

## Chapter 1

# Formative Days in Colonial New York

“You have now a call to go forth unto my vineyard; and this you must do, too, upon an evangelical principle—that the master may receive the fruits of it.”

—Letter from Benjamin Kissam to John Jay  
November 6, 1769

On the morning of May 12, 1794, the first chief justice of the United States, John Jay, prepared to set sail for England on a ship named the *Ohio*. His mission was to negotiate a treaty between the United States and Great Britain that would keep the two nations from engaging in yet another destructive war. Internationally, the times were dire. A throng of well-wishers gathered in lower Manhattan near where the ship was moored to send John Jay off with their encouragement and well-wishes. As Jay boarded the ship, he turned to the crowd, expressed his “sensitivity and gratitude for their intentions,” and promised them that he was determined “to do everything in his power to effect the object of his mission and secure the blessings of peace.” The crowd responded to the remarks with enthusiastic chants of “huzzah!” and then followed the ship on foot as it sailed toward the Battery at the southernmost tip of Manhattan island. There, the occasion was saluted with commemorative bursts of cannon fire as the *Ohio* began its voyage toward Staten Island and across the Atlantic Ocean.<sup>1</sup>

On that morning, John Jay—a New Yorker, a lawyer, a founder of the nation, a covert intelligence operative during the Revolutionary War, a coauthor of the infamous *Federalist Papers*, a former diplomat, a

former chief judge of the New York State Supreme Court of Judicature, and current chief justice of the US Supreme Court—embarked on what some believed could be the greatest mission, or the greatest challenge, of his days in public life. The trans-Atlantic peace was at stake. George Washington was nearing the second half of his final term as president of the United States, and three persons stood out as among Washington's most probable successors. If a Democratic-Republican were to win the presidency in 1796, former Secretary of State Thomas Jefferson was Washington's likely successor. If the Federalist Party retained control of the presidency, Washington's successor was expected to be either Vice President John Adams of Massachusetts or the current chief justice of the United States, John Jay. Jay's political fate in the 1796 election and beyond, if he were to have any interest in being a candidate, would be affected by whether he could successfully negotiate a peace treaty with Great Britain, and if so, whether the terms of any such a treaty would merit the approval of the American people.

John Jay's extraordinary life began on December 12, 1745, in lower Manhattan, not far from where he would sail on the *Ohio* almost fifty years later. He was born into an exclusive circle of New York wealth. Jay's maternal grandfather was Jacobus Van Cortlandt of the prominent Van Cortlandt family, who served as a member of the New York Assembly and as a mayor of New York City. His maternal grandmother, Eva Philipse, was also from a prominent family of landowning wealth. On the paternal side, John Jay's grandparents were Augustus Jay and Anna Maria Bayard (Jay), both of merchant families. Jay was mostly of Dutch descent, but his paternal grandfather had been a French Huguenot. The Dutch comprised a significant portion of the population of New York City at the time.<sup>2</sup>

The daughter of Jacobus and Eva was Mary, and the son of Augustus and Anna was Peter. Peter Jay became a successful merchant, trading cloth and clothing from England and Holland, flax seed from Ireland, and timber, furs, and wheat from the American colonies. Peter Jay and Mary Van Cortlandt married one another in 1728 and had ten children, three daughters and seven sons. The third child, Jacobus, and the seventh child, Frederick, each survived for only several weeks, and the tenth child, Mary, died at age three. The eighth child was John Jay. Jay likely was born at 66 Pearl Street in Manhattan.<sup>3</sup>

The family bore other personal tragedies. Jay's brother Peter and sister Anna were both permanently blinded by smallpox in 1739. The oldest sister, Eve, suffered from fits of hysterics. The eldest brother, Augustus,

was so mentally slow that he never learned to read. Reverend Samuel Johnson, who was among those who failed to teach Augustus how to read, diagnosed the boy to Peter Jay as “bird-witted,” a condition that did not improve with age. The Jay children who did not suffer from ongoing physical or mental maladies were James, John, and the youngest brother, also named Frederick.<sup>4</sup>

The family threw off its earlier French Calvinism before John Jay was born in favor of membership in the Church of England. John was baptized at the historic Trinity Church in lower Manhattan within days of his birth, and he remained a devout Anglican/Episcopalian for the entirety of his life.<sup>5</sup>

At about the time that John Jay was born, his father, Peter, purchased a 400-acre farm and farmhouse in Rye, New York, in the southeast quadrant of Westchester County north of New York City. The move to Rye allowed for Peter Jay’s retirement from active commercial life and kept the family safe from a potential war that was feared in 1745. Black slaves worked at the Jay family farm during John’s childhood but were treated “humanely” for the times, and this influenced John’s own views of slavery that would emerge during his adulthood in a way that would prove consequential.<sup>6</sup>

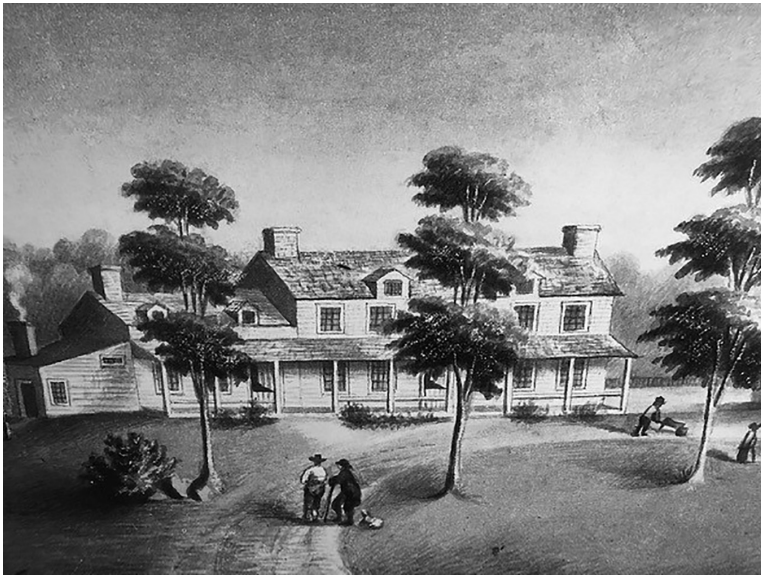


Figure 1.1. Drawing of John Jay’s boyhood home in Rye, New York.

Although Peter Jay retired from trading in 1745, he was still owed money from British merchants and spent considerable time and energy collecting on those debts. The various debts owed to him originally totaled 4,000 British pounds, with only one-eighth of it still outstanding by 1748. The conversion of British pounds into current dollars can be estimated through different methodologies, but by comparing the cost of consumer goods then and now, 4,000 British pounds in 1745 is worth approximately \$1.1 million today. John Jay, later in his childhood, knew of his father's debt collection efforts, and, as will be shown, it appears to have influenced his views as an adult about enabling creditors from different countries to collect upon debts from others.<sup>7</sup>

John Jay received his earliest formal education at the family home in Rye and demonstrated an ability for learning. At age eight, he was sent to a boarding school in New Rochelle, New York, that was operated by Reverend Peter Stroupe approximately eight miles from the family farm. In 1756, John returned home for further education provided by a private tutor, George Murray. He entered Kings College in New York City in 1760 at the tender age of fourteen. To be admitted to the college, Jay needed to establish that he was fluent in Latin and Greek by translating chapters of the Bible from one to the other and translating Virgil's *Aeneid* from Latin to English, and proficient in mathematics to the Rule of Reduction.<sup>8</sup> Enrollment at Kings College must have been an easy choice for the Jay family. John's older brother, James, had attended the same college before beginning his medical studies at the University of Edinburgh and becoming a physician. The college was Anglican, which neatly fit the family's religious preferences. The college was run by a family friend, Reverend Samuel Johnson, who, years earlier, had been among those who unsuccessfully tried to teach Augustus Jay to read. And Kings College was located closer to the family home in Rye than other notable institutions of higher learning on the East Coast. There, Jay was exposed to a classical education rich with Greek, Latin, English, philosophy, law, math, and science.<sup>9</sup>

A few weeks before graduation, some assembled students broke a table either as a result of teenage mischief or as an act of defiance, and each student who was present was questioned by Samuel Johnson's successor, Dr. Myles Cooper, about who was responsible. None of the students professed any knowledge of the culprits until Cooper reached Jay, who was second from last in the line. Jay apparently knew who was responsible but said to Cooper, "I do not choose to tell you, sir." The

youthful defiance earned Jay a suspension and jeopardized his graduation, as the school had required all students to sign an oath of obedience to the college statutes. In a lawyerly fashion, Jay maintained that there was no school statute that required him to inform on his companions or disgorge information against his will. According to Jay's son William, Jay "retained among his papers to the day of his death a copy of the [college] statutes, from which it appears that the conduct for which he was suspended was not even indirectly forbidden by them." The incident demonstrates that even in his teens Jay was a stickler for detail and procedure, as would prove to be the case in his adulthood as well. The incident also demonstrates that Jay may have been more honest than his classmates, almost all of whom denied knowing how the table was damaged. Notwithstanding the incident, Jay was permitted to graduate from Kings College with his class on May 15, 1764.<sup>10</sup>

Jay made valuable friends while at Kings College, some of whom would become prominent attorneys and government leaders. Those included Robert R. Livingston Jr., a member of an established and wealthy New York family and son of a justice of the New York State Supreme Court. Of the two friends, Jay was the more reserved, quiet academic, while Livingston was outgoing, confident, and brash. A year after Jay's college graduation, Jay wrote to Livingston, whom he addressed as "Dear Rob," that their friendship was a "tie [that was] firm and indissoluble, which, once entered into, ought ever to be preserved as inviolable." Later in life, events would cause the inviolable friendship to decay. Jay was also a classmate of Peter Van Schaack, who would later be involved in revolutionary activities and become Jay's personal attorney; Egbert Benson, who would become a leading revolutionary in New York, a member of the First and Second Continental Congresses, the first attorney general of the state of New York, a US congressman, and a federal circuit court judge; Gouverneur Morris, who would become a member of the New York legislature, a member of the Second Continental Congress, the author of the preamble to the US Constitution, minister plenipotentiary to France, and a US senator of New York; and Richard Harison, a future law partner of Alexander Hamilton and US attorney for the District of New York. The Kings College Class of 1764 was, with limited exceptions, an impressive group of young men who would put their educations and privileges to good use in their years ahead.<sup>11</sup>

There was a seedier side to New York City in the 1760s. The city teemed with British troops away from home, merchant sailors, privateers,

rowdies, thieves, an abundance of taverns, and brothels. John Jay assiduously avoided those aspects of society, as it was not in his reserved nature, and instead attended daily services at Trinity Church in the family pew. He also spent a recurring portion of his free time with his godfather, former New York Supreme Court Justice John Chambers. Chambers resigned his position at the state's Supreme Court as a matter of principle, rather than accepting a new appointment that would have required him to serve at the pleasure of the British Crown. Upon Chambers's death in 1764, he bequeathed to Jay half of the books in his extensive law library. It was an appropriate bequest, as Jay was intent on becoming an attorney after his graduation from college.<sup>12</sup>

The number of attorneys comprising the New York bar during much of the 1700s was small. Between 1709 to and 1776, only 136 attorneys were licensed to practice law in the colony of New York, and from roughly those, only 41 practiced in New York City between 1695 and 1769. Some of those attorneys were no doubt "sharper and pettifoggers," while others were capable "learned and accomplished men." In the 1760s, attorneys did not receive their legal educations from law schools, as no such thing yet existed on the continent. William & Mary would be the first college to offer a dedicated degree in law, but that did not occur until 1779, followed by the Litchfield Law School in 1784 (no longer in existence), Harvard in 1817, Dickinson College in 1834, Yale in 1843, and Albany Law School in 1851. In the first half of the 1800s, only a handful of schools offered degrees in law so that even then, the vast majority of attorneys still received their legal training through the method of clerking for an attorney at an established law office.<sup>13</sup>

Good or bad timing is sometimes a serendipitous factor in life. Since 1756, including much of the time that John Jay was in college, New York's legal profession was closed to new members, as there were too many lawyers and not enough work to sustain them all. For that reason, Jay's father, Peter, preferred that his son become a religious minister. But in January 1764, a mere four months before John Jay's graduation from college, the New York bar changed its policy to reopen the profession. The rule in New York was that individuals wishing to become attorneys were required to clerk for a member of the bar for five years to then be considered for membership in the bar. The timing was fortuitous for Jay, who graduated from Kings College in May 1764 and began his clerkship in the law later that same year.<sup>14</sup>

John Jay clerked for an established, successful attorney named Benjamin Kissam. Kissam's clients included members of some of New York's

most illustrious families, including DeLancey, DePeyster, Livingston, Van Cortlandt, and Van Rensselaer. Kissam was married to Catherine Rutgers, whose family owned considerable tracts of land in New York and who had a brother, Daniel, who was a judge in the Court of Common Pleas in Jamaica, New York. The Jay family paid Kissam 200 British pounds for the privilege for five years, with the understanding that during the final two years, John would have the freedom to read law on his own. Peter Jay advised his son John on August 23, 1763, that “[A]s its [sic] your inclination to be of that Profession, I hope you’ll closely attend to it with a firm Resolution that no difficulties in prosecuting that Study shall discourage you from applying very close to it, and if possible, from taking delight in it.” The son would not disappoint the father. Benjamin Kissam was certainly among the “best” attorneys to clerk for, as he and Jay forged a true collegial friendship with each other, and Jay was able to learn much about the substantive, procedural, and practical aspects of law at Kissam’s elbow.<sup>15</sup>

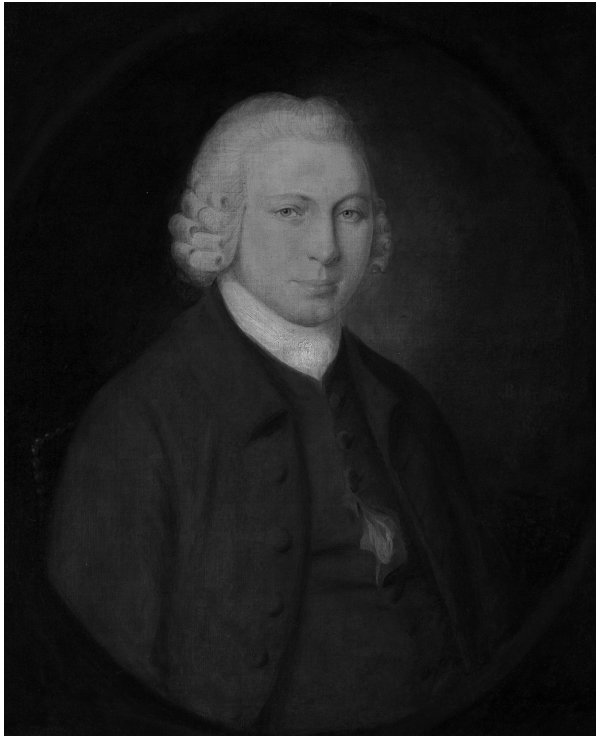


Figure 1.2. John Jay’s father, Peter Jay.

The positive relationship between Kissam and Jay must have made the portions of the law clerkship that were sheer drudgery easier for Jay. Printed fill-in-the-blank legal forms were unknown at the time. All law clerks were expected to perform the most mundane of office tasks for their employers—hand copying dense legal contracts, wills, deeds, pleadings, and judgments; hunting for obscure law books and research; and performing whatever other menial work the attorney in charge directed. Sixteen of the seventeen judgments filed by Kissam between June 1764 and November 1765 were written in Jay's handwriting. Certainly some of Jay's work was mundane, but Jay emerged from the experience with a grasp of the law that would suit him well in the years ahead. John's father, Peter, wrote that his son was "very happily placed, with a gentleman who is extremely fond of him and who spares no pains in instructing of him."<sup>16</sup>

Initially Jay's work was also overseen by a more senior clerk at Kissam's office, Lindley Murray. Jay and Murray would stay in touch with each other for several decades. Jay's non-mundane work included the preparation anew of legal documents, the drafting of deeds, and the drafting of wills. When the day's work was done, Jay had the right to read law from the stacks in Kissam's library. Elementary treatises on law were not plentiful at the time, but they included Finch's Law, Wood's Institutes, Coke Upon Littleton, and, for the truly fortunate, Blackstone's Commentaries.<sup>17</sup>

Early in John Jay's clerkship, Benjamin Kissam was hired to act as the notary at a high-profile civil jury trial where a plaintiff named Thomas Forsey sought money damages for personal injuries caused to him by defendant Waddell Cunningham as a result of a waterfront stabbing where Forsey was almost killed. Jay likely attended at least portions of the trial. The jury returned a verdict in favor of Forsey, and Cunningham sought to appeal the verdict to the colonial acting governor, Cadwallader Colden. While Colden was eager to gain control over the courts by hearing the appeal, and to perhaps then hear others, there was a public outcry against it. Opponents refused to recognize Colden's authority to review Forsey's verdict, as his doing so would divest the citizens of the right to have cases ultimately determined by juries of their peers. New York's Supreme Court of Judicature refused to allow the appeal to go to the governor. Governor Colden eventually backed down, and the controversy underscored for Jay the need of separating judicial powers from the other arms of government.<sup>18</sup>



In May 1765, during the first year of John Jay's clerkship, the British Parliament enacted the Stamp Act. It required the purchase of special stamps to be used on all legal papers, shipping papers, newspapers, almanacs, playing cards, and even dice, even if exchanged solely within the American colonies. It was to become effective on November 1, 1765. The Stamp Act was particularly controversial because it was a form of tax that was "internal" to the colonies, and not a tax on any transactions between the colonies and Europe. The Stamp Act undermined the colonies' right to govern themselves through elected assemblies, as it was a form of taxation without representation.<sup>19</sup>

On August 14, 1765, a mob in Boston stormed the house of the local stamp distributor, Andrew Oliver, calling for his death. Oliver, who fortunately was not present at the time, resigned from his office the next day. By October 1765, as the first year of Jay's clerkship with Benjamin Kissam came to a close, the merchants boycotted British goods, citizens participated in riots, and many attorneys announced their refusal to use stamped paper in the courts. The Stamp Act Congress, which convened in October 1765 and was attended by representatives of nine colonies, passed a resolution urging the British Parliament not to impose taxes without the colonies' consent. On October 31, 1765, there were incidences in New York City of rioting, property damage, and a confrontation between a large crowd and British troops, though no one was injured. A mob carrying an effigy of New York Governor Colden forcibly took his coach, smashed its wood, and used the wood to fuel a large bonfire at Bowling Green. As a result of threats to the life of Governor Colden and other citizen outrages, the stamps were not distributed throughout the New York colony. Within days, courts closed, and without their legally stamped papers, law offices closed as well, including the law office of Benjamin Kissam.<sup>20</sup>

Jay and his college friend Livingston, whose own legal clerkship had also been placed on hiatus, decided to use the once-in-a-lifetime opportunity to enjoy some leisure, ride horses, and read law books. Livingston apparently used more of that time frolicking and carousing while Jay studied books, prompting Jay to write to his friend on May 1, 1765, that he [Livingston] was gaining a reputation as a "man of pleasure," wisely suggesting that he not neglect the opportunity for study and self-improvement.<sup>21</sup>

The Stamp Act was repealed in March 1766, and attorneys' law offices then reopened with months of overdue work. Soon after Jay

returned to his clerkship work, Kissam was away from the office for a considerable time representing certain tenant rioters in a high-profile trial at the original Dutchess County Courthouse in Poughkeepsie. Tenant farmers in the county had been leasing land from the Wappinger Indians, but the Philipse family claimed the land as part of its large royal land grant. John Jay was related to the Philipse family through his maternal grandmother. In 1765, before the controversy over the Stamp Court closed the law offices, the Philipse family had successfully enforced its claim against the Wappinger in court, became the landlord of the tenant farmers, and promptly raised the tenants' rent, which was to become payable by them in perpetuity. Many tenants defaulted on their new leases under the higher rents, including some who were sent to debtors' prison, and 1,700 tenant farmers organized themselves for resistance. Tied as he was to the landed gentry, it is unlikely that Jay could have considered bloody riots against property owners as a legitimate form of protest, as he preferred legal processes over lawlessness.<sup>22</sup>

The reopening of the courts after the repeal of the Stamp Act prompted a spate of pent-up ejectment proceedings against the tenants who had defaulted in paying their rents, which in turn inspired large-scale rent riots and violence. The new governor, Henry Moore, responded to a rent riot in May of 1766 by sending a regiment of troops from New York City to Dutchess County to confront the rebellious tenants. Several militiamen who supported the troops were killed in the skirmish that followed. Many rioters were captured, and forty-seven were indicted for crimes including treason, "constructive murder," unlawful assembly, and making war against the peace. The charges of treason and "constructive murder" meant that the rioters could be held accountable for the killing of the militiamen even if individual rioters did not fire any shots or cause any particular deaths. The trials began on August 6, 1766. Kissam argued that the rioters he represented had been asserting private grievances rather than engaging in public demonstrations, and that private grievances were not subject to charges of treason or sentences of death. The trial must have weighed heavily on Kissam, as he wrote Jay, "it is terrible to think that so many lives could be at stake upon the principles of constructive murder."<sup>23</sup>

The Dutchess County rent trials illustrate the harsh state of criminal justice that existed under the Crown's courts. The results of the trials were likely foregone conclusions before they even began. The leaders of the riots were found guilty, including their titular head, William Prendergast, whose sentence was to be disemboweled, drawn, and quartered;

and then, for extra good measure, beheaded. Prendergast's wife, Mehitabel Wing, undertook a desperate, eighty-five-mile nonstop ride on horseback to lower Manhattan to make a personal plea to Governor Moore for a stay of the death sentence upon her husband pending its appeal to King George III. The stay was granted, and ultimately Prendergast was pardoned by King George III. During the time of the notorious Dutchess rent riot trials, John Jay and Lindley Murray were busy in the office preparing Kissam's next round of trials scheduled for the upcoming court terms in New York City.<sup>24</sup>

When Lindley Murray's clerkship with Kissam ended during the fall 1866, Jay was essentially in charge of the law office for the next two years. Additional clerks and scribes worked in the office under Jay's direction. While thirteen of Kissam's judgments were in Jay's handwriting between May 1866 and October 1868, another twenty-one were not, although Jay's endorsements were signed to most of them. Jay's signature on the documents suggests that he was acting at those times in a supervisory capacity. Jay managed Kissam's dockets and maintained

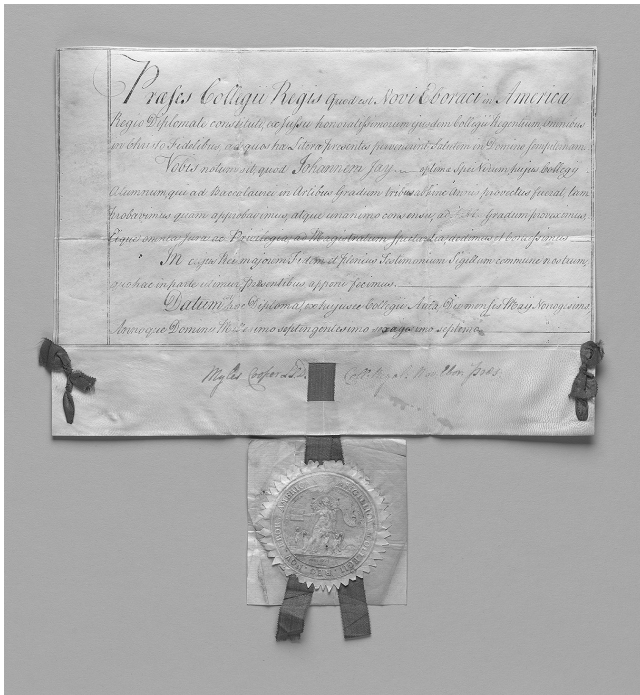


Figure 1.3. John Jay's Master's Degree from Kings College.

the disbursements and fee registers of the office. Jay also managed to find time to undertake further studies at Kings College, where he was awarded a master of arts degree on May 19, 1767.<sup>25</sup>

During Jay's apprenticeship with Kissam, the bar changed the rules so that clerks with college degrees, such as Jay, became eligible for admission to the bar after only three years of work instead of five. Jay, of course, had already committed to Benjamin Kissam for a clerkship that was to be for five years. While Jay likely was eager to conclude his clerkship under the newer rule, he had lost six months of work experience while Kissam's law office was closed because of the Stamp Act. The men split the difference by amicably amending Jay's commitment to Kissam from five years to four.<sup>26</sup>

In those days, clerks working toward a career in the law often did not have to take and pass a bar examination to attain a professional license. A bar examination procedure was created in 1764, but not all aspiring attorneys were required to take it. Instead, the attorneys who sponsored clerks could, at the conclusion of the clerk's apprenticeship, merely vouch for the clerk's training and abilities and recommend to all colleagues in the bar that the examination be waived and the clerk be recognized as an attorney. The New York City bar was small and parochial enough that many of its members knew one another, and they were willing to accept each other's word that a clerk was a worthwhile addition to the profession. The clerk would then become a member of the bar of New York, subject only to the taking of an oath and signing the official membership roll. Attorneys' licenses were issued by the colonial governor, unlike the practice today where law licensure is overseen and administered by New York State's appellate judiciary. John Jay received his license to practice law from Governor Moore on October 26, 1768. Jay and his college friend Robert R. Livingston Jr. were then sworn in together at the Supreme Court by Hon. David Jones and were the only two persons admitted to the practice of law in New York that year.<sup>27</sup>

Jay and Livingston decided to open their own law firm together. Law partnerships were unusual at the time, as the vast majority of attorneys engaged in the profession as solo practitioners. For Jay and Livingston, the partnership made sense beyond their personal friendship. Likely, they surmised that they were better off combining their professional and family connections as a means of generating business so that their law firm would become greater than the sum of their individual parts. The location of their joint law office might have been at the home of Livingston's father, Supreme Court Justice Robert R. Livingston Sr. The

rent there would have been reasonable, if not entirely free. New York City was wide open to both Jay and Livingston. With a population of 18,000 persons, New York was the second-largest city in all of the colonies at the time, behind only Philadelphia. During their first year together the pair was not particularly busy, but the establishment of any business usually requires time, effort, and patience. The lack of work early in the two men's partnership afforded Livingston the opportunity to travel to his ancestral home.<sup>28</sup>

One good piece of substantive legal work that Jay did procure was the position of clerk to a seven-member commission that was established to settle border disputes between the colonial provinces of New York and New Jersey. The members of the Boundary Commission



Figure 1.4. A copy of John Jay's law license issued on October 26, 1768.

were all well-connected men of national repute, including attorney Jared Ingersoll, who would become a Pennsylvania delegate at the Second Continental Congress, an attorney arguing cases before John Jay at the US Supreme Court, a Pennsylvania attorney general, and the Federalist candidate for the US vice presidency in 1812; Peyton Randolph, the speaker of Virginia's House of Burgesses; and James Duane, who would also be a delegate to the First and Second Continental Congresses and later become the first judge appointed to the federal District Court for the District of New York.<sup>29</sup>

New York claimed parts of what is today northern New Jersey, while New Jersey claimed the land that today comprises Rockland and Orange counties in New York. Jay's appointment as clerk of the Boundary Commission was likely a product of having the right professional connections, perhaps through Kissam. The commission met and held hearings from July through September 1769, which included the taking of witness testimonies, reviewing land surveys, and examining ancient Dutch land grants. Commission meetings scheduled for December 1869 and July 1770 failed to meet quorum requirements, suggesting that both colonies would accept the border line that the surveyors had recommended the previous September, which, on balance, was somewhat favorable to the arguments of New Jersey. Each colony also wished to appeal the commission's anticipated findings to the British Privy Council, but to do so, they needed to obtain a final and official record of the proceedings from the commission's clerk, John Jay. When Jay was asked by the attorneys for New York and New Jersey to provide a transcript of the work conducted so far, Jay refused to do so in the absence of an order from either the Boundary Commission or the British Privy Council. Jay's refusal to provide the record is a further indication early in his career that he was a stickler for detail and procedure, which, as will be seen, would arise again while Jay was chief justice handling cases at the US Supreme Court.<sup>30</sup>

The Boundary Commission suffered from its inability to obtain a quorum for further meetings. To deal with the problem, the quorum rules were changed to enable the commission to conclude its work. Unfortunately, when only one commissioner attended the session that had been scheduled for a date in May 1771, a question naturally arose of whether the presence of only one man qualified as a "meeting." Eventually, a second member of the commission was located, and a final report was issued. By the time the Boundary Commission issued its ultimate findings and recommendations, the New York and New Jersey provinces

were agreeable to its results. In early 1772, the governors and legislatures of both colonies formally accepted the Boundary Commission's recommendations, subject to their approval by British authorities in London. However, by then, the order that had allowed for less than a quorum to act had expired, and the final recommendations had been issued by only two commissioners. Once again, Jay refused to release a certified copy of the commission's records without a directive from the commission itself or the Privy Council. The official records of the Boundary Commission remained with Jay until 1773, when the New York Assembly voted to direct that the records be surrendered to then-Governor William Tryon for their later submission to the Privy Council. The Assembly vote was aimed directly at John Jay.<sup>31</sup>

Much of John Jay's law practice involved trial work. One case, *Budd v Tompkins*, handled in Westchester County, involved a plaintiff schoolteacher who sued certain White Plains defendants for wages that were allegedly owed for the teaching of the defendants' children. John Jay represented the parents and won the trial by turning the jury against the plaintiff. He did so by presenting evidence that the defendants were deceived into hiring the plaintiff and that the plaintiff had stolen a bag of corn from his clients.<sup>32</sup>

In another matter, Jay was co-counsel in a high-profile litigation at the provincial High Court of Chancery on behalf of a religious minister, Reverend Joshua Bloomer. In *Bloomer v Hinchman*, the minister, who was appointed by the provincial governor to a parish in Jamaica, New York, sued for wages that had not been paid by the Presbyterian vestrymen of the parish, who had preferred a competing minister. The governor upheld his own authority to appoint the minister, which presumably entitled Jay's client to his overdue wages, and any appeal to the Privy Council was interrupted by the Revolutionary War.<sup>33</sup>

Another matter involved Jay's representation of the defendant in *King v Nathaniel Underhill*, where the British Crown, as plaintiff, challenged the propriety of the defendant's election as mayor of the now-nonexistent Town of Westchester. The Town of Westchester was subsumed into Bronx County in 1895. Jay successfully delayed the progress of the case from 1772 to the latter part of 1774, when the Crown lost interest in further prosecuting the matter and Underhill was able to serve out the remainder of his elective term without further complication.<sup>34</sup>

Yet another case was *Leadbetter v Harison*, which was tried before a jury at the New York State Supreme Court. It involved a claim of slander by plaintiff Leadbetter against George Harison, a relative of Jay's

college classmate Richard Harison. The plaintiff and defendant owned a brewery business together. Jay called a total of ten witnesses to testify, while Richard Harison called three more on behalf of the defense. No doubt, the volume of witnesses and the nature of the claim suggest that the trial was hotly contested. The judgment roll reflecting the verdict has not survived to inform us of the trial's outcome.<sup>35</sup>

Other cases handled by Jay, which reflect the variety of legal matters he dealt with in his practice, included *Canfield v Dickerson* (breach of contract), *Deane v Vernon* (slander), *Anthony v Franklin* (assault), *Rapalje v Brower* (property damage), and *John Doe ex dem. Philip Verplanck v Griffin* and *Peter Quiet ex dem. Susannah Warren v Van Cortlandt* (ejectments).<sup>36</sup>

Jurors at the time needed to be white males between the ages of twenty-one and seventy and listed on county assessment rolls as owning real property worth at least sixty British pounds. If a citizen performed jury service one year, he would be excused from service during the next. If a trial involved a specialized dispute such as a commercial matter, a "special jury" could be requested by the attorneys that would be composed of jurors familiar with the general nature of the parties' dealings. Later in John Jay's life, his familiarity with the role of special juries would influence the handling of a case at the US Supreme Court.<sup>37</sup>

The trials that John Jay handled as an attorney necessarily formed some of the experiences that would relate to his later career as a jurist. There are problems and pressures associated with the private practice of law that jurists are best off knowing and understanding. Judges with prior experience as trial attorneys bring to the bench insights that help shape their understanding of claims, defenses, legal paperwork, courtroom strategies, arguments, rules of evidence, and proper courtroom procedure. Jay's years as a trial attorney undoubtedly helped prepare him for his later responsibilities at the US Supreme Court, though no one could have known or foreseen that at the time.

Jay's law practice boomed. He and Livingston dissolved their business partnership in October 1771 but remained good friends until political disagreements strained their personal relationship in later years. Jay moved his office to a location in Manhattan that is no longer precisely known.

Jay was necessarily a hard worker. His law practice focused on civil litigation in the New York Supreme Court, the New York Court of Chancery, the New York City Mayor's Court, and the Westchester and Dutchess County Courts of Common Pleas. At that time, Westchester and Dutchess counties were contiguous to one another, with Westchester



County's northern boundary being the same as Dutchess County's southern boundary. Another county in between, Putnam County, would not come into existence in its own right until 1812. Jay's practice stretched from New York City, north through Westchester County, into Dutchess County, all on the east side of the Hudson River. Jay does not appear to have ventured much into counties west of the Hudson River, perhaps because of the existence of the river itself. Some of his caseload was referred to him by his former mentor, Benjamin Kissam, who had become lame by late 1769. In a letter dated November 6, 1769, Kissam referred his cases to Jay and instructed, "You have now a call to go forth unto my vineyard; and this you must do, too, upon an evangelical principle—that the master may receive the fruits of it." Kissam described some of the cases as one involving a horse race "in which I suppose there is some cheat," a second involving an eloped wife and the loss of affections, and a third regarding "horseflesh." The cases Jay handled were as varied as were the human interactions of his clients.<sup>38</sup>

Jay rode horseback six miles most days from his home to his office, which he considered good for his health. Cases in Westchester and Dutchess Counties required much greater travel. He hired law clerks to assist his efforts at various and overlapping times. Those clerks included Thomas H. Barclay, John Strang, and Robert Troup, the last of whom was a former roommate at Kings College of Alexander Hamilton. Troup was another person in Jay's early professional life who remained a friend and confidante for several decades.<sup>39</sup>

The cases Jay handled, which he acquired either directly or from Kissam, appear to represent a broad spectrum of pedestrian disputes among commoners and merchants, which had the effect of merging his aristocratic surroundings with the real-life problems of the common folk. Jay, like his colleagues in the bar, did not turn away good clients or good cases. Attorneys in the latter 1700s were mostly general practitioners who took whatever meritorious matters came through the door, rather than concentrating in one or two narrow areas of the law that would be insufficient for sustaining a livelihood. By late 1773, Jay was counsel on 136 cases pending in the Supreme Court of Judicature and 118 in the Westchester County Court of Common Pleas. By 1774, Jay's law practice was perhaps the most prosperous in the colony, earning him roughly 1,000 British pounds a year, which is equivalent in today's value to roughly \$257,000. He used a portion of his earnings to purchase additional books for his personal law library.<sup>40</sup>

Jay handed over his Dutchess County cases to his former partner, Livingston. This development demonstrates that as between the two men, Jay's practice was the more robust, as Jay had cases he could surrender, and Livingston had room to take them on. By referring to Livingston the Dutchess County cases, rather than cases pending in New York or Westchester, Jay shed the portion of his workload that was most geographically inconvenient for him to handle. Today, it is common for civil litigators in the greater New York City area to travel to various law offices, county clerk's offices, courthouses, and other locations for the conduct of case-related business. Contemporary New York litigators have the benefit of heated and air-conditioned automobiles, trains, subways, and even public trams and motorized ferries. During Jay's time, attorneys rode horses to conduct their business, which necessarily included doing so on days of heat, rain, biting cold, high wind, and snow. The public then did not have the benefit of modern-day transportation or weather forecasting. Nor were there telephones, email, fax machines, telecommuting, or Zoom or Teams conferences that render the practice of law more efficient today. Jay's Dutchess County cases were the most distant from his home and office at a time when there were no modern conveniences and were the logical cases for him to surrender to his trustworthy friend and colleague.<sup>41</sup>

In late 1772, Jay and Livingston made an offer to the colony of New York that it might have thought better not to refuse. Both men had observed that in the counties outside New York City, judges in the Courts of Common Pleas tended to be non-lawyers. Jay and Livingston proposed that they and other legally trained attorneys be organized to travel from county to county to act as uncompensated advisors to the common pleas judges. Opposition arose to the proposal from within the counties themselves that a team of advisors was an affront to the capabilities and autonomy of the county judges who were serving there. The plan died on Governor William Tyron's desk. Jay's proposal is noteworthy for three reasons. First, it reflects a true commitment on his part to elevating the standards of the New York judiciary, which was laudable. Second, because the part-time advisor role would have been without financial compensation, the offer by Jay and Livingston was selfless and would have taken each of them away from their paying clients at least some of the time. And third, the proposal is the first indication that John Jay held any interest in decision-making from the

judges' side of the bench. If the role had been approved by New York, it would have burnished his resume for a possible future appointment to a provincial judgeship.<sup>42</sup>

Jay involved himself in various aspects of New York society during the time of his legal apprenticeship and law practice. During his clerkship, he joined a debating society to hone his speaking abilities. As an attorney, he belonged to a loose association of lawyers called "the Moot," which included his former college classmates Egbert Benson, Peter Van Schaack, Robert R. Livingston Jr., Gouverneur Morris, and James Duane, and which, like modern-day bar associations, fostered discussions on thorny issues of substantive and procedural law. He was also a member of the "Social Club," which met frequently at Samuel Fraunces's Tavern and at Kip's Bay in Manhattan. And he managed a dancing assembly where eligible men and women could meet one another in an entirely respectable fashion.<sup>43</sup>

What is notable about John Jay's years as a law clerk and attorney was that he displayed little if any outward involvement in politics. His main focus was on the law and his law practice. To the extent that he was politically aligned at all, he was close to the "Livingston faction" of provincial politics as related to Jay's college friend and onetime law



Figure 1.5. Drawing of historic Fraunces Tavern, New York City.

partner, Robert R. Livingston Jr. For the most part, Jay either had not yet experienced a political awakening, or if he had, he kept it to himself.

Jay's relationship with the Livingstons took a step closer with his courtship of Sarah Livingston, whom he met in late 1772 or early 1773. He called her "Sally." Sarah was the sixteen-year-old daughter of William and Susannah Livingston. They married on April 28, 1774, at the Livingston home, four months short of Sarah's eighteenth birthday. Although Jay was twenty-eight years old, the age difference between them was not unusual for the time, nor was it unusual for women to marry in their latter teens. Jay's father-in-law, William Livingston, would become the first governor of the state of New Jersey and served in that capacity for fourteen years, from 1776 to 1790. The happy couple traveled to Rye to meet the Jay family, and from there took a honeymoon touring the northern counties of the Hudson Valley.<sup>44</sup>

Jay was not yet thirty years old, but his future was bright. He was young and educated, lean of build, and close to six feet tall. His law practice was financially successful and secure. He had married into a wealthy family. He was professionally and socially connected to the movers and shakers of colonial New York. And there were no visible impediments to whatever his future might hold.

Although John Jay's future looked bright in 1774, events in colonial America would hurdle the provinces toward revolution later that same decade. By the time of his marriage, John Jay's worldview was formed and influenced by the people, education, events, issues, and experiences that he had encountered in his childhood, teens, and twenties. Jay, who was quiet, reserved, and academically inclined, was not by nature a revolutionary. He knew that years earlier, his father, Peter, successfully collected the bulk of the debt that was owed to him upon retirement through normal adjudicative channels. He had watched Governor Colton back down in the face of public opposition to his executive review of the jury's verdict in *Forsey v Cunningham*. He had observed the mercy of King George III's pardon of William Prendergast after Prendergast's death sentence was rendered in Dutchess County. He had witnessed the British Parliament's repeal of the Stamp Act on account of strong public opposition. He had been engaged in a process where border disputes between the New York and New Jersey provinces were cordially and peacefully resolved. The workings of democratic processes and opinion had operated in many instances and contexts as a powerful check on the potential abuses of government in ways that Jay saw and absorbed