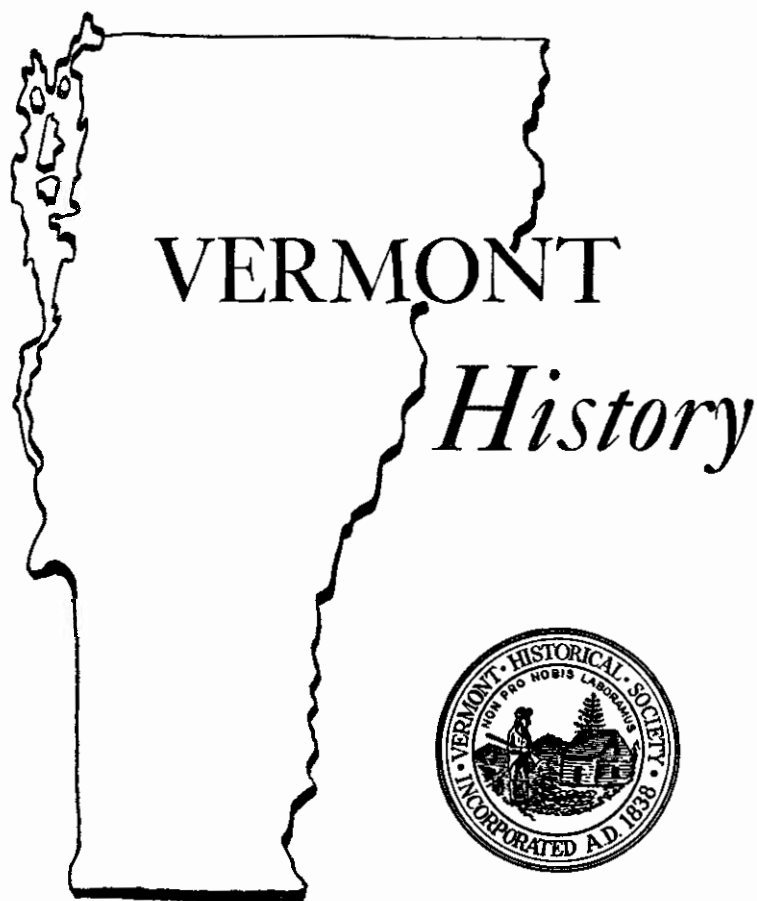
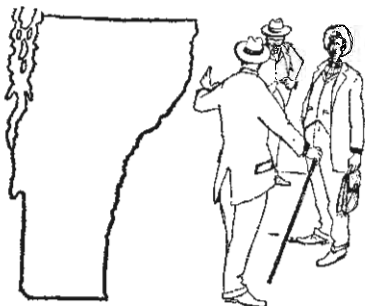


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The Vermont bar and the Vermont Legislature combined to overturn Governor Allen Fletcher's breach of tradition . . .

Vermont's Judicial Crisis of 1914-1915

By WILLIAM C. HILL

Mr. Fletcher's course then, whatever the motive might have been has not been such as to meet the approval of Vermonters. Vermonters are somewhat slow in their political movements; their political palate has not become so jaded that they are constantly seeking experiment and sensation; they seek rather a continuity of policy, which is the secret of real growth, and they still feel deeply and persistently on things political.

This may explain the failure of the Fletcher administration. Mr. Fletcher is not a Vermonter as Vermonters use the word. A westerner by birth and training, it is not strange that he has been unable to shake off the western influence, nor is it to be wondered at that western methods should fail in Vermont. As the flower which grows in luxuriant bloom in the tropics will fade and die in a northern clime, so Indiana methods are very apt to be entirely out of place in this eastern commonwealth.¹

IN 1914 Governor Allen M. Fletcher broke a judicial tradition which some Vermonters felt was so crucial, that like the above editor, they considered that the Governor could not be of the metal of which true Vermonters were made. The tradition dictated that the judges of the Vermont Supreme Court and Superior Court be reappointed to those benches in the order of their seniority. No judge would be refused re-election unless he chose not to run. This tradition of advancement within the judicial hierarchy by seniority, which has been in existence for over one hundred years, and its function in our legal system to

1. Editorial by John T. Cushing, St. Albans *Messenger*, January 7, 1915.

the present time, is revealed by the breach of it in 1914, the ensuing controversy, and by the resolution of that controversy.

The tradition really began in 1857. From 1857 until 1906 there was one set of judges elected to the Supreme Court by the Vermont Legislature. During these years all judges were re-elected in the order of their seniority. In 1906 two separate courts were established by the Legislature. The Supreme Court was reduced to four members and became restricted, with few exceptions, to appellate work. The Superior Court consisted of six judges having trial jurisdiction in the county courts.

The Legislature of 1906 elected John W. Rowell as Chief Judge of the new Supreme Court and James M. Tyler, Loveland Munson, and John H. Watson joined him on that bench. Seneca Haselton was elected Chief Superior Judge followed in order by George M. Powers and Willard W. Miles of the old court. They were joined as Superior Judges by Eleazar Waterman, Alfred A. Hall and William H. Taylor. The Legislature had again elected judges in the order of their seniority.²

By 1908 the problems inherent in an even number of Supreme Court Judges became apparent and by No. 57 of the Acts of 1908 the membership of the Supreme Court was increased from four to five. The Legislature elevated Seneca Haselton and raised Powers to a vacancy created by the failure of James M. Tyler to seek re-election. Still following tradition, all the remaining Superior Judges were correspondingly moved up with Judge Miles becoming Chief Superior Judge. Zed S. Stanton was elected Fifth Superior Judge and Fred M. Butler Sixth Superior Judge filling the vacancies thus created on the trial bench. Judge Hall died in January 1912, and Governor John A. Mead appointed Frank L. Fish of Vergennes as a Superior Judge.

The tradition of advancement by seniority had been well established by this time and the Legislature which convened in October of 1912 elected all the then sitting Supreme Court Justices and Superior Judges in the order of their seniority.³ Since 1915 this tradition has been interrupted twice. In each instance only the internal structure of the bench was reordered when a Superior Judge was elevated over his peers to the Supreme Court. No judge has been refused re-election by the Legislature.

In 1913, Chief Justice Rowell of the Supreme Court retired. Precedent dictated that Governor Fletcher appoint the senior Supreme Court

2. *Journal of the Senate*, 1906, pp. 551-554.

3. *Journal of the Senate*, 1912, pp. 1041-1044.

Justice, Loveland Munson, as Chief Justice. On September 21, 1913, Governor Fletcher announced his new appointments. George Powers was appointed Chief Justice, by-passing three justices. Judge Taylor by-passed Chief Superior Judge Miles and was elevated to the Supreme Court. Leighton Slack was appointed Superior Judge to fill the vacancy thus created. Although tradition of seniority had been broken, these appointments caused hardly a ripple.

No further changes occurred in the Courts until December 1, 1914, at which time the terms of all sitting judges expired.⁴

The Legislature was not then in session and, in accordance with the recent constitutional amendments, would not convene until January. Governor Fletcher thereupon proceeded to appoint a new slate of judges for two year terms. He failed to reappoint Supreme Court Justices Munson and Haselton and Superior Judge Fish. In their stead he appointed Judge Slack to the Supreme Court and picked Bennington attorney Robert Healy for the other Supreme Court vacancy. On the Superior bench, the appointments went to Walter A. Dutton and James B. Donoway. Thus tradition was violently broken by Governor Allen M. Fletcher.

The bar, the press and the public reacted quickly to the Governor's reorganization of the courts. In question was not only the Governor's disruption of the tradition of judicial advancement by seniority which gave continuity to the courts, but appointment of the judges for a two year period which would again terminate when the legislature was not in session.

The Vermont Bar had not become aroused when Fletcher had bypassed Justice Munson for Justice Powers, presumably because the membership of the courts was not changed. With the Governor's more recent "transgression," however, the tradition of continuity of judges was threatened and the organized bar reacted quickly. Bar opinion coalesced pretty much against the Governor. The consensus seems to have been that the Governor had violated the spirit while complying with the letter of the Constitution and thus had committed a grave impropriety.

4. The judges' terms would ordinarily have expired when the Legislature was in session since beginning in 1870 the Legislature had convened on October 1 and elected the judges to two year terms. But the 1913 Constitutional amendments changed the convening of the Legislature to January beginning in 1915, gave the governor interim appointment power, and retained the terms of the Supreme Court. What the new amendments failed to do was change the judicial term to correspond with that of the Legislature. Although the Superior Court was a creation of the Legislature rather than the Constitution, the terms of its judges ran with those of the Supreme Court. *Vermont Legislative Directory and State Manual*, (1965), p. 86. *Vermont Constitution*, Chapter II, Sections 7, 20 and 44.

Before the announcement of judicial changes on December 1, 1914, the bar had been alerted to Governor Fletcher's intentions. Thus, in September 1914, the Board of Managers of the Bar Association met at the home of its president, former Chief Justice John Rowell, and decided "in view of the unsettled situation in regard to the Judiciary" to postpone the annual meeting until the first Tuesday in January.⁵

The position of the bar itself was made abundantly clear at this postponed meeting on January 5, 1915, one day before the Vermont Legislature was to convene. The issue was brought before the assembled attorneys by Mr. W. B. C. Stickney of Rutland, who proposed the adoption of a resolution he had drafted:

THEREFORE, BE IT RESOLVED, that it is the sense of the Vermont Bar Association that the solution of this matter rests with the General Assembly, and this Association is confident that the Legislature will meet that responsibility and perform its duty faithfully, considerately and temperately.⁶

The vote on the resolution was 73 for and 13 opposed. The *Burlington Free Press* of January 6, 1915, rightly interpreted the sense of the resolution as confirming that the Bar Association favored Legislative elections.

Individual lawyers took to composing brief-like epistles to support their diverse opinions as to the precise character of the Governor's infraction. On December 3, 1914, in a letter to the *Burlington Free Press*, Levi Smith contended that:

Vermont has had good courts in the past because they have kept aloof from personal politics. The attempt of one man [Fletcher] to set up a court of his own personal liking is not to be laughed over or lightly passed off.

On the same day Olin Merrill, an Enosburg Falls attorney, wrote to Smith to congratulate him on finally recognizing Fletcher for the scoundrel he was. Merrill had reached that opinion in 1906:

Up to that time I was a defender of his . . . honestly because I was misled by his smooth tongue and diplomatic methods, but there happened to be at that time a true test of his sincerity which disclosed to me the man in his true character . . . Certainly we have never had a more unfair Governor than Fletcher. More than that, I think he is nothing more or less than a political demagogue, cheap in every respect, and I believe I am possessed with the facts enough to warrant this statement.⁷

5. *Vermont Bar Association Proceedings*, Vol. X, Burlington Free Press Publishing Company, 1917, p. 2.

6. *Ibid.*, pp. 39-40.

7. Smith Collection, Letter Olin Merrill to Levi Smith, Dec. 3, 1914, Guy Bailey Library, Univ. of Vermont.

John H. Mimms, a Burlington attorney and Secretary of the Vermont Bar Association, adopted a more lofty tone in his condemnation of Governor Fletcher. In a letter published in the *Burlington Free Press* he took the occasion to quote some allegedly relevant comments by Isaac Redfield, a former Chief Judge of Vermont:

. . . whatever we may think of the importance of an able and incorruptible executive or Legislative department in carrying forward governmental administration, still, for the security of public or private rights, and for the promotion of public liberty it is undeniably true that more depends upon a pure and wise administration of the laws by the courts than upon anything else That man, therefore, however pure his motives or honorable his purposes, is doing the public but a poor service who lends his aid in any manner to lower the dignity, or lessening the independence of the judiciary in a State, and especially in a free State.⁸

In Colonel Mimms' opinion Governor Fletcher had done "a poor service" to the people of Vermont.

It is apparent that whatever the constitutional niceties, the real issue, at least as far as the Vermont Bar was concerned, was to retain a commitment to the continuity of judicial personnel. Former Chief Justice Rowell, who had earlier advised the Governor that he possessed the two year appointive power, was distraught:

When I saw what the Governor had done in changing the personnel of the Supreme Court I realized more fully than ever before the danger that lurked in the view I had hitherto entertained . . . my trouble still being, as it always had been, to find some way to break the continuity of the terms of office of the justices.

Rowell suggested that the opinion he had given the Governor was not by a unanimous court, but merely his opinion as Chief Justice. His views, he admitted, had not altered until after the Governor made his personnel changes.⁹

A plea for the continuity and stability of the bench was offered in a letter to the *Free Press* by Levi Smith. He argued that judicial stability was fundamental to the general form of government not only of the United States itself but also of its component states. He drew attention to the spirit of the Constitution: "The test of the effect of a constitution is what did its makers mean?" and he discussed the meaning of the Vermont Constitution as it applied to the judiciary. The Constitution, in his opinion, either continued the practice of electing judges by the Legislature or changed this long standing constitutional meaning and

8. *Burlington Free Press*, December 5, 1914.

9. *St. Albans Messenger*, Jan. 14, 1915.

now gave to the chief executive of the state the power to appoint, with no controls, the judiciary.¹⁰ Mr. Smith concluded that the real meaning of our Constitution denied the executive the power to control appointments to the Supreme Court.

The press had generally approved the promotion of Judge Powers to Chief Justice. After Fletcher's more extensive reorganization of the bench in 1914, however, the press was divided on the new appointments. The larger dailies backed Fletcher. The *Burlington Free Press* took cognizance of public bewilderment over the appointments when it editorialized: "We notice expressions of wonder as to what the Legislature will do with reference to the Supreme Court Judges. Possibly some people have overlooked Governor Fletcher's statement that he appointed for two years . . ."¹¹ In the *Free Press* view the Legislature had been confronted with a *fait accompli* and was powerless to rescind the Governor's action.

The *Rutland Herald* had already favored Fletcher in an editorial on November 30, 1914, when it forecast that Fletcher might get rid of some judges but would really not do anything startling. The editorial concluded that it was unfortunate that the judges only received two year appointments without the benefit of election by the Legislature, but that was Constitutional.

The anti-Fletcher forces were represented by the *St. Albans Messenger* and the *Barre Times*. The former attitude was best expressed by its editor, John T. Cushing:

It is too great an assault on our principles to permit it to go unnoticed although I do verily believe that Mr. Fletcher will be only pleased if an attack is made upon him, for from my experience with him it occurs to me that he glories in the role of martyr which gives him, as he believes, an opportunity to create some capital for himself, and of which he is sorely in need.

But the part of wisdom dictates to me that more will be gained by proceeding carefully and with as much dignity as can be assumed, treating of the question fully and fairly and eliminating as much as possible all personal inference, although, in truth, the personality of the man is so wrapped up in his actions that it is extremely difficult to disassociate it from the discussion.¹²

On December 2, 1914, the *Barre Times* submitted that no real reason for the removals had been given. Its editorial on December 3 went further and decried the action of the Governor.

10. *Burlington Free Press*, Jan. 20, 1915.

11. *Burlington Free Press*, Dec. 4, 1914. On Dec. 3 it had reprinted favorable editorials on the appointments from the *Rutland Herald*, *Morrisville Messenger*, and *St. Johnsbury Caledonian*. The only discordant note that day was Levi Smith's letter.

12. Letter Cushing to Levi Smith, December 5, 1914, Smith Collection.

The debate continued throughout the month of December. On December 23, 1914, the *Free Press* alleged the two year appointment was not the real issue and if the Governor had reappointed the same judges, that would have ended the matter but would not have answered the constitutional questions now raised.

An editorial from the *St. Johnsbury Caledonian* was reprinted in full in the December 26 issue of the *Free Press*. This article for the first time in any pro-Fletcher paper suggested that while the Governor was not legally wrong in his action, nevertheless the 1915 Legislature should elect the judges. The *Rutland Herald* also suggested a new solution. Get rid of the superior judges; raise the number of Supreme Court justices to seven and bring back to the high bench Justices Munson and Haselton.¹³

The *Free Press* never approved any solution other than Fletcher's. The other papers slowly retreated from their positions and after the Legislature convened in 1915, the only active proponent of Fletcher's position was the *Free Press*. The other pro-Fletcher papers looked for compromises.

There was speculation as to what led Governor Fletcher to risk such debate by breaching the tradition of advancement by seniority within the judiciary. The backgrounds of the key figures in the controversy do not reveal any obvious motives. Allen M. Fletcher was indeed born in Indiana and was a successful banker in his home state and in New York City before retiring in 1900 to the home of his forebears in Cavendish. He was elected to the General Assembly as the representative from Cavendish in 1902 and remained in the Legislature until his election as governor in 1912.

For a man whose ambition was to be U.S. Senator,¹⁴ Republican Vermont which had no direct Senatorial primary and Cavendish which was the home of the Proctors who "controlled access to the highest political offices in Vermont"¹⁵ was an excellent platform. Although his success in being elected and appointed to crucial legislative committees was spectacular, the rise of middle class reformers, the death of the Proctors and the popularity of Theodore Roosevelt¹⁶ combined as factionalizing forces to throw Allen Fletcher's election as governor into

13. This suggestion was adopted by Governor Fletcher in his out-going message to the 1915 Legislature.

14. Winston Flint, *The Progressive Movement in Vermont* (Washington, D.C. American Council on Public Affairs 1941), p. 53. In many interviews with older attorneys this was a point on which they all agreed.

15. Duane Lockard, *New England State Politics*, (Princeton, 1959), p. 15.

16. Lester Jipp, *The Progressive Movement in Vermont in 1912*, (unpublished Master's thesis, University of Vermont, 1965) Preface i.

the Legislature where there was little doubt about its outcome. In this meteoric rise in Vermont politics some became staunch backers of Allen Fletcher while others had their doubts about him. But many agreed that he did not enjoy opposition.

Governor Fletcher failed to reappoint three judges to the bench in 1914. Again, there seems to be nothing obvious in the backgrounds of these three men which would mark them for this dubious distinction. Justice Loveland Munson was a scholarly lawyer from Manchester who in twenty-five years on the bench had moved upward through the seniority system to the position of first Associate Justice of the Supreme Court when Governor Fletcher retired him at the age of seventy-one. Justice Haselton, a Democrat, who had enjoyed a distinguished career as a legal scholar and politician, had served on the bench for fourteen years when he was retired by the governor at age sixty-six. Judge Frank Fish was only fifty-one when he was not reappointed to the Superior Court. He was also a man whose scholarship was highly regarded and he had been selected to write the *Vermont Bench and Bar* section of Crockett's *History of Vermont*.

Had Governor Fletcher reappointed the same judges to the two benches for a two year period he probably would have encountered less opposition. As previously mentioned, former Chief Justice Rowell, who initially advised the Governor that he had the power to appoint for two years, changed his mind after Justices Munson and Haselton and Judge Fish were retired. The Governor must have been strongly motivated to act as he did. But the reasons given by the Governor for these retirements appear inadequate.

The Governor indicated age was a factor and stated that all judges should retire at age seventy. But the three men replaced only one, Justice Munson, was over seventy. Superior Judge Eleazar Waterman was older than Justice Munson, yet was retained. Governor Fletcher also indicated that the personnel changes were based upon the incompetency and the conservative nature of the judges. Again, these reasons appear inadequate. The probable reasons for the replacements were the liberal, rather than the conservative nature of the three members of the bench, and that Munson, Haselton and Fish had at one time or another opposed Governor Fletcher.

Contemporaries were willing to believe that it was a difference of opinion which led to the enforced retirements. John H. Mimms wrote:

Let us for a moment analyze his 'reasons.' First as to the dropping of one of the best superior judges, 'trustee' Fletcher gives no reason. Some of us are able to assign a reason. The move was on a par with the action of the Irish

boss who said 'Sure you'll do as I say or you'll get off the Job!'¹⁷

Mimms' analysis of Fish's dismissal was also equally appropriate for Justices Munson and Haselton.

The nature of these possible conflicts was not readily apparent but some contemporary observers were undaunted in their speculation. Governor Fletcher, as we have seen, breached tradition twice. The first breach occurred when he appointed George M. Powers Chief Justice of the Supreme Court and thereby passed over three senior justices. Although Governor Fletcher never gave a reason for this breach, Levi Smith has suggested that Justice Powers represented a threat to Fletcher's ambition to become a U.S. Senator. Despite some evidence that Justice Powers was not interested in running for the Senate, he was certainly well-regarded enough to do so had he chosen to.¹⁸ Moreover, his father H. Henry Powers had been elected to the U.S. House of Representatives while serving on the Vermont Supreme Court.

As evidence against the theory that Governor Fletcher's appointment of George Powers as Chief Justice was to eliminate him as a political competitor also stands the so-called "Mountain Rule."¹⁹ This dictated that there should be a geographic "balance" among Republican candidates for state-wide office. The "mountain" was roughly the Green Mountain Range running north and south through the center of the state. In the case of a team of two candidates, one was to come from the east and the other from the west. Governor Fletcher himself was from Cavendish (east) while his Lieutenant Governor, Frank Howe, was from Bennington in the southwest corner of the state. Applying the rule to the U.S. Senatorship, in which each side of the mountain would claim one senator, Justice Powers would have been in a good position to succeed Senator Page as both were from Lamoille County (west). But Governor Fletcher could not have run for this seat because he was from Cavendish (east). If the "Mountain Rule" is taken seriously, it appears that there is no clear explanation of why Justice Powers was elevated over the three justices who enjoyed traditional seniority.

The second and more radical breach of tradition, of course, occurred

17. *Burlington Free Press*, December 5, 1914.

18. Horace Powers, son of Chief Justice George Powers, stated that he had overheard his parents discussing this possibility and the Chief Justice emphatically denied any such ambition. Interview, March 1967.

19. There was enough validity to this rule to warrant its mention by Winston Flint, *The Progressive Movement in Vermont*, (Washington, D.C., American Council on Public Affairs, 1941), p. 34.

in 1914 when Governor Fletcher failed to reappoint three members of the bench. Here his reasons are not so obscure.

Neither Justices Munson nor Haselton represented either a direct or indirect threat to Governor Fletcher's overriding ambition to be a Senator. Justice Haselton was a Democrat in a Republican state. Justice Munson was seventy-one and had been out of politics since his appointment to the bench by Governor Dillingham in 1889.

The probable reason was alluded to in an editorial appearing in the *Bennington Banner* claiming that Governor Fletcher had openly and boldly criticized Justices Munson and Haselton on their stand relative to the Public Service Commission.²⁰ Although a thorough survey of the press of that period does not disclose any confirmation of this statement, nevertheless, because this statement appears in a newspaper edited by Lieutenant Governor Frank Howe, it must be considered seriously.

The Public Service Commission possessed regulatory powers over the public utilities of the state including the railroads. By 1904, the Rutland Railroad controlled a line running the length of Vermont and connecting with New York state at its northern and southern ends. The Proctor interests enjoyed close relationships with and were one of the largest if not the largest users of the line.²¹ When the *Rutland Herald*, owned and published by Percival Clement, backed Fletcher in his campaigns and battle over the judiciary, Fletcher reciprocated by appointing Clement to Justice Watson's education committee. The close relationship of the Governor to the state railroad interests is an important clue to his unwillingness to encourage regulation over the major utility of the era.

The Supreme Court decision which raised the Governor's ire as reported in the *Bennington Banner* was most likely an opinion filed on January 21, 1913, in the case of *Sabre v. Rutland Railroad Company and Central Vermont Railway Company*. The case arose from a petition directed to the Vermont Public Service Commission requesting better protection at a railroad crossing near the Alburg station. Both the majority of the court and the minority were satisfied that the order of the Commission directing the defendants to construct and operate gates at the crossing must be reversed on the ground that the evidence on which the order was based was improper.

The crucial part of the case was the defendants' claim that the Act of

20. *Bennington Banner*, January 11, 1915.

21. Jim Shaughnessy, *The Rutland Road*, (Berkeley Howell-North Books, 1964) p. 82. The Proctors owned a small railroad called the Clarendon and Pittsford which delivered marble from its quarries to the Rutland main line.

1906, which had greatly expanded the powers of the Public Service Commission and enabled the Commission to promulgate the order, was unconstitutional. While this issue could have been avoided by the court, it became, by their own choice, the major issue. The majority (Haselton, Munson, and Rowell) held that the Act was constitutional while the minority (Powers and Watson) decided that the Act was unconstitutional in that it violated the Separation of Powers doctrine. The case itself disclosed the willingness of the majority to regulate railroads more strictly while the minority considered an increase in the power of the Public Service Commission to be a "Legislative usurpation." Thus Justices Munson and Haselton were cast in the role of opposing the interests of Governor Fletcher's friends and supporters.

Although *Sabre V. Rutland Railroad Company* is the most obvious instance of conflict between the Governor and the retired Justices Munson and Haselton, a survey of the Vermont Supreme Court decisions during the period in which the bench consisted of Rowell, Munson, Watson, Haselton and Powers disclosed that the court became divided more than any court before or since.

In the beginning (Vol. 82) the bench was generally unanimous. In Volume 83 there are seventy-nine opinions in which either four or five of the justices decided the case. Justice Haselton dissented singly in two cases and Justices Watson and Powers joined in a dissent. In Volume 84 there were sixty-six decisions rendered by either four or five of the justices. Again Justice Haselton recorded one dissent, Watson and Rowell another, and Rowell and Munson a third. The justices were still quite unanimous in Volume 85 in which only two dissents were recorded, one by Haselton and one by Powers. In Volume 86 (1912-1913) the Court was split three to two in four cases (including *Sabre*). It is important to note that Justices Munson and Haselton were never joined in their dissents by the justices reappointed by Governor Fletcher—Watson and Powers.

The case of Judge Fish presents an entirely different problem. Although Governor Fletcher never named any specific judge at any time during this controversy, in his final message to the Vermont Legislature in 1915, he did allude to Judge Frank Fish. Fletcher revealed that Fish had made some statements at a hearing in Rockingham which forced Fletcher to remove him.²² Fish was friendly with W. R. Warner, a Vergennes neighbor of Fish and a member of the Public Service Commission. Levi Smith alleged that Fletcher always held Fish

22. *Senate Journal*, 1915, p. 709. No county court sat in Rockingham so the hearing must have been non-judicial.

responsible for Warner's contrary opinions whether written or otherwise while Warner was a member of the Public Service Commission. It was Smith's conclusion that the whole reorganization was designed to get Fish.²³

The controversy climaxed with the convening of the Legislature in January 1915. It was after all, the Legislative prerogative to elect the judges. Had it not been for the constitutional quirk which left a month between the time the judges terms expired and the Legislature convened, the Governor would have been unable to assert his interim power. But the Governor had acted and many now looked to the Legislature for the redress of grievances.

According to the one-term gubernatorial tradition, Governor Fletcher had been supplanted as chief executive by Charles W. Gates of Franklin. Governor Gates had given no clue as to his feelings about the bench. But Governor Fletcher used his final message to the Legislature to defend his actions regarding the courts. He said that he was advised by the Chief Justice that it was the unanimous opinion of the court that he, Fletcher, had the right to appoint for two years. The Chief Justice submitted to the Governor a memorandum "in the handwriting of Judge Watson" and this he alleged, was the basis for his action. Fletcher placed the blame for the constitutional problem directly on the 1910 Senate. Regarding his personnel changes, the Governor asserted that he had acted for the people rather than the Bar Association. Finally, he reiterated that retirement at seventy should be compulsory.²⁴

Fletcher's speech had little impact on the Legislature. Senator Powell, as he had promised, introduced a bill (S2) which called for the election of all judges by the Legislature and set their terms of office to commence on February 1, 1915. When the Senate Judiciary Committee held its first hearing on the bill, its protagonist was Senator Powell. His antagonist was Senator Dunnett (the former law partner of new Associate Justice Slack) speaking as a citizen.

Dunnett suggested that there were three ways that the Legislature could proceed to elect judges. They could not, he stated, elect now under the provisions of Powell's bill because the appointments made by Governor Fletcher were properly for two years but they could elect now for judges to take office in December 1916. This method was inopportune, he felt. The Legislature could adjourn and meet again in November 1916, and then elect. This, he opined, would be cumbersome. The last method would be to request the present members

23. Interview, March 1967.

24. *Senate Journal*, 1915, pp. 710-713.

of the court to resign in a body. Then an election could be held as the vacancies would occur during a Legislative session. When asked if he would make such a request to the court, he replied, "he didn't have the cheek."²⁵

At this point the lines had been drawn between the Governor's power to appoint for two years and the Legislative right to set the beginning of the term. The suggestion made by Bishop Hall (and considered "good theology but bad law"²⁶), advocating that the court resign, was now becoming the real issue if the Powell bill passed. The possibility of two courts sitting at the same time was part of the argument against the Powell bill. Dunnett expressed the opinion that with the two courts, no one would know which one was correct:

If a Legislative term is properly filled and then the Legislature fills it again it spells nearer anarchy than anything this State has approached for one hundred years.²⁷

Much to the surprise of the *Free Press*, at least, the Powell bill passed the Vermont Senate the day following the hearing by its judiciary committee. The vote was unanimous. The *Free Press* asked what happened if the bill passed, the Legislature elected, and the present Supreme Court did not resign. It wondered if the Legislature realized what it would mean to have two Supreme Courts in the State of Vermont.²⁸

The Powell bill arrived in the House on January 14, 1915, and received a favorable committee report (7-2) on January 15. The *Free Press* reported there was an indication that the present Supreme Court would resign, "if there was a sober sentiment for such action."²⁹ On that same day, the House of Representatives concurred with the Senate and the Powell bill was passed.

The bill was messaged to the Governor on a Friday afternoon. On Monday there was no decision by the Governor.³⁰ The Hapgood resolution, which requested the Supreme Court justices to resign, was placed on the House calendar for action.³¹ Newspaper speculation dealt with the possibility of a gubernatorial veto and the personnel of the new Supreme Court should that veto be overridden. In retrospect, it appears that Governor Gates feared the spectacle of two sets of

25. *Senate Journal*, 1915, pp. 697-709.

26. Letter from John Redmond to Levi Smith, December 7, 1914, Smith ms.

27. *Burlington Free Press*, January 13, 1915.

28. *Burlington Free Press*, January 14, 1915.

29. *Burlington Free Press*, January 16, 1915.

30. *Ibid.*, January 19, 1915.

31. *Ibid.*, January 19, 1915.

courts should the sitting justices not resign.

On January 20, the members of the Supreme Court met in their chambers.³² Word was forthcoming from the Governor's office that both S2 and S7 (also introduced by Senator Powell, and designed to accomplish for the superior judges what S2 accomplished for the Supreme Court) were to be signed. The justices requested the Governor to wait until they could determine their course of action. The Governor acceded to this request. The Supreme Court stayed in session until early afternoon when it forwarded to the Governor this message:

Unless we act, the proposed election by the Legislature may create a grave and deplorable condition, and might lead to most serious complications. Whatever the attitude of others may be in present circumstances, ours must be one of patriotic purposes. Therefore and for the sole purpose of averting the calamitous consequences which may impend, we . . . tender our resignations.³³

Upon receipt of this letter of resignation the Governor sent S2 and S7 to the Senate with his signature. About ten minutes later he also advised the Senate officially of the resignation of the justices. The confrontation was now over and the way was clear for the election by the Legislature of the Supreme and Superior Judges on the last Thursday of January for a two year term commencing February 1, 1915.³⁴

With no opposition the Supreme Court was returned to the members in office on November 30, 1914, except that Justice Munson became Chief Justice and Justice Powers became third associate behind Watson and Haselton in seniority. The superior judges were elected as expected with Judges Fish and Slack returning to that bench in that order. The Legislature had affirmed the tradition of judicial tenure and advancement within the hierarchy by seniority.

The numerous judges and attorneys I interviewed while preparing this essay expressed shock and indignation that a person not intimately connected with the court system would retire judges without evidence of an effort on the part of the bar to declare such judges incompetent. Their consensus was that the tradition of continuity and stability on the bench was essential to the preservation of the Vermont system of justice.

32. Since the Superior Court was a Legislative creation, there was no question about the ability of the Legislature to make appointments to this bench to take effect at any time. But as the Supreme Court was constitutionally empowered, the justices themselves had to resign.

33. *Burlington Free Press*, January 21, 1915.

34. *Ibid.*, January 21, 1915.

In the American legal tradition precedent is the basis on which law is established. It is only with stability in the law, as represented by precedent, that the American democratic system can continue without chaos or anarchy. An integral part of this judicial process is the judges. They must be assured of continued appointment or election so that they will never become the tools of any political faction. A free bench is the hallmark of a free society. Of this not only the legal profession but also the average citizen is most vividly aware.

It is true that some Vermont judges have retired from office at a comparatively early age. Deane C. Davis left the Superior Bench to accept a position with the National Life Insurance Company, and Stanley Wilson left the bench to become governor. Others, have retired for various reasons, but their retirements were voluntary, and no judge has been refused re-election by the Legislature if he desired it, with the exception of the Fletcher experience, since the dual system of courts was established in 1906.

It was because of the necessity for continuity and stability that the bar and the Legislature combined to overturn the breach of tradition by Governor Fletcher. Since the time of the election in 1915, the only two exceptions to the tradition have been the by-passing of some Superior Court judges by another being appointed to the Supreme Court. In these instances the tradition had not really been ignored. The membership of the court remained stable as these exceptions were in the internal structure.

As long as the personnel of the bench remains the same, the internal order, while important, is not over-riding. But when there is a feeling of instability on the bench, transmitted to the bar as a whole, then the Vermont system of justice is in danger. It is then that tradition must be maintained. This is no more vividly shown than in the action of the 1915 Legislature and the acceptance by the judges themselves of the tradition in submitting their resignations to Governor Gates.