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James Kent: A Master Builder of Legal Institutions

An Oration delivered by Hon. Charles E. Hughes, Secretary of State,
at Columbia University.
(Continued)

Laying aside all else, he was unremitting in his attendance at the convention and "was an eye and ear witness to everything of a public nature that was done and said." He heard Hamilton day after day as he argued his points with an eloquence, never surpassed, and, winning over his chief opponent, Melancthon Smith, performed the extraordinary feat of overcoming in a hostile atmosphere a well-organized opposing majority by the sheer force of his reasoning. We today reconstruct the scene and gaze with the same fascination, as held Kent enthralled, at the spectacle of this young man of thirty-one pouring out learning and wisdom and securing by consummate leadership the momentous decision which incorporated the State of New York in the indissoluble Union.

Kent had begun in 1786 to be a zealous Federalist. He read everything on politics; he "got the Federalist almost by heart" and he had the good fortune to enjoy an intimacy with Hamilton to whom he gave his unreserved intellectual allegiance. Not the least of Hamilton's achievements was the influence he exerted over Marshall and Kent, the foremost legal minds of his time. When his career ended with tragic abruptness, Hamilton lived on in the labors of these great jurists. It was Hamilton's logic that was the cornerstone of the opinion of Marshall in *McCulloch* against Maryland, and it was the political principles of Hamilton that dominated the thought of the great commentator.

Kent had a more direct approach to political activity when in 1790, and again in 1792, he was elected to the New York Assembly. His writings and speeches gave him some notoriety, and he showed energy and ability in his leadership of the minority against the action of the State canvassers in throwing out the votes of Otsego County and thus defeating John Jay and re-electing George Clinton as Governor. The strength of character and sound principles which he displayed in this bitter controversy won for him the enduring friendship and esteem of Jay, who conducted himself with rare forbearance and magnanimity during the whole affair. But the contest hurt Kent's political chances, and, defeated for Congress in 1793, he removed without regret to New York City and thus a new era in his life began. Such was his repute for learning that at the close of that year, at the age of thirty, he was elected Professor of Law in Columbia College and was thus drawn to deeper legal researches. He at once read, in the original, Bynkershoek, Quintilian, and Cicero's rhetorical works, besides reports and digests, and began the compilation of his lectures.

His introductory lecture, of remarkable quality, was delivered in November, 1794. With dignity and power he reviewed the fundamental principles of our institutions and set forth his conception of the breadth of the preparation which he deemed to be essential for the lawyer. But the most significant part of his lecture was the emphatic and illuminating statement, eight years before

Marshall's decision in *Marbury* against Madison, upon the function of American courts in passing upon the constitutional validity of legislative acts. Kent's view may indeed be regarded as a reflection of what we know to have been the preponderant opinion at the time the Federal Constitution was adopted. Hamilton said in the *Federalist*: "A constitution is in fact, and must be regarded by the judges as a fundamental law; * * * If there should happen to be an irreconcilable variance between the two, * * * the constitution ought to be preferred to the statute."

While Kent's lectures elicited approval, the time was not ripe for such an undertaking. On the flyleaf of his own copy, he records that the first season he read twenty-six lectures, attended by seven students and thirty-six others, chiefly lawyers and law students not connected with the college. The second course, in 1795, he gave in his office and he had only two students besides his clerks. The next season no students attended, and Kent resigned, but his resignation not being accepted, he read one more course to six or eight students. It was natural, as he confessed, that this discouraging experience "cooled and dulled his ardor" for finishing and perfecting his lectures. He longed to enter on his old classical career, to realize property enough to withdraw into the country and there to live in retirement. Oddly enough, despite his eager spirit, this was always a cherished hope.

Meanwhile he was on the straight road to deserved preferment. In February, 1796, Governor Jay appointed him a Master in Chancery, and this gave him adequate pecuniary support. About the same time he was elected a member of the Assembly from New York, and a year later he was appointed Recorder of the City of New York, an office then exclusively occupied with civil business. With his official duties and counsel work in the Supreme Court he was busy and prosperous. He was soon to reach the goal he now desired, and in 1798 he was appointed Judge of the Supreme Court of the State. "This," he says, "was the summit of my ambition. My object was to retire back to Poughkeepsie, and resume my studies, and ride the circuits, and inhale the country air, and enjoy *otium cum dignitate*. I never dreamed of volumes of reports and written opinions; such things were not then thought of." In 1799, Kent removed to Albany and there he remained for twenty-four years. In 1804 he was made Chief Justice of the Supreme Court and he held that office until in 1814 he became Chancellor. His judicial labors continued until, by virtue of the sapient provision of the Constitution of the State, he was forced to retire, having reached the age limit then fixed at sixty years.

Mr. Justice Holmes has remarked that "to read the great works of the past with intelligent appreciation is one of the last achievements of a studious life." And this is especially true of early legal decisions and treatises. It is impossible to appraise Kent's judicial work without visualizing the conditions which obtained before he went upon the Bench. Twenty years had passed since the adoption of the first Constitution of the State, but the jurisprudence of the State was in a miserable condition; indeed it was almost non-existent. Lack of legal scholarship and care on the Bench found their counterpart in the poor standards of the Bar. Let Kent himself tell the story:

The progress of jurisprudence was nothing in this State prior to the year 1793. There were no decisions of the court published. There were

none that contained any investigation. In the City of New York, Hamilton, Harrison, Burr, Cozife and perhaps old Samuel Jones (then deemed and known as the oracle of the law) began to introduce the knowledge and cultivation of the law which was confined of course to Coke, Littleton and the reporters down to Burrow. * * * The judges of the Supreme Court (Morris, Yates and Hobart) were very illiterate as lawyers, and the addition of John Lansing in 1790 was supposed to be a great improvement to the Bench, merely because he appeared to have studied more the King's Bench practice and was more diligent, exact and formal in attending to cases and in enforcing rules of practice. The country circuit courts were chiefly occupied in plain ejectment suits and in trying criminals in the courts of Oyer and Terminer. In short, our jurisprudence was a blank when Hamilton and Harrison first began with their forensic discussions to introduce principles and to pour light and learning upon the science of the law. * * * Again, when I came to the bench there were no reports or State precedents. The opinions from the Bench were delivered ore tenus. We had no law of our own and nobody knew what it was.

At this time the Supreme Court of the State consisted of the Chief Justice and four associates. Kent's learning and pertinacity soon gave him an ascendancy. He used every precedent he could find, but he was not looking for mere cases to follow but for correct principles to apply. To discover these he searched the civil law as well as the common law. He made much use of the corpus juris and as the Judges, with the exception of Livingston, knew nothing of the French or civil law, he had an immense advantage. He tells us that he could usually put his brethren to rout and carry his point by his "mysterious wand of French and civil law." The judges, with the liberal views of the period, were kindly disposed to everything that was French and this enabled Kent without exciting any alarm or jealousy, to make free use of such authorities and thus to enrich our commercial law.

His directing influence in the Court was enhanced by his appointment as Chief Justice. The first practice was for each Judge to give his portion of the opinions, when all were agreed, but that gradually fell off, and in the later years Kent gave the most of them. He recalls that "in the 8th Johnson all the opinions for one term are per curiam! The fact is, I wrote them all and proposed that course to avoid exciting jealousy." But Kent did not lack opposition. He found his brother Spencer, particularly, of a bold, vigorous, dogmatic mind and overbearing manner. But Kent labored his cases all the more thoroughly in his attempt to bear down opposition or shame it by the overwhelming authority he called to his aid. He had zest in conflict and felt that his mind "was kept ardent and inflamed by collision." He could do more than overwhelm his opponents; he could correct himself. Thus, in 1806 he tried a trespass case at Circuit, which turned on the sufficiency of a gift of growing corn; Kent charged the jury that there was sufficient evidence of a valid gift, but on a motion for a new trial, as Chief Justice, he wrote a learned opinion for the Court reversing himself and stating the distinction between the civil and common law as to the necessity of delivery.¹

1. Noble v. Smith, 2 Johns. 395.

Even more fruitful work, even more congenial to his abilities than his service in the Supreme Court, awaited Kent when he was appointed Chancellor. Following the practice of the Colony, the State had maintained separate courts of law and equity, but the Court of Chancery had evoked a popular distrust. The importance of its jurisdiction in dealing with the intricacies of interests which lay beyond the bounds of the remedies of the common law, was not appreciated, and the exercise of the extraordinary power of the Chancellor seemed to be inconsistent with the liberties of the people. What was worse, the Court of Chancery had failed to justify itself by either method or results. It appeared in its ineptitude to distrust itself, and the intelligent and systematic exercise of its power was lacking. It was not until Kent became Chancellor that we had a court of equity in a true sense. It is extraordinary that, notwithstanding the example furnished by the developments in the Supreme Court under Kent's leadership, such defective methods should have continued in Chancery. Kent took the office of Chancellor with considerable reluctance; it had no charm for him. Of its condition he says: "It is a curious fact that for the nine years I was in that office, there was not a single decision, opinion or dictum of either of my predecessors,—Livingston and Lansing, from 1777 to 1814, cited to me or even suggested. I took the Court as if it had been a new institution and never before known in the United States."

Kent had nothing to guide him; he was left at liberty to assume all such English chancery practice and jurisdiction as he thought applicable under our Constitution. Here was a wealth of material at his command, the product of the labors of the great English Chancellors from Nottingham to Eldon, but the equity system of England could not be transferred bodily. In this country there were new institutions, new relations, different political conceptions requiring an American system of equity which, while its seeds might be brought from abroad, must strike its roots deep into American soil. This was the extraordinary service of Kent, that he was not enslaved by his comprehensive knowledge or overawed by the learning of the past, that his energy was not exhausted in the toil of research and transcription, or in the laborious study of the complicated details of his cases, but always the easy master of his material he used it with the sagacity of a statesman and with the skill of constructive genius, rejecting, selecting, adapting and adding until he gave to the country an equity system suited to its particular interests.

With this aim, in the prime of life, he redoubled his efforts. He is very frank about his method: "My practice was," he says, "first to make myself perfectly and accurately (mathematically accurately) acquainted with the facts. It was done by abridging the bill and the answers and then the depositions; and by the time I had done this slow and tedious process I was master of the case, and ready to decide it. I saw where justice lay, and the moral sense decided the case half the time. And then I sat down to search the authorities until I had exhausted my books; and I might once in a while be embarrassed by a technical rule, but I always found principles suited to my views of the case, and my object was so to discuss the point as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel." His industry, absolute integrity and love of justice established the confidence needed to counteract the

prejudice against the Court, and he was intrenched in public esteem. "It required," says Story, "such a man, with such a mind, at once liberal, comprehensive, exact and methodical * * * pursuing principles with a severe and scrupulous logic, yet blending with them the most persuasive equity; it required such a man, with such a mind, to unfold the doctrines of Chancery in our country and to settle them upon immovable foundations."

But these endeavors were not free from vexation; he suffered much humiliation at the hands of smaller men. The reversals of his decisions by the Court of Errors, that extraordinary Court of last resort, composed of the members of the State Senate as well as of the Chancellor and the Judges of the Supreme Court, nearly broke his heart. In a moment of utter depression he writes to William Johnson in 1820:

The judges have prevailed on the Court of Errors to reverse all my best decisions. They have reversed *Frost v. Beekman*, the *Methodist Episcopal Church v. Jacques*, *Anderson v. Boyd*, and others. After such devastation, what courage ought I to have to study and write elaborate opinions? There are but two sides to every case and I am so unfortunate as always to take the wrong side. I never felt more disgusted with the judges in all my life. * * * According to my present feelings and sentiments, I will never consent to publish another opinion, and I have taken and removed out of my sight and out of my office into another room my three volumes of chancery reports. They were too fearful when standing before my eyes.

After this outcry of a wounded spirit, Kent continued his work with the same energy and resourcefulness.

His opportunities for safeguarding the development of the law were increased by his membership in the Council of Revision, that curious arrangement by which the Governor, the Chancellor and the Judges of the Supreme Court, exercised the veto power. It can hardly be said that this extraordinary authority of judicial officers was abused. Chancellor Livingston, and Kent as Judge and Chancellor, each served in the Council of Revision for twenty-four years. Yet during the forty-five years of the existence of the Council, only 169 bills were vetoed out of 6,590 bills passed. It appears that 83 bills were vetoed as unconstitutional, and as the most of these were not passed over the veto, they were thus disposed of without coming before the courts.

When, in 1823, at the height of his intellectual power Kent reached the age limit prescribed for judicial officers, Columbia College recalled him to its faculty and thus had the good fortune to link to itself the most important service of his long career. His lectures as professor of law, remodeled and enlarged, became his Commentaries. The first volume was brought out in 1826 and the four volumes were completed by 1830. This gave him the opportunity to present in a systematic manner the results of the thorough and comprehensive legal studies which he had unceasingly prosecuted from his youth to the end of his judicial labors. Moreover, as Lincoln expressed it, Kent's "attitude was most favorable to correct conclusions. He was struggling to rear a durable monument of fame; and he well knew that truth and thoroughly sound reasoning were the only sure foundations." If Blackstone "taught jurisprudence to speak the language of the scholar and the gentleman," Kent, in Story's phrase, "embodied the principles of our law in pages as attractive by

the persuasive elegance of their style as they are instructive by the fullness and accuracy of their learning." While there was similarity in the general aim of the two treatises, the differences in plan and arrangement are more important than the resemblances. Kent had no predecessor in his own field, and his work abides as the model of legal exposition.

Kent could now deal, not only with those subjects which had most frequently engaged his attention as Judge and Chancellor, but with such departments as international and constitutional law, which he had touched but rarely in the course of his official duties. He had been a close student of the law of nations, and when his work on the Bench gave occasion to discuss it, as in the case of *Griswold against Waddington*,⁶ where he dealt elaborately with the consequences of war in its effect upon the intercourse and contracts of the subjects of the belligerents, he was at his best and revealed the range of his researches. Kent began his *Commentaries* with the *Foundation and History of the Law of Nations*, observing that when the United States ceased to be a part of the British Empire and assumed the character of an independent nation, "they became subject to that system of rules which reason, morality and custom had established among the civilized nations of Europe as their public law." His treatment of international law at once challenged attention abroad as well as at home and received the highest commendation from the most expert critics. Professor Abdy, of the University of Cambridge, who published this part of Kent's treatises in a separate edition, speaks of his work as containing "wisdom, critical skill and judicial acumen of the highest kind," and he most cordially assented to the tribute of *Historicus*, who described Kent as "the greatest jurist which this age has produced, whose writing may safely be said to be never wrong."

Not only did Kent develop the common law but he safeguarded its institutions. In the bitter contest over the proceedings for contempt against John Van Ness Yates he established the immunity of the judges from private prosecution for the exercise of their official powers, and thus rendered secure the independence and authority of the courts.² Otherwise he said "we shall embolden the licentious to trample upon everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." He was equally solicitous to preserve inviolate the essentials of trial by jury, and to prevent any encroachment by the Court upon the proper freedom of the jury. In the *Croswell* case, a prosecution for a libel of Thomas Jefferson, Kent asserted the right of the jury to judge of the law as well as of the facts in criminal prosecutions for libel, and thus buttressed the liberty of the press.

Kent's *Commentaries* were an unusual success, passing through four editions by 1841 and, until his death in 1847, Kent enjoyed the full pleasure of the complete recognition by a grateful people of the transcendent importance of his long and arduous labors. He also had reason to know, as Charles Sumner wrote him, that in addition to the spoken words of esteem "the mighty tribute of gratitude was silently offered to him from every student of the law in our whole country." Where among all of our profession can be found a more perfect and useful life?

In reviewing this career and in considering in its light the exigencies of our own day, we cannot fail to be impressed with the imperative need of the

competent exposition of the law. When Kent labored there were few law reports; we are now overwhelmed by their multitude. The courts then handed down few opinions; there are now far too many. Kent by his industry could command all the legal learning of his time; now it is given to but a small number to master a single department of the law. Then the problem was how to develop a body of law; now the question is how the growth of that body can be controlled and how it may be subdued to the proper service of perplexed lawyers, their still more puzzled clients, and our overburdened courts. In these United States we have the greatest output of law the world has ever seen. It is our chief product; forty-eight sovereignties have an unexampled producing organization. The appetite for legislation is insatiable. Every statute has its progeny of decided cases, and many decisions instead of settling the law raise questions to be settled by other decisions, while the keenest minds of the country are devoting themselves to finding new differentiations in applying old principles. Thus it has come to pass, we are told, that in a recent year there were 175,000 pages of reported decisions in the United States. We need the master expositor; only we require a hundred Kents instead of one. For this work, which is the special obligation of the Bar, we find both the inspiration and the pattern in the achievements of Kent. In his luminous simplicity, and in his accuracy of exposition, he achieved an authority even greater than that of most of the particular precedents he cited, and his text created a well-nigh conclusive presumption of law.

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