discovery process] occasions, nor what expense the suitor is put to, in consequence.”); LOOMIS, *supra* note 29, at 10 (“[T]he delays of justice, more especially in the court of chancery, were a subject of universal complaint.”); STANTON, *supra* note 31, at 50 (remarking that in one complex case “years rolled away till the constantly accumulating testimony reached thousands of folios”).

²⁷¹ See FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 10.

²⁷² See *id.*; see also FIRST REPORT *supra* note 109, at 178 (noting the “rapid examination which takes place on common-law trials before the juries”).

money damages or the recovery of real property, the default mode of trial was to a jury.²⁷³ Bench trial pertained in other cases by default,²⁷⁴ but in all cases the parties were free to choose the mode of trial if they could agree.²⁷⁵ The commissioners' commentary explained their intent to expand the right to a jury over more types of cases,²⁷⁶ but in another section, the commissioners surmised that bench trial would become much more popular, and the report welcomed this development.²⁷⁷ Field is thought to have drafted the sections both in the Code and in the accompanying report that called for expanding the right to a jury.²⁷⁸

Several scholars have interpreted the Code as being pro-jury, one consequence, they argue, of Field's affinity for Jacksonian Democracy.²⁷⁹ Lawrence Friedman has written of the

²⁷³ 1848 Code, *supra* note 113, at 536, § 208 (“[I]n an action for the recovery of money only, or of specific real or personal property, . . . an issue of fact . . . must be tried by a jury, unless a jury trial be waived.”); *accord* 1949 Amended Code, *supra* note 118, at 666, § 253; 1850 Completed Code, *supra* note 121, at 318, § 761.

²⁷⁴ 1848 Code, *supra* note 113, at 536, § 209 (“Every other issue is triable by the court.”); *accord* 1949 Amended Code, *supra* note 118, at 666, § 254; 1850 Completed Code, *supra* note 121, at 319, § 762.

²⁷⁵ 1848 Code, *supra* note 113, at 536, § 209 (court permitted to refer whole issue to jury) & 538, § 221 (parties can consent to bench trial); *accord* 1949 Amended Code, *supra* note 118, at 666, § 254 & 668, § 266; 1850 Completed Code, *supra* note 121, at 319, § 762 & 332, § 796.

²⁷⁶ FIRST REPORT, *supra* note 109, at 185, § 208 and accompanying notes (“We propose an extension of the right of trial by jury to many cases, not within the constitutional provision [i.e., beyond formerly common law cases].”).

²⁷⁷ *Id.* at 189-90, § 221 and accompanying notes (“If that burthen [of jury service] can be lessened, by the plan proposed . . . we shall regard it as a great benefit.”).

²⁷⁸ The collected works of Field include portions of the commissioners' reports that the editor, A. P. Sprague, had ascertained were written by Field alone. *See* 1 SPEECHES, *supra* note 43, at 262 (“[N]othing is here reproduced which was not written by [Field].”). The pro-jury sentiments contained in the commissioners' reports are included in the excerpts that follow the editor's notice. Before the 1846 constitutional convention, Field wrote, “[I]t [is] a first principle, that every common law judge . . . should sit at trials with juries; a principle which I would extend to equity judges also.” FIELD, RE-ORGANIZATION, *supra* note 69, at 3.

²⁷⁹ *See, e.g.*, MILLAR, *supra* note 1, at 52; Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 La. L. Rev. 677, 715-16 (2005); Kessler, *supra* note 39, at 1234; Pound, *supra* note 3, at 8; Subrin, *supra* note 5, at 318. In his early career, Field had been a member of the Barnburner Democrats, the radically populist wing of the Democratic Party, and it was Field's fellow Barnburners who had forged “the People's Constitution” of 1846. *See* note 72 *supra*, at 318. At times, populist rhetoric infused Field's writings, especially in his calls for law reform. “Causes are determined upon technical reasons so often, that a plain man may almost despair of justice,” wrote Field in an article published – appropriately – in the *Democratic Review*. Field, *The Study and Practice of Law*, *supra* note 45 at 490. In the introduction to the 1850 Completed Code, Field and the other commissioners concluded that “[i]n a country where the people are sovereign, where they elect all officers, even the judges themselves, where education is nearly universal, it was not long possible, to keep the practice of the courts enveloped in mystery.” 1850 Completed Code, *supra* note 121, at v at 490. Accordingly, “[t]he Commissioners ha[d] never lost sight of these considerations” and crafted the Code so that “no person need have occasion to witness a legal proceeding, read a pleading, or render a verdict, the meaning of which, he does not comprehend.” 1850 Completed Code, *supra* note 121, at v. Such statements, however, must be considered along with Field's speeches before law students and bar associations in which Field expressed less optimism about the abilities of common jurors. *See, e.g.*, notes 281-285, *infra* and accompanying text.

Field Code that “the root ideas” were to make procedure “so simple and rational that the average citizen could do it on her own.”²⁸⁰ Field did not have so high a view of democracy, or of the jury, however. “Justice is attainable only through lawyers,” Field wrote later in his career.²⁸¹ “Only a few men, set apart for that particular calling, and devoting to it the best part of their lives,” could learn and apply the law.²⁸² Juries, on the other hand, were “popular bodies, subject to popular influences, and always liable to be swayed by an eloquent address.”²⁸³ Despite the fact that states had been abandoning property requirements for jurors two decades before the Code,²⁸⁴ the commissioners retained these requirements in the 1850 Completed Code,²⁸⁵ an unusual step if the main goal were to expand democracy.

An alternative explanation for Field’s jury preference is that Field sought the advantages of collegiality in having multiple adjudicators. With regard to questions of law, Field thought New York judicial structure before 1846 was the very reverse of what it should have been: Multiple judges ruled on the law at common law trial, and in equity only a single judge heard appeals on complex questions.²⁸⁶ Field argued that only a single judge was needed at trial where most cases were easy to decide.²⁸⁷ A case that posed a difficult question of law would naturally be appealed, and it was then that “several judges are safer than one.”²⁸⁸ Similarly for findings of fact, Field was apprehensive about trusting a single adjudicator. For bench trials, Field argued that a trial judge should not be granted full discretion over fact-finding, and

²⁸⁰ FRIEDMAN, *supra* note 1, at 297.

²⁸¹ Field, *Reform in the Legal Profession and the Laws*, *supra* note 43, at 499.

²⁸² *Id.*

²⁸³ *Id.* at 500.

²⁸⁴ See JOHN H. LANGBEIN ET AL. HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 533 (2009).

²⁸⁵ See 1850 Completed Code, *supra* note 121, at 110, § 251.

²⁸⁶ See FIELD, RE-ORGANIZATION, *supra* note 69, at 4.

²⁸⁷ See *id.* (“[T]o dispose of those questions of law which involve no real difficulty, after both the parties have heard and answered each other . . . , one judge is enough.”) The Code accordingly specified that “[a]ll issues, whether of law or fact, triable by a jury or by the court, shall be tried before a single judge.” 1848 Code, *supra* note 113, at 536, § 210; accord 1849 Amended Code, *supra* note 118, at 666, § 255; 1850 Completed Code, *supra* note 121, at 319, § 763.

²⁸⁸ See *id.*

some level of review was appropriate to ensure that multiple adjudicators determined the facts.²⁸⁹ A jury was a virtue, then, not because it represented the people but because it naturally involved a multiplicity of decisionmakers to decide questions of fact.²⁹⁰

4. Trial Practice Under the Code

The commissioners' expectation that open court examination would be more rapid than equity's proceedings proved true in practice. One judge wrote to Field, "I often try at the circuit, in a few hours, an equity cause that would have occupied several days before the Examiner, under the old system."²⁹¹ Another wrote of a particular case: "[U]nder the old mode, several days would have been spent in the Examiner's office, taking testimony in writing, at an expense equal to half the costs of the suit; and the hearing would have occupied quite as long as the trial did before me, which was less than a day."²⁹²

Although the Code's provisions for adjudication did not mention law or equity, practitioners mostly assumed that jury trial applied to formerly common law cases, whereas bench trial was the default in formerly equity cases, even equity cases seeking money damages.²⁹³ Occasionally, a court followed the commissioners' construction of the Code and used jury trial in the latter case.²⁹⁴ More often, however, lawyers chose to opt out of jury trial.²⁹⁵

²⁸⁹ See FIRST REPORT, *supra* note 109, at 178-79.

²⁹⁰ See FIELD, RE-ORGANIZATION, *supra* note 69, at 4 (advocating a jury to decide questions of fact and a panel of judges to decide appeals on law).

²⁹¹ Letter of Amasa J. Parker, Justice of the New York Supreme Court, Third District, to David Dudley Field, May 8, 1850, [hereinafter Amasa Letter] in DAVID DUDLEY FIELD, THE COMPLETION OF THE CODE: FIVE ARTICLES RE-PUBLISHED FROM THE NEW YORK EVENING POST 6, 6 (1851) [hereinafter FIELD, COMPLETION].

²⁹² Letter of Lewis H. Sandford, Judge of the Superior Court of New York City, to David Dudley Field, May 10, 1850, in FIELD, COMPLETION, *supra* note 291, at 6-7.

²⁹³ See 1 WHITTAKER, *supra* note 11, at 661.

²⁹⁴ See 1 WHITTAKER, *supra* note 11, at 659. See also *supra* notes 291-292 and accompanying text.

²⁹⁵ See, e.g., Amasa Letter, *supra* note 291, at 6 ("Very few such causes are tried by a jury. The counsel generally waive a jury, and try the cause before the court.").

E. Remedies

1. Remedies in New York Equity Before 1848

New York chancery administered a broad array of remedies. Equity courts had jurisdiction over claims regarding trusts,²⁹⁶ mortgages,²⁹⁷ corporations,²⁹⁸ divorce,²⁹⁹ and a variety of guardianship issues.³⁰⁰ Equity courts also granted relief in cases in which common law courts refused to hear claims of fraud,³⁰¹ accident,³⁰² or mistake.³⁰³ Chancery granted remedies in the form of money damages, specific performance, or declaration.³⁰⁴ One of the most powerful tools of chancery was the injunction.³⁰⁵ Graham explained that whereas a common law court “could only punish” in its remedial system, equity could “both punish and prevent” injustice through its injunctive decrees.³⁰⁶

2. Remedies at New York Common Law Before 1848

Common law historically granted fewer types of remedies than equity, but in mid-nineteenth-century New York, this distinction was collapsing. Common law courts exercised jurisdiction over real property,³⁰⁷ contracts,³⁰⁸ and torts.³⁰⁹ “Damages, are in most cases, the sole

²⁹⁶ See GRAHAM, JURISDICTION, *supra* note 22, at 366-84.

²⁹⁷ See *id.* at 385-93.

²⁹⁸ See *id.* at 444-480.

²⁹⁹ See *id.* at 394-414.

³⁰⁰ See *id.* at 433-39 (mentally disabled and drunkards); 440-43 (minors); 415-32 (property of married women).

³⁰¹ See *id.* at 513-36.

³⁰² See *id.* at 527-34.

³⁰³ See *id.* at 535-42.

³⁰⁴ See generally *id.*, book 2, ch. 1. Declaratory relief was most often sought in actions for account or partition. See *id.* at 549-56; 564-68.

³⁰⁵ See *id.* at 575-76.

³⁰⁶ *Id.* at 568.

³⁰⁷ See GRAHAM, PRACTICE, *supra* note 24, at 406-12.

³⁰⁸ See *id.* at 420-33.

³⁰⁹ See *id.* at 434-53.

object of [a common law] action,” wrote Graham,³¹⁰ although judges could grant specific relief in certain actions for the recovery of real property and chattels.³¹¹ By the 1830s, common law courts had “greatly relaxed the strictness of their proceedings, by assimilating them to those of equity” in several instances.³¹² Consequently, both circuit and county courts exercised concurrent jurisdiction with equity courts over certain claims in which the remedy was typically declaratory, such as partition, waste, and even fraud.³¹³ In such a case, a party was not required to use the forms of action but instead requested relief by petition, whose form and operation were similar to a bill in equity.³¹⁴

3. Field Code Remedies

The Code empowered a court to grant “any relief consistent with the case made by the complaint,” thus allowing judges to exceed even the remedy that the plaintiff requested.³¹⁵ Neither the 1848 Code nor the 1849 Amended Code specified what causes of action a plaintiff could litigate or what remedies a court could grant, although both Codes detailed the procedures for issuing an injunction³¹⁶ and entering a judgment.³¹⁷ The commissioners left it to whatever statutes were already in place or a possible future civil code to define the substance of civil causes of action.³¹⁸ The 1850 Completed Code provided detailed procedures on a number

³¹⁰ See *id.* at 779. The jury calculated money damages in all cases. Juries were bound by a liquidated damages clause in a contract, but they otherwise enjoyed wide discretion and were free to include punitive damages in tort actions. See GRAHAM, *supra* note 265, at 318-23.

³¹¹ See GRAHAM, PRACTICE, *supra* note 24, at 779-84; see also FIRST REPORT, *supra* note 109, at 77.

³¹² GRAHAM, JURISDICTION, *supra* note 22, at 364.

³¹³ See *id.* at 564-68 (partition); 573-75 (waste); 513-26 (fraud).

³¹⁴ See, e.g. GRAHAM, PRACTICE, *supra* note 24, at 408 (petition procedure for partition); see also 1 MOULTON, *supra* note 157, at 17-21 (describing petitions).

³¹⁵ 1848 Code, *supra* note 113, at 540, § 231; accord 1849 Amended Code, *supra* note 118, at 670, § 275; 1850 Completed Code, *supra* note 121, at 314, § 751.

³¹⁶ 1848 Code, *supra* note 113, at 533-35, § 191-99; accord 1849 Amended Code, *supra* note 118, at 658-60, § 218-26.

³¹⁷ 1848 Code, *supra* note 113, at 540-41, § 230-37; accord 1849 Amended Code, *supra* note 118, at 669-71, § 274-82.

³¹⁸ The 1850 Completed Code, for instance, re-codified a portion of the Revised Statutes on special proceedings, see note 122 *supra* and accompanying text, mainly for the sake of simplicity, with the understanding that the Revised Statutes had been a sufficient complement to the Codes of 1848 and 1849. See 1850 Completed Code, *supra* note 121, at

of “proceedings for special cases,” most of which were formerly equitable causes of action,³¹⁹ but the commentary insisted that the general “form of civil actions under the code, is in its nature adapted to almost every case requiring the interposition of judicial authority.”³²⁰

Before joining the commission, Field wrote that the main problem with New York’s justice system was that the availability of remedies depended upon the form of pleading and not upon the underlying issue.³²¹ Field recalled that before the reforms, he litigated an insurance case which he nearly lost for filing in assumpsit rather than covenant. Only because “the judge looking at [the policy] without his glasses said he could see no seal” did Field manage to win his suit.³²² The commissioners’ goal was to remove such procedural impediments to substantive justice. “Why should justice be obstructed by . . . form?” wrote Loomis. “[The Code] was designed to abolish all forms and technicalities which obstruct justice and prevent a speedy trial on the merits, . . . by a plain and direct method of ascertaining the truth and application of the law.”³²³

In addition to the pitfalls of pleading common law forms of action, the dismissal of claims for being misfiled in either law or equity was of major concern to the commissioners. Loomis claimed to know of cases “prosecuted with ability and in good faith for several years” that were non-suited on final appeal because they “belonged to the other branch of

378, note to tit. 11. Along with the Practice Commission, New York had established a Code Commission to “reduce into a written and systematic code the whole body of the law of this State.” N.Y. CONST. of 1846, art. I, § 17; *see also* note 90 *supra*. The Code Commission proceeded slowly at first; in 1857 Field became a member of a restructured Code Commission, and by 1865 he had completed a draft of a Civil Code. *See* note 133 *supra*, and accompanying text.
³¹⁹ Such proceedings included mortgages, partition, corporations, and probate. *See* 1850 Completed Code, *supra* note 121, at 378-492, tit. 11.

³²⁰ *Id.* at 378, note to tit. 11.

³²¹ FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 37 (“[E]quitable relief, as distinguished from legal, has been made necessary only because of the fixed forms of the common law; [and] those forms do not in any degree conduce to the attainment of justice, but are a hindrance and a snare.”); *see also* LOOMIS, *supra* note 29, at 27.

³²² David Dudley Field, *Law Reform in the United States and Its Influence Abroad*, 25 AM. L. REV. 515, 518 (1891).

³²³ LOOMIS, *supra* note 29, at 27.

jurisprudence.”³²⁴ A statute of limitations continued to run if litigation were begun in the wrong court, so some parties that were non-suited late in litigation were foreclosed from any remedy.³²⁵ Non-suiting claims for mistake of jurisdiction appears to have been a central strategy for some lawyers, “whose favorite argument appears to be,” according to Field, “either that the plaintiff has mistaken the forum, or that the defendant, if he has a defence, can assert it only in another court.”³²⁶

To address the problem of over-frequent dismissal, the 1850 Completed Code would not have allowed a court to dismiss or non-suit a plaintiff’s complaint without the plaintiff’s consent.³²⁷ Under no circumstances could a complaint be dismissed with prejudice.³²⁸ Every case was to have a resolution, either with a remedy or a determination that no remedy was deserved. “If [the plaintiff] insist on having his case decided finally in the action, it is his right to do so,” declared the official comment.³²⁹

4. Remedial Practice Under the Code

Some lawyers and judges resisted the Code’s provisions for a fused remedial system. One judge even declared that the Code left “the principles of pleading . . . untouched, and that the forms [of action] are affected only where they are inconsistent with some positive enactment of the code,” a standard he applied to dismiss a case for failing to conform to any of the old

³²⁴ LOOMIS, *supra* note 29, at 9.

³²⁵ *See id.* at 9-10.

³²⁶ FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 32. Another concern of Field’s was efficiency: A case could require recourse to both courts, and for Field, “[e]very [equitable] bill that is filed in aid or defense of a suit at law is a reproach to our legal system.” *Id.* at 33. Although chancery ostensibly could grant common law remedies and “do perfect justice” to parties having mixed legal and equitable claims, in Field’s experience, “there [were] numerous instances in which a party [was] sent back to law after having got all a court of equity could give him.” *Id.*

³²⁷ 1850 Completed Code, *supra* note 121, at 471-72, § 1114.

³²⁸ *Id.* A judge could dismiss a case if the plaintiff failed to show up at the appointed time or if the plaintiff filed in the wrong county, but in both cases, the plaintiff was free to re-file suit.

³²⁹ *Id.* at 472, note to § 1114.

forms of action.³³⁰ The former practice of classifying claims as legal or equitable persisted; one treatise-writer asserted that “[a]lthough . . . the preamble [of the Code] seems to contemplate the abolition of all distinction between legal and equitable remedies also, that abolition is, to some extent, and must always continue to be, impracticable.”³³¹ Loomis complained as late as 1879 that bench trial and jury trial calendars still bore the law and equity nomenclature.³³² “They tend to keep up a distinction that no longer exists,” Field wrote about New York judges in 1878, “and go far to confuse and mislead.”³³³

III. The Balance of Law and Equity in the Field Code

Outside of following constitutional mandates, the commissioners adapted equitable procedure for their fused system, with one puzzling exception: The commissioners replaced the bill of discovery in favor of limited in-court examination, thus ostensibly curtailing equity’s power of investigation in pretrial discovery. Part II explains this choice by reference to the commissioners’ belief in the efficacy of pleading and by their experience of mostly contract-breach litigation, but one other explanation is found in the unenacted 1850 Completed Code, in which Field and the other commissioners weakened pretrial discovery to facilitate abolishing the disqualification of party testimony at trial, one of Field’s most controversial procedural reforms.

A. *The Code’s Preference for Equity*

The commissioners generally relied upon equitable procedure for their model. The Code’s pleading provisions followed equity by requiring brief, general statements of fact, and

³³⁰ FIELD, ADMINISTRATION, *supra* note 206, at 16 (quoting *Dolliner v. Gibson*, 3 CODE REP. 153 (1850)).

³³¹ 1 WHITTAKER, *supra* note 11, at 56.

³³² LOOMIS, *supra* note 29, at 26; *see also, e.g.*, 23 R.M. STOVER, NEW YORK STATE REPORTER 92 (1889).

³³³ David Dudley Field, *Law and Equity*, in 1 SPEECHES, *supra* note 43, at 573, 583 (1878).

by allowing liberal powers of amendment.³³⁴ The commissioners adopted equity's expansive permission for joinder,³³⁵ as well as the entire range of remedies available at chancery.³³⁶

Looking back in 1878, Field observed that some states had adopted the Code with "an express provision that, when the legal and equitable rules clash with each other, the latter shall prevail. Such a provision may be expedient, from abundant caution, but I conceive it nevertheless to be unnecessary," Field argued, "because it is implied in the blending of the procedure."³³⁷ Loomis concurred; in his view, the Code produced a "system [that] approaches and assimilates more nearly with the equity forms than with those of the common law" by granting a plaintiff "any relief the facts warranted."³³⁸

Field expected Code procedure would so facilitate litigation, he expressed indifference as to whether the Code encouraged litigation to increase.³³⁹ Field argued that codification of the substantive law would decrease litigation, because it would make citizens better informed about their rights and duties. "[I]n our opinion," he wrote, "the legitimate means of lessening the number of suitors in the courts, is not by obstructing their passage thither, but by removing

³³⁴ See notes 168-171 *supra* and accompanying text.

³³⁵ See notes 206-209 *supra* and accompanying text; see also FIELD, ADMINISTRATION, *supra* note 206, at 24 ("Is [Judge Barculo] ignorant, that there are other rules of pleading than those of the common law? Is he, who was once Circuit Judge and Vice-Chancellor, ignorant, that, in the late court of Chancery, all the causes of action mentioned by him might have been united in the same bill, if they had arisen out of connected transactions?").

³³⁶ See note 315 *supra* and accompanying text.

³³⁷ Field, *Law and Equity*, *supra* note 333, at 579.

³³⁸ LOOMIS, *supra* note 29, at 25-26. Critics noted the choice as well. In James Fenimore Cooper's last novel, *The Ways of the Hour*, protagonist Thomas Dunscomb is "'emphatically' a common-law lawyer" who takes umbrage at the Code's preference for equity procedure over common law, or as the novel puts it, he "was not at all 'agreeable' to this great innovation on the 'the perfection of human reason.'" COOPER, *supra* note 231, at 13 "Some of the forms of pleadings are infernal, if pleadings they can be called at all," complains Dunscomb, "I detest even the names they give their proceedings—complaints and answers!" *Id.* at 14.

³³⁹ See FIELD, ADMINISTRATION, *supra* note 206, at 33 ("Whether the quantity of litigation has been yet diminished by the code, it is too early to know. There are many reasons why it should have been lessened, and some why it should not.")

the occasions for their going; taking away the temptation to do wrong or to resist a just demand, by making the redress speedy, certain, and easy to be obtained.”³⁴⁰

The commissioners inclined toward equitable procedure because they believed that chancery had fewer procedural barriers to substantive justice. In their Second Report, the commissioners explained that “the basis” for their reforms “was substantially that upon which courts of equity were originally founded,” because in equity, “the means to be used are directed solely by the end to be attained, without regard to the forms of action.”³⁴¹ The First Report of the commissioners admonished courts to “be hereafter confined in their adjudications to questions of substantial right, and not to the nice balancing of the questions, whether the party has conformed himself to . . . arbitrary and absurd” procedures.³⁴²

B. Limited Pretrial Discovery and Expanded Party Testimony

Given the commissioners’ preference for equity, the Code’s discovery provisions remain somewhat puzzling. The Code abolished the equitable bill for discovery and allowed a pretrial deposition only on condition that the deposed witness or party did not appear at trial, and the

³⁴⁰ *Id.* at 34; see also David Dudley Field, *The Duty of the Lawyer to the Law: Address to the Law School of the University of New York, April 7, 1884*, in 2 SPEECHES, *supra* note 43, at 502, 507 (“When [people] know the rules prescribed for their government they conform to them and keep away from the courts. Few persons go to law for the love of it. A better knowledge of the rights and the duties for which the law provides would have saved many a lawsuit, impoverishing to the parties and wearisome to the courts.”).

³⁴¹ SECOND REPORT, *supra* note 114, at 7.

³⁴² FIRST REPORT, *supra* note 109, at 87. In this analysis, I differ with Subrin’s thesis that the Field Code primarily retained common law procedure. See Subrin, *supra* note 5, at 337 (“They used the merger of law and equity as much as an occasion for conforming equity to common-law procedure as the reverse.”) and 338 (“[T]he Field Code . . . leaned as much, or more, toward the view of common law procedure as to equity.”). A main component of Subrin’s argument is the “limited joinder provisions” of the Code, *id.* at 338, but Subrin relies on Judge Barculo’s interpretation of Code joinder, see notes 208-210 *supra* and accompanying text, rather than the commissioners’ actual intentions. See Subrin, *supra* note 5, at 332 (“Regardless of the number of parties, causes of action were joinable only if they belonged to one of a group of classes of cases The categories were very restrictive and greatly resembled previous common law forms of action.”). Subrin makes further claims that contradict what the commissioners expressed. Compare, e.g. *id.* at 329 (“Field did not want procedure to get out of the way of substance, because he did not see procedure as an impediment.”) with notes 321-323 *supra* and accompanying text. This Article has relied on the later editions of the Codes, the Second Report of the commissioners, and contemporary treatise literature and case reports to provide a fuller understanding of the commissioners’ project.

commissioners disapproved of examining a witness more than once in the course of litigation.³⁴³

Just as pleading was not to obstruct a trial on the merits of a case, so too discovery was not to delay trial with duplicate investigation.³⁴⁴

The envisioned trial, however, involved significant changes to a party's competency to testify. Prior to the Code, the main function of equitable discovery had been to compel party statements under oath.³⁴⁵ If a substitute for party testimony were the goal, however, Field wondered: "Why should it be necessary to go through with this troublesome, dilatory, and expensive process, simply to ask one's adversary a question?"³⁴⁶ The commissioners' solution in the 1850 Completed Code was to treat all witnesses alike – including interested witnesses and parties – for purposes of testimony and examination.³⁴⁷ In this choice, the commissioners affirmed their preference for the more flexible principles of equity, because equity had allowed sworn party statements through the pleadings. "Admission is the rule here," the official comment explained, "exclusion is the rule of the common law. Let in all the light possible, we ask. Not so the common law; exclude the light, it says, lest perchance it deceive you; unmindful, as it appears to us, that poor light is better than none."³⁴⁸

The commissioners hesitated to abolish the disqualification, however. Among the Code's reforms, allowing party testimony at trial had the least support among even the reform-

³⁴³ See note 239-241 *supra* and accompanying text.

³⁴⁴ See *id.*

³⁴⁵ See notes 211-215 *supra* and accompanying text. For a history of the party disqualification rule, see Fisher, *supra* note 211. Other common law jurisdictions were abolishing the exclusion rule around this time. England permitted civil parties to testify in minor causes in 1846, and in all causes in 1848. Michigan allowed interested witnesses to testify in 1846, and Connecticut allowed party testimony in 1848. See *id.* at 659. In 1855 Field wrote a law reform tract compiling favorable reviews on the abolition of the exclusion rule in Connecticut, Vermont, Ohio, and Minnesota, all states that had dropped the rule between 1848 and 1851. See [DAVID DUDLEY FIELD], COMPETENCY OF PARTIES AS WITNESSES FOR THEMSELVES 4-6 (1855).

³⁴⁶ See FIELD, PRACTICE OF THE COURTS, *supra* note 91, at 10.

³⁴⁷ See 1850 Completed Code, *supra* note 121, at 714-15, notes to §§ 1707-08.

³⁴⁸ *Id.*

mindful segment of the legal profession.³⁴⁹ In order to make the innovation appear less striking, the commissioners allowed in the 1848 Code a restricted form of party testimony that mimicked equity practice. Like the equitable bill for discovery, in which a party could only answer his opponent and could not make affirmative statements for his own case,³⁵⁰ the 1848 Code provided that a party could not testify on his own behalf but could be called to be examined by the adverse party.³⁵¹ Further, the commissioners allowed this examination to take place in the pretrial phase,³⁵² resulting in a written record of a party's statements that could then be admitted into evidence at trial – almost exactly what equity had provided before the Code.³⁵³ Thus, although the 1848 Code appeared to offer a somewhat restricted version of equitable discovery, the attempted purpose, revealed in the final draft of the Code, was to expand the equitable power to bring party statements into the trial.

Conclusion

Although procedures based on the Federal Rules have largely replaced Field Code procedure in America,³⁵⁴ some of the significant innovations of the Code have persisted in the last century and a half of American procedure. The Code substantially altered common law

³⁴⁹ See, e.g., [DAVID DUDLEY FIELD,] EVIDENCE ON THE OPERATION OF THE CODE (1852). *Evidence on the Operation of the Code* was the second in a series of "Law Reform Tracts" produced by Field in the early 1850s to encourage the adoption of the 1850 Completed Code. This tract reproduces a survey conducted by the English Law Amendment Society. The society's president, Lord Brougham, sent inquiries to twenty prominent members of the New York bench and bar seeking their opinions on the new Code. Attorney Simon Greenleaf and the firm of Henry Van Der Lynn, James Clapp, and Henry R. Mygatt all exhibited intense hostility to the Code. Other than these individuals, however, the reviews were generally favorable and at times highly enthusiastic. The one question that divided the supporters of the Code was number nine: "Does the experience you have had of the admission of the evidence of interested witnesses lead you to desire that the principle should be carried to its full extent by making parties competent to give evidence in their own behalf?" Most of the answers, even among Code supporters, were negative. See *id.* at 11-13.

³⁵⁰ See LANGDELL, *supra* note 217, at 83 ("[A]lthough a party was disabled, by interest, from testifying in his own behalf, this was no reason why he should not admit the truth in favor of his adversary."); 1 MOULTON, *supra* note 157, at 320.

³⁵¹ 1848 Code, *supra* note 113, at 559, § 344.

³⁵² 1848 Code, *supra* note 113, at 559, § 345.

³⁵³ See notes 212-219, *supra* and accompanying text.

³⁵⁴ See LARRY L. TEPLY, ET AL., CASES, TEXT, AND PROBLEMS IN CIVIL PROCEDURE 547 (2002).

pleadings, requiring short statements that used the straightforward language of everyday commerce. It divorced modes of trial from remedies, instead giving to the parties the option of judge or jury to resolve disputes. In addition, the practice commissioners sought to have disputes settled in as few actions as possible by providing for liberal amendment of pleadings and broad joinder, and they attempted to make parties competent witnesses to testify at trial.

Few of these reforms happened immediately, and it is important to realize that the Field Code project encompassed more than simply the first enactment of the partial Code in 1848. The 1849 Amended Code made clear the commissioners' intent to allow liberal amendments to pleadings. It was not until 1852 that the New York legislature clarified the Code's broad joinder provisions, and some of the Code's most significant reforms were never realized in New York at all. Unrestrained party testimony was incorporated only into the 1850 Completed Code, a Code rejected by New York but adopted in many other states.

The Code was not the Federal Rules come eighty years early. Although the Code simplified pleading, it nevertheless required factually detailed statements verified by oath, requirements not found in the Federal Rules. Further, the Field Code significantly restricted discovery on the grounds that pretrial investigation was merely a wasteful duplication of what pleading and trial examination provided.

Nevertheless, the Field Code bears similarities to the later equity-preferring Federal Rules. In nearly every major decision, the commissioners chose equitable procedure over common law. One exception was the requirement of oral, in-court examination, a provision already mandated by New York's 1846 constitution. Another exception was the Code's restrictions on discovery, which were, however, attempts to replicate equity's power to compel party statements under oath.

The fusion of law and equity in the Field Code of Procedure was thus an important step towards the later Federal Rules. The large-scale replacement of common law procedure with equity procedure was a trend that continued in the FRCP, and some of Field's most daring and controversial proposals have become commonplace today. Remedies are no longer tied to the form of pleadings, and party statements form an important part of witness testimony in many cases. The commissioners set out to remove the "burden" of "a double system of jurisprudence" and largely to make "all law . . . conformable to equity."³⁵⁵ In doing so they laid the foundations of modern American procedure.

³⁵⁵ SECOND REPORT, *supra* note 114, at 5.

Appendix: Sample Pleadings for a Plaintiff Seeking Recovery of a Debt

A. Sample Pleadings Before the Code

1. Burrill's Treatise³⁵⁶

(Indebitatus assumpsit for goods sold – suit commenced by capias.)

Supreme Court. Of (January) term, in the year one thousand eight hundred and (forty.)

(City and) county of (New-York,) ss.: A.B., plaintiff in this suit, by E.F., his attorney, complains of C.D., defendant in this suit, being in custody, &c. of a plea of trespass on the case upon promises: For *that whereas* the said defendant, heretofore, to wit, on the (thirty-first day of December,) in the year of our Lord one thousand eight hundred and (thirty-nine,) at (New-York,) to wit, at the (city and in the) county of (New-York,) aforesaid, was indebted to the said plaintiff in the sum of (one thousand) dollars lawful money of the United States of America, for divers *goods, wares and merchandise*, by the said plaintiff, before the time, sold and delivered to the said defendant, and at the special instance and request of the said defendant: And *being so indebted*, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, *undertook*, and then and there faithfully promised the said plaintiff, well and truly, to pay unto the said plaintiff the said sum of (one thousand) dollars, when he, the said defendant, should be thereunto afterwards requested.

*(Quantum valebant for the same.)*³⁵⁷ And *whereas also* the said defendant, afterwards, to wit, on the same day and year, (last aforesaid,) and at the place aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had, before that time, sold and delivered to the said defendant, divers *other goods, wares, and merchandise* of him, the said plaintiff, the said defendant *undertook*, and then and there faithfully promised the said plaintiff, to pay him *so much money as* the said last mentioned goods, wares and merchandise, at the time of the said sale and delivery thereof, *were* reasonably *worth*, when the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that the said last mentioned goods, wares and merchandise, at the time of the sale and delivery thereof, were reasonably worth the further sum of (one thousand) dollars, of like lawful money as aforesaid, to wit, at the place aforesaid; whereof the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, had notice.

(Indebitatus assumpsit, for work and labor.) And *whereas also* the said defendant, afterwards, to wit, on the same day and year (last aforesaid,) and at the place aforesaid, was indebted to the said plaintiff in the further sum of (one thousand) dollars, of like lawful money as aforesaid, for the *work and labor*, care and diligence of the said plaintiff, by the said plaintiff, before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at his special instance and request. (*Same count for materials.*) And also for diverse *materials*, and other necessary things, by the said plaintiff, before that time, found and provided, and used and applied in and about that work and labor, for the said defendant, and at his like special instance and request. And *being so indebted* to the said plaintiff, the said defendant in consideration thereof, afterwards, to wit, on the same day and year (last aforesaid,) and at the place aforesaid, *undertook*, and then and there faithfully promised the said plaintiff,

³⁵⁶ 2 BURRILL, *supra* note 161, at 268-72.

³⁵⁷ Several counts. [Burrill's note.]

well and truly, to pay unto the said plaintiff, the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

(*Quantum meruit for the same.*) And *whereas also* the said defendant afterwards, to wit, on the same day and year (last aforesaid,) and at the place aforesaid, in consideration that the said plaintiff had, before that time, at the like special instance and request of the said defendant, done, performed, and bestowed divers *other* work and labor, care and diligence, in and about the business of the said defendant, and for the said defendant, and had, before that time, found, provided, used and applied divers other materials, and other necessary things, in and about that business, the said defendant undertook, and then and there faithfully promised the said plaintiff, that he, the said defendant, would well and truly pay to the said plaintiff *so much* money *as* the said plaintiff reasonably *deserved*, to have of the said defendant for the same, when he, the said defendant, should be thereunto afterwards requested. And the said plaintiff avers, that he reasonably deserved to have of the said defendant for the same, the further sum of (one thousand) dollars, of like lawful money as aforesaid, to wit, at the place aforesaid: Whereof the said defendant afterwards, to wit, on the same day and year (last aforesaid,) and at the place aforesaid, had notice.

(*Money counts.*) (*Indebitatus assumpsit for money lent and advanced.*) And *whereas also*, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the sum of (one thousand) dollars, like lawful money, as aforesaid, for so much money, before that time *lent and advanced* by the said plaintiff to the said defendant, and at the special instance and request of the defendant. And *being so indebted*, the said defendant in consideration thereof, afterwards, to wit, on the same day and year (last) aforesaid, and at the place aforesaid, *undertook*, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff, the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

(*The like for money paid, &c.*) And *whereas also*, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff, in the further sum of (one thousand) dollars, of like lawful money as aforesaid, for so much money before that time, *paid, laid out, and expended* by the said plaintiff, to and for the use of the said defendant, and at the like special instance and request of the said defendant. and *being so indebted*, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year (last) aforesaid, and at the place aforesaid, *undertook*, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

(*The like for money had and received.*) And *whereas also*, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of (one thousand) dollars, of like lawful money as aforesaid, for so much money, before that time, *had and received* by the said defendant, to and for the use of the said plaintiff. And *being so indebted*, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year (last) aforesaid, and at the place aforesaid, *undertook*, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff, the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

(*Insimul computassent.*) And *whereas also* the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, *accounted together* with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and

upon such accounting, the said defendant then and there was found to be in arrear, and indebted to the said plaintiff in the further sum of (one thousand) dollars, of like lawful money as aforesaid. And being so found in arrear, and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year (last) aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff, the said sum of money last above mentioned, when he, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant, (although often afterwards requested so to do,) hath not as yet paid the said several sum s of money above mentioned, or any, or either of them, or any part thereof, to the said plaintiff; but to pay the same, or any party thereof to the said plaintiff, the said defendant hath hitherto altogether refused, and still doth refuse. To the damage of the said plaintiff of (one thousand) dollars, and therefore the said plaintiff brings suit, &c.

E.F., Attorney for the plaintiff.

2. Yates's Treatise³⁵⁸

For that whereas the said defendant, on &c. was indebted to the said A.B. in the sum of one hundred dollars, (here state the subject matter of the debt, whether for land, goods, work or money, precisely as in assumpsit, and then proceed as follows:) And to be paid by the said C.D. to the said A.B. when he the said C.D. should be thereunto afterwards requested; whereby, and by reason of the said sum of money, being and remaining wholly unpaid, an action hath accrued to the said A.B. to demand and have of and from the said C.D. the said sum of one hundred dollars, parcel of the said sum above demanded.

And whereas also afterwards, to wit, on &c. at, &c. in consideration that the said A.B. at the like special instance and request of the said C.D. had before that time, &c. (Here state the subject matter of the debt, as in the *quantum meruit* counts in assumpsit,) he the said C.D. undertook, and then and there agreed to pay to the said A.B. so much money as he therefor [sic] reasonably deserved to have of the said C.D. when he, the said C.D. should be thereunto afterwards requested. And the said A.B. avers, that he therefor reasonably deserved to have of the said C.D. the further sum of one hundred dollars, to wit, at, &c. whereof the said C.D. afterwards, to wit, on, &c. there had notice, whereby an action hath accrued to the said A.B. to demand and have of and from the said C.D. the said last mentioned sum of one hundred dollars, other parcel of the said sum above demanded.

And whereas, also the said A.B. afterwards, to wit, on, &c. at, &c. at the like special instance and request of the said C.D. lent to the said C.D. and the said C.D. then and there borrowed of the said A.B. a large sum of money, to wit, the sum of one hundred dollars, to be paid by the said C.D. to the said A.B. when he, the said C.D. should be thereunto afterwards requested; whereby, and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said A.B. to demand and have of and from the said C.D. the last mentioned sum of one hundred dollars, other parcel of the said sum above demanded.

And whereas also the said A.B. afterwards, to wit, on, &c. at, &c. had paid, laid out, and expended a certain other sum of money, to wit, the sum of one hundred dollars, for the said C.D. and at his like special instance and request, and to be paid by the said C.D. to the said A.B.

³⁵⁸ JOHN V. N. YATES, A COLLECTION OF PLEADINGS AND PRACTICAL PRECEDENTS WITH NOTES THEREON 455-56 (1837).

when he, the said C.D. should be thereunto afterwards requested; whereby, &c. (Same as last, from the words “afterwards requested,” to the end.)

And whereas also the said C.D. afterwards, to wit, on, &c. at, &c. had and received a certain other sum of money, to wit, the sum of one hundred dollars, to and for the sue of the said A.B. and to be paid by the said C.D. to the said A.B. when he, the said C.D. should be thereunto afterwards requested; whereby, &c. (Same as last, from the words afterwards requested,” to the end.)

And whereas also, the said C.D. afterwards, to wit, on, &c. at, &c. accounted with the said A.B. of and concerning divers other sums of money, before that time and then due and owing, and in arrear, and unpaid, from the said C.D. to the said A.B. and upon that accounting, the said C.D. was then and there found to be in arrear and indebted to the said A.B. in the further sum of one hundred dollars, to be paid by the said C.D. to the said A.B. when he the said C.D. should be thereunto, afterwards requested; whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said A.B. to demand and have of and from the said C.D. the said last mentioned sum of one hundred dollars, residue of the said sum above demanded.

Yet the said C.D. (although often requested so to do,) hath not as yet paid the said sum of six hundred dollars, (this is the same sum as mentioned in the commencement of the declaration, being the aggregate of all the sums,) above demanded, or any part thereof, to the said A.B. But he to do this hath hitherto wholly refused, and still doth refused, to the damage of the said A.B. of nine hundred dollars, and therefore he brings his suit, &c.

W. Stuart, *Atty. for Plff.*

B. Sample Pleadings After the Code

1. Actual Pleading Filed in the New York Supreme Court³⁵⁹

Supreme Court. City and County of New York.

B.C., O.H., and W.H.H., *against* B.H.B.

The plaintiffs for their complaint in this action, say:

First. That on the third day of October, 1853, the defendant made his promissory note dated that day, whereby he promised to pay, sixty days after the date thereof, to the order of one A.M.H., at the Williamsburg City Bank, ten hundred dollars for value received, and delivered said note to said A.M.H.

Second. That the said A.M.H., before the maturity of the said note, duly indorsed the same, *and delivered it* to the plaintiffs.

Third. That the defendant did not pay the said note when it became due, and has never yet paid it, or any part thereof, *and that the plaintiffs are the owners and holders thereof.*

Fourth. That at different times between the 11th October, 1852, and the 17th October, 1853, both dates inclusive, the plaintiff sold and delivered to the defendant cattle and sheep to the amount of \$14,649; and, during the same period, the defendant paid thereon, at different times, sums amounting together to \$13,296, leaving the sum of \$1,353 due from the defendant to plaintiffs on the 27th day of October, 1853, no part of which has been paid.

Fifth. *That the plaintiffs are the holders and owners of said last-mentioned claim.*

³⁵⁹ FIELD, PLEADING MANUAL, *supra* note 180, at 22-23.

The plaintiffs, therefore, as judgment against the defendant for the sum of \$2,353, with interest on \$1,000 from 5th December, 1853, and on \$1,353 from the 27th October, 1852, *besides costs*.

A.B., Attorney for Plaintiffs

2. Field's Corrected Version of the Above³⁶⁰

Supreme Court. City and County of New York.

B.C., O.H., and W.H.H., *against* B.H.B.

The plaintiffs complain;

For a first cause of action:

First. That on the third day of October, 1853, the defendant made his promissory note, dated that day, whereby he promised to pay, sixty days after the date thereof, to the order of one A.M.H., at the Williamsburg City Bank, ten hundred dollars for value received, and delivered the said note to the said A.M.H.

Second. That the said A.M.H., before the maturity of the said note, indorsed the same to the plaintiffs.

Third. That the said defendant has not paid the said note, or any part thereof.

For a second cause of action:

That at different times, between the 11th of October, 1852, and the 17th of October, 1843, both dates inclusive, the plaintiffs sold and delivered to the defendant cattle and sheep to the amount of \$14,642; and, during the same period, the defendant paid thereon, at different times, sums amounting together to \$13,296, leaving the sum of \$1,353 due from the defendant to the plaintiffs on the 27th day of October, 1853, no part of which has been paid.

Wherefore the plaintiffs demand judgment against the defendant for the sum of \$2,353, with interest on \$1,000 from the 5th of December, 1853, and on \$1,353 from the 27th of October, 1853.

A.B., *Plaintiffs' Attorney*

3. Practice Commissioners' Official Book of Forms³⁶¹

[Complaint for Money Lent]

Supreme Court. County of . . .

John Smith *against* John Jones

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 18 . . . , at . . . , he lent to the defendant . . . dollars.

II. That the defendant has not paid the same (except . . . dollars, paid on the . . . day of . . . , 18 . . .).

Wherefore the plaintiff demands judgment for . . . dollars, with interest from the . . . day of . . . , 18 . . .

[Complaint for Goods Sold and Delivered]

The plaintiff complains, and alleges:

³⁶⁰ *Id.* at 23.

³⁶¹ COMMISSIONERS OF THE CODE, *supra* note 11, at 22-26.

I. That on the . . . day of . . . , 18 . . . , at . . . , he sold and delivered to the defendant (one hundred barrels of flour, *or* the goods mentioned in the schedule hereto annexed, *or* sundry goods.)

II. That the defendant promised to pay . . . dollars for the said goods.

III. That he has not paid the same.

(Demand of Judgment.)

4. Whittaker's Treatise³⁶²

Title, &c.

[The complaint of the above-mentioned plaintiffs respectfully shows to this court upon their information and belief,]

That the defendant heretofore, on the day of at the city of made his promissory note in writing, whereby months after the date thereof, he promised to pay to the plaintiff, on his order, at the sum of dollars for value received, and then and there delivered the same to the plaintiff. That the plaintiff is now the lawful owner and holder of the said promissory note, and that the defendant is justly indebted to him thereupon, in the sum of dollars, principal, together with interest thereon, from the day of .

Whereupon, the plaintiff demands judgment against the said defendant, for the said principal sum, and interest thereon, as aforesaid.

(Signature and verification.)

³⁶² WHITTAKER, *supra* note 11, at 772.